[2022] JMSC Civ 230

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV04468

BETWEEN	**NADINE O'HARA-CUMMING**	**CLAIMANT/RESPONDENT**
AND	**LISA BARRETT**	**1ST DEFENDANT**
AND	**COURTNEY SALMON**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. Kaysian Kennedy-Sherman instructed by Townsend Whyte & Porter for the Claimant

Ms. Bobbi-ann Malcolm instructed by BCIC for the Applicants

Heard: November 7th, 2022 and December 20th, 2022

Application to set aside – Substituted service – Overriding objective – Whether insurance company has done enough to bring documents to insured's attention – Effect of service of unsealed order

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] This is a Notice of Application for court orders filed on the 17th day of June 2021 by British Caribbean Insurance Company (hereinafter referred to as BCIC) to set

aside an Order for Substituted Service. The Applicant, BCIC is seeking to set aside an order made by Master R. Harris. This order was made on the 5th of November 2016 giving permission to the claimants to serve the claim form, prescribed notes, Acknowledgment of Service Form and all subsequent documents in relation to the claim on BCIC who are insurers for the Defendant's motor vehicle, bearing registration number 6277 FN.

[2] The circumstances giving rise to the claim in relation to which the application was made are that on the 22nd day of November 2010, the Respondent was crossing in the vicinity of Park Plaza and the Bank of Nova Scotia, along Constant Spring Road, St Andrew when she was struck by a motor vehicle. The motor vehicle in question is a Nissan Sedan registered 6277 FN, jointly owned by both Defendants, which was stated as being driven by the 2nd Defendant Courtney Solomon at the time of the collision and insured by the Applicant.

[3] As a result of the collision, the Respondent sustained a number of injuries. She also incurred financial expenses in respect of same and as a result, she instructed her attorney to bring an action against the Defendants.

[4] BCIC is seeking to have the order set aside on the following grounds:

a. That the Applicant was not served with the perfected Order for substituted service.

b. That the Defendants' policy of insurance is breached and as such no indemnity is being granted as it relates to this claim.

c. That obligations arising from the existence of that policy of insurance have been displaced as a result of the breach.

d. That the Applicant is not in a position to satisfy any judgment entered against the Defendants in light of the breach of the policy.

e. That the Applicant has no interest in this claim.

f. That it would be unreasonable and inequitable were the Applicant made to incur additional costs and expenses in relation to this claim.

g. That the Applicant seeks the above order pursuant to **Rule 11.16** of the Civil Procedure Rules, 2002 and in keeping with the overriding objective of dealing with cases justly.

CHRONOLOGY

[5] The chronology of events, which form the background to this application is as follows;

1. The accident giving rise to the claim occurred on the 22nd day of November, 2010. The Claim Form and Particulars of Claim were filed on the 18th of September, 2015. BCIC was served with notice of proceedings on the 18th of September 2015.

2. An ex-parte Application for Court Orders for substituted service was filed on the 22nd day of February 2016 seeking the following orders:

    i. Leave be granted to dispense with the personal service of the Claim Form and Particulars of Claim on the 1st Defendant.

    ii. Leave be granted to effect substituted service of the Claim Form and Particulars of Claim on the 1st Defendant by personal service on BCIC, the insurers of the 1st Defendant's Nissan Sedan motor car registration 6277 FN.

    iii. That time for service of the Claim Form and Particulars of Claim be extended for a period of six (6) months.

3. An Amended Ex Parte Application for Court Orders for Substituted Service was filed on the 7th March 2016. A supplemental affidavit in support of this application sworn to by Mr. Christopher Townsend was filed on that same day. A further Amended Ex Parte Application for Court Orders for Substituted Service was filed on the 3rd day of May 2016.

4. A Master in Chambers granted the Orders sought in the amended notice of application on the 21st day of November, 2016. On the 16th of December 2016, the Claimant filed a Formal Order pursuant to the orders of the Master. On the 13th of February 2017, another Formal Order was filed. An unsigned and unsealed copy of the Formal Order filed in 2017 was served on the Applicant on the 17th day of March 2017.

5. A request for default judgment against the 1st and 2nd defendants was filed on the 22nd day of June 2017. Interlocutory judgment in default was entered in judgment book no. 771 folio 50 on the 22nd day of June 2017.

6. On the 17th day of June 2021, BCIC filed its Notice of Application to set aside the order for substituted service on it. An Acknowledgment of Service was filed on behalf of the 1st and 2nd Defendants on the 10th of May 2022, indicating that they were served with the claim and the accompanying documents on 21st April 2022. An affidavit in support of the application to set aside substituted service sworn to by Ms. Peter-Gaye Bromfield was filed on the same date and served on the Claimant's Attorney-at-Law on July 12, 2022.

7. Ms. D. Alvaranga filed two affidavits in response to Ms. Bromfield's affidavit on August 23, 2022 and 21st of October 2022.

APPLICANT'S SUBMISSIONS

[6] Ms. Bobbi-ann Malcolm**,** in her submissions, asked the court to have regard to the contents of the affidavit filed on behalf of the applicant in this matter. She urged the court to find that the applicant had done all that was within its power to do in order to locate the Defendants. She pointed out that despite sending numerous letters to their brokers and directly to their registered address, BCIC was unable to make contact with the Defendants.

[7] Miss Malcolm asked the Court to take into consideration that the relationship between BCIC and the Defendants having expired on June 29th, 2011, meant there was no contractual relationship with the applicant company. She directed the court's attention to the case of ***Insurance Company of the West Indies Ltd. v Shelton Allen et* al** [2011] JMCA Civ 33. She stated that the last contact the Applicant/BCIC had with the Defendant was in 2010 when the accident was investigated and that from their investigation, it was discovered that the Defendants had breached their insurance policy as the vehicle was habitually used for purposes contrary to the terms and conditions of the policy of insurance.

[8] She submitted that the case of ***Porter v Freudenberg; Krelinger v Samuels and Rosenfield; Re Merten's Patent***: [1915] 1 KB 857 provides useful guidance as it was relied upon by Master N Hart-Hines (as she then was) in ***Orville Campbell v Evardo Campbell*** [2019] JMSC Civ 249 in which she affirmed that the sole basis on which a Court would grant an order for specified service is if it ensures that the Defendant would be able to ascertain the contents of the document. Counsel posited that the Claim Form and accompanying documents would not have been brought to the attention of the Defendants as BCIC was no longer in contact with the Defendants at the time of service. She stated that the reason for the late filing of the application (14 days after the application to set aside) was because the applicant was consumed with its efforts to locate the Defendants, and that it was only after a comprehensive search that the applicant/BCIC made its application to set aside the order.

[9] Ms. Malcolm submitted further that at the time that the Respondent had applied to the Court for an order for substituted service, they would have been aware that the Applicant did not intend to provide an indemnity to the Defendant as there had been a breach of the policy of insurance but they failed to communicate this information to the Court. Counsel also contended that had the application for alternate service been served on the Applicant, they would have been able to participate in the matter and advise the Court that they were not in contact with the Defendants.

[10] On the question of whether the Applicant had taken reasonable steps to locate the Defendants, Ms. Bromfield pointed to the letters sent to the Defendants as well as their Brokers by registered mail. Counsel submitted that this was done in 2014 as well as 2015 when they were served with the Notice of Proceedings in respect of the initial claim filed in 2014 and the re-filed claim in 2015. Reference was also made to follow-up correspondence sent to the Brokers in 2017 after receipt of the unsigned formal order for substituted service.

[11] Ms. Bromfield argued that by failing to obtain and serve a signed and sealed copy of the Formal Order, the Respondent had not complied with **rules 8.15(5)** and **3.9(1)** which require that a sealed copy of the order made, must be served with the formal order and the Court must seal all documents issued to include 'orders.' Counsel made reference to the decision of ***Erraldo Henry v Alphanso Clarke etal [2019] JMSC Civ 248*** in which the Court had granted a similar application to set aside service as the document served had not been signed or sealed and amounted to a 'courtesy copy' and at the time the perfected order had been served, the Claim Form had expired.

RESPONDENT'S SUBMISSIONS

[12] In urging the Court to refuse BCIC's application, on behalf of the respondents, Mrs. Kennedy-Sherman submitted that the application to set aside the specified service

order ought to have been made within fourteen days of the date BCIC was served with the court order.

[13] In response to the submissions advanced by Ms. Malcolm on behalf of the Applicant, Counsel asked the Court to deny the application in its entirety and impose the necessary sanctions. In advancing this position, she referred to and relied on the affidavit of Christopher Townsend filed on March 7, 2016 in which he outlined unsuccessful attempts made to serve the 1st and 2nd Defendants at their last known address at 4 Elm Crescent in the parish of St. Andrew. It was also noted that the process server was informed that the Defendants no longer lived at the said location. Mr. Townsend also averred that that the 1st and 2nd Defendants' insured (BCIC) were served with the Notice of Proceedings and had engaged in without prejudice discussions with the Respondent's Attorneys-at-Law, which led him to believe that BCIC is in contact with their insured. Counsel noted that it was on the basis of the reasonable efforts outlined in this affidavit and the indications by the Insurance Company that the order for alternate service was sought and granted.

[14] Counsel directed the Court's attention to the case of ***Damion Welch v Roxneil Thompson and another*** [2018] JMSC Civ 59, paragraph 16 as cited and referred to paragraph 57 of ***Rachael Graham v Erica Graham and Winnifred Xavier*** [2021] JMCA Civ 51 where Master Hart-Hines (as she then was) examined the considerations of the Court in determining whether an order for substituted service should be set aside. She pointed to the affidavit evidence given by the Respondent to the effect that BCIC had accepted notice of proceedings in the matter and therefore had a duty to contact its insured, once the company was served with the notice of proceedings in this matter.

[15] Counsel for the Respondent also relied on the case of ***British Caribbean Insurance Company Limited v David Barrett, Ivor Leigh Ruddock and Jason Evans*** [2014] JMCA App 5 to show that the Court has discussed what it considers to be reasonable steps to bring documents to the attention of the insured. Similar

to the case at bar, BCIC made an application to set aside an order for substituted service on the premise that it had made reasonable steps to locate the insured and had failed to do so. BCIC was knowledgeable of two addresses of the Defendants and had only made attempts to serve the Defendant at one address.

[16] Counsel asked the Court to consider that the assertions by BCIC regarding the breached policy had not been disclosed to the Court as they had been communicated in the course of discussions on the possibility of settlement and in without prejudice communication. She acknowledged that through the affidavit of Ms. Bromfield, the Court had now been apprised of this position. She highlighted that the fact that the policy had expired and the relationship with the Defendants ended, had never been communicated to them and the Respondent learned of this for the first time through the Affidavit of Peter-Gaye Bromfield.

[17] In support of her contention that the fact that the policy had been breached would not have been a material consideration which would bar a grant for alternate service, Mr Kennedy relied on ***Insurance Company of the West Indies Limited v Shelton Allen (Administrator of the Estate of Harland Allen), Mervis Nash, Delan Watson and Nichon Laing*** [2011] JMCA Civ 33. In that decision, the Court made it clear that a breach of policy does not prohibit the grant of orders for Substituted Service, as it is not an indication that the insurer is not in communication with the insured. The Court also stated that whether the policy has been breached is a matter between the insured and insurer which does not affect the right of the claimant to serve the insurer once the criteria in **Rule 5.14** of the CPR have been satisfied.

[18] Mrs. Kennedy posited that the evidence before the Master was sufficient to justify the order that she made, and unless it can be shown that she exercised her discretion in an improper manner, or that there was no material before her supporting her order, then that order should not be disturbed.

[19] Counsel also took issue with the efforts made by the Applicant and asserted that they failed to meet the threshold of reasonable steps. She made reference to the correspondence sent by the Applicant to the Defendants and contended that they presented clear evidence that the Applicant had in fact been in touch with the Defendants in 2014 and 2015. Mrs. Kennedy-Sherman argued that although the addresses of the Defendants were known to the Applicants, they had not expressed any challenges finding them at this address or even provided any evidence of attempts to do so. Counsel again made reference to the principles outlined in the decision of ***British Caribbean Insurance Company Limited v David Barrett, Ivor Leigh Ruddock and Jason Evans*** and asked the Court to find that the steps taken fell short of what could be considered reasonable.

ISSUES

[20] The issues as identified in this matter have been extracted as follows;

a. Whether the Application should be heard out of time?

b. Whether the Claim Form, Particulars of Claim and accompanying documents were likely to come to the attention of the Defendants service having been effected on the Applicants.

c. Whether BCIC took reasonable steps to locate the defendants?

d. Whether the order for substituted service should be set aside or can be accepted as good service?

e. The effect of the service of the unsealed and unsigned Formal Order.

DISCUSSION/ANALYSIS

Whether the application should be heard out of time?

[21] In respect of the Application to have this order set aside, the Applicant has asked this Court to exercise its powers pursuant to **Rule 11.18** but given that the order was made on a without notice application it may be that **Rules 11.16(1)** and **(2)** of the CPR may be more applicable which provides:

> *(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."*

[22] Of equal importance to the determination of this application are **Rules 1.1** and **Rule 26(2)(c)** of the CPR, on the powers of the Court in the management of cases. **Rule 1.1(1)** and **1.1(2)(d)** of the CPR provide:

> *1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.*
>
> *(2) Dealing justly with a case includes - (d) ensuring that it is dealt with expeditiously and fairly.*

[23] **Rule 26.1(2)(c)** of the CPR provides:

> *"(2) Except where these Rules provide otherwise, the Court may - (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."*

[24] In analysing this issue, the decision of ***Moranda Clarke v Dion Marie Godson etal*** **[2015] JMSC Civ 44** provides useful guidance as in her consideration of a similar application, the Learned Master opined that the views of the Court weighed heavily in favour of timelines being adhered to. She stated that '*It is within this context that I say that a mandatory timeline was being dictated under* ***Rule 11.16(2)***.' She stated further that '*The Rules however …under* ***Rule 26.1(2)*** *correspondingly provides for the extending of the time for such an application in*

the exercise of the court's discretion and this provides some flexibility to ensure that justice is done'.

[25] The Learned Master posited that the overriding objective would best be served by recognizing that the 1st defendant (in that case) was in breach of the mandatory rule in **Rule 11.16 (2)** in failing to apply to have the order for substituted service set aside within 14 days of the service upon her of the order for default judgment, but the court's discretion is justly exercised in allowing the substantial issues to be considered by enlarging the time to file the application in her favour.

[26] In addition to that decision, I also considered the dicta of Panton JA in ***Leymon Strachan v The Gleaner Company Limited and Stokes (Motion No 12/1999***, judgment delivered 6 December 1999, page 20), where the Learned Judge outlined the principles that should guide the Court in considering an application to extend time generally:

> *"The legal position may therefore be summarised thus: (1) Rules of Court providing a time-table for the conduct of litigation must, prima facie, be obeyed. (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time. (3) In exercising its discretion, the Court will consider - (i) the length of the delay; (ii) the reasons for the delay; and (iv) the degree of prejudice to the other parties if time is extended. (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."*

[27] In asking the Court to allow them to bring this application approximately five years after they had been were served with the unsealed order for substituted service and been put on notice of the Default Judgment entered against them; it is evident that the Applicant is in breach of **Rule 11.16**. In explaining the reasons for their delay, they have made reference to the efforts which they assert were being made to locate the defendants as being the reason for the delay and on the basis of same they have asked that the time be enlarged.

[28] In my analysis of this issue, I have carefully considered the relevant law and rules which are applicable. I have also weighed the reasons which have been provided

for the delay. While the Applicant has insisted that the extensive efforts to locate the Defendants are wholly to blame for their dilatory conduct in this regard, there has been no evidence provided in support of this assertion as the correspondence which had been sent to the Defendants date back to 2014, 2015 and 2017. This leaves a 5-year window of apparent inactivity which the Applicants have failed to explain. While it is a fact that the Court has the power to extend time this would have to be on the premise that good reason has been provided for same and a bald assertion of efforts being made without proof is not sufficient.

Whether the Claim Form, Particulars of Claim and accompanying documents were likely to come to the attention of the Defendants service having been effected on the Applicants.

Whether BCIC took reasonable steps to locate the defendants?

Whether the order for substituted service should be set aside or can be accepted as good service?

[29] Having concluded that there was no good reason provided by the Applicant for this delay, I decided nonetheless, to address the other issues which were raised by the Applicant in keeping with the overriding objectives to do justice between the Parties, even in the absence of a good explanation. On the issue of substituted service, the relevant rules in respect of alternate service and service by a specified method are **Rules 5.13** and **Rule 5.14** of the Civil Procedure Rule (CPR).

[30] **Rule 5.13** states that,

> *(1) instead of personal service a party may choose an alternative method of service. (2) Where a party –*
>
> *(a) chooses an alternative method of service; and*
>
> *(b) the Court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the Defendant to ascertain the contents of the claim form.*

[31] **5.13(3)** provides that an affidavit under paragraph (2) must –

> *(a) give details of the method of service used;*
>
> *(b) show that –*
>
> > *(i) the person intended to be served was able to ascertain the contents of the documents; or*
> >
> > *(ii) it is likely that he or she would have been able to do so;*
>
> *(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and*
>
> *(d) exhibit a copy of the documents served."*

[32] In the instant case, the Application of the Respondent was made pursuant to **Rule 5.14** of the CPR which provides that:

> *"(1) The Court may direct that service of a claim form by a method specified in the Court's order be deemed to be good service.*
>
> *(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit-*
>
> *(a) specifying the method of service proposed; and*
>
> *(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the Claim Form and Particulars of Claim."*

[33] In considering this issue of whether the documents served were likely to come to the attention of the 1st and 2nd Defendants, this Court is guided by the principles outlined in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent*** (supra), where in examining the purpose for which a court would allow an order for substituted service, Lord Reading CJ stated at pages 887-888) as follows:

> *"[a Defendant] is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him.… In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the Defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted."*

[34] For the order to be made, the Court must be satisfied that despite their best efforts, the Respondent was unable to locate the Defendants and the circumstances were as such that service on the insurance company would assist in bringing the documents to their attention. It is apparent from an examination of the affidavit evidence of Ms. Alvaranga, Mr. Townsend and Mr. Jason Latham, the Process Server and the Counsel for the Respondent that in respect of the 1st and 2nd Defendants, there existed a challenge in locating them in order to have them served with the documents. The efforts made on behalf of the Claimant were unsuccessful thereby prompting them to adopt this course.

[35] In their Application, the Applicants outlined that letters were sent by registered mail to the Defendants' brokers as well as to their addresses. In considering whether the order ought to be set aside, one of the primary considerations is whether the Applicant has demonstrated that it; 'has made reasonable efforts to locate the 1st and 2nd Defendants. On this point I am guided by the Court of Appeal decision of ***British Caribbean Insurance Company Limited v David Barrett and Others [2014] JMCA App 5.*** In that decision, Brooks JA considered the efforts made by the Applicant insurance company to locate a Defendant (Ivor Leigh Ruddock) with whom an insurance contract had existed, and to locate the driver of the vehicle (Jason Evans).

[36] Similar to the case at bar, BCIC applied to have the substituted service order set aside on the basis that efforts were made to locate the Defendants without success, and the Applicant relied on the fact that it had sent letters and made telephone calls. It was the decision of the Court that the learned Master could not be criticised for refusing to exercise her discretion to set aside the substituted service order on the basis that BCIC had not made all reasonable efforts to contact Mr. Ruddock, as there was no evidence that the letters sent were sent to his home address or that efforts were made to personally deliver any letter to either the home or work address.

[37] In paragraphs 9, 12, 15 of her affidavit, Ms. Peter-Gaye Bromfield outlined the efforts which were made to bring the Claim Form and Particulars of Claim to the attention of the second defendant. She stated that the outcome of these efforts by BCIC was that they were unable to make contact with the 1st and 2nd Defendants and as such the contents of the documents served on BCIC were never brought to the attention of the 1st and 2nd Defendants. It is settled law as stated in ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield; Re Merten's Patent*****:** (supra) that the basis on which a Court would grant such an order is to ensure that the defendant would have been able to ascertain the contents of the document or that it was likely that he would have been able to do so. If this cannot be achieved by the individual or body on whom this service is effected, then the purpose would not have been achieved. This position is also reflected in ***ICWI v Allen (Shelton)*** (supra) and other decisions on this point.

[38] Having reviewed all the evidence, I found that unlike the Respondent, the Applicant made no effort to have the Defendants personally served at the addresses which they had on file for them which were 16 Cortina Avenue, Kingston 10 and 5 Clarion Road, Kingston 20. There was also no evidence provided that the correspondence sent to these addresses by registered mail were returned unclaimed. Additionally, there was no document provided as having been issued by the brokers which stated that there had been no contact made with the Defendants. I also noted that although the Applicant had instructed an investigator to make contact with the Defendants and elicit a report as to the accident in question, they appear to have opted not to pursue that course on receipt of the Respondent's documents. In light of these observations, I did not believe that the Applicants had met the threshold in terms of reasonable steps taken and in that regard had undermined any merit that the application may have had in law for the setting aside of the order for substituted service.

The effect of the service of the unsealed and unsigned Formal Order

[39] In respect of the Applicant's request to have the order set aside on this basis, reliance has been placed on **rules 8.15(5) and 3.9(1)** which provide as follows;

> *8.15(5) Where an order is made extending the validity of the claim form - (a) the claim form must bear a certificate by the claimant or the claimant's attorney-at-law showing the period for which the validity of the claim form has been extended; and (b) a sealed copy of any order made must be served with the claim form*
>
> *3.9 (1) The court must seal the following documents on issue - (a) the claim form; and (b) all judgments, orders or directions of the court.*

[40] Reliance was also placed on the ***Erraldo Henry v Alphanso Clarke*** decision in which the Court had found that the service of an unsealed copy of the Formal Order was not in keeping with the mandatory language of the rules and was no more than a courtesy copy. The Court then set aside the substituted service on the basis that the Claim Form and Particulars had been irregularly served as they had not been served with a signed and sealed Formal Order. The Court also opined that the irregularity had not been waived by the Applicant in that matter. In this situation, the perfected order not having been served until April 2022, the Applicant asserts that the situation is the same and a similar approach should be adopted by this Court.

[41] In my examination of this issue, I carefully considered the fact that in respect of both provisions, the language used indicates that there is a clear requirement for these steps to be observed. In the instant case, unlike the situation in ***Erraldo Henry***, the Respondent provided an affidavit sworn to by Denelia Alvaranga in which she outlined the sequence of events which resulted in the unsigned and unsealed order being served. In that affidavit, reference was made to efforts made by the Respondent's attorneys to obtain the perfected order, after the replacement formal order had been filed, which were unsuccessful.

[42] Ms. Alveranga outlined that email communication with the Registrar was also explored in an attempt to secure same. She averred that based on the

communication received the application for this order could not be located and she was advised that the file would have to be placed before the Master who had granted the order. Ms. Alveranga also stated that the matter was then placed for hearing on the 15th of June 2021, but the application for alternate service had not been located and the situation was not resolved until April 2022 when the perfected order was obtained and served.

[43] While I agree that the provisions relied on by Counsel would seem to be mandatory in their wording, I am mindful of the fact that in addressing matters before the Court the overriding objectives of acting justly between the parties would be equally applicable to a situation such as this. From the evidence provided by the Respondent, I accept that they had sought to take steps to obtain the document which complied with **8.15(5)** and **3.9(1)** but had been frustrated in this regard by circumstances that were not within their control. In order to ensure that the Applicant was provided with timely notification of this order, they adopted the safeguard of providing a copy of the unsealed order with the documents and did not await the perfected order which as it turns out was severely delayed.

[44] The actions of the Applicant, on the other hand, were not consistent with the submissions which they now seek to make as no application was made at the time to set aside the order on the basis that they had not been served with a perfected order and as such service was irregular. What they elected to do instead was to send communication to the Defendants' Brokers in 2017 advising of the situation and according to the submissions made, make efforts in the intervening period to locate the Defendants. In the circumstances, I was persuaded that this situation can be distinguished from that which existed in the ***Erraldo Henry*** case. I was also satisfied that it would not be in keeping with the overriding objectives to allow the Applicant to have been aware of this situation from 2017, taken the steps that they did and then five years later seek to have the order set aside on the basis of an irregularity.

[45] In respect of the Applicant's submission that the Respondent had failed to indicate to the Court that they had been advised that the Applicant would not be indemnifying the Defendants, this issue was considered in the ***ICWI v Shelton Allen*** matter***.*** In this carefully reasoned decision, Morrison JA as he then was, made it clear that this could be viewed as a matter between the insured and insurer which did not affect the right of the Claimant to serve the insurer in these circumstances.

[46] In light of the foregoing analysis, the Application is denied. Costs awarded to the Respondent to be taxed if not agreed. Applicant's attorney to prepare, file and serve orders herein.