[2015] JMCC COMM 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO 2015CD0001

BETWEEN	**ROGER HUNTER**	**CLAIMANT**
AND	**ALMA GRACE LEAHY**	**FIRST DEFENDANT**
AND	**BUPA INSURANCE LIMITED (T/A "BUPA GLOBAL")**	**SECOND DEFENDANT**

IN CHAMBERS

Melissa McLeod instructed by Hylton Powell for the claimant

Alexis Robinson instructed by Myers Fletcher & Gordon for the second defendant

September 23 and October 7, 2015

CIVIL PROCEDURE – APPLICATION TO SET ASIDE ORDER PERMITTING SERVICE OUT OF JURISDICTION – APPLICATION TO SET ASIDE SERVICE OF STATEMENT OF CASE – APPLICATION TO STRIKE OUT CLAIMANT'S STATEMENT OF CASE – RULES 7.3, 7.5 (5), 7.7, 8.16, 9.1, 9.2, 9.3, 9.6, 11.15, 11.16 (3), 26.9 OF THE CIVIL PROCEDURE RULES

SYKES J

[1] Dr Roger Hunter is distinctly unimpressed with the conduct of Bupa Insurance Limited (trading as Bupa Global) ('Bupa'). He says that Bupa has not paid him the full sum due for his medical services provided to one of the named beneficiaries, Mrs Alma Grace-Leahy, under a contract of insurance between Bupa and Kier who is the employer of Mrs Leahy's husband. He agreed to provide specified medical care to her on the understanding that he would be paid by Bupa; at least this was what he said he understood from his dialogue with Mrs Leahy and Bupa. He has been paid some of the money but he says that well over £150,000.00 is outstanding. He has now sued both the patient, Mrs Leahy, and the insurer, Bupa.

[2] Bupa, in its response, says that it has no contract with Dr Hunter and therefore cannot be sued directly by him. In lawyers' language – there is no privity of contract between the doctor and Bupa and therefore can be no breach of contract. This was the substantive law point and on this basis Bupa says that the claim should be struck out against it. Needless to say Bupa's stance is that the other areas of law that impose obligations such as equity and tort do not arise for examination in this case. Bupa rounds off its response to the claim by adding that, in any event, it conducted the arrangements with Medical Associates Hospital ('MAH') and none was made with Dr Hunter.

[3] Bupa took a procedural point which was to the effect that there was non-compliance with rules 11.15 and 11.16 (3) of the Civil Procedure Rules ('CPR') and this failure was fatal to Dr Hunter's case and therefore the claim should be struck out against it. Bupa also says that the order permitting service outside of Jamaica should not have been granted at all. It relies on rule 7.3 in support of this last point.

[4] The procedural points arose in this way. Bupa is in a foreign country. Under the CPR permission is needed to serve process overseas. Dr Hunter sought and obtained permission for Edwards J to serve the claim form and particulars of claim on Bupa in the United Kingdom. No complaint is being made about the

accuracy of the information used to secure the order. The problem arose at the second stage, namely the service of the documentation. Bupa was served with the amended claim form, the amended particulars of claim and the order giving permission to service the document overseas. However, Bupa was not served with the application and evidence in support seeking permission to serve process overseas. The order served on Bupa did not have any information on it telling it that it had the right to apply to set aside or vary the order (rule 11.16 (3)). The consequence was that Bupa did not know that it had fourteen (14) days to apply to set aside the order. This omission was said to be fatal. The consequence being that this court cannot exercise any jurisdiction over Bupa.

[5] Dr Hunter took a very bleak view of this response by Bupa. His indignation rose to higher levels and this was his reply. The doctor says that Mrs Leahy came to him as a private patient and not as a hospital patient. At all material times Mrs Leahy and Bupa understood that she was his private patient and thus, when the course of treatment was decided the only question was the venue for providing the service. The venue, in this case, turned out to be MAH but that fact does not disguise the clear understanding that Mrs Leahy was his private patient and the payment arrangements made were made on that footing. The reference to MAH in the correspondence arose because MAH would be providing the bed space and pre and post procedure nursing care as well as the physical plant for providing the service for which MAH would be paid. Dr Hunter indicated that he, it was, who procured the material needed for the surgery. MAH had nothing to do with the procurement of the material.

Bupa's attack on Dr Hunter's case

[6] Mrs Alexis Robinson, on behalf of Bupa, took two points: one based on procedural law and the other, on substantive law. The court will deal with the procedural law first.

[7] More detailed information is needed here to understand the submission. On January 21, 2015, an order was granted by Edwards J granting permission to serve the claim form and particulars of claim out of jurisdiction. In that order Bupa had 42 days to file its acknowledgment of service and 70 days to file its defence. These time limits are found in rule 7.5 (5). Bupa was served on May 7, 2015 with an amended claim form and amended particulars of claim as well as the court order of Edwards J. Bupa was not served with the application for service out of jurisdiction and neither was it served with the affidavit in support of the application as required under rule 11.15. Also the order did not contain any clause or notice, as required by rule 11.16 (3), telling Bupa that it had the right to apply to set aside or vary the order within 14 days.

[8] Bupa's first response was to file a notice of application for court orders on July 3, 2015. This application was amended. In that unamended application Bupa was seeking to set aside Edward J's order; set aside service of the amended claim form and amended particulars of claim and an extension of time to make the applications just mentioned. No acknowledgment of service was filed either before or at the time the July 3 application was filed. The application was supported by an affidavit of Miss Sarah Pozner. Bupa apparently realised that it had not filed the acknowledgment of service and filed it on September 18, 2015.

[9] In the application filed July 3, Bupa sought to lay total blame for its late filings on the failure of Dr Hunter to comply with rule 11.16 (3). This was repeated in the amended application.

[10] In the amended application Bupa wants an order setting aside Edward J's order permitting service of claim form and particulars of claim out of Jamaica; an extension of time to seek the order just mentioned; setting aside service of the amended claim form and particulars of claim; any judgment entered in default of acknowledgment of service set aside; Dr Hunter's entire claim to be struck out.

[11] The grounds are that the order served on Bupa did not tell Bupa that it had the right to make an application under rule 11.16 to set aside or vary the order and this failure is in breach of rule 11.16 (3). Bupa, it was said, was unaware of its

right to make such an application within 14 days and this failure to notify Bupa of this crucial right means that the setting aside orders sought by Bupa should be granted as of right and not discretion because the rule is a mandatory rule and its breach means that an incurable fatal error has occurred. It is also said that the claim did not fall within rule 7.3 and so service out of jurisdiction was not justified and therefore Edwards J should not have granted the order permitting service out of Jamaica. It is said that Bupa is not a necessary party to the claim since the contract is between Bupa and Kier. With this relevant evidence the court is now able to assess the submissions made on this issue.

[12] Mrs Robinson relied on the Court of Appeal's decision in **Vendryes v Keane** [2011] JMCA Civ 15 for the proposition that in the CPR, in certain circumstances, the word 'must', when used, means 'must' and not 'may'. Learned counsel relied on the circumstances of that case to buttress the submission. She submitted that in that case a defendant was served with the claim form and particulars of claim but was not served with the additional documentation required by the rules. The additional documentation contained important information that would have informed the defendant of how he may respond to the claim such as the time within which he would need to respond as well being informed about the consequence of failing to respond in the manner and in the time stipulated in the additional documents. The Court of Appeal held that rule 8.16 of the CPR which stated that these additional documentation 'must' accompany the claim form and particulars of claim meant 'must' and the failure to serve these documents amounted to an irregularity and consequently the judgment obtained must be set aside as being irregularly obtained.

[13] By parity of reasoning, Mrs Robinson said that rule 11.5 states what the recipient of a without notice order must do and rule 11.16 (1), (2), (3) states what the order 'must' contain. The failure to serve the application for service out of jurisdiction along with the supporting evidence meant that Bupa was not aware of the evidence placed before the judge. The omission of the notification in the order was of extraordinary significance in that the order did not inform Bupa that

it had a 14-day window within which to apply to set aside or vary the order. These facts, in principle, she said, made it imperative that **Vendryes** be applied and the result ought to be that the court cannot embark upon any adjudication of the claim made against Bupa because the defect in the documents served on Bupa means that this court cannot try the claim. It is convenient to examine rule 11.15 and 11.16.

[14] Rule 11.15 states:

> *After the court has disposed of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all the other parties.*

And 11.16 provides:

> *(1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.*
>
> *(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.*
>
> *(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.*

[15] Mrs Robinson's argument is that the order did not have the statement mandated by rule 11.16 (3) and thus Bupa was deprived of the opportunity to respond in a timely manner.

[16] Miss Melissa McLeod's response was this: the pot and the kettle, in this case, have the same defect or to misquote Mercutio in Romeo and Juliet 'A plague a' both [our] houses.' According to Miss McLeod while she accepts that the order served on Bupa did not comply with rule 11.16 (3) Bupa itself did not comply with Part 9 of the CPR. Under Part 9, it was submitted, any person who wishes to contest the claim or jurisdiction of the court must first file an acknowledgement of service within the time specified. The general rule is that the acknowledgment of service must be filed within 14 days after service of the claim form (rule 9.3 (1)). However in this case, the order permitted filing of the acknowledgement of service within 42 days of being served with the claim form. This Bupa failed to do. Miss McLeod also accepts that Bupa was not served with the application for service out of Jamaica and neither was it served with the evidence in support of the application but submitted that Bupa, by its conduct, made that non-service of the documents a non-issue in the case. In any event, Bupa now has the application and the evidence and so the lack of information has now been cured. Learned counsel submitted that striking out was a drastic remedy and when all the circumstances of this case are examined justice can be done to all parties without striking out the claim (see **International Hotels Jamaica Ltd v New Falmouth Resorts Ltd** SCCA Nos 56 & 95/03 (unreported) (delivered November 18, 2005) and **S & T Distributors Ltd and another v CIBC Jamaica Ltd and another** SCCA No 112/04 (unreported) (delivered July 31, 2007) where the Court of Appeal held that striking out is a very draconian remedy and should be seen as the remedy of last resort). Finally, Miss McLeod submitted that Bupa failed to comply with rule 9.6 in that Bupa did not file an application either disputing the court's jurisdiction or suggesting that the court should not exercise its jurisdiction within the time set by the court order. The court order permitting service out of jurisdiction gave Bupa 70 days to file its defence and under rule 9.6 (3) any issue relating to the jurisdiction of the court 'must' be made within the

period for filing a defence. This submission requires an examination of the relevant rules of Part 9.

[17] Rule 9.1 reads:

> *(1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a judgment in default of acknowledgment of service being obtained.*
>
> *(2) Where by any enactment provision is made for the entry of an appearance, an acknowledgment of service must be used.*

[18] Rule 9.2 states:

> *(1) A defendant who wishes*
>
> > *(a) to dispute the claim; or*
> >
> > *(b) to dispute the court's jurisdiction must file … an acknowledgment of service … containing a notice of intention to defend…*
>
> *(2) A claimant must serve copies of any acknowledgment of service on all other defendants who have been served with the claim form.*
>
> *(3) ..*

(4) An acknowledgment of service has not effect until it is received at the registry.

(5) However the defendant need not file an acknowledgment of service if a defence is filed and served on the claimant or the claimant's attorney at law within the period specified in rule 9.3.

(6) Where a defendant fails to file either an acknowledgment of service or a defence, judgment may be entered against that defendant if Part 12 allows it.

[19] Rule 9.3 provides:

(1) The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.

(2) Paragraph (1) does not apply where

(a) the claim form is served outside the jurisdiction on accordance with Part 7; or

...

(3) A defendant may file an acknowledgment of service at any time before a request for default judgment is

received at the registry out of which the claim form was issued.

[20] There is also rule 9.6:

(1) *A defendant who-*

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.

(3) *An application under this rule must be made within the period for filing a defence.*

(4) *An application under this rule must be supported by evidence on affidavit.*

(5) *A defendant who-*

(a) files an acknowledgment of service; and

(b) does not make an application under this rule, within the period for filing a Defence, is treated as having accepted that the Court has jurisdiction to try the claim.

[21] Rule 9.2 states that a defendant who wishes to dispute the claim or the court's jurisdiction must file an acknowledgment of service. Crucially, rule 9.5 states that a defendant who files an acknowledgment of service does not lose any right to dispute the court's jurisdiction. Rule 9.6 provides that a defendant who wishes to dispute the court's jurisdiction must file an acknowledgment of service and make the application raising the challenge within the time for filing a defence. According to counsel, despite the fact that Bupa did not file the acknowledgment of service as required by the rule (except where a defence is filed within the time to file the defence) there was no indication that it was disputing the court's jurisdiction over Bupa. That issue only arose on September 18, 2015 when Bupa filed the amended application.

[22] From these rules it is clear then that any defendant who wishes to dispute the claim or contest jurisdiction must begin with the filing of an acknowledgment of service unless he files and serves a defence within the time laid down either by the general rule (if the general rule applies) or the time set by the order permitting service out of Jamaica (which is the case here). Bupa has failed to (a) file the acknowledgment of service within the time laid down by the order; (b) failed to file a defence within the time specified in the order for filing a defence and (c) failed to make the challenge to jurisdiction within the time laid down by the rules. Thus the kettle and the pot are of the same hue.

[23] Based on these provisions in the CPR the following is not in doubt:

a. the general rule is that a defendant must file an acknowledgment of service before he can take any further part in the proceedings;

b. if the defendant files and serves the defence on the claimant or his attorney at law then within the specified time for filing an acknowledgment of service then he need not file an acknowledgment of service. The logic here is that if the defendant files a defence contesting the merits of the claim he is not challenging the jurisdiction of the court;

c. if the defendant wishes to contest the jurisdiction of the court he must file an acknowledgment of service;

d. the failure to file an acknowledgment of service does not deprive the court of jurisdiction over the matter. If that were the case then there would be no such thing as judgment in default of acknowledgment of service. Since there is such a thing as judgment in default of acknowledgment of service then it necessarily means that the court has jurisdiction over claim where no acknowledgment of service has been filed. Not only can judgment be granted in default of the acknowledgment of service but the judgment can be enforced through the enforcement processes of the court;

e. if the defendant makes some challenge or raises issues on the merit of the case the court may order him to file his acknowledgment of service before he is heard any further. What is clear is that the acknowledgment of service must be filed when a challenge to the jurisdiction of the court is being made or the court is being asked not to exercise its jurisdiction over the claim;

f. it is entirely possible that the conduct of the defendant may be seen to be one of submitting to the jurisdiction of the court which means that he cannot make that an issue after such an act of submission as occurred.

[24] Miss McLeod relied on the implication of the propositions just stated to say that when Bupa filed its first document in the case on July 3, 2015, the notice of application for court order, it was not contesting the jurisdiction of the court. All that it sought to do was to set aside the service of the statement of case and service order permitting service out of jurisdiction. These applications are not a

challenge to the jurisdiction of the court. Having submitted to the court's jurisdiction by its conduct on July 3, Bupa, it is said, cannot now wriggle its way out of the 'clutches' of the court by the simple device of filing its acknowledgment after submitting unequivocally to the court's jurisdiction.

[25] The court wishes to observe that the acknowledgment of service appropriate for claim forms has a section headed '**WARNING**' in under that heading there is this sentence 'See Rules 9.2 (5) and 9.3 (1).' The section also has an opening sentence warning of the consequences of failing to file an acknowledgment of service. It explicitly says that judgment may be entered against the defendant if he fails to file the acknowledgment of service within the specified time. Rule 9.2 (5) is a reminder that if a defence is filed and served in the time specified in rule 9.3 then an acknowledgment of service need not be filed. Rule 9.3 (1) indicates that the general rule is that the acknowledgment of service must be filed within 14 days after the date of service of the claim form. This point is being made because the acknowledgment of service is among the additional documentation required to be served with the claim form and particulars of claim. In other words, Bupa would not need to have consulted a lawyer to appreciate that, in this case, it had 42 days forty days to file the acknowledgment of service and 70 days to file the defence. The consequences of failing to abide both days were spelt out to Bupa. All this it would have known from reading the documents. The language is easy to read and easy to understand. Thus apart from what should have been in the order Bupa would have known that whatever it intended to do an acknowledgment of service was a vital document to be filed and served if it did not intend to file a defence within the time specified for filing the defence. The point of all this is to emphasise that Bupa's failure to act at all within the stated times cannot be attributed solely or primarily to Dr Hunter's failure to serve an order with the information stating the right to challenge the order within 14 days. The court would go further to say that failure to serve the application and the evidence and the omission to follow rule 11.16 (3) could not possibly have prevented the application now being made because apart from the notification of the right to apply to set aside the order within a specified time frame, the CPR

would not have barred Bupa from applying to set aside the ex parte application because it is well known that an application made ex parte can always be set aside unless some law prohibits it. In **Ministry of Foreign Affairs, Trade and Industry v Vehicles and Suppliers** [1991] 1 WLR 550, 556 it was held that ex parte orders are essentially provisional in nature. The Privy Council, on appeal from Jamaica, expressly approved the following observations first by Lord Donaldson MR in **WEA Records Ltd v Visions Channel 4 Ltd** [1983] 1 WLR 721, 727 ('*As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order'*) and second Lord Denning MR in **Becker v Noel (Practice Note)** [1971] 1 WLR 803 ('*Not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention*'). The CPR has not altered these principles. All that the CPR has done is to add a time limit within which to make the application provided there is notification of that right in the order served on the affected party. The CPR provides that the time for making the application may be extended. In addition, Part 9 covers what a defendant who wishes to contest jurisdiction needs to do and this is so regardless of what Part 11 says. Also, under the CPR a litigant can apply for an extension of time to make applications, even after the time for making the application has passed, as was in fact done in this case by Bupa. It seems to this court that the only thing Bupa did not know in this particular case was that it had 14 days to make the application under rule 11.16. However, even if Bupa did not know this, the law referred to above

relating to ex parte orders applies unless excluded by some rule or law. Bupa can also challenge the jurisdiction of the court. The interesting thing to observe is that the absence of telling Bupa that it had 14 days to make the application to set aside the order did not prevent it making an application challenging the jurisdiction of the court, that is to say, the failure to make the challenge to the order in 14 days did not prevent Bupa filing the acknowledgment of service within the 42 day period and make the application to challenge jurisdiction within the 70 days for filing the defence.

[26] This court wishes to refer to rule 26.9 which applies where the failure to follow a rule, practice direction or court order is not specified. Rule 26.9 states:

> *(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
>
> *(2) An error of procedure or failure to comply with a rule, practice or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
>
> *(4) The court may make such an order on or without an application by a party.*

[27] The terms of the rule are plain. It is giving the court maximum discretion where the consequence of a procedural failure has not been specified in any rule, practice direction or court order. Where a rule specifies the consequence then that consequence governs unless there is relief from the consequence. Where the consequence is not specified, the court must look at things in the round and determine the way that is the best to proceed. This is in keeping with the overriding objective of dealing with cases justly.

[28] Mrs Robinson sought to rely on **Delroy Rhoden v Construction Developers Associates Limited and another** SCCA No 42/2002 (unreported) (decided March 18, 2005). There was a long discussion focussing on the distinction between irregularity and nullity. The court did not find that case applicable and in any event the case was not decided under the CPR which is a new procedural code. It was concerned with the Civil Procedure Code which was the relevant code at the time.

[29] In the oral judgment delivered it was implicit that this court did not agree with the approach of Mangatal J in **Valley Slurry Seal Caribbean and another v Valley Slurry Seal Company and another** [2012] JMCC Comm 18 where her Ladyship decided that failure to serve the defendant with the application to serve out of Jamaica and the evidence in support meant that the court did not have jurisdiction over the defendant. The court agrees with her Ladyship to the extent that it is important for defendants to have that information but does not accept that the failure to meet the black letter of the rule means that the court does not have jurisdiction over the defendant.

[30] Edward J's order did not say what was to happen if Bupa failed to act in accordance with the order. Part 11 does not specify the consequence if the applicant serves an order that does not comply with rule 11.16 (3). No practice direction has been cited to say what the consequences are for Bupa's breach and Dr Hunter's breach.

[31] The court observes that it is ironic that Bupa is seeking to enforce strict compliance with rule 11.15 and 11.16 when it failed to comply with any of the

procedural rules within the time prescribed either by the rules or the court order which it could have done without any reference to rule 11.15 and 11.16.

[32] As this court understands Mrs Robinson, in respect of her complaint about 11.16 (3), she is not saying that there was a defect in the application for the order for service out of Jamaica; she is not saying that there was a failure to meet ex parte application standards; she is not saying that the judge acted upon incorrect information. Her complaint is that the order did not have the words specified by rule 11.16 (3). It is the conclusion of this court that the omission of those words, important as they are, in the circumstances of this case, is not sufficient for the order to be set aside. Looking at things in the round no harm has been done to Bupa. It is not been prejudiced in any way whatsoever. The only possible prejudice it might suffer is that a judgment in default of acknowledgment of service may have been entered and even then, Miss McLeod has indicated that she would not be opposing the setting aside of the judgment if it has been entered. There has not been any inordinate delay in getting this matter moving forward. The claim was served in May 2015; a notice of application for court orders was filed by Bupa by July 3; the long vacation came along from August 1 to September 16, 2015 and by September 18 the amended application and acknowledgment of service was filed; submissions heard on September 23 with the decision being given by October 7. Subject to counsel's diary, the Commercial Court and hear and determine this matter within 12 months from the date of this judgment which the time from filing the claim to final judgment can take 17 months (if mediation is excluded).

[33] There is another point. Bupa, without saying so explicitly, seems to be suggesting that the 42 days to file the acknowledgment of service was too short. The court disagrees. Bupa could have done a number of things. If it was unsure about the jurisdiction issue, there was nothing preventing Bupa from filing the acknowledgment of service and indicate its intention to raise the jurisdiction point within the 42 days and file the application challenging jurisdiction within the time to file the defence which was 70 days. By doing this Bupa would have given itself

time to think more about whether the jurisdiction point should be taken. There is nothing that says that the acknowledgment of service and the application challenging jurisdiction must be made simultaneously. The sole requirement is that the acknowledgment of service and the application must be made within the time to file the defence and as noted just now, the acknowledgment of service can be filed first and the application follows later.

[34] The court now turns to the submission under rule 7.3.Mrs Robinson's next submission was that the service of the statement of case should be set aside because this claim does not fall within rule 7.3. Counsel also referred to rule 7.7. The court disagrees. Rule 7.3 deals with circumstances where the court may permit service of the claim form outside of Jamaica. Miss McLeod relied on rule 7.3 (2) (c) which reads:

> *A claim form may be served out of the jurisdiction with the permission of the court where*
>
> > *(c) a claim is made against someone on whom the claim form has been served or will be served, and*
> >
> > > *(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and*
> > >
> > > *(ii) the claimant wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to the claim.*

[35] Dr Hunter is alleging that he agreed to treat Mrs Leahy on being assured that he would be paid by Bupa. He is also saying that the dialogue passing between himself and Bupa also fostered that belief. Indeed, he seems to be saying that had he not received that assurance from Bupa that he would be paid then he might have gone about the matter of treating Mrs Leahy differently. This is a real issue which it is reasonable for the court to try, says Miss McLeod.

Striking out on the basis of lack of privity of contract between Dr Hunter and Bupa and that contract of indemnity was between Bupa and Kier

[36] Mrs Robinson submits that the insurance contract was really between Kier, the employer of Mrs Leahy's husband, and Bupa. Mrs Leahy was a beneficiary. She also submitted that the contract is one of indemnity which means that Mrs Leahy would be reimbursed for expenses incurred by her. While all this may be true that fact, without more, does not prevent the possibility of any liability arising against Bupa in favour of Dr Hunter. The reality suggested by the pleadings is that Mrs Leahy was either unable or unwilling to pay 'up front' the full cost of the procedure and await indemnification under the insurance. Discussions took place with all the relevant parties to work out how the doctor would be paid. The pleadings suggest that the arrangement arrived was that Dr Hunter would be paid directly by Bupa upon providing the services provided that the costs were reasonable and customary in Jamaica. This suggests that there is an issue to be tried between Bupa and Dr Hunter. These are the questions that arise: did Bupa make any representation to Dr Hunter that led him to believe that he would be paid the full value of his services by Bupa once he provided the services? If yes, were these representations made in Jamaica? If yes, then clearly the Jamaican courts would have jurisdiction and therefore Bupa is a proper party and thus properly falls within rule 7.3. These questions cannot be resolved on just pleadings. Oral evidence is necessary along with the documentation so that the court can determine what exactly passed between Bupa, Mrs Leahy and Dr Hunter. The court concludes that Bupa is a necessary party to the claim. Bupa

cannot be relegated to the sidelines. It is an active player in this claim. The court will now refer to case law in order to demonstrate a possible way of analysing the evidence in this case.

[37] In **Brown & Davis Ltd v Galbraith** [1972] 1 WLR 997 the owner's car was damaged in a collision. The claimant was the repairer. The repairer was told that the car was insured. The repairer repaired the car but upon being told that the repairs were unsatisfactorily done the insurers refused to pay. The insurer sued the owner. The insurer subsequently went bankrupt and so the repairer was left with just the owner to recover from. The county court judge found that there were two contracts: one between the repairer and the insurers and the other between the owner and the repairers. The owner appealed against that finding and was successful. The important point for present purposes is not the success of the owner but the observations of the court.

[38] Buckley LJ observed at page 1006:

> *The crucial part of the judgment of the county court judge is that in which he dealt with the contractual position between the parties. He reached the conclusion, I think rightly, that there were two contracts here involved, one between the repairers and the insurance company, and one between the repairers and the owner.*

[39] Sachs LJ stated at page 1007:

> *. Any decision in this type of case must necessarily depend on the facts established in evidence. In general, however, in those everyday transactions — there must be thousands each week — when, upon a car owner bringing his damaged car to a repairer for repairs, which in practice will be paid for*

by the insurers, and the insurers are then brought into the negotiations, the resulting arrangements produce an agreement which in law is properly termed a tripartite agreement. I prefer that term to "two separate agreements" though in the present case, as indeed in most cases, it makes no difference which terminology is used.

That tripartite agreement is one to which there are three parties, the owner, the repairer and the insurers, and each can acquire rights and each can come under obligations. As in practice there is on such occasions hardly ever any overall agreement in writing, it follows that the rights and obligations of each party have to be gathered from such documents as are put in evidence and from the implications to be drawn from the circumstances of the case as a whole. In the end one looks at the position as if the three parties were round a table and then applies the Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd. [1918] 1 K.B. 592 *tests for any matter which does not appear from the documents before the court.*

[40] This court is fully aware that these statements were not part of the ratio of the case but nonetheless they provide insight into how these matters may be viewed. While made in the context of a motor car repair case, the underlying idea can be of assistance in analysing the present case. What these Lords Justices recognised was that the reality of these arrangements is that the insurers are crucial to the payment arrangements. Unless there was some indication that they would pay it may be that the necessary repairs would either not be done or done solely or substantially at the insured's expense. It is interesting to observe that neither Lord Justice thought that the finding of two contracts was beyond the pale. They spoke as if it were the most natural conclusion. This is not to say that

under closer judicial scrutiny the obiter dicta will hold up but what is clear is they provide support for Dr Hunter's approach to this matter.

[41] Interestingly, the court in **Galbraith** cited cases where it was apparent that no one thought it strange that a contract may arise between the repairers and the insurers despite the fact that the contract between the insurers and the insured was a contract of indemnity. Mrs Robinson made a valiant attempt to dispose the **Galbraith** case by pointing to the peculiarities of motor vehicle insurance. She even referred to the insurance statute dealing with motor vehicle insurance. This submission cannot avail counsel because the points of dissimilarity are not so great as to make the essence of the cases inapplicable to the circumstances under consideration.

[42] Finally, Mrs Robinson sought to say that the contract, if any, was between the insurer and MAH. Dr Hunter's case is that MAH provided nursing care and the physical plant and would have to be paid for that while provided the material for the surgery at his expense. The doctor's case is that he was not an employee of MAH but was a consultant in his own right. He simply using MAH's facilities. That would have to be determined at trial and not at this stage where the pleaded case suggests otherwise and discovery has not even properly begun.

Conclusion

[43] The application to extend time to make these applications is granted. The application to strike out the claim is refused. The application to set aside the order for service out of jurisdiction is refused. The application to set aside the service of the amended claim form and amended particulars of claim is refused. Any default judgment entered is set aside. Miss McLeod indicated that she did not have any opposition to the default judgment being set aside if one had been entered. Costs of the application to the claimant to be taxed if not agreed. Leave to appeal granted.