**[2025] JMCA App 13**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P**
**THE HON MISS JUSTICE SIMMONS JA**
**THE HON MRS JUSTICE V HARRIS JA**

**APPLICATION NO COA2024APP00183**

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| **BETWEEN** | **GK GENERAL INSURANCE COMPANY LIMITED** | **APPELLANT** |
| **AND** | **DESMOND BAKER** | **RESPONDENT** |

**Mark-Paul Cowan instructed by Nunes Scholefield DeLeon & Co for the appellant**

**Mrs Jeromha Crossbourne Onfroy instructed by George E Clue for the respondent**

**20 January, 19 March, 11 April and 26 September 2025**

**Civil Procedure – Order for service of claim form by specified method – Substituted service of claim on insurance company – Application by insurance company to set aside substituted service order – Evidence that defendant emigrated – Whether an order can be made for substituted service within the jurisdiction on defendant out of jurisdiction – Reasonable efforts of insurance company to contact or locate defendant – Whether deemed good service rebutted – Balancing prejudice to the parties – Rules 5.14 and 7.5 of the Civil Procedure Rules, 2002**

**MCDONALD-BISHOP P**

[1] I have read in draft the comprehensive reasons for judgment of V Harris JA, with which I agree, and there is nothing that I could usefully add.

**SIMMONS JA**

[2] I, too, have read in draft the reasons for judgment of V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

**V HARRIS JA**

[3] Before us was an application by GK General Insurance Company Limited ('GKGI'), a company duly registered under the laws of Jamaica, for leave to appeal against the decision of T Johnson J (Ag) ('the learned judge') delivered in the Supreme Court on 17 July 2024. By that decision, she, among other things, refused to set aside an *ex parte* order made by Master C Thomas (Ag) (as she then was) ('the learned master') in favour of the respondent, Mr Desmond Baker. Although GKGI was not a party to the substantive claim filed in the court below, the previously mentioned interlocutory proceedings gave rise to this application.

[4] On 19 March 2025, we heard submissions on behalf of the parties, and after receiving additional written submissions, on 11 April 2025, we made the following orders:

> " 1. The application for permission to appeal is granted.
>
> 2.The hearing of the application is treated as the hearing of the appeal.
>
> 3. The appeal is allowed.
>
> 4. The orders of the learned Judge of the Supreme Court, made on 17 July 2024 are set aside.
>
> 5.The *ex parte* order for substituted service, granted on 15 November 2021, that personal service on the defendant, Maurice Marks, of the Claim form along with prescribed notes to the defendant, notice to the defendant, acknowledgment of service, defence, counter-claim and particulars of claim filed on 15 January 2021, be dispensed with and that service of the said documents be effected by service on GK General

Insurance Company Limited at 19 Knutsford Boulevard, Kingston, is set aside.

6. Costs in the court below and of the appeal to GK General Insurance Company Limited, to be agreed or taxed."

[5] However, on a review of these orders, we formed the view that since the formal order in this matter has not yet been perfected, and so that the correct decision of the court can be appropriately reflected in the orders, in keeping with the authorities of **Preston Banking Co v Allsup** [1895] 1 Ch 141 (applied in the recent decision of **West Indies Petroleum Limited v Courtney Wilkinson et al** [2024] JMCA App 33 at para. [31]) and **JISCO Alpart Jamaica v Garnet Newman and anor** [2025] JMCA App 10, as well as rule 1.7(7) of the Court of Appeal Rules, 2002 ('the CAR') (which allows this court to vary or revoke its orders), the original orders have been amended as follows:

"1. The application for permission to appeal is granted.

2. By consent and with leave of the court, the hearing of the application is treated as the hearing of the appeal.

3. The appeal is allowed.

4. The orders two to five made on 17 July 2024 by T Johnson J (Ag) are set aside.

5. The *ex parte* order for substituted service granted by Master C Thomas (Ag) on 15 November 2021 that personal service on the defendant, Maurice Marks, of the 'Claim Form along with prescribed notes to the Defendant, Notice to the Defendant, Acknowledgement of Service, Defence, Counter Claim and Particulars of Claim', be dispensed with and that service of the said documents be effected by service on GK General Insurance Company Limited at 19-21 Knutsford Boulevard, Kingston 5, in the parish of Saint Andrew, is set aside.

6. The *ex parte* orders four and five made on 15 November 2021 by Master C Thomas (Ag) are set aside.

7. Costs both here and in the court below to the appellant, to be agreed or taxed."

We promised to provide written reasons for our decision. This is a fulfilment of that promise.

## Background

[6] On 20 March 2015, a motor vehicle driven and owned by Mr Baker was involved in an accident with a motor truck driven and owned by Mr Maurice Marks ('the defendant') along Struan Castle Main Road, in the parish of Manchester. Subsequently, Mr Baker's attorney-at-law, Mr George E Clue, began corresponding with the defendant's then insurers, GKGI, regarding liability for the accident.

[7] With no substantive resolution arising from their discussions, on 15 January 2021 (approximately five years and nine months after the accident and approximately two months shy of the expiry of the limitation period), Mr Baker, by way of claim form and particulars of claim, commenced proceedings in the court below to recover damages for negligence against the defendant. Unfortunately for Mr Baker, he was unable to locate the defendant to effect personal service of the relevant documents, which included the claim form, the notice to the defendant, a form of acknowledgement of service, a form of defence, and the particulars of claim ('the claim documents').

[8] Steadfast in his pursuit of the claim, on 20 May 2021, Mr Baker filed an *ex parte* notice of application for court orders dispensing with personal service of the claim documents and directing that service of those documents be effected by substituted service on GKGI, among other things.

[9] On 15 November 2021, following an *ex parte* hearing before the learned master, the following order was made ('the substituted service order'):

"1. Permission is granted to [Mr Baker] to dispense with personal service of the Claim Form along with prescribed notes to the Defendant, Notice to the Defendant, Acknowledgement of Service, Defence, Counter Claim and Particulars of Claim filed on the 15th day of January, 2021 on the Defendant.

2. Service of Claim Form along with prescribed notes to the Defendant, Notice to the Defendant, Acknowledgement of Service, Defence, Counter Claim and Particulars of Claim filed on the 15th day of January, 2021 is to be effected on the Defendant by way of substituted service on the Defendant's Insurance Company, [GKGI] at 19 Knutsford Boulevard, Kingston.

3. Validity of the Claim Form and Particulars of Claim filed on the 15th day of January 2021 is extended for a period of six (6) months from the 14th July 2021.

4. The Defendant shall file and serve an acknowledgement of service and defence within fourteen (14) days and forty two (42) days respectively of service on [GKGI].

5. Costs of this Application are to be costs in the Claim.

6. [Mr Baker's] Attorney-at-Law is to prepare, file and serve this Order on [GKGI]."

[10] As a result of the substituted service order, Mr Baker served GKGI with the claim documents on or about 29 November 2021. Notwithstanding its efforts, GKGI was also unable to locate the defendant. For that reason, on 14 January 2022, GKGI applied to set aside the service of the claim documents effected on them as well as the substituted service order ('the application to set aside'). Since the application to set aside was made outside of the stipulated 14 days from the date of service of the order (see rule 11.16(2) of the Civil Procedure Rules 2002 ('the CPR')), GKGI also sought an extension of time within which to apply.

[11] In the affidavit supporting the application to set aside, which was filed on 26 August 2022, Ms Anna-Kaye Coy, a legal officer at GKGI, averred that the defendant's

insurance policy with GKGI expired on 19 April 2019. Therefore, they had no contractual relationship with the defendant at the time that the claim was filed. Notwithstanding, upon receiving the claim documents and substituted service order, GKGI sought to contact the defendant by telephone and email. GKGI also engaged the services of a private investigator to locate the defendant and deliver the claim documents to him. Upon visiting the defendant's last known address, the private investigator was informed that he had emigrated. Dialogue was had with members of the community, as well as a family member who did not disclose any information regarding his whereabouts or provide a means of contacting him directly. In those circumstances, it was GKGI's position that since it had no other means of contacting the defendant, the substituted service order should not stand.

[12] Following an *inter partes* hearing on 29 April 2024, the learned judge made the following orders on 17 July 2024:

> "1) An extension of time is granted to the Applicant, [GKGI] to make its application to set aside the Ex Parte Order made on November 15, 2021 and the application and the affidavits filed in support of the application are permitted to stand as filed.
>
> 2) The application to set aside the Order for substituted service made on November 15, 2021 is refused.
>
> 3) The application to set aside service of the Claim Form and Particulars of Claim on [GKGI] pursuant to the Order for substituted service made on November 15, 2021 in respect of the Defendant on [GKGI] is refused.
>
> 4) Leave to appeal is refused.
>
> 5) Costs of this application are awarded to [Mr Baker] to be agreed or taxed.
>
> 6) [GKGI's] Attorneys-at-Law are to prepare, file and serve the Formal Order herein."

**The application before this court**

[13] Undeterred by the learned judge's refusals, GKGI sought to renew their application for leave to appeal before this court. By way of notice of application for court orders filed on 31 July 2024, GKGI applied for leave to appeal pursuant to Part 1.8 of the CAR, and for the hearing of the application to be treated as the hearing of the appeal (see rule 1.8(8)(c) of the CAR). The application is supported by an affidavit deponed by Ms Jeneil Green, an attorney-at-law and legal officer at GKGI, which was filed on 31 July 2024, the contents of which will be discussed in due course. There was no objection for the application for permission to appeal to be treated as the hearing of the appeal, and the court granted that application.

[14] An applicant who seeks permission to appeal in civil cases must satisfy this court that the appeal has a real chance of success (see rule 1.8(7) of the CAR). This means that the proposed appeal against the decision of the learned judge must have a "realistic" as opposed to a "fanciful" prospect of success (see **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Another** [2015] JMCA App 27A at para. [21]).

[15] Given that the learned judge was exercising her judicial discretion, this court's review of the prospect of success must be conducted with the appropriate restraint, consistent with its appellate function. It is well established that this court will only interfere with the learned judge's exercise of her discretion on an interlocutory application if satisfied that it was based on a misunderstanding of the law or of the evidence before her, or on an inference that particular facts existed or did not exist, which can be shown to be demonstrably wrong, or where her decision is so aberrant that it must be set aside on the ground that no judge regardful of her duty to act judicially could have reached it (per **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[16] With this objective in mind, GKGI, in its proposed further amended notice of appeal, which was exhibited to the affidavit of Ms Gabrielle McCormack (an attorney-at-law with Nunes, Scholefield, DeLeon & Co) filed on 10 March 2015, outlined 25 prolix grounds of appeal that substantially overlap. To avoid the unnecessary lengthening of this judgment, they have been set out in full in the appendix. Counsel Mr Cowan helpfully reduced the proposed grounds into seven issues, which he further condensed as formulated below:

> "i. Whether there was evidentiary basis at either the ex parte or inter partes stage for an order for service by way of [GKGI].
>
> ii. If there was evidentiary basis for the order, whether the steps taken by [GKGI] to contact the Defendant were adequate in the circumstances.
>
> iii. Whether an order for service by a specified method within the jurisdiction can be made in relation to a defendant who is outside of the jurisdiction.
>
> iv. Whether it was just to refuse the Application to set aside on the basis of prejudice to the Respondent/Claimant."

[17] Those points of inquiry call into question not only the learned judge's exercise of her discretion (in refusing to set aside the substituted service order), but also the learned master's exercise of her discretion (in granting the substituted service order). The overarching issue is whether, in the circumstances of this case, the learned judge erred in refusing to set aside the substituted service order and the service effected on GKGI. In resolving that issue, there are two broad questions under which I will address the concerns raised in the parties' submissions and the relevant authorities:

A. Was the substituted service order properly granted?

If so, having regard for the evidence presented at the *inter partes* hearing,

B. Should the substituted service order and the consequential service on GKGI stand?

**Discussion**

[18] The general rule is that the claim form and particulars of claim must be served personally on the defendant (rules 5.1(1) and 5.2(1) of the CPR). That is, by handing it to or leaving it with the person to be served (rule 5.3 of the CPR) within the jurisdiction (rule 5.4 of the CPR). That general rule is, however, subject to certain exceptions. It is implied that the claimant must first seek to serve the defendant personally. It is when personal service cannot be effected that a substituted method of service would be justified. The term "substituted service", originating in the pre-CPR era, is ordinarily used to describe service on a person or place other than personal service on the named defendant. While the underlying principles have been incorporated in the CPR, the processes are not explicitly referred to as "substituted service".

[19] The modes of substituted service are provided for in rules 5.6 to 5.19 of the CPR under specific and general provisions. Service on an insurance company further to a claim regarding a motor vehicle accident is relatively common and typically falls under the general provisions outlined in rules 5.13 and 5.14 of the CPR. Whereas rule 5.13 for "Alternative methods of service" does not require permission since the court's endorsement is sought after the alternative service has been made, rule 5.14, titled "Power of court to make order for service by specified method", requires an order of the court before a defendant can be served by a specified method.

[20] In this case, Mr Baker's application in the court below for the substituted service order was made in accordance with rule 5.14 of the CPR, which stipulates as follows:

> "5.14 (1) The court may direct that service of a claim form by a method specified in the court's order be deemed to be good service.
>
> (2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit -

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim."

[21] Accordingly, upon an application for an order allowing service by a specified method supported by affidavit evidence, the court is empowered to direct that service of the claim form by the method specified in the order is deemed to be good service. The affidavit supporting that application should outline the method of service proposed, and it must show that that method of service is likely to enable the defendant to ascertain the contents of the claim form and particulars of claim.

[22] This represents the codification of a principle that has long existed, as was stated in the case of **Porter v Freudenberg; Kreglinger v Samuel & Rosenfeld; Re Merten's Patents** [1915] 1 KB 857 ('**Porter v Freudenberg**') by Lord Reading CJ (at page 888):

> "In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted. ..."

[23] As mentioned earlier, the affidavits in support of the application for the substituted service order disclosed that the defendant could not be located to effect personal service. Mr Baker's process server was informed that the defendant had emigrated. For that reason, it was advanced that service should be effected on GKGI, the insurer of the defendant's motor truck at the time of the accident. The learned master, in granting the application, directed, among other things, that service of the claim documents should be effected on GKGI, following which the defendant ought to file and serve his

acknowledgement of service within 14 and 42 days, respectively, of the said service on GKGI (see para. [9]).

[24] In considering whether the substituted service order was properly granted, the learned judge found that there was no evidence to suggest that, at the time the affidavit was filed, Mr Baker and his attorney-at-law were aware that the relationship between the defendant and GKGI had been discontinued. She ultimately agreed with the learned master's decision.

[25] We did not had the benefit of the reasons for the learned master's decision, and so it was open to this court to embark on its own assessment of the evidence and the relevant law to determine the propriety of the substituted service order.

**A. Was the substituted service order properly granted?**

[26] As indicated above, rule 5.14(2) of the CPR requires the application to serve the defendant by a specified method to be supported by affidavit evidence specifying the proposed method of service and showing that it would likely enable the defendant to ascertain the contents of the claim documents. The affidavit in support specified the steps taken by Mr Baker to locate the defendant and reported that he was advised by persons in the vicinity of where the defendant resided that he had emigrated. On account of Mr Baker's inability to locate the defendant, and the information received that he had emigrated, it was believed that substituting personal service on the defendant with specified service on his insurers, GKGI, would likely bring the claim documents to his attention. The learned master acceded and granted the application for substituted service on GKGI.

[27] The learned judge affirmed the substituted service order in the following terms:

> "[35] In these circumstances, this Court is of the view that the evidence supports a finding that there was a relationship in

> existence between [GKGI] and the Defendant at the time of the accident, and that service of the Claim Form and the Particulars of Claim [on GKGI] was likely to enable the Defendant to ascertain the contents of the said documents."

[28] She also expressed the view that "...the subsequent ending of the contractual relationship between [GKGI] and the Defendant does not automatically absolve [GKGI] of its obligations under the contract which existed at the time of the accident" (see para. [30] of her judgment). The learned judge also determined that since there was no assertion that the defendant had breached the insurance policy agreement, nor any indication that GKGI would refuse to indemnify the defendant, GKGI was seized of sufficient information to appear in the claim (having received the statements of Mr Baker and the defendant).

Sufficiency of the evidence in support of the substituted service order (grounds (a), (b), (c), and (d))

*Submissions on behalf of GKGI*

[29] In an effort to impugn the substituted service order, learned counsel Mr Cowan challenged the evidence provided in support of that order. He contended that the duty to effect service on a defendant ultimately rests with the claimant who initiated the proceedings. Therefore, the party seeking permission to substitute personal service with another method of service is required to demonstrate with satisfactory evidence that the proposed method of service would or would likely result in the actual service of the claim documents on the defendant or in enabling the defendant to ascertain the contents of those documents. That requirement is essentially a prerequisite for the court to exercise its discretion to grant such an order, since the fundamental objective of the substituted service order is to notify the defendant of the contents of the claim form so that he will have ample opportunity to respond to the claim. The case of **Advantage General Insurance Company Ltd v Yvette Gordon** [2024] JMCA Civ 8 was cited in support of this submission.

[30] It was further submitted that Mr Baker offered a bare assertion (supported by GKGI's letter dated 2 May 2016) that the contents of the claim documents would come to the defendant's attention if served on GKGI. There was no other evidence of correspondence between GKGI and Mr Baker's attorneys-at-law, nor was there evidence of an existing or continuing relationship between the defendant and GKGI. This, Mr Cowan argued, was insufficient for the court to be reasonably satisfied that the service on GKGI would likely enable the defendant to ascertain the contents of the claim documents. Moreover, the argument continued, there is no evidential or legal foundation for serving an insurance company in substitution for a defendant simply because it insured that defendant at the time the cause of action arose. The court must still be presented with some evidence from which it can be reasonably satisfied that at the time of the application for substituted service, GKGI was able to bring the claim documents to the defendant's attention.

[31] He contended that even if this court found that the evidence sufficiently justified the substituted service order under rule 5.14 of the CPR, in the light of the unchallenged evidence presented by GKGI in its application to set it aside, it became clear that the assumptions made at the time of the making of the substituted service order were incorrect and based on "sparse evidence".

[32] Relying on rule 5.1(1) of the CPR and the authority of **Insurance Company of the West Indies Ltd v Shelton Allen (Administrator of the Estate of Harland Allen) and Others** [2011] JMCA Civ 33 ('**ICWI v Allen**'), Mr Cowan submitted that, in such circumstances, the substituted service order should not stand since a party being sued is entitled to be notified of the proceedings against him and the allegations made so that he will have an opportunity to answer them.

*Submissions on behalf of Mr Baker*

[33] Learned counsel, Mrs Crossbourne Onfroy, contended that the evidence before the learned master was sufficient to justify the exercise of her discretion to grant the application for substituted service. The evidence indicated that GKGI, as the insurer of the defendant, could assert its interest and was likely to bring the proceedings to the defendant's attention. The learned master also clearly accepted the evidence that Mr Baker had attempted personal service at the defendant's address, that the defendant could not be located at that address, and that the process server was informed that the defendant had emigrated. Furthermore, it was open to the learned master to consider the correspondence between Mr Baker's attorney-at-law and GKGI, which included GKGI's letter of 2 May 2016, which indicated the defendant's position denying liability as well as GKGI's stance on the matter. She argued that even if this court would have exercised its discretion differently, it could not be said that the learned judge was plainly wrong in endorsing the learned master's determination that the evidence was sufficient to support the substituted service order.

*Law and analysis*

[34] It was neither argued nor could it properly be argued that the duty to personally serve a defendant with a claim is incumbent on anyone but the claimant. It is timely to re-emphasise the objective of an order for substituted service. As was discussed in the dictum of Morris LJ in **R v Appeals Committee of the County of London Quarter Sessions Ex parte Rossi** (1956) 1 QB 682 (page 696):

> "…The purpose of giving notice to a party of the hearing of a case is so that the party may have the opportunity to appear in order to assert or to defend his rights. It seems to me, therefore, that it is of the very essence of such notice that it should be communicated to or should reach the party interested.

> It is fundamental in our system of administration of justice that a party should have the right and opportunity to be heard or to be represented. This is well recognised. …"

Although that case pertained to service by registered mail, its underlying rationale is of general application.

[35] Specifically, in relation to the operation of rule 5.14 of the CPR, service by a specified method is proved by an affidavit demonstrating that the terms of the order were fulfilled (rule 5.15 of the CPR). Once the specified method of service is realised, it is deemed to be good service (rule 5.14(1) of the CPR). At that point, the obligation to serve the defendant is discharged, and there is no conditional requirement to ensure that the claim came to his knowledge. It need hardly be stated that the court ought to be careful before acceding to an application for service by a specified method. Given the gravity of that deeming provision, the court requires precise and compelling evidence that the proposed method of service "is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim" as required by rule 5.14(2)(b) of the CPR. That evidentiary burden rests with the party seeking the order.

[36] The evidence in support of Mr Baker's *ex parte* application for service by a specified method was contained in three affidavits by Mr Clue (filed on 20 May 2021 and 9 November 2021) and Mr Joel Hibbert (filed on 20 May 2021). It was averred that Mr Hibbert, a district constable, was engaged by Mr Baker on 25 February 2021 as a process server to personally serve the defendant with the claim documents. On 1 March 2021, around 4:00 pm, Mr Hibbert visited the defendant's residential address in Montpelier District, in the parish of Manchester (the address provided in the police report). The defendant, however, could not be located, and Mr Hibbert was informed that he had migrated. Beyond this, no further evidence was adduced regarding Mr Baker's efforts to locate or contact the defendant.

[37] On that basis, it was proposed that substituted service on GKGI would be "sufficient to and [was] likely to enable the Defendant to ascertain the contents of the documents served and further [would] bring to him notice [of] the existence and nature of [the] proceedings through [GKGI]" (per Mr Clue's first affidavit). The belief that GKGI would be able to bring the claim documents to the defendant's attention, notwithstanding Mr Baker's inability to effect personal service, was predicated on the widely held understanding that insurers, by virtue of their relationship with the insured, typically maintain up-to-date contact information for their policyholders. However, at this juncture, it is important to point out that, while in some instances it may be appropriate to permit substituted service on a defendant's insurers, the wide discretion to make such orders must not be exercised in a manner that disregards fundamental legal principles.

[38] In establishing that such a relationship existed between GKGI and the defendant, counsel Mrs Crossbourne Onfroy relied on a letter marked "WITHOUT PREJUDICE", dated 2 May 2016, from GKGI and addressed to Mr Clue. In that letter, GKGI, through its legal officer, Miss Rachael Brown, responded to Mr Clue's letter dated 9 March 2016, regarding the motor vehicle accident. GKGI conveyed that, based on the information they received, it was Mr Baker who drove his motor vehicle in a negligent manner and was responsible for the accident. The record is otherwise silent as to their discussions.

[39] It is implicit in the granting of the substituted service order that the learned master accepted that Mr Baker was unable to personally serve the defendant with the claim documents and that substituted service on GKGI was likely to enable him to ascertain the contents of those documents. I was, however, not convinced that the scant evidence presented was sufficient to justify the order. Apart from visiting the residential address of the defendant, Mr Baker made no other effort to locate or contact him. Moreover, the learned master must have failed to appreciate that GKGI's letter was dated approximately four years and eight months before the issuing of the claim. Was it, therefore, reasonable to assume that GKGI continued to act as the defendant's insurers throughout that period?

In my opinion, the letter alone did not constitute irrefutable evidence that a contractual relationship existed between GKGI and the defendant at the time of the application for substituted service. That presumption was further undermined by the evidence that the defendant had emigrated. If there was a possibility that no insurance policy remained in force and/or the defendant was no longer resident in the jurisdiction, it followed that GKGI might reasonably not have possessed up-to-date contact information for the defendant.

[40] In my opinion, the evidence presented to the learned master did not sufficiently demonstrate that the defendant was likely to ascertain the contents of the claim documents. The proposed grounds (a), (b), (c), and (d) would support the conclusion that the substituted service order was improperly granted. Additionally, the evidence in support of the application for substituted service that the defendant had emigrated raises significant jurisdictional concerns regarding whether the substituted service order was rendered invalid due to a lack of jurisdiction.

Jurisdiction to order substituted service (grounds (a), (l), (m), (n), (o), (p), (q) and (r))

*Submissions on behalf of GKGI*

[41] The premise of this challenge, as argued by Mr Cowan on behalf of GKGI, is that substituted service within the jurisdiction is generally not permissible in respect of a defendant who is resident outside the jurisdiction at the time of the filing of the claim (citing **Fry v Moore** (1889) 23 QBD 395 and **Wilding v Bean** [1891] 1 QB 100). He contended that the proper course is to apply for leave to effect service on the defendant out of the jurisdiction pursuant to the relevant rules of court (as stated in **Myerson v Martin** [1979] 3 All ER 667). Counsel found support for that point in Part 7 of the CPR, which specifies the requirements for permission to serve a defendant outside the jurisdiction. He submitted that if that procedure is not complied with, then service on a defendant who is outside the jurisdiction at the time of the filing of the claim would not

be lawfully possible, and so substituted service within the jurisdiction would be impermissible as well. Mr Cowan drew our attention to the fact that the appellants in two of the appeals addressed in **Porter v Freudenberg** complied with the stipulated procedure for service and obtained permission to issue concurrent writs and serve the relevant notices outside the jurisdiction. Whereas, in this case, Mr Baker did not receive permission to serve the defendant outside the jurisdiction in compliance with the CPR.

[42] Counsel also referred to the cases of **Broom v Aguilar** [2024] EWHC 1764 (Ch), **Fairmays v Palmer** [2006] EWHC 96 (Ch), **Marashen Ltd v Kenvett Ltd (Ivanchenko, third party)** [2018] 1 WLR 288 ('**Marashen v Kenvett**') and **Barclays Bank of Swaziland Ltd v Hahn** [1989] 2 All ER 398 in asserting that the principle enunciated in the vintage cases of **Wilding v Bean**, **Porter v Freudenberg** and **Myerson v Martin** requiring the defendant to be within the jurisdiction as a prerequisite for an order for substituted service within the jurisdiction is a fundamental rule of law independent of the CPR, as it goes to the root of the court's jurisdiction and the defendant's right to be duly notified of the proceedings.

[43] It was submitted that there is uncontroverted evidence that the defendant emigrated before the commencement of the claim. Consequently, personal service would not have been legally possible unless Mr Baker obtained an order pursuant to Part 7 of the CPR to serve him with the claim documents outside of the jurisdiction. Without that order, an order for specified service within the jurisdiction would not be permissible, he argued.

[44] The learned judge's reliance on **Porter v Freudenberg** to sanction the substituted service order with no conditions on the basis that GKGI was an agent of the defendant within the jurisdiction is a misunderstanding of the law, counsel contended. He further described that finding of fact as a "mischaracterisation of the relationship between an insurance company and its insured" since "an insurance company is not an

agent of its insured for the purpose of service". Relying on **ICWI v Allen**, Mr Cowan asserted that, irrespective of its statutory obligation under the Motor Vehicles Insurance (Third-Party Risks) Act ('the Act'), the insurance company for a motor vehicle is not an agent of its insured for the purpose of service.

*Submissions on behalf of Mr Baker*

[45] On the other hand, Mrs Crossbourne Onfroy stated Mr Baker's position as being that the defendant does not need to reside in this jurisdiction for the claimant to effect service by a specified method. She submitted that if that were the intention of the framers of the CPR, then it would have expressly stated so. Therefore, applying that limitation on Part 5 of the CPR would result in injustice to claimants in this jurisdiction.

[46] It was her further contention that the common law principles established in the case of **Wilding v Bean** have been displaced by the "clear, unequivocal and unqualified provisions" of Part 5 of the CPR. Citing the majority decision in **Myerson v Martin**, she argued that the court has the discretion to order specified service in respect of a defendant who resides outside the jurisdiction even when no order for service outside the jurisdiction has been obtained. Since an order for service outside the jurisdiction would have been permissible under rule 7.3 of the CPR (the claim being grounded in a tort that took place within the jurisdiction and resulted in damages sustained here), counsel posited that the court had the discretion to allow the substituted service in the circumstances, notwithstanding that there was no order for service outside the jurisdiction.

[47] In any event, she continued, an application for service outside the jurisdiction would not have been permitted under rule 7.5 since Mr Baker, having been notified that the defendant had emigrated, had no other particulars of where he was, which was required for the affidavit in support of that application. Accordingly, Mr Baker was constrained to utilise the methods available for service within the jurisdiction under Part

5. On an ordinary reading of Part 5, where personal service is not possible because the defendant is outside the jurisdiction at an unknown address, the claimant is not precluded from utilising the other methods of service, she argued. Reliance was placed on the case of **Rachael Graham v Erica Graham and anor** [2021] JMCA Civ 51 in support of this proposition.

[48] Counsel noted that the court is being asked to decline jurisdiction on the basis that the process server was informed that the defendant emigrated. Mrs Crossbourne Onfroy submitted that the limited value of that information is that it demonstrated that Mr Baker could not locate the defendant to effect personal service. The court did not have factual knowledge of whether the defendant had emigrated or was outside the jurisdiction when the claim was issued or at the time of the application for substituted service. Counsel asserted that in **Wilding v Bean** and **Myerson v Martin**, there was clear evidence that the defendants in those cases were outside the jurisdiction. In the light of these uncertainties, the court must vigorously, zealously and scrupulously protect and safeguard its jurisdiction, the argument continued. It was also advanced that although the court cited **Porter v Freudenberg** on this point, it could not be said that the learned judge treated GKGI as the defendant's agent, but instead she was simply making the point, correctly so, that **Porter v Freudenberg** did not establish an absolute rule. For these reasons, this court should find that the learned master did not misapply or misconstrue the applicable principles since it was within her discretion to order substituted service.

*Law and analysis*

[49] The proposed method of specified service on GKGI would amount to service within the jurisdiction on a defendant who, as the undisputed evidence before the court showed, was out of the jurisdiction. From as early as 1891, Lord Esher MR in the United Kingdom's Court of Appeal pronounced in the case of **Wilding v Bean** (referring to the dictum in

the preceding case of **Fry v Moore**) that "...where the writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service. As long as the defendant is abroad, such a writ as this cannot be served upon her personally. Therefore, it cannot be served by substituted service" (at pages 101 to 102).

[50] In that case, a writ was issued for service on a defendant within the jurisdiction. The plaintiff could not locate the defendant to effect personal service, so he applied for and obtained an order for substituted service on the defendant's solicitor. An application to set aside that order was refused. On appeal, it was revealed that the defendant had left the jurisdiction to reside abroad eight days before the issue of the writ. The court did not find that he left the jurisdiction to evade service of the writ. Having considered that there was a statutory provision empowering the court, under certain conditions and with certain formalities, to allow service outside the jurisdiction on such a defendant, it was held that an order for substituted service within the jurisdiction could not be made in the circumstances.

[51] Subsequently, in the landmark case of **Porter v Freudenberg**, the United Kingdom's Court of Appeal considered once again the question of whether substituted service of a notice of writ within the jurisdiction can be ordered in respect of a defendant that is out of the jurisdiction. In that case, a formidable panel of seven judges jointly determined three appeals, the facts of which are not necessary for the purpose of this judgment. At the material time, the United Kingdom was in a state of war. A consequence of the war was the prohibition of any commercial dealings or correspondence between a British subject and the inhabitants of a hostile country without the sovereign's permission. Those inhabitants were "alien enemies", a status that was not determined by nationality but rather by where the person resided or operated their business. Notwithstanding the heightened conflict at that time, the court preserved the principle that an alien enemy who is sued has the right to enter an appearance and to defend the action in the King's Courts.

[52] Delivering the judgment of the court, Lord Reading CJ expressed at page 883:

> "Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice."

[53] The learned Chief Justice firmly stated that an order for substituted service within the jurisdiction cannot be made if, at the time of issuing the writ, there could not be good personal service because the defendant was outside the jurisdiction. In such a case, the defendant could only be properly served by substituted service where there was a concurrent writ for service out of the jurisdiction. Lord Reading CJ, however, identified exceptions to the general rule, such as where the court is satisfied that the defendant left the jurisdiction before the issue of the writ to evade service or the party in the jurisdiction, upon whom service is substituted, is the agent of the defendant. The factual circumstances in this case did not give rise to any of the recognised exceptions.

[54] It is noteworthy that the right to appear and be heard is so sacrosanct that even during wartime, an alien enemy was entitled to be properly served. In the context of contemporary means of communication, any curtailment of that entitlement would be unwarranted.

[55] The prevailing rule, as enunciated in **Porter v Freudenberg**, was later elaborated upon in **Myerson v Martin.** The plaintiff, Mr Myerson, initiated legal proceedings in England by writ for service within the jurisdiction against a defendant, Mr Martin, who was resident outside the jurisdiction but was a director of a company that had its head office in England. He frequently visited England for the company's business, but at the

time of the issuing of the writ, he was not in the jurisdiction. Shortly after the writ was issued, however, he travelled to England for a week and made additional visits thereafter. The process server, nevertheless, was unsuccessful in serving him personally. The plaintiff applied for and obtained an order for substituted service of the writ on Mr Martin at one of his company's showrooms, although he was not in the country. Having received the writ, Mr Martin applied to have the order for substituted service and the service effected thereunder set aside as being improper, on the basis that he was not within the jurisdiction of the court at the time of the issuing of the writ.

[56] Lord Denning MR unequivocally endorsed the principle that an order for service within the jurisdiction against a person who is resident outside the jurisdiction when the writ is issued could not properly be made. He elaborated (page 671c-e):

> "... If the defendant was in fact outside the jurisdiction at the time the writ was issued, and the plaintiff in ignorance of it issued a writ for service within the jurisdiction, then the plaintiff must wait until the defendant comes back within the jurisdiction and serve him personally on his return. There cannot be substituted service on the defendant.
>
> ...
>
> Otherwise if the defendant was in fact outside the jurisdiction when the writ was issued, and is likely to remain outside, the proper course for the plaintiff is to apply for leave to serve out of the jurisdiction ..."

[57] In the more recent cases of **Marashen v Kenvett** and **Broom v Aguilar**, this principle has been applied within the context of the United Kingdom's Civil Procedure Rules ('the UK CPR'). In **Marashen v Kenvett**, the court held (at para. 17):

> "...that an order for service by an alternative method within the jurisdiction against a person who was resident outside of the jurisdiction therefore could only be made if the court had

> satisfied itself that the case was a proper one for service out of the jurisdiction, and had made an order to that effect..."

[58] Rule 6.15 of the UK CPR was considered in **Marashen v Kenvett**. Notably, rule 6.15(2) stipulates that "the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service". This is equivalent to rule 5.14(1) of the CPR, which allows the court to direct "that service of a claim form by a method specified in the court's order be deemed to be good service" on the defendant. However, it was ultimately determined that an order for alternative service on a defendant who is resident outside of the jurisdiction is only valid if the court had first granted permission to serve out of the jurisdiction. This was because the power to order service by an alternative method where a defendant is out of the jurisdiction is derived from rule 6.37(5)(b)(i) of the UK CPR (which provides that where the court grants permission to serve a claim form out of the jurisdiction, it may give directions about the method of service), which presupposes permission to serve out, and not rule 6.15.

[59] In **Broom v Aguilar**, the appellant, a Spanish national, had emigrated to Spain after living in England for several years. Certain proceedings were initiated against her; however, service was unsuccessful. The respondent obtained an order for service by alternative means but did not obtain permission to serve outside the jurisdiction. It was determined that the court acquires jurisdiction over a defendant if the defendant is physically within the jurisdiction at the time of service or if permission has been granted to serve the defendant outside the jurisdiction. The judgment cited numerous cases (including **Barclays Bank of Swaziland Ltd v Hahn**, which was relied on by GKGI) in making the point that service by alternative means under rule 6.15 of the UK CPR will only be valid if the court has jurisdiction over the defendant.

[60] As in the present case, the appellant's location in **Broom v Aguilar** was unknown at the time the respondent obtained an order for service by alternative means.

Nevertheless, the court found that granting the alternative service order without obtaining permission to serve outside the jurisdiction was incorrect, as the court had no jurisdiction over the appellant. As a result, the court found that compliance with the alternative service order could not amount to service of the proceedings on the appellant, and that this was a proper basis on which to set aside the order.

[61] It follows from the authorities discussed above that the validity of service within the jurisdiction is dependent on the defendant being in the jurisdiction at the time when service is effected. If the defendant is outside the jurisdiction, service can only be made within the jurisdiction by some alternative or specified method if the claimant also obtains permission to serve the defendant outside the jurisdiction. It is with that concurrent order that the court would have extended its jurisdiction to reach the defendant, who is outside its territorial jurisdiction.

[62] As already established, the evidence in support of Mr Baker's application for substituted service on GKGI was that the defendant was no longer in the jurisdiction. The plain and ordinary meaning of the words "within the jurisdiction" (in rule 5.4 of the CPR) does not restrict the court's jurisdiction to parties domiciled in the jurisdiction, but instead requires that service be effected in the jurisdiction. Specific provision is also made for service of the claim form on an agent of the principal who is out of the jurisdiction (rule 5.17 of the CPR), which I need not explore for two reasons: an insurance company is not an agent of its insured for the purposes of this rule, and neither the application nor the substituted service order was made pursuant to this rule.

[63] It is true that the CPR itself does not specifically confine the court's discretion in the manner discussed in the cases of **Marashen v Kenvett**, **Broom v Aguilar Barclays** and **Bank of Swaziland Ltd v Hahn**, nor does it require permission for service out of the jurisdiction before a substituted service order can be made within the jurisdiction (in respect of a defendant that is out of the jurisdiction). However, I am not prepared to

accept that the framers of the CPR intended for the operation of rule 5.14 to abrogate the general rule. For the reasons that rule 5.1 of the CPR endorses the governing principle that the claim form must be personally served on the defendant, rule 5.4 further mandates that, except where permission is obtained (pursuant to Part 7 of the CPR for service out of the jurisdiction), the service of that claim form must be effected at a place within the jurisdiction. Where a defendant is outside Jamaica, rule 5.14(1) of the CPR does not confer jurisdiction on the court to order service on that defendant; instead, it is Part 7 of the CPR that bestows this jurisdiction. As already established, rules 5.13 and 5.14(1) concern alternative methods of service on a defendant within the jurisdiction (see **Rachael Graham v Erica Graham and anor** paras. [21] – [28]), with rule 5.14(1) (further to which the application was made and granted), stipulating that service by the method specified in the court's order is deemed to be good service on the defendant.

[64] It is, therefore, illogical and untenable that service by a specified method within the jurisdiction would be deemed to be good service on a defendant who is out of the jurisdiction without permission also being given to serve the defendant out of the jurisdiction. How then would the objective of service be achieved since the defendant, who lacks knowledge of the existence of a claim against him, would be deprived of his right to appear and be heard? To my mind, unless Mr Baker can prove that the defendant was in the jurisdiction (even though he was no longer ordinarily resident in the jurisdiction) at the time of deemed service on GKGI, then the service would be invalid.

[65] Considering the circumstances of this case, where the defendant's whereabouts are unknown to both Mr Baker and GKGI, it is patent, as admitted by counsel for Mr Baker, that obtaining an order for service outside the jurisdiction would have been unlikely. In order to obtain such an order, affidavit evidence must be provided that states, among other things, "in what place, within what country, the defendant may probably be found" (rule 7.5(1) of the CPR) and that evidence was not available. Nevertheless,

allowing substituted service within the jurisdiction on the defendant that is out of the jurisdiction would, in this case, be in clear conflict with Part 7.

[66] As the discussion above illustrates, it seems to me that Mr Cowan is on solid ground. I am convinced that his submissions are correct, that in this case, it was necessary for Mr Baker to have obtained an order for permission to serve the claim documents out of the jurisdiction (under Part 7 of the CPR) before an order for service by an alternative method within the jurisdiction could be made. For the avoidance of doubt, the foregoing should not be construed as limiting the court's discretion to assess the circumstances of each case and determine if it is a proper case for the court to exercise its jurisdiction to grant an order for substituted service. However, in doing so, regard must be had to the principles stated above.

[67] In the light of the above exposition of the law, grounds (a), (l), (m), (n), (o), (p), (q) and (r) have raised an arguable basis for the appeal. This determination resolves the overarching issue and provides a basis for the substituted service order to be set aside. However, I am cognisant that if the learned master was not satisfied that the defendant was no longer in the jurisdiction (either because he was evading service or the process server was wrongly informed that he had emigrated), the exercise of her discretion in granting the substituted service order could possibly be justified. This is particularly so if she reasonably believed that GKGI was likely to possess current and/or additional information capable of assisting in locating or contacting the defendant. Therefore, in the absence of reasons for the learned master's decision and in the interest of settling the law, I will proceed to the second question.

## B. Should the substituted service order and the consequential service on GKGI stand?

[68] The next matter for consideration is whether, having regard to the evidence before the learned judge at the *inter partes* hearing, the substituted service order ought to have been set aside.

[69] As stated earlier, GKGI's application for permission to appeal the learned judge's order was supported by Ms Jeneil Green's affidavit. In short, it was averred that GKGI insured the defendant's motor truck for successive periods from 16 April 2014 to 19 April 2019. Upon being served with the notice of proceedings on 2 February 2021, GKGI commenced efforts to contact the defendant regarding the claim. Following service of the claim documents on GKGI on 29 November 2021, a private investigator was retained to locate the defendant and serve the claim documents. Despite the private investigator's extensive enquiries in December 2021, the defendant could not be located, and the private investigator was made aware that the defendant had been living outside the jurisdiction for over a year. Given GKGI's inability to find the defendant despite its efforts, it sought to have the learned master's order set aside.

[70] In determining the application before her, the learned judge focused her analysis on the steps taken by GKGI to bring the documents to the defendant's attention. She concluded that she would not exercise her jurisdiction in favour of setting aside the substituted service order because she was not satisfied that GKGI made reasonable efforts to locate or contact the defendant. In her assessment, the learned judge observed that GKGI made no further attempts to contact the defendant's references, and that all efforts undertaken by the private investigator were confined to a single day and focused solely in the Montpelier District area. She also found that there was no evidence indicating that GKGI took any additional steps to locate the defendant after being informed that he had emigrated. She suggested that additional steps could have included the local publication of an advertisement to indicate to the defendant or anyone who knows him

that attempts were being made to contact him or that GKGI could have followed up with the tenant who was renting the house the defendant previously lived in. In her reasons, the learned judge referred to, among other things, rules 5.13 and 5.14 of the CPR as well as authorities such as **Porter v Freudenberg**, **ICWI v Allen** and **British Caribbean Insurance Company Ltd v David Barrett** [2014] JMCA App 5 ('**BCIC v Barrett**').

[71] The learned judge also found that there was no evidence that (at the time of the filing of the application) Mr Baker and his attorney-at-law knew that the relationship between the defendant and GKGI had terminated. She found it reasonable, at any rate, that based on the relationship that existed at the time of the alleged accident, and GKGI's knowledge of the matter (as reflected in their 2 May 2016 letter), GKGI was in a position to defend the claim. In addition, she formed the view that it would be unjust to set aside the substituted service order and the consequential service, having regard to the overriding objective, in circumstances where the claim would be statute-barred if GKGI's application were granted.

[72] Ultimately, her decision was rooted in her dissatisfaction with GKGI's efforts to bring the claim documents to the attention of the defendant, as well as her finding that if the substituted service order were set aside, Mr Baker would suffer great prejudice since his claim would expire and effectively be barred by the statute of limitations.

Sufficiency of the evidence in support of the application to set aside the substituted service order (grounds (a), (e), (f), (g), (h), (k), (s), (t), (u), (v), (w), (x) and (y))

*Submissions on behalf of GKGI*

[73] Mr Cowan contended that although there was no evidentiary basis for the substituted service order, GKGI still took extensive steps to locate the defendant and/or ascertain his whereabouts. The steps taken exceeded those taken by Mr Baker, who, being the claimant, had the obligation to serve the defendant. He submitted that the concept of "reasonable efforts" is not a requirement of the CPR; it arose from decisions

in this jurisdiction. Therefore, it "has no independent standing or function in the assessment of the controlling criterion" in rule 5.14. Citing **BCIC v Barrett**, counsel acknowledged that what constitutes reasonable efforts by an insurer to contact its insured would vary depending on the peculiar facts of each case.

[74] He asserted, however, that the court should not expect an insurance company to take steps that are unrealistic or that surpass those taken by the claimant or should be taken by the claimant. It was his contention that the insurance company ought not to be saddled with a greater obligation than the claimant, whose duty it is to serve the defendant. The additional steps suggested by the learned judge were, therefore, unreasonable and fell outside the scope of Part 5.

[75] It was counsel's position that there was no evidence to show that GKGI would have any advantage in undertaking the service on the defendant. When the claim arose, GKGI no longer had a relationship with the defendant, and its records reflected the same residential address in Montpelier District for the defendant. Counsel emphasised that the uncontroverted evidence was that the defendant no longer lived at that address and had emigrated over a year prior to the claim being filed. His contact information, including his location outside this jurisdiction, is unknown. In light of this evidence, it was further contended that it is not likely that the defendant will be able to ascertain the contents of the claim documents through service on GKGI. Consequently, the substituted service order should be set aside.

[76] GKGI contended that the learned judge erred in her determination that the steps it took to bring the claim documents to the defendant's attention were inadequate. By refusing to set aside the order, she allowed constructive service in circumstances where the defendant was unaware of the proceedings, thereby rendering him vulnerable to a default judgment and enforcement proceedings. Counsel maintained that upholding the substituted service order in these circumstances was plainly wrong in law.

*Submissions on behalf of Mr Baker*

[77] It was argued that, on the contrary, the fact that GKGI had not contacted the defendant was not sufficient on its own to set aside the substituted service order. Mrs Crossbourne Onfroy submitted that in seeking to set it aside, GKGI must demonstrate that all reasonable efforts were made (the case of **BCIC v Barrett** was also cited in support). What amounts to "all reasonable efforts", she contended, turns on the facts of each case, and the court is entitled to its assessment of the various methods utilised to contact the defendant. The private investigator's affidavit demonstrated that GKGI had made progress in contacting individuals connected with the defendant, and the learned judge simply found that GKGI could have followed up on that. The additional steps recommended by the learned judge were intended to facilitate the location of the defendant, not to effect service by that method, which could not be said to be onerous. Therefore, having regard to the totality of the circumstances, the learned judge was not plainly wrong in concluding that GKGI did not make all reasonable efforts, she argued.

*Law and analysis*

[78] The defendant's insurance policy with GKGI was in effect for consecutive terms from 16 April 2014 to 19 April 2019. Therefore, the policy was in effect at the time of the accident on 20 March 2015, but by the time the action was filed in the court below, it had ceased to be in force. When GKGI was served with the notice of proceedings on 2 February 2021 (outside the requisite period of 10 days from the commencement of the proceedings as stipulated by section 18(2)(b) of the Act), approximately one year and nine months had passed since the termination of its policy with the defendant. Nevertheless, it took the following steps:

a) Emails were dispatched to the defendant on 3 February 2021 and 11 November 2021; however, no response was received.

b) Telephone calls were placed to the defendant on 15 March 2021, 22 June 2021, and 11 November 2021. On each occasion, the calls went unanswered, and voice messages were left.

c) Telephone calls were made to the defendant's references, Mr Noel Delisser and Mr Wendel Abrahams, on 22 June 2021. Calls to Mr Delisser's number went unanswered, and a recording indicated that his number was no longer assigned. Mr Abrahams stated that he had neither seen nor heard from the defendant for almost five years and did not possess any current contact information for him.

[79] Subsequently, GKGI was served on 29 November 2021 with the claim documents pursuant to the substituted service order, and escalated its efforts by hiring a private investigator three days after being served to locate the defendant and deliver the claim documents. The only address GKGI had for the defendant was the same Montpelier District address at which Mr Baker's process server attempted service.

[80] On 10 December 2021, the private investigator, Miss Zonya Wright-Henlan, went to Montpelier District. The defendant could not be found at his address. The premises was occupied by a tenant who was renting from the owner. That tenant did not know the defendant's whereabouts. The private investigator spoke with shopkeepers, taxi drivers, bar owners, as well as persons at a garage along the road and in a gated housing scheme in the area. According to a shopkeeper, the defendant had emigrated more than a year earlier. This information was independently confirmed by others in the community, including a resident of the adjoining property. The private investigator also received a telephone call from a female on a private number who appeared to be a relative of the defendant. She did not provide her name or any information about the defendant, but she confirmed that the defendant had emigrated over a year prior. She also indicated that she would pass on the private investigator's information to him. On account of its

inability to locate the defendant, GKGI filed its application to set aside the substituted service order approximately one month later.

[81] In her reasons for refusing the application, the learned judge concluded that she was "not satisfied that reasonable efforts were made to locate or contact the Defendant". The criterion of "reasonable efforts" was explored in the case of **BCIC v Barrett**, in which Brooks JA (as he then was) examined the question of whether the master in chambers erred in refusing an application by an insurer to set aside an order for specified service. The insurance company, BCIC, sought to set aside the order for specified service on the ground that it had made all reasonable efforts, without success, to contact its insured. The argument advanced before the learned master in that case was that since BCIC was unable to bring the claim to the attention of the intended defendant, Mr Ivor Ruddock, service on it would not be effective service, and so it should be set aside. As in the present case, the application to set aside and permission to appeal were refused by the learned master.

[82] The renewed application for leave to appeal before this court was also refused on the basis that it could not be said that the master was wrong in finding that BCIC had not made all reasonable efforts to contact Mr Ruddock. The factual circumstances of that case and the case at bar are distinguishable. **BCIC v Barrett** involved a claim for personal injuries due to a motor vehicle accident. By the time BCIC was served with the claim, Mr Ruddock was no longer insured under a current policy. BCIC attempted to contact him, without success. In assessing the prospects of success, this court noted that counsel for BCIC failed to particularise the efforts it made to locate Mr Ruddock, except for mentioning that they called the numbers they had on record and sent a letter to the work address on file, which was returned. There was, however, a residential address known to BCIC, but no letter was sent to that address. Neither was there evidence that BCIC visited the addresses on file in an effort to locate Mr Ruddock. Additionally, counsel for BCIC indicated that a private investigator was not retained, as it was too expensive.

[83] The distinctions between this case and **BCIC v Barrett** are unequivocally clear. The criticisms directed at BCIC are inapplicable in this instance since GKGI particularised its efforts, which included hiring a private investigator and visiting the defendant's known address. It cannot be said that GKGI's cumulative efforts equate to those of BCIC's.

[84] Moreover, taking this case on its own facts, Mr Baker's efforts to personally serve the defendant were limited to one visit to Montpelier District by his process server. GKGI, on the other hand, although relying on outdated information, undertook reasonable steps to locate the defendant, including making telephone calls to the defendant and his references, sending unacknowledged email communications, and retaining a private investigator to make enquiries in the Montpelier community concerning his whereabouts. It is not disputed (as observed by the learned judge) that the private investigator's efforts were seemingly limited to one day in the Montpelier community, but so were Mr Baker's efforts through his process server.

[85] With respect, it is difficult to see how additional attempts to contact Mr Delisser, as proposed by the learned judge, would have been of any practical utility, given the fact that his number was not simply unanswered but had been deactivated and was no longer assigned. Pursuing the person who had contacted the private investigator would also be improbable, as she did not provide her name or any contact information to facilitate further communication. The learned judge also recommended that further steps to ascertain the defendant's whereabouts, even after being advised that he had emigrated, were warranted, such as advertising in the local newspaper or following up with the tenant. I am, however, in agreement with Mr Cowan that it is the prerogative of the claimant to bring the claim to the attention of the defendant. Therefore, a heavier burden ought not to be imposed on the insurance company. Notwithstanding, in all the circumstances, GKGI acted with greater urgency and undertook more extensive steps to contact the defendant than Mr Baker did.

[86] I observed in the case of **Porter v Freudenberg**, that even where an order for substituted service within the jurisdiction was allowed (in respect of a defendant that was out of the jurisdiction) on an agent in the jurisdiction and on account of a concurrent writ to serve notice out of the jurisdiction, the obligation to employ other means of communication and/or to advertise was placed on the plaintiff.

[87] In the earlier case of **ICWI v Allen**, Morrison JA (as he then was) considered, among other things, "the efficacy of orders for substituted service made in the context of the insurer/insured relationship". That case similarly concerned a claim arising from a motor vehicle accident. The claimant obtained an order dispensing with personal service of the claim on the owner of one of the motor vehicles and for service to be effected on his insurer, ICWI. ICWI, having been duly served, applied for an extension of time within which to make an application to set aside that *ex parte* substituted service order, which was granted by a master of the Supreme Court; however, she refused to set aside the order.

[88] The uncontradicted evidence before the court was that ICWI was unable to locate or contact its insured and had no knowledge of his current address. Therefore, there was no evidence before the master that could satisfy the court that if the claim form was served on ICWI the insured "would in fact have been able to ascertain the contents of the documents, or that it was likely that he would have been able to do so, as the rules require in these circumstances" (para. [41]).

[89] Having earlier cited with approval the principle in the case of **Porter v Freudenberg** (per Lord Reading CJ) that a defendant is entitled to effective notice of the proceedings against him, Morrison JA observed that while there is a mechanism in the Act that provides for the recovery of damages awarded against insured persons directly from the insurer, upon the insurer receiving the notice of proceedings, "this is only possible where a judgment has been obtained against the insured person, who for

that purpose must necessarily have been served with the originating process, either personally or by way of substitution" (para. [29]).

[90] In my judgment, despite GKGI's reasonable efforts, the evidence before the learned judge at the *inter partes* hearing clearly demonstrated that GKGI was unable to locate or contact the defendant. I do not endeavour to establish the steps taken by GKGI as the benchmark for evaluating what constitutes "reasonable efforts". Each case must be determined on its own facts. In the circumstances of this case, once GKGI had proved that service on it was not likely to enable the defendant to ascertain the contents of the claim documents, in keeping with the overriding objective or criterion of justice, the presumption of "deemed good service" was rebutted. Accordingly, I found that there is also merit in the proposed grounds (a), (e), (f), (g), (h), (k), (s), (t), (u), (v), (w), (x) and (y), supporting the proposition that the substituted service order should be set aside.

Prejudice to the parties (grounds (a), (i), and (j))

*Submissions on behalf of GKGI*

[91] Mr Cowan acknowledged that if service on GKGI is set aside, the claim would be statute-barred, but GKGI would not be at fault for that consequence. He criticised the learned judge's finding that granting the application to set aside would be unjust on account of this factor since it was wholly or substantially due to Mr Baker's delay in pursuing his claim. The claim was initiated shortly before the expiration of the limitation period, and by the time the application for substituted service was filed, the limitation period had already expired.

[92] The contract between GKGI and the defendant expired in April 2019, and so GKGI had long been out of communication with him when the application for substituted service was heard and granted. Nevertheless, GKGI made efforts to contact the defendant, which included engaging a private investigator.

[93] Counsel submitted that the perceived delay in filing the affidavits in support of the application to set aside the substituted service order has no bearing on GKGI's inability to locate the defendant. It was Mr Baker's delay in filing the claim that exposed him to the risk of his claim being statute-barred. In the circumstances, he was duty-bound to attempt service or explore alternative methods of service swiftly. The consequence of Mr Baker's delay and inaction should not be visited on either GKGI or the defendant. The late service of the notice of proceedings on GKGI would also potentially expose the defendant, who has not been served, to any judgment obtained in default. The justice of the case, therefore, required the substituted service order to be set aside.

*Submission on behalf of Mr Baker*

[94] No submissions were advanced on Mr Baker's behalf on this issue.

*Law and analysis*

[95] As per GKGI's letter of 2 May 2016, Mr Baker had prior notice that GKGI and the defendant were not accepting liability for the accident, yet he commenced his claim approximately two months before the limitation period of six years would elapse. Even then, he had six months from the date the claim was issued to serve the defendant; otherwise, the claim form would cease to be valid (see rule 8.14 of the CPR). The claim form was set to expire on 14 July 2021; however, the time for service was extended by the learned master for six additional months to 14 January 2022 (as provided for by rule 8.15 of the CPR). If it were not for that extension, since the defendant was not personally served, the claim form would have expired, and the action would have been statute-barred. Having obtained a substituted service order and duly served GKGI before 14 January 2022, the claim subsisted. GKGI's application to set aside the substituted service order was filed on the last day of the extended period within which the claim could be served (that is, 14 January 2022). Accordingly, if the application to set aside the substituted service order were granted, the defendant would, in effect, be deemed not

to have been served. As a result, the claim would lapse, and Mr Baker would be precluded from commencing fresh proceedings, as any new claim would be statute-barred.

[96] In **Juliette Wright v Alfred Palmer and anor** [2021] JMCA Civ 32, the claim was filed shortly before the expiry of the limitation period, and it was not served on the defendants. Three days before the claim form expired, the claimant applied for an extension of the validity of the claim form and sought permission to serve the insurance company instead of personally serving the defendants. By the time the application was filed, the limitation period had expired. Edwards JA, addressing *obiter* the issue of prejudice, stated:

> "[77] Having filed the claim in 2019, almost six years after the cause of action accrued, it was incumbent on the appellant to move with due expedition. **Whilst there is no law or rule against a claimant waiting until the last minute of the limitation period to file a claim, or even waiting until the last possible moment to serve it, as all the authorities on this issue have been at pains to point out, they do so at their peril and must stand the consequence of that decision with fortitude** (see for instance the dictum of Smith LJ in [**Drury v British Broadcasting Corporation and another** [2007] All ER (D) 384] at paragraph 40).
>
> ...
>
> [80] Although it is not strictly necessary to comment on this aspect of the application, I will say that the prejudice to the 1st respondent and the insurance company of such an order at this stage, if this application is to be granted, is glaring. **For having filed a late claim and having allowed the claim form to expire**, the appellant now requires a court order extending the validity of the claim form for an unallowable period of 12 months in a single application, and **an order permitting her to serve it on the insurers, so that it becomes their duty to find the respondents. I can only question the efficacy and fairness in such a move since,**

> **if it is already known that the 1st respondent lives overseas, how is the court to accept that service on the insurance company will bring the matter to the attention of these respondents? There is no evidence that the 1st respondent still does business with the insurance company and that the insurance company has any greater knowledge of his whereabouts.** …" (Emphasis supplied)

[97] Brooks P added in agreement that:

> "[3] It is a classic example of the situation addressed by Harman LJ in **Baker v Bowketts Cakes Ltd** [1966] 1 WLR 861, when he said, in part, at page 867 (adapted for the purposes of this case):
>
> '…Now it is true that you may wait until the 364th day of the [last year of the limitation period] before issuing your [claim form] and until the [last day of the validity of the claim form] before serving it and you will still be in time. **But if you choose to wait until the last moment like that, you must be very careful to be right, and there is no reason why you should be given any further indulgence. The nearer you get to the last moment, the stricter ought to be the attitude of the court**…' " (Emphasis as in original)

[98] This point requires minimal elaboration, given the chronology of events outlined at para. [95] above. Mr Baker delayed the filing of the claim (by approximately five years and nine months), engaging the process server to serve the claim (in excess of one month after filing), seeking an order for substituted service (approximately two months after the unsuccessful visit to the defendant's residential address), and effecting service of the claim documents on GKGI (14 days after obtaining the substituted service order). At every step of the way, Mr Baker squandered the limited time he had to safeguard the validity of his claim. I rejected the notion that the substituted service order and consequential service on GKGI should remain to preserve his cause of action.

[99] If the substituted service order is upheld, then the service effected on GKGI would be deemed good service. In **Advantage General Insurance Company Limited v Yvette Gordon** (another case with similar facts), this court held that when the insurance company presented compelling evidence of its inability to notify its insured about the proceedings instituted against him, the "just" order or direction was to set aside the substituted service order. It was recognised that if the substituted service order remained, the intended defendant would be robbed of the protections afforded by the doctrine of natural justice since the case would proceed against him without his knowledge. Likewise, in this case, the effect of the learned judge's refusal to set aside the substituted service order is that the service effected on GKGI is deemed good service, and Mr Baker can proceed with his claim. Consequently, GKGI may be required to indemnify the defendant in respect of a judgment arising from a claim for which he was not afforded an opportunity to present a defence.

[100] The learned judge noted that GKGI received a report and the relevant statements and found that it was able to defend the claim upon being served. She noted the fact that GKGI did not contend that the defendant was in breach of the insurance policy or that it would deny indemnity under the said policy (distinguishing this case from **ICWI v Allen**). Essentially, she found that the termination of the contractual relationship between GKGI and the defendant did not automatically absolve it of its obligations under the insurance policy in effect at the time of the accident. She observed that adopting a contrary approach would enable defendants to evade liability by strategically switching insurance providers.

[101] In my view, the learned judge conflated GKGI's obligations under the insurance policy with Mr Baker's duty to bring notice of the proceedings to the defendant. In circumstances where GKGI (not itself a participant in the accident) was not a party to the claim nor an agent of the defendant (as pointed out by Mr Cowan), proceeding solely against it would be inconsistent with the proper administration of justice. Such a course

would not only be significantly prejudicial to insurance companies but would also potentially enable claimants to strategically effect substituted service on insurers, resulting in default judgments in unopposed claims unbeknownst to defendants. It appears that the learned judge did not adequately consider or balance the potential prejudice to GKGI and the defendant, who would have had no notice of the claim brought against him, against that of Mr Baker. I was, therefore, satisfied that the proposed grounds (a), (i), and (j) have a real chance of success.

**Conclusion**

[102] Having found that there is merit in the proposed grounds of appeal, it is beyond dispute that there was a real chance of the appeal succeeding, thereby justifying the grant of permission to appeal. The learned judge's exercise of her discretion to refuse the application to set aside the substituted service order was based on a misunderstanding of the law and the evidence, and in the circumstances of this case, was found to be demonstrably wrong.

[103] Moreover, in the absence of evidence to the contrary, it is accepted that the evidence before the learned master and the learned judge from Mr Baker and GKGI, respectively, was that the defendant was out of the jurisdiction by the time the claim was filed and remained out of the jurisdiction at the time of service on GKGI. This would mean that the court (having not granted a concurrent order for service out of the jurisdiction) lacked the jurisdiction to order substituted service on the defendant within the jurisdiction, rendering the substituted service order granted by the learned master void *ab initio* and, therefore, liable to be set aside by the learned judge.

[104] For the foregoing reasons, we treated the hearing of the application as the hearing of the appeal and made the order delineated at para. [4] above, which has now been partially revised and set out at para. [5] to accurately reflect this court's decision.

## Appendix

**"THE GROUNDS OF APPEAL ARE:-**

a) The Learned Judge erred as a matter of fact and/or law in her findings of fact and law as set out in paragraph 2 hereof.

b) The Learned Judge erred as a matter of fact and law in concluding that the evidence presented by the Respondent/Claimant in support of his ex parte application for substituted service of the Claim Form and Particulars of Claim on the Appellant/Applicant was sufficient to satisfy the requirement of Rule 5.14 (2) of the Civil Procedure Rules.

c) The Learned Judge erred as a matter of fact and law in concluding that the letter from the Appellant/Applicant to the Respondent/Claimant's Attorney-at-Law dated May 2, 2016 was sufficient to demonstrate the Defendant was likely to ascertain the contents of the Claim and Particulars of Claim by service of same on the Appellant/Applicant in November 2021.

d) The learned Judge failed to give any or any adequate consideration to the fact that the Appellant/Applicant's letter dated May 2, 2016 was written several years before the filing of the claim and the ex parte application and there was no evidence as to the Appellant/Applicant's relationship with the Defendant as at the time of the said application.

e) The Learned Judge failed to give any or any adequate consideration to the undisputed fact that the Appellant/Applicant did not have a subsisting contract of insurance with the Defendant and had not insured him since April 2019.

f) The Learned Judge erred as a matter of law in treating the existence of a contractual relationship between the insurer and insured at the time of the relevant accident in March 2015 as, *ipso facto,* satisfying the legal test of likelihood under Rule 5.14(2)(b) of the Civil Procedural Rules without due consideration of the status quo regarding the relationship between the parties and the whereabouts of

the Defendant as at November 2021 when the ex parte order for alternative service on the Appellant/Applicant was made and/or when the Claim Form and Particulars of Claim were served on the Appellant/Applicant.

g) The Learned Judge misdirected herself on the role, scope and application of the concept of "reasonable efforts", and in doing so failed to properly consider and/or address the legal test of likelihood under Rule 5.14(2)(b) of the Civil Procedure Rules and whether that test was satisfied with respect to the proposed method of service.

h) The Learned Judge erred as a matter of law in imposing a duty on the Applicant to effect service of the Claim Form and Particulars when no such duty existed, and in concluding that the Applicant could not be "absolved" of its legal duty if it could not demonstrate that it carried out all reasonable efforts as determined by the court. (Paragraphs [35] to [39] of the written reasons for judgment).

i) The Learned Judge erred as a matter of fact in concluding that the Appellant/Applicant was in a position to defend the claim at the time that it was served with the documents, and as a matter of law in failing to appreciate that the Appellant/Applicant's ability or lack thereof to defend the claim was not a relevant consideration in determining whether the ex parte order for alternative service on the Appellant/Applicant should stand or be set aside.

j) The learned Judge erred as a matter of law in conflating the Appellant/Applicant's contractual obligation as the Defendant's insurer at the time of the accident to grant indemnity, with the steps to be taken in relation to an order [for] alternative service, and in failing to appreciate that an insurer's obligation to grant indemnity is irrelevant to the question of whether an ex parte order for alternative service on the said insurer should stand or be set aside.

k) The Learned Judge erred as a matter of law in distinguishing this case from **Insurance [C]ompany of the West Indies v Shelton Allen and Ors** on the basis of facts immaterial to the germane issue highlighted in **Shelton Allen** as to

whether service on the Appellant/Applicant would likely enable the Defendant to ascertain the contents of the Claim Form and Particulars of Claim. (Paragraph [26] of the written reasons for judgment).

l) The Learned Judge erred as a matter [of] law in failing to consider or adequately consider the principle espoused in **Wilding v Bean** [1891] 1 Q.B. 100 that an order for substituted service (alternative service) within the jurisdiction ought not to be made in respect to a Defendant who is outside the jurisdiction at the time of the filing of the Claim and remains outside of the jurisdiction.

m) The learned Judge misapplied and/or misconstrued the principles from **Porter v Freudenberg** and erred as a matter of law in treating same as authority for a general proposition that substituted service in relation to a defendant who is outside the jurisdiction can be ordered on an agent of the defendant within the jurisdiction even in circumstances where the appropriate order for service out of the jurisdiction has not been obtained, and no conditions are required to be imposed. (Paragraphs [32] to [35] of her written reasons)

n) The learned Judge erred as a matter of law in conflating the issue of whether there was sufficient evidence to indicate that the Defendant was residing out of the jurisdiction with the issue of whether the Respondent/Claimant was in a position to make the relevant application under Rule 7.5 of the Civil Procedure Rules for permission to serve out of the jurisdiction, thereby erroneously determining that the principles enunciated in **Porter v Freudenberg** were not offended.

o) The Learned Judge failed to appreciate that once the Court is faced with credible facts which indicate that the person to be served is outside of the jurisdiction, an order for substituted service on a third party within the jurisdiction cannot lawfully be made unless permission is simultaneously granted for service out of the jurisdiction.

p) Given the credible evidence on both sides that the Defendant had migrated from the jurisdiction, the Learned Judge erred in failing to appreciate, that the fact that

the Respondent/Claimant may not have been in an evidentiary position to make a service out application, does not remove the requirement for such an application to be made.

q) The learned Judge failed to appreciate that it was incumbent upon the Respondent/Claimant and not the Appellant/Applicant to conduct the relevant checks and enquiries in a timely manner to ascertain the whereabouts of the Defendant so as to put himself in a position to make the relevant application to serve outside the jurisdiction under Rule 7.5 of the Civil Procedure Rules.

r) The Learned Judge misapplied the reasoning in **Porter v Freudenberg** in relation to substituted service on an agent of the party to be served within the jurisdiction, and thereby failed to appreciate that the existence of a relationship between the Appellant/Applicant and the Defendant at the time of the accident did not mean that the Appellant/Applicant was an agent of the Defendant within the jurisdiction for the purposed of service or at all.

s) The Learned Judge erred as a matter of law in imposing a greater obligation/duty on the Appellant/Applicant in relation to service on the Defendant, than on the Respondent/Claimant who is ultimately under a duty to effect service of the Claim Form and Particulars of Claim on the Defendant.

t) The learned Judge failed to give any or any adequate consideration to the fact that the Appellant/Applicant's information as to the Defendant's last known address was the same as Claimant/Respondent's.

u) The Learned Judge erred in failing to consider that the additional steps of (1) doing an advertisement locally and (2) following up with the tenant at the Defendant's last known address which she deemed necessary to be taken by the Appellant/Applicant in locating or contacting the Defendant, would in effect require the Appellant/Applicant to undertake service of the Defendant by other alternative methods of service in the absence of any evidence as to the likelihood that those

additional steps would bring the contents of the Claim Form and Particulars of Claim to the attention of the Defendant.

v) The Learned Judge erred in and misdirected herself in her assessment of the Applicant's efforts to contact and/or obtain current contact information for the Defendant.

w) The learned judge erred in concluding that the contents of the Claim Form and Particulars of Claim was likely to come to the attention of the Defendant by service on the Appellant/Applicant when the evidence demonstrated that the Appellant/Applicant itself had no direct knowledge as to the Defendant's whereabouts.

x) The learned judge's decision that the Appellant/Applicant had not taken all reasonable steps to contact the Defendant and bring the contents of the Claim form and Particulars of Claim to his attention was unsupported by the evidence and plainly wrong in fact and in law.

y) The learned judge erred in permitting the ex parte Order and alternative service on the Appellant/Applicant to stand when the evidence demonstrated that the Appellant/Applicant was unable to bring the contents of the Claim Form and Particulars of Claim to the Defendant's attention.