[2016] JMSC. Civ. 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV04145

BETWEEN	**JUDITH SMITH**	**CLAIMANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**DEFENDANT**

Leonard Green and Sylvan Edwards instructed by Chen, Green & Company for the Claimant.

Suzette Campbell instructed by Campbell & Campbell for the Defendant.

Heard: January 26 and 27, 2015, May 5, 2015 and October 14, 2016

Motor vehicle accident – Motor vehicle insurance – Judgment in default entered in favour of Claimant against owner of motor vehicle as well as driver – Court's refusal of insurer's application for declaration to avoid policy of insurance – Whether insured should be allowed to employ same defence as used in the application for declaration – Whether issue estoppel or res judicata arises – Whether insurer should be held liable to indemnify Claimant in respect of judgment debt – Motor Vehicles Insurance (Third Party Risks) Act, Section 18(1)

Thompson-James, J.

Introduction

[1] The Claimant, Judith Smith was involved in a motor vehicle accident February 1, 2005. She suffered personal injuries and contends that Heike O'Brian was the

driver of the motor vehicle at the material time. Consequently, she filed Claim No. 2007 HCV 02971 to recover damages against Stetson and Heike O'Brian. The 1st Defendant being the owner of the motor vehicle involved and the husband of the 2nd Defendant. A Notice of Proceedings filed May 17, 2007 was served on United General Insurance Company (as it was then), now the Defendant in the case at bar.

[2] October 20, 2010 damages was assessed in the sum of $8,021,825.00 (eight million, twenty-one thousand, eight hundred and twenty-five dollars). This judgment remains unsatisfied. The Claimant now seeks to be indemnified pursuant to the Motor Vehicles Insurance (Third Party Risks) Act (MVIA) by the Defendant company.

Preliminary Issue

[3] A preliminary issue arises whereby the Claimant seeks to have admitted into evidence a Fixed Date Claim Form and supporting Affidavit in Claim No. 2006 HCV 01534 filed April 27, 2006 wherein United General Insurance Company (UGI) sought a declaratory order that it was under no obligation to indemnify its insured, Stetson O'Brian or satisfy any judgment obtained in relation to the said accident.

July 13, 2007, Brooks J, as he then was refused the application (Exh. 7).

[4] The Claimant here raises the issue of whether this Claim at bar amounts to a re-litigation of the issue that was adjudicated on in the 2006 case, since the Defendant had advanced the same reason for avoiding the relevant insurance policy, as his defence in this Claim and whether it amounts to an abuse of process.

It can therefore be inferred that this is the reason admission of the Fixed Date Claim and supporting Affidavit is being sought.

Defendant's Objection

[5] The Defendant objects to the admission of the documents on the grounds that;

(i) the document was not attached to the Claimant's Claim Form or Particulars of Claim as required by CPR 8.9(3).

(ii) The Claimant has failed to comply with the provisions of Sec 31 E (1) of the Evidence Act in attempting to tender the documents in evidence;

(iii) The Claimant is in breach of the order made at the case management conference for disclosure of documents and pursuant to CPR 28.14 (1) is barred from relying on or putting the document in evidence.

The cumulative effect of the Evidence Act and the CPR is that Fixed Date Claim Form and the Affidavit cannot be admitted into evidence due to failure to disclose the documents or to provide notice of intention to rely on them despite having ample opportunity to do so.

[6] Further, these documents are not sworn to or signed by Miss Ruthann Morrison and, therefore, must be deemed hearsay for the sole purpose of proving the truth of their contents. Further, no reason valid or otherwise has been put forward for failure to notify of the intention to tender them into evidence and has thereby robbed the Defendant of the opportunity to effectively examine the document and prepare its case.

[7] The Defendant relies on the cases of Debbie Powell v Bulk Liquid Carriers Ltd et al SSCCA 52/2010, Rule 28.14 (1) of the CPR; Tombstone Ltd v Raja & Anor [2008] EWCA Civ 1444.

Claimant's Response

[8] The Claimant in its written submissions, though not explicitly stating so, appears to be saying that it did not disclose because it was not aware of the previous action. In that vein, the Claimant asserts that the Defendant has demonstrated a clear intention not to be forthright in their dealings in this matter, particularly that the Defendant failed to disclose to the Claimant that they had filed an application

against Stetson O'Brian and Heike O'Brian seeking a declaration that there was a policy breach even though they were served with the Notice of Proceedings May 17, 2007 in the claim between the Claimant and the insured and his agent. The service of the notice was acknowledged by the Defendant. The Claimant relies on the case of Lloyd Heman v Advantage General Insurance Limited Claim No. 2010HCV00456 for the proposition that the insurer has a duty to be upright and forthright and the court should not countenance conduct on the part of the insurers that is not forthright and upright. In that case, Sinclair-Haynes J chided the conduct of the Defendant, in that it did not inform the Defendant that it intended to apply to the court for a declaration although the Defendant was aware that the Claimant had made a claim against them.

[9] In response to the Defendant's objections to the admissibility of the documents, the Claimant submits that, pursuant to CPR 3.9(4), since the Fixed Date and supporting Affidavit bear the seal and stamp of the court both documents are admissible in evidence without more. For this, the Claimant relies on an extract from Blackstone's Civil Practice, which at paragraph 47 reads:

> *"Every document purporting to be sealed or stamped with the seal or stamp of the Senior Courts shall be received in evidence without further proof…"*

[10] In relation to the issue of hearsay, the Claimant asserts that the Fixed Date Claim Form and the Affidavit are the Defendant's own documents so these are not hearsay but stand as proof of the acts of the Defendant. Further, the Defendant cannot seek protection on the ground of prejudice by their own documents that are under their control.

[11] In relation to the disclosure issue, it is asserted that since disclosure is the formal process by which parties give each other copies of the documents in their control, there can be no question of disclosure regarding a court document filed by the Defendant since that document would be in the control of the Defendant.

[12] There is no duty on the Claimant to disclose a court document filed in the Supreme Court by the party claiming that they might be prejudiced by a failure to disclose their own document to them.

[13] Conversely, the Claimant posits that the court should find that the Defendant had a duty to disclose the relevant documents as a part of standard disclosure ordered at Case Management Conference (CMC). However, even if the court should find that the documents ought to have been disclosed by the Claimant who is seeking to rely on them, which is not agreed, the parties have a duty to disclose continuously until the proceedings have concluded (CPR 28.13).

[14] The matter not having concluded, and since the Defendant has not disclosed the said documents to the Claimant through standard disclosure, the Claimant has prepared a supplemental List of Documents dated, filed and served on the Defendant on the 16th February 2015, which discloses, inter-alia, certified copies of the relevant documents, both filed in the Supreme Court on April 27th 2006. Furthermore, it is submitted, it is trite law that the court can rely on its own document, provided that a sealed copy is presented, not to speak to the truth of what is contained in the document but of its existence and its contents.

Should the documents be admitted?
Failure to include documents in statement of case and failure to disclose

[15] **CPR 8.9(3)** requires that the Claim Form or Particulars of Claim must identify or annex a copy of any document which the Claimant considers is necessary to his or her case. This provision is listed under the heading 'Claimant's duty to set out case'. However, under the next heading 'consequences of not setting out case', at **8.9A**, it is stated that the Claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission. What it does not say is that a failure to include the documents mentioned at **8.9(3)** should result in an inability on the part of that party to rely on them. In my view, a proper reading of these provisions lead to the clear conclusion that only the failure to at all indicate an

intention to rely on a particular document could prevent the party from being able to rely on it. Indeed, **8.9(3)**, in stating what it means to 'set out' case, requires that the Claimant "identify **or** annex a copy of any document…" [*emphasis mine*].

[16] It is my view that since the Claimant did in fact raise the issue of the Fixed Date Claim Form and Affidavit filed in the 2006 matter in its Particulars of Claim filed June 27, 2011, she is not precluded from relying on them, as the Defendant contends, on the basis of these provisions.

Failure to Disclose

[17] **CPR 28.14(1)** provides that a party who fails to give disclosure by the date ordered or to permit the inspection may not rely on or produce any document not so disclosed or made available for inspection at trial.

[18] However, it is to be noted that this provision would only apply where a duty to disclose actually arises in respect of a document. ***CPR 28.2(1)*** provides that a party's duty to disclose documents is limited to documents which are or have been in the control of that party, and a party is deemed to have control of a document where it is or was in the physical possession of that party, that party has or had a right to possession of it, or that party has or has had a right to inspect or take copies of it.

[19] To "disclose" means revealing that the document exists or has existed (**CPR 28.1(1)**), and where a party is required by any direction of the Court to give standard disclosure that party must disclose all documents which are directly relevant to the matters in question in the proceedings.

[20] In my view, the fact of a previous claim being brought by one of the parties in this case, arising from the same incident, and involving the adjudication of an identical issue to one of the main issues in this case, is clearly directly relevant to these proceedings, and thus the initiating documents, i.e. the Fixed Date Claim and Affidavit in support are directly relevant documents.

[21] Since these documents were created by an agent of Advantage General's documents and filed by that company in pursuit of their own claim, there is no doubt that these documents were and still may be in their control. As such the duty of disclosure, in my view, falls on the Defendant, as submitted by the Claimant, in accordance with the order for standard disclosure.

[22] Furthermore, they would not have reasonably been in the control of the Claimant. It matters not that it is the Claimant who seeks to rely on them. The duty of disclosure of documents within one's control extends to a party where that document tends to adversely affect that party's case or if it tends to support another party's case. The Defendant ought to have disclosed them.

Do the documents amount to Hearsay?

[23] It is trite law that hearsay is an out of court statement relied on to prove the truth of its contents, where the maker of that statement is not present at Court to give evidence so that its veracity or accuracy can be tested (**Subramaniam v Public Prosecutor on Appeal from the Supreme Court of the Federation of Malaya** [1956] 1 W.L.R. 965; **National Water Commission v VRL Operators Limited et al** [2016] JMCA Civ 19). Such evidence is inadmissible unless it falls within one of the exceptions established by Common Law or statute. I am in agreement with Counsel for the Claimant that the Fixed Date Claim and Affidavit do not amount to hearsay, as they are not being adduced for reliance as to the truth of their contents. Their admission is being sought solely to prove the fact that they were filed and a claim commenced, as well as the fact of what had been alleged and what was sought from the court. It means therefore that the requirement of notice under section 31E of the Evidence Act is not applicable.

Effect of the Court Seal

[24] **CPR 3.9(4)** provides that 'a document purporting to bear the court's seal shall be admissible in evidence without further proof'. The Jamaican Court of Appeal (COA) case of **Glenford Anderson v George Welch** [2012] JMCA Civ 43 is authority for the proposition that the proper interpretation of ***CPR 3.9(4)*** is that a

document bearing the court seal is admissible without more, once it is relevant and of probative value to the particular case in which it is sought to be adduced. The COA in that case had to deal squarely with the issue as in this case as to whether documents from another suit, imprinted with the seal and stamp of the Supreme Court, could be admitted pursuant to **Rule 3.9(4)** in a later case. The relevant ground of appeal asserted that the trial judge had erred in law and in fact in failing to find that the Appellant/Defendant could rely on such documents (writ of summons, notice of proceedings to insurance company, and a memorandum of appearance).

[25] The COA found that such documents are admissible in evidence without further proof of their authenticity once sealed, and they are in fact relevant to the proceedings and have probative value. In those circumstances, it was found that the only document that qualified under **R*ule 3.9(4)*** was the writ of summons and that said writ would only tend to show that the Appellant had commenced an action against a party or parties and the nature of his claim. It would not establish liability of any party or parties against whom the proceedings were initiated, nor does it show the outcome of the proceedings, or show that it tended to absolve the Appellant. As a consequence, if admitted into evidence, it would have had no probative value whatsoever [para. 20].

[26] In the case at bar, the Fixed Date Claim Form and the Affidavit in Support are imprinted with the stamp and seal of the Court, and there is no doubt that these documents are relevant and would be of probative value. As stated above, the fact of a previous claim being brought by one of the parties in this case, arising from the same incident, and involving the adjudication of an identical issue to one of the main issues in this case, is clearly relevant to these proceedings, and thus the initiating documents, i.e. the Fixed Date Claim and Affidavit in support would be of probative value, to show the fact of the claim as well as the nature of the claim.

Prejudice to the Defendant

[27] It has been argued that prejudice would be caused to the Defendant if the documents are admitted because the failure of Claimant to give notice would have robbed the Defendant of the opportunity to effectively examine the document and prepare its case, and such is likely to result in an adverse decision on the substantive issue. I find this argument unacceptable. The relevant documents were prepared by an agent of the Defendant for use by the Defendant to file the 2006 claim. The documents were and probably still are in the Defendant's possession, and it would have been apprised of the information contained therein. Especially as the Defendant is trying to advance the same substantive defence in this matter as was given in that case. Therefore, it can hardly be said that the Defendant would not have been able to effectively examine the document and prepare its case. Furthermore, the Claimant raised the issue by making reference to the documents in its Particulars of Claim. So the Defendant would have been put on guard, as early as at the time of service of the Particulars of Claim, that the Claimant intended to rely on that assertion, and quite possibly the said documents. I cannot see where there would be any prejudice to the Defendant.

Significance of Admission of Documents

[28] The Claimant seeks to have the documents admitted as support for the contention that the main issue in this case, i.e. whether the insured Stetson O'Brian breached his insurance policy, was already adjudicated and pronounced on by the Court, and as such to rehash them in this case would be an abuse of the process of the Court. Brooks J refused to grant the declaratory order sought by the Defendant, that Stetson O'Brian was in breach of his policy. It is to be observed, as stated previously, that the fact of the refusal of the order in that claim is a matter of court record, which is public record. Even without the documents being tendered, it is open to the court to take note of the outcome of that case if it so deems it as relevant. I find therefore that there is no legal impediment to the admission of the documents and, in my view, no prejudice will

accrue to the Defendant. I could not find that any injustice would arise in the circumstances where the order of Brooks J made in relation to Claim No. 2006 HCV 01534 is adduced into evidence in the case at bar without any objection, yet the relevant Fixed Date Claim Form and Affidavit be excluded.

Whether Issue Estoppel or Res Judicata Arises

[29] The Claimant submits that the circumstances of this case, though not falling under the rubric of res judicata or estoppel give rise to a blatant abuse of the process of the court in that the court has already decided on an issue that the Defendant is seeking to have the court relitigate during the course of the trial, and for that the Claimant submits that it is manifestly unfair for the Defendant to raise the issue of policy breach of the insured, Stetson O'Brian when the court has already ruled on the issue of policy breach.

Reliance was placed on **Hon Gordon Stewart et al v Independent Radio Co. Ltd & Anor** SCCA No. 92/2011 [2012] JMCA Civ 2; **Henderson v Henderson** 1843-60 All ER Rep 378; **Ashmore v British Coal Corp** [1990] 2 All ER 981; **Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd et al** [1982] 2 Lloyd's Rep 132; **Barrow v Bankside Members Agency Ltd** (1996) 1 All ER 981.

[30] The doctrine of *res judicata,* (from the latin term *res Judicata pro veritate accipitur* meaning 'a thing adjudicated is received as the truth'), holds that where a judicial decision is made by a court of competent jurisdiction, said decision is conclusive between the parties, and the same matter cannot be reopened by the parties save on appeal. The purpose of the doctrine is 'to protect courts from having to adjudicate more than once on issues arising from the same cause, to protect litigants from having to face multiple suits arising from the same cause of action, and to protect the public interest that there should be finality in litigation and that justice be done between the parties' [**Hon. Gordon Stewart et al v. Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ 2]. *Issue estoppel* is a branch of res judicata that refers to 'a defence which may arise where a particular issue forming a necessary ingredient in a cause of action

has been litigated and decided'. [See **Halsbury's Laws of England**, Civil Procedure Volume 12A, The Doctrine of Res Judicata, 1603).

[31] It is well settled that for issue estoppel or res judicata to succeed it must be shown that the parties are the same and the issues of law and of fact are the same. The Jamaican Court of Appeal decision of **Gloria Edwards v George Arscott and Herman Campbell** (1991) 28 JLR 451 is instructive. The facts in that case, dealing with a negligence claim arising from a motor vehicle accident, are similar to those in this case, in that the court had to decide whether the trial judge erred in allowing the Defendant/Respondent to amend his defence to rely on a judgment in his favour in an earlier action filed by him and arising from the same accident, in which another party was adjudged to be wholly responsible for the accident. It is to be noted that though the issue and facts were the same, the parties were different, in that the Plaintiff Gloria Edwards had not been involved in the first action. The claim was against the successful party in the first action and whereas her claim was one of personal injury, the issue as between the parties in the first action was one of damage to property already decided by a competent court.

[32] The question the court therefore had to grapple with was whether the Plaintiff/Appellant was estopped in an action for personal injuries by reason of the fact that the issue of negligence had already been litigated by a competent court in a first action joined between the Respondent owners and the third parties.

[33] In discussing the law, Morgan J.A. noted that issue estoppel supports the principle that it is desirable that a person should not be pursued in litigation with regard to a matter that has already been decided. For such a plea to succeed the principle has been that there must be in existence a final judgment by a court of competent jurisdiction, where there is co-existing the same parties or their privies, the same damages and the same question of law or fact.

[34] It is also argued, as a related but separate issue, that the circumstances of this case, though not falling under the rubric of res judicata or estoppel, give rise to a blatant abuse of the process of the court, in that the court has already decided on an issue that the Defendant is seeking to have the court relitigate during the course of this trial.

[35] The Claimant says it is manifestly unfair for the Defendant to raise the issue of policy breach of the insured Stetson O'Brian when the court has already ruled in the issue of policy breach. She relies on the case of **Hon. Gordon Stewart et al v. Independent Radio Company Limited and Wilmot Perkins** SCCA No. 9/2011 for the principle that an abuse of process will arise where to challenge the findings in an earlier claim would amount to be manifestly unfair to a party in the later claim for the issues to be relitigated, or if relitigating will bring the administration of justice into disrepute. The Claimant also relies on the **Henderson v Henderson** formulation of abuse of process arising from the case of **Henderson v Henderson** [1843-60] All ER Rep 378.

[36] Also relied on are the cases of **Ashmore v British Coal Corp** (1990) 2 ER All ER 981, **Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd et al** [1982] 2 Lloyd's Rep 132 at 137 and **Barrow v Bankside Members Agency Ltd** (1996) 1 All ER 981.

[37] Interestingly, the Claimant makes reference to the pleadings contained in para. 11 of her Particulars of Claim, wherein she alleges the fact of the 2006 claim having been filed seeking the declaratory order, and said claim being refused, to which the Defendant in para. 8 of its Amended defence categorically denied. It is noted that the Defendant's own witness, Ruthann Morrison, the same witness that certified the truthfulness of the defence, gave evidence on this point inconsistent with the Defendant's pleadings by acknowledging upon cross-examination the existence of the application, but alleging that the order sought was in relation to a failure to disclose or misrepresent by the insured. It is further noted that Ms. Morrison, upon suggestions being put to her, admitted that the

order was not sought re failure to disclose or misrepresentation, but she did not agree or disagree that it was re breach of policy. I find her evidence unreliable.

[38] In the case at bar, though the material issue is the same as in the 2006 claim, the parties are not the same, as the Claimant was not a party to that claim. Thus, the narrow formulation of issue estoppel and res judicata do not arise. However, on the question of whether the broadened formulation should apply, I am of the view that it should not. In balancing the public interest of finality of litigation and the undesirability of inconsistent court decisions as against fairness and justice being done to all parties, it is my view that the Defendant should be allowed to put forward his defence. I consider that, as in ***Gloria Edwards***, in the matter at hand the court has before it no evidence as to the reasoning behind the refusal of Brooks J in the 2006 Claim to grant the order sought that there had been a breach of the insurance policy. In my estimation, the fact of the refusal of the order to say there was a breach of the policy, is not in and of itself determinative that the policy was not breached, or that the Court should be deemed as saying so. It could very well have been that, in that matter, the evidence put forward by the Defendant was insufficient to meet the burden of proof for the granting of the order, and not that Brooks J was saying that the policy was not breached. In the absence of a written judgment or other clear indication, this Court ought not to speculate that this was indeed so.

[39] The issue at hand is whether the insurance policy was breached by the insured. I cannot say with certainty, for the reasons stated above, that this issue was conclusively decided by Brooks J. Further, I take into account the sentiments of Drake J in the North Water case (approved by our Court of Appeal in ***Gloria Edwards***) that caution should be exercised before shutting a party out of putting forward its case.

Abuse of Process

[40] **Rule 26.3(1)** of the CPR provides as follows:

"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-

(a) …

(b) That the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) …

(d) …"

[41] Though the **CPR** neither defines nor provides guidelines that should be followed in striking out on this basis, it is well established that the Supreme Court has an inherent jurisdiction to regulate its own processes by preventing misuse and abuses. Lord Diplock in **Hunter v. Chief Constable of the West Midlands Police** [1982] A.C. 529 (as quoted in Osborn's Concise Law Dictionary, 9th. Ed.), defined it as a power *"which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people"*.

Case law demonstrates a varied amount of circumstances in which an abuse of the court's process can be found.

The Claimant has relied on authorities which support what is known as the **Henderson v Henderson** formulation of abuse of process as laid down in **Henderson v Henderson** [1843-60] All ER Rep 378, which essentially allows for the court to find that an abuse of process exists where res judicata and issue estoppel is not made out, where a party was now trying to litigate issues or rely on arguments that ought properly to have been dealt with in a previous claim. Per Wigram VC at page 381-382:

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the

subject of litigation in, and of the adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

In my view this type of abuse of process does not arise for obvious reasons. None of the parties are trying to litigate an issue which was neglected in the earlier suit.

[42] Another type of abuse of process, referred to as a "*collateral attack*" was discussed by F Williams JA (Ag.) (as he then was) in the Court of Appeal authority of **The Minister of Housing v New Falmouth Resorts Ltd.** [2016] JMCA Civ 20. At paragraph [93] Williams J quoted from Lord Diplock's formulation of that doctrine in the authority of **Hunter v Chief Constable of West Midlands and another** [1981] 3 All ER 727 at pg. 733:

"…*The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made…*"

[43] Williams J then went on at para 94 to cite another quotation from Lord Diplock (again from pg. 733) as follows:

"My Lords, collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in

those passages from the judgment of A L Smith in Stephenson v Garnett [1898] 1 QB 677 and the speech of Lord Halsbury LC in Reichel v Magrath (1889) 14 App Cas 665 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A L Smith LJ in Stephenson v Garnett [1898] 1 QB 677 at 680-681:

'…the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court'."

[44] Williams J, then went on to adopt this formulation in para 96, noting that, even where the circumstances did not strictly fall within the spirit of the rules as to res judicata and issue estoppel, a matter could be still found to be in essence an abuse of the process of the court.

[45] In the case at bar, for the same reasoning which led me to my finding above, in particular that the refusal of Brooks J to grant the order could not be viewed as determinative of the relevant issue, I am of the view that this avenue would also fail.

[46] In the premises, the Defendant should be allowed to employ its defence as res judicata and issue estoppel do not arise, and the putting forward of the defence does not amount to an abuse of process of the court.

Whether the Defendant should be held liable to indemnify its insured, Stetson O'Brian in respect of the judgment debt to the Claimant.

The Claimant's Case

[47] The crux of Claimant's case is that the Claimant is entitled to an indemnity by the Defendant company pursuant to section 18(1) of the MVIA in respect of the judgment debt owed to the Claimant by its insured Stetson O'Brian.

[48] The Claimant asserts that it is clear from the relevant authorities that where an insurance company raises the issue of a policy breach, it is the duty of the

insurer to prove that the insured breached the policy to the extent that the insurer would not be duty bound by the terms of the policy. For this the Claimant relies on Conrad McKnight v NEM Insurance Company and Others Claim No. 2005 HCV 3040, delivered on July 13, 2007.

No such breach, they say, has been proved by the Defendant.

[49] The Claimant argues that the Defendant's argument in its statement of case that it sought to avoid the policy on the basis that the policy provided that an authorized driver of the vehicle was one who was the holder of a "PPV licence", and that the insured's driver did not hold such licence, is untenable as there is no such licence as a "PPV licence" and it is not open to the court to find that such a licence exists. In support of this, the Claimant relies on **section 16(4)** of the Road Traffic Act which provides the three classes of licences, none of which include a reference to "PPV licence". The Claimant argues that it is not relevant what the Defendant meant when it stated that the insured was not the holder of a PPV licence as the basis of the Claim, they assert, was predicated on the assertion that a PPV licence existed as a fact when this was not so.

[50] The Claimant further points out the Defendant's duty is to set out its case in accordance with CPR 10.5, and argues that any failure to do so means that the Defendant ought not to be able to rely on any fact not included unless permitted by the court to do so, and even then that would require an application to amend its statement of case, with an amendment only being permitted where the opposing party will not suffer prejudice. The Defendant has not applied to do so. In that regard, the Claimant argues that the Defendant had a duty to ensure that it informed the Claimant that it was relying on the failure of the insured's driver to be the holder of a valid "general licence" of the category set out under s16(4) of the RTA. Had it done so it would have given the Claimant an opportunity to cross-examine the witnesses called by the Defendant to support the Defendant's claim that the insured's driver was not the holder of a valid licence. Further it is submitted that the Claimant would have been entitled to call evidence to rebut

the claim that the insured's driver was not the holder of a valid licence and was deprived of that opportunity.

[51] The Claimant notes that the rationale of pleadings in the Defendant's statement of case is to alert the Claimant as to what it intends to rely on at trial and that the judge is not permitted to give judgment on the basis of a claim that is not included in the statements of case. It is argued that the Defendant should not be allowed to change its basic case at trial. Even in cases where the Defendant is relying on a "fall back defence" the court will not permit the amendment during the course of a trial if it is satisfied that the Claimant would be disadvantaged.

The Claimant relies on the cases of Sturton v Sutherland Holdings plc (2000) LTL 27/10/2000 and Rosengrenstann Ltd v Ayres (2001) LTL 22/6/2001.

[52] In relation to the issue of whether Heike O'Brian was an unauthorized driver, the Claimant submits that there is no evidence before the court that this was the case, nor is there any evidence that Heike was an unlicensed driver at the time that the accident took place. There is nothing in the police report of Constable G. Hall to suggest that the driver was warned for prosecution or charged with any offence under the Road Traffic Act, including any in relation to a valid driver's licence.

[53] The Claimant asserts that the court must make the distinction between a driver who may have authority to drive the vehicle but who is not in possession of the requisite licence to drive that vehicle on the roadway. Such authority, it is contended, must come from the owner of the vehicle, Stetson O'Brian, and there is no evidence that Heike did not have his permission.

[54] The Claimant further submits that the prohibition under the RTA on the holder of a private driver's licence to drive a public passenger vehicle means that the vehicle must not be used for the purpose of transporting passengers "for reward". It is asserted that in order to prove a policy breach the Defendant must prove that the vehicle was being used for reward or as a public passenger vehicle or as a

commercial motor vehicle or as an "invalid carriage". It is contended that the Defendant must prove that the vehicle was being used in contravention of the terms of the licence issued to her. It is not enough to say that the driver was issued with a Private licence at the relevant time so the insured has breached the policy.

[55] It is contended that all the terms stipulated in the Motor Proposal Form are relevant only to the answers given by the insured and the purpose of said form is to inform the Insurer of the risk that he undertakes vis-à-vis the insured. The Claimant argues that from the answer given at section 22 'open policy' of the proposal form in this case, it is obvious that the insured clearly intended that he was proposing use by drivers other than himself.

[56] The Claimant relies on the words of the learned judge in Lloyd Heman wherein she stated:

> *"Implicit in that statement is that the vehicle was being operated as a carriage for hire. No evidence has been provided as to whether the vehicle has been licensed for multiple purpose, for example domestic as well as pleasure. There is no assertion that at the time of the accident the vehicle was being used as a carriage for hire. In any event an isolated act of infringement of a policy will not automatically avoid a policy. The circumstances of the breach are crucial" (my emphasis).*

The Defendant's Case

[57] The crux of the Defendant's case is that the Claimant as a third party, not privy to the insurance contract, can only recover pursuant to section 18(1) of the Motor Vehicles Insurance (Third Party Risks) Act (MVIA) if the liability is one covered by the terms of the policy, and in the circumstances it is not, as the vehicle was being operated contrary to the terms of the policy, Heike O'Brian being an unauthorized driver at the time of the accident. Thus the Claimant cannot recover.

[58] The Defendant relies on the words of Gordon J.A. in the Court of Appeal judgment of The Administrator General (Administrator Estate Hopeton Samuel Mahoney deceased) v NEM (1988) 25 JLR 459 at p. 477, where he stated:

> *"the frequent use of the word "liability covered by the terms of the policy" recognizes that the policy of insurance embodies a contract between the insured and the insurers and this policy can contain terms limiting the user of the vehicle and providing for the avoidance of liability if the user does not conform to the terms stipulated in the contract."*

[59] The Defendant further relies on the words of McDonald-Bishop J (Ag) in Conrad McKnight v NEM Insurance Company Claim No. 2005 HCV 03040 at pg. 5, wherein she stated:

> *"It is clear that it is open to the parties to set the terms and conditions of the policy and to agree the cover to be afforded by the policy. Like in any form of contract, the parties are free to negotiate the terms of their dealings subject of course to the requirements of the law and public policy. It is also patently clear that the extent of the indemnity is to the extent of the cover offered by the policy. So, before the Claimant can recover on the indemnity, the liability must be one that the policy purports to cover."*

[60] It is submitted that in order to determine whether driving by a particular person is a liability covered by the policy of insurance there must be a proper interpretation of the contract of insurance [Michelle Foote-Doonquah v Jamaica Citadel Insurance Brokers Limited & NEM, Claim No. 2005 HCV 01078, per Sykes J at pg. 9). Further, there is no law in Jamaica, statutory or otherwise, which restricts an insurer from making provision in a policy of insurance in relation to who is an authorized driver [Conrad McKnight**,** per McDonald Bishop at pgs. 7 & 9).

[61] Where a motor vehicle is operated by an unauthorized driver, any liability which occurs while the vehicle is in the possession of the unauthorized driver, is a liability not covered by the policy and, notwithstanding section 18(1) of the Act, the third party cannot claim to recover under the policy. In support of this the

Defendant relies on the cases of *Michelle Foote-Doonquah*, *Conrad McKnight* and Donovan Bennett v Advantage General Insurance Company Limited Claim No. 2009 HCV 0078.

[62] It is submitted that in determining whether Heike O'Brien was an authorized driver and whether driving by her was a liability covered by the policy the starting point must be an interpretation of the relevant term in the contract.

[63] The law recognizes, and It is unchallenged, that the contract of insurance is made up of:

i. the proposal form (exhibit 5)
ii. the certificate of insurance (exhibit 2)
iii. the motor policy renewal schedule (exhibit 3)
iv. the insurance policy booklet (exhibit 4)

[64] The following questions were posed to the insured on the proposal form and his answers indicated as follows:

"(7) Type of Cover and use of vehicle
Answer: PPV

(8) Will use be solely for social, domestic and pleasure? If not state other purposes.

Answer: PPV JCALT
(14) Questions 14 to 18 relate to proposer, spouse and/or additional driver (s) referred to in 13 above.

(ii) State type of licence (other than motor cycle)

Answer: General PPV
(21) if used for Carriage of Goods:-
(i) what is the general nature:

Answer: PPV – Contract (JCALT)
(iii) in respect of each vehicle state the type of Licence which you hold

Answer: General PPV

[65] The Certificate of insurance headed ***PPV Certificate of Insurance*** names as persons or classes of persons entitled to drive the following:

> *"Mr. Stetson O'Brian*
> *Any person driving on the insured's order or with the insured's permission in keeping with the terms and conditions of the policy.*
>
> *Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by any reason of any enactment or regulation in that behalf from driving the Motor Vehicle."*

[66] The Motor Policy Renewal Schedule is headed Motor Policy Renewal Schedule – Public Passenger, and notes that the use of the vehicle is as a passenger vehicle. Under the heading authorized driver it states as follows:

> *"Mr. Stetson O'Brian*
>
> *Any person driving on the insured's order or with the insured's permission provided the person driving is not less than twenty five (25) years old and the holder of a valid driver's licence for the use and classification of the vehicle being operated, for not less than two (2) years.*
>
> *Provided that the person driving is permitted in accordance with the licencing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a court of Law or by reason of any enactment or regulation in the behalf from driving the Motor Vehicle."*

[67] The Policy Booklet, in section II (Liability to Third Parties) at (ii) states the following:

> *"In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver*

(a) Shall as though he were the insured observe fulfil and be subject to the Terms of this Policy in so far as they can apply."

[68] Additionally, section 1X of the Policy Booklet under the heading General Exceptions provides:

"The Company shall not be liable in respect of

(1) any accident loss damage or liability caused or sustained or incurred

(ii) whilst any motor vehicle in respect of which indemnity is provided by this policy is

(b) being driven by or is for the purpose of being driven by him in the charge of any person other than an Authorised Driver."

[69] The Defendant further submits that these documents read individually or together indicate that the risk or liability covered extends only to driving by authorised drivers, and they further identify who is regarded as an authorised driver. In that regard, they say:

a) The person must be driving with the insured's order or permission.

b) Must be the holder of a valid licence for the use and classification of the vehicle being operated. Stated in an alternate way the authorised driver must be permitted in accordance with the licencing or other laws or regulations to drive the Motor Vehicle.

[70] It is asserted that the evidence before the court as contained in the contract of insurance and the witness statements is that the motor vehicle licenced PP713E is classified as a public passenger vehicle. Also, evidence from cross-examination of the Claimant indicates that it is her understanding that the PP in the licence number of any vehicle indicates it is a public passenger vehicle. There can therefore be, and it is not in fact disputed, that the motor bus involved in the accident was a public passenger vehicle.

[71] The policy of insurance issued by the Defendant required an authorized driver to have a licence for use and classification of the vehicle being operated, and so the issue is therefore what type of licence is required for the driving of a public passenger vehicle.

[72] The Defendant notes that based on the types of licences set out in section 16(4) of the Road Traffic Act, an authorized driver of a public passenger vehicle as in the instant case must have a licence under class (b), since the provisions of (a) specifically excludes public passenger vehicles and (c) is inapplicable.

[73] The Defendant highlights the evidence of Fernando Davis from the Collector of Taxes Motor Vehicles Licences and Documentation Department which is that category (b), the General Licence, encompasses all other licences which are not covered by classes (a) and (c), and that such a licence will be endorsed with the particular type of vehicle the holder is permitted to drive.

[74] Regarding the use of the term “PPV Licence” the Defendant asserts that it is the unchallenged evidence of Mrs. Primrose Cleghorn-Haughton that when reference is made to a PPV licence, as it was in the pleadings filed on behalf of the Defendant and in the evidence to the court, it simply means a general licence which specifically permits the holder to operate a PPV vehicle. She states a simple reference to a general licence would not be adequate since it’s possible to have a general licence which does not permit driving a public passenger vehicle.

[75] It is argued that the clear and unchallenged evidence is that Heike O’Brian was not an authorized driver. The evidence of Mr. Fernando Davis from the Tax Collectorate is that records indicate that Heike O’Brian’s licence only permitted her to drive private motor vehicles, a class (a) licence which specifically prohibits the driving of public passenger vehicles. Thus she did not, at the time of the accident, have a licence for the use and classification of the relevant motor vehicle.

[76] In relation to the issue arising at trial as to whether the vehicle was being operated as a public passenger vehicle at the time of the accident and if not whether the PPV licence would still be necessary, the Defendant submits that that issue is immaterial and need not be determined by the court. This they argue since the policy specifically provides that 'the company shall not be liable in respect of any accident loss damage or liability caused sustained or incurred whilst any motor vehicle in respect of which indemnity is provided by this Policy is being driven by or is for the purpose of being driven by him in the charge of any person other than an authorized driver.

[77] It is further posited that, it is not even necessary for the unauthorized person to be actually driving, it is sufficient if the vehicle is in his possession for the purpose of being driven. As such in the Donovan Bennett case, where the vehicle was stolen while the unauthorized driver was asleep and clearly not driving, McDonald-Bishop J held that the words 'or is for the purpose of being driven by him' must be given their clear and unambiguous meaning, the result being that there was no recovery under the policy.

[78] The Defendant argues that there can be no contention by the Claimant that the relevant motor vehicle was in the possession of Heike O'Brian for the purpose of being driven, since she says at paragraph 1 of her witness statement:

> *"I was involved in an accident wherein Heike O'Brien (sic), the servant and/or agent and/or authorized driver of Stetson O'Brien (sic) negligently drove, managed and/or controlled motor vehicle registered PP713e".*

[79] Ultimately, it is submitted that the authorities show that, despite the difference in terminology used, where a motor vehicle is in the possession of an unauthorized driver, the insurer is not liable to pay either the insured or the third party who has suffered loss.

[80] It follows that, since Heike O'Brian is an unauthorized driver whether it be deemed a 'breach of contract', a 'liability not covered by the policy' or the

Defendant being "off risk" the end result is that the Claimant cannot recover under the policy.

Law and Analysis

[81] 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 as against the parties to the contract. Hence, a third party, not privy to an insurance contract, can only recover for loss or damage suffered in an accident involving a vehicle covered under that contract pursuant to the **Motor Vehicle Insurance (Third Party Risks) Act (MVIA)** which provides a statutory exception to the limitations of privity.

Section 18(1) of the MVIA provides:

> *"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."* **[emphasis Mine]**

[82] It is important to note that the aforementioned section makes it clear that the third party can only recover under the policy if the liability is one '*covered by the terms of the policy*'. In that regard, in the Jamaican Court of Appeal (COA) case of **Advantage General Insurance v Lloyd Heman** [2015] JMCA Civ 13, in which the facts were similar to those in this case, Dukharan JA noted that the primary consideration as to whether the third party Claimant could recover was whether

the liability was one which was covered by the insurance policy at the material time.

[83] In ***Heman's*** case the Respondent Lloyd Heman had been seriously injured in a motor vehicle accident owned by Claudia Palmer who was insured by the Appellant Advantage General Insurance Company Limited (AGI). The Respondent successfully sued Claudia Palmer for damages for personal injuries, however the Appellant refused to indemnify its insured on the basis that the insured had breached the policy since at the material time the vehicle was being driven/ operated by a driver without the requisite driver's licence, and as such was an unauthorized driver.

[84] The learned judge, in examining the correct interpretation to be given to section 18(1) and (2) of the **MVIA**, considered and applied the COA's own judgment in **The Administrator General v National Employers Mutual Association Limited** (1988) 25 JLR 459. He noted at para. 17, that Forte JA (as he then was) in that case held that the sub-section requires the following conditions to be satisfied before a third party can recover from an insurer:

> (1) A certificate of insurance must have been issued by virtue of section 5(4);
>
> (2) Judgment in respect of any such liability as is required to be covered by a policy under section 5(1) (b) has been obtained against the insured;
>
> (3) The liability must be a liability covered by the terms of the policy.

[85] Dukharan JA in **Heman's** case cited with approval [at para. 17] the words of Forte JA in the 1988 case, who found the following:

> *"…If the use to which the vehicle is put is contrary to the contract of insurance between insured and insurer, then it is my view that its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user. Any liability arising out of such user would therefore not be covered by the terms of*

> *the policy. Indeed, any such user would be subject to a criminal prosecution by virtue of section 4 of the Act – in that it is an offence to use or permit to be used a motor vehicle on the roads "unless there is in force in relation to the USER of the vehicle…such a policy of insurance."*

[86] Dukharan JA found that the liability will be covered where the user is within that which is covered by the terms of the policy. If it can be established that the vehicle was being used for a purpose outside the scope of the existing policy of insurance, then no liability would exist under that policy and the third party could not recover [para. 18].

[87] The COA rejected the argument that the breach was a mere breach of conditions rather than that which made the policy itself inoperative. The decision of the court did not involve a determination of whether the breach was a condition precedent versus a mere breach. The decision was centred around the question of whether the use that the vehicle was being put to fell within the scope of what was permitted by the policy. Since it did not, the COA found that the insurance company was not liable and thus Heman could not recover.

[88] The court in **Heman's** case also considered the Supreme Court of Jamaica judgment of **Conrad McKnight v NEM Insurance Company (JA) Limited**. In that case, McDonald-Bishop J (as she then was) had to determine the similar issue of whether the Defendant insurance company was liable to the third party Claimant, to indemnify its insured pursuant to section 18(1) of the MVIA, in circumstances where the driver at the material time was not a driver authorized under the terms and conditions of the insurance policy. The learned judge considered whether the liability incurred by the insured was a liability covered by the terms of the policy so as to render the Defendant liable to the third party Claimant.

[89] In deciding the issue, McDonald-Bishop J noted that parties are free to contract whatever terms they desire subject to the restrictions provided in the relevant statute. Once they do so however, they are so bound and must conform to the

terms therein. It would be unfair to hold an insurance company liable for something which it did not agree to be bound by in the terms of the contract and for which it did not receive premiums. If the driver breaches these terms, he cannot expect the insurer to undertake a greater responsibility than that for which he agreed.

[90] The learned judge further found that in determining the question as to whether a liability is covered or not for the purposes of **section 18(1)**, the primary consideration must be whether, on a proper construction of the terms of the policy, the liability in question can be said to have arisen from a risk that was apparently covered by the express terms of the policy at the time of the incident giving rise to the claim or whether the liability emanated from a risk that falls outside the cover afforded by the express terms of the policy at the material time.

[91] Since the insurance agreement in **Conrad McKnight** explicitly restricted the policy coverage to the named authorized driver, the learned Judge found that the insured's action of allowing a driver other than the named authorized driver to drive the vehicle rendered the insurance policy inoperative. The driver was therefore in effect operating the vehicle on the road without insurance in breach of **section 4** of the Act, and as such the liability was not one covered under the policy and the Defendant was not liable to the Claimant under the Act.

[92] The court reasoned that the protection afforded to third parties under **s18(1)** allowing them to recover notwithstanding a breach of policy by the insured could only be invoked where the liability is one covered by the policy, such as where the policy was avoidable due to material non-disclosure. Where the liability is one that was never covered by the policy, the policy would be deemed as inoperable at the material time and the insured considered as not having insurance at the material time. There would be no policy to avoid or cancel. Thus, the third party could not recover.

[93] In the case at hand, based on the foregoing, the question to be determined is whether Heike O'Brian was an unauthorized driver and as a result the liability incurred was one not covered under the policy.

[94] The Defendant argues that she was not an authorized driver at the material time as she did not have the requisite licence for a vehicle of that classification, that is, a 'PPV licence'. Whilst, the Claimant, who does not address the issue directly, makes the argument that the Defendant, in using the term 'PPV licence' in its statement of case, a term which is nowhere to be found in the Road Traffic Act and, therefore, does not exist in fact, has failed to properly set out its case and should not be allowed to rely on it.

[95] It is undisputed that in matters of this nature where an insurance company seeks to avoid liability under a policy that insurance company has the burden of proving whatever breach is being relied on (**Conrad McKnight v NEM Insurance Company and Others)**. Notwithstanding this, I will address the Claimant's argument first as it presents as somewhat of a preliminary issue.

[96] The Defendant in its Amended Defence filed the 28th November 2014 stated the following at para. 6 in defence of the Claim:

> *"At the time of the accident giving rise to the claim, Heike O'Brian was not the holder of a PPV license (sic) and coverage under the policy of insurance was suspended whilst the vehicle was in her possession. Further the Defendant will say that Heike O'Brian was not an authorized driver of the vehicle and as such the Defendant is not obliged to offer indemnity under the policy of insurance."*

The Claimant has correctly noted that there is no such licence referred to in the Road Traffic Act.

[97] The Defendant submits that when reference is made to a PPV licence, as it was in the Defendant's pleadings and evidence presented to the court, it simply means a general driver's licence which specifically permits the holder to operate a PPV vehicle. This they say is supported by the unchallenged evidence of Mrs. Primrose Cleghorn-Haughton, Insurance Supervisor at the Montego Bay branch

of the Defendant company, who also gave evidence that a simple reference to a general licence would not be adequate since it is possible to have a general licence which does not permit driving a public passenger vehicle.

[98] However, the Claimant argues that it does not matter what the Defendant meant, as their defence was predicated on the assertion that a PPV licence existed as a fact when this was not so, and further, that the failure to inform the Claimant that it was relying on the fact that the insured's driver did not hold a valid 'general licence' under section 16(4) of the Act, means that it cannot now rely on it. I am unable to agree with the Claimant.

[99] The purpose of pleadings in a Defendant's statement of case, as pointed out by the Claimant, is to alert the Claimant as to what it intends to rely on at trial, so that the Claimant will know what is the case it has to meet.

[100] Indeed, **CPR 10.5** outlines the Defendant's duty to set out his case, including the duty to set out all the facts on which he intends to rely and to state the reasons for the denial of any allegation and to set out his own version of events if he intends to prove a different version from the Claimant.

CPR 10.5 provides as follows:

> *"10.5(1) The defence must set out all the facts on which the Defendant relies to dispute the claim.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In the defence the Defendant must say –*
> *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
> *(b) which (if any) are denied; and*
> *(c) which (if any) are neither admitted nor denied, because the Defendant does not know whether they are true, but which the Defendant wishes the Claimant to prove.*
>
> *(4) Where the Defendant denies any of the allegations in the claim form or particulars of claim –*

(a) the Defendant must state the reasons for doing so; and
(b) if the Defendant intends to prove a different version of events from that given by the Claimant, the Defendant's own version must be set out in the defence.

(5) where, in relation to any allegation in the claim form or particulars of claim, the Defendant does not –
(a) admit it; or
(b) deny it and put forward a different version of events, the Defendant must state the reasons for resisting the allegation.

(6) The Defendant must identify in or annex to the defence any document which the Defendant considers to be necessary to the defence."

In my estimation the Defendant is not in breach of the above rule.

[101] **CPR 10.5(1)** and **(4)** are directly applicable. In para. 5 of the Amended Defence, the Defendant asserts that the policy of insurance required that any authorized driver must be the holder of a 'PPV licence' for a period of two years, and outlines the documents which make up the said policy. In para. 6 the Defendant asserts that it is not obliged to offer an indemnity under the relevant policy as Heike O'Brian was not the holder of a 'PPV licence' and as such coverage under the policy of insurance was suspended whilst the vehicle was in her possession, and further, that she was not an authorized driver of the vehicle. Then in para. 8, the Defendant explicitly denies paras. 10-12 of the Particulars of Claim (that the Defendant has, inter-alia, breached its contract with its insured as well as the MVIA by refusing to honour its obligations and pay the judgment debt, and that the Claimant has suffered loss as a result of said breach), asserting that 'it is under no obligation to satisfy the judgment granted to the Claimant as at the time of the accident giving rise to the claim, the policy of insurance was suspended as the vehicle was being operated by an unauthorized driver'.

[102] The Defendant sets out as the facts on which it sought to rely as its reason for resisting the claim: (1) that the policy was suspended at the material time, (2) that Heike O'Brian was an unauthorized driver at the material time, (3) that the policy

required that an authorized driver holds a 'PPV licence' for a period of two years, and (4) that Heike O'Brian did not possess a PPV licence.

[103] These facts, taken together or individually, are more than sufficient, in my view, to inform the Claimant of the exact nature of the case she had to meet. Though the term 'PPV licence' is not the correct legal name given to a licence to be issued under the **RTA** for a driver of a PPV vehicle, there could be no misconception of what the term refers to. I reject the Claimant's contention that it does not matter what the Defendant means when it refers to 'PPV licence'. The **RTA** itself does not ascribe a specific name for a licence permitting the driving of a PPV vehicle only, so that such a licence would be referred to as a general licence permitting the driving of a public passenger vehicle. As Mrs. Cleghorn-Haughton pointed out in her evidence on behalf of the Defendant, a simple reference to a general licence would not suffice, as there are several different types of general licences that can be issued under the Act, all of which do not have a specific name identifying each type. As such, the term 'PPV licence' has become a well accepted abbreviation in Jamaican society, to refer to the type of general licence permitting one to drive a public passenger vehicle. Indeed, the term is used by many agencies including the Transport Authority and the Tax administration of Jamaica. I take judicial notice of this. Further, the conduct of the Claimant's case throughout the proceedings has demonstrated that the Claimant was well aware and under no misconception as to the case it had to meet.

[104] In any event, I find that the assertion that Heike O'Brian was an unauthorized driver at the material time based on the policy of insurance, and the fact of disclosure as to the policy documents, by themselves, sufficiently indicated to the Claimant the case it would have had to meet and what evidence it would have been required to bring to challenge that assertion.

What constitutes an unauthorized driver under the policy? And was Heike O'Brian an unauthorized driver at the material time so as to suspend the policy?

[105] It is unchallenged, that the contract of insurance is made up of the following documents:

v. the proposal form (exhibit 5)
vi. the certificate of insurance (exhibit 2)
vii. the motor policy renewal schedule (exhibit 3)
viii. the insurance policy booklet (exhibit 4)

[106] The proposal form, from the following questions and the insured's answers indicated that the policy was to cover the use of a public passenger vehicle and that the type of licence held by the insured was a general PPV:

"(7) Type of Cover and use of vehicle
Answer: PPV

(8) Will use be solely for social, domestic and pleasure? If not state other purposes.

Answer: PPV JCALT
(14) Questions 14 to 18 relate to proposer, spouse and/or additional driver (s) referred to in 13 above.

(ii) State type of licence (other than motor cycle)

Answer: General PPV

(21) if used for Carriage of Goods:-

(i) what is the general nature:

Answer: PPV – Contract (JCALT)
(iii) in respect of each vehicle state the type of Licence which you hold
Answer: General PPV

[107] The Certificate of insurance headed ***PPV Certificate of Insurance*** names as persons or classes of persons entitled to drive under the policy (1) Mr. Stetson O'Brian, and (2) any person driving on the insured's order or with the insured's permission in keeping with the terms and conditions of the policy. However, the person driving is only covered in so far as that person 'is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by any reason of any enactment or regulation in that behalf from driving the Motor Vehicle'.

> *"Mr. Stetson O'Brian*
>
> *Any person driving on the insured's order or with the insured's permission in keeping with the terms and conditions of the policy.*
>
> *Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by any reason of any enactment or regulation in that behalf from driving the Motor Vehicle."*

[108] The *Motor Policy Renewal Schedule – Public Passenger* notes that the use of the vehicle is as a passenger vehicle and under the heading authorized driver it states as follows:

> *"Mr. Stetson O'Brian*
>
> *Any person driving on the insured's order or with the insured's permission provided the person driving is not less than twenty five (25) years old and the holder of a valid driver's licence for the use and classification of the vehicle being operated, for not less than two (2) years.*
>
> *Provided that the person driving is permitted in accordance with the licencing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by*

order of a court of Law or by reason of any enactment or regulation in the behalf from driving the Motor Vehicle."

[109] The Policy Booklet, in section II (Liability to Third Parties) at (ii) states the following:

> *"In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver*
>
> *(c) Shall as though he were the insured observe fulfil and be subject to the Terms of this Policy in so far as they can apply.*

[110] Additionally, section 1X of the Policy Booklet under the heading General Exceptions provides:

> *"The Company shall not be liable in respect of*
>
> *(4) any accident loss damage or liability caused or sustained or incurred*
>
> *(ii) whilst any motor vehicle in respect of which indemnity is provided by this policy is*
>
> *(d) being driven by or is for the purpose of being driven by him in the charge of any person other than an Authorised Driver."*

[111] I accept the Defendant's submissions that these documents read individually or together indicate that the risk or liability covered extends only to driving by authorised drivers, and further identify who is regarded as an authorised driver.

[112] These documents clearly indicate that an authorized driver is either the insured or someone instructed or permitted by him to drive, **AND** either of the two must be the holder of a valid licence for the use and classification of the vehicle being operated which accords with the licensing or other laws or regulations to drive the Motor Vehicle (***emphasis mine***).

[113] I reject the Claimant's argument that authorization only refers to whether permission was given to the driver by the insured. It is clear from the wording of the policy that authorization is comprised of (1) the driver being a person named in the policy (that is the insured or one permitted by him to drive, as well as (2) compliance with the terms of the policy and, (3) compliance with the road traffic laws of Jamaica. All three must be complied with for the driver to be covered under the policy. Indeed, the insured could not lawfully permit someone to drive the vehicle contrary to law, nor could an insurance company lawfully sanction driving in a manner that breaks the laws of the land.

[114] The Defendant has not raised an issue as to whether Heike had been permitted by Stetson to drive the vehicle. What they have raised issue with however, is that she did not possess the requisite licence permitting her to drive a PPV vehicle as required by law and required by the policy (for a period of 2 years).

[115] The Claimant admits, which is supported by the evidence, that Heike only had a private driver's licence, but argues that such a licence, under section 16(4)(a) of the RTA, only prohibits the holder from driving a public passenger vehicle for the purpose of transporting passengers "for reward", and thus it would not have been necessary for Heike to be the holder of a general licence whilst driving the vehicle at the material time, since she was not using it for that purpose. It is contended that it was the Defendant's duty to prove that this was in fact the purpose for which she was using the vehicle, and there is no evidence before the court that this was in fact so.

[116] The Defendant however argues that such a licence permitted Heike to drive private motor vehicles only, and that the purpose for which she was driving the vehicle is immaterial. Far from even possessing a general licence, they say, her licence falls in class (a) of available licences which specifically prohibits the driving of public passenger vehicles on a private licence.

[117] On a careful interpretation of section 16(4) of the RTA, I have to agree with the Defendant on this point. Section 16(4) provides:

"(4) Drivers' licences shall be of three classes, that is to say –

(a) a private driver's licence", which shall entitle the holder thereof to drive, not for reward, "trucks", "motor cars", (not being public passenger vehicles or commercial motor cars) and "invalid carriages"

(b) "a general driver's licence", which shall entitle the holder thereof to drive, whether for reward or otherwise may be specified in the licence and which his examination test or tests prove him competent to drive;

(c) "a motor cycle driver's licence", which shall entitle the holder thereof to drive a motor cycle.

[118] The prohibition in subsection (4)(a) is two-fold, in that the private driver's licence holder is permitted to drive the classes of vehicles listed provided (1) the purpose is '*not for reward*' and (2) the vehicle is not a public passenger vehicle. There would be no need for the legislature to include the words '*not being public passenger vehicles*', if the prohibition was only in regards to not driving for reward. The words 'not for reward' would have sufficed. Additionally, subsection (4) (b), which speaks to a general driver's licence specifically permits the holder to drive the classes of vehicles specified in the licence '*for reward or otherwise*'. This, in my estimation, would mean that the general licence in which the holder is licensed to drive as PPV, authorizes the driver to drive the public passenger vehicle either for reward or for any other purpose the driver desires (within the law).

[119] I am fortified in this view by the qualification at the end of subsection (4)(b) wherein it is provided that the general licence holder is permitted to drive '*such class or classes of vehicles as may be specified in the licence* ***and which his examination test or tests prove him competent to drive***'. This is important to bear in mind considering that the tests which are required to be completed to obtain a private driver's licence is considerably different from those required to obtain the different types of general licence, and as a consequence, a person

deemed as competent to drive a vehicle in the classes that fall under a private licence, quite possibly would not be sufficiently competent to manage a vehicle falling under the class of vehicles under a general licence. Hence, one of the main purposes of the issuance and adherence to a driver's licence is to show competency and to prevent whatever ill consequence may result from the lack of the requisite competency.

[120] In the premises, I find that Heike O'Brian was required by law to be the holder of a general driver's licence permitting her to drive public passenger vehicles in order for her to lawfully drive the vehicle (PP 713E) that she was driving at the time of the accident. As a consequence, she was not only in breach of the road traffic law, but she was also acting contrary to the terms of the policy, rendering the policy suspended at the material time. Therefore, there would be no active policy at the material time under which the Claimant could recover. I am constrained to find that the Claimant Judith Smith cannot recover under the **Motor Vehicles Insurance (Third Party Risks) Act**, and the Defendant insurance company is not liable to provide an indemnity.

Conclusion

[121] The Claimant, Judith Smith, cannot recover under the **Motor Vehicles Insurance (Third Party Risks) Act**, and the Defendant insurance company is not liable to provide an indemnity as the vehicle was being operated contrary to the terms of the insurance policy at the material time. At the time of the accident, the driver Heike O'Brian was an unauthorized driver, as she did not hold the requisite driver's licence for the class of vehicle being driven, (i.e. a general licence permitting the driving of public passenger vehicles) as required by law and the policy. The policy specifically provided that the insurer would not be liable for any loss incurred by a person other than an authorized driver. Therefore, the liability created by Heike O'Brian whilst driving the vehicle was not one covered under the policy. **Section 18(1) of the MVIA** explicitly requires that in order for a third party to recover a judgment debt under the Act from the

debtor's insurance company, the liability must be one covered by the terms of the policy.

[122] Consequently, since the liability was not one covered by the terms of the policy, the Defendant company is not liable to provide an indemnity to the Claimant in respect of the judgment debt.

Order

i. Judgment for the defendant

ii. Costs to the defendant to be agreed or taxed

iii. Defendant's attorney to prepare, file and serve order herein.