BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 0612 of 2016

BETWEEN:

COREY VAUGHN **CLAIMANT**

AND

GREGORY DAWE **DEFENDANT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 21 September 2017

Ms. Zahidha James for the Claimant.

DECISION

INTRODUCTION

[1] This is a without notice application by the claimant for an extension of time within which to serve his claim form on the defendant. The application was filed on 26 April 2017 and is made pursuant to ***Part 8.11*** of the ***Supreme Court (Civil Procedure) Rules, 2008 (the CPR)***.

[2] The grounds of the application are expressed on the notice of application as follows:

1. That in accordance with CPR Parts 8.11(1) (2) and (3) the Claimant has taken all reasonable steps to trace the Defendant and serve the Claim Form but has been unable to effect service.

2. That despite the best efforts of the Claimant's process server, the Defendant cannot be found to effect service and the period for serving the Claim Form, pursuant to Part 8.10(1) of the CPR will expire on the 28th day of April 2017.

3. The Claimant therefore requires additional time to locate and serve the Defendant.

THE CLAIM

[3] The claim to which the application relates is one for damages for personal injuries, loss and damage which the claimant asserts to have been caused by the negligent driving of a motor vehicle on 5 May 2013 by the defendant. The claim form was filed on 29 April 2016.

THE PROCEDURAL RULES

[4] I will now set out the provisions of the ***CPR*** which relate to the application and make some preliminary comments on them.

[5] The central provisions are those relating to the time within which a claim form may be served. These are ***CPR 8.10*** and ***8.11***. They provide:

> **8.10** (1) The general rule is that a claim form may only be served within twelve months after the date when it was issued.
>
> (2) ...

> **8.11** (1) The claimant may apply for an order extending the period within which the claim form may be served.
>
> (2) Save in special circumstances, an application under sub-rule (1) must be made within the period for serving the claim form specified by rule 8.10, or within the period of a previous extension by the court.
>
> (3) Save in special circumstances, the court may make such an order only if it is satisfied that the claimant has taken all reasonable steps
>
> (i) to trace the defendant, and
>
> (ii) to serve the claim form,
>
> but has been unable to effect service.
>
> ...

[6] Recently, in ***Best v Greaves High Court Suit No. 1866 of 2014 (date of decision, 22 June 2017)*** at paragraphs 20 to 22, I summarised those provisions in this way:

> [20] ***CPR 8.10(1)*** … sets the period for service of a claim form as twelve months after the date of issue.
>
> [21] ***CPR 8.11(2)*** regulates the filing of extension applications. It requires that, save in "special circumstances", the application be filed within the allotted period of twelve months after the date of issue of the claim form, or within the period of a previous extension.
>
> [22] ***CPR 8.11(3)*** sets out the conditions for the grant of an extension order. It provides, in effect, that save in "special circumstances", a court may not make an extension order unless satisfied that the claimant has taken all reasonable

> steps to trace the defendant, and to serve the claim form but has been unable to do so.

[7] I ought to have expressed the first sentence in paragraph [22] of ***Best*** more precisely. That sentence may suggest that once the ***8.11(3)*** conditions are satisfied, the grant of the order is automatic. That is not so. ***CPR 8.11(3)*** sets out certain conditions in the absence of which the court may not go on to consider further whether it ought to make an extension order. As I went on to state at paragraph 43 in ***Best***:

> If the ***CPR 8.11(3)*** conditions are satisfied, a court must then determine whether to exercise its discretion to extend time. In exercising that discretion, a court is required by ***CPR 1.2*** to have regard to the overriding objective, the general thrust of which is to deal with cases justly, as set out in ***CPR 1.1(1)***. ***CPR 1.1(2)*** provides a non-exhaustive list of factors that are included in dealing justly with a case. The open-ended nature of that list leaves a court positioned to take account of any factor that may be relevant in the particular circumstances in the quest to secure a just outcome. Whether or not a limitation period has expired may well be an example of one such factor.

[8] An understanding of the various means by which a claim form may be served is required later. The related procedural rules are set out in ***CPR 5***. ***CPR 5.1(1)*** states that "[t]he general rule is that a claim form may be served personally on each defendant". ***CPR 5.13(1)*** provides that "[i]nstead of personal service a claimant may choose an alternative method of service." ***CPR 5.13(2)*** requires a claimant who adopts an alternative method to prove that the method was

sufficient to enable the defendant to ascertain the contents of the claim form, if the court is asked to take any step on the basis that the claim form has been served. ***CPR 5.14*** empowers a court to direct that a claim form be served by a method specified in its order. This is commonly referred to as service by a specified method.

WHAT MUST THE CLAIMANT SHOW?

[9] I turn next to consider what is required of the claimant if his application is to succeed. No issue arises under ***CPR 8.11(2)***. The claimant filed the application within the prescribed period of time. However, ***CPR 8.11(3)*** is centrally important. This requires the claimant to establish that he has taken all reasonable steps to trace the defendant and serve the claim form, and that he has been unable to do so. Failing that, the court must be satisfied that "special circumstances" exist such as to enable the court to go on to consider whether to grant the order.

[10] I essayed an opinion as to the meaning of the term "special circumstances" as it appears in ***CPR 8.11(3)*** in ***Best*** and in ***Smith v Taylor et al High Court Suit No. 1262 of 2010 (date of decision, 25 September 2014)***. A summary of what I set out at paragraphs 30 to 32 in ***Best*** follows:

> (1) The term "special circumstances" suggests a requirement for circumstances that are special, exceptional or peculiar.

(2) "Special circumstances" for the purposes of CPR 8.11(2) and 8.11(3) should be such as would render it unjust not to depart from the rule of general application; and the non-application of the general rule must be justified by reference to the special circumstances.

(3) The scope of the term "special circumstances" must be circumscribed by the context in which the term appears. Hence:

(a) for the purposes of CPR 8.11(2), the "special circumstances" must be confined to circumstances which satisfactorily explain the failure to make a timely application; and

(b) for the purposes of CPR 8.11(3), the term must be limited to circumstances which would justify the grant of an extension order despite the failure to take all reasonable steps to trace the defendant and serve the claim form. The proffered circumstances should satisfactorily explain the failure to trace and serve.

[11] The first sentence in paragraph 3(b) of the above summary is in need of some refinement. In formulating it, I overreached in my consideration of what comprises the general rule in ***CPR 8.11(3)***. The general rule in that provision is that the court **may *only*** grant the order if the claimant has taken all reasonable steps to trace the defendant and serve the claim form but has been unable to do so.

[12] Hence, "special circumstances" for the purposes of that provision ought to be limited to circumstances that satisfactorily explain why the claimant failed to

take all reasonable steps to trace the defendant and serve the claim form, or to serve the claim form if he was able to do so. I would therefore reformulate proposition (3)(b) to read:

> For the purposes of CPR 8.11(3), the "special circumstances" must be confined to circumstances which satisfactorily explain the failure to take all reasonable steps to trace the defendant and serve the claim form, or, the failure to serve the defendant despite being able to do so.

[13] As I stated at paragraph [7] above, if the ***CPR 8.11(3)*** hurdle is surmounted, the court must go on to determine how to exercise its discretion. It is at that stage that the court ought to consider any other factors that would justify the grant of the extension order.

THE EVIDENCE

[14] Against the above backdrop, I will now set out the evidence adduced in support of the application. Ms. Zahidha James who appeared for the claimant swore two affidavits. There was the additional affidavit of Ms. Cartena Mayers, a court process server.

(i) *the evidence of Ms. James*

[15] Ms. James deposed that notice of the proceedings was served on the defendant's insurer on 3 May 2016. She stated that the matter had been passed to her by her associate Mrs. Cyrillene Thomas-Mascoll who had informed her that the claimant "was struggling financially and it was difficult to make any

applications as [he] could not afford to pay". She asserts that she was also informed by Ms. Mascoll "that discussions had been taking place with the Defendant's ... insurers throughout the past year but that they had not yet reached a final settlement."

[16] Ms. James deposed further that she had attempted to notify the defendant's insurers of this application but that they had refused to accept the documents. Her evidence is that she was later informed by the insurer's counsel Ms. Nicole Roachford that they had been unable to locate the defendant.

[17] Counsel's additional evidence is that she assumed conduct of the matter in "early March 2017" and that she immediately instructed Ms. Mayers to serve the claim form. She continued at paragraphs 5 to 7 of her second affidavit in this way:

> 5. Generally, I had put off making any applications either for alternative service or permission to extend the time for service because I was aware that the Defendant had limited financial means. Eventually, as time was running out for service, I chose to bring this application almost entirely at my own cost.
>
> 6. In terms of the type of application, I had surmised that an application under the Civil Procedure Rules (CPR) 8.11 was the most practical both in terms of costs and feasibility. An application to advertise for example would be more costly overall and applications for substituted / alternative service in general seemed unlikely to bring a result as we had no information whatsoever as to whom, where or how we could serve in an alternative to personal service. It seemed to me that an application to extend the time for service would allow

us more time to investigate the whereabouts of the Defendant and/or an alternative means of finding him.

7. Finally, we the lawyers were taken quite by surprise by the Defendant's disappearance as there was every indication that the Defendant was rooted at the residence stated in the Claim Form. Even a police report obtained a year after the accident, was consistent with the information that he lived at the named Licorish Village My Lord's Hill. From the process server's account it seems that the Defendant started to move around after the death of his mother. … It is possible from [Ms. Mayer's] account that he has moved overseas.

The evidence of Ms. Mayers

[18] Ms. Mayers deposed as to her unsuccessful efforts to locate the defendant. A summary of her evidence follows:-

Early in March 2017, Ms. James asked her to serve the claim form on the defendant, whose address she was given as "Licorish Village My Lord's Hill". She telephoned someone whom she knew from that area and was informed that the defendant previously lived with his mother but had left the area subsequent to the latter's death. She visited the My Lord's Hill area and located the house in which the defendant used to reside. She was informed by a male occupant that the defendant no longer lived there and might now be living "somewhere out Brittons Hill". She then made inquiries of postal workers and others but was unable to trace the defendant to any location in Brittons Hill or in the My Lords Hill area. She also

communicated with a relative of the defendant on the social media website Facebook to no avail.

SUBMISSIONS AND DISCUSSION

[19] Ms. James filed written submissions which she amplified at the hearing. She presented her arguments with fervour, tenacity and conviction. In her written submissions, Counsel urged that:

(i) the claimant had taken all reasonable steps to trace the defendant and serve the claim form but was unable to do so;

(ii) alternative methods of service were not available to the claimant;

(iii) a claimant should not be "faulted for attempting to serve a defendant personally before seeking alternative methods of service";

(iv) it was open to the claimant to apply "to substitute service, use alternative service, dispense with service or extend service" and he chose the latter;

(v) the court ought to consider the financial constraints faced by the claimant in considering whether he ought to have utilised an alternative method of service; and

(vi) given the overriding objective, the court should be mindful of the fact that it would be prejudicial to the claimant not to allow the extension and that the defendant would bear no personal liability as his insurers have been notified of the claim and are negotiating a settlement.

[20] Ms. James referred me to ***Herbert v Spencer, suit no. 0391 of 2016, High Court of Antigua*** (***date of decision***, ***26 January 2016***) (***Herbert***) and ***Imperial Cancer Research et al v Ove Arup & Partners Limited et. al. [2009] EWHC 1453 (TCC)*** (***date of decision***, ***23 June 2009***) (***Imperial Cancer Research***) during the course of her arguments. I am constrained to state that these are foreign cases decided in respect of procedural rules that are not identical to ***CPR 8.11***. They must be approached with caution and great care taken in determining if, or how, to transplant any principles they espouse to this jurisdiction.

[21] ***Imperial Cancer Research*** is a decision of the High Court of England and Wales. It relates to ***rule 7.6*** of the ***Civil Procedure Rules 1998*** of that jurisdiction (***ECPR***). That rule differs markedly in structure and content from ***CPR 8.11***. Yet, Ms. James relied heavily on this case in her written submissions. In particular, she referred to certain criteria identified by Ramsey J at paragraph 9 of that decision.

[22] Before turning to those criteria, it is instructive to set out the procedural rules which Ramsey J considered as he sought to provide general guidance on the approach of the courts to an extension application in England and Wales. ***ECPR*** 7.5 provided a four-month period for the service of claim forms within the jurisdiction. ***ECPR*** 7.6 read:

> (1) The claimant may apply for an order extending the period for compliance with rule 7.5.
>
> (2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made-
>
> (a) within the period specified by rule 7.5; or
> (b) where an order has been made under this rule, within the period for service specified by that order.
>
> (3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if-
>
> (a) the court has failed to serve the claim form; or
> (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
> (c) in either case, the claimant has acted promptly in making the application.

[23] Having identified ***Hashtroodi v Hancock [2004] 1 WLR 3206***; ***Steele v Mooney [2005] 2 All ER 256***; ***Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806*** and ***Collier v Williams [2006] EWCA Civ 20***, at paragraph

8, as appellate decisions in which "the proper approach" to an extension application had been considered, Ramsey J went on at paragraph 9 to state:

> These decisions obviously depend on the particular facts but contain some general guidance on the approach of the courts...
>
> (1) The general rule is that a Claim Form must be served within 4 months after date of issue: CPR 7.5(1);
>
> (2) In relation to an application under CPR 7.6(2), that rule does not impose any threshold condition on the right to apply for an extension of time. The discretion to extend time should be exercised in accordance with the overriding objective identified in CPR 1.1: Hashtroodi at [17], [18] and [19].
>
> (3) In order to deal with an application under CPR 7.6(2) justly it will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period: Hashtroodi at [22].
>
> (4) The preconditions in CPR 7.6(3) do not apply to 7.6(2) but those requirements will always be relevant to the exercise of discretion on an application under CPR 7.6(2) but the fact that the conditions are not satisfied is not necessarily determinative of the outcome of a CPR 7.6(2) application: Collier at [87];
>
> (5) The matters which the Court may take into account include the following in relation to the reason why the Claimant has not served the claim form within the specified period:
>
> (a) Whether the claim has become statute barred since the date on which the claim form was issued is a matter of considerable importance.
> Where there is doubt as to whether a claim has become time-barred since the date on which the claim form was issued, it is not appropriate to seek to resolve the issue on an application to extend the time for service or an application to set aside an extension of time for service.

> In such a case, the approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service: Hashtroodi at [18] citing Zuckerman on Civil Procedure (2003) at paragraph 4.121; Hoddinott at [52].
>
> Where the application is made before the end of the four month period the fact that the claim is clearly not yet statute barred is a relevant consideration: Hoddinott at [52], [53].
>
> (b) Whether before the expiry of the four month period the nature of the claim was brought to the attention of the defendant: Hoddinott at [57].
>
> (c) Whether a party was in a position where it could not determine whether the claim had real prospects of success and could not responsibly proceed against the defendant without an expert report which was delayed awaiting a response to proper requests for information from the defendant's solicitors: Steele at [33].

[24] A comparative analysis of ***CPR 8.10*** and ***8.11*** on the one hand, and **ECPR 7.5** and ***7.6*** readily demonstrates why that approach cannot guide us in this jurisdiction. At paragraphs 24 and 25 in ***Smith***, I offered the following comparison:

> Like the CPR, [ECPR 7.6] stipulates a general time limit for the making of extension applications. However, unlike the case in Barbados where it is left to the court to determine whether [special circumstances] exist such as to allow for a circumvention of the time bar, the ECPR expressly set out the conditions that must exist before a court can grant an order on an application filed out of time. Interestingly, those conditions appear to include, at Part 7.6(3)(b), those which the Barbados code stipulates, at CPR 8.11(3)(i) and (ii)

> as being conditional to the grant of an order, regardless of when the application was filed.
>
> This leads to another fundamental difference between the Barbados and English codes. Unlike the case in Barbados, the English provision sets out no general conditions that are applicable to the grant of orders where an application is made in a timely manner. Hence, in such cases, applications are left entirely to the discretion of the court.

[25] It is incumbent on our courts to determine the approach that is appropriate in this jurisdiction having due regard to ***CPR 8.10*** and the structure and content of ***CPR 8.11***. It seems to me that our criteria and roadmap ought to be as follows:

> (1) the general rule is that a claim form must be served within 12 months after the date of issue (***CPR 8.10(1)***)
>
> (2) Save in "special circumstances", the hearing of the application can only proceed if the application was filed within the twelve-month period allotted for service or the period of any extension granted by the court. (***CPR 8.11(2)***)
>
> (3) To constitute "special circumstances" for the purposes of ***CPR 8.11(2)*** the factors relied on should satisfactorily explain the failure to file within the prescribed time. (***Paragraph 10 above)***
>
> (4) Save in special circumstances, the court may not grant an extension order unless it is satisfied that the claimant has taken all

reasonable steps to trace the defendant and serve the claim form but has been unable to do so. (***CPR 8.11(3)***).

(5) To constitute special circumstances for the purposes of ***CPR 8.11(3)*** the factors relied on should satisfactorily explain the claimant's failure to take all reasonable steps to trace the defendant and serve the claim form, or to serve it if he was able to do so. (***Paragraphs 10 to 12 above***).

(6) If the court is satisfied that the claimant has taken all reasonable steps to trace the defendant and serve the claim form but has been unable to do so, or that there are special circumstances which justify his failure to have done so, it may then determine whether to exercise its discretion in favour of the application.

(7) In determining how to exercise its discretion, the court must do so in accordance with the overriding objective, taking account of the factors set out in ***CPR 1.2***, so far as is practicable, and any other relevant factor.

[26] While some of the factors mentioned by Ramsey J in ***Imperial Cancer Research*** may well be relevant in an application before our courts, the stage at which they ought to be considered must be determined in accordance with

the structure and provisions of ***CPR 8.11(3)***. Generally, I considered Counsel's sweeping reliance on that case to be unhelpful.

[27] I turn now to ***Herbert***. That case was determined by reference to ***Part 8.13*** of the ***Eastern Caribbean Supreme Court Civil Procedure Rules 2000***. That rule bears greater similarity to ***CPR 8.11*** but the two rules are not identical. It is in these terms:

> (1) The claimant may apply for an order extending the period within which a claim form may be served.
>
> (2) ...
>
> (3) An application under paragraph (1) -
>
> (a) must be made within the period –
>
> (i) for serving a claim form specified by rule 8.12; or
>
> (ii) of any subsequent extension permitted by the court; and
>
> (b) ...
>
> (4) The court may make an order under paragraph (1) only if it is satisfied that –
>
> (a) the claimant has taken all reasonable steps –
>
> (i) to trace the defendant; and
> (ii) serve the claim form,
>
> but has been unable to do so; or
>
> (b) there is some other special reason for extending the period.

....

[28] ***Herbert*** involved an application to set aside an extension order. The application failed. At paragraph 33, Glasgow M determined that the issue before him was "whether the respondent [had] presented a good reason for the request to extend time to serve the claim form". At paragraph 35, he found that the respondent had taken reasonable steps to serve the applicant personally. He went on at paragraphs 35 to 37 to consider a variety of factors in determining that he would refuse the application to set aside the extension order.

[29] At paragraph 35, Glasgow M indicated that he had approached the matter as advised by the Court of Appeal of the Eastern Caribbean Supreme Court in ***Steinberg et al v Swisstor & Co et al BVIHCVAP 2011/0012***, ***12 March 2012*** and based on what he had "[gleaned] from the learning in Hashtroodi". I have commented already on the need for caution with English authorities. Having perused ***Steinberg***, I have found nothing in it to persuade me that the approach I have articulated at paragraph 25 ought to be revised or reconfigured.

[30] Keeping in mind the principles and approach I have set out, I will now consider whether it can be said that the claimant took all reasonable steps to trace the defendant and serve the claim form, but was unable to do so. This ***CPR 8.11(3)*** requirement is a fairly stringent one to the extent that it requires

a claimant to take "***all*** reasonable steps". However, a claimant is only required to take such steps as are "***reasonable***". He, or she, is not required to take all possible steps. Describing the like condition in ***ECPR 7.6(3)(b)***, Thorpe LJ noted in ***Nanglegan v Royal Free Hampstead NHS Trust [2002] 1 WLR 1043***, at paragraph 16:

> That rule is clearly intended to cover cases where the person endeavouring to effect service has taken all reasonable steps, but his reasonable efforts have been frustrated by some near insuperable difficulty or obstacle.

[31] Counsel sought to make some comparison of the efforts at service made by the claimant in this case and those made by the respondent in ***Herbert***. She referred to paragraphs 35 and 36 of that case as evincing a "definition" of "reasonable steps". Her aim was to persuade me that since Glasgow M had found the efforts made in ***Herbert*** to be "reasonable", I should do likewise in this case.

[32] ***Herbert*** is not helpful in any respect. It contains no definition of the term "reasonable steps". On the facts before him, Glasgow M was satisfied that the respondent had taken reasonable steps to find the applicant and serve her personally. I must assess the evidence before me and determine if the claimant took all reasonable steps to locate the defendant and serve the claim form but was unable to do so. Nothing in ***CPR 8.11(3)*** limits the consideration to any particular type of service.

[33] This obvious approach and the test it requires have been expressed by Smith LJ in ***Carnegie v Drury [2007] EWCA Civ 497*** (***Carnegie***) at paragraph 37 in this way:

> It seems to me that the right approach is to consider what steps were taken in the [relevant period] and then to ask whether, in the circumstances, those steps were all that it was reasonable for the claimant to have taken. The test must, in my view, be objective; the test is not whether the claimant believed that what he had done was reasonable. Rather it is whether what the claimant had done was objectively reasonable, given the circumstances that prevailed.

[34] It is a striking feature of this case that after the issue of the claim form, a considerable period of time elapsed before the claimant attempted to locate and serve the defendant. The claim form was filed on 29 April 2016. Attempts at service only started in March 2017. The claimant was inactive for approximately ten out of the twelve months afforded him for service by ***CPR 8.10***.

[35] At paragraph 58 of ***Best***, I cited with approval a passage found at ***Zuckerman, Civil Procedure, 3rd ed. paragraph 5.97*** which I accepted to be the law in this jurisdiction. The general proposition it espouses was also applied by Wallace J (Ag) in ***Williams v Chang and Surrey Paving and Aggregate Co. Ltd., High Court of St. Kitts and Nevis***, ***(date of decision, 10 October 2012).*** The passage reads:

> The question of whether the claimant has taken all reasonable steps to serve the claim form must be judged by reference to the entire

> period for service. Much will therefore depend on the reasonableness of periods of inactivity as well as on the active steps taken. A claimant who sits back for most of the period and springs into action only close to the end of the service period would not normally be considered to have taken all reasonable steps, even if what he has done at the last moment was in itself reasonable.

[36] For what it is worth, in ***Carnegie***, Smith LJ underscores this point and reminds of the hazards of inactivity in this way, at paragraph 40:

> A litigant is entitled to make use of every day allowed by the rules for the service of a claim form. But it is well known that hitches can be encountered when trying to effect service. A litigant who leaves his efforts at service to the last moment and then fails due to an unexpected problem is very unlikely to persuade the court that he has taken all reasonable steps to serve the claim in time. … A litigant who delays until the last minute does so at his peril.

[37] Ms. James took issue with the proposition expressed in ***Zuckerman***. She noted that the ***CPR*** impose no obligation on a claimant to commence efforts at service at any particular time during the general period for service. Hence, she urged, what is important is the reasonableness of the steps taken by a claimant when he or she decides to attempt service rathe r than the time at or over which that attempt is made.

[38] I disagree with this submission. ***CPR 8.11(3)*** requires the claimant to have taken "all reasonable steps" to serve the claim form. I do not see how a claimant can be said to have done so having frittered away a significant part of the period allowed for service, thereby limiting his efforts to a small

fraction of that time. Consequently, I find that the claimant did not take all reasonable steps to locate the defendant and serve the claim form.

[39] Before going on to consider whether special circumstances exist for the purposes of ***CPR 8.11(3)***, I will comment on an aspect of Counsel's submissions in relation to the claimant's failure to exploit any avenues for service other than personal service. It involves a point of law and was fully argued by Counsel.

[40] Ms. James submitted that a claimant is not required to endeavour to exploit alternative methods of service in order to satisfy a court that he has taken all reasonable steps to serve a claim form. Counsel cited ***Herbert*** in support of this submission. In particular, she referred me to paragraph 37 of that decision where Glasgow M stated:

> In respect of the complaint that the respondent failed to put before this court the fact that the applicant is an attorney at law who could be reached by email and the criticism that the respondent did not utilize an alternative method of service, I do not see how these arguments assist the applicant in the face of the finding that the respondent had good reasons for seeking the extension of time. ... Having filed the claim, he should not be faulted for seeking to find the applicant to serve the claim personally before considering alternative means of service. … His efforts to serve personally having proven futile, it was not unreasonable for him to approach the court to seek to extend the time to serve the claim and to pursue service of the same on her. …

[41] I derived no assistance from this passage. Glasgow M attempted no statement of principle on the issue at hand. Rather, he dismissed the criticism that the

respondent had not utilised alternative methods of service as unhelpful to the applicant, given his finding that the respondent had good reason to seek the extension of time. That is not a permissible approach under ***CPR 8.11(3)***. Whether the applicant has good reasons for seeking the extension of time is not relevant at this stage.

[42] In ***Daniel et al v Mohammed, High Court of Trinidad and Tobago*** (***date of decision***, ***23 May 2007***) Jamadar J considered this issue by reference to ***Part 8.14(3)*** of the ***Civil Procedure Rules 1998 of Trinidad and Tobago*** (***CPRTT***). That rule incorporates a "reasonable steps" requirement identical to that contained in ***CPR 8.11(3)***. Having noted that the claimants had not availed themselves of any other method of service available under ***CPRTT Part 5***, Jamadar J stated on page 3:

> In my opinion, this Court cannot be satisfied that the claimant took all reasonable steps to serve the claim form, when after being informed of the times the defendant left and returned to his residence they never made any further attempts to serve him personally in light of this knowledge, and when no attempt has been made to use an alternative method of service other than personal service by which to serve the claim form [Part 5.10], and also when no attempt has been made to get an order for service by a specified method [Part 5.12].

[43] Clearly, Jamadar J relied on the claimant's failure to exploit the potential for alternatives to personal service as one of the grounds on which he concluded that the claimant had not taken all reasonable steps to serve the claim form.

However, I discern no general principle in ***Daniel*** that a failure to explore alternatives to personal service must axiomatically have such a consequence.

[44] I do not think that any such general rule exists. In determining whether a claimant has taken all reasonable steps to trace and serve a defendant but has been unable to do so, a court must consider whether it would have been reasonable in the circumstances of the particular case for the claimant to have explored alternative methods of service.

[45] I will now consider whether "special circumstances" can be said to exist for the purposes of ***CPR 8.11(3)***. Is there anything that satisfactorily explains the claimant's failure to take all reasonable steps to trace the defendant and serve him? Two factors mentioned in Ms. James' submissions appear to merit consideration. These are (i) his alleged financial standing; and (ii) the existence of ongoing negotiations with the defendant's insurers.

[46] The first factor raises a question of principle as to whether a court can take account of a claimant's financial capacity in determining whether he has taken all reasonable steps for the purposes of ***CPR 8.11(3)***. Counsel did not fully address this issue in her submissions and this Court would prefer to have the benefit of greater discussion on it before essaying an opinion.

[47] In any event, I am not satisfied that there was adequate evidence from which I could conclude that the claimant is impecunious, or that he was unable to

finance the service of the claim form by any particular means. Ms. James' evidence is that she was told by Ms. Thomas-Mascoll that the claimant was "struggling financially" and that it was difficult to make any applications as he could not afford to pay.

[48] This second-hand hearsay evidence is not sufficiently probative. I would have expected a claim of this nature to be buttressed by documentary proof relating to the claimant's income and expenditure and an indication of the costs of the services which it is claimed he could not afford. The absence of evidence of that nature leaves a court (in the words of Morrison J) "to graft figures upon airy nothing".

[49] Furthermore, there is no assertion that the claimant was unable to finance the personal service of the claim form. It is clear from the evidence that he attempted personal service late in the day. References to his financial ability provide no explanation as to why there was no effort at service for nine months after the issue of the claim form.

[50] This brings me to consider whether the existence of negotiations between the claimant's Counsel and the defendant's insurer ought to constitute special circumstances for the purposes of ***CPR 8.11(3)***. Ms. James sought to draw some support from ***Imperial Cancer Research*** for her contention that delay

in such a circumstance ought not to preclude the claimant from obtaining the order sought.

[51] I have demonstrated already that ***Imperial Cancer Research*** did not involve consideration of a ***CPR 8.11(3)***-like rule. In that case, the court had to determine whether the discretion to grant the extension order under ***ECPR 7.6(2)*** had been properly exercised. The court held that the order was properly granted. One of the primary reasons for this conclusion was the court's satisfaction that the claimants had demonstrated a good reason for their failure to serve the claim form.

[52] Perhaps, some further details might be instructive. The claim in ***Imperial Cancer Research*** arose from allegations of water egress into the claimants' building. The defendants had carried out engineering and design services in relation to the construction of the building and had done a geotechnical study which reported that there were no surface water issues. To determine the cause of, and responsibility for, the flooding and assess the viability of the claim, the claimants' solicitor had to await an expert report. The expert's investigations involved excavation to view the construction of the building and an examination of the plans of the building. These were in the defendant's possession and, though requested by the claimants' solicitors before the issuance of the claim form, were only obtained by them after the general

period allotted for service of the claim form. Against that background, Ramsay J endorsed the approach adopted by the claimants' solicitors in delaying service. He stated at paragraph 43(6):

> I consider that … the claimants' solicitors behaved sensibly and responsibly in not wishing to serve the claim form until they were in a position where they knew whether they had a viable particularised claim against a particular party.

[53] It may well be that the facts in ***Imperial Cancer Research*** provide an example of factors that may constitute special circumstances for the purposes of ***CPR 8.11(3).*** I do not have to decide that. This is a simple case of failure to serve while negotiations were in progress.

[54] Traditionally, courts have rejected the existence of negotiations alone as a sufficiently good reason for not serving originating documents in a timely manner. The general approach was tersely expressed by Denning MR, as he then was, in ***Easy v Universal Anchorage Co Ltd [1974] 2 All ER 1105, 1107***, at paragraph g. He stated there that "[n]egotiations for a settlement do not afford any excuse for failing to serve a writ in time or to renew it."

[55] Lord Denning was quoted with approval in ***The Mouna [1991] 2 Lloyds Rep 221***, a decision which went on to acknowledge that where there is an agreement between the parties that service should be deferred, the result would be different. That position is also expressed at ***paragraph 6/8/6*** of the ***Supreme Court Practice 1999***, ***Vol. 1*** where the editors provided a list of

reasons considered to be an insufficient explanation for the failure to serve a claim form. They state:

> (a) … In the absence of an actual agreement that service be deferred, it is both incorrect and dangerous to defer service in the hope that negotiations will succeed; too often the writ is forgotten until after the limitation period has elapsed; offers may be withdrawn and the plaintiff left without remedy save against his solicitors (see the Mouna [1991] 2 Lloyd's Rep 221.)

[56] I am mindful that those principles were developed and applied within a procedural framework that predated and differed from that contained in ***CPR 8.11***. However, it seems to me that ***CPR 8.11*** was not intended to relax the strictness of the procedural rules relating to extension orders. It would be surprising therefore if the settled principle that rendered negotiations without more an insufficiently good reason for the failure to serve a writ timeously could metamorphose under ***the CPR*** into a rule of opposite effect.

[57] The rationale underlying the old principles remains as valid today as it was yesterday. Negotiations in respect of potential claims are a common feature of life. They sometimes break down for various reasons. Sometimes offers are withdrawn or remain unfulfilled. A claimant must be ever mindful of that possibility and do what is required to protect his legal rights. While the position of a claimant who defers service pursuant to an agreement might well be different, the existence of negotiations without more does not constitute special circumstances for the purposes of ***CPR 8.11(3)***.

DISPOSAL

[58] This Court is not satisfied that the claimant took all reasonable steps to trace the defendant and serve the claim form but was unable to do so, nor that there are any special circumstances justifying the grant of the order despite this failure. In the circumstances, it can proceed no further with the hearing of the application. Accordingly, the application is refused. Needless to say, the claimant must bear his own costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT