IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU 2022 CD00471

BETWEEN	**MAUREEN BLACK**	**CLAIMANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Ms Ashley Mair instructed by Mayhew Law for the Claimant

Ms S. Wright instructed by Campbell McDermott for the Defendant

Heard: July 10 & October 17, 2023

Insurance – Whether Striking out or Summary Judgment – Motor vehicle collision – Release and discharge executed not honoured – Fraudulent misrepresentation alleged by insurer – Burden of proof – Whether Accord and Satisfaction – Whether Breach of contract with claimant

Civil Procedure Rules 10.5(1),(4),(5), 15.2(b), 26.3(1)(a),(c),(d) & 74.4
Motor Vehicle (Third Party Risks) Act, sections 4,8 & 18

Wint-Blair, J

[1] The application before the court seeks orders striking out the defendant's statement of case. Alternatively, that summary judgment be entered in favour of the claimant. The claimant grounded her application on rules 10.5(1),(4), (5), rules 26.3(1)(a),(c), (d) and rule 15.2(b) of the Civil Procedure Rules ("CPR"). In

addition, the claimant asks the court pursuant to rule 74.4 to dispense with mediation as the matter is unlikely to be resolved by those means and to apply the overriding objective.

[2] On the date the application was heard a number of documents were not on the court's file. This necessitated this decision being reserved.

The affidavits in support of the application

[3] In support of the application, the claimant relies on the affidavit of Lesley-Ann Stewart,[1] attorney-at-law employed to Mayhew Law. She deposed that the claimant's motor vehicle was involved in an accident on or about November 30, 2020, while being driven by the claimant's authorised driver, Kemoy Williams along Llandovery main road in the parish of Saint Ann. Upon reaching a section of the road, Kemon Davis, so negligently and recklessly drove, managed and/or controlled the motor vehicle bearing registration 9044 HZ that it collided into the claimant's motor vehicle causing the claimant to suffer loss, damage and incur expense, ("the accident.")

[4] The defendant was at all material times the insurer of the motor vehicle bearing registration number 9044 HZ owned by Kemon Davis. Mr Davis accepted liability for the accident. The defendant pursuant to its right of subrogation, entered into discussions with the claimant through her insurance company, Key Insurance Company Limited, for settlement of the claimant's claim arising from the accident.

[5] These settlement discussions were successful and in response, the defendant presented a form of release and discharge in the amount of Two Million Four Hundred and Twenty-Four Thousand Three Hundred and Two Dollars and Eighty-

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[1] January 31, 2023

Six Cents ($2,424,302.86) to the claimant. This sum was agreed to be paid to the claimant by the defendant in full satisfaction of all claims, costs and expenses in respect of all personal injury and loss of damage to property suffered by the claimant as a result of the accident.

[6] The claimant accepted the offer and signed the release and discharge. It was returned to the defendant on July 21, 2021, along with a copy of the claimant's driver's licence. In breach of the terms of the release and discharge, the defendant has refused and failed to pay the agreed sums.

[7] A claim was filed on October 19, 2022, and served on the defendant on October 20, 2022. The defendant filed a defence on or about November 30, 2022. The defence was a bare denial which failed to set out any facts on which the defendant intended to rely to dispute the claim. The defendant therefore has no real prospect of successfully defending the claim.

[8] Several demands have been made for the defendant to pay the sums as agreed in the release. By letter dated June 27, 2022, the claimant's attorneys demanded payment of the outstanding sums. The defendant responded but not to the substantive demand. In the circumstances, mediation will serve no useful purpose.

[9] In support of the application, Terry-Joy Golaub also filed an affidavit[2] in which she stated that she is the legal officer at Key Insurance Company Ltd. ("Key.") In response to the affidavit of the claimant, the affiant deposed that prior to engaging in settlement discussions with the defendant, Key commissioned Priority Investigations ("Priority") to investigate the motor vehicle accident involving the claimant's motor vehicle which took place on or about November 30, 2020. Priority having interviewed the claimant's driver and the officer on scene, in its report dated

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[2] June 12, 2023

March 2, 2021, determined that the accident had occurred on the date, time and place described by the claimant's driver. The damage was also consistent with the nature and circumstances of the accident.

[10] Based on that report, Key was satisfied that the accident had occurred. Kemon Davis had accepted liability for the accident and the defendant pursuant to their right of subrogation entered into settlement discussions with the claimant and with Key for the settlement of the claimant's claim. These settlement discussions were successful. The defendant presented a release and discharge in the amount of Two Million Four Hundred and Twenty-four Thousand Three Hundred and Two Dollars and Eighty-Six Cents ($2,424,302.86) to the claimant.

[11] This sum was agreed to be paid to the claimant in full satisfaction of all claims, costs and expenses in respect of all personal injury and loss of damage to property suffered by the claimant as a result of the accident and was to be paid by the defendant. The claimant accepted the offer, and a signed release and discharge was returned to the defendant on July 21, 2021, along with a copy of the claimant's driver's licence.

[12] Since then, the defendant has refused and/or failed to pay the settlement sum. Several demands both oral and written have been made to the defendant with the most recent being in June 2022.

[13] The defendant was fully aware of the investigator's findings prior to entering into settlement discussions with Key. Before the claim was filed, the defendant did not disclose the existence and findings of the investigator's report it had commissioned from Detect Investigations Company Limited ("Detect"). As at the date of this affidavit, neither the claimant nor Key has had sight of that document despite requests for the production of and copies of same.

[14] The affiant deposed that her industry experience has made her aware that such an investigation involves not just analysing the "black box" of the motor vehicle,

but also the questioning of witnesses and visits to the accident site. The investigation was also conducted one year after the accident. The authenticity and chain of custody of the "black box" is questioned.

[15] In addition, there was significant delay between the defendant's discovery of the alleged misrepresentation and their communication to their insured that they would not provide indemnity. Such delay has resulted in prejudice to the claimant whose rights accrued under the signed release and discharge.

The defendant's affidavit in response

[16] In response to the application, the defendant filed the affidavit of Claudeen Stewart Linton.[3] She deposed that she is the legal officer for the defendant. The defendant denies the allegation of an accident between Kemon Davis ("the insured") and Kemoy Williams on November 30, 2020, along Llandovery main road in the parish of St Ann or at all.

[17] The defendant admits that it entered into settlement discussions with Key in 2021 to settle the claimant's claim under the mistaken belief that their insured had provided a truthful and honest report of the alleged accident. In fact, their insured had submitted a completed, signed motor accident report form in early December 2020 which amounted to a fraudulent misrepresentation of the alleged accident.

[18] The insured in an excerpt from his statement said: "he was driving his vehicle on November 30, 2020, when he swerved to the right-hand side of the road and collided into the right front section of the Honda car." This statement was false in all material respects. Investigators were commissioned to conduct investigations

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[3] June 8, 2023

surrounding the accident with the insured. Two investigators were retained Detect and ORB Crash Reporting and Analytics ("ORB.")

[19] A report from ORB was received on or about March 19, 2021, and it provided black box data for the 2013 Toyota Corolla Axio registered 9044 HZ with certificate of insurance policy number MPCCS-906515. The report concluded that the damage to the vehicle insured by the defendant did not accord with a collision, neither was the airbag deployment system commanded. The ORB report concluded that the vehicle was not in motion when it was damaged, the vehicle speed was "0" and the shift position was "P." The report significantly contradicted the statement of the insured in his motor vehicle accident report form dated December 9, 2020.

[20] Mrs. Linton deposed that having received the "last investigator's report" in 2022, the defendant concluded that the insured had not been open and honest when he reported the accident and fraudulently misrepresented the information he gave about the accident on the motor accident report form. The declaration by an insured on the motor accident report form forms part of the contract and makes the truth of the statement a condition precedent for liability on the part of the insurer.

[21] In a letter to the insured dated August 22, 2022, the defendant advised that the information in its possession confirmed that the accident was inconsistent with his account and that it would not be granting indemnity.

[22] The defendant agrees that had there been no fraudulent misrepresentation on the part of its insured under the insurance policy, it would have been obliged to pay based on the claimant's executed release and discharge. However, given the fraudulent misrepresentation of facts by the insured regarding the accident, the defendant is not liable to pay for any loss or damage resulting directly or indirectly from the intentional or wilful acts of the insured. The misrepresentation has extinguished all benefits under the policy of insurance to the insured, Kemon Davis. For these reasons, the defendant has not paid on the release presented

by the claimant and has refused to indemnify the insured for the claimant's loss and damage.

[23] The defence filed on behalf of the defendant sufficiently raises triable issues and are not bare denials. The burden to prove fraud is on the defendant who would establish by facts in its witness statement, the fraud it alleges.

Issue: Whether the defendant's statement of case should be struck out

Claimant's submissions

[24] Ms Mair for the claimant cited rule 26.3(1) of the CPR which gives the court the authority to strike out a statement of case or parts thereof where certain rules or practice directions have not been complied with. She cited rule 10.5 which provides that the defendant should set in its defence out all the facts relied on to dispute a claim.

[25] Counsel for the claimant relies on **Louie Johnson, Joya Hylton and Lamoy Malabre et al v National Solid Waste Management Authority**[4] for the principle that the court has the discretion to strike out pleadings which disclose no reasonable cause of action. Counsel further relies on the case of **Ocean Chimo Ltd. v Royal Bank (Jamaica) Ltd (RBC) et al**[5] in relation to the principles to be considered on an application for summary judgment.

[26] The claimant argues that the defence contains bare denials and in doing so has run afoul of the rules. Rule 10.5 is mandatory in nature. The word "must" means that strict compliance on the part of the defendant is required.

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[4] [2017] JMSC Civ. 130

[5] [2015] JMCC Comm 22

[27] Further, that there has been no order of the court declaring the policy of insurance void. Pursuant to section 18(1) of the Motor Vehicle Insurance (ThirdParty Risks) Act, the defendant is liable to pay out to third parties notwithstanding that the insurer may have been entitled to avoid or cancel or may have avoided or cancelled the policy.

[28] The claimant contends that the accident did occur and that this is confirmed by the investigator's report from Priority Investigations Services who were commissioned by Key to investigate the accident.

[29] It is submitted that the claim before the court is one for breach of contract, the defendants having failed to honour the release and discharge. The law on release and discharge was set out by Smith, JA in the case of **Alcan Jamaica Company v Delroy Austin and Hyacinth Austin**.[6]

[30] The claimant submits that in order for the claim to be extinguished or discharged there must be both accord and satisfaction. She argues that in this case, accord exists, the issue lies in the defendant's failure to satisfy the agreement. To date, there has been no withdrawal of the offer made to the claimant by the defendant. There is a binding agreement between the parties and the defendant's failure to comply with its terms constitutes a breach of contract. The appropriate action to be taken in the matter is for the satisfaction of the contract between the claimant and the defendant and for the defendant to sue its insured for breach of contract due to the alleged misrepresentation; in order to recover sums paid to the claimant pursuant to the release and discharge.

[31] Further, the defendant by its actions affirmed its insured's misrepresentation. The defendant became aware of its insured's alleged misrepresentation by way of the

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[6] SCCA No. 106/2002; 20 December 2004, at p. 8

report it commissioned and received on or about March 19, 2021. Despite being aware of the findings in that report the defendant, in or around July 2021, entered into settlement discussions with the claimant pursuant to their right of subrogation and issued a release and discharge which was executed by the claimant.

[32] It is submitted that as the defendant being aware of the alleged misrepresentation, affirmed the contract of insurance with their insured and by extension sought to settle the claimant's claim on their insured's behalf; it cannot now go back to seeking rescission or termination of the contract with the claimant.

[33] Affirmation in this context is a species of waver by election, that is, exercising the right to elect between inconsistent remedies. The key requirements of the requisite knowledge are set out in the case of **SK Shipping v Capital VLCC**.[7] It is submitted that the defendant in seeking to elect must meet the requirements as to knowledge, communication, conduct and delay.

Defendant's submissions

[34] Ms Wright, for the defendant, also cited rules 10.5 and 26.3, arguing that in the text Commonwealth Caribbean Civil Procedure[8] a distinction between striking out and summary judgment was made in that *"[s]triking out is aimed at the weakness in the manner in which the issues are set out in the statement of case"* whereas "*[S]ummary judgment is used in cases of defences that are weak on the facts."*

[35] Counsel for the defendant agrees that according to rule 10.5, a defence consisting of bare denials is not a good one. The case of **Williams & Humbert Limited v W**

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[7] [2020] EWHC 3448 (Comm), para 202-203

[8] By Gilbert and Vanessa Kodilinye at page 63

& H Trade Marks[9] says that striking out is only appropriate in plain and obvious cases, courts usually prefer to further the overriding objective by ensuring that the parties are on an equal footing as far as is possible. A court may allow an applicant the opportunity to amend their statement of case where there are bare denials.

[36] Ms Wright argues that the defendant is entitled to provide no indemnity to its insured as there has been a material misrepresentation on the part of its insured which renders the policy of insurance void. As a result, they have refused to and or failed to perform the contract with the claimant for the payment of settlement sums related to the accident. She submits that the matter before the court is one of breach of an insurance contract caused by fraudulent misrepresentation.

[37] The defendant filed its defence on the 30th of November 2020, the amended defence was filed on the 14th of March 2023. The amended defence required the claimant to prove the damage to her vehicle and outlined that the defendant refused to provide indemnity to its insured as a result of fraud between the claimant and the driver of the insured's vehicle. Fraudulent misrepresentation is the basis of the defence. It is submitted that the claim is not one that is properly suited for striking out or summary judgment.

Discussion

[38] The power of the court to strike out a statement of case is provided for by rule 26.3 of the CPR, which states that:

(1) *"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–*

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[9] (1986) AC 368

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.

(b) …

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim.

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10."

[39] *Rule 10.5 of the CPR states:*

1. *"The defence must set out all the facts on which the defendant relies to dispute the claim.*

2. *…*

3. *…*

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."

[40] Striking out deals with an examination of the statement of case. In the text Commonwealth Caribbean Civil Procedure[10] it states that *"[s]triking out is aimed at the weakness in the manner in which the issues are set out in the statement of case"*

[41] **In Louie Johnson, Joya Hylton and Lamoy Malabre et al v National Solid Waste Management Authority** (supra) Lindo, J at paragraph 29 states:

"Where a statement of case discloses no reasonable grounds for bringing or defending it, it will ordered struck out or amended, if it is capable of amendment under Part 20 of the CPR. Rule 26.3(1)(c) however, will only be applied to cases which are 'plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable".

[42] In the Court of Appeal decision of **Rudd V Crowne Fire Extinguishers Services Ltd**4 Downer JA citing the case of **The Republic of Peru v Peruvian Guano Company**, 36 Ch. D 496, said:

"If notwithstanding defects in the pleading, which would have been fatal on a demurrer, the court sees that a substantial case is presented the court should, I think, decline to strike out that pleading, but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation."

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[10] By Gilbert and Vanessa Kodilinye at page 63

[43] The Chronology

1. The claim was filed on October 19, 2022.

2. The defence filed on November 30, 2022, was indeed a holding defence which was in breach of the rules.

3. The instant application brought by the claimant was filed on January 31, 2023.

4. The defendant filed an amended defence on March 14, 2023.

5. On March 16, 2023, Barnaby, J made orders that neither side should file any further documents without permission and adjourned the hearing of the instant application due to technical difficulties caused by a power outage at the defendant's remote location.

6. On March 28, 2023, the defendant applied for permission to be heard in the claim and to file an affidavit in response to the claimant's application and submissions in response.

7. At a hearing on June 1, 2023, this court as currently constituted, granted permission to the defendant to file and serve its affidavit in response, as well as its submissions in response to the claimant's application no later than June 5, 2023. The claimant was similarly permitted to respond to the affidavits and submissions filed by the defendants no later than June 12, 2023. The instant application was set down for hearing on July 10, 2023 and was heard.

What is the claim

[44] This is a claim which raises the issue of breach of contract on the part of the defendant.

What is the defence

[45] The long settled position at common law is that an insurance contract is a contract *uberrimae fidei;* it is a contract based on utmost good faith, and if the utmost good faith is not observed by either party the contract may be avoided by the other.

[46] The defence in this claim is essentially this, had the insured not misrepresented the facts on his motor vehicle accident report form then the defendant would have been obliged to honour the release and discharge signed by the claimant.

The amended defence

[47] The pleadings must state such facts as would, if proved or admitted, establish the case of the defendant and make out the defence it relies on.

[48] The salient parts of the amended defence state:

> *"That[sic] Insured and the Claimant fraudulently mispresented facts of a[sic] alleged collision which took place on the 30th day of November 2020 and on those facts the Defendant relied to its detriment.*
>
> *That the Claimant did not suffer any loss and as a consequence the Defendant is not entitled to honour any claim made by the Claimant as a consequence of the alleged accident on the basis of [sic]fraudulent representations."*

[49] Fraudulent Misrepresentation

> *"A misrepresentation of material facts may be perfectly innocent; or; even though made without reasonable grounds of belief, merely negligent; but it becomes fraudulent if made (1) knowingly, or (2) without belief in its truth, or (3) recklessly without care whether it be true or false and without care does not mean without taking care, that being wilfully indifferent to the truth of some statement which it is known will be acted on.* ***In this connection, however, actions for rescission of contracts must be distinguished from those for damages for deceit;*** *that misrepresentation of material facts, though honestly made, being sufficient to sustain the former, well*

fraud in one of the three forms supra, must be proved in the latter. (Derry v Peek.)"[11] *(Emphasis added)*

[50] In order to advance this defence of fraudulent misrepresentation, there must be pleadings and evidence distinguishing between the course being taken whether by way of deceit or recission of the contract and in addition:

1) *There must be a representation of fact made by words or conduct and mere silence is not enough.*

2) *The representation must be made with knowledge that it is false, i.e. it must be wilfully false or at least made in the absence of any genuine belief that it is true or recklessly (i.e. without caring whether his representation is true or false) (Derry v Peek [1889] 14 App.Cas. 337).*

3) *The representation must be made with the intention that it should be acted upon by the defendant or by a class of persons which will include the claimant, in the manner which resulted in damage to him.*

4) *It must be proved that the defendant acted upon the false statements; and that damage has been sustained by so doing (see Bradford Third Equitable Benefit Building Society v Borders [941] 2 All E.R. 205 at 211 per Viscount Maugham.*

5) *The representation must usually be a matter of fact, not opinion or intention.*

6) *The pleadings must state that the defendant has validly rescinded the contract into which it has entered in reliance on and induced by the fraudulent misrepresentation.*

7) *The details of the representation, its falsity, inducement, and dishonesty have to be pleaded.*

8) *The defence should explicitly plead that the defendant has duly disaffirmed the contract.*[12]

[51] In **McPhilemy v Times Newspapers Ltd and others**, Lord Woolf MR, said this:

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[11] Phipson on Evidence, 10th ed. Para 433

[12] Bullen & Leake & Jacobs on Precedents of Pleadings, 14th ed. Volume 2 paras 49-01 to 49-04

> *"Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."*[13]

[52] **In Gasoline Retailers of Jamaica Limited Appellant v Jamaica Gasoline Retailers Association**[14] Morrison, P in referring to the dictum of Lord Woolf MR said:

> *"[47] Those observations were cited with approval by the House of Lords in Three Rivers District Council and others v Bank of England (No. 3) [2001] 2 All ER 513 (per Lord Hope at para [50]); and, as the learned editors of Blackstone's Civil Practice 2012 observe (at para 8.21), "…it is clear from the comments of Lord Woolf MR in McPhilemy v Times Newspapers Ltd…that contests over the terms of statements of case are to be avoided".*[15]

[53] The authorities clearly state that the statements of case are to consist of pleadings which make clear the case that each side is asking the other to meet and the court to determine.

Assessment of the parties' statements of case

[54] The issue as to whether a representation is fraudulent is one of fact. The evidence to be adduced in this claim by the defendant would have to show that the statement of fact was intended to induce it to believe in the facts being asserted. This calls for evidence of intention of the maker/s of the statement of fact. It is not enough to

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[13] [1999] 3 All ER 775 at 792-3

[14] [2015] JMCA Civ 23 at [46]-[47]

> show that the representation was made, without any reasonable ground for believing it to be true, and that it was false; it must be proven to have been made dishonestly. The defendant is relying on a breach of the insurance contract which entitles it to avoid or cancel the policy. By virtue of that action, the contract with the claimant would be rescinded and she would not benefit from the payment agreed to be made under the release and discharge. Evidence of due disaffirmation of the contract should be apparent.[16] The evidence must show that the right to disaffirm was exercised without unreasonable delay after the discovery of the fraud and while the parties remain in or can be restored to their original position.[17]

[55] The amended defence makes the bare assertion that the claimant is a party to fraud involving their insured. The evidence on which the defendant intends to rely is set out in the affidavit of Mrs Claudeen Stewart Linton. She is legal counsel for the defendant company. The defendant admitted entering into negotiations with the claimant's insurers to settle her property damage under the mistaken belief that their insured had provided a truthful and honest report of the alleged motor vehicle accident on November 30, 2020. The affidavit of Mrs Linton makes no mention of the claimant doing anything at all. This is as against the pleadings which allege that the claimant and their insured are involved in fraud which have not been particularized. Notably, in the affidavit at paragraph 15 is the statement that the defendant agrees that had there not been any fraudulent misrepresentation under the policy of insurance, the defendant would have been obliged to pay on the claimant's release and discharge.

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[16] Deposit Life Assurance Co. v Ayscough (1856) 6 E&B. 761; Oakes v Turquand (1867) L.R. 2 H.L. 325 referred to in Reese River Co v Smith (1869) L.R. 4 H.L. 64

[17] Gordon v Street [1899] 2 Q.B. 641 at 649; Lake v Simmons [1927] A.C. 501; Spence v Crawford [1939] 3 All E.R. 288

[56] In other words, there are neither pleadings nor evidence before this court setting out the details of fraud on the part of the claimant.

[57] The defendant grounds its assertions upon the crash and analytics report from ORB. The report stated that the damage to the insured's car did not accord with the report of a collision, neither was the airbag deployment system commanded. The report from ORB significantly contradicted the statement made by their insured in his motor accident report form of December 9, 2020. As a consequence, the defendant concluded that the insured had not been open and honest when he stated the particulars of the circumstances leading to the accident.

[58] The evidence of intention of the maker of the statement cannot come from this affidavit. The intent required to be proven may be inferred from the circumstances however the dishonest mind must be proven. Proof of dishonesty is being based on the report from ORB only, as the defendant has acted without reference to its insured. There is no nexus between the pleadings and the affidavit evidence as both the pleadings and the affidavit fail to set out the claimant's participation in the alleged fraud, the required facts from which intent may be inferred and the particulars regarding the dishonest mind.

[59] What is before the court in the defendant's statement of case is that the report of their insured is false, and no accident took place. Therefore, there was no event under the policy by which they were obliged to indemnify their insured. The defence raises fraud, the details of which have to be pleaded. The sufficiency of those details is a matter of law.

[60] In relation to fraud, at paragraphs 180 to 182 of **Ocean Chimo**, Edwards, J (as she then was) said:

> ***"****There is no generalized tort of fraud known to the common law. Fraud may refer to actual fraud in the sense of dishonesty or deceit or it may refer to equitable fraud in the sense of unconscionability. Actual fraud requires*

evidence of dishonesty and an intention to deceive. Evidence of gross negligence is not enough to establish actual fraud. Because actual fraud may take several actionable forms, the dishonesty relied on must be particularized. See Armitage v Nurse (1998) Ch 241 at 256–257 and Bullen and Leake and Jacobs Precedents of Pleadings 16th ed. Vol. 11.

Fraud must be distinctly alleged and distinctly proved. In Wallingford v Mutual Society [1880] 5 App Cas 685 at 697 Lord Selborne LC noted that the settled principle regarding fraud is that it was insufficient to make general allegations of fraud no matter how strongly worded and a court will take no notice of such allegations. A very explicit case of fraud or facts suggestive of fraud must be stated. The language used must be unequivocal and not consistent with innocence, accident or negligence. The allegation of fraud must be supported by particulars.

It is not open to the court to infer dishonesty from facts which have not been pleaded or from facts which have been pleaded but are consistent with honesty. The court cannot infer that innocent acts were done with fraudulent intent. An allegation of fraud must be proved to a high standard and there must be a clear and plain case in the face of a denial of all the allegations."

[61] The amended defence fails to identify all the facts on which the defendant intends to dispute the claim as regards fraud. As has been settled in Rule 10.5(1) where there is a denial of the allegations raised in the claim form, or the particulars of claim the defendant, must state the reasons for doing so. See Rule 10.5(4).

[62] In exercising my discretion in this application. The court is not to engage in deciding issues of credibility or reliability in examining the affidavit evidence. Rather, the court must look at the contents of the statement of case filed for a sufficiency of evidence.

[63] It is noted that the report of Detect Investigations Company Limited which had also investigated the collision at the behest of the defendant and is referred to in the affidavit of Mrs Linton has not been placed before the court at the election of the defendant.

[64] Further, in the affidavit relied on by the defendant, there are assertions made with no connection to the pleaded case. The report of ORB states the date of the accident as September 30, 2020, whereas in the instant case, the date of the accident is November 30, 2020.

[65] The investigator retained by Key Insurance submitted a report which said the collision did in fact occur on November 30, 2020. The report from ORB was dated March 18, 2021, and that was the date on which the data from the black box was retrieved. The defendant was aware of the content of the report from ORB from March 19, 2021. The release and discharge was nevertheless issued in July 2021 despite this knowledge. None of this is in dispute.

[66] In my view, the defendant in its statement of case is saying two things, on one hand, that both the claimant and their insured were involved in fraud and there was no collision. On the other hand, even if there was a collision, it would still have been liable. That is the meaning I give to paragraph 15 of the affidavit of Mrs Linton, which says that the only reason that they have not honoured the release is the fraudulent misrepresentation which is the motor accident report form. This is in the face of a report from ORB, upon which the defendants singularly rely which says there was a collision on September 30, 2020, a date upon which there was no relevant event from all the pleadings and the evidence in the case.

[67] To be entitled to avoid the policy, the information or facts misrepresented must be material. The materiality of the issue can sometimes be deduced without the need

for evidence on the point.[18] This much is clear from the position taken by the insurer. In the instant claim, the defence requires no further exploration by the court as the materiality of the facts allegedly misrepresented is without foundation.

Delay

[68] The claimant argues that there was significant delay between the defendant's discovery of the alleged misrepresentation and its communication to Key that they would not provide indemnity. Such delay has resulted in prejudice to her rights accrued under the signed release and discharge. There has been no accounting for delay in the affidavit evidence of the defendant nor any answer to the issue of prejudice raised by the claimant. There is no evidence from the defendant to show that the right to disaffirm was exercised without unreasonable delay after the discovery of the alleged fraud nor evidence to show that the parties remain in or can be restored to their original position.[19]

The Law

[69] The purpose of the Motor Vehicle Insurance (Third Party Risks) Act is the protection of third parties who are the victims of the negligent driving of persons who use motor vehicles on the roadway. Consequently, it makes compulsory the insurance of all vehicles being used on the roads.

[70] Section 4 (1) provides:

> *"Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that*

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[18] See MacGilvray on Insurance Law, 10th Edition, paragraphs 17–40, 17–41.

[19] Gordon v Street [1899] 2 Q.B. 641 at 649; Lake v Simmons [1927] A.C. 501; Spence v Crawford [1939] 3 All E.R. 288

> *person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."*

[71] Section 4 (2) makes the contravention of subsection (1) a criminal offence and covers the user not just the driver of the vehicle. This is seen from the following words of the subsection:

> *"It shall not be lawful for any person . . . unless there is in force in relation to the user of the vehicle."*

[72] This view is supported by the dicta of Humphreys, J., in the case of ***John T. Ellis Ltd v. Hinds***[20]:

> *". . . it is not any particular person who uses the vehicle who is required by section 35 (equivalent to section 4 (1)) to be insured. What is required is that the user on the road by the person or persons in fact using should be covered by the insurance in respect of third parties."*

[73] Section 18 (1) of the Motor Vehicle Insurance (Third Party Risks) Act states inter alia that:

> *". . . notwithstanding that the insurer may, be entitled to avoid or cancel or may have avoided or cancelled, the policy, the insurer, shall . . . pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."*

[74] It is to circumstances such as these that section 18 of the Motor Vehicle Insurance (Third Party Risks) Act refers.

[75] The only restrictions on the contractual relations between the insurer and the insured are as revealed in section 8 of the Act, which is set out hereunder:

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[20] [1947] 1 All E.R. 337 at page 341

"8.(1) Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be no effect in connection with such claims as are mentioned in paragraph (b) of subsection (1) of section 5:

Provided that nothing in this subsection shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

(2) Where a certificate of insurance has been issued under subsection (4) of section 5 in favour of the person by whom a policy has been effected, so much of a policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters -

(a) the age or physical or mental condition of persons driving the vehicle; or

(b) the condition of the vehicle; or

(c) the number of persons that the vehicle carries, or

(d) the weight or physical characteristics of the goods that the vehicle carries, or

(e) the times at which or the areas within which the vehicle is used; or

(f) the horsepower or value of the vehicle; or

(g) the carrying on the vehicle of any particular apparatus; or

(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the law for the time being in force relating to motor vehicles, shall as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 5, be of no effect:

Provided that nothing in this subsection shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this subsection shall be recoverable by the insurer from that person."

[76] Section 8 specifically provides the circumstances where the provisions of the policy will have no effect on claims made on the policy in respect of third party risks. Section 8 (2) outlines in detail the provisions which, if included in a policy of insurance, would have no effect on the liability of the insurers to third parties and provides for recovery by the insurers from the insured any sums paid by them in the discharge of a liability by virtue only of the subsection.

[77] It behoves insurers to place the policy of insurance on the record of the court in order to rely on any of its limitation clauses in a third party claim given the statutory provisions.

The power to strike out

[78] The learned authors of Halsbury's Laws of England,[21] in discussing the court's power to strike out, stated, inter alia that the powers are derived from two parallel sources. Firstly, they are confirmed by rules of court and secondly, they are exercisable under the court's inherent jurisdiction. The summary procedure under this provision will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defences on the face of it is obviously unsustainable, or where the case is unarguable... Nor will a pleading be struck out where it raises an arguable, difficult, or important point of law.

[79] A court hearing an application to strike out is therefore exercising a discretionary power. Halsbury's goes on to say, this discretion will be exercised by applying two fundamental, although completely, complementary principles. The first principle is that the parties will not likely be driven from the seat of judgement, and for this reason, the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay,

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[21] 4th edition, paragraphs 430 to 435

or even dismissal or proceedings, may often be required by the very essence of justice to be done so as to prevent the parties being harassed and put to expense, in frivolous, vexatious or hopeless litigation.[22]

The Overriding Objective

[80] Rule 1.1 seeks to ensure that there is an appropriate allocation of the court's resources to matters coming before it. In short, judicial time is a valuable and finite resource which must not be wasted.

[81] In my view, the defendant's statement of case cannot be cured by additional disclosure nor an amendment to its statement of case. Its statement of case raises no issues requiring cross-examination given the sole report before the court upon which the defendant grounds its defence. I rely on the manner and the terms of the statement of case[23] placed before the court[24] by the parties and find that as the defendant has already decided that its insured has committed fraud, there is nothing requiring investigation by way of cross-examination. There remains the absence of evidence as to the claimant's involvement therein.

[82] I must emphasize that I am aware that striking out is a sanction that should only be used as a last resort. Furthermore, it is important to note that in applying the overriding objective, striking out the defence will have severe implications for the defendant. Nevertheless, the grounds for defending the claim have been found to be without merit.

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[22] Lindo, J in Louis Johnson v Joya Hylton (supra) at paras 27 and 28

[23] Dictum of Morrison, P in Gasoline Retailers of Jamaica Limited Appellant v Jamaica Gasoline Retailers Association (supra) [2015] JMCA Civ 23

[24] Commonwealth Caribbean Civil Procedure, page 63 (supra)

Issue: Whether to strike out or to grant summary judgment

[83] In **Weston-Parchment, Helen (Administratrix, estate Headley Weston) v Pete Weston** the difference between striking out and summary judgment and how the court should treat each was set out. Anderson K, J referred to the dicta of Morrison J.A. (as he then was) at para 31-32 of **Gordon Stewart v John Issa**[25], in reference to rule 26.3(1)(c) and said at para 88 of **Weston-Parchment** (supra) that:

> *"It is clear from their lordships' dicta, that on an application to strike out a statement of case, the court is merely concerned with the parties' statements of case. The question is whether on the relevant statement of case, there is a cause of action disclosed or reasonable grounds are disclosed for defending a claim. The prospect of success of that statement of case, at trial, is irrelevant, for the purposes of an application to strike out a party's statement of case, pursuant to rule 26.3(1)(c) of the C.P.R. On an application for summary judgment however, the court, although not engaged in a mini-trial, can have regard to the evidence supporting the parties' statement of case, in determining whether the claim or defence has a real prospect of success."*

Issue: Whether the claimant's application for summary against the defendant should be granted in the alternative?

[84] Ms Mair referred to rule 15.2 of the CPR and **Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd (RBC) et al**[7] to support her application for summary judgment. **Ocean Chimo Ltd** (supra) illustrates that where the court finds that the claim has no realistic prospect of success, then the matter must be disposed of summarily.

[85] Counsel argued that the defendant's defence was filled with bare denials which do not comply with rule 10.5. She submits that the defendant was required to set out the defence clearly to provide the claimant with a clear understanding of the defence that they need to meet. The case of **Medine Forrest v Kevin Walker et**

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[25] SCCA 16/2009; September 25, 2009

al[26] states that a defendant must state the reasons why he denied any of the allegations that were contained in the claim form, especially if they intend to prove a different version of events.

[86] Further, counsel submits that the defence being in breach of rule 26.3 (1) (a), (c)and (d) of the CPR should be struck out and there would be no defence on the issue of liability. Therefore, the defendant would not have a realistic chance of success and so summary judgment should be entered in favour of the applicant.

[87] Ms Wright for the defendant cited Part 15 of the CPR which permits the court to determine a claim or issue without undergoing a trial. She referred to rule 15.2 and stated that the use of the word "may" indicates that the court's power is discretionary and the claimant's request for summary judgment ought to be refused. She relied on the case of **Swain v Hillman**[27] to highlight that the term "real prospect" is directed at "a realistic, as opposed to a fanciful, prospect of success." Counsel also referred to the interpretation of "real prospect" in **ED & F Main Liquid Products Limited v Patel and another**[28] which was adopted locally in **Marcia Jarrett v South East Regional Health Authority et a**l[29] where McDonald-Bishop J (Ag.) (as she then said was) "The defence must have a 'real' as opposed to a 'fanciful' prospect of success and that real is to be taken in its natural and ordinary meaning…"

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[26] [2019] JMSC Civ 25

[27] [2001] 1 All ER 91

[28] [2003] EWCA Civ. 472

[29] 2006 HCV 00816; November 3, 2006

[88] Counsel referred to the case of **Thorn Plc v MacDonald and another,**[30] where Brooke L.J., said: "The primary consideration should be whether the Defence had merit in the sense that there was a real prospect of success." She submits that the defendant's defence has a real prospect of success as the defendant has raised several triable issues including the fact that the release was mistakenly sent under the belief that the insured's accident was legitimate and that he was liable for the damage to the claimant's car.

[89] According to counsel the case of **Gordon Stewart et al v Merrick Samuels**[31] is relevant because in that case a settlement was also reached and the release was executed but later challenged on the ground of undue influence. In that case, the court held that there was a real prospect of the respondent successfully showing that the release did not effectively constitute accord and satisfaction. Therefore, Miss Wright submits that this court should find that there is a real prospect of the defendant's success on the ground of fraudulent misrepresentation. As a result, the defendant is asking this court to refuse the orders sought by the claimant.

Discussion

[90] The authorities are legion in this area of the law and the interpretation of the rules. I am guided by the Privy Council in the seminal case on summary judgments of ***Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright***[32] as the issue decided by the Board is very similar to that raised here. The issue before the Board was: *If a claimant comes to court seeking specific relief, by way of summary judgment, and the defendant, while denying the claimant's case on the facts,*

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[30] (1999) CPLR 660

[31] SCCA No. 02 of 2005; November 18, 2005

[32] [2018] UKPC 12

advances facts of her own which, if proved, would still entitle the claimant to the relief sought, should the court direct a trial to resolve those competing accounts of the facts, or grant summary judgment on the basis that a trial is not necessary to determine whether the claimant is entitled to the relief sought?

[91] In dismissing the appeal, the Board determined that despite the issues of fact which may have been contested summary judgment was not excluded as the court could look beyond the pleadings.

[92] Lord Briggs delivered the judgment of the Privy Council. The Board reviewed the role and effect of summary judgment against the background of the overriding objective, which is to "encourage[s] the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources." Stating quite plainly that these factors "*all militate in favour of summary determination if a trial is unnecessary.*"

[93] The Board continued:

> *18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms: "The court may give summary judgment on the claim or on a particular issue if it considers that - (a) The clamant has no real prospect of succeeding on the claim or the issues; or (b) The defendant has no real prospect of successfully defending the claim or the issues." That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.*
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> *19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows: "(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies. … (3) The claim form or the particulars of claim must identify or annex a copy*

of any document which the claimant considers is necessary to his or her case."

Para.8.9A further provides: "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."

20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: see para 61 of the judgment of the Court of Appeal in this case.

21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b).

[94] In the **Gordon Stewart** case, which I find very instructive on what should guide the judge in performing the assessment necessary to determine the application, it was stated that:

"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence, it must be a "real prospect" not a "fanciful" one – Swain v Hillman. ***The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party.*** *Real prospect of success is a straightforward term that needs no refinement of meaning.*

[95] In **Sagicor Bank** the Board added in relation to the facts in dispute:

> *"There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon," he said. "**But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought**. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."*[33] *(Emphasis added.)*

[96] As in **Gordon Stewart**, the applicant bases its case on the release signed and the arguments are similar. That case does not assist in determining the issues before this court as it does not turn on the fact of the executed release being based on fraud as is being contended in this case but on undue influence inter alia.

[97] The only fact in dispute in the instant case is whether the claimant was a party to insurance fraud. The parties agree that there has been accord in this case, the only other issue is the reason for satisfaction not having been made as agreed.

[98] The law on accord and satisfaction was set out by Smith, JA in **Alcan Jamaica Company v Delroy Austin**[34]**:**

> "As *any person who has a cause of action against another may agree with him to accept in substitution for his legal remedy any consideration. The agreement by which the obligation is discharged is called Accord and the consideration which makes the agreement binding is called Satisfaction – see Clerk and Lindsell on Torts 17th Edition 30-06 p. 1559. Thus, Accord*

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[33] Para 17

[34] SCCA No. 106/2002; December 20, 2004

and Satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. When the satisfaction agreed upon has been performed and accepted, the original right of action is discharged and the Accord and Satisfaction constitute a complete defence to any further proceedings upon that right of action. Where the demand is disputed or the amount unliquidated, payment of any sum agreed upon by the parties is a good satisfaction – ibidem."

[99] It is important to highlight that the claimant accepted the terms offered by the defendant when she signed the form of release. There was a binding contract between the claimant and the defendant, which the defendant subsequently failed to honour.

[100] The contract of insurance is separate from the contract under which the release and discharge is applicable. A court has to be satisfied that a release and discharge can be set aside as this is a separate contract. This is an issue raised in the claimant's statement of case. The statement of case of the defendant answers this question of law with the allegation of fraud on the part of its insured but with no evidence as to the details of the involvement of the claimant other than as stated in the amended defence.

[101] Blackstone's Civil Practice, 2004[35] states that:

"On the application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting up one of the following:

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[35] Paragraph 34.13

(a) a substantive defence e.g. volenti non fit injuria, frustration or illegality;

(b) a point of law destroying the claimant's cause of action;

(c) denial of facts supporting the claimant's cause of action;

(d) further facts answering the claimant's cause of action, e.g. an exclusion clause, or that the defendant was an agent rather than a principal."[36]

[102] Having considered the authorities, the following factors have to be considered:

1. The test is whether the respondent has a case with a real prospect of success;

2. The court has to apply the overriding objective;

3. The burden of proof is on the respondent to establish that it has a case with a real prospect of success.

4. The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof.[37]

5. A defendant will have no real prospect of successfully defending the claim, within the meaning of rule 15.2(b) if:

    a. A pleaded claim is defended by pleadings or by evidence which is true, and despite the truth of the defence, the claim still entitles the claimant to the relief sought, then there is no need for a trial.

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[36] Marcia Jarrett (Administratrix of the Estate of Dale Jarrett, deceased) v South East Regional Health Authority et al 2006 HCV 00816; November 3, 2006, at para 39.

[37] Royal Brompton Hospital NHS Trust v Hammond [2001] BLR 297

b. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed and there is no need for a trial.

c. If the defence justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in the defence.[38]

[103] Upon an examination of the statement of case of both sides in this application it is striking that the defendant has chosen not to consider or to answer material raised by the claimant's insurer in its commissioned report from Priority, dated March 2, 2021; such as:

(1) the date of the collision which is stated in the report from Priority from November 30, 2020;

(2) the report made at the St Ann's Bay police station to Sergeant P. Bryan on November 30, 2020, a receipt from the police station is exhibited;

(3) the statement from the claimant's driver that a wrecker from KWICK Towing Wrecker Service came on the scene and the claimant paid for it to tow his vehicle;

(4) the valuation said to have been done on the claimant's vehicle post-collision;

(5) The date of its own release which is July 19, 2021. The release refers to the date of the accident as on or about November 20, 2020. This is again, another document with a date which is inconsistent with the other material

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[38] Sagicor Bank v Marvalyn Taylor-Wright

before the court and the report from ORB upon which the defendant based its defence.

(6) This date of the release was before the “last report” but five months after the report of ORB on which the defendant relies; raising the question of delay.

(7) The last report could not have been a factor inducing the defendant to make the decision to settle the claim as the release was signed long before the last report was received in 2022.

(8) The last report is not before the court; it therefore cannot be a factor on this application or in this claim.

[104] The defendant’s statement of case does not disclose any consideration of the material indicated above, all of which is before the court and constitutes evidence in the case brought against it by the claimant. There is no answer in the defence or the evidence. A claim may be considered fanciful or without substance, where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based.[39]

The effect of granting the orders sought

[105] A court is required in addition to the rules to consider the effect of granting the order sought.[40] A grant of the orders sought would ordinarily have the following effect:

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[39] Three Rivers District Council v Bank of England (No. 3) [2001] UKHL 16; [2003] AC 1

[40] Watson v Ian Snipe and Co [2002] EWCA Civ 293

i. To derive a defendant of its right to a trial.

ii. To deprive a defendant of the ability to strengthen its case through disclosure and further information whether with or without a court order.

iii. The advantage of witness statements and cross-examination.

[106] In the instant claim, the defendant would be deprived of its right to a trial if the orders sought are granted, given that the defendant admits it relies solely on the report of ORB, which does not bear the date of the accident and does not relate to the collision at issue. At no point during the hearing did the defendant indicate that this report contained any errors or that an amended report would be filed if the court would so permit. There was no application to file a further affidavit to correct this position. This is in addition to the averments in the affidavit of Mrs Linton that two investigators were retained to investigate the alleged accident, Detect and ORB. She stated that after obtaining the last report in 2022, the defendant wrote to its insured refusing to grant indemnity. The report of ORB was received in March 2021. The defendant relied only on the report of ORB. The only report before the court is that of ORB.

[107] In this application, the pleaded claim was contested on the basis that there was fraud but the defence of fraud has been cut away when the defendant's statement of case was examined. The court in assessing the parties' respective positions has done so on the basis of the affidavit evidence filed by the parties.

[108] This court having considered the claimant's evidence in support of this application for summary judgment and the defendant's evidence against it finds that the defendant has failed to discharge the burden of proof that it has a realistic prospect of success. As a result of the foregoing, the court makes the orders below:

Orders:

1. Mediation is dispensed with in the claim.

2. The application to strike out the defendant’s statement of case filed on the 14th of March 2023 is granted.

3. Summary judgment is granted to the claimant.

4. Costs of the application and costs of the claim are awarded to the claimant, such costs to be taxed if not agreed.