



[2016] JMSC Civ. 118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008HCV02466

BETWEEN	RONALD CHANG	1ST CLAIMANT/APPLICANT
AND	NATASHA CHANG	2ND CLAIMANT/APPLICANT
AND	FRANCES ROOKWOOD	1ST DEFENDANT/APPLICANT
AND	NEVADO LISTZ	2ND DEFENDANT/APPLICANT

CONSOLIDATED WITH

CLAIM NO. 2009HCV04059

BETWEEN	FELICIA VASSELL	1ST CLAIMANT
AND	AYEESHA MAXWELL	2ND CLAIMANT
AND	RONALD CHANG	1ST DEFENDANT
AND	NATASHA CHANG	2ND DEFENDANT
AND	FRANCES ROOKWOOD	3RD DEFENDANT
AND	NEVADO LISTZ	4TH DEFENDANT

AND CONSOLIDATED WITH

BETWEEN	FRANCES ROOKWOOD	1ST ANCILLARY CLAIMANT/ 3RD DEFENDANT
AND	NEVADO LISTZ	2ND ANCILLARY CLAIMANT/ 4TH DEFENDANT
AND	RONALD CHANG	1ST ANCILLARY DEFENDANT/

		1ST CLAIMANT
AND	NATASHA CHANG	2ND ANCILLARY DEFENDANT/ 2ND CLAIMANT
AND	ADVANTAGE GENERAL INSURANCE COMPANY	RESPONDENT

Ms. D. Archer instructed by Kinghorn and Kinghorn for 1st and 2nd Applicants

Mrs. D. Senior-Smith instructed by Oswest Senior-Smith and Company for 3rd and 4th Applicants

Mr. L. Jack Hines for Vassell and Maxwell

Ms. J. Cummings instructed by Archer, Cummings and Co; for Advantage General Insurance Company Limited

Application for costs and interests – whether Court to order payment of costs litigation at first instance, on appeal and on oral application for costs and interest by Respondent Principles – S 5, 8 and 18(1) of the Motor Vehicle (Third Party Risks) Act

Heard on: 23rd April, 2014, 7th May, 2014, 16th May, 2014, 28th May, 2014, 25th June, 2015, 16th January, 2015, 19th January, 2015, 24th February, 2015, 11th March, 2015, 25th March, 2015 and 1st July, 2016

Coram: Morrison, J.

[1] At the very outset I wish it to be known that this court was without the case file and as such is totally dependent on the parties for the facts. Nevertheless, I think it is incumbent on me to refer to the Notice of Application to be Appointed Administrator Ad Litem and for An Order to pay Judgment by Instalments filed by Kinghorn and Kinghorn on the 17th March, 2014 and heard by me over numerous dates. On the 23rd day of April 2014 I ordered that Advantage General Insurance

Company Limited (AGIC)"...do pay out to Frances Rookwood, Felicia Vassell and Ayeesha Maxwell the sums due and payable under the said policy of Insurance to the said persons in satisfaction of the Judgment of the Court in this matter as well as the costs awarded to the said parties within 21 days of the date hereof."

[2] AGIC has taken exception to the referenced order on a number of bases by the filing on May 6, 2014 of a Notice of Application for Court Orders. In this they relied on the affidavit evidence of Ruthann Morrison. The bases are, first, that AGIC was not a party to these actions nor the application in which the Order was obtained. Second, that by virtue of section 18(2)(b) AGIC was not served by either Claimant or Ancillary Claimant with the required Notice of Proceedings within the requisite (10) days of their claim to pay their claims / judgments. Third, that the insured Ronald Chang / Natasha Chang had discontinued their suit filed against AGIC and could only resolve their dispute with the latter by Arbitration as provided by their policy of insurance. Fourth, that the Claimant would not be prejudiced by the granting of this order. It is to be observed that the affidavit failed to comport with Rule 11.18 of the Civil Procedure Rules 2002 in that the Application to set aside filed by AGIC did not advert to the issue of whether "a good reason for failing to attend the hearing and that it is likely that had the Applicant attended some other Order might have been made." I decline to make any further comment as it is not necessary for the disposal of the issues spawned by this Application.

[3] I wish now to advert to the orders which were sought and granted to Natasha Chang in her Notice of Application filed on 17th March 2014. In it she had asked for the following orders to be made -

"1. That there be a stay of execution of the Judgment of the 16th August 2010 in this matter pending the hearing of this Application.

2. That Pursuant to Rule 21.7 and 21.8, the Applicant be appointed Administrator Ad Litem for and on behalf of the Estate of Mr. Ronald Chang for the sole and limited purpose of advancing these proceedings.
3. That Advantage General Insurance Company Limited be permitted to be heard and participate in these proceedings as an interested party.
4. That disclose to the Court the Policy of Insurance in respect of motor vehicle registration number 4633 DR, particularly, the amount under the policy of insurance that Advantage General Insurance Company Limited may be obliged to pay out to third parties who have sustained injuries as a result of a motor vehicle accident involving motor vehicle registration number 4633 DR.
5. That Advantage General Insurance Company Limited do pay out to Frances Rookwood, Felicia Vassell and Ayeesha Maxwell the sum due and payable under the said Policy of Insurance to the said persons in satisfaction of the Judgment of the Court in this matter.
6. That if the said sum due and payable under the Policy of Insurance is insufficient to satisfy the Judgment herein, the Court do make an Order stipulating how the said sum should be paid to the said Frances Rookwood, Nevado Listz,, Felicia Vassell and Ayeesha Maxwell.
7. That if the said sum due and payable under the Policy of Insurance is insufficient to satisfy the Judgement herein, Pursuant to Rule 47.5, the Court makes an Order allowing the Applicant time to pay the balance of the Judgement debt and permitting the Applicant to pay the balance of the Judgement debt in instalments.
8. That the costs of this Application be borne by Advantage General Insurance Company Limited.

9. That such further and/or other relief as this Honourable Court deems just be granted.”

[4] The grounds upon which the Applicant rested her Application are now set out-

THE GROUNDS

- i. Ronald Chang was at all material times the owner of motor vehicle registration number 4633 DR.
- ii. At all material times, and particularly on the 22nd day of September 2007, motor vehicle registration number 4633 DR was insured with Advantage General Insurance Company Limited by dint of Insurance Policy Number 230151/001.
- iii. At all material times, and particularly on the 22nd day of September 2007, the Applicant, Natasha Chang was an authorized driver of motor vehicle registration number 4633 DR and consequently was covered by Insurance Policy Number 230151/001 in respect of her driving of motor vehicle registration number 4633 DR.
- iv. On the 22nd day of September 2007, Natasha Chang was involved in a motor vehicle accident while driving motor vehicle registration number 4633 DR. As a result of this motor vehicle accident. Frances Rookwood, Felicia Vassell and Ayesha Maxwell sustained personal injury and/or loss and damage.
- v. The said motor vehicle accident of the 22nd day of September 2007 is the subject matter of the instant Claim.
- vi. Both this Honourable Court and the Court of Appeal have ascribed liability to the Applicant and Mr. Ronald Chang for the occurrence of the

said accident and have awarded and confirmed Judgement in favour of Frances Rookwood, Felicia Vassell and Ayeesha Maxwell

- vii. Mr. Ronald Chang is now dead.
- viii. Advantage General Insurance Company Limited is liable under contractual principles and under The Motor Vehicle (Third Party Risk) Act to satisfy the Judgment made in favour of Frances Rookwood, Felicia Vassell and Ayeesha Maxwell.
- ix. Advantage General Insurance Company Limited has failed and/or refused to pay out the sum payable under the said policy of Insurance in satisfaction of the Judgement debt.
- x. The Applicant is the best person in the circumstances to be appointed Administrator Ad Litem for the limited purpose of advancing this Application for and on behalf of the Estate of Ronald Chang.
- xi. The Applicant is willing to pay the Judgement debt but wishes to have time to pay the said debt and in instalments. The Applicant however first wishes for the sum due and payable under Insurance Policy Number 230151/001 to be paid out to the said Frances Rookwood, Felicia Vassell and Ayeesha Maxwell pursuant to the provision of The Motor Vehicle (Third Party Risk Act.”

[5] The circumstances giving rise to the current application for costs and interest (by the second claimant Ms. Natasha Chang) can be tersely stated.

By way of background, Mr. Ronald Chang was the owner of a motor vehicle registered 4633 DR. It was being driven by Ms. Natasha Chang on the 22nd day of September 2007 when it collided into the motor vehicle owned by Frances Rookwood registered 7796 FB and being driven by Nevado Listz, Ms. Felecia

Vassell and Ms. Ayeesha Maxwell were passengers in the motor vehicle that was being driven by Nevado Listz.

- [6]** At all material times AGIC were the insurers of Ronald Chang motor vehicle. A report of the accident was made by Mr. Ronald Chang's to them. In the result, AGIC conducted an investigation into the accident and advised the Changs to have the matter settled. However, the Changs who were resolute that Ms. Natasha Chang was not to blame for the accident instructed AGIC not to settle any claim made against Mr. Ronald Chang's motor vehicle policy of insurance made by any third party.
- [7]** In consequence the Changs filed Claim No. 2008HCV02466 against Frances Rookwood and Nevado Listz and the defendants in turn filed a defence and counter claim on 19th day of January 2009 in which they asked for a contribution as well as an indemnity.
- [8]** The passengers in the Rookwood-owned motor vehicles, Felecia Vassell and Ayeesha Maxwell filed a claim against Frances Rookwood and Nevado Listz and against Ronald Chang and Natasha Chang. This is evidenced by Claim No. 2009HCV04059. Subsequently, Frances Rookwood and Nevado Listz filed an Ancillary claim against both Ronald Chang and Natasha Chang. Both claims were subsequently consolidated.
- [9]** On the 20th day of July, 2010 Felecia Vassell served AGIC with notice of Proceedings that both her and Ayeesha Maxwell had commenced suit against the Changs. AGIC contended that service of the Notice of Proceedings was in contravention of Section 8(2)(b) of the Motor Vehicle (Third Party Risk) Act .
- [10]** All claims in the matter were consolidated and upon their coming on for trial before Her Ladyship Justice Jennifer Straw on the 16th day March, 2010 Her Ladyship handed down Judgment against the Changs.

[11] By letter dated 11th September 2012 AGIC informed the attorneys-at-law for the Claimants and the Ancillary Claimants that it was under no obligation to and did not intend to indemnify the insured based on the failure of the Claimant to serve the notice of Proceedings within the prescribed time.

The Changs appealed the first instance Judgment. They lost. In both instances the first instant court and the Court of Appeal awarded cost to the successful litigant against the charges. They then filed a claim against AGIC for an order to compel AGIC to settle the Judgment debts. This claim was subsequently withdrawn by them. In the meanwhile Mr. Ronald Chang fell away into his eternal sleep.

[12] The First Applicant, Ms. Natasha Chang, contends that she was forced to make this application due to the fact of an Order for Seizure and Sale being issued against her by the Court because of the failure of AGIC to honour a judgment issued against her in August, 2010.

The Applicants contention is that AGIC had a duty to pay such sums that fell due under the policy of insurance and that it having failed to so has unnecessarily exposed her to costs and interest.

[13] The Second Applicants, Frances Rookwood and Nevado Listz, have also contended that AGIC is bound to pay costs and interest on the judgment sums.

Both Applicants have relied on the case law authority of **PRUDENTIAL INSURANCE COMPANY v MOLLY HOSEIN STAFFORD** [1999] UKPC (4 ("PRUDENTIAL INSURANCE")). The second Applicant also placed reliance on **HARKER v CALEDONIAN INSURANCE COMPANY** [1980] Lloyds Rep. 556.

[14] Further, contends the Second Applicant, AGIC's application to set aside an order made in its absence could only have merited consideration if AGIC, through its attorney-at-law had in its supporting affidavit a good reason for failing to attend the hearing and that it is likely that had the Applicant attended some other Order

might have been made. For that proposition the second Applicant invoked Part 11 of the Civil Procedure Rules 2002.

- [15] On the 17th day of March, 2014 Natasha Chang filed an Ex Parte Application for Stay of Execution and a notice of Application to be appointed Administrator Ad Litem and for an Order to pay Judgment debt by instalments.
- [16] On the Application coming before me on the 23rd day of April 2014 I granted the said orders in the terms as prayed for and an order for AGIC to pay out to Frances Rookwood, Felicia Vassell and Ayeesha Maxwell the sums due and payable under the said Policy of Insurance to them in satisfaction of the judgment of the court as well as the costs awarded to the said parties “within 21 days” of the date of the order.
- [17] In response to the above AGIC filed an Application for Court Orders, on the 6th day of May 2014, where it sought a stay of my orders as well as an order to set aside the order for payments in satisfaction of the judgment of the court and the order for the payment of attendant costs.
- [18] In the end, according to AGIC, “In a bid to bring the matter to an amicable end,” it agreed to pay out the sums to the parties as ordered up to the policy limit of \$4,000,000.00 and no more. Pursuant thereto, “Release and Discharge” documents, according to AGIC, were executed by the claiming parties. By way of parenthesis, I am to remark here that this court was not made privy to any such documents. Nevertheless, it remains for me to say that I shall be considering the matter of costs and interest pursuant to Section 18(1) of the Motor Vehicle Insurance (Third-party Risks) Act and Part 64 of the Civil Procedure Rules, 2002.

THE ISSUES

- [19] Two issues fall for determination. They are:

1. Whether AGIC is legally obligated to pay the costs awarded to the successful litigants at first instance, at the Court of Appeal and the costs of the present Application.
2. Whether AGIC is legally obligated to pay the statutory interest on the sum due under the policy to the date of payment

The above issues will now be looked at in the light of statute law and on decided cases

THE LAW

[20] Attorneys-at-Law costs are governed by the Judicature (Supreme Court) Act and regulated under the Civil Procedure Rules, 2002.

Under Section 28 E (1) of the former, "Subject to the provisions of this [Act] of any other enactment as to the rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court."

Further, according to Section 28 (2), "without prejudicial to any general power to make rules of court the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing-

- (a) Scales to be paid –
 - (i) between party and party;
 - (ii) the circumstances in which a person may be ordered to pay the costs of any other person; and
- (b) the manner in which the amount of any costs payable to the person or to any attorney shall be determined

Subsection 3 of the law states that the Court may determine by whom and to what extent the costs are to be paid, subject however to the rules of court.

[21] I wish now to turn to the Civil Procedure Rules 2002 (CPR) referred to in the principal Act as the rules of court."

[22] Part 64 of CPR is headed, “Costs general”, and in particular Rule 64.1 says, “This Part contains general rules about costs and the entitlement to costs...”

As to “Orders about Costs”, Rule 64.3 says that the court’s power to make order about costs include power to make orders requiring any person to pay the costs of another person arising out of or related to all or part of any proceeding

[23] It is to be observed that, generally, the successful party is entitled to his or her costs.

[24] Under Rule 64.6 (1), it is laid out that, “if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.”

[25] Who then is to be regarded as the successful party? In determining who is to be so regarded a Judge is obliged to consider the underlying realities of the litigation. See *ONAY v BROWN* [2009] EWCA Civ 775, LTL 10/8/2009.

[26] In applying the general rule, the Court is obliged to have regard to all the circumstances: See Rule 64.6 (3). In particular, the Court is to pay regard to first, the conduct of the parties both before and during the proceeding. Second, whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings. Third, whether any payment into court has been made or whether there has been an offer to settle made by a party which is sought to the court’s attention. Fourth, whether it was reasonable for a party to have pursued a particular allegation and, or, to have raised a particular issue. Fifth, the manner in which a party has pursued its case, a particular allegation or a particular issue. Sixth, whether a claimant who has succeeded in his or her claim, in whole or in part, exaggerated his or her claim. Seventh, whether the claimant gave reasonable notice of intention to issue a claim, notice of intention to issue a claim.

[27] Rule 69.8 is particularly apposite for it is denoted, “Assessed costs-procedural applications and enforcements.”

It reads: “On determining any application except at a case management conference, pre-trial review or the trial, the court must decide which party, if any, should pay the costs of that application...

a) ...

b) ...

(2) In deciding what party if any, should pay the costs of the application the general rate is that the unsuccessful party must pay the costs of the successful party.

(3) The court must however take account of all circumstances including the factors set out in Rule 64.6 (4) ...” see Rule 65.8 (2) and (3)

[28] In **SCHERER v COUNTING INSTRUMENTS LTD** [1986] 1 WLR 615, the Court of Appeal, England, set out the principles for determining the award of costs. They are, first, that the normal rule is that costs follow the event. The party who unjustifiably either brought another party before the court, or gave another party cause to have recourse to the court to obtain his rights, is required to compensate that other party in costs.

Second, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by opposing party.

Third, the judge has a discretion to make what order as to costs he considers that the justice of the case requires.

However, and fourth, this discretion is not one which is to be exercised arbitrarily. It must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case.

Fifth, the discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge’s function.

Sixth, the grounds must be connect with the case. This may extend to any matter relating to the litigation, but no further.

Seventh, if a party invokes the jurisdiction of the court to grant him some discretionary relief and establishes the basic grounds therefor, but the relief sought is denied in the exercise of discretion, as in **DUTTON v SPINK and BEECHING (SALES) LTD** [1977] 1 All ER 287 and **OTTWAY v JONES** [1955] 1 WLR 706, the opposing party may properly be ordered to pay his costs. But where the party who invokes the court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs.

In **BRENT LONDON BOROUGH COUNCIL v ANIEDOBE (NO. 2)** (1999) LTL 23/11/99 is authority for the proposition that it is incumbent on a judge to give reasons for departing from the usual rule that costs follow the event.

- [29] In relation to the application at bar it is clear that it was not made at the stage of case management , pre-trial review or indeed at a trial. Nevertheless, the very factors enumerated at Rule 64.6 (4) apply. The court is also obliged to take into consideration all the circumstances of the case.
- [30] I make the observation from the records that on the 23rd day of April 2014 that all documents filed pursuant to the Ex parte Application for Stay of Execution, Notice of Application to be appointed Administrator Ad Litem and for order to pay Judgment by instalments, affidavit of urgency, formal order dated March 19, 2014, formal order of March 21, 2014, Notice of Adjourned hearing dated April 22, 2014 and Affidavit of Natasha Chang dated March 17, 2014, were served on AGIC.
- [31] I make the further observation that on April 23, 2014 I ordered that the matter be adjourned to the 7th day of May 2014 at 9 am and that the formal order made on the same day be served on AGIC and on the Attorneys-at-Law for Frances

Rookwood and for Felicia Vassell. I had also granted the Application by Natasha Chang in terms of paragraphs 1, 2, 3, 4 and 5 as amended

[32] On the 7th day of May 2014 Ms. J. Cummings instructed by Archer, Cummings and Company, among others, was in attendance when I granted a further order that paragraph 5 of the Chang application be stayed to the 16th day of May 2014.

[33] On the 16th day of May, 2014 the matter was further adjourned to the 28th May 2014. On this day the matter was adjourned to the 25th day of June 2014 for AGIC to deliver the basis of their calculation of balances due to Frances Rookwood and Ayesha Maxwell. On the 25th day of June 2014 the matter was adjourned to the 19th day of January 2015 for an application by AGIC to be dismissed from the matter.

On 16th January 2015 it was further adjourned to the 24th February 2015 and on the latter date it was further adjourned to the 11th March 2015. I have set out the items of appearances over the time chronology in order to show the efforts which were prosecuted by the Applicants to have the matter of the payment by AGIC determined.

[34] In AGIC's opening salvo they argue that the starting point to unravel this nodus ought to be its obligation to satisfy a judgment made against its insured, Mr. Ronald Chang.

[35] Accordingly, Section 18 (1) (1A), and (2) of the Motor Vehicle Insurance (Third-Party Risks) Act, "The Act", was cited in aid of that submission. So, what are the prescriptions of these sections? They are "If after a certificate of insurance has been issued under subsection (9) of sections (5) in favour of person by whom a policy has been affected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section (5) ... is obtained against any person incurred by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section, pay to the persons

entitled to the benefit the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating on interest on judgments” – S.18 (1)

[36] Continuing, according to Section 18 (1 A), the right of payment under subsection (1) shall not be limited by reference to –

(a) the minimum liability coverage required under subsection (1), (2) or (3) of Section 5;

(b) any limitation of liability to claim specified in subsection (4) of Section 5.

[37] Further, according to Section 18 (2), “Subject to subsection (1A) No sum shall be payable by an insurer under the foregoing provisions of this section-

(a) ...

(b) in respect of any judgment, unless before or within ten days after the commencement of the proceedings in which the judgment was given, the insurer has notice of the bringing of the proceeding

(c) ...

(d) ...”

I will here remark that Section 18 of the Act imposes a duty on insurers to satisfy judgments against its insured in respect of third-party risks.

[38] Further, that the insurers exemption from that duty to pay its insured, is contained in subsections (2) and (3) of Section 18.

[39] AGIC further contends that since the Notice of Proceedings were served on it outside of the ten days stipulated by Section 18 (2) of the Motor Vehicles

Insurance (Third Party Risks) Act, then it is under no obligation to satisfy any judgment awarded to the Claimants, Felicia Vassell and Ayesha Maxwell, and the Ancillary Claimants, Frances Rookwood and Nevado Listz against the Changs. Being under no obligation to do so, any payments made by it were gratuitous and not obligatory.

[40] Again, it is to be noted that AGIC recruited in support of its contention, the authority of **WALTRAUD EAST v INSURANCE COMPANY OF THE WEST INDIES**, Claim NO. E002 of 2002, (“WALTRAUD EAST”).

[41] In refuting this contention both counsel for the successful claimants and ancillary claimants relied on the authority of **PRESIDENTIAL INSURANCE COMPANY v MOLLY HOGEIN STAFFORD** [1999] UKPC 14 (22nd March, 1999), (“PRUDENTIAL” INSURANCE). I should here remark that counsel for Vassell and Maxwell, through his written submission, adopted the submission of counsel for AGIC, which I have already foreshadowed. He was content to say that Chang’s are not to be countenanced in their application for costs and interest. While he did not explicitly apply for costs and interest for his claims. I make the observation that both Vassell and Maxwell were awarded costs at the trial and at the Court of Appeal.

[42] In **WALTRAUD EAST**, the claimant brought an action against Triple “C” Electrical Company (“Triple C”) and one Collin Crooks for negligence on behalf of the estate of her husband who was killed in a motor vehicle accident. The claimant was awarded damages. However, the Claimant was unable to enforce the judgment against the defendant owing to the fact that Triple C had ceased operating and Collin Crooks could not be located. Motor Owners Insurance Company of the West Indies (ICWI) the claimant, demanded and received payment from ICWI with the latter stating that the sum payed was the extent of the liability for which they had insured Triple C. The claimant after negotiating the cheque brought a claim against ICWI for the total amount of the judgment and costs which were awarded against Triple C.

The issues which arose were, first, whether an injured party, by virtue of Section 18 (1) of the Motor Vehicle Insurance (Third Party Risks) Act, is entitled to recover against the Insurer, a sum above the statutory limit of (\$750,000); second, whether the acceptance by the claimant of the payment of \$750,000 estopped her from alleging that she is entitled to the greater sum of the judgment; and, third, whether the defendant is liable to pay interest on the judgment sum.

- [43] After hearing submissions on the matter the judge of first instance at the urging of the claimant took into consideration the case law authorities of **FREE LANKA INSURANCE COMPANY LIMITED v RANASINGHE**, [1964] AC 541 and **JAMAICA COOP FIRE AND GENERAL INSURANCE COMPANY v SANCHEZ** (1968) 11 JLR 5 and the defendant's authorities of the **FREE LANKA** case, **SUTTLE v SIMMONDS** [1989] 2 Lloyd's Law Report 227 and **MATADEEN v CARIBBEAN INSURANCE COMPANY LIMITED**, P.C.A No. 46 of 1999.
- [44] In the end the judge felt constrained to rely on the authority of **GLOBE INSURANCE COMPANY OF THE WEST INDIES v JOHNSON & STEWART**, SCCA 70/79, in coming to the decision that the effect of the provisions of Section 18 of the Motor Vehicle Insurance (Third Party Risks) Act is to limit the amount which an injured party can recover directly from the insurers. As was observed by Walker, JA in the **GLOBE INSURANCE** case, "the scheme of the Act is to protect innocent third parties who suffer injury as a result of the negligent conduct of motor vehicle operators on the public roads."
- [45] In consequence, the Court of Appeal while not reluctant to conclude that the insurers liability was limited to the statutory minimum, felt that the result was repugnant to the dictates of justice. Accordingly, Walker, JA with the concurrence of his brethren recommended that the Act be amended with the least possible delay, while Forte P in measured language observed that, "the insurer is the beneficiary of a gift as it had collected premiums on a policy of insurance containing an insured amount of \$750,000 and will now be liable only for the statutory minimum of \$200,000."

- [46] Parliament thus being stirred into action heeded the Court of Appeals advice and Section 18 (1) of the Act was amended to reflect that the limit of the insurer's liability on a third party claim should be calculated by having regard to the amount that is actually covered by the policy of insurance and not the minimum amount.
- [47] In other words, the 2005 amendment of section 18 (1) had the former words, "any sum payable there under" being replaced by the words, " the amount covered by the policy or the amount of the judgment, whichever is the lower."
- [48] Let me now set out in aliquot, section 18 (1), inclusive of its amendment. It reads:

"If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as it required to be covered by a policy under subsections (1) (2) and (3) of section 5 ... is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment whichever is lower, in respect of liability, including any amount payable in respect of costs, and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. In other words according to the side note, a duty is placed on the insurer to satisfy judgments against persons insured in respect of third-party risks.

It is also pertinent that I set out Section (8) (2) (1A) which is made subject to Section (8) which in speaking to the right of payment under subsection (1) says, it is not limited by reference to the minimum liability coverage under subsections (1), (2) or (3) under Section 5, or to any limitation of liability to claim specified in subsection (4) of section 5. Recall that section 5 deals with the requirements in respect of policies of insurance which must cover persons, persons or classes of persons; death or bodily harm claims; and, property damage, while at the same time it stipulates that such a policy shall not be required to cover for example, a person who is in a certain employment relationship with insured and in which death or bodily harm ensues and any contractual liability.

However, section 18 (2), subject to subsection (1A), what sums are payable by an insurer, by stating it in the negative.

Thus, "no sum shall be payable by an insurer under the foregoing provisions of this section-

- (a) Liability for which is exempted from the cover granted by the policy pursuant to subsection (4) of section 5; or*
- (b) In respect of any judgment, unless before or within ten days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the of the proceedings..."*

- [49] In PRUDENTIAL INSURANCE, supra, the Respondent Mrs. Stafford obtained judgment against the Appellants insured. The insured did not pay the judgment thus causing Mrs Stafford to commence an action against the Appellant to enforce the judgment. The Appellant did not deny their liability to Mrs Stafford but contended that their liability was limited to \$50,000.00. Mrs Stafford assessed damages were in the order of \$111,000.00 with interest.
- [50] The question which arose was whether the Insurer was entitled to pay no more than the sum of \$50,000.00 and in so doing avoid the costs.
- [51] The Privy Council, through Lord Hobhouse, in determining the matter paid regard to Section 10 (1) of the Trinidad and Tobago Motor Vehicles Insurance (Third-Party Risks) Act and in so doing had occasion to refer to the words... “the insurer shall ... pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.”
- [52] His Lordship pointed out that the point of contention concerned the word “including” as used in the excerpted emphasised context which the Insurer contended ought to be given a restricted meaning thereby rendering the section to mean that there were to be no additions to the required sum.
His Lordship said that such an interpretation as submitted by the Insurer was an error for it sought to relate the word, “including”, to the word, “liability”, whereas it should be related to the word, “entitled”.
- [53] He concluded that, what was being referred to in the last part of the sub-section is clearly, interest on the judgment. The correct understanding of the words “including” interest on that sum by virtue of any written law relating to interest on judgments” is not a reference to the calculations made before judgment but to the interest upon the unsatisfied judgment.

Further, His Lordship said that the word “including” is clearly used in the sense of referring to what the injured person is entitled to be paid by the insurer.

He concluded by saying that the injured person is entitled to be paid by the insurer not only the deemed amount of the judgment but also interest on it so long as it shall remain unpaid.

- [54]** In the instant case the reasoning of Lord Hobhouse in the PRUDENTIAL INSURANCE applies through parity of reasoning and with equal force when one bears in mind that our Section 18(1) of the Motor Vehicles Insurance (Third-Party Risks) Act is in point of substance and meaning the same as its Trinidad and Tobago counterpart.
- [55]** This means, consistent with Lord Hobhouse’s conclusion, and that which is explicitly stated in the 2005 amended Section 18(1), that the injured party is “entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment whichever is the lower, in respect of liability including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”
- [56]** However, I must bear in mind, at the risk of repetition, what Section 18(2)(b) of the Act says: No sum shall be payable by an insurer in respect of any judgment , unless before or within ten days after the commencement of the proceedings in which judgment was given, the insurer had notice of the bringing of the proceeding. But Section 18(2)(b) is expressly made subject to subsection (1A) which speaks to the right of payment under subsection (1).
- [57]** Subsection (1A) speaks to the right of payment not being limited by reference to the limited liability coverage under section 5(1), (2) or (3) and , any limitation of liability to claim under Section 5 (4).
- [58]** In other words, excepting for the circumstances adumbrated by subsection (1A), no sum shall be payable where the ten days notice of proceedings is not given

either before or within the commencement of the proceedings, to the Insurer, in respect of any judgment which was given.

- [59]** It seems to me that the rationale behind this section was to allow Insurers to investigate such claims and thereby inform themselves, otherwise it would open up Insurers to a cheaters charter.
- [60]** Even accepting that AGIC was under no compulsion or obligation to pay the sums under the policy of insurance they nevertheless did so albeit at the policy limit.
- [61]** If, then, they agreed, whether through corporate considerations or otherwise, to pay, that in my view did not allow them the discretion to withhold the payment of interest and costs on any sum representing the policy limit. It was through their own voluntary act that they gave countenance to Section 18(1). It was a binary decision: to pay or not to pay. Once AGIC decided to pay it ought to have paid costs and interest incidental thereto.
- [62]** Assuming I am wrong in my reasoning thus far, Section 8(1) may yet be determinative of the matter. It reads, “Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in subsections (1), (2) and (3) of section 5 ...”. Here I will only remark again as before that AGIC’s barricade mounted against the application for Court Order falls in the light of Section 8(1) and as well by AGIC’s own voluntary position in paying out such sums as became due under the policy of insurance. However, AGIC’s refusal to pay cost and interest ran afoul of Section 18(1).
- [63]** Section 5 (1), (2) and (3) spells out the requirements in respect of policies of insurance mandated under the Act. First, that the policy must be a policy which

issued by a person who is an insurer. Second, that the insurer insures such persons, persons or classes of persons, as may be specified in the policy, against any liability incurred by him or them in respect of, inter alia, the death of or bodily injury to, any person and in respect of death or bodily injury claims what the policy shall be required to cover.

[64] In the context of the above, it must be borne in mind however that users of motor vehicle are to be insured against third-party risks. It is not the policy of the law that an innocent third party should be left without a remedy. The law was designed for their protection and benefit.

[65] Accordingly I had that AGIC is legally obligated to pay the costs awarded to the successful litigants at first instance, at the Court of Appeal and the costs of the present application. Also, AGIC is legally obligated to pay the statutory interest on the sum due under the policy to the date of payment.