[2017] JMSC Civ. 193

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2014 HCV 01120**

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| **BETWEEN** | **SHURMAINE VALENTINE** | **CLAIMANT** |
| **AND** | **KELINA NORMIL** | **1ST DEFENDANT** |
| **AND** | **ANDRE EDWARDS** | **2ND DEFENDANT** |
| | **ADVANTAGE GENERAL INSURANCE COMPANY LIMITED INTERVENING** | |

**IN CHAMBERS**

Mr. John Givans and Ms. Lori-ann Givans instructed by Givans & Company for the Claimant

Ms. Claudine Stewart instructed by Burton Campbell & Associates for intervener Advantage General Insurance Company Limited.

Heard: 15th June 2017 and 13th July 2017

Judgment delivered: 31st July 2017

**Order for Specified Service – Whether Sufficient Basis for making Order – Whether Order should be set Aside**

**MASTER A. PETTIGREW-COLLINS, (A.G)**

**[1]** The matter with which the court is concerned is an amended Notice of Application for Court Orders filed on the 12th of August 2016. The applicant is Advantage General Insurance Company Limited, (hereinafter referred to as AGIC

or the applicant) who was the insurer of a motor vehicle registered 4960 FL owned by Auto All Car Rental Limited. This vehicle had been rented by the 1st Defendant Kelina Normil and was being driven by the 2nd Defendant Andre Edwards who is the son of the 1st Defendant, when the motor vehicle was involved in an accident.

**[2]** On the 5th of June 2015, the claimant Shurmaine Valentine filed an Amended Notice of Application for Court Orders seeking service by specified method in lieu of personal service on the 1st and 2nd Defendants. On the 25th of February 2016 a Master in Chambers granted an order in thus regard. I pause here to say that this order could possibly be interpreted in two different ways but it appears that the order was understood by both the applicant and the respondent in this matter to mean that it allowed service of the Claim Form and Particulars of Claim upon the 1st Defendant to be effected via service upon Advantage General Insurance Company and service upon the 2nd Defendant by way of registered post to his address at 45 Evan Meadows. I am minded to think that by virtue of the way the order was worded, it allowed for service on both defendants by both methods but I will assume the position accepted by both parties for the purposes of this case. It is the service in relation to the 1st Defendant which is impugned.

**[3]** The circumstances giving rise to the claim in relation to which the application was made are that the claimant Shurmaine Valentine was a passenger in the motor vehicle registered 4960 FL when it was involved in the accident in question. This accident occurred on the 15th of May 2009 in Four Paths in the parish of Clarendon. The claimant allegedly sustained very serious and debilitating injuries which from all indications have left him permanently physically impaired.

**[4]** It might be useful at the outset to set out the chronology of events.

i. The accident giving rise to the claim took place on the 15th of May 2009.

ii. The claim form and particulars of claim were filed on the 3rd of March 2013.

iii. A Notice of Application for Court Orders seeking that the time for service of the claim form be extended by six months as well as service by specified method in relation to the 2nd Defendant was filed on June 17th of 2014. An affidavit in support of this application sworn to by Mr. John Givans was filed on the same date.

iv. An Amended Notice of Application for Court Orders was filed on the 5th of June 2015, this time seeking service by specified methods on both the 1st and 2nd Defendants.

v. A supplemental affidavit in support of this application sworn to by Mr. Givans on the 4th of December 2015 was filed on that same day.

vi. Another affidavit sworn to by Dave Quest in support of the amended notice of application was filed on the 1st of February 2016.

vii. A Master in Chambers granted the Orders sought in the amended notice of application on the 25th of February 2016.

viii. The order of the Master was served on Advantage General the applicant company on the 21st of June 2016.

ix. On the 12th of August 2016, Advantage General filed its Notice of Application to set aside the order for specified Service on it in relation to the 2nd Defendant.

x. An affidavit in support of this application sworn to by Ms. Vanessa Nesbeth was filed on 3rd of April 2017.

xi. Mr. Givans filed an affidavit on the 12th of June 2017 in response to Ms.
Nesbeth affidavit.

xii. The hearing of this application commenced on the 15th of June 2017.

xiii. Ms. Nesbeth filed a further affidavit on the 10th of July 2017.

xiv. The hearing of the application continued on the 13th of July 2017.

xv. A decision in the matter will be given on the 31st of July 2017.

**[5]** In his affidavit filed 17th of June 2014 in support of the order, Mr. Givans deponed that he had given the claim form and particulars of claim to the bailiff (for the parish of Clarendon) to serve, and that these documents were returned to him on May 20,2014. He did not state when he had given these documents to the bailiff. The Bailiff for the parish of Clarendon Mr Dave Quest deponed that he had made several visits to the 2nd Defendant's address at 45 Evan Meadows, May Pen, Clarendon in an attempt to serve both the 1st and 2nd Defendants but on each occasion, he was unable to locate them. He deponed further, that he was not aware of any other address at which they could be located.

**[6]** In his supplemental affidavit filed on the 4th of December 2015, Mr. Givans further deponed in paragraph 3 that he had served Notice of Proceedings on AGIC on 10th of March 2014 and that the notice had not been rejected or returned by the company. However, he also deponed in paragraph 4 that via letter dated 25th of November 2014, the said company had intimated to him that they would not be settling the claim because the 2nd Defendant, the driver of the vehicle at the material time, was not the holder of a driver's license. Notwithstanding, he continued in paragraph 5

> *"Given the matters stated in paragraphs 3 and 4, it is therefore likely that if the claim form and related documents are served on the said insurance company they will bring them to the attention of the defendants because,*

*in the ordinary way of things, this insurance company would have all the information on how to contact the defendants, which information the claimant, on my instructions, does not and necessarily would not, possess. The essence of the insurance company's stance is simply that they would not be indemnifying them, not that they are not in touch with them. The process of interaction between the insurance company and the 1st and 2nd Defendants which would follow from service of the documents on the insurance company would also allow and enable the 1st and 2nd Defendants to know of the nature of the suit filed against them and the contents of the claim form and particulars of claim".*

**[7]** It is noteworthy that in pursuing the application for specified service, the Claimant supplied a local address for the 2nd Defendant and stated that the 1st Defendant resides in Miramar Florida. The foregoing information formed the basis on which the Master made her orders which were that:

1. The time for service of the claim form, is extended for 6 months from the date hereof, pursuant to CPR Rule 8.15.

2. Personal service on the defendants of the claim form and particulars of claim both filed on 3rd of March 2014 is dispensed with.

3. Service on the defendants of the said documents and of all other documents in these proceedings which require personal service is to be effected by the following methods:

    a. Sending copies of the said documents by registered post to the address of the 2nd Defendant at 45 Evan Meadows, May Pen in the parish of Clarendon.

    b. Leaving copies of the documents at the 1st defendant's insurers Advantage General Insurance Company Limited whose address is at 4 Trafalgar Road, Kingston 5.

**[8]** In its Notice of Application for Court Orders, the applicant in the present matter seeks the following orders:

1. That the applicant be granted an extension of time to file the application herein.

2. That the order for service by specified method made herein on the 25th of February 2016 to effect service of the Claim Form and Particulars of Claim on Advantage General Insurance Company in lieu of the 1st defendant be set aside.

3. That service of the Claim Form and Particulars of Claim pursuant to the order for substituted service be set aside.

4. That cost of the application be awarded to the applicant.

The stated grounds on which the application was made are that:

1. The 1st defendant is not insured with the applicant company.

2. The applicant has no dealing with the 1st defendant and has no information pertaining to her whereabouts.

3. The Claim Form and Particulars of Claim have not been brought to the attention of the 1st defendant by substituted service on the applicant for reason stated in 1 and 2 Above.

4. Pursuant Part 42.12(5)(b)&(c) of the Civil Procedures Rule (CPR) a party who is not a party to the claim may take part in any proceeding under the order and may apply to the court to discharge the order.

5. The applicant has a good explanation for failing to make the application in time under Part 42.12 under the CPR.

6. Pursuant to Rule 26.1(2)(c) of the CPR the court has the discretionary power to extend time within which to comply with an order or rule.

**[9]** The date of service of the order which AGIC seeks to set aside was stated as the 21st of June 2016 in Ms. Vanessa Nesbeth's (Legal Officer employed to the applicant company) affidavit of the 3rd of April 2017. Paragraphs 5, 6, 7 and 8 of her affidavit state the following:

> 5 *"That a search of the company's records was conducted and the results indicated that the Applicant Company, Advantage General Insurance Company Limited issued a policy of insurance to Auto All Car Rental Ltd providing coverage of motor vehicle licensed 4960 FL for the period 15th December 2008-14th December 2009. At the time of the accident however the said motor vehicle was leased to the 1st Defendant for her own purpose and benefit."*
>
> 6 *" That the search further indicated that the Applicant Company was never the insurer of the 1st Defendant, Kelina Normil with respect to whom the order for specified service was made. The Applicant has never had any contractual relationship with Kelina Normil, has no knowledge of her whereabouts and as such has no way of bringing the Claim Form and Particulars of Claim to her attention.*
>
> 7 *" That in all the circumstances, no relationship exists between the Applicant Company and the 1st Defendant with respect to whom the order for specified service was made and the claim has not and will not come to the 1st Defendant's attention by specified service on the Applicant Company."*
>
> 8 *" That I verily believe that the Order on Notice of Application for Court Orders made on the 25th February 2016 and all proceedings flowing therefrom are irregular and ought to be set aside."*

**[10]** In Mr. Givan's affidavit of the 12th of June 2014, he refuted Ms. Nesbeth's assertion that the applicant company had no way of bringing the contents of the claim form and particulars of claim to the attention of the 1st defendant. Among the reasons he pointed to as to why they would be able to, is the fact that the 1st defendant rented a vehicle from Auto All Car Rental Limited and that this defendant would in the ordinary course of things fill out and sign a rental agreement with the company detailing her particulars, including her address and telephone numbers and that these particulars would have been passed on to the applicant insurance company. He asserted that there is a closer connection between the car rental company (which is the applicant's insured) and the 1st defendant, than between the claimant and the said 1st defendant. He also stated

that in the usual run of things, the car rental company would have reported the accident to the applicant, giving details of the person who rented the vehicle and of the driver, among other things.

**[11]** Ms. Nesbeth countered those assertions by stating in paragraph 7 of her affidavit filed on July 10, 2017 that rental agreements are not sent to the applicant company as there is no relationship between the hirer and the insurance company. The rental company is only under an obligation to provide the insurance company with the name of the driver and his/her driver's license in the event of an accident. Further, that the detail in the motor claim form is limited to what is required by the applicant company. She exhibited a copy of the form filled out. From a perusal of this photocopied document, there was no address provided for the driver Andre Edwards. The hirer's name did not appear on the document. Neither was there any information of any kind in relation to the hirer, Ms. Normil.

**THE ARGUMENTS**

**[12]** Ms. Claudine Stewart on behalf of the applicant, asked the court to take into consideration the fact that the 1st defendant had 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 connection between the driver and the insurance company was distant. She pointed out that the hirer would not be in direct contact with the insurance company. She stated in essence that the order for substituted service is predicated on the existence of a relationship of insurer/insured. Clearly those are not the facts in this case. What exists is an order for substituted service in relation to the 1st defendant on an insurance company that never insured nor had a relationship with the 1st defendant. She also referred the court to the case of **Avis Rental Car Company v Maitland** (1980) 32 WIR 294 which is authority for the principle that a person who lets a

motor vehicle out on hire, is not, by virtue of that transaction, vicariously responsible for the negligent driving of the person to whom he hires the vehicle.

**[13]** She asked the court to distinguish the instant case from the case of **Nico Richards v Roy Spencer (Jamaica International Insurance Company Limited Intervening)** [2016] JMCA Civ. 61. In **Nico Richards** she stated, the likelihood of Mr. Brown ascertaining the information would have been greater because of the nature of the contract. If the court were to parallel that situation with the instant case she opined, there arises a certain level of difficulty because it cannot be said that Ms. Normil was the servant/agent of Auto All Limited. She further asserted that the contract having come to an end, there would be no further relationship, and therefore no further necessity for Auto All to be in contact with Ms. Normil. To ask the insurance company to serve her on the basis that the contents of the claim form would likely come to her attention, that likelihood was very low indeed.

**[14]** Mr. Givans submitted that the applicant company knew of the fact of the motor vehicle accident and also knew of the driver of the motor vehicle because they were able to state that the driver of the vehicle insured by them was not the holder of a driver's license. He further asserted that if the insurance company was able to state that the driver was not the holder of a driver's license, the question arises, from whence came that information? He asked the court to draw the inference that the fact of the accident would have been reported to the insurance company and would have been detailed by both the driver and Ms. Normil. The insurance company would therefore have had in their possession all relevant information pertaining to both driver and the person in legal possession of the vehicle, who of course, was Ms. Normil. Thus, Mr. Givans surmised that the insurance company would therefore have had the means of contacting the driver as well as the person from whom he had received the vehicle. Mr. Givans also submitted that there is no principle of law that says that it is only where a relationship of insurer/insured exists that a court can make an order for specified service on an insurance company. He pointed to the case of **Nico Richards** as

the authority for saying so. He specifically referred the court to paragraphs 19,20,21,24 and 37of the judgment in that case. He pointed out that the appeal in **Nico Richards** was dismissed on a different point.

**[15]** Mr. Givans further 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. He further pointed out that the amended application before the Master mentioned that the insurer accepted service of the notice of proceedings without protest as far back as the 10th of March 2014.

**[16]** On the 13th of July 2017 when the hearing continued, Miss Stewart pointed to the form exhibited to Ms. Nesbeth's affidavit filed the 10th of July 2017. As indicated before, this affidavit was filed in response to Mr. Givans' affidavit of the 12th of June 2017. She pointed to the fact that the information that was required by the rental company was limited only to the name of the driver and the details of his/her driver's license at the time of the accident. She stated that the rental company, having supplied that information on the accident report form, would have honoured its obligations to the insurance company and this was the information communicated to the claimant's attorney. She also pointed to paragraph 6 of Ms. Nesbeth's earlier affidavit reiterating that there was no contractual agreement with Ms. Normil either, and postulated that if there is no relationship of insurer/insured, and based on the information provided by the rental company, the applicant company would have no details on the 1st defendant and therefore the applicant company would not have been in a position to bring the claim to the 1st defendant's attention. The order for substituted service was therefore irregular and ought to be set aside.

**[17]** Miss Givans in her response to Miss Stewart's further submissions noted that the application was hinged on the non-existence of a contractual relationship, but pointed out that there was no need for there to be such a relationship, and so the

absence of such a relationship cannot equate to an inability to bring the documents to the attention of the 1st defendant. She submitted that in order for the applicant to succeed, the applicant would have had to show that there was no relationship with the 1st defendant, that they had tried to bring the documents to her attention, indicate the steps taken to do so, and then show that the attempts proved futile.

**[18]** She further submitted that the court cannot set aside the order for specified service simply because it would have ruled differently and that that is what this Applicant is asking the court to do. She accepted that the Applicant in Ms. Nesbeth's affidavit proved that the driver was not their insured and that the vehicle was rented and further that in the second affidavit, that the driver was not the holder of a driver's licence and that the insurance company would not honour the policy. She pointed out that having accepted all of that, the previous Master made the order and did so based on the same facts that the Applicants are now putting before the court and then asking the court to decide differently. They have given the court no valid reason why the order should be set aside, she argued.

**THE LAW**

**[19]** The relevant rules dealing with alternative service and service by a specified method are Rule 5.13 and Rule 5.14 of the Civil Procedure Rules (CPR). Rule 5.13 which deals with alternative methods of service states:

> *(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*

Rule 5.13(5) states that

> *where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order ...*

Rule 5.14 deals with the power of the court to make order for service by specified method.

*Rule 5.14(1) states that*

> *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.*

Rule 5.14(2) states that

> *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.*

**[20]** In the case of **Shelton Allen** mentioned before, (and which will be further discussed) Morrison JA observed that Rule 5.14 supplements Rule 5.13. He further observed that Rule 5.13 gives the claimant the option to adopt an alternative method of service without any 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. (Rule 5.13(3)). Further, 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 rule 5.14 for an order for service by a specified method. (It will be readily observed that the claimant in this case bypassed the provisions of Rule 5.13 and made his application under Rule 5.14). As in **Shelton Allen**, issue was not taken with the route adopted by the claimant. In my limited experience it seems to be the norm that Rule 5.13 is bypassed and the applications are made before the court under Rule 5.14.

**[21]** The facts of **Shelton Allen** were that the administrator of the estate of Harlan Allen deceased (the 1st respondent) brought a claim against the other three respondents in the matter. On an application heard by Master Simmons, an ex parte order was made dispensing with personal service on the third Respondent Delan Watson and allowing instead service upon the applicant Insurance Company of the West Indies (ICWI), who were the insurers of the third respondent Watson. ICWI applied to have the ex parte order set aside on the basis that its insured, the third respondent, was in breach of the policy of insurance and so was not entitled to an indemnity under the policy, that this fact was known to the 1st respondent before he had made the application for substituted service, but did not disclose it to the court and further, that steps taken to locate the third respondent were unsuccessful. An application by ICWI to set aside the ex parte order was refused. ICWI appealed.

**[22]** One of the grounds of appeal was that the 1st respondent had failed to make full and frank disclosure of the fact that the applicant had advised the 1st respondent that the third respondent was in breach of the policy of insurance and would therefore not be indemnified under the policy.

**[23]** Morrison JA quoting from **R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac** 1917 11 LB 486, stated the relevant principle. It is to the effect that if an applicant on an ex parte application fails to make full disclosure of the material facts which are within his knowledge, then he will be deprived of any advantage obtained by 'means of an order wrongly obtained'. Morrison JA also went on to observe that it was not for every omission to disclose that an order will be set aside.

**[24]** As it relates to the issue of substituted/alternative method of service and when it should be allowed, the broad principle to be extracted from the discussion as being applicable to our present regime under the CPR is that substituted service should only be allowed where it is clearly shown by affidavit evidence that the

document to be served is likely to come to the knowledge of the defendant by the alternative method of service chosen.

**[25]** Morrison JA disagreed with Mangatal's J (Ag.) conclusion in **Lincoln Watson v Paula Nelson** (Suit No. CL 2002/W-062) which was a case decided under the CPC. This decision was to the effect that where a plaintiff had established that he was unable to effect personal service, the court had a wide discretion to order substituted service and that the insurer was a proper party on which to effect service. She also went on to state that this was so whether or not the insurer was likely to be able to bring the document served on it to the attention of the person to be served.

**[26]** The facts of **Nico Richards** briefly**,** were that the applicant who was a passenger in a motor truck which was being driven by the respondent Roy Spencer and owned by one Peter Brown was unable to effect personal service on Roy Spencer. Master Harris (Ag.) (as she then was) made an order allowing for service on Mr. Brown via service on the intervener Jamaica International Insurance Company Limited (JIIC) who were the insurers of Mr. Brown's truck. Upon an application by JIIC, Master Tie (Ag.) (as she then was) set aside the order of Master Harris (Ag.) There was affidavit evidence in this case that made it clear that JIIC was in contact with Mr. Brown and that the company declined to make Mr. Brown's address available to the appellant when it was requested.

**[27]** In paragraph 37 of her judgment, Sinclair Haynes JA observed the following:

> *"Although there is no relationship between the respondent and the intervener as submitted by Mr. Adedipe, the respondent was the servant and or agent of Mr. Brown with whom the intervener is obviously in contact, having entered a defence on his behalf. The detailed information pertaining to the accident, on a balance of probabilities, would have been provided by the respondent since there is no evidence that Mr. Brown was present at the time of the collision and there is no evidence that the information emanated from another source. It is therefore likely that the intervener will be able to bring the documents to the attention of Mr. Brown and the respondent."*

In paragraph 39 she noted that there was *"no evidence that the policy was a named driver policy"* which would have precluded all other persons except the driver named in the insurance policy from driving the motor vehicle. Furthermore she said, "there is no assertion that Mr. Brown has breached the terms of the policy".

**[28]** Sinclair-Haynes JA emphasized that there was need for the appellant to demonstrate that service of the documents on JIIC was likely to enable the respondents to ascertain the contents of the documents and in fact formulated the central issue in the matter as being whether the appellant had done so. Ultimately, the court declined to disturb Master Tie's setting aside of Master Harris's order. The basis for the decision was that Rules 5.13 and 5.14 mandate that affidavit evidence be presented to establish that the method of service sought to be utilized will enable the person to be served to ascertain the contents of the claim form and particulars of claim, and no such affidavit evidence had been presented before Master Tie. The court also observed that by the time the application to set aside the order had come before Master Tie, JIIC had filed an acknowledgement of service and in that document had given Mr. Brown's address. She stated further that service on Mr. Brown was more likely to enable the respondent to ascertain the contents of the documents.

**[29]** Sinclair Haynes JA accepted as sound, the arguments made on behalf of the respondents by counsel Mr. Adedipe (paragraph 40 of her judgment). One such argument was that stated in paragraph 20 of the case. This was that "*the intervener was obliged to provide the learned master with evidence as to its efforts if any, to contact the respondent or to ascertain his whereabouts".* He further went on to say that the evidence made it clear that no such effort was made because the insurance company was served on 5th of December 2014 and it had determined by 9th of December 2014 that it could not bring the papers to the attention of the respondent.

**[30]** Mr. Givans directed the court's attention to the case of **British Caribbean Insurance Company Limited v David Barrett, Ivor Leigh Ruddock and Jason Evans** [2014] JMCA App 5. This was an appeal from the decision of Master Lindo (as she then was) in which she refused to set aside an order for substituted service which had allowed for service of the claim on Mr. Ruddock by service on the applicant British Caribbean Insurance Company Limited (BCIC). Mr. Ruddock was the owner of a motor vehicle which had allegedly struck and injured the 1st respondent Mr. Barrett. Service on the driver Mr. Jason Evans was ordered to be made via advertisement in the Daily Gleaner. The main issue in that case was whether or not BCIC had made sufficient effort to locate Mr. Ruddock in order to bring the claim to his attention. It would appear that the evidence before the Master was that efforts had been made to contact the insured and the driver but those efforts were not particularized. There was also evidence that, being unsuccessful in contacting the insured and the driver, the matter was referred to BCIC's Attorney-at-Law. The affidavit evidence was that the Attorney had made calls and had sent out letters to both men and that the letters had been returned unclaimed.

**[31]** Before the Court of Appeal, it became apparent that a letter was sent to a work address for the insured but there was no evidence that any effort was made to locate him at his place of residence. The Court of Appeal held that based on the evidence before the Master, her decision could not be criticized on the basis that she was obviously wrong in finding that BCIC had not made all reasonable efforts to contact its insured.

**[32]** The court must have regard to the relevant principles by which it is guided when faced with an application to set aside the decision of another judge. A Court of Appeal is guided by the considerations delineated by Lord Diplock in **Hadmoor Productions Ltd. and others v Hamilton and others** [1982] 1 All ER 1042 in addressing the question of whether or not a judge's discretion exercised on a matter at first instance ought to be set aside. Lord Diplock declared that:-

> *"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court Judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of the appellate court, whether it be the court of appeal or your lordship's house, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his according to an application to vary it."*

**[33]** That case has been quoted in numerous matters in this jurisdiction and the principle has been accepted as the guide and has been applied repeatedly. One such instance of its application is in the case of **The Attorney General of Jamaica v John McKay** [2012] JMCA APP1. At paragraph 20 of his judgment in that case Morrison JA said:-

> *"this court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or the evidence before him, or on an inference that particular facts existed or did not exist which can be shown to be demonstrably wrong, or where the judge's decision is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it".*

Although we are not here concerned with an appeal or the grant of an injunction, the applicability of the principle is wide in its scope. If a judge in a higher jurisdiction will not lightly interfere with the exercise of discretion by a judge of a lower court, a fortiori, a judge of concurrent jurisdiction should not lightly interfere with the exercise of discretion by a colleague. This court must therefore examine the decision of the Master to determine whether there is any basis in law upon which it should be impugned.

**LAW APPLIED**

**[34]** The gravamen of the applicant's submission was that the applicant had issued a policy of insurance to Auto All, that Auto All had hired the car to the 1st defendant, the applicant was never the insurer of the 1st Defendant Kelina Normil, and that no relationship existed between the applicant company and the 1st Defendant with respect to whom the order for specified service was made. Therefore the applicant company has no duty to bring the claim to the 1st defendant's attention. The applicant also relied on the fact there was a breach of the relevant policy of insurance.

**[35]** Implicit in the reasoning in **Nico Richards** is that the applicant company had a duty to make some effort to locate the individual to be served. Neither the 1st nor 2nd affidavit of Ms. Nesbeth indicated that any such effort had been made. The affidavit evidence was as previously pointed out, essentially that, AGIC was in receipt of the Notice of Proceedings, had indicated they would not honour any claim arising from the accident (giving rise to this claim), the claimant should deal directly with the insured, there was no relationship of insurer/insured and there no contractual relationship between the applicant company and the 1st Defendant, that the rental company was only obliged to provide them with the name of the driver, and his driver's license in the event of an accident which apparently was done, and based on those circumstances the applicant cannot bring the claim to the attention of the 1st defendant.

**[36]** The Court of Appeal's decision to set aside the order for specified service in **Shelton Allen** did not turn on the fact that there had been an alleged breach of the contract of insurance on the part of the third respondent, which would have meant that ICWI would not be indemnifying the third respondent in respect of any claim for damages made against him and certainly would not be exercising any right of subrogation. The case turned on whether or not it was established that the criteria set out in Rules 5.13 or 5.14 had been satisfied. Morrison J.A. observed that there was uncontroverted evidence that the applicant insurance

company had had no report of the accident from the third respondent and had been unable to locate or contact him and had no knowledge of his current address. It was not specifically stated whether ICWI had stated what if any efforts had been made by them to contact the third respondent. **ICWI V Shelton Allen** did not address the issue of whether in circumstances where there was no insurer/insured relationship in existence between the applicant insurance company and the defendant to be served, a court could properly make an order for specified service in lieu of service on such a defendant who had some connection, even if remote, with the insurance company**.**

**[37]** **Nico Richards** in some measure addressed that issue. Mr. Givans placed heavy reliance on the fact that the person sought to be served in **Nico Richards** was not the insured. It is to be noted however that there was a master/servant relationship between JIIC's insured Mr. Brown and the person that the appellant was seeking to serve in **Nico Richards**. There is, as Ms. Stewart pointed out, no master/servant or principal/agent relationship between Auto All and Ms. Normil. Further, in **Nico Richards**, it was clear from the response of JIIC to the appellant when the latter requested information, that JIIC was in contact with its insured but never the less declined to provide the appellant with their insured address. The appellant it seemed would have been satisfied with that information had it been given to him. Also there was some indication that JIIC had been in touch with the person that the appellant was seeking to serve. JIIC had in fact filed a defence in the claim on behalf of Mr. Brown their insured. The court inferred that the detailed information regarding the accident had to have been provided by the individual the appellant was seeking to effect service on, he being the driver at the time of the accident, and since there was no evidence that Mr. Brown was present at the scene at the accident.

**[38]** I am mindful that Sinclair-Haynes JA was not deterred by the absence of the relationship of insurer/insured. She was however clear in pointing out the existence of a master/servant relationship between Mr. Brown and the individual the claimant was seeking to effect service on. There is clearly no indication in

this case that Advantage General had been in touch or even had a reason to be in touch with Ms. Normil, the person the respondent is seeking ultimately to effect service on. Given that Sinclair-Haynes JA also made reference to the fact that it did not appear that there was a breach of the policy of insurance in **Nico Richards**, it seems to me to indicate that that would have been or ought to be a relevant factor weighing in favour of a court making an order for specified service on an insurer.

**[39]** The case of **Nico Richards** can quite easily be distinguished from the case at hand. The court was in that case dealing with an application to effect specified service in circumstances where there was in existence a master/servant relationship between the insured of the applicant insurance company and the individual to be served.

**[40]** The question inevitably arises as to whether in the circumstances of this case, the applicant Advantage General had a duty to make efforts to locate the 1st Defendant in this matter. When I refer to the circumstances of this case, I make particular reference to

a) The absence of an insurer/insured relationship between the applicant and the individual to be served.

b) What I view as a remote connection between the applicant and the 1st defendant, the person to be served.

c) The fact that the insurance policy in question would not be honoured based on the breach occasioned by the fact that the driver at the relevant time (the 2nd Defendant) was not the holder of a driver's license.

d) The fact that it was borne out in the affidavit evidence of Ms. Nesbeth (and which evidence stands uncontroverted) that the applicant was never provided with the address of or any contact information regarding the 1st defendant by Auto All.

e) The probability that more likely than not, any effort made by the applicant to ascertain the whereabouts of the 1st Defendant is very likely to reveal information already known to the claimant/respondent in this case, which is that the 1st Defendant resides in Miramar, Florida and that she frequently visits the address of her son the 2nd defendant at 35 Evan Meadows May Pen Clarendon.

To my mind, it would have been unreasonable in all the circumstances to ask that of the applicant.

**[41]** Assuming the assertion in Mr. Givans' affidavit filed June 12, 2014 that there is a closer connection between Auto All Car Rental Limited and the 1st Defendant than between the 1st Defendant and the claimant to be true, it does not in any way assist the claimant's position, this for more reasons than one. Firstly, this statement if anything, demonstrates the remote relationship between the 1st Defendant and the applicant. It is not Auto All that the claimant is seeking to effect service on. Further, the basis on which a court makes an order for specified service cannot be solely on the premise of any close connection between the parties but on the basis set out in Rule 5.14. Even if closer connection was to be taken to mean being in possession of information such as the address of the defendants, then what is clear, is that the insurance company would not necessarily be in a better position than the claimant in terms of the information the insurance company had. It was clear based on the information in Mr. Givans' affidavit which must be taken as having been given to him by or on behalf of the claimant that the claimant was in possession of the address of at least the 2nd Defendant.

**[42]** During the course of the hearing, I intimated that the order for specified service made in this case is not one that I would have made. I wish to assure the respondent in particular that my decision was in no way influenced by that viewpoint. What were the facts known to the Master at the time she made the order? From paragraph 4 of the bailiff's affidavit, we learnt that he had visited the

address at 45 Evan Meadows May Pen Clarendon with a view to finding both the 1st and 2nd Defendants. From paragraph 5, we also know that the information conveyed to him was that the 1st Defendant lives in the United States and would frequently visit the home of the 2nd Defendant (45 Evan Meadows). In paragraph 6, he stated that he had made several visits to that address to serve both defendants but that each time he went to the address he did not locate either of them. He stated that he visited the address between March and May 2014 but he did not say on how many occasions he did. In Mr. Givans' affidavit filed June 2014, he stated that the instructions from his client were that he had no knowledge of the whereabouts of the 2nd Defendant and that there are no other known addresses (presumably other than the address at 45 Evan Meadows).

**[43]** In the affidavit filed December 4, 2014, Mr. Givans said that the insurers of the motor vehicle rented by the 1st Defendant and owned by the 2nd Defendant is Advantage General Insurance Company and that the insurers had advised him that they would not be settling any claims arising as a result of the accident, as the driver of the motor vehicle was not the holder of a driver's license. He was also clear in paragraph 3 about the relationship between the insurer and the person on whom he was seeking to effect service. It therefore cannot be said as was the case in **Shelton Allen,** that the applicant failed to make full and frank disclosure of material facts. In paragraph 5, Mr. Givans surmised that the insurance company will bring the claim to the attention of the defendants because in the ordinary way of things the insurance company would have all the information to contact the defendants. Was that information sufficient evidence that should have satisfied the Master that if the claim form was served on AGIC, such service was "likely to enable the 1st Defendant to ascertain the contents of the claim form and particulars of claim? I would hesitate to say that it was. Notwithstanding that I recognize that there would have been a route to contact between AGIC and the defendants which may have been through the rental company Auto All, because Auto All must have garnered information as to their address and telephone number, in the least from a person to whom it was hiring its vehicle, the rental company would not necessarily have had information on the

driver beforehand but more likely than not would have received this information after the accident. In any event, the present application does not concern the driver.

**[44]** Further, the court did come to learn of facts during this application, which facts were not known to the Master at the time of the application. Ms. Vanessa Nesbeth in her affidavit of 10th of July 2017, deponed in paragraph 7 "that in response to paragraph 6 (iii) of the affidavit of John Givans, rental agreements are not sent to the Applicant Company as there is no relationship between the hirer and the Applicant Company. The rental company is only under an obligation to provide the Applicant Company with the name of the driver and his/her driver's license in the event of an accident". Indeed upon scrutinizing the form which is exhibited to her affidavit, it is observed that the information so provided is quite scanty. It gives no information regarding the individual who rented the motor vehicle. The information regarding the 2nd Defendant was merely his name and that he had no driver's license.

**[45]** It may also be said that the Master's decision was based on an inference that facts existed which can be shown to be demonstrably wrong. Mr. Givans would have asked the court then to infer that in the usual course of things the insurance company would have had all the information to contact the defendants. He stated that the stance of the insurance company was simply that they would not be indemnifying their insured, not that they were not in touch with the defendants. It seem to me that the decision of the learned Master was in part premised on facts that were really not so, i.e. that the insurance company was in possession of information regarding the defendants as was stated in Mr. Givans' affidavit.

**[46]** The much clearer basis on which I say that the evidence was not enough to have satisfied the Master is the fact that it was stated in Mr. Givans' affidavit that the 1st Defendant's address is in Miramar Florida. No specific address was given. In circumstances where it was known that the ordinary residence of the 1st Defendant was outside of the jurisdiction, I do not think it was prudent to have

made an order under Rule 5.14 to effect service on someone who ordinarily resides outside of the jurisdiction. Rule 5 governs service within the jurisdiction whereas Rule 7 deals with service outside of the jurisdiction. From my perusal of the rules, there is no provision in Rules 5 or 7 which imports into Rule 7, the provisions of Rule 5 in order that the method of alternative service provided for in Rule 5.14 could be invoked in the circumstances to effect service on someone residing outside of the jurisdiction. I make this point being aware that it is part of the evidence that the 1st Defendant would regularly visit the jurisdiction. If the intent was that she would be served whilst within the jurisdiction then it would also as my view be unreasonable quite apart from the reasons already stated, to expect the applicant to embark upon investigations to attempt to determine when she was likely to be within the jurisdiction.

**APPLICATION FOR EXTENSION OF TIME**

**[47]** The application by AGIC was brought pursuant to rule 42.12(5)(b) and Rule 26.1(2)(c). Rule 42.12(1) provides

> *Where in a claim an order is made which may affect the rights of persons who are not parties to the claim, the court may at any time direct that a copy of any judgment or order be served on any such person.*

Rule 42.12(2) speaks to the manner in which service may be effected.

Rule 42.12(5) states:

> *Any person so served or on whom service is dispensed with*
>
> *(a) Is bound by the terms of the judgment or order but*
>
> *(b) May apply within 28 days of being served to discharge, vary or add to the judgment or order and*
>
> *(c) May take part in any proceedings under the judgment or order*

Rule 26.1(2)(c) states except where the 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.*

**[48]** Although the court omitted at the commencement of the hearing to state explicitly that order number 1 (a request for an extension of time to file the application) it must be taken by implication that, that order is granted. Since the application has been heard.

**[49]** The parties in this matter did not address the Court in relation to the usual considerations such the length of the delay, the reason for the delay and the prejudice to the Respondent or the merits of the applicant's case. The Court however takes the view that there was no inordinate delay on the part of the applicant in bringing the application. As indicated before, the Applicant was served with the Order of Master Brown on the 21st June 2016 and the application to set aside the Order was filed on the 12th August 2016. The Applicant however, did not offer an explanation for not bringing the application within the stipulated 28 days of being served with the Order but the respondent in this application did not join issue with the application for extension of time.

**[50]** There is one troubling aspect to this case. The Orders sought by the Applicant are being granted. The Claimant cannot now file a new claim in relation to the incident giving rise to this claim, as he is now barred based on the provisions of the Limitation of Action Act (1623); which applies in this jurisdiction by virtue received law. Further the validity of the Claim Form was extended for a period of six months from the 25th of February 2016. That Claim Form is no longer valid for service and can be given no further life. Were the reasons for the delay in getting to the point where this order is being made to be laid at the feet of the Applicant in this matter, I might have ruled differently and not grant the extension of time within which to bring this application. I cannot help but observe that the Claimant was dilatory in prosecuting its initial application for the Order for specified service.

**[51]** Based on the forgoing analysis, the application is granted and the Court makes the Orders as sought by the Applicant which are set out in paragraph 8 of this judgment.