



[2022] JMSC Civ 88

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 00786

BETWEEN	HOPETON BROWN	CLAIMANT
AND	RAYMOND HALL	1ST DEFENDANT
AND	MYRAL LEASING & DEVELOPMENT COMPANY LIMITED	2ND DEFENDANT
AND	MYRAL LEASING & DEVELOPMENT COMPANY LIMITED	ANCILLARY CLAIMANT
AND	OWEN LOWE	1ST ANCILLARY DEFENDANT
AND	BENJAMIN JAMES	2ND ANCILLARY DEFENDANT

IN CHAMBERS

**Suzette Campbell instructed by Burton Campbell & Associates for the Applicant,
Advantage General Insurance Company Limited.**

Leslie Ann Stewart instructed by Mayhew Law for Respondent/Ancillary Claimant.

Heard: 7th & 17th June, 2022

**Application to set aside Court orders for substituted service; Extension of Time
to Effect Service**

S. Barnes, J (Ag)

[1] This is an Application for Court Orders filed on March 3, 2016 by Advantage General Insurance Company Limited, to set aside orders made by Justice Lindo on October 7, 2015. The orders relevant to this application are:

1. Order No. 2
Service of the Ancillary Claim Form and Particulars of Claim on the common law wife of the 1st Ancillary Defendant at the 1st Ancillary Defendant's address at Lot 90, 8 Dolphin Way, Braeton, Portmore in the parish of St. Catherine, shall stand as effective service of the Ancillary Claim on the 1st Defendant.
2. Order No 3
Service of the Ancillary Claim Form on the 2nd Ancillary Defendant is to be effected by way of substituted service on his insurer, Advantage General Insurance Company Limited

The application also seeks the following:

3. That all proceedings flowing from the said service be set aside.

Applicant's submissions, law and analysis

[2] Attorney-at-Law Miss Suzette Campbell, made oral submissions at the hearing of the Application. She relied on the Affidavit of Ruthann Anderson filed on February 1, 2022 in support of the Application. She also relied on Rule 11.16 and 26.1 (2)(c) of the Civil Procedure Rules.

[3] Rule 11.6 comes under the heading "Application to set aside or vary order made on application made without notice". It states –

1. A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.

2. A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent
3. An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.

[4] Rule 26.1 is headed “The court’s general powers of management”. The relevant section states:

26.1 (2) Except where these Rules provide otherwise, the court may –

(a).....

(b).....

(c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.

[5] Mrs Anderson, the Attorney-at-Law and Legal Counsel for the Applicant Company, outlined the history of insurance with the 2nd Ancillary Defendant and that on October 30, 2015 her company was served with the Court Orders of Justice Lindo as well as the Claim Form and other documents pertinent to the suit. It was thereafter that steps were taken to locate their insured, Mr Benjamin James. Those attempts commenced in January 2016 and continued through May 2016. There were several unanswered telephone calls, she said, even up to February 2022.

[6] At paragraph 21, Mrs Anderson states that the delay in making the application to set aside the orders was due to the failed attempts to find Mr James and, that said delay was not excessive, they having done everything that was “reasonable in the circumstances”, to find him. These included contracting the service of Actar Investigations in May 2016. They were able to get a telephone number for Mr Bell in the United Kingdom and spoke to him. That brought their quest to an end.

- [7] What is very clear from Mrs Anderson's affidavit, however, is that Mr James' vehicle was insured by Advantage General Insurance at the time of the accident and up to when he reported said accident to them (paragraphs 6 and 7).
- [8] Counsel Miss Campbell urged upon the Court, that this delay of some four months in filing the application to set aside the orders, should be read in context with what was happening with the case, and all the steps taken by the insurance company to find the relevant persons. But that very statement defies reliance on Rule 11.16 (2) of the CPR which mandates an application within 14 days of receipt of the court orders.
- [9] The Attorney also submitted that although the documents had been received by the common law wife of the 1st Ancillary Defendant, the insurance company was not in a position to say if the contents of same was brought to his attention. The fact is, though, that the court's order had been complied with. Plus, for such an order to have been made, the court would have had to be satisfied that serving the documents on that individual, would likely cause it to be brought to the attention of defendant.
- [10] The case of **ICWI v Shelton Allen [2011] JMCA Civ 33**, was noted, which Counsel said outlines the approach to be followed in setting aside such orders. But this court notes, that on the basis of such authority, the Applicant has not shown that the documents as served, were not brought to the attention of the 1st Ancillary Defendant (Mr. Owen Lowe).
- [11] The court further notes that the Applicant took no steps to have the Application heard within a reasonable time, but had it languishing for nearly 6 years even before filing the Affidavit in support of same, which was prejudicial to the Claimant. It cannot be said that the overriding objective of the CPR, Rule 1.1 was followed, to deal with cases justly and expeditiously.

Respondent/Ancillary Claimant's submissions, law and analysis

[12] Attorney at Law Miss Leslie Ann Stewart of Mayhew Law, for the Respondent to the Application (Claimant in the suit) stridently opposed the application. She filed her written submissions with authorities in support of her position on May 20, 2022.

[13] The several authorities referred to were noted. **Moranda Clarke v Dion Marie Godson & Donald Ranger [2015] JMSC Civ 48**, was one of significance with facts similar to the instant case. The insurance company engaged the services of investigators and took what could be described as their flimsy and inadequate investigations as sufficient to ground the argument that the Defendant could not be found. No advertisement was placed in the newspaper, in fact, no further steps were taken to find the defendant. Facts very similar to the instant case.

[14] The court takes particular note of paragraph 19 of Counsel's submissions:

Advantage General Insurance Company was aware of the difficulty in personal service as well as the possible whereabouts of the Defendant from the time of service of the court documents in October 2015 on them. The Affidavit of Symone M. Mayhew which was served on Advantage General Insurance Company in October 2015 indicated that Mr. James had migrated the year before in 2014 to England.

[15] That being so, to now argue that "reasonable steps" were taken to find Benjamin James, would not be correct, as those "steps" would now need to go beyond mere telephone calls.

[16] Reference was made to the decision of Panton JA in **Port Services Ltd v Mobay Undersea Towns SCCA No 18/2001** (delivered March 11, 2002), in which he said:

"In this country, the behaviour of litigants, and in many cases, their attorneys-at-law in disregarding rules of procedures, has reached what may comfortably be described as epidemic proportions."

[17] As already stated, there were delays in

- i. Filing this Application – four months after service of the Court Orders
- ii. Filing the Affidavit in support – six years after filing the application.

These delays are the definition of “inordinate”, prejudiced the Claimant and flouted Rule 1.1 of the CPR.

Court Ruling

[18] The Applicant has failed to satisfy the Court that they

- a) took all reasonable steps to find the Defendants
- b) Filed the Application to set aside the orders within the stipulated time
- c) Filed all relevant documents and had the application heard within a reasonable time

Court Orders:

1. Application for Court Orders filed March 3, 2016 is refused.
2. Cost to the Respondent/Ancillary Claimant on the Application to be taxed if not agreed.
3. Parties are to attend and complete mediation by October 31, 2022.
4. Case Management Conference is set for 25th January 2023 at 2:00 p.m. for 1 hour.
5. Applicant’s Attorney-at-Law is to prepare, file and serve these orders.