IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2005 HCV 01078

BETWEEN	**MICHELLE FOOTE-DOONQUAH**	**CLAIMANT**
AND	**JAMAICA CITADEL INSURANCE BROKERS LIMITED**	**FIRST DEFENDANT**
AND	**NEM INSURANCE COMPANY LIMITED**	**SECOND DEFENDANT**

IN CHAMBERS

Mrs. Denise Kitson instructed by Grant Stewart Phillips and Company for the claimant

Miss Linda Wright for the first defendant

Mr. David Johnson instructed by Piper and Samuda for the second defendant

July 13, July 27 and August 18, 2006

RULES 1.3, 8.9, 10.5, 15.2 AND 26.3 (1) (C) OF THE CIVIL PROCEDURE RULES, SUMMARY JUDGMENT, APPLICATION TO STRIKE OUT CLAIM, CONTRACT OF INSURANCE, EXCLUSION CLAUSE, AUTHORISED DRIVER

SYKES J

1. I have before me an application by NEM Insurance Company Jamaica Ltd ("NEM"), the second defendant, to strike out the claim of Dr. Michelle Foote-Doonquah, a medical practitioner, the claimant. The application was brought under rule 26.3 (1) (c) of the Civil Procedure Rules ("CPR"). Jamaica Citadel Insurance Brokers Ltd ("the broker"), the first defendant, did not make a similar application but it is accepted that if NEM succeeds then the claim against the broker falls as well.

The context

2. Dr. Michelle Foote-Doonquah, between the years 2001 and 2004, practised in the capital city of Kingston and Montego Bay, Jamaica's second city. She owned a Honda CRV motor

vehicle that she used to transport herself between the two cities. The vehicle was insured with NEM through the broker during the years mentioned above.

3. In July 2004, she placed the vehicle in the garage to under go minor body repairs. Unknown to her and without her permission, her bearer, on July 16, 2004, took the vehicle from the custody and control of the garage operator and drove to that most Jamaican activity – a dance. The dance was held in Morant Bay, St. Thomas. During the early hours of July 17, 2004, at approximately 3:30 am, the bearer's night of merriment ended in quite a dramatic and destructive manner. On his way back go Kingston he levelled a wall and severely damaged the vehicle. The information in this paragraph comes largely from a crucial letter dated July 21, 2004, written by Dr. Foote-Doonquah to her insurers. This letter proved to be the Achilles heel in the case of the claimant.

4. At the time of the accident, it was erroneously thought by all concerned that Dr. Foote-Doonquah had not paid the premium which would have meant that she would have been without insurance coverage. The confusion over the premium payment arose in this way. Dr. Foote–Doonquah had asked her husband to pay the premium for her. He deposited the sum in the account of the broker but did not inform his wife that he had done so. She, in turn, had not informed the broker that the premium was paid. The broker, during the reconciliation of its accounts, found an "unknown" sum deposited to its accounts. The sum was the precise figure of the premium paid into the account by the claimant's husband. For some inexplicable reason the broker did not seek to find out who had deposited the money in its account. The broker having failed to make any enquiries about the deposit did not appreciate that it had in fact received the premium. The result was that the premium was not paid to NEM by the broker.

5. The letter of July 21, 2004, was written before the mystery of the premium payment was solved. When the accident occurred the discussions proceeded on the erroneous basis that the premium was not paid. To summarise the communication, the broker had asked NEM to consider whether any special arrangements could be made for Dr. Foote-Doonquah since she had been a long standing customer of good repute. Apparently, NEM agreed to accommodate the claimant provided she paid approximately $29,000.00. This she did. It was after this sum was paid that it was found out that the premium had been deposited in the broker's account. Once this discovery was made, the whole picture changed. Dr. Foote-Doonquah was no longer relying on grace but her contractual rights under the insurance

policy. She formed the view that there was indeed a contract of insurance between herself and NEM which should now be honoured by the insurance company. Her view was that it matter not whether the broker paid over the premium. The fact was that the premium was paid to the broker, who failed to exercise that small modicum of diligence that would have revealed that Dr. Foote-Doonquah had indeed paid the money. NEM resisted. She filed suit.

6. As against NEM Dr. Foote-Doonquah claimed under the contract of insurance. NEM opposed on the ground that it had not received any premium and therefore it is not liable on the policy. It also said that, based on the letter of July 21, 2004, the bearer was an unauthorised driver and thus not covered by the contract. Dr. Foote-Doonquah alleged, against the broker, that it was the agent of NEM and when it received the premium it did so for and on behalf of NEM and in the alternative, the broker was negligent in that it failed to make such reasonable enquiries which had they been made would have shown that the premium was paid. The broker responded by saying that, over time, there was a course of conduct established between itself and the claimant to the effect that the claimant would inform it whenever she paid the premium. Dr. Foote-Doonquah failed to do so for the insurance year 2004/05, therefore it is not liable.

7. The case has ultimately been reduced to a matter of construction of the contract. I have treated the matter as if it were an application for summary judgment. I now explain why I did this.

The application

8. As stated earlier, the application was made under rule 26.3 (1) (c) of the CPR. The first paragraph of the application states that the claimant's statement of case discloses no reasonable grounds for bringing a claim or in the alternative, is frivolous, vexatious and an abuse of the court's process. I need to make some comments about the application as formulated.

9. The ground of frivolous and vexatious does not appear in rule 26.3 (1) (c) and so an application for striking out on that basis cannot be made under that sub-rule. Similarly, the sub-rule does not speak to abuse of process. Abuse of process appears only in rule 26.3(1) (b). The only ground that appears in rule 26.3(1) (c) is the one that says that the statement of case discloses no reasonable grounds for bringing or defending the claim. I have not been able to find in the CPR a rule that accommodates the ground of frivolous and

vexatious as a basis for striking out. It appears that if the ground of frivolous and vexatious is going to be relied on then it cannot be brought under any of the grounds listed in rule 26.3. The only home for accommodating that ground now seems to be the inherent jurisdiction of the court. Therefore if this application is to proceed under rule 26.3(1) (c) then it would have to be on the basis that there is no reasonable ground for bringing the claim.

10. Rule 26.3 (1) (c) is the modern equivalent of what used to be called a demurrer where no evidence was admissible. The court simply looks at the pleadings or to use the modern language the particulars of claim or defence as the case may be and makes a determination whether the claim or defence is vague, incoherent or does not amount to a legally recognised claim or defence. No evidence is admissible on this application. Evidence, on the other hand, is admissible when the striking out is based on the frivolous and vexatious ground.

11. It cannot be said that the claim against both defendants is vague, incoherent or does not amount to a legally recognised claim. This is why it was not appropriate to proceed under rule 26.3 (1) (c). It is equally true to say that the claim was neither frivolous nor vexatious if proper regard is had to the meaning of those words. It cannot be said that the claim is an abuse of process if that phrase is properly understood. The result then is that there was no room under rule 26.3(1) (c) to accommodate this application.

12. It would seem to me that the proper application should have been one for summary judgment under rule 15.2. I say this because all the parties have fully pleaded their respective cases supported by affidavit evidence. I now have before me all the evidence that is going to be adduced at trial. There is hardly any factual dispute between the parties. The question really is what is the legal consequence of the known facts? Under rule 15.2 the court can look at the evidence proposed to be called at any trial.

The court's powers under rule 15.2 of the CPR

13. In a recent judgment of the House of Lords ***Sutradhar v National Environmental Research Council*** [2003] UKHL 33, (delivered July 5, 2006) Lord Hoffman spoke of the English rule 24.2 which is similar to rule 15.2 of the CPR. I agree with Lord Hoffman's comments which I set out below and adopt them as a correct statement of principle. He said at paragraphs 3 to 5:

3. Under CPR r 24.2 the court has power to give summary judgment against a claimant if it considers that (a) he "has no real prospect of succeeding on the claim and (b) there is no other compelling reason why the case or issue should be disposed of at a trial." This is a broader power than existed under the old rules, when a claim could be struck out only on the grounds that the pleading disclosed no cause of action (the old demurrer, on which no evidence was admissible) or that the claim was frivolous, vexatious and an abuse of the process of the court. Under CPR r. 24.2 evidence is admissible and witness statements have been submitted by both sides. The new power has been described by Lord Woolf MR (in Swain v Hillman [2001] 1 All ER 91, 92) as salutary:

> *"It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding' do not need any amplification, they speak for themselves. The word "real' distinguishes fanciful prospects of success"*

4. Lord Woolf went on to say:

> *"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial."*

5. These remarks were approved by this House in Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1: see Lord Hope of Craighead at pp. 259-260; Lord Hutton at pp. 272-273. In addition, as Lord Millett said in the same case (at p. 294) the ""most important principle of all is that justice should be done. But this does not mean justice to the plaintiff alone." It is not just to a defendant to subject him to a lengthy and expensive trial when there is no realistic prospect of success.

And at paragraph 42

> *42. The overriding objectives of the Civil Procedure Rules include achieving justice for both claimants and defendants and saving time and expense. These objectives sometimes conflict and compromises are required.*

14. I recognise that rule 24.2 (b) cited in this passage does not appear in the Jamaican rules but that does not detract from the point made by Lord Hoffman. I have already stated that this case really comes down to the proper construction of the contract of insurance.

The proper approach to the interpretation of contracts

15. The proper approach to the interpretation of contracts has been restated by Lord Hoffman in ***Investor Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 W.L.R. 896, 912 – 913:

> *My Lords, I will say at once that I prefer the approach of the judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1384-1386 and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.*
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.*

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

16. While I accept this statement as generally correct I must not be taken to have assented to Lord Hoffman's assessment of the alleged revolution wrought by Lord Wilberforce and neither do I unreservedly assent to the view that almost anything can be used as background to interpret the contract. This latter reservation need not be resolved for the purposes of this case and must wait for another day.

17. I do not believe that an examination of the judgments of Lord Wilberforce in the cases mentioned by Lord Hoffman would support the conclusion that the Law Lord was setting the spark to any revolution in the interpretation of contracts. Lord Wilberforce in ***Prenn v Simmons*** [1971] 1 W.L.R. 1381 referred to a 1918 case from the United States of America (***Utica City National Bank v. Gunn*** (1918) 118 N.E. 60) and a 1933 authority from the House of Lords (***Hvalfangerselskapet Polaris Aktieselskap v. Unilever Ltd.*** (1933) 39 Com.Cas. 1). I make a similar observation in respect of ***Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*** [1976] 1 W.L.R. 989. The cases cited by Lord Wilberforce in ***Reardon*** were all cases in which the courts looked at the contract in its context. The tone of his speeches betrays no recognition that he was doing anything new or revolutionary.

The construction of the contract

18. The critical words in the contract before me are "authorised driver". The contract in question was issued by NEM and it has the exhortatory title "Careful Driver's Policy Motor (Private Car) Insurance (excluding cars used for hire)". The document has a section headed *General Exceptions*. Under this heading is a list of circumstances in which the company shall not be liable. It does not in terms say that the company will not be liable if the car was being driven at the time by an unauthorised driver. Mrs. Kitson seized up on this to submit

that unless there were those words in the contract then the company cannot escape liability.

19. Under the heading *Conditions* there is this sentence: *This policy and the Schedule shall be read together and any word or expression to which a specific meaning has been attached in any part of this Policy or of the Schedule shall bear such specific meaning wherever it may appear.*The schedule has information about the insured, the period of insurance, the geographical area covered by the contract, the type of motor car, the applicable legislation, limits of liability, limitation on use and authorised driver.

20. The expression *authorised driver* is defined in the schedule in these terms (a) *the insured: the insured may also drive a motor car not belonging to him and not hired to him under a hire purchase agreement*; and (b) *any person driving on the insured's order or with his permission.* This definition has this proviso which reads *provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the Motor Vehicle.*

21. This schedule referred to is from the insurance year 2001/02. In an affidavit dated July 12, 2006, Dr. Foote-Doonquah has exhibited the insurance policy and the certificate of motor insurance for the year 2004/05, the relevant year for the purposes of this application. Paragraph 6 of the certificate identifies the classes of persons who are entitled to drive the vehicle in question. The classes are the same as those identified in the schedule mentioned already. The only difference being that in the schedule there is a reference to the *insured* whereas under the certificate the expression is *policyholder.* Thus on either document my conclusion is the same. Indeed the certificate of insurance is being put forward by the claimant as part of the documentation relating to insurance coverage for the year 2004/05. In looking at both documents they bear the same kind of information save for the insurance year. It is clear that the important part of the definition of authorised in this case is part (b) which says *any person driving on the insured's order or with his permission.*

22. Mrs. Kitson urged on me the case of ***G.F.P. Units Ltd v Monksfield*** [1972] 2 Lloyd's 79 and ***Samuelson v National Insurance Guarantee Corporation*** [1985] 2 Lloyd's 541. These cases she submitted showed how strictly the courts construe exemption clauses and since the exemption clause in the instant case did not expressly exclude unauthorised drivers it necessarily meant that the company could not deny liability in this case.

23. I believe this approach is the wrong way to look at the matter. It seems to me that one has to start with a proper construction of the contract to see the classes of persons covered before one can properly determine whether the exemption clause applies. It has already been pointed out that the policy explicitly incorporates the schedule. When one examines both documents the person intended to be covered is defined as the authorised driver. Within the definition of authorised driver there are two categories (a) the insured and (b) any person driving on the insured's order or with her permission. This definition is not unqualified. The proviso further narrows the class by requiring that the person driving the vehicle is properly licensed and not disqualified for any legitimate reason.

24. The schedule is clearly expected to ready by laymen. It sets out the essential things that a layman would need to know about the contract. Surely one fact that the layman would want to know is who is entitled to drive the vehicle. He is told in simple language: the authorised driver. It necessarily follows that any person who does not fall within the definition of authorised driver is not permitted to drive the vehicle. Thus if one is not an authorised driver to begin with the question of whether the exemption clause applies does not arise for consideration.

25. Once the issue of construction is disposed of there remains one simple factual question, namely, whether the bearer was an authorised driver as defined by the documents at the time of the accident. Based on her admission in the July 21 letter there is no doubt that the bearer was not an authorised driver at the time of the accident. Dr. Foote-Doonquah unambiguously stated, without any pressure from anyone, that the bearer removed the vehicle without her knowledge or permission. She made that statement without any qualification or reservation. Therefore Dr. Foote-Doonquah has no real prospect of success on the claim. But for a late affidavit of July 12, 2006, my judgment would have ended at this point.

26. Dr. Foote-Doonquah has sought to extricate herself from her previous admission that the bearer was driving without her consent or permission. She filed an affidavit dated July 12, 2006, in which she stated that her bearer returned to the garage and removed the vehicle as he would normally do. She added that what she meant when she said in her July 21 letter that he drove without her knowledge or permission was that she did not know that he was driving the vehicle to a dance in Morant Bay. She concluded by saying that he would normally drive the vehicle home in the evenings. Mrs. Kitson has said that affidavit now

raised factual issues that can only be resolved at a trial. How is a judge to deal with this late development?

27. Lord Hope in the case of ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1, offered some guidance. He said at pages 260 – 261:

> *For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is--what is to be the scope of that inquiry?*
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> *I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.*

28. In the same case Lord Hobhouse (a member of the minority) said at page 282:

> *This leads me back to the CPR. As previously noted, Part 1 adopts a philosophy similar to that enunciated in Ashmore v Corpn of Lloyd's [1992] 1 WLR 446. It is followed through into the new version of RSC Ord 14. It is Part 24. It authorises the court to decide a claim (or a particular issue) without a trial. Unlike Order 14, it applies to both plaintiffs (claimants) and the defendants. It therefore can be used in cases such as the present where the application for judgment without trial is being made by the defendant. The court may exercise the power where it considers that the "claimant has no real prospect of succeeding on the claim" and "there is no other reason why the case or issue should be disposed of at a trial". The concluding phrase corresponds to the similar phrase used in RSC Ord 14, r 3(1) and has not been relied upon in the present case. The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a "discretionary" power, i. e. one where the choice whether to exercise the power lies within the*

jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC Ord 14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters. Part 24 includes provisions covering various ancillary matters, at what stage the application can be made (24.4), the filing of evidence (24.5) and supplementary powers of the court (24.6). The Practice Direction which was originally appended filled out some of what is in the rules.

...

The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases "no realistic possibility" and distinguished between a practical possibility and "what is fanciful or inconceivable" (ante, p 83h). Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the statement of case discloses no reasonable ground for bringing or defending the claim.

29. It is not hard to see why counsel said that the judge had made findings of fact because any submission that there is no realistic prospect of success because the factual foundation, as distinct from the legal foundation, is very weak it is difficult to avoid some kind of assessment of the facts and the prospects of surviving in a trial. The circumstances that may lead to conclusion that the factual foundation of the claim or defence does not disclose any prospect of success vary. In one case it may be that the assertions of fact are so farfetched or inconceivable that no time should be spent exploring them at a trial. In other type of case it may be that the allegations are not farfetched but proof of them may be well nigh impossible. In yet another, it may be that the contemporaneous documents undermines the case being put forward. At the stage of summary judgment no findings of fact can be made because the matter has not been fully explored at trial but that does not mean that a judge should refrain from making a decision to grant summary judgment in appropriate cases. If the factual assertions stand on quick sand then the judge should say so.

30. At page 283 Lord Hobhouse noted the difficulty of deciding whether there was no real prospect of success when he said:

The difficulty in the application of the criterion used by Part 24 is that it requires an assessment to be made in advance of a full trial as to what the outcome of such a trial would be. The pre-trial procedures give the claimant an opportunity to obtain additional evidence to support his case. The most obvious of these is discovery of documents but there is also the weapon of requesting particulars or interrogatories and the exchange of witness statements may provide a party with additional important material. Therefore the courts have in the present case recognised that they must have regard not only to the evidence presently available to the plaintiffs but also to any realistic prospect that that evidence would have been strengthened between now and the trial.

And at page 284:

The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party's case is hopeless.

31. The passages cited from the two Law Lords are of extreme importance. They are making the vital point that simply to assert facts might not be sufficient. The court can look at contemporaneous documents or documents made by either party at a time when litigation was not contemplated. If the person has no **realistic** chance of proving the facts asserted then summary judgment may be entered. The breadth of these passages cannot be overstated. Lord Hobhouse also suggested that lack of expected particulars may provide a clue to the hopelessness of the case. It is this last point that I found of significance for the present case as well as the point previously made about earlier documents undermining the factual claim.

32. It is not sufficient to simply raise a factual question and that without more bars summary judgment. The judge is entitled to look at the case of the resisting party in the round to see whether there is an absence of reality of success in the case put forward. It is not necessary that the judge concludes that the case is bound to fail though if he so concludes then obviously he will enter summary judgment for the other side. This conclusion is supported by this passage from Lord Hope in ***Three Rivers*** at pages 259 – 260 when he said:

The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In Swain v Hillman, at p 4, Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In Monsanto plc v Tilly The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924

of 1999; Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor v Midland Bank Trust Co Ltd 21 July 1999 he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

33. The implication of this new power vested in the judge should not be lost on anyone. As Lord Justice Potter observed in ***E.D.F. Mann v Patel & ANR*** [2003] C.P. Rep 51 at paragraph 10:

It is certainly the case that under both [13.3 (1) and 24.2], where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].

34. Implicit in Mrs. Kitson's submissions is this idea, "Judge if you were to decide the matter now you would be deciding that Dr. Foote-Doonquah's explanation in her affidavit of July 12, 2006 affidavit is not credible and that is properly the function of a trial court." I would respond to this way. The only value that a trial would add to what is before me is the demeanour of Dr. Foote-Doonquah. Her evidence would in all probability be the same. Demeanour, while important, is overrated as a test of truth. The modern trend in judicial assessment of witnesses is to rely less on demeanour and more on the internal logic and consistency of a witness' testimony, on how the testimony fits in with facts established by other evidence and on other objective criterion.

35. It seems to me that there is no realistic prospect of Dr. Foote-Doonquah making out her case that she is entitled to compensation under the policy. There is the stark admission that the bearer removed the vehicle without her knowledge and consent. The letter containing this admission does not admit of any other sensible interpretation. Her new assertion is not sustainable in light of the letter written when litigation was far from anybody's mind. She, a highly trained professional, was not careless in her use of language in the letter. If the bearer were authorised to remove the vehicle from the garage one would have expected

her to say so from the very first letter or some time before this application began. Her recent account is contradicted by a letter written by her and there is no reasonable and rational explanation for the difference. It is difficult to see a reasonable judge giving the letter another interpretation that would allow her to recover under the policy. What I have said are not findings of fact but part of the assessment of Dr. Foote-Doonquah's case as a whole.

36. There is also marked absence of assertions of fact in the affidavit which one would expect to find if the case is based on the driver having authority to drive the vehicle at the relevant time. There is no indication that she told him to pick up the vehicle. There is no indication that the repairs were completed. There is no indication that he asked for and received permission to drive to Morant Bay. Finally, there is no indication that driving to Morant Bay at the material time was done as part of his employment for the claimant. In other words, whether the vehicle was insured or not at the material time cannot alter the regrettable conclusion that at the time of the accident the bearer was indeed driving without her consent or permission – a fact admitted in the July 21 letter.

Conclusion

37. The application is treated as one under rule 15.2 of the CPR. The claim has no real prospect of success when the methodical analysis indicated by Lords Hope and Hobhouse is applied. Judgment for both defendants on the claim. Cost to both defendants at $40,000 each.