IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 03483

BETWEEN	**ADOLPH BROWN**	**CLAIMANT**
AND	**WEST INDIES ALLIANCE INSURANCE COMPANY LIMITED**	**DEFENDANT**

SUMMARY JUDGMENT APPLICATION UNDER PART 15 OF THE C.P.R. - TIME BAR PROVISION IN INSURANCE POLICY - WHETHER INSURER ENTITLED TO RELY ON CLAUSE - WHETHER CLAUSE VOID AS BEING CONTRARY TO PUBLIC POLICY - WHETHER APPLICATION NOTICE SUFFICIENTLY IDENTIFIED ISSUES- RELIANCE ON WITHOUT PREJUDICE CORRESPONDENCE – WHETHER CLAIMANT HAS NO REAL PROSPECT OF SUCCEEDING ON THE CLAIM

IN CHAMBERS

Mr. Alton Morgan and Ms. Marlene Uter instructed by Alton Morgan & Co. for the Claimant.

Mrs. Tashia Madourie instructed by Nunes Scholefield DeLeon & Co. for the Defendant.

Heard: 18th January 2010, 4th June 2010.

Mangatal J:

1. This is an application by the Defendant West Indies Alliance Insurance Company Limited "W.I.A." for summary judgment against the Claimant "Mr. Brown" pursuant to Part 15.2. of the Civil Procedure Rules 2002 "the C.P.R.". The application is made

on the ground that Mr. Brown has no real prospect of succeeding on the Claim.

2. Mr. Brown has also filed an application dated December 17th 2009 for the following :

    1. A declaration that the term of the policy between the parties which provides that no legal action may be brought against W.I.A. unless the action is started within one year of the incident causing the loss is void;

    2. That W.I.A.'s application for summary judgment filed on the 17th of September 2008 and set for hearing on the 18th January 2010 be struck out or dismissed;

    3. That Summary Judgment be entered in favour of Mr. Brown against W.I.A.;

    4. In the alternative, that the application for summary judgment filed by W.I.A. be stayed, pending mediation.

3. The time allotted for the hearing of both of these applications on the 18th of January 2010 was woefully short, and so I ordered the parties to file written submissions so that the parties would not suffer any further delay in having the matter adjudicated. There was therefore no actual oral hearing. I have read and considered all of the Affidavits and written submissions filed by the parties, the last submission having been received as recently as May 2010.

THE CLAIM

4. Mr. Brown has claimed against W.I.A. as his insurer under Policy Number KI MAR 271582 in relation to damage to his Stamas Liberty Cabin Cruiser motor vessel "Kidolph III" which occurred on the 2nd September 2001. On that date, Mr. Brown's motor vessel accidentally hit a submerged concrete stake while at sea. On or about September 2001, Mr. Brown made a claim against W.I.A. and he claims that W.I.A. has refused to compensate him for the

loss incurred and for which he had contracted with W.I.A. under the policy of insurance. Mr. Brown asserts that W.I.A. has acted in breach of the contract of insurance by failing to compensate him for expenses incurred in repairing the vessel. He claims compensation for the cost of repairs in the sum of JA $1,877,252.85 and U.S. $ 32,709.85.

THE DEFENCE

5. There are several grounds of Defence filed, but the one with which this application for summary judgment is buttressed concerns Section G of the Policy Contract. Section G states:

> *No legal action may be brought against* (W.I.A.) *unless there has been compliance with all terms of this policy and the action is started within one year `after the accident causing the loss.*

6. W.I.A. relies upon this section and the fact that this claim was filed more than one year after the accident which occurred on the 2nd September 2001. In fact this claim was filed on August 30th 2007 and accordingly W.I.A. deny any liability to compensate Mr. Brown under the policy.

THE AFFIDAVIT EVIDENCE

7. In his 1st Affidavit Mr. Brown states that he has been advised by his Attorneys at Law and verily believes that W.I.A.'s attempt to exclude liability by stating that the action had to be brought within a year after the accident has occurred seeks to oust the jurisdiction of the Court and ought to be deemed void and contrary to public policy. He states that he is further advised that the law provides that actions for breach of contract are brought within 6 years of the date the cause of action arose and Mr. Brown states that his claim was filed within this 6 year period. In paragraphs 11

to 23, Mr. Brown describes the nature of the accident and damage. He states:

11. *That I decided to engage the services of Mr. Richard Machado, a highly experienced Marine Specialist to prepare an estimate of the parts and labour required to restore the vessel.*

12. *That Mr. Machado carried out a thorough inspection of the damage and submitted a detailed estimate totaling $3,412,050.00. I exhibit hereto marked "AB 3" a copy of the said estimate dated September 13, 2001.*

13. *That on October 22, 2001, I received a letter from Crawford Jamaica Ltd., in which they concluded that the two engines of the vessel were not in need of replacement and offered on behalf of the insurers, a mere $475,350.00 in settlement of the claim. I exhibit hereto marked "AB 4" a copy of the said letter.*

14. *That owing to my concerns regarding possible damage to my engines I sought further professional advice from H & L Agri & Marine Co. Ltd. I exhibit hereto marked "AB 5" a copy of my letter to them dated October 30, 2001.*

15. *That I received a response from H & L Agri & Marine Co. Ltd. by letter dated October 31, 2001 which recommended that the power head and engines be replaced on the basis that when engines become submerged at sea the integrity of the power head and engines and electrical system will be compromised. I exhibit hereto marked "AB 6" a copy of the said letter.*

16. *Based on this advice, I wrote to the insurers rejecting the offer made by Crawford Jamaica Ltd.*

17. *That for my further guidance, I requested and obtained the costs of two (2) Mercury Outboard Motors from H & L Agri & Marine Co. Ltd. I exhibit hereto marked "AB 7" a copy of letter dated November 13, 2001 outlining the costs.*

18. *That I had meetings with representatives of the Defendant company over a protracted period and was advised in the end that my claim was too high and needed adjustment.*

19. *That on the 27th November 2001, I received communication from McLarens Toplis offering $588,350.00 in settlement of the claim.*

20. *That based on the recommendation from Mr. Machado and H & L Agri & Marine Co. Ltd, I felt that this amount was grossly inadequate and consequently I refused the offer.*

21. *On the 27th December 2001, I received a further letter from McLarens Toplis advising that on grounds of findings of Mariserve Jamaica Ltd., Specialist Marine Surveyors, they were willing to make an offer of $449,477.50 after deduction of the policy excess of $25,000.00.*

22. *That in the circumstances, I was not prepared to accept the said offer and I wish to point out that the assessment could not have been comprehensive, as the Surveyors had no access to examine the cabin of the vessel.*

23. *That during this period, I was deprived of the use of my vessel and was incurring additional costs to have it taken care of at the dock. I exhibit hereto marked "AB*

8" a copy of letter from the Royal Jamaica Yacht Club dated May 6, 2002 outlining dry dock charges.

8. After the matter had come on for hearing and submissions had been filed by both sides, Mr. Brown filed a further Affidavit, his 3rd Affidavit, on the 5th February 2010. In that Affidavit, at paragraphs 2-10, Mr. Brown states as follows:

> 2. *That I crave leave of this Honourable Court to provide evidence of correspondence concerning my claim for indemnity against the Defendant herein. That the relevant letters are exhibited hereto and marked "AB 13" for identification.*
>
> 3. *That the letters show that extensive negotiations for settlement of my claim took place between October 2001 and December 2002.*
>
> 4. *That I proceeded with the negotiations with the Defendant in good faith in anticipation that a reasonable offer would be made to settle my claim.*
>
> 5. *That the negotiations continued for more than one year after the claim arose.*
>
> 6. *That given the nature and extent of the negotiations I was not afforded enough time to seek legal redress pursuant to the contract of insurance.*
>
> 7. *That I was advised by Claims Administrators Ltd. by letter dated December 23, 2002 that I had no options available to claim against the Defendant and no alternative but to accept the offer of $449,477.50.*
>
> 8. *That I declined to accept the Defendant's offer as based on the professional advice received I knew that the amount offered would not be sufficient to repair my vessel.*

9. *That in frustration and in order to have the use of my vessel I proceeded to do the repairs on my own.*

10. *That given the expense involved, I had to do the repairs little by little and accordingly the repairs took place over an extended period from 2003 to 2007, after which I proceeded to take legal action.*

9. Driven to respond to this late Affidavit filed by Mr. Brown, Mrs. Karen Bhoorasingh, W.I.A.'s General Manager filed an Affidavit on March 26 2010, and in paragraphs 3-5 she states:

3. *That I have seen the Further Affidavit by the Claimant filed February 5, 2010 to which he has exhibited several letters which he contends evidences the existence of an extended period of negotiations between himself and the Defendant company.*

4. *That these letters do not represent an accurate account of the chronology of events and I crave the leave of this Honourable Court to exhibit hereto marked "K.B.1" copies of several letters which although referred to were not exhibited to the Claimant's Affidavit.*

5. *That these letters are necessary to assist the court in coming to an informed decision in this matter as they disclose that the Defendant's full and final offer was made to the Claimant by letter dated December 27, 2001. Thereafter there were no further negotiations as the Defendant maintained its position as contained in the said letter.*

10. Yet again, whilst my judgment was already reserved, Mr. Brown filed another Affidavit on April 19 2010 in which at paragraphs 4-8 he states:

4. *That I am advised by my Attorneys-at-Law and do verily believe that three(3) of the letters exhibited* (to the

Affidavit of Mrs. Karen Bhoorasingh) *are without prejudice communication and ought not to be relied on and should not be accepted into evidence.*

5. *That I am further advised by my Attorneys-at-Law that of the remaining four (4) letters, the letters dated May 21, 2002, May 28, 2002 and July 29, 2002 do not add anything to the chronology of events and that the letter dated October 22, 2002, which came more than a year after the incident causing loss arose, supports my position that I did everything in my powers to have the matter resolved, but to no avail.*

6. *That I am advised by my Attorneys-at Law and do verily believe that even if the without prejudice letters exhibited were to be accepted into evidence, the Defendant's case remains one which highlights manifest error on its part as the experts it appointed to assess the vessel failed to inspect the engine in seeking to arrive at the losses suffered as a result of the accident which took place on September 2, 2001.*

7. *That I also crave leave of the Court to refer to letter dated December 19, 2002 exhibited at page 26 of my Affidavit filed on February 5, 2010. That the said letter provides evidence of communication which took place between the Defendant and my representative well beyond one year after the cause of action arose.*

8. *That I humbly ask that this Honourable Court declines the Defendant's request to rely on the without prejudice letters attached to its Affidavit filed on March 26, 2010 and I further ask that this Honourable Court grants the orders sought in my Application for Court Orders filed herein.*

ISSUE NO.1-WHETHER NOTICE SEEKING SUMMARY JUDGMENT FAILS ADEQUATELY TO IDENTIFY THE ISSUES FOR THE PURPOSES OF RULE 15.4(4) OF THE C.P.R.

11. Late in the day, Mr. Brown's Attorneys-at- Law have raised a point which they really ought to have taken preliminarily. Mr. Brown's Attorneys have submitted that in its application for summary judgment, W.I.A. has failed to outline the issues involved in the application. They have referred to Rule 15.4(4) of the C.P.R. and to the Court of Appeal's decision in **Margie Geddes v. Messrs. McDonald Millingen** S.C.C.A. No. 44/2009, delivered on February 5 2010. It has been submitted that the failure to outline the issues is fatal to the application, goes to the root and substance of the application, and is not merely procedural. They submit that the Court cannot utilize the power under Rule 26.9 of the C.P.R. to rectify procedural errors.

12. Rule 15.4 of the C.P.R. indicates that the notice by virtue of which the summary judgment application is sought must identify the issues which it is proposed that the court should deal with at the hearing.

13. In the **Geddes** case, Harrison J.A., at paragraph 18, stated: *[18] It is abundantly clear that the purpose of the Rules is to allow the Court and the party meeting the application to have adequate notice of the issues raised by the application. This is not only desirable but also necessary, as the Court has to consider the appropriateness of the application before embarking on the hearing.*

14. Harrison J.A. rejected an argument that the issues could be gleaned from the affidavit evidence as he indicated that the affidavit evidence did not state with the clarity demanded of the Rules any of the issues which arose for the consideration of the Court. The learned Justice of Appeal also held that the case was

not one in which the judge at first instance could have exercised the powers under rule 26.9 of the C.P.R. which pertains to the general powers of the Court to rectify matters where there is a procedural error.

15. In the present application, the grounds are set out as follows:

    1. *The application for summary judgment is made pursuant to Part 15.2 of the C.P.R. on the ground that the Claimant has no real prospect of succeeding on the claim.*
    2. *The policy contract between the parties provided that no legal action may be brought against the applicant unless there has been compliance with all terms of the policy and the action is started within one year after the accident causing the loss.*
    3. *The instant claim was commenced more than a year after the loss sustained by the Claimant.*
    4. *In the premises, the claim is statute barred.*

16. Ms. Madourie very helpfully provided me with a copy of the Notice of Application for Summary Judgment which had been filed in the **Geddes** case. It appears that in **Geddes**, the notice merely stated:

    The application is made pursuant to Part 15 of the C.P.R.

17. I agree with Ms. Madourie that the notice in the instant case is quite different from that considered in **Geddes** . I agree that the grounds sufficiently set out the issues which it was proposed would be dealt with. In my judgment, there is no need for the word "issues" to actually be stated in the Notice; it is sufficient if the issues are in fact clearly delineated. The grounds indicate quite clearly the issues which the court is being asked to deal with on the summary judgment application and these are, whether Mr.

Brown has a real prospect of succeeding on the claim, whether W.I.A. is entitled to rely upon a time bar clause in the contract of insurance, whether the claim was started within the time limited in the contract of insurance, and if not, whether the claim is time barred.

ISSUE NO.2 ADMISSIBILITY OF EVIDENCE –WITHOUT PREJUDICE CORRESPONDENCE

18. Since Mr. Brown and his Attorneys-at-Law have taken a point which relates to the evidence that the Court can properly consider, I will deal with the submissions in relation to this point next. Br. Brown's Attorneys submit that W.I.A. ought not to be able to refer to and rely upon the letters dated December 27, 2001, June 24, 2002 and July 2, 2002 because these letters are privileged and are without prejudice communications. They assert that W.I.A. has neither sought nor obtained the consent of Mr. Brown to put these documents into evidence. It is also submitted on behalf of Mr. Brown that the letters dated May 21 2002, May 28 2002, and July 9, 2002, which are exhibited to Mrs. Bhoorsingh's Affidavit do not add anything material to the chronology of events. They therefore do not merit W.I.A.'s assertion that the letters exhibited to Mr. Brown's Affidavit filed on February 5, 2010 do not represent an accurate account of the chronology of events.

19. The elements of the rule with regard to without prejudice communication were outlined in the English decision of **Cutts v. Head** [1984] ADR.L.R. 12/07. At page 5 of the judgment, Oliver L.J. makes extensive reference to the case of **Walker v. Wilsher** (1883) 23 Q.B.D.335, and the statements of the law by Lord Esher M.R.(at page 336-337) and Lord Lindley L.J. (at page 337 and 338), respectively, which statements are instructive:

> *"It is I think a good rule to say that nothing which is written or said without prejudice should be looked at without the consent*

of the parties, otherwise the whole object of the limitation would be destroyed. I am therefore, of the opinion that the learned judge should not have taken these matters into consideration...."

"What is the meaning of words "without prejudice"? I think they mean without prejudice to the position of the writer if the terms he proposes are not accepted.... 'No doubt there are cases where letters written without prejudice may be taken into consideration as was done the other day in a case in which the question of laches was raised. The fact that such letters have been written and the dates at which they were written may be regarded, and in so doing the rule to which I have averted would not be infringed. The facts, may, I think, be given in evidence, but the offer made and the mode in which that offer was dealt with- the material matters, that is to say, of the letters-must not be looked at without consent."

20. Oliver L.J. at page 7 of the judgment describes the nature of the underlying public policy as follows:

> *It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings.*

21. Tim Reid, in his article entitled **"How to use "Without prejudice" and "Subject to Contract"** states the following to be exceptions to the Rule:

    i) *when a party applies for its costs in court under C.P.R. Part 36 or in an arbitration;*

ii) *if the exclusion of the evidence would act as a cloak for improper threats, perjury, blackmail or other unambiguous impropriety;*

iii) *if the issue is whether "without prejudice" communications have resulted in a concluded compromise agreement;*

iv) *in order to show that an agreement concluded during negotiations should be set aside on the grounds of misrepresentation, fraud or undue influence;*

v) *if there is no concluded compromise agreement, but a clear statement is made by one party in the negotiations on which the other party is expected to act and does in fact act; and*

vi) *in order to explain delay or apparent acquiescence.*

22. In their submissions in response, W.I.A.'s Attorneys refer to the fact that Mr. Brown has referred to offers from W.I.A. and has exhibited to his Affidavit correspondence passing between himself and his insurers. In his Affidavit filed on December 18, 2009 at paragraph 21, Mr. Brown recites the details of the offer which he received by way of the letter dated December 27, 2001. Mr. Brown has himself put into evidence the fact that there were offers made by W.I.A. to settle his claim under the policy.

In **United Building and Plumbing Contractors v. Malkit Singh Kajla** [2002] EWCA Civ 628 2002 WL 819944, the English Court of Appeal were concerned with an appeal on the issue whether a trial judge in making his determination could rely upon what the appellant was alleged to have said in settlement negotiations. It was held that the appellant having himself introduced the privileged discussions into evidence he could not thereafter maintain that they were privileged and not inadmissible.

23. I agree with Ms. Madourie that Mr. Brown has waived any privilege on this subject matter and cannot now complain about W.I.A.'s reliance on this or any related material. Further, as Lord Tuckey stated at paragraph 8 of the judgment, and quoted by Counsel in her submissions, "It is fair to infer that both parties must be taken to have consented to allow evidence of this kind to be given."

24. I now turn to consider the letters dated June 24, 2002 and July 2, 2002. Ms. Madourie referred to the decision of Drake J. in **Dixons Stores Group Ltd v. Thames Television Plc.** [1993] 1 All E.R. 349, where he stated at 351 c-d:

> *The privilege exists in order to encourage bona fide attempts to negotiate settlement of an action and if the letter is not written to initiate or continue such a bona fide attempt to effect a settlement, it will not be protected by privilege.*

Counsel also referred to **Buckinghamshire County Council v. Moran** [1990] Ch. 623, where at page 635, Slade L.J. stated:

> *The public policy on which the privilege rests does not in my judgment justify giving protection to a letter which does not unequivocally indicate the writer's willingness to negotiate.*

25. I accept Ms. Madourie's submission that Mr. Brown having exhibited some of the correspondence in a bid to explain his delay in filing suit within the time specified in the contract, he has acted in keeping with the exception vi) of Tim Reid's article, i.e. in order to explain delay or apparent acquiescence. I also agree that Mr. Brown cannot now be heard to object to W.I.A. referring to all of the correspondence exhibited to Mrs. Bhoorsingh's Affidavit. It also appears that the letters dated June 24, 2002 and July 2, 2002 were not part of an attempt to negotiate; rather, they appear to demonstrate that W.I.A. had made a final offer in its earlier letter dated December 27 2001.

THE SUBSTANTIVE ISSUES

26. The court will have to examine a number of issues in order to decide whether Mr. Brown has no real prospect of succeeding on the Claim and to determine whether W.I.A. is entitled to summary judgment.

NATURE AND APPLICABILITY OF SUMMARY JUDGMENT APPLICATION

27. The oft-cited case of **Swain v. Hillman** [2001] 1 All E.R.91, is a case in which the English Court of Appeal provides useful guidance as to the appropriate meaning to be attached to the words "no real prospect of succeeding". Lord Woolf M.R. pointed out that the word "real" distinguishes "fanciful" prospects of success. The approach in **Swain v. Hillman** has been adopted and applied in a number of local cases - see for example **Supreme Court Civil Appeal No. 88/08 U.G.I.v. Marilyn Hamilton**. In my judgment, a real "prospect" of success is also to be distinguished from a real "likelihood" of success. Mrs. Justice Gloster in **Fortisbank SA v. Trenwick International Ltd.** [2005] E.W.H.C. 399, a case cited by W.I.A's Attorneys, at paragraph 24, expresses the requirements this way: "It is also common ground that a respondent is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success even if it is improbable."

28. In **Fortisbank** an application for summary judgment was made by the Defendants who were insurers/underwriters of a policy issued by them in favour of the Claimant. The Claimant had sued to recover indemnity under the said policy. The underwriters defended the claim on the basis that the court action was brought outside of the two year limitation period specified in the policy. The Defendants made their application seeking summary judgment pursuant to the CPR Part 24, the English equivalent of our Part 15.

29. The Court found that the insured had commenced their proceedings outside of the time stipulated in the policy and that in order to avoid the period as limited in the policy, the insured would have to show that the underwriters were estopped from relying on the condition. Alternatively they would have to demonstrate that there was an implied agreement that underwriters would not do so, or that they had waived their rights in that regard. The Court found that statements relied upon by the insured could not amount to an assurance that a contractual limitation period would not be enforced. In addition, there was no common assumption that the underwriters would not rely upon the limitation provision.

30. Justice Gloster gave summary judgment in favour of the underwriters. She held that the Claimant bank had no real prospect of succeeding on the issue that the Defendant underwriters were estopped from relying on the time provision or had waived their right to do so.

THE SUBMISSION THAT THE TIME BAR CLAUSE IS VOID AS BEING CONTRARY TO PUBLIC POLICY

31. In their submissions dated 22nd January 2010, reference was made by Mr. Brown's Attorneys to the text by Kim Lewinson Q.C., **The Interpretation of Contracts**, Sweet & Maxwell 1997 2nd Edition, at page 338, where the learned author states:

> *Time bar clauses are treated as exemption clauses and are construed strictly and contra proferentem.*

32. Mr. Brown's Attorney Mr. Morgan referred to a number of cases, including **Super Chem Products Limited v. American Life and General Insurance Company Limited** Privy Council Appeal No. 68 of 2002, and **Barkhuizen v. Napier** (CCT72/05) [2007] ZACC 5. He submits that the construction of the limitation clause in the instant case when compared to those in **Super Chem Products**

Limited and **Barkhuizen v. Napier** is very instructive. In both these cases, the limitation clauses in the contract did not render the contracts void as being contrary to public policy. Both clauses stated that suit should be brought within a limited time after the insurer has rejected liability (Counsel's emphasis) and therein, Mr. Morgan submits, lies the fundamental difference between those clauses and that in the instant case.

33. Counsel further submits that the clause in the present case does not notify the Claimant Mr. Brown that his action would be statute-barred upon W.I.A. rejecting the claim. This, it is submitted, is an important feature in determining whether or not the clause is objectively unreasonable. In the absence of proper notification in the contract that if the insurer rejected liability the Claimant should proceed to seek redress from the court, the actions of the Defendant ought to be deemed unreasonable.

34. Mr. Morgan also referred to **Nasser Diab v. Regent Insurance Company Limited** Privy Council Appeal No. 61 of 2004 where the issue of the insurer's liability under a policy of insurance was addressed. Mr. Morgan's submission runs as follows:

> *The Board raised some important arguments which had not been presented before them. At pages 6-7, His Lordship stated:*
>
> *"Ever since the enactment of section 25 of the Supreme Court Judicature Act, 1873, stipulations in contracts as to time are not to be deemed to be or to become of the essence of the contract unless they would be so treated in equity."*
>
> *A further point was made at page 7 which though specific to the circumstances of that case is nonetheless relevant. Perhaps the specified time should as Lord Salmon suggested (at 951) be treated as directory, not mandatory.*

The Board also considered ***Superchem*** *that the decision reaffirmed, in a fire insurance context, that despite a repudiatory breach of contract, obligations under the contract survive until the breach is accepted by the innocent party as terminating the contract.*

35. The written submissions on behalf of Mr. Brown at paragraphs 34, 35 and 39 continue:

> *34. The Claimant entered into the transaction in good faith and the parties were in negotiations after a year had passed since the damage occurred. The Claimant has in his possession evidence by way of numerous letters to show the extent and length of the negotiations, which will be duly tendered into evidence. In the circumstances, the Defendant seemed to have intended to ambush the Claimant in reliance on the limitation clause especially since at no point in time in their business relationship did the Defendant specifically point out the existence of the clause to the Claimant.*
>
> *35. The Defendant's conduct towards the Claimant reveals that the Defendant was more intent on limiting or evading liability rather than satisfying its contractual obligation.*
>
> *39. The Defendant instead used its superior bargaining power to try to lock the Claimant into an unreasonable offer, which if he didn't accept before the passage of one year would, according to the policy, render him unable to recover his losses..... The Defendant failed to act in good faith throughout the claim resolution process with the intent that the Claimant should bear all his losses and lose the benefit of the insurance policy.*

36. Mr. Morgan goes on to submit that the Defendant having not repudiated the contract of insurance, the obligations under the contract continue to exist and the Defendant is liable to fulfill its obligations. Further, that the six year limitation period imposed by Statute is applicable to the circumstances of this case.

37. I agree with Ms. Madourie that Mr. Brown's Further Affidavit dated February 5, 2010 does seem to raise points not previously made, and not made prior to W.I.A.'s submissions filed on January 19, 2010. Up to that point there was indeed no reason stated by Mr. Brown as to why he failed to comply with Condition G.

38. The Court therefore has had to grapple with a number of points that have been added since the original submissions. I shall deal with them in an order that seems convenient.

THE STATUS OF THE TIME BAR CLAUSE

39. Mr. Brown's Attorneys concede that such clauses are not automatically void. However, they submit that in seeking to determine the status of such a clause courts apply a two-pronged test. The 1st rung is objective and considers whether the clause is unreasonable. The 2nd rung assesses from an objective standpoint whether enforcement of the clause is unreasonable in light of the circumstances of the particular case. It is submitted by Counsel that the subjective test entails an enquiry into the reasons for not adhering to the time stipulation and the 'relative circumstances' of the parties. **Barkhuizen v. Napier** is cited.

40. In **Barkhuizen**, which is a decision of the Constitutional Court of South Africa, NCOBO J. stated:

> (page 6 of the judgment provided to me). *In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach*

leaves space for the doctrine of ***pacta sunt servanda*** *to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. ...*

(page 8)***Does public policy tolerate time limitation clauses in contracts between private parties?***

The main thrust of the argument presented on behalf of the applicant was that the clause limits the applicants' right to seek judicial redress in court and thus offends public policy. That the clause limits the right to seek judicial redress cannot be gainsaid. What is also apparent from the clause is that it does not deny the applicant the right to seek judicial redress; it simply requires him to seek judicial redress within the period it prescribes failing which the respondent is released from liability. It is in this sense that the clause limits the right to seek judicial redress...

(page 9) *I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness....*

(page 11) **The determination of fairness**

There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.

The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and

voluntarily undertaken. This consideration is expressed in the maxim ***pactu sunt servanda*** *which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity....The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must inform all laws, including the common law principles of contract....*

The second question involves an inquiry into the circumstances that prevented compliance with the clause. Was it unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply.

It follows, in my judgment, that the first inquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relevant situation of the contracting parties.

(page 17) *The difficulty in the present case is that the applicant has not furnished the reason for the non-compliance with the time clause. He waited for two years after the defendant had repudiated his claim before instituting legal proceedings. On the face of it, there is nothing in his particulars of claim which suggests why he had to wait for*

such a long period. If the applicant had been prevented by factors beyond his control from complying with clause 5.2.5, one would have expected this fact to have been pleaded. We are left to speculate on the reason for non-compliance. Without those facts, it is impossible to say whether the enforcement of the clause against the applicant would be unfair and thus contrary to public policy.

.....For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequence in these circumstances would be contrary to the doctrine of ***pacta sunt servanda****. This would indeed be unfair to the respondent.*

41. Mr. Brown's Attorneys-at-Law also cited the case of **Lee v. Showmen's Guild of Great Britain**[1959] 1 All E.R. 1175, but I cannot really see the relevance of that authority as it was concerned with the question of whether the courts have jurisdiction to examine decisions of a domestic tribunal. True it is that in that case, Lord Denning at page 1179 stated:

Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy.

However, the case does not assist with the question of contractual time bars, which is the central issue in the present application.

42. Mr. Brown's Attorneys cite the Privy Council decision in **Superchem** and state that in that case, whilst highlighting the issue of time limitation policies in insurance policies, the Board of the Privy Council did not have before it the issue of whether the provisions would be void as contrary to public policy. However, in my judgment, it is clear that implicit in this judgment, and

expressly in others, there is no rule that such provisions are automatically void as being contrary to public policy. That the clause will not be void as contrary to public policy per se is supported by the decision of the Privy Council in the **Superchem** case, as well as in **Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Company** [1907] A.C.59. The **Barkhuizen** case is also supportive of this position.

43. In the **Home Insurance Company** case, the Privy Council made a distinction between a contract of insurance and a contract of re-insurance, but as regards a contract of insurance, the Board Per Lord McNaughten, at page 64, had this to say:

> *A clause prescribing legal proceedings after a limited period is a reasonable provision in a policy of insurance against direct loss to specific property. In such a case the insured is master of the situation. He can bring his action immediately.*

44. I accept Ms. Madourie's submission that the clause in the present case, Section G is objectively fair and reasonable. Mr. Brown had 12 months from the occurrence of the loss to commence legal proceedings. He had an adequate and fair opportunity to file his suit. In the **Barkhuizen** case, the court rejected an argument that a period of 90 days stipulated in the insurance policy was too short a time in which to file suit. I agree that as was held in **Barkhuizen**, once the time started to run Mr. Brown knew what his cause of action was, and he also knew the identity of the Defendant W.I.A. It is clear also that Mr. Brown knew what amount he intended to claim and it is evident from his letter to the Financial Services Commission that he was already resolute in his position that he would not accept the offer made by W.I.A. In addition, the comment by Lord Scott in **Nasser Diab** that perhaps the specified time should be treated as directory and not mandatory was not a statement of legal principle. In any event, the point was not

argued before the Privy Council and so the Board reached no conclusion on this and related points.

45. Mr. Brown's Attorneys sought to argue that the wording of the clause in the instant case is to be distinguished from those cited in the authorities on the basis that those cases dealt with the limitation period running from the time of the rejection of the claim. However, that distinction cannot be maintained in light of the wording of the clauses under consideration in the **Superchem, Home Insurance Company of New York**,and **Fortis Bank S.A.** cases.

WHETHER THERE WAS ANY INSTANCE OF UNEQUAL BARGAINING POWER

46. I also find that, like in the **Barkhuizen** case, there is no evidence that the contract between Mr. Brown, a company director, and W.I.A. was not freely concluded between persons with equal bargaining power or that Mr. Brown was not aware of the clause. Nor is there evidence that he had no opportunity to know of it prior to the expiration of the limitation period. In addition, I do not know what the status of the law in South Africa is with regard to express statutory protection against unequal bargaining power, separate and apart from such protection as the Court in **Barkhuizen** perceived to be afforded by the Constitution. However, in Jamaica, unlike several other common law jurisdictions, there is no Unfair Contract legislation, specifically addressing inequality of bargaining power. Parties are substantially left to contract as they see fit.

WHETHER INSURER IN BREACH OF THE DUTY OF UTMOST GOOD FAITH

47. I agree with W.I.A.'s Attorneys that the principle of utmost good faith which is applicable both to insurer and insured, places a mutual duty of disclosure on the insured and the insurer prior to

the conclusion of the contract of insurance. The allegation made by Mr. Brown that the Defendant "failed to act in good faith throughout the claim resolution process" does not find fertile ground in the general principles of utmost good faith in relation to insurance contracts. This is because this assertion does not relate to non-disclosure by the insurer of matters or facts which a prudent insured would take into account in deciding whether to enter into the insurance contract with that insurer (emphasis mine)-see **MacGilvray on Insurance Law**, 10th Edition, para. 17-88, page 448, and **Banque Keyser Ullman SA v. Scandia (U.K.) Insurance Company Ltd.** [1990] 1 Q.B., 665.

WHAT IF ANY ARE THE CIRCUMSTANCES WHICH PREVENTED THE INSURED FROM COMPLYING WITH THE CLAUSE - WERE THERE EXTENSIVE NEGOTIATIONS BETWEEN MR. BROWN AND W.I.A.

48. I agree with Ms. Madourie's submission that up until the filing of W.I.A.'s submissions in January 2010, the Affidavits filed on behalf of Mr. Brown do not contain any reason for his failure to comply with the limitation clause. However, be that as it may, in his later Affidavits, Mr. Brown maintains that the negotiations between himself and W.I.A. continued for more than one year after the claim arose and that the correspondence shows that there were extensive negotiations for settlement of his claim which took place between October 2001 and December 2002. Having reviewed the correspondence in its entirety, it seems clear to me that Mr. Brown has no real prospect of succeeding in arguing that there were extensive negotiations for over a year after the claim arose. It seems far more probable that W.I.A. would successfully maintain that their full and final offer was made to Mr. Brown from as far back as by way of letter dated December 27, 2001. The letters subsequently sent by W.I.A. to or through Mr. Brown's agents or

the Financial Services Commission simply maintained that W.I.A. would be standing by its offer made in its December 2001 correspondence.

49. In this case there has been no plea of waiver or estoppel which are generally the only bases upon which a limitation clause in an insurance policy which has been found to be fair and reasonable can be defeated. Further, W.I.A. has denied that there were extended negotiations between itself and Mr. Brown. However, even if there had been, the case law shows that this has been rejected as a basis for not filing suit within the time specified in the contractually agreed limitation clause. At paragraphs 22 and 23 of the **Superchem** case, Lord Steyn stated:

> *22.... It is common ground that waiver and estoppel can only be established, in the circumstances of the present case, if the insurers made a clear and unequivocal representation to the insured that they would not rely on the time bar....*
>
> *23. ..the mere fact that a party has continued to negotiate with the other party about the claim after the limitation period had expired, without anything being agreed about what happens if the negotiations break down, cannot give rise to a waiver or estoppel....Nothing in the exchanges in the present case is therefore capable of creating a representation that the time bar would not be relied on. Thirdly, there is nothing to show that the insurers knew whether a protective writ had been issued or not. It is therefore impossible to say that their silence signified that they would not be relying on the time bar. It is further clear that in this case the insurers did nothing to raise an expectation in the mind of the insured that the time bar would not be relied on.*

IS THE INSURER OBLIGED TO INFORM THE INSURED OF THE LIMITATION CLAUSE

50. In their written submissions, Mr. Brown's Attorneys submit that at no point in their business relationship did W.I.A. specifically point out the existence of the time limitation clause to Mr. Brown. They submit that that fact, coupled with the alleged extensive negotiations beyond the year from the accident, suggest that W.I.A. intended to ambush Mr. Brown with the limitation clause.

51. In the **Superchem** case, a judge at first instance upheld the insured's submission that he was unaware of the clause. In that case the insured had argued that since his brokers were not aware of the clause, he could not be fixed with knowledge of it. The Board of the Privy Council held that the judge had wrongly applied a subjective test and that the brokers, whether or not they knew of the clause had authority to and did bind the insured to the contract containing the clause. I agree with W.I.A.'s submission that when that analysis is applied to this case there is no dispute that Mr. Brown entered into the contract with W.I.A. containing a limitation clause. As such the objective approach warrants a finding that an acceptance of the entire contract invariably involves an acceptance of the limitation clause.

52. In the **Fortis Bank** case, Counsel for the insured submitted (see paragraph 26 of the judgment), that "at no stage whatsoever either orally or in writing did the defendants either themselves or through their servants or agents state that any reliance was to be made on clause 13(b) of the policy". At paragraph 30 of the judgment, the learned judge made the following useful observations:

> *30. I accept Mr. Turner's submission that, in order for a claimant to establish the necessary constituents to demonstrate waiver or promissory estoppel in relation to a*

limitation clause, the following propositions of law are relevant:

i) *The claimant must show that "there [is] a clear, unequivocal, unambiguous and unconditional promise by the insurers that they will not raise the defence that the action is statute [or otherwise time] barred. The focus has to be on whether or not they were giving up that right"; see per Ward LJ in Seechurn-v.-Ace [2002] 2 Lloyd's Rep 390 at paragraph 26.*

ii) *The claimant must establish that the conduct relied upon is not capable of more than one explanation, since such conduct is indeed equivocal. Mere silence and inaction are of their nature equivocal. As Goff LJ said in Allied Marine Transport Limited –v- Vale de Rio Doce Navegacao SA[1985] 2 Lloyd's Rep 18 at page 20:*

> *"It is well settled that the principle [of equitable estoppel] requires that one person should have made an unequivocal representation that he does not intend to enforce his strict legal rights against the other; it is difficult to imagine how silence and inaction can be anything but equivocal.*

But silence and inaction are of their nature, for the simple reason that there can be more than one reason why the person has been silent or inactive."

This statement was cited with approval in Seechurn at paragraph 20.

Iii) *It is also necessary for the claimant to establish that, objectively construed, the representation or promise was a promise not to raise a limitation defence. As Ward LJ said in Seechurn at paragraph 26:*

> *"The promise must be construed objectively, not subjectively. The question is whether the correspondence can reasonably be understood to*

contain that particular promise. It does not matter what Mr. Seechurn thought it meant, nor does it matter what a layman might have thought,... unless of course, that layman is a passenger on the Clapham omnibus.

iv) *The mere fact that an insurer has attempted to negotiate with the insured about a claim, both before and after the expiry of the limitation period, cannot per se amount to a waiver or an estoppel; as Ward LJ said in Seechurn (see paragraph 55 and 58) the mere fact insurers said in that case that the door to compromising the claim was still open was not impliedly to promise that a limitation point would not be taken when the negotiations failed and the proceedings started out of time.*

53. In light of the analysis demonstrated in the cases, it does seem to me that there is no obligation on an insurer to specifically direct the insured's attention to the time bar clause in the contract of insurance.

WHETHER W.I.A. IS ENTITLED TO SUMMARYJUDGMENT

54. In my judgment, Mr. Brown has no real prospect of succeeding on the claim under the insurance policy. It is clear from W.I.A.'s filed Defence that they intend and do rely upon the Section G time bar. In my view W.I.A. are entitled to summary judgment for reasons similar to those as delineated in **Fortisbank**. It is to be noted that in this case, unlike the **Fortisbank** case, there is no pleading that W.I.A. are estopped from relying upon the clause or that they have waived their right to rely upon it. Even if such matters were pleaded, the evidence and issues put forward by Mr. Brown in this application do not demonstrate the requisite criteria. Mr. Brown therefore has no real prospect of succeeding on the claim as

pleaded or of defeating W.I.A.'s contractual limitation plea in the circumstances.

55. There will therefore be summary judgment for the Defendant W.I.A. against the Claimant Mr. Brown on the Claim. Costs are awarded to the Defendant. The Claimant's application dated December 17, 2009 is dismissed, with costs to the Defendant. The costs are to be taxed if not agreed or otherwise ascertained.