



[2026] JMSC Civ 52

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV02964

BETWEEN	WINSTON BRADY	CLAIMANT/RESPONDENT
AND	SUEWAYNE LLOYD KEENE	DEFENDANT
AND	INSURANCE COMPANY OF THE WEST INDIES	INTERVENER/APPLICANT

IN CHAMBERS

Ann Marie Stewart instructed by Donovan E. Collins and Company, Attorneys-at-Law for the Claimant/Respondent.

Monique Rowe instructed by Michelle Shand Forbes, Attorney-at-law for Applicant (ICWI).

Heard: 8th January and 23rd February and 1st May 2026

Civil Procedure - CPR rule 11.16 - Considerations on application to extend time - Whether time should be extended to make application to set aside orders made without notice - Application to set aside order for substituted service on insurance company - Whether reasonable efforts made by insurer to contact insured to bring contents of claim form and particular of claim to his attention

C. Barnaby, J

INTRODUCTION AND SUMMARY CONCLUSION

[1] On 10th February 2025, the Applicant, the Insurance Company of the West Indies (ICWI) filed a Notice of Application for Court Orders to Set Aside Order for Substituted Service (the Application). The following relief are sought.

1. *Permission be granted for the Applicant to intervene in the matter for the purpose of making this application to set aside the Ex-Parte Order of the Honourable Miss Justice C. Barnaby for substituted service.*
2. *The Applicant's time within which to make this application is extended.*
3. *The ex-parte Order of the Honourable Miss Justice C. Barnaby granted on 16th day of September 2024 on the Claimant's Application for Court Orders extending time to serve Claim Form and permission to effect substituted service on the Applicant and all subsequent proceedings is set aside.*
4. *Service of the Claim Form and Particulars of Claim on the Applicant on October 11, 2024 and all attendant documents herein on the Applicant is set aside.*
5. *The costs of the application to be granted to the Applicant herein.*
6. *Such further and/or other relief as this Honourable Court deems fit.*

[2] Affidavit of Michelle Shand Forbes in Support of Notice of Application for Court Orders filed was filed on 10th February 2025, to which the Affidavit of Donovan E. Collins in Response to the Applicant's Notice of Application to Set Aside Order for Substituted Service was filed on 16th June 2025. The Affidavit in Response to Affidavit of Donovan E. Collins in Response to the Applicant's Notice of Application to Set Aside Order for Substituted Service sworn by Michelle Shand Forbes was also filed on 30th June 2025.

[3] The Application came on for hearing on 8th January 2026 and 23rd February 2026, after several adjournments for reasons including flooding of the offices of counsel for the Claimant/Respondent which affected preparation, ill health of one counsel, issue being taken with the affiant for the Applicant arguing the Application, the passage of a hurricane and there being insufficient time for oral arguments.

[4] At the close of submissions on 23rd February 2026, a decision on the Application was reserved to 1st May 2026, a date convenient to all concerned.

[5] The court was assisted by the written submissions and authorities filed by both parties to the Application, which were duly considered together with oral arguments made in supplement. For reasons set out herein, I find that the applications to intervene and to extend time to make the application to set aside should be

granted, but that the applications to set aside the *ex parte* orders should be refused.

REASONS

Permission to intervene

[6] There is no dispute that the Applicant on whom substituted service of the claim was permitted in lieu of personal service on the Defendant has an interest sufficient to warrant intervention in these proceedings to make the Application. Permission is accordingly granted to the Applicant for this purpose.

Extension of time to make the Application

[7] Counsel for the Respondent concedes that the court has a discretion to extend the time within which to apply to set aside the orders, but submits that it should not be exercised in favour of the Applicant in this case.

[8] Rule 11.16 of the Civil Procedure Rules 2002 (the CPR) provides that:

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

(2) *A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.*

(3) *An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.*

[9] Rule 26.12(c) of the CPR nevertheless empowers the court, unless the Rules otherwise provide, to

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.

[10] The matters which the court are to consider in exercise of the discretion are not stated but it is trite that where a rule does not provide specific guidance, regard is to be had to the overriding objective when applying the rule.¹

[11] The Applicant prays in aid the decision in **Leymon Strachan v The Gleaner Company Limited and Stokes** Motion No 12/1999, judgment delivered 6 December 1999, where the Court of Appeal indicated a number of considerations for a court confronted with an application to extend time. These considerations are: the length of the delay; the reasons for the delay; whether there is an arguable case; and the degree of prejudice if time is extended. While the application there was determined prior to the CPR, under different rules, and in different circumstances, the considerations identified by the Court of Appeal have been engaged on applications for extensions of time under the CPR. They are not inconsistent with the overriding objective and I see no reason that they could not apply in the context of rule 26.12(c), with such modification which is necessary on consideration of the rule which is the subject matter of the application to extend time.

Length of delay

[12] There is no dispute that on 14th October 2024 the Applicant was served with the claim form, particulars of claim, supporting documents and the *ex parte* orders sought to be set aside (the Documents). Accordingly, an application under rule 11.16(2) ought to have been filed on or before 28th October 2024. The Application was not filed until 10th February 2025. There has been delay of some one hundred

¹ See for example **Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (A Minor) by Rashaka Brooks Snr (his father and next friend)** [2013] JMCA Civ 16, [14]

and five (105) days on the part of the Applicant in making the application. Having regard to the nature of the application and its potential impact on the litigation I consider the delay inordinate. I accordingly find the submission of Counsel for the Applicant to the contrary to be unmeritorious. An inordinate delay does not bar the Applicant from obtaining relief, however.

- [13] Before moving on to consider the reason for the delay, I wish to address a factual inaccuracy arising on the Applicant's submissions. It is contended that there was no undue delay between the time of dismissal of the Claimant's claim in December 2024 and the making of the Application on 10th February 2025. The Claimant's claim was not dismissed. The court having before it evidence of service of the claim form and particulars of claim pursuant to the order for substituted service, and there being inaction for a period, a notice was sent to indicate that the court would dismiss the claim for want of prosecution of its own motion if the Claimant failed to take steps to prosecute within the period limited in the notice. The Claimant in response to the notice filed a request for judgment in default of defence which was duly entered.

Reasons for the delay

- [14] Counsel for the Applicant submits that there are good reasons for the delay in making the Application as it was engaged in efforts to locate the insured. I do not find that the efforts to locate the insured prevented the application being filed sooner.
- [15] The evidence of the Applicant shows that between 14th October 2024 and the time limited by the rules for making an application to set aside the *ex parte* orders, effort was only made on one day - being the said 14th October 2024 - to contact and locate the insured, which effort is said to have been unsuccessful. On this evidence, I can see no good reason for the failure to file the application within the fourteen (14) days limited by the rules.

[16] It was not until 8th November 2024 that other like effort was made, which was also unsuccessful. Thereafter, by letter dated 14th November 2024 the Applicant engaged a company of private investigators. On 22nd November 2024, the investigators wrote to advise the Applicant that based on the information they received and observations made in the conduct of their investigations, it had been some time since anyone lived at the insured's residence; that they believe the insured is currently overseas; and that they have no evidence to prove otherwise. The affiant for the Applicant indicates that she verily believes the indications from the investigators to be true. There is no evidence of any effort being made thereafter to locate the insured and seek to bring the documents to his attention. On this evidence, the Applicant knew of its difficulty in locating and bringing the Documents to the attention of the insured yet over two (2) months passed without an application being made. In all these circumstances, I do not accept that the efforts made to locate the insured constitute a good reason for the inordinate delay in making the Application. The authorities are clear however that the absence of a good reason for the delay in making an application to extend time does not bar the exercise of the discretion in favour of a tardy applicant, the overriding principle being that justice has to be done.

Arguability of the application to set aside

[17] Considering the issues raised on the application to set aside, and the arguments advanced by the opposing parties, it could not be said that the application to set aside is inarguable or bound to fail.

Prejudice

[18] Whether undue prejudice would be suffered if time were granted to extend the time for making the application to set aside is also a relevant consideration.

- [19] Permitting the application to set aside the order for substituted service of the claim form and all subsequent proceedings undoubtedly causes some delay in the progress of the claim towards conclusion, but that alone would not cause me to refuse to consider the application.
- [20] I also consider that the Respondent has obtained judgment in default of defence on the claim, and it is well settled that this is something of value. Permitting the Applicant to pursue the application to set aside out of time undoubtedly puts the Respondent at risk of losing that judgment if the court should find that the *ex parte* orders should be set aside. If the risk materialises I do not consider that there would be irreparable prejudice to the Respondent as limitation has not run on the claim. On the contrary, there would be irreparable prejudice to the named Defendant if the court refuses to even consider the application because it is being made out of time. He would be shut out from defending the claim without so much as an enquiry into whether the specified method of service of the Claim Form and Particulars of Claim, which was sought and granted *ex parte* in lieu of personal service, was likely to enable him to ascertain their contents.
- [21] The Claimant relies on the judgment of Sykes, J (as he then was) in **Egon Baker v Novelette Malcolm and Ors.** C.L. 1999/B 055 (Unreported decision of the Supreme Court of Jamaica delivered 1st June 2006) in contenting that based on the special relationship between the Defendant and the Applicant at the material time, the Applicant can litigate the matter on the Defendant's behalf. That argument was rejected in **Insurance Company of the West Indies Ltd v Shelton Allen (Administrator of the Estate of Harland Allen) and others** [2011] JMCA Civ 33, where Morison JA (as he then was), and the **Egon Baker case** determined to be inapplicable to rule 5.13 of the CPR. That position was confirmed in **Juliette Wright v Alfred Palmer and Anor.** [2021] JMCA Civ 32, [80]. In my view, the observation would also extend to rule 5.14, which deals with orders for service by a specified method and, like rule 5.13, requires the court to be satisfied that the method of service, other than personal service, is likely to enable the defendant to ascertain the contents of the documents served.

[22] In all the foregoing circumstances I consider that justice requires the favourable exercise of the discretion reserved to me by rule 26.12(c), to extend the time for the Applicant to make the application to set aside the *ex parte* orders and subsequent proceedings.

The Application

Setting aside order extending time to serve claim form

[23] Among the orders sought on the Application is the setting aside of the order extending the time to serve the Claim Form. That was not argued by the parties and it is accordingly regarded as abandoned. Further and in any event, I see no proper basis on the evidence presented for setting aside that order. Accordingly, I find that the order should be refused.

Setting aside order for substituted service

[24] Pursuant to rule 5.14 of the CPR,

(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.

[25] The Respondent sought and was granted an order to serve the claim form on the Defendant by a specified method, that is, on the Applicant who was the insurer of the Defendant's motor vehicle at the time of the collision giving rise to the claim. The application on which it was granted was made without notice.

- [26] While CPR rule 11.16(1) permits a respondent to whom notice of an application was not given to apply to the court to set aside any order made on the application, the considerations for the court have not been prescribed. Regard is accordingly had to the overriding objective of dealing with cases justly. Helpfully, there are a plethora of decided authorities, some of which have been relied on by both parties to the Application as to the consideration for the court on an application to set aside orders for alternative or substituted methods of service. Among them are the **Shelton Allen case** and **Welch v Roxneil Thompson and Anor.** [2018] JMSC Civ 59 relied on by the Applicant; **British Caribbean Insurance Company Limited v David Barrett and Ors.** [2014] JMCA App 5 and **Yolando Sutherland v Rolston Hutchinson and Anor.** [2023] JMSC Civ 25 which were relied on by the Respondent.
- [27] Like the application here, those in the **Damion Welch, David Barrett and Yolando Sutherland cases** were in respect of the setting aside of orders for substituted service made pursuant to rule 5.14. The **Shelton Allen case**, which was concerned with an application to set aside an alternative method of service which was accepted as good service pursuant to CPR rule 5.13, was cited with approval in those cases. This does not come as a surprise as rule 5.13(3)(b)(ii) like rule 5.14(2)(b) speaks to the basis for making an order as being the likelihood of the method in lieu of personal service enabling a defendant to ascertain the contents of the pleadings sought to be served.
- [28] The Respondent also relies on the decision of the Court of Appeal in **Advantage General Insurance Company Limited v Yvette Gordon** [2024] JMCA Civ 8 which was an appeal from the decision of a judge of the Parish Court refusing to set aside an order for substituted service on the defendant's insurer. Referencing dictum from the **Shelton Allen case**, V. Harris JA accepted the submission of the insurer's counsel

[11] ... that "[t]he whole purpose of granting an Order for Substituted Service is to bring the suit to the attention of the Defendant thus giving him

the opportunity to [d]efend himself against the claim being made by the Plaintiff; this is the Defendant's right under Natural Justice and [t]he Constitution. It is palpably clear that the refusal to [s]et [a]side the order for Substituted Service robs the Defendant ... of his Natural Justice rights as the matter would be proceeding against him without his knowledge and without the opportunity to [d]efend himself against the Claim”.

[29] That alone does not prevent the court from refusing to set aside an order for substituted service. This no doubt prompted V. Harris JA to go further in stating:

*[12] To that sound argument, we would simply add that, **in any event**, given that the appellant had presented compelling evidence of its inability to notify Mr Escoe about the proceedings instituted against him, the “just” order or direction would have been to set aside the substituted service order.*

[Emphasis added]

[30] The authorities clearly demonstrate that having regard to the basis upon which an order for alternative service or service by a specified method can be granted by the court, when confronted with an application to set aside such an order, the court is to enquire into efforts made to bring the contents of the pleadings to the attention of the defendant. What is required of the party on whom the documents are served pursuant to the order for specified service, is reasonable effort to contact the defendant for the purpose. Reasonableness is determined on consideration of the peculiar facts of each case and as observed in the **Damion Welch case** [16], in reliance on dictum in the **Moranda Clarke v Dion Marie Godson and Donald Ranger** [2015] JMSC Civ 48, “‘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’. Where the court is satisfied that reasonable efforts have been made without success, the order for specified service is properly set aside. Where not so satisfied, the application is appropriately refused.

- [31] Ahead of proceedings, with application of the consideration, I wish to address a particular ground relied upon by the Applicant in pursuit of the application to set aside the *ex parte* orders. That is, the Defendant had no insurable interest in the motor vehicle at the material time as he sold the property insured prior to the accident. On the Applicant's evidence, the latter matter came to its attention following investigations into the accident after being made aware of it by demand letter from the third party's insurer on 15th June 2022.
- [32] On 30th January 2024 the Applicant wrote to the Claimant's Attorney-at-law to advise "*that no indemnity will be granted as our insured had no insurable interest at the material time having sold the vehicle prior to the accident.*" This indication from the Applicant was disclosed on the application for substituted service. This evidence alone would have given me some pause in granting the application for substituted service *ex parte*, on account that in the absence of a legitimate financial stake in the continued existence of the property, an insured would have no insurable interest in it, rendering the contract void and unenforceable.
- [33] I do not consider communication of the kind received from the Applicant as conclusive evidence of the absence of a subsisting relationship between an insurer and its insured, or that substituted service on the insurer is unlikely to enable the contents of the claim form and particulars of claim to be ascertained by the insured who cannot be located to effect service. Disclosure nevertheless alerts the court to these possibilities and of the need to take steps which enable enquiries to be made in these regards. Such steps were not taken however as the evidence in support of the application for specified service disclosed that on receipt of communication that no indemnity would be granted on account that the vehicle was sold before the accident, the attorneys-at-law for the Claimant requested the name and information of the person to whom the Defendant sold the vehicle from the Applicant. The Applicant responded by stating that the Defendant reported that he only remembered the first name of the buyer. In these circumstances, communication of a decision not to grant indemnity for the reason indicated by the Applicant did not then cause me to be satisfied that substituted service on the

Applicant was unlikely to enable the Defendant to ascertain the contents of the claim form and particulars of claim.

- [34] The Applicant's evidence here is that the Defendant had been its client from 17th September 2021 to 30th May 2022 when his insurance policy was cancelled, and not renewed thereafter. On this evidence, on 28th May 2022, which is the date of the accident, the policy of insurance subsisted. When this is considered together with the fact that the Applicant took steps to contact and locate the Defendant in order to bring the Documents to his attention, such evidence as there is that the vehicle was sold prior to the collision and that the Defendant had no insurable interest does not resolve the application to set aside.
- [35] The consideration for the court, consistent with the authorities is whether the Applicant made reasonable efforts to contact the Defendant for the purpose of bringing the contents of the claim form and particulars of claim to his attention.
- [36] The parties were referred to **GK General Insurance Company Limited v Desmond Baker** [2025] JMCA App 13 where the Court of Appeal allowed the appellant's appeal against the decision of a master refusing to set aside an *ex parte* order for substituted service. Among other things, the insurer was found to have made reasonable efforts to contact the defendant and bring the claim form and particulars of claim to his attention, consequent on service being effected on it pursuant to an order for service by a specified method.
- [37] The evidence before the court is that on receipt of notice of proceedings, the appellant sent emails to the defendant to which no responses were received. Telephone calls to him also went unanswered, and voice messages were left. Telephone calls were also made to the insured's references. Calls to one referee's number went unanswered, and a recording indicated that the number was no longer assigned. Contact was made with the second referee who indicated that he had not seen nor heard from the defendant for almost five years and did not possess current contact information for him.

- [38] Three (3) days after the claim documents were served on GKGI pursuant to the order for service by a specified method, it escalated its efforts by hiring a private investigator to locate the defendant and deliver the claim documents. The only address GKGI had for the defendant was the same address where the claimant's process server attempted service. The private investigator went to the address but did not find the defendant there. It was occupied by a tenant who was renting from the owner of the premises. The whereabouts of the defendant was unknown to the tenant. The investigation did not end there, the private investigator spoke with shopkeepers, taxi drivers, bar owners, and persons at a garage and gated housing scheme in the area. A shopkeeper had advised that the defendant had emigrated more than a year earlier, a matter which was independently confirmed by a resident of the adjoining property and others in the community.
- [39] The private investigator also received a telephone call from a female who appeared to be a relative of the defendant who confirmed emigration a year prior to the investigator's search. That relative had indicated that she would pass on the private investigator's information to the defendant.
- [40] I concede that there is some similarity in the methods engaged by GK General Insurance Company Limited (GKGI) in the **Desmond Baker case** and the Applicant here, in attempting to contact and locate the defendant. In my view however, engagement of methods to contact and locate a defendant is very different from the efforts made in the application of those methods. This distinction is particularly important on an application to set aside an order for specified service where the concern of the court is the reasonableness of the efforts made. In the result, careful scrutiny of the efforts is required.
- [41] The Applicant provides evidence as to efforts made to contact the Defendant on receipt of the Notice of Proceedings in the matter on 20th September 2023. Attempts were made to contact the Defendant by phone but the calls went directly to voicemail. It is also averred that a letter was sent to the Defendant by post but was returned by the post office as uncollected. The Respondent makes heavy

weather of the cogency of the efforts in the absence of the telephone number(s) called for example but nothing really turns on these efforts in my view. Notice of Proceedings are served on an insurer pursuant to the **Motor Vehicles Insurance (Third Party Risks) Act** as part of the mechanism for recovery where judgment is entered against the insured person. It serves an altogether different purpose from service of a claim form and particulars of claim on a defendant, to which the order for specified service applies. In any event, the evidence is that those efforts were unsuccessful. In the circumstances, the relevant efforts are those which were made when specified service of the claim form and particulars of claim was effected.

- [42] The Applicant has put into evidence a Motor Vehicle Proposal Form dated 17th September 2021 which is said to have been “... *completed by the Defendant at the time of inception of the policy which indicates no next of kin. In addition, the Proposal Form contains no additional information outside of what has already been utilized by the Applicant to seek to locate the Defendant.*”
- [43] It is the Applicant’s evidence that upon receipt of the Documents on 14th October 2024 and on 8th November 2024, a named paralegal attempted to contact the insured via telephone to bring the documents to his attention but those calls were unsuccessful. Calls to one (1) of the insured’s numbers is said to have gone directly to voicemail with the indication that the number was not available, and calls to two (2) other numbers on its file for the insured were answered by women who indicated that “*it was a wrong number*”. On this evidence three (3) telephone numbers for the insured appear to have been on the Applicant’s file.
- [44] No call logs have been presented, and the numbers called and the frequency of the calls have not been supplied. While I accept the evidence of the Applicant that hundreds of calls are made daily at its offices through a switchboard, and that it would be onerous and unreasonable to present such logs, I can see no reason good or otherwise for the failure to supply the numbers called and their frequency. The failure to supply this information to the court is particularly significant when I

consider that only one (1) telephone number appears on the Motor Vehicle Proposal Form. This gives rise to pertinent questions which are unanswered on the evidence. For example, was that one (1) telephone number among the three (3) to which the paralegal placed calls? When and how were additional telephone numbers for the insured received by the Applicant? On what part of the Applicant's file were those additional numbers recorded? Most significantly, what other contact information might the Applicant have on its file for the insured which it has failed to disclose to the court in pursuit of the application to set aside?

[45] In addition to the telephone calls referenced, it is the Applicant's evidence that by letter dated 14th November 2024 it retained the services of an investigation company. The letter, which has been put into evidence shows that the investigators were advised that attempts to reach the insured by telephone were unsuccessful. A "*last known address*" and a last known contact number for the insured was also stated in the letter. I observe that the contact number given is materially different from the telephone number which appears in the Motor Vehicle Proposal Form. There is no evidence of when and how this telephone number was received by the Applicant, whether it was among the three (3) numbers called by the paralegal and where that number may be recorded. This causes me to harbour serious doubt as to whether the Applicant has disclosed all relevant contact information or other matters which may be relevant to the application.

[46] The report from the investigators is also in evidence. On careful perusal of it I can find no reference to the telephone number on the Motor Vehicle Proposal Form, or of the last known telephone number supplied to the investigators. It does not appear to me to have been too onerous or unrealistic in the least for the Applicant to provide evidence of all contact numbers which it has for the insured and provide evidence of calls being made to each of those numbers whether by its servants and/or agents or the investigators engaged by it, and the frequency of those calls. While the switchboard call log might have been onerous and unrealistic to produce, evidence from the persons initiating the calls to the insured could have been supplied and were not.

- [47] The Applicant having failed to disclose the numbers for the insured to which the paralegal placed calls, there being no evidence that the investigators made any attempt to contact the insured at the last known contact number given for him and having regard to my concerns as to whether the Applicant has disclosed all relevant contact information for the insured, I cannot find on a balance of probabilities that the Applicant has made reasonable efforts to contact the insured by telephone so as to bring the contents of the claim form and particulars of claim to his attention.
- [48] In the letter to the investigators, the Documents were enclosed for delivery and the investigators asked to obtain current contact information including an email address.
- [49] The “*last known address*” given to the investigators and the address on the Motor Vehicle Proposal Form are Albert Town District in the parish of Trelawny. The investigators’ report shows that they conducted checks and discovered that the Defendant resides at Butt Up Town District in the Albert Town Area. The JCF e-ticketing device was canvassed for the insured’s address and an extract therefrom is included in the report in respect of an individual with the same name as the insured, and the same TRN and date of birth which appears for him on the Motor Vehicle Proposal Form. It shows his address as “*Butt Up Town District, Albert Town P.O., Trelawny*”. I note that the date when the information from the e-ticketing device was accessed does not appear on the report. There being no application to strike out any portion of the evidence or for cross examination challenging the evidence, I am prepared to accept that it was accessed at a time contemporaneous with the investigation and the report, that is November 2024.
- [50] The investigators said they spoke to a Ms. Brown via cell phone who verified the address discovered. There is no evidence as to who Ms. Brown is or of her relationship, if any, to the insured. That notwithstanding, considering the congruence in the name, TRN and date of birth which appears on the JCF-e ticketing extract as well as the Albert Town P.O. address, I am satisfied on a

balance of probabilities that the investigators had identified “*Butt Up Town District, Albert Town P.O., Trelawny*” as an address for the Defendant.

- [51] The address on the Proposal Form and that identified by the investigators is markedly different from the address for the Defendant on the Claim Form, the police report attached to it, and at which the Claimant unsuccessfully sought to effect personal service on the Defendant. This is to be contrasted with the position in the **Desmond Baker case** where there was consistency in a single address at which both the claimant and GKG made unsuccessful efforts to locate the defendant. The address for the Defendant which the Claimant has is Mike Town District, Manchester. There is absolutely no evidence that any effort was made by the Applicant to make enquiries at that address. Such an effort does not appear to me to be onerous or unreasonable.
- [52] It is indicated that the investigators engaged by the Applicant visited and spoke to a named constable of the Ulster Spring Police Station on 17th November 2024 who advised that the insured was overseas on the farm work programme, and verified the contact number. The number verified was not stated.
- [53] The investigators also report that they visited the address in Butt Up Town District on 19th November 2024 and spoke to a named man who identified himself as the insured’s uncle and advised that the insured was overseas with his father. The Uncle indicated he had no contact information for the insured or his father as he does not have a cell phone, that he is the only relative of the insured on the Island, and he could not say when the insured would return.
- [54] From the investigators’ report, information was received from the two informants referenced previously, that the insured was on the farm work programme in one instance and with his father in the next. There is an obvious inconsistency in the purpose for which the Defendant is said to have left the jurisdiction yet there is no evidence of any attempt being made by the investigators to probe and reconcile them, if possible. Among the reasonable efforts in that regard would be to make

enquiries of other persons within the community to ascertain where the truth may lay. That is be contrasted with the effort made in the **Desmond Baker case** where the private investigator spoke with shopkeepers, taxi drivers, bar owners, and persons at a garage and gated housing scheme in the area.

- [55] There is no evidence of any enquiries being made of any person as to when the Defendant would have left this jurisdiction. The date or an approximate period of when he is said to have done so is therefore unknown. In the **Desmond Baker case** a shopkeeper had advised that the defendant had emigrated more than a year earlier, a matter which was independently confirmed by a resident of an adjoining property and other persons in the community.
- [56] On my assessment, the evidence presented by the Applicant in a bid to prove that the Defendant has left the jurisdiction is flimsy and unconvincing. To find that he is or was ever outside of the jurisdiction at any material time on such evidence would be irresponsible.
- [57] The investigators also advised the Applicant that the insured's residence at Butt Up Town was also visited, where a yard overgrown with trees and bushes, and parked worn-down vehicles as if they had not been driven for some time were observed. While the observations could properly be made by them, how they came to identify the property as the local residence of the insured is not stated, and there is no evidence that the investigators knew the insured or his house previously. In these circumstances, I am unable to find on a balance of probabilities that it is the insured's residence that was visited and that all reasonable efforts were made by the Applicant to locate him at this stated place of residence in the jurisdiction.
- [58] In respect of social media, the investigators also indicate simply that they checked Instagram but do not say whether the insured has an account on that platform or that they were able to identify such an account. They do state that they searched the insureds' Facebook account, but they failed to identify the account, specify when any search(es) of it was conducted, what searches were conducted or

whether any direct messages or other attempts at contact were made. The generalised statement as to search is insufficient to demonstrate that reasonable effort was made to contact or locate the insured using Facebook in circumstances where the investigators state that they searched the insureds' account thereon.

[59] In all the foregoing circumstances, the evidence presented by the Applicant does not cause me to be satisfied that reasonable efforts were made to bring the Documents to the attention of the insured using the available contact information for him, which the Applicant states were available to it from its file or discovered by the investigators engaged by it. In the circumstances, the application to set aside the order granting permission to effect substituted service on the Applicant is refused and in consequence thereof, so too the order to set aside all subsequent proceedings.

Application for leave to appeal

[60] Having summarised the foregoing reasons, and on enquiry of Counsel whether they wished to make any applications, Ms. Rowe indicated that her instructions were to seek leave to appeal on the following grounds:

- (i) the steps taken to locate the Defendant in the instant case were similar to those taken in the **Desmond Baker case** and were regarded by the Court of Appeal as reasonable efforts;
- (ii) evidence was presented by the Applicant that the Defendant was outside of the jurisdiction and no contrary evidence was presented by the Claimant; and
- (iii) there was no further information which could have been garnered by the Applicant to ascertain the Defendant's current whereabouts.

- [61] In response, Ms. Stewart submits that she was not in agreement with the stated grounds of appeal.
- [62] In respect of the first ground, Ms. Stewart submits that it is not being disputed that the Applicant took steps, but that the steps taken were not reasonable having regard to the information which the Applicant had. She submits that such information ought to have been used to ask the pertinent questions - at least - in order to get relevant information. The concerns raised by the court as to whether the Applicant has disclosed all relevant information to enable the court to determine the application was also offered in resistance to the application for leave to appeal.
- [63] On the second ground, Ms. Stewart submits that there was no obligation on the Respondent to supply the evidence referenced. She went on to state that the principle that he who asserts must prove, applies to the instant case. Additionally, she submits that there is no compelling evidence that the Defendant was, or is out of the jurisdiction. She contends that more importantly, if the Applicant is going to assert that the Defendant is out of the jurisdiction, there is no evidence estimated or otherwise as to when the Defendant would have left. Accordingly, she contends that the **Desmond Baker case** is distinguishable from the case at bar.
- [64] Ms. Stewart relied on the submissions made in respect of the first and second grounds advanced on the oral application for leave to appeal in resisting the third, and went further to submit that the only reason that there was no further information is because reasonable efforts were not made.
- [65] For the reasons indicated below and those set out in refusing the application to set aside the *ex parte* orders, I am not satisfied that the Applicant has any arguable grounds of appeal with a real prospect of success. I accordingly refuse the application for leave to appeal.
- [66] While I considered that the methods engaged to locate the Defendant were similar to those engaged in the **Desmond Baker case**, the gaps in the efforts made in the

instant case did not enable me to arrive at a conclusion that reasonable steps were taken by the Applicant based on information which was available to it.

[67] As to the contention that evidence was presented by the Applicant that the Defendant was outside of the jurisdiction and no contrary evidence was presented by the Claimant, the Applicant being the party asserting that the Defendant is out of the jurisdiction, it had the burden to prove the existence of that fact. The evidence presented in that regard was not cogent and was unconvincing.

[68] Further, having regard to the gaps identified in the efforts said to have been taken to locate the Defendant and the concerns which I have expressed relative to disclosure, the Applicant has not put the court in a position to conclude that there was no further information which could have been garnered by the Applicant to ascertain the Defendant's current whereabouts, and to find that reasonable steps had been taken by the Applicant to locate and contact him.

ORDER

1. Permission is granted to the Applicant to intervene in the matter for the purpose of making the application to set aside the *ex parte* order for substituted service made on 16th September 2024.
2. The time under Rule 11.16 (1) of the Civil Procedure Rules 2002 for making an application to set aside the orders made on 16th September 2024 is extended.
3. The application to set aside the orders made on 16th September 2024 extending time to serve claim form and granting permission to effect substituted service on the Insurance Company of the West Indies Limited and all subsequent proceedings is refused.

4. The application to set aside service of the Claim Form and Particulars of Claim on the Insurance Company of the West Indies Limited and all attendant documents on it is refused.
5. Costs of the Notice of Application for Court Orders to Set Aside Order for Substituted Service filed on 10th February 2025 to the Claimant/Respondent to be taxed if not sooner agreed.
6. The oral application for leave to appeal is refused.
7. An assessment of damages case management conference is fixed for 15th June 2026 at 12:00 noon for thirty (30) minutes.
8. The term "NEG 1" is to be inserted in the top center of the first page of any documents to be filed prior to their filing at the Registry.
9. The Applicant's Attorney-at-law is to prepare, file and serve this order.