



[2023] JMSC Civ 25

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU 2019 CV00628**

<b>BETWEEN</b>	<b>YOLANDO SUTHERLAND</b>	<b>CLAIMANT/RESPONDENT</b>
<b>AND</b>	<b>ROLSTON HUTCHINSON</b>	<b>1<sup>ST</sup> DEFENDANT/APPLICANT</b>
<b>AND</b>	<b>CRAIG HUTCHINSON</b>	<b>2<sup>ST</sup> DEFENDANT/APPLICANT</b>

**IN CHAMBERS**

**Mr. Stephen Palmer instructed by Archer Cummings & Co. for the Claimant**

**Ms. Houston Thompson instructed by Dunbar and Company for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Heard: January 10<sup>th</sup>, 2023 and February 17<sup>th</sup>, 2023**

**Application to set aside – Substituted service – Overriding objective – Whether insurance company has done enough to bring documents to insured’s attention**

**T. HUTCHINSON SHELLY, J**

## **INTRODUCTION**

[1] This is a Notice of Application for court orders which was filed on the 23rd day of March 2021 by Advantage General Insurance Company Limited (hereinafter referred to as “AGIC”) to set aside an Order for Substituted Service. The Applicant, AGIC is seeking to set aside an order made by Master Miss R. Harris. This order was made on the 3rd of July 2019 giving permission to the Claimant to serve the claim form, particulars of claim and all subsequent documents on AGIC, who are

insurers for the 1st Defendant's motor vehicle, bearing registration number 8791 GA.

- [2] The circumstances giving rise to the claim are that the Claimant was driving her motor vehicle registered 7577GD along Dam Head Main Road in the vicinity of the PETCOM Gas station in the parish of Saint Catherine when the 2nd Defendant operating motor vehicle registered as 8791 GA collided into the rear of the Claimant's vehicle. Motor vehicle registered 8791 GA is owned by the 1st Defendant Rolston Hutchinson and was being driven by the 2nd Defendant Craig Hutchinson, who was the servant and/or agent of the 1st Defendant.
- [3] As a result of the collision, the Claimant 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.

## **CHRONOLOGY**

- [4] A chronology of events is outlined below in order to provide a clear understanding of this matter.
1. The accident giving rise to the claim occurred on the 29th day of March, 2014.
  2. On February 20, 2019, a Claim Form and Particulars of Claim were filed in respect of the said motor vehicle accident.
  3. On February 26, 2019, Notice of Proceedings was served on the Applicant, AGIC.
  4. On June 19, 2019, an ex-parte application to dispense with personal service on the 1st and 2nd Defendants and to permit the service of the Claim Form and Particulars of Claim on his Insurers was filed. The Application was supported by an Affidavit of Urgency of Shantol White which outlined the attempts made to serve the 1st and 2nd Defendants at Lot 3 Wallen

Housing Scheme, Cheesefield District, Linstead P.O in the parish of Saint Catherine.

5. On July 3, 2019, an order to dispense with service and to permit the service of the Claim Form and Particulars of Claim on AGIC was granted by a Master in Chambers.
6. On July 10, 2019, AGIC were served with a Formal Order dated July 3, 2019, along with the Claim Form and Particulars of Claim.
7. On March 23, 2021, Dunbar and Company filed an Acknowledgment of Service on behalf of the Applicant, AGIC, indicating that they were served with the Claim Form and the accompanying documents pursuant to a court order made on July 3, 2019.
8. An Application to set aside the order for substituted service made on July 3, 2019 was filed on the same date. The application was not accompanied by an Affidavit in support.
9. On January 29, 2020, a request for default judgment was filed. Interlocutory judgment in default was entered by the Registrar in judgment book on August 9th, 2021.
10. On or about March 29, 2020, the claim became statute-barred.
11. On June 26, 2020, Dunbar and Company wrote a letter to the 1st Defendant. This letter was returned unclaimed.
12. On October 22, 2020, Delroy Lawson, Process Server/Private Investigator instructed on behalf of the Applicant, visited the 1st and 2nd Defendants' address of Lot 3 Wallen Housing Scheme, Cheesefield District, Linstead P.O. in the parish of St. Catherine.
13. On February 10, 2022, the Affidavit of Vanessa Nesbeth, Legal Counsel for AGIC was filed in support of the Application to set aside the Order.

14. On February 10, 2022, the Affidavit of Delroy Lawson, was filed in support of the Application to set aside the Order. In this affidavit he outlined his visit to the address and the information received that the defendants had migrated to the Cayman Islands and Canada respectively.
15. On February 25, 2022, a Notice for the Case Management Conference for Assessment of Damages was scheduled.
16. On May 5, 2022, the Case Management Conference for Assessment of Damages came on for hearing and was adjourned due to AGIC's pending application.
17. On July 19, 2022, the Affidavit of Matthew Palmer was filed in response to Vanessa Nesbeth's affidavit.
18. On November 22, 2022, the Affidavit of Althea Wilkins, Legal Counsel for AGIC, was filed in response to the affidavit of Mr Matthew Palmer.

#### **Grant of Order for Substituted Service**

- [5] As outlined in the chronology above, the Claimant's Application for permission to serve the said documents on the Applicant was supported by an Affidavit of Urgency of Shantol White. The claim having been instituted, Miss White indicated that she forwarded sealed copies of the claim form and accompanying documents to Mr Ralston McCalla, a bailiff at the Saint Catherine Parish Court Bailiff to serve the Defendants personally at their address. Ms White averred that she had been advised by the bailiff that despite visiting the address of Lot 3 Wallen Housing Scheme, Cheesefield District, Linstead P.O. in the parish of Saint Catherine and making enquiries of the occupants of the premises, he was unsuccessful in locating and serving either of the Defendants and their whereabouts are unknown. A copy of the Bailiff's report was also attached to her affidavit.

[6] On July 3, 2019, Master Miss R. Harris made the Order allowing substituted service of the Claim Form and Particulars of Claim on the Applicant as insurers for the 1st Defendant's motor vehicle. The Orders made were in the following terms:

1. *The Claim Form and Particulars of Claim are renewed for six (6) months from the 19th August 2019.*
2. *Personal service of the Claim Form and Particulars of Claim on the Defendants Rolston Hutchinson and Craig Hutchinson, is dispensed with.*
3. *The Claimant is permitted to substitute personal service of the Claim Form and Particulars of Claim on the Defendants herein, with service on the insurers Advantage General Insurance Company Limited of 4-6 Trafalgar Road, Kingston 5 in the parish of Saint Andrew and by publication of a Notice of Proceedings twice, one week apart in the daily edition of the Gleaner Newspaper (Jamaican edition) and in two consecutive publications of the North American edition of the Gleaner. Notice of Proceedings to be settled by the Court.*
4. *That time for Acknowledgement of Service of the Claim Form and Particulars of Claim and filing of Defence be fourteen (14) days and forty-two (42) days respectively, from the date of service on Advantage General Insurance Company Limited and/or the last publication of the Notice of Proceedings in the Jamaican edition of the Gleaner and twenty-eight (28) days and fifty-six (56) days respectively, in the North American edition of the Gleaner."*

### **Application to set aside**

[7] In its Application to set aside the Order, filed on March 23, 2021, the Applicant now seeks the following Orders:

1. That the order for substituted service on Advantage General Insurance Company Limited for the Defendants be set aside;
2. That the service of the Claim Form and Particulars of Claim on the Defendants by serving them on Advantage General Insurance Company Limited be set aside;
3. That the time to bring this application be extended;
4. Any further and other relief as this Honourable Court deems just.

AGIC is seeking to have the order set aside on the following grounds:

- a. The Applicant has been unable to locate Rolston Hewitt Hutchinson and Craig Hutchinson to advise them of claim form and Particulars of Claim to their attention and knowledge.
  - b. That the Applicant made attempts to contact them by sending letters to their last known address but there has been no response and the mail has been returned.
  - c. That the Applicant has also tried the last contact number on record for efforts were made to contact him at the number on record for Rolston Hutchinson being 876-430-2381 and Craig Hutchinson being 876-583-4883. However, the former number was just constantly busy while the latter was not assigned.
  - d. An investigator was sent to locate them but they have both migrated, Rolston Hutchinson to the Cayman Islands and Craig Hutchinson to Canada.
  - e. That the Applicant therefore, is unable to advise the Defendants of the claim against them and to notify them and bring the contents of the Claim Form and Particulars of Claim to their attention and knowledge.
  - f. It is in these circumstances that the Applicant now seeks the court's assistance in setting aside the order for substituted service of the Claim Form on it for the Defendants.
- [8]** The Court is mindful of the fact that at the time of the filing of the application, no Affidavit in Support was filed. It has also been noted that affidavits were filed on February 10, 2022 and November 22, 2022, respectively. The Affidavit of Mr Delroy Lawson, which was filed on February 10<sup>th</sup>, 2022, indicates that he visited the Cheesefield District, Linstead P.O. in the parish of St. Catherine in October 2020 and made enquiries for Lot 3 Wallen Housing Scheme, Rolston Hutchinson

and Craig Hutchinson. At the aforementioned address, he was informed by one Junior Blake, the brother-in-law of Rolston Hutchinson, that Rolston Hutchinson migrated and has been residing in the Cayman Islands for the past two (2) years or so. Mr. Lawson averred that queries about Craig Hutchinson revealed that he now resides in Canada, having migrated over 7 years ago. Mr. Lawson indicated that in those circumstances he was unable to locate the Defendants.

- [9]** The second Affidavit, which was also filed on the same date, is that of Vanessa Nesbeth, Legal Counsel for the Applicant. In her affidavit, she indicated the various steps undertaken by the Applicant to communicate with the Defendants after the Formal Order and accompanying documents were served on the Applicant on July 10, 2019. She explained that these included sending copies of the suit documents to them by registered post as well as calls to the numbers on file. Both of which were unsuccessful. She stated that Dunbar and Co were then retained and correspondence sent to the 1st Defendant in August 2019 which were returned unclaimed.
- [10]** Miss Nesbeth indicated that their attorneys made numerous calls to the phone number on record for the 1st Defendant but the number was always busy and attempts made to contact the 2nd Defendant were also unsuccessful as the number is no longer assigned. She then outlined that the services of Delroy Lawson, Private Investigator were engaged which were also unsuccessful. Miss Nesbeth also averred that the order made to serve both Defendants by publication of a Notice of the Proceedings in the Jamaican and the North American edition of the Gleaner would be fruitless given the information provided by the investigator.
- [11]** The third Affidavit filed on November 22, 2022, is that of Althea Wilkins, Legal Counsel for the Applicant. Miss Wilkins indicated therein that the Applicant Company had been of the view that the matter had been resolved with the Claimant as there had been an offer and acceptance. There was no date provided by Ms Wilkins in this regard but in the course of the submissions, correspondence was exchanged by Counsel and Mr Palmer accepted that there had been

correspondence on this point in September and October 2018 but no acceptance of the offer had ever been secured from the Claimant. Miss Wilkins also stated that having been served with the documents in July 2019, the Applicant contacted the Claimant's Attorneys-at-Law and were informed by them that they had instructions to proceed with court action. Miss Wilkins asserted that the Applicant company was perplexed at receiving suit documents as they had laboured under the belief that a settlement had been reached.

- [12] The Affidavit of Miss Wilkins also bore similar information to that of the Affidavits of Delroy Lawson and Vanessa Nesbeth in respect of efforts made to locate the Defendants and this Court will not reprise same. In response to paragraph 20 of the Affidavit of Matthew Palmer filed on July 19, 2022, Miss Wilkins averred that Dunbar & Co. Attorneys-at-Law contacted ITC Tile which is located in Grand Cayman by telephone and were advised by a Joey Kozaily that he does not know Rolston Hutchinson or Craig Hutchinson. Miss Wilkins indicated, with reference to paragraph 22 of the same affidavit, that Dunbar & Co. contacted the Caribbean restaurant located in Ontario and spoke with George Powell. She stated that George Powell informed Dunbar & Co. that he is the cousin of Craig Hutchinson and that he would endeavour to take a message for Craig Hutchinson and have him contact their office as he had not been in communication with him for some time. He also advised them to call him again. Miss Wilkins averred further that all other attempts to contact George Powell proved futile and they were advised by a lady that George Powell does not have a number for Craig Hutchinson. Miss Wilkins posited that in those circumstances, Dunbar & Co and the Applicant by extension are unable to locate the Defendants.

### **APPLICANT'S SUBMISSIONS**

- [13] Ms. Thompson submitted that the Applicant has taken sufficiently reasonable steps to locate and make contact with the 1st and 2nd Defendants but had not been able to do so. She relied on the efforts outlined in the affidavit of Delroy Lawson as well as those of Ms Nesbeth and Ms Wilkins. She pointed out that despite sending a



letter to their address, hiring a private investigator and making checks in respect of the information received of their possible location in the Cayman Islands and Canada, the Applicant Company was unable to establish contact.

- [14] Ms. Thompson asked the Court to take into account the fact that the relationship between the Applicant and the 1st Defendant had ceased from November 2018, which meant that there was no contractual relationship in existence at the time of this claim. She directed the court's attention to the case of ***Nico Richards v Roy Spencer (Jamaica International Insurance Co Ltd – Intervening) [2016] JMCA Civ 61***. At paragraph 33, it was suggested that a court hearing such an application should be mindful of the amount of time that has elapsed between the date of the accident and the date of the hearing. Ms. Thompson submitted that with the passage of time, where the contractual relationship between the Defendant and the insurer has ceased, the insurer might have no knowledge of the whereabouts of the Defendant.
- [15] Counsel argued that the Applicant has demonstrated that the steps taken have not enabled the 1st and 2nd Defendants to ascertain the contents of the documents, and it is not likely to do so as it cannot locate the Defendants to serve the relevant documents and relied on the authorities of ***ICWI v Shelton Allen (Administrator of the estate of Harland Allen) and others [2011] JMCA Civ 33*** and ***Porter v Freudenberg; Krelinger v Samuel and Rosenfield***; Re: ***Merten's Patent [1914-15] All ER Rep 918*** in this regard.
- [16] She submitted that the Applicant's do not possess any further information to act on and the efforts taken have been more than sufficient in the circumstances. Counsel posited that 'the Court must be wary of placing too onerous a burden on one party, especially in matters such as this.' She asserted that any efforts that could be undertaken by an insurer can also be taken by the Claimant.

## RESPONDENT'S SUBMISSIONS

- [17] In urging the Court to refuse AGIC's application, Learned Counsel for the Respondent raised the point that despite being served with the Notice of Proceedings in February 2019 and the Formal Order on July 10, 2019, AGIC only filed their application to set aside substituted service on March 23, 2021 and thereafter failed to provide the Affidavit evidence until February 10, 2022.
- [18] Mr. Palmer submitted that the Applicant has not made sufficient efforts to locate the 1st and 2nd Defendants and to bring the Claim Form and Particulars of Claim to their attention. Counsel argued that AGIC did not treat the matter with alacrity as apart from calling the Defendants, the Attorneys-at-Law for AGIC sent correspondence with the Claim Form and Particulars of Claim enclosed eleven and a half months after being served with the Formal Order.
- [19] Mr. Palmer asserted that the Private Investigator was only hired to locate the Defendants after the matter was already statute-barred. He also took issue with the sufficiency of the evidence of Mr Delroy Lawson. He submitted that when Mr Lawson was informed by Junior Blake that the Defendants had migrated it would have been within reason for him to request their contact information but this was not done.
- [20] Counsel relied on the Affidavit of Matthew Palmer in which the latter indicated that he conducted an online search in July 2022 from which he was able to find Facebook profiles belonging to the Defendants as well as possible contact and work details for them. Mr Palmer submitted that taking into account the foregoing, it is clear that despite having the advantage of an Investigator, neither AGIC nor its Attorneys-at-Law took all reasonable steps to locate the Defendants.
- [21] Mr Palmer argued that there are other important factors to be considered in determining whether the order for substituted service ought to be set aside which include whether the application was made in a timely manner and whether there is a reasonable explanation for the delay. He relied on the authority of *Damion*

***Welch v Roxneil Thompson and Tyrone Brown*** [2018] JMSC Civ 59 (“Damion Welch”) where the Court stated at paragraphs 25-27 that even if it had been satisfied that the Applicant made all reasonable efforts to locate the 2nd Defendant, it would not be appropriate to set aside the order in circumstances where the Applicant has delayed for two years in pursuing its application and where the claim is statute barred.

[22] Counsel also relied on the case of ***Vanessa Cooper v Ricardo Austin and Marcia Whitter*** [2020] JMSC Civ. 68 (“Vanessa Cooper”) in which AGIC 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. Mr Palmer made reference to the reasoning of the Court at paragraph 15 of ***Damion Welch*** as well as 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. He urged the Court to refuse the application due to the incredible delay as the application was filed 1 year and 8 months after being served with the Formal Order and the initial affidavits in support 2 years and 7 months after same.

[23] In addressing the evidence contained in the affidavit of Ms. Wilkins, Mr. Palmer submitted that the explanation provided that the Applicant had believed that the matter had been settled was without merit. He argued that the service of the notice of proceedings in February 2019 would have put the Applicant on notice that legal proceedings had been instituted and this would have been confirmed by the service of the Formal Order. In respect of the checks made on the social media information by Ms Wilkins, Mr Palmer argued that the delay in following through, likely impacted the Applicant’s ability to make contact and they should not now be

allowed to benefit from same given the deleterious effect that any order to set aside would have on the Claimant at this stage.

**[24]** In respect of the question of whether publication in the Gleaner would also have been effective in bringing these proceedings to the attention of the Defendants, Mr. Palmer submitted that the Gleaner was circulated in North America which includes Canada which was the jurisdiction to which the 2nd Defendant was said to have migrated. He also made reference to paragraph 17 of the affidavit of Mr. Matthew Palmer where the affiant outlined the information received from a representative of the Gleaner Company in respect of the availability of the newspaper in Canada.

## **ISSUES**

**[25]** The Court has to decide the following issues:

- i. Whether the Application should be heard out of time?
- ii. 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 and by publication?
- iii. Whether AGIC took reasonable steps to locate the defendants?
- iv. Whether the order for substituted service should be set aside?

## **THE LAW**

### **Substituted Service**

**[26]** Rules 5.13(1), 5.13(2), 5.13(3) of the **CPR** provide that,

*“5.13(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.*

**(3)** *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.”*

**[27]** In the instant case, the Application was made pursuant to Rule 5.14 which provides that:

**“5.14(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.”*

### **Extension of Time for Application to Set Aside**

**[28]** **Rule 11** of the **CPR** outline the general rules for applications for Court Order; in respect of the Application to have this order set aside. Given that the order was made on a without notice application, **Rules 11.16(1)** and (2) of the CPR are applicable which provide:

*11.16 (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.”*

[29] Of equal importance to the determination of this application are **Rules 1.1** and Rule 26.1(2)(c) which are outlined below;

*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.*

*26.1 (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”*

[30] In the case of **ICWI v Shelton Allen** (supra), while examining an application to set aside alternative service, Morrison J.A. (as he then was) observed that Rule 5.14 supplements 5.13. He also noted that Rule 5.13 gives the claimant an option to adopt an alternative method of service without prior application to the court, subject only to the affidavit of service filed subsequently, satisfying the court that the method of service chosen by the claimant was sufficient to enable the defendant to ascertain the details of the claim form. The Learned Judge also opined, that it is only when the court is not so satisfied that it will become necessary for an application to be made to the court under 5.14 for an order for service by a specified method.

[31] Having considered these rules, the Learned Judge also reviewed the dicta of the Court 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.”*

His Lordship then outlined the position that service under those Rules should only be permitted where it is shown on affidavit evidence that the claim form is likely to come to the attention of the Defendant by the method chosen.

- [32] On the issue of reasonable steps, in addition to the authorities cited by Counsel for the respective parties, the Court of Appeal decision of ***British Caribbean Insurance Company Limited v David Barrett and Others*** [2014] JMCA App 5 provides useful guidance on the relevant legal principles to be considered. In that decision, Brooks JA (as he then was) 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).
- [33] 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.
- [34] The authority of ***Moranda Clarke v Dion Marie Godson and Donald Ranger*** [2015] JMCA Civ 48 is also relevant, particularly paragraph 37, where Master Bertram-Linton (as she then was) made it clear that making *“reasonable efforts does not mean that the steps of enquiry ought to be so onerous that it becomes unrealistic for the insurance company to achieve.”*

## DISCUSSION/ANALYSIS

### Whether the Application should be heard out of time?

[35] In considering the issue of whether or not the failure to file the application within 14 days after the Order is fatal to the hearing of the application, I note that the use of the word 'must' at Rule 11.16 (2) suggests that the Rule is meant to be mandatory. It therefore means that a litigant is expected to strictly comply with this provision. This is in accordance with the general thrust of the CPR to deal with cases expeditiously. While this is so, I am cognizant that the Court is empowered to grant an extension of time where the Applicant fails to comply with the time stipulated by the Rules.

[36] In *Moranda Clarke (supra)*, the Learned Master, had to address this very issue and consideration was given to the wording of **Rule 11.16 (2)**. At paragraph 15, the Learned Master opined that "**CPR Rule 11.16 (2)** is meant to be mandatory .... In keeping with the stated thrust of the Civil Procedure Rules ... to prevent protracted litigation on an issue'. In that particular case, an application was made by the insurers seeking an order from the court to set aside the order for the substituted service which was effected on them. Despite the fact that she found that **Rule 11.16 (2)** "is meant to be mandatory", in paragraphs 17-19 of her judgment, she stated;

*"[17]...The Rules however also 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 provide some flexibility to ensure that justice is done."*

*[19] In my judgment in the instant case, the overriding objective would best be served by recognizing that the 1st Defendant is indeed in breach of the mandatory rule in Rule 11.16 (2) 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."*

[37] At paragraphs 8 and 9 of her Affidavit, Ms. Nesbeth indicated that the reason for the delay is due to the efforts the Applicant made to locate the 1st and 2nd Defendants. In this regard, she made reference to correspondence sent to their



addresses on record. I noted however that although this was said to have been done in 2019, the envelope and letter exhibited show that this was not done until almost a year after the service of the formal order.

**[38]** I also considered the evidence of Ms. Wilkins which indicated that the delay was due to the Applicant's belief that the matter had been settled. While it is clear that there had been settlement discussions and correspondence exchanged in this regard, I agree with the submissions of Mr Palmer that the Applicant would have been put on notice from February 2019 that the matter had not been settled and was now the subject of Court proceedings. Any lingering doubt in that regard would have been addressed by the service of the Formal Order in June 2019.

**[39]** The Applicant's delay was twofold as although the application was filed in March 2021 it was not properly before the Court until February 2022 when the affidavits in support were filed. On an examination of the affidavit of Ms Nesbeth, there has been no explanation provided for the further delay in filing same as the efforts to send correspondence to the Defendants and the visit to their address by the investigator had preceded the filing of the application to set aside by several months. In circumstances where the application was already severely delayed, the Applicant should have recognised the need to act with alacrity in placing the matter before the Court for its consideration. 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 in these circumstances, the explanation provided by the Applicant has fallen short of the mark in respect of this issue.

**[40]** Having concluded that there was no good reason provided by the Applicant for this delay, I believed it prudent 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.

**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 and by publication?**

**Whether AGIC took reasonable steps to locate the defendants?**

- [41] On the issue of substituted service, the relevant rules in respect of alternate service have already been outlined above. An examination of the rules and decided cases on these provisions has shown that alternative service does not require personal service on the Defendant. What must be ensured is that the contents of the documents are likely to come to the attention of the Defendant.
- [42] In considering the 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 *ICWI v Shelton and Porter v Freudenberg; Krelinger v Samuel and Rosenfield*; Re *Merten's Patent* (supra).
- [43] For the order to be made, the previous Tribunal would have to be satisfied that despite their best efforts, the Claimant 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. White that in respect of the Defendants, there existed a challenge in locating them in order to have them served with the documents. It was these unsuccessful efforts which prompted the Claimant to adopt this course.
- [44] In their Application to set aside the order, the Applicants outlined that following their receipt of the Formal Order, letters were sent by registered mail to the Defendants' address. A review of the attachments to the affidavit of Ms Nesbeth does not reveal any correspondence sent by the Applicant itself and there was only one letter appended, which had been sent to the 1st Defendant only. This was sent by the Applicant's Attorneys in June 2020. There is no evidence of any effort to contact the Defendants in 2019, whether by the Applicant or their Attorneys. The

additional efforts relied on were phone calls placed to the Defendants and the visit to the address on file by the private investigator. In respect of the calls, while it has been stated that numerous calls were made, there were no telephone records or calls logs provided in this regard, neither was the Court provided with the dates of these calls in order to assess when the efforts were made and the extent of same.

**[45]** In respect of the visit to the address by the Investigator, it is evident that the Applicant would already have been aware that the order for substituted service had been made in circumstances where the Defendants could not be found for personal service. Having had the opportunity to see and speak with a close relative of the Defendants at this location, it would have been in keeping with Mr Lawson's remit to locate the defendants, to obtain addresses for them, but this was simply not explored.

**[46]** In my consideration of the additional evidence presented in the affidavit of Ms Wilkins, I carefully analysed the contents of same bearing in mind the relevant law and submissions. In the course of my examination, I noted that while it was asserted that no contact could be established, the contents confirmed that the 2nd defendant was known to the operator of the restaurant and was even a relative of his. It also confirmed that he was someone with whom Mr. Powell indicated he should be able to make contact even though he had not seen him for some months

**[47]** It was also noted that although this information was provided to the representative from Dunbar and Co, this individual did not request an address for the 2nd defendant and the conversation came to an end with a promise by Mr. Powell to get a message to the 2nd defendant to call the Applicant's Attorneys. In respect of their follow up calls, which Ms Wilkins averred were answered by a different individual who provided no assistance, it could not be stated with certainty that the results would have been the same if these additional steps had been taken.

**[48]** In respect of the efforts made to contact the 1st Defendant, while Ms. Wilkins made reference to unsuccessful efforts to make contact with him at the telephone

number which she said belonged to ITC Tile, there was no attempt made to establish contact with him through his page or by reaching out to any of the other persons on his page with a like surname. While the Court accepts that the Insurance Company is not to be placed under an onerous burden, the Court expects that reasonable efforts would include follow up steps which are immediately apparent in circumstances such as these.

[49] On the issue of whether the matter could have been brought to the attention of the Defendants by publication, I have carefully considered the affidavits of Mr. Palmer and those of Ms. Nesbeth and Ms. Wilkins. Although it has been argued that the publication could not have assisted in this regard, I note that the 1st Defendant is said to have left the jurisdiction about '2 years or so' ago. There has been no documentation provided from PICA (Passport, Immigration and Citizenship Agency) or any other entity to confirm his actual date or year of departure. In the absence of documentary proof, I was unable to accept the bald assertion that this Defendant would have already left this jurisdiction prior to the publication and would not have been aware of it.

[50] Additionally, with the evidence of the circulation of the Gleaner in Canada, specifically in Ontario where it has been established the 2nd Defendant had been seen, it could not be asserted as a fact that the 2nd Defendant would not have seen the publication. In light of these observations, I do not believe that the Applicants have met the threshold in terms of reasonable steps taken. Neither can it be accepted as a fact that they would not have been aware of these proceedings by publication.

#### **Whether the order for substituted service should be set aside?**

[51] The overriding objective requires that a Court exercises its discretion, in a manner which accords with justice. **Rule 1.1(2)(d)** of the **CPR** outlines that a Court has to ensure that cases are dealt with fairly and expeditiously. In exercising my discretion, in addition to determining whether reasonable steps have been taken, I am also guided by factors such as:

- (1) the length of the delay in filing the application supported by affidavit evidence,
- (2) the explanation for the delay, or lack thereof, and
- (3) the possible prejudice occasioned by the delay.

**[52]** The length of the delay and explanation provided for same have already been reviewed in the course of this judgment. In respect of the possible prejudice which may be occasioned by the delay, Counsel for the Claimant has asked the Court to note that the matter is now statute barred, this having occurred in March 2020. Mr Palmer argued that to set aside the matter at this stage after delay on the part of the Applicant would leave the Claimant in a position where she would not be able to re-file this suit and without a remedy. In her submissions on this point, Ms Thompson argued that the suit had been filed in February 2019 which was just over a year before the action was statute barred. She contended that to hold the Applicant responsible for the matter going statute barred would be wholly unfair in those circumstances.

**[53]** While I agree that the claim was filed several years after the motor vehicle accident, the question which falls to be decided is whether the Applicant acted with alacrity once they became aware of the proceedings and made all reasonable efforts. It is clear from the evidence presented that they would have been put on notice of the action from February 2019 which was 3 or 4 months after the policy with the 1st Defendant had come to an end. There has been no evidence presented that they made contact with him to advise that court proceedings had been initiated and it was stated earlier that no evidence has been presented of any action by them in this regard during 2019.

**[54]** In circumstances where timelines have been established for certain actions to be pursued and the need for matters to be expedited, it would not be unreasonable for the Claimant and Court to expect that the matter would have been addressed in a timely manner. Unfortunately, this was not the course pursued by the Applicant

with the result that the Claimant has been greatly prejudiced. In light of the foregoing discussion and findings, I am satisfied that the Applicant has not met the required threshold to persuade the Court to set aside the order for substituted service and accordingly its application is refused.

## **ORDERS**

**[55]** Based on the foregoing analysis, I now make the following orders:

- a. The Application to set aside the Order for substituted service is refused.
- b. Costs awarded to the Claimant/Respondent to be taxed if not agree.
- c. Applicant's attorney to prepare, file and serve orders herein.