[2025] JMSC Civ 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. SU 2022 CV 02313

BETWEEN	**CONRAD MATHIE**	**CLAIMANT/RESPONDENT**
AND	**BRITISH CARIBBEAN INSURANCE COMPANY**	**DEFENDANT/APPLICANT**

IN CHAMBERS
Mr Sean Kinghorn instructed by Kinghorn and Kinghorn for the claimant/respondent
Ms Faith Gordon instructed by Samuda and Johnson for the defendant/applicant

Heard: 6 & 20 December 2024 & 17 February 2025

Civil Procedure Rules – Rule 8.8 – Whether sanction imposed – Whether appropriate relief should be for relief from sanctions or extension of time – Part 32 – Whether the expert will assist the court in resolving any issue in the claim – Whether the existence of a report prepared by the person to be appointed expert is a prerequisite to the appointment of that person as an expert - Motor Vehicle (Third Party Risks) Act – section 18 – grounds on which an insurer can avoid a claim arising from a judgment obtained against its insured

MASTER C THOMAS

Introduction

[1] By way of notice of application for court orders, which was filed on 9 March 2023, the defendant, British Caribbean Insurance Company seeks the following orders: -

1. That the Court certifies Miss Brenda Singleton, Private Investigator as an expert witness to this Honourable Court;
2. That the Defendant be permitted at the trial of this matter to put in as an expert report Miss Brenda Singleton's Report dated February 27, 2023;
3. That the Affidavit of Miss Bobbie-Ann Malcolm filed herein on the 3rd of March, 2023 in response to the Fixed Date Claim Form be permitted to stand and that the Applicant be granted relief from sanctions imposed by the failure to file the Affidavit in response within time;
4. Such further and other relief as this Honourable Court deems just in the circumstances.

[2] The application is grounded on the following bases: -

i. That no party may call an expert witness or put in an expert witness' report without the Court's permission;
ii. That no oral or written expert witness' evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the Expert Witness intends to give;
iii. The Defendant requires the permission of this Honourable Court to adduce the evidence of Miss Singleton at trial, pursuant to Rule 32.6(1) of the Civil Procedure Rules, 2002 (as amended);
iv. That the Claimant has contended that on the 3rd of September 2019 his motor vehicle was involved in a motor vehicle collision allegedly caused by the negligence of Davion Chin, whose motor vehicle at the material time was insured by the Defendant and further contends that as a consequence the Claimant's motor vehicle was damaged beyond repair.
v. That the Report of February 27, 2023 speaks to the damage to the Claimant's vehicle and assists with issues which this Honourable Court will be required to consider in determining whether the Claimant's contention as to how his motor vehicle was damaged is genuine.

vi. That the earlier version of the Report dated the 6th of December 2021 was served on the Claimant's Attorneys-at-Law. The only difference between the Reports is that the latter version conforms with the Civil Procedure Rules 2002 (as amended);

vii. That granting the Orders herein will not prejudice the Claimant;

viii. That granting the Orders herein will further the overriding objective to deal with this matter justly.

Background

[3] As will be appreciated from the grounds relied on, the substantive claim concerns a motor vehicle accident which occurred on 3 September 2019 between a motor vehicle driven by the claimant and one driven by the defendant's insured, Davion Chin. As a consequence of this accident, on 24 March 2021, the claimant filed claim number SU 2021 CV 01256 ("the 2021 claim") naming himself as the claimant and Mr Chin as the defendant.

[4] Default judgment was obtained in the 2021 claim and on 26 July 2022, the instant claim was filed by way of fixed date claim form seeking, among other orders, a declaration that the defendant is obliged under the Motor Vehicle (Third Party Risks) Act ("MVTPRA") to honour the judgment obtained in the 2021 claim.

[5] The claimant swore to an affidavit in support of the fixed date claim form in which he chronicled the events subsequent to the accident, including the filing of the 2021 claim and certain court occurrences during the subsistence of the claim culminating in the award of damages. I do not intend to traverse in minute detail the evidence contained in that affidavit having regard to the fact that this is not the hearing of the fixed date claim. I will summarise only so much of the evidence that is, in my view, pertinent to understanding this application, the arguments of counsel and my decision.

[6] In his affidavit in support of the claim, the claimant deponed that on or about 3 September 2019, there was a collision on the Guys Hill Main Road in the parish of St Catherine involving his vehicle and a Honda motor car driven by Mr Chin.

The accident was caused by Mr Chin swerving on to his (the claimant's) side of the roadway. The claimant further deponed that on 18 June 2021, he successfully obtained judgment against Mr Chin. On 5 August 2021, service was acknowledged on behalf of Mr Chin, and on 20 September 2021, a defence was filed. Later, at a Pretrial Review, orders were made permitting Mr Chin to file and serve a notice of application to set aside judgment, among other orders. Subsequently, an application to remove attorney's name from record was filed by "British Caribbean Insurance Company", which was dismissed. A second application was filed and was granted at an assessment of damages hearing. Thereafter, the assessment of damages hearing proceeded and the claimant was awarded general damages in the amount of $1,900,000.00 and special damages in the amount of $8,697,000.00 plus interest and costs. The claimant stated that the judgment had been served on the defendant and that since the granting of the judgment, the defendant has failed and/or refused to pay over the judgment sum along with interest.

[7] An acknowledgment of service to the instant claim was filed on 1 September 2022 indicating that service of the claim documents was effected on 18 August 2022. No affidavit in answer was filed and at the first hearing on 30 January 2023, the court granted permission to the defendant to file affidavits in answer on or before 24 February 2023. The first hearing was adjourned on a number of occasions and on one such occasion, the connected matter of Claim No. SU 2022 CV 02479 between **Rosalie Prince v British Caribbean Insurance Company Limited** was ordered to travel along with the instant claim.[1]

[8] As previously stated at paragraph 1 of this judgment, the instant application was filed on 9 March 2023. It was supported by an affidavit deponed to by Joerio Scott which exhibited a report prepared by Brenda Singleton as well as her curriculum vitae. The claimant filed an affidavit in response raising queries about Ms Singleton's qualification and certain statements made by her in her report dated 27 February 2023. This sparked the filing of a supplemental report

[1] See – Minute of Order dated 6 May 2024

by the defendant in response. I will delve into the contents of these documents during my analysis below.

A preliminary issue

[9] Although the issue considered here was not raised strictly speaking as a preliminary one, but rather almost at the end of the oral submissions on behalf of the claimant, given the implications of a finding in favour of the claimant on this issue, I took the view that it should be considered first. The issue concerned whether the affidavit sworn to by Joerio Scott in support of the application was a proper affidavit before the court as a consequence of non-compliance with the Civil Procedure Rules ("CPR").

[10] Mr Kinghorn submitted that the affidavit in support of the application ought not to be considered as it was not properly before the court in that it did not comply with the dictates of rule 30.4(1) of the CPR because it did not contain the full name of the person before whom it was sworn but instead two initials along with his surname. Ms Gordon expressed no position on this issue.

[11] Rule 30.4(1) of the CPR contains as it does the imperative that an affidavit "must" contain the full name of the person before whom it is signed, I came to the view that the provision makes it mandatory that the affidavit be completed in the manner prescribed by the rule. Where this is not done, the affidavit is to be regarded as irregular and not properly before the court. I also took the view that the defendant having failed to comply with a rule, there being no sanction prescribed by the CPR for non-compliance that it was in the interests of justice for me to exercise my discretion under rule 26.9 of the CPR to make an order putting matters right by allowing the defendant to file an affidavit which complies with the provisions of rule 30.4 of the CPR and which contains the same contents as the previously filed affidavit.

[12] Mr Kinghorn submitted that given that the defendant's counsel had made no submissions on the question whether the affidavit was defective and did not make an application to file an affidavit in compliance with rule 30.4(1) of the CPR, the court would have overreached in coming to the conclusion that all

parties were of the view that the affidavit was defective and that the court's powers under rule 26.9(1) of the CPR should be invoked. He also submitted that although the court can make an order on its own volition without an application, there must be evidence upon which the court is relying to exercise its discretion and there was no such material provided to the court.

[13] The defendant expressed no position in relation to the effect of the non-compliance of the affidavit with the CPR. Thus, it can be said that there was no real opposition to the contention that the affidavit was defective and this position remained unchanged when I indicated to both counsel the order I proposed to make. I came to the view that in the circumstances, no useful purpose would be served by refraining from making the order to correct a procedural irregularity so that the matter could proceed to be considered on the merits especially given that there would be no irremediable prejudice to the claimant as counsel for the claimant had advanced extensive submissions on the merits of the application. I also took the view that given the nature of the procedural irregularity no evidence was necessary for the order putting matters right to be made. Therefore, I made the order as indicated at paragraph [11] of this judgment, which has been complied with by the defendant filing the affidavit on 2 January 2025.

Submissions

For the defendant

[14] In respect of the order seeking that the affidavit of Bobbie-Ann Malcolm stand and for relief from sanctions, Ms Gordon submitted that the sanction was imposed by the rules. Relying on **HB Ramsay & Associates & Ors v Jamaica Redevelopment Inc & Anor** [2013] JMCA Civ 1, Ms Gordon submitted that the requirement of promptitude in the making of an application for relief from sanctions is relative. The applicant, she submitted, needed some time to complete the investigations and put the relevant information before the court.

[15] In relation to the order being sought appointing Ms Singleton as an expert, it was submitted that she is an expert in the insurance industry and that she has approximately thirty (30) years of experience as a motor insurance claims investigator, twenty-five (25) years of experience as a valuator and twenty-four (24) years of experience as a loss adjuster of motor insurance claims. Her report dated 24 February 2023 will assist with the issues which the court will be required to consider in determining whether the claim for loss is genuine. For this submission, reliance was placed on **Sally Fulton v John Ramson** [2002] JMCC Comm 26. It was also submitted that cases involving specialised areas of knowledge require expert evidence to assist the court to understand the implication of particular facts and that the investigation of motor insurance claims, the assessment and valuation of motor vehicles and motor vehicles claims are all specialised areas.

[16] It was further submitted that the claim at its core is intrinsically linked to whether the collision which gave rise to the claimant's insurance claim against the defendant is genuine and that it is highly likely that expert evidence will be required to assist in the resolution of this issue.

For the claimant

[17] Mr Kinghorn submitted that the court ought not to take into account the supplemental affidavit in support of the application as it was filed outside the time for doing so, thereby depriving the claimant of filing a response. In addition, no relief had been sought for an extension of time. In his affidavit in opposition the claimant had exhibited email correspondence sent by his counsel to the defendant's counsel in which deficiencies in Ms Singleton's report were highlighted. The email referred to seven (7) requisite components of an expert report but there ought to have been no need to request this information. Even at this point, Mr Kinghorn argued, the requested information has still not been provided.

[18] He argued that it was a precondition to the appointment of an expert that there must be service of the expert report and that it must be a proper report in that

it must be in the format required by the rules. In the alternative, he submitted that even if a person could be appointed an expert without service of the report, the only information that would have been given about Ms Singleton was in the only expert report which was served which caused the claimant to query whether Ms Singleton was a fit and proper person to give evidence as an expert.

[19] It was imperative that the information that had been requested by the claimant be provided because the claimant had a right to address the court on whether to appoint Ms Singleton. Mr Kinghorn argued that one who purports to be an expert can produce evidence which has a devastating effect on a party's case. The claimant therefore had an inalienable right to challenge the alleged qualifications of the expert. The requirements of the CPR in relation to the authenticity of one who purports to be an expert and the admissibility of an expert report are predicated on the salient rules of natural justice and the principle that trial by ambush is not a part of our jurisprudence. He submitted that in the particular circumstances of this case, the appointment of the expert and the filing of the expert's report could not be separated because the deficiencies of the report bear on the question of whether the proposed expert, Ms Singleton should be appointed.

[20] He submitted that there is no legal or factual basis to appoint Ms Singleton as an expert witness and that the report not only breached the CPR but fell significantly below the standard of an expert report.

[21] In relation to relief from sanctions, it was submitted that the relevant rule 8.8(2)(c) imposes a sanction for failing to file an affidavit within the stipulated time in that if there is no filing of the affidavit within twenty-eight (28) days as prescribed by the rule, then the defendant will not be able to rely on the evidence. Relying on **Oneil Carter & Ors v Trevor South & Ors** [2020] JMCA Civ 54, he submitted that this is not affected by the fact that the court would have granted an extension of time and a further extension of time as the court could not take away a sanction. The defendant had failed to show that the application was prompt, that the failure to comply was unintentional and that it has generally complied with all other orders. He also submitted that if relief from

sanctions is not needed, the defendant has not put before the court sufficient evidence to satisfy the court that relief should be granted.

Further submissions

[22] In the light of what appears to be the defendant's answer to this claim which is that there was fraud or collusion as well as the statutory framework of the MVTPRA, the parties were invited to file further submissions. These submissions were to address the relevance of the proposed expert report to the issues raised in the claim in the context of the law applicable to the circumstances of a claim by a third party seeking to enforce a judgment against the insurer.

[23] Ms Gordon submitted that a contract of insurance, like any other contract, is subject to the principle of privity of contract and as such the terms thereof are generally enforceable only against the parties to the contract. It was submitted that the MVTPRA provides for a third party to claim against an insurance company irrespective of the fact that the third party would not be privy to the contract of insurance. Referring to section 18 of the Act, she submitted that the section clearly provides that the liability must be one covered by the terms of the insurance policy. Relying on **Conrad McKinght v NEM Insurance Co (Ja) Ltd et al** 2005 HCV 03040 (delivered 13 July 2007), it was submitted that the issue is whether the circumstances that brought about the judgment debt is one which is covered under the insurance policy.

[24] It was submitted that the claim brought by the claimant against Mr Chin was based on fraud and/or misrepresentation which is not covered under the relevant policy of insurance and therefore the defendant was not obligated to honour the judgment. Mr Gordon submitted that while the MVTPRA aims to protect innocent third parties from being left uncompensated, it does not absolve claimants from establishing the authenticity of their claims nor does it preclude an insurer from raising fraud as a defence. Relying on the cases of **Derry v Peek** [1889] 14 App Cas 337, **Manifest Shipping Co ltd v Uni-Polaris Insurance Co Ltd** [2001] UKHL 1, **Royal & Sun Alliance Insurance v Fahad** [2014] EWHC 4480, **Versloot Dredging BV v HDI Gerling Industrie**

Versicherung AG and Ors [2016] UKSC 45, she submitted that fraud vitiates all transactions including insurance contracts. Insurers therefore, are not liable for fraudulent claims even if the policy covers the risk as it is critical that claimants do not benefit from dishonest conduct; and that there are cases in which expert evidence from an insurance investigator has been admitted to establish fraud in motor vehicle accident claim.

[25] Ms Gordon submitted that Ms Singleton in her findings contained in her report revealed several inconsistencies in the claimant's motor accident report. According to Ms Singleton these inconsistencies reveal statements amounting to misrepresentations. It was submitted that fraudulent claims undermine the integrity of the insurance system and are not protected by section 18(1) of the Act and certifying Ms Singleton as an expert allows the defendant to effectively defend itself under section 18(1) and avoid being unjustly liable for a fabricated claim.

[26] Mr Kinghorn submitted that having regard to the state of the law in this area, the expert report has no relevance to the proceedings and therefore the application should be dismissed. This was so as the court had pronounced on the law in these circumstances in **Kirk Burford v Advantage General Insurance Co** Ltd [2017] JMSC Civ 84. In that case, the court had held that it was not for the court to re-examine the evidence placed before the court in the previous matter against the insured. Mr Kinghorn submitted that **Kirk Burford** clearly shows that the expert report that the defendant now chooses to place before the court is a futile attempt to retry this matter where the court has already pronounced on the facts placed before it.

Discussion and Analysis

The issues

[27] The issues which arise are**:**

(i) Whether the appropriate relief should be for relief from sanctions or an extension of time;

(ii) Whether Ms Singleton should be appointed an expert.

Two sub-issues arise:

a) Whether Part 32 of the CPR requires that there must be in existence an expert report which complies with that Part of the CPR before a person (being the maker of the report) may be appointed as an expert;
b) Whether the report of Ms Singleton dated 27 February 2023 will assist in or is relevant to any of the issues to be decided in the claim.

Whether the appropriate relief should be for relief from sanctions or an extension of time

[28] Though the parties appear to be of the view that it was necessary to seek relief from sanctions, I raised this issue with both counsel during the oral submissions given the provisions of the relevant rule.

[29] The relevant rule is rule 8.8(2)(c) of the CPR. It provides:

> A defendant who wishes to rely on written evidence must within 28 days of service of the claim form file an affidavit containing that evidence.

I am of the view that though the rule contains the imperative “must”, there is no sanction stated in this rule for the failure to file the affidavit within the time stipulated.

[30] The rule is similar in effect to rule 10.2(1) of the CPR which concerns the filing of a defence. Rule 10.2(1) states:

> A defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5).

These two rules may be contrasted with rule 29.11 (1) of the CPR, which states as follows:

> Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by

> the court, then the witness may not be called unless the court permits.

It is clear that rule 29.11 provides its own sanction for failure to file the witness statement within the time ordered by the court. In **Oneil Carter**, on which Mr Kinghorn relied, our Court of Appeal in holding (as it did in **Jamaica Public Service v Charles Vernon Francis and Columbus Communications Ltd** [2017] JMCA Civ 2) that this rule imposes a sanction, referred with approval to the dictum of the English and Wales Court of Appeal in **Chartwell Estate Agents Limited v Fergies Properties SA, Hyam Lehrer** [2014] EWCA 506, in which the similarly worded provisions of the English Civil Procedure (rule 32.10) was considered. In **Chartwell Estate Agents Limited**, it was stated:

> It can therefore be seen that CPR 32.10 provides its own sanction for failure to serve a witness statement within the time specified by the court: that is, that the witness may not be called to give oral evidence unless the court gives permission.

[31] No such device is contained in rule 8.8(2)(c). Further, there is no other rule which imposes any sanction. I am therefore of the view that though the application sought relief from sanction, this was not necessary. Consequently, it is unnecessary for me to consider this aspect of the application as the court does not act in vain. In other words, there is no utility in granting relief from sanctions when there is no sanction imposed.

[32] It seems to me that the next question which arises is whether I can properly consider whether to grant an extension of time. I consider that though the application did not expressly use the words “extension of time”, that implicit in the seeking of the order for the affidavit to stand is a request for an extension of time. This is so because the affidavit of Bobbie-Ann Malcolm having been filed after the 28 days specified in rule 8.8(2)(c), it cannot stand unless the time is extended. I will therefore consider whether an extension of time ought to be granted against the well-established factors adumbrated in **Leymon Strachan v Gleaner Company Limited** SCCA Motion No 12/99 (delivered 6 December 1999), which are: (i) the length of delay; (ii) reason for the delay; (iii) the merits

of the defence; and (iv) the degree of prejudice to the other party. In the process of doing so, I will assess Mr Kinghorn's submission that there was no material on which the discretion can be exercised.

[33] Where the length of delay is concerned, the acknowledgment of service filed on 1 September 2022 indicated that service of the claim documents was effected on 18 September 2022. As previously stated, on 30 January 2023, the court granted permission to the defendant to file affidavits in answer on or before 24 February 2023. The defendant was present on that occasion and there has been no appeal of that order. This order amounted to the grant of an extension of time to file the affidavit in answer. So, any period of delay would have to be calculated from 24 February 2023, the expiry of the period of extension granted by the court. The Affidavit of Bobbie-Ann Malcolm was filed on 3 March 2024, which was some eight days later. So, the period of delay is not inordinate.

[34] With respect to the reasons for the delay, the evidence contained in the affidavit which, in my view, is relevant is contained at paragraphs 4 and 9-11 of the Affidavit of Joerio Scott filed on 2 January 2025. Mr Scott stated that he was advised by in-house counsel that in light of what appeared to be serious concerns as to whether the claimant's claim was genuine, in or about July 2021, the defendant engaged Ms Singleton of Perceptive Investigation Services to investigate the matter. In or about November 2022, the defendant established an investigation unit with Guardsman. The matter was referred to this unit and it was decided that the defendant would await the outcome of this investigation before responding to the claim with the view that the matter would be subject to a comprehensive review and assessment prior to the conclusion of the investigations. As at the date of the affidavit, the investigations were incomplete, and the defendant took the decision to respond to the claim by relying on the report dated 27 February 2023 prepared by Ms Singleton. Ms Singleton's report dated 27 February 2023 was exhibited.

[35] From the above, it can be seen that the reason given in essence is that the defendant was awaiting the report of the investigations into whether the claim was genuine to provide a comprehensive review of the matter. It seems to me

that the timing of the results of the review would have been outside the control of the defendant. Having awaited the outcome of the review by Guardsman for an extended period and not having received same, the defendant proceeded with the report previously commissioned. So, contrary to Mr Kinghorn's submissions, there is material before the court upon which it can consider exercising its discretion. In my view, this is a good explanation. In any event, there are numerous cases which demonstrate that the absence of a good explanation is not fatal, the decisive factor being whether there is merit to the proposed defence.

[36] The defence must now be considered to determine whether there is any merit. The evidence of Mr Scott was that there were serious concerns about whether the claim made against Mr Chin was genuine and that the report of Ms Singleton, which was exhibited, would assist the court in determining whether the alleged collision in question was genuine. Mr Scott referred to the evidence contained in the affidavit of Bobbie-Ann Malcolm but I am of the view that I cannot properly take Ms Malcolm's affidavit into account because it is not properly before the court and is the subject of the application for it to be allowed to stand. Until the order is made for it to stand, it is not properly before the court.

[37] The defence is that the claim is not genuine, it having been based on fraud. In support of this position, the defendant is intending to rely on the report of Ms Singleton. So, it seems to me that the issue as to whether there is a good defence and whether Ms Singleton will assist the court in determining an issue which is to be decided in the claim are intertwined because without the report of Ms Singleton, the defence will be mere assertions unsupported by any real facts.

[38] In considering the issues identified in the preceding paragraph, the critical question for consideration is whether in answer to a claim under section 18(1) of the MVTPRA, it is a good defence that the claim in which judgment was obtained against the insured was not genuine. In other words, it was obtained by fraud. If this is impermissible, as Mr Kinghorn argues, in my view, Ms Singleton's report would not assist in resolving any issue to be determined in the case and there would be no utility in appointing her. It follows that my

consideration of this aspect of the application will necessarily result in the determination of the issue of whether Ms Singleton's report will assist in resolving any of the issues to be decided in the claim (issue (ii)(b).

[39] The resolution of this issue turns on an interpretation of section 18 of the MVTPRA, the relevant portion of which reads:

> "18.-(1) 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 is required to be covered by a policy under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) 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 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 to interest on judgments.
>
> (1A) 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.
>
> (2) Subject to subsection (1A), 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 bringing of the proceedings; or

(c) in respect of any judgment, so long as execution thereof is stayed, pending an appeal; or

(d) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein and either-

(i) before the happening of the said event the certificate was surrendered to the insurer or the person in whose favour the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy the certificate was surrendered to the insurer or the person in whose favour the certificate was issued made such a statutory declaration as aforesaid; or

(iii) before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Act in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action

> commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the nondisclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto.

[40] It is clear from the provisions of section 18(1) of the Act that Ms Gordon is on good ground in her submission that the insurer is not liable under that section if the liability giving rise to the judgment is not covered by the terms of the policy. There is a plethora of cases in which courts have found that the liability was not one covered by the terms of the policy with the consequence that the insurer was not obliged to honour the judgment obtained against the insured. One such case was **Conrad McKnight**, on which Ms Gordon relied. It is of significance that in **Conrad McKnight,** McDonald-Bishop J (as she then was) noted that the terms of the policy must be examined for the nature and extent of the indemnity to be determined[2] and the learned judge examined the policy to determine whether the liability in question was covered by the policy.[3] In the **Kirk Burford**

[2] See paragraph 14 of the judgment
[3] See paragraph 32 of the judgment

case, which was also a case brought under section 18 of the MVTPRA relied on by Mr Kinghorn, Bertram-Linton J found that the insurance documents were not provided to the court with the consequence that the court could not make a finding as to whether the liability was one that was covered or not.[4]

[41] In **Kirk Burford,** the defendant insurer had raised several discrepancies in the previous claim which had culminated in the judgment against the insured. These, as identified by Bertram Linton J were (i) the defendant insurer was not able to inspect the vehicle to confirm the damages done to it and cross reference these with the injuries that the claimant claimed to have suffered; (ii) the accident was said to have taken place at a particular location yet no report had been made to what seems to have been police stations in the vicinity; (iii) the police report relied on in the previous matter cited the accident as occurring at a different location; and (iv) checks made at a particular hospital that the claimant purportedly visited revealed no record of the claimant's visit and the defendant had not had an opportunity to examine the medical report relied on by the claimant. With respect to those matters Bertram-Linton J stated:

> The issues which the defendant has pointed to, as it relates to the discrepancies in the previous matter are such that their considerations are best suited to be heard on an appeal. To consider those matters now would almost operate as a retrial of the [claim] and this cannot be done by this tribunal.

She further stated:

> Further, the discrepancies as it relates to the police report, the claimant's medical history and injuries as well as damage to the car are all matters which would have been dealt with in the previous matter in which judgment was granted in the claimant's favour. It is not for this court to reexamine the evidence placed before the court in the previous and even so, there is not enough information presented for any tribunal of fact to find that these discrepancies are legitimate in nature

[4] See paragraph [16] of the judgment

> and are material enough to ground a finding adverse to the law.

[42] It seems to me that Bertram-Linton J was not shutting the door on the possibility of a defence of fraud connected to the previous claim being raised by the insurer. She did express the view that with respect to the discrepancies that "there was not enough information presented for any tribunal of fact to find that these discrepancies are legitimate in nature and are material enough to ground a finding adverse to the law."

[43] There is authority from our Court of Appeal **Williams v United General Insurance** SCCA No 82/1996 (delivered 28 April 1997) that the court in **Kirk Burford** did not have for consideration, which is relevant in determining the interpretation to be given to section 18 including the nature of the defence that may be raised by the insurer. Although the facts of the case are not similar to the instant one, the dictum of the court on the rights given to a third party under section 18 are instructive.

[44] In that case, the claimants had obtained a judgment against parties insured by United General Insurance and after making a claim for the company to honour the judgment without any positive response, they filed a petition for the winding up of the company. The Court of Appeal found that the benefit given to a third party under section 18 had to be accessed by the bringing of a claim against the insurer to honour the judgment. Since, in that case, no claim had been brought and a declaration obtained, the claimants had no standing to bring the winding up petition. Downer JA stated:

> What is the effect of section 18 of the Act [MVTPRA]? Since the petitioners have obtained judgment against the insured, then the insurer is liable to pay the petitioners the sums claimed. What procedures are mandatory to secure payment? The answer is that proceedings must be instituted against the insurer for recovery of the sum claimed. In the course of proceedings, the insurer may have defences against the insured and they can be raised if the need arises. This is recognised by the authorities and in any event it confirms the ordinary principles of common law.

An apt illustration of this is **Guardian Insurance Co Ltd v Sutherland** [1939] 2 KBD 246 at p 250 Branson J said:

> In McCormick's case (19340 50 TLR 528; Digest Supp.; 40 Com Cas 76 Scrutton LJ said at pp84, 85:
>
> > I might approach that matter as I approached it in another case. It was a commonplace of the law that an insurance company was not liable on a policy obtained by fraud or by concealment or by innocent misrepresentation. That common law right you would not expect to be taken away, and on the construction the court has adopted it would not be taken away by Parliament without clear words showing what the Act referred. There is a series of decisions under the Agricultural Holdings Act to that effect; and if I approach subsect. (4), meeting an argument that subsect. (4) intended to take away from insurance companies the right to object to a liability on a policy obtained by fraud or misrepresentation or concealment, I should expect very clear words to compel me to do it; and I find no such clear words in subsect. (4).

"Then he goes on to say that the subsection was intended to have the effect, and to make it clear, that a certain defence could no longer be raised. **The effect of this paragraph can only be avoided by Mr Holmes if he says that his action for indemnity is not upon the contract but upon the statutory right conferred by the section. The section does not, in my opinion, impose any statutory liability upon the insurer. It only gives to "persons specified" a statutory right, which apart from statute they did not possess, to sue upon the contract**. This is on all fours with the right given

> by the Third Parties (Rights Against Insurers) Act 1930, to third parties in the event of bankruptcy or winding up of persons insured, and the rights given by the Road Traffic Act 1934, s 10, to persons who have recovered judgment against persons insured. I am satisfied that sub-s (4) does not help the defendants." (Emphasis supplied)

Bingham JA also stated:

> **The effect of this provision by creating a statutory exception to the common law rule based on the doctrine of privity of contract is to assign to the successful third party, which in this case are the appellants, all such rights as are vested in the insured under the indemnity clause in the policy of insurance.** Such a right would be one enabling the third party to enforce the judgment obtained against the insured by action against the insurers, limited in this case to one million dollars; such being the extent of the liability of the coverage under the policy of insurance. In such an action, the insurers would be entitled to raise any defences available to them against the insured. This is so as **by virtue of the statutory assignment under section 18(1) a third party could obtain no greater right of recovery against the insurers than the insured has under the contract of insurance.** (Emphasis supplied)

[45] Thus, the judgment of the Court of Appeal in **Williams v United General Insurance** shows that in defending a claim filed pursuant to section 18 of the MVTPRA, it is possible to rely on the defence of fraud. There is no indication in the judgment that the Court of Appeal considered what implications this would have for the judgment obtained in the claim filed against the insured.

[46] Mr Kinghorn in support of his submission, stated that the defendant is now trying to re-litigate the previous claim argued that the facts in respect of the evidence that the defendant is trying to rely on was always available to be put

before the court. He argued that at the time the court heard the evidence in the 2021 claim, Ms Singleton's report was in the possession of the defendant and that no application has been made to set aside the judgment.

[47] A brief perusal of Ms Singleton's report indicates that on 30 July 2021, she was appointed to conduct investigations into the accident. She was provided with copies of the claim form submitted by Mr Chin, the suit documents filed in the Supreme Court on 24 Match 2021, Mr Chin's proposal form and the Third Party's Assessor's Report. Ms Singleton in carrying out her investigations identified a number of inconsistencies in, among other things, the report made by Mr Chin to the defendant including his account as to how the accident occurred, which account suggested that Mr Chin was at fault. The report concluded that claimant's claim was fraudulent and that the insured Mr Chin was in collusion with the claimant.

[48] It seems to me that given the account provided by Mr Chin and the implications that it had for challenging liability, it could well be said that the defendant may have faced an uphill task were it to have made an application to set aside given the requirements of Part 13 of the CPR for setting aside a regularly obtained judgment.

[49] Nonetheless, in light of the various dicta from the Court of Appeal in **Williams v United General Insurance**, the issue of fraud and collusion perpetrated by the claimant and Mr Chin is one that may be raised in resisting the claim. I am therefore of the view that there being no evidence of the insurance policy, there is no foundation upon which the assertion that the liability in question is not covered by the terms of the policy can stand. The absence of any evidence of the policy is no impediment to the defendant relying on this because as was recognized by the House of Lords in **Manifest Shipping**, the prohibition against fraud need not be stated in the contract of insurance but arises by virtue of the common law position.

[50] Ultimately, it will be for the court at the hearing of the fixed date claim form to consider how to treat with this defence including what impact, if any, it will have

on the judgment obtained in the 2021 claim in light of the views expressed by Bertram-Linton J in **Kirk Burford**.

[51] In light of the foregoing, it is my view that there is merit in the defence and that in that regard, Ms Singleton's report will assist in resolving issues to be decided in the claim.

Whether Part 32 of the CPR requires that there must be in existence an expert report which complies with Part 32 of the CPR before a person (being the maker of the report may be appointed as expert;

[52] The provisions relevant to this issue are to be found in rule 32.6 of the CPR. It provides:

(1) No party may call an expert witness or put in an expert witness' report without the court's permission.

(2) The general rule is that the court's permission is to be given at a case management conference.

(3) When a party applies for permission under this rule –

(a) that party must name the expert witness and identify the nature of the expert witness' expertise; and

(b) any permission granted shall be in relation that expert witness only.

(4) No oral or written expert witness' evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.

(5) The court must direct by what date such report must be served.

(6) The court may direct that part only of an expert witness' report be disclosed.

I am of the view that it is clear from the provisions of rule 32.6(3) that what is required when permission is being sought to call or appoint an expert is that the court is satisfied that the proposed person to be called has expertise in a particular area that will assist the court. This is separate and distinct from his or her report, which rule 32.6(5) of the CPR contemplates may be served at a later date. Further, rules 32.9 in providing for a single expert where each party is

seeking to instruct his own expert and rule 32.10 which provides for parties to give instructions to the expert reinforce the point that the expert may be appointed first and the report produced later. That these are two separate issues was in my view made clear by the Court of Appeal in **Winston Coley and Pam Coley v Toy Tyrell** [2024] JMCA Civ 45. In that case, the issue concerned whether the proposed expert Quantity Surveyor and Construction Cost Consultant was qualified to give an opinion on the quality of work to be done on a construction site. McDonald-Bishop P in considering this issue stated that the expert's qualification to be appointed an expert was intertwined with the contents of the report that had been submitted and so she had regard to that report. Having considered the expert's qualifications as stated in the report, she stated:

> There may be aspects of his report that could well be challenged by the respondent or even found to be unacceptable by the court, but that does not mean he cannot be appointed as an expert. **His appointment is essentially a question of law for the judge and not a question of the weight to be attributed to his report. (Emphasis supplied)**

[53] In the case at bar, Mr Kinghorn has stated that the report is intertwined with whether Ms Singleton is qualified to be an expert. In so far as the report states her qualifications and her experience which are relevant to whether she has expert knowledge in a particular field, I agree. However, the issue of whether the report complies with all the requirements of the rules is, as I have endeavoured to show, a separate matter. The attorneys for the claimant in taking issue with her report had identified 7 areas in which they were requesting information. Mr Kinghorn contends that that information has not yet been provided and therefore she ought not to be called as an expert. Of the 7 areas, only two concerned her qualifications or expertise, which were expressed as follows:

(i) Ms Brenda Singleton describes herself as a Licensed Motor Vehicle Insurance Investigator. Please provide us with a copy of the licence

(ii) Copies of the certificates referred to under the heading "EDUCATION" in Ms Singleton's curriculum vitae.

The other five areas concerned the contents of the report, which were expressed as follows:

iii. The instructions given to Ms Singleton as well as the documents that accompanied those instructions, namely, the copy of the claim from submitted by the insured, copies of the suit documents filed, copy of the insured proposal form and copy of the Third Party's Assessor's Report;

iv. A copy of the "follow-up statement" dated October 2, 2021, given by Mr Davion Chin;

v. The source of the information of Range Rover Evoque 2019 since Ms Singleton did not inspect the claimant's vehicle;

vi. The source of the information for "1998 Honda Civic Ferio 1.5" since Ms Singleton did not inspect Mr Davion Chin's vehicle;

vii. In her report dated 6 December 2021, Ms Singleton indicates that the [sic] "this matter is being further pursued and a supplemental report will be forwarded to provide additional irrefutable evidence", kindly provide us with that supplemental report.

[54] The supplemental affidavit sought to address the concerns related to her qualifications by exhibiting Ms Singleton's academic certificates which were requested as well as at least two of the other concerns. However, Mr Kinghorn has argued that the supplemental affidavit ought not to be considered because it was filed out of time and has deprived the claimant of an opportunity to respond.

[55] It is to be noted that when the matter came on for the first hearing on 15 May 2023, an order had been made for the service of the instant application, among other things, and for the claimant to file and serve an affidavit in response on or before 30 June 2023. It appears that the claimant did not comply as an order

was made extending the time to 30 November 2023 for filing his affidavit. An order was also made for any further affidavits to be filed by the defendant on or before 12 January 2024 and affidavits in response by the claimant on or before 3 February 2024. The supplemental affidavit was filed by the defendant after the date for the filing of its affidavit and after the date for the claimant to respond. It is my view that having regard to the following considerations, it would not be in the interests of justice to preclude the defendant from relying on the supplemental affidavit: (i) the claimant had previously obtained an extension of time to put his affidavit before the court; (ii) the affidavit of the defendant had been filed with the intention of addressing the issues raised in the claimant's affidavit, particularly Ms Singleton's qualifications (iii) the claimant will have the opportunity of raising the issues not related to her qualifications which concerned the contents of the report, either by putting questions to Ms Singleton (within the parameters of the CPR) and/or by cross-examining Ms Singleton at the hearing of the fixed date claim form.

[56] It is now necessary to determine whether the defendant should be permitted to call Ms Singelton as an expert having regard to Ms Singleton's qualifications and experience. In written submissions, the claimant had argued that the defendant has failed to identify what exactly Ms Singleton is an expert in and that she had failed to disclose the very qualifications that makes her an expert.

[57] In her report dated 27 February 2023, Ms Singleton stated that she is a licenced motor vehicle insurance investigator. She stated that she has over 20 years of experience as an investigator conducting motor vehicle insurance claims investigations since 1993, motor vehicle valuations since 1998, adjusting damage vehicles since 1999 and process serving since 2007. She stated that she was at the time of the report the president of the Loss Adjusters Association of Jamaica in charge of investigations. She referred to her curriculum vitae that was attached setting out her educational qualifications, which included certification with the College of Insurance and Professional Studies, certification in dealing with suspicious financial transactions, among others. In addition, her curriculum vitae reveals that from 1993 to the year of the report 2023, she had occupied several positions as investigators at various places of employment and at the time of the report was operating her business as Perceptive

Investigation Services. Some of the certificates were exhibited to the supplemental affidavit of Mr Scott as also a letter from the Financial Services Commission dated 29 October 2019 stating that her application to be registered as an individual investigator had been approved.

[58] I am of the view that the educational qualifications referred to in addition to her extensive experience in investigating insurance claims qualify her to assist the court in determining whether the defendant can avoid honouring the judgment on the basis of fraud perpetrated through collusion between the claimant and the defendant's insured.

[59] With respect to the issue raised by Mr Kinghorn as to the absence of the instructions to the expert, I am of the view that this can be addressed by the making of an order for the filing of same as an addendum.

[60] I am of the view that the defence of fraud has merits especially when considered against the background of Ms Singleton's report dated 27 February 2023. Consequently, the Affidavit of Bobbie-Ann Malcolm should be allowed to stand.

Conclusion

[61] I therefore make the following orders:

(i) The affidavit of Bobbie-Ann Malcolm filed on 3 Match 2023 is permitted to stand as being filed in time.

(ii) Ms Brenda Singleton, private investigator is certified as an expert witness for the purposes of the hearing of the fixed date claim form.

(iii) Ms Brenda Singleton's report dated 27 February 2023 is certified as an expert report;

(iv) The claimant is to file an addendum to Ms Singleton's report prepared by Ms Singleton attaching all the instructions given to her by the claimant.

(v) Costs of the application are to be costs in the claim.