[2020] JMSC Civ 49.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 06237

BETWEEN	**COLLIN NELSON**	**CLAIMANT**
AND	**JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED**	**DEFENDANT**

IN OPEN COURT

Mrs Charmaine Patterson and Hugh Brown instructed by Charmaine Patterson & Associates for the claimant

Kwame Gordon instructed by Samuda & Johnson for the defendant

Heard: 17 March, 11 April 2017 & 3 April 2020

Insurance law – Breach of insurance contract – Whether claimant breached the terms of the policy – Incorporation of terms and conditions - Whether failure to refer claim to arbitration is fatal. Motor Vehicles Insurance (Third-Party Risks) Act sections 2 and 4. Arbitration Act s.5. Arbitration Act, 2017 s. 5.

EVAN BROWN, J.

Introduction and background

[1] Collin Nelson brought this claim against his motor vehicle insurers, Jamaica International Insurance Company Limited (JIIC), now trading as 'GK Insurance Company,' to recover damages for breach of contract, arising out of an incident involving his motor vehicle, which took place on the 10th November, 2005. Mr. Nelson claimed that JIIC breached the contract of insurance when they failed to

indemnify him $340,000.00 as the value of the insured vehicle. He has therefore claimed damages for the value of the insured vehicle ($340,000.00), loss of use ($95,500.00), and attorney's costs ($64,000.00).

[2] The Certificate of Insurance that was issued to Mr. Nelson, by JIIC, stated that the period of coverage of Mr. Nelson's vehicle was 25th August, 2005 to 24th August, 2006. The Certificate of Insurance further stated the following:

> *'**5. Persons or classes of persons entitled to drive***
>
> *(a) The Policyholder.*
>
> *The Policyholder may also drive a Motor Car:*
>
> *(i) Not belonging to him and not hired to him under a hire purchase agreement or under a car rental agreement.*
>
> *(ii) Not belonging to or hired to his employer or his partner.*
>
> *(b) Any other person who is driving on the Policyholder's order or with his permission.*
>
> *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.*
>
> ***6. Limitations as to use***
>
> *USE ONLY FOR SOCIAL DOMESTIC AND PLEASURE PURPOSES AND BY Collin Lenworth Nelson IN PERSON IN CONNECTION WITH HIS BUSINESS.*
>
> *The Policy does not cover use for hire or reward or commercial travelling racing pace-making reliability trial speed-testing the carriage of goods or samples in connection with any trade or business or use for any purpose in connection with the Motor Trade.'*

[3] Prior to having motor vehicular insurance coverage with JIIC, Mr. Nelson's vehicle was insured with Dyoll Insurance Company Limited (Dyoll). In or around 2005, JIIC acquired the insurance portfolio of Dyoll. Mr. Nelson's portfolio, which, as stated before, was then insured with Dyoll, was also assumed by JIIC under this acquisition. Thereafter, the claimant's policy with Dyoll, was renewed by JIIC in

August, 2005, and the Certificate of Insurance (mentioned above at paragraph **[2]**) was issued to the claimant through his insurance broker.

[4] As earlier mentioned, Mr. Nelson's claim against JIIC is that of breach of contract, for their failure to honour the policy of insurance, by refusing to indemnify him for his loss arising out of an incident that occurred on 10th November, 2005. The issue which led to Mr. Nelson's claim is that, following upon the incident of 10th November, 2005, he lodged a claim with JIIC on 11th November, 2005, seeking an indemnity for his loss.

[5] In that claim for indemnity, it was stated that Mr. Nelson's vehicle was stolen on the 10th November, 2005, whilst it was in the possession of Dwayne Badchkam. Mr. Badchkam was given permission by Mr. Nelson to drive the vehicle on that date. That claim for indemnity, further stated under the heading 'particulars of use,' that at the time of the incident, Mr. Badchkam was '*returning home from Retreat after taking a friend home.'*

[6] Having received the claim for indemnity, JIIC commissioned an investigation into the matter. Subsequently, by letter dated 16th January, 2008, JIIC informed Mr. Nelson of the following:

> *'Having reviewed our Investigator's Report, it is clear that our Insured breached his policy of Insurance as the vehicle was being used as:*
>
> *1) A robot taxi as well as;*
>
> *2) Being used to transport ice cream for sale.*
>
> *Both of these are a breach of the policy of Insurance and based upon same, we are of the view that we will not be indemnifying the Insured for any loss he sustained.'*

[7] Aggrieved by JIIC's response, Mr. Nelson brought this claim, on 25th November, 2009. JIIC opposed the claim, and averred in their Amended Defence, filed on 9th February, 2015, that, in addition to breaching the policy of insurance, Mr. Nelson failed to adhere to clause 9 of the policy, which stated:

> *'If we accept your claim but disagree with the amount due to you, the matter will be passed to a legally appointed arbitrator. When this happens, an arbitration award must be made before proceedings can be started against us. If we disclaim any part of your claim and you do not refer such claim to an arbitrator with twelve calendar months from the date of such disclaimer the claim shall for all purposes be deemed to have been abandoned and cannot be pursued again.'*

[8] JIIC also averred further, that Mr. Nelson breached clause 7 of the policy of insurance, by failing to disclose that the vehicle was regularly driven by another person, namely, Dwayne Badchkam. Clause 7 of the policy of insurance, reads as follows:

> *'You must tell us if any vehicle that is insured in your name belongs to anyone else or is being used regularly by another person.'*

[9] Mr. Nelson then filed a reply to JIIC's amended defence, on 2nd March, 2015, and averred there that the terms of the policy of insurance, referred to by JIIC are vague. He also averred that the terms of the policy of insurance were inadequate in providing sufficient information on the process of dispute resolution, in the event of JIIC's refusal to indemnify an insured.

[10] Mr. Nelson further averred in his reply to the amended defence that he did not receive the policy of insurance being relied upon by JIIC, and that Dwayne Badchkam was not the regular driver of the vehicle. He later averred as well, that he authorized Dwayne Badchkam, pursuant to clause 5 of the Certificate of Insurance (mentioned at paragraph **[2]** above), to drive the said vehicle, when it was stolen on 10th November, 2005.

Case for the claimant

[11] Mr. Nelson, in his evidence in chief, stated that, up until the time of trial, he was the operator of a bicycle shop, which also doubled as an ice cream shop. On 10th November, 2006, he loaned his vehicle to Dwayne Badchkam, who used the said vehicle to run errands for him, and not as a taxi. He stated further in his evidence in chief, that JIIC handed to him 'cover notes' and 'forms,' and did not pass to him any document which outlined the terms and conditions of the insurance. He further

stated, in his evidence in chief that, as he was unaware of the terms and conditions of the insurance policy, he did not know that he was to disclose to JIIC that Dwayne Badchkam drove the vehicle with his permission.

[12] Mr. Nelson continued that, although Dwayne Badchkam was permitted to drive his vehicle, and to run errands on his behalf, the vehicle was not regularly used by Mr. Badchkam or any other person. Mr. Badchkam, he stated, never retained the vehicle, as it was used by Mr. Nelson each day.

[13] Under cross examination, on the other hand, Mr. Nelson said that he understood clause 6 of the Certificate of Insurance (recounted above at paragraph **[2]** herein). In expressing his understanding of clause 6 of the Certificate of Insurance, Mr. Nelson said the following: '*A me alone fi use it in a me business.'* Below is an excerpt of Mr. Nelson's cross examination on his understanding of clause 6 of the Certificate of Insurance:

> *'Q: You understand [that section] in the certificate you just read? You understand that to be saying that you alone must use your car to do your business, agreed?*
>
> *A: Yes, sir.*
>
> *Q: Okay, good. So, if your mother used [the car] to do your business, you agree with me, therefore, that it would not be in line with what that statement in the certificate says?*
>
> *A: But we would not send me mother.*
>
> *Q: No, me know you would not do that. Assume you did that, what if your mother was to do it, use your car to do your business, you agree with me that it would not be in line with what that statement is saying?*
>
> *A: If I am going to do any business I would go and use the car, but if I send somebody like me woulda say to my brethren say go down the road with de car he would not be doing any business for me.*
>
> *Q: Alright I think we are making a little progress. But, if you gave your brethren the car to do your business, it would not align with what the certificate is saying, you agree with me on that?*
>
> *A: What type of business?*

Q: Your business, man. What is it that you do, you run an ice cream shop and a bicycle shop?

A: Yes.

Q: Good. So, if you gave your brethren the car to go deliver ice cream or to carry people go people house go fix bicycle, you would agree with me that that would not align with what the certificate says?

A: No, they would have to come to the shop, sir.

Q: So, you agree with me that it would not align with the provisions in the certificate?

A: How you saying, I don't understand it that way, so if somebody want the bicycle to fix, him bring it to the shop. If somebody want ice cream they come to the shop.

Q: I am not asking you about that, I am asking you about the car, we are talking about the car, so focus on the car.

A: If somebody have a bicycle to fix, they bring it to the shop.

Q: So, if someone say they are not coming to the shop to buy ice cream..

A: They not going to get my ice cream.

Q: Hold on no man. And if you were to send somebody in your car to deliver the ice cream, do you agree with me?

A: Nobody would not deliver no ice cream.

Following that line of questioning, Mr. Nelson agreed that it would not align with the terms of the certificate of insurance, if his vehicle was used by someone else to deliver ice cream for his ice cream shop.

[14] Mr. Nelson continued under cross examination that, after he had reported the theft of his vehicle to JIIC, an investigator from JIIC, visited him. Mr. Nelson went on to say that the investigator took a statement from him, regarding the matter. He further said that he signed the statement that he gave to the investigator. Mr. Nelson denied that he told the investigator that Mr. Badchkam was the regular driver of his vehicle, and that the vehicle was in Mr. Badchkam's constant possession. He also denied telling the investigator that Mr. Badchkam made

deliveries of ice cream, using the vehicle. Mr. Nelson's subsequent evidence, on this point, may be gleaned from the following excerpt of his cross examination:

> *'Q: Okay. So, let me see if I understand. You are saying that the investigator made up these statements regarding Mr. Badchkam being the regular driver, you are saying he made that up, the investigator?*
>
> *A: I don't know how he come to that, you know.*
>
> *Q: But you never tell him that?*
>
> *A: I never tell him that.*
>
> *Q: And you are saying, he also made up the statement about the driver, meaning Mr. Badchkam being in the constant possession of the vehicle or the vehicle is in the constant possession of the driver, you are saying that the investigator made that up?*
>
> *A: Yes.*
>
> *Q: Okay. And I guess you are also saying he made up the part about the vehicle being used to do deliveries, he made up that part as well?*
>
> *A: Yes, sir.*

[15] Mr. Nelson was then questioned, on what he meant when he said in his evidence in chief, that Mr. Badchkam used his vehicle to run 'errands' for him. The following is a portion of that discourse under cross examination:

> *'Q: Look at your statement, Mr. Nelson, not your document, the investigator's statement, look at your witness statement, you see paragraph 6?*
>
> *A: Yes.*
>
> *Q: You see where it says Mr. Badchkam used your vehicle to do errands for you?*
>
> *A: Yes.*
>
> *Q: That's correct, isn't that so?*
>
> *A: what do you mean by errands.*
>
> *Q: Is that correct, that statement is correct that he used your vehicle to run errands for you?*
>
> *A: Your Honour, I don't understand what he means by run errands.*

Court: You don't understand the word 'errands?'

Witness: That is what I am asking.

Court: You don't know what errands mean.

Witness: No, sir.

Court: Nothing comes to mind with the words errands, to run errands?

Witness: To guh check a girl or something suh.

Counsel: So you would ask Mr. Badchkam to check a girl for you, that is what you called errands?

A: That is what I call errands to pick up a girl.'

[16] Contrary to the evidence of Mr. Nelson, Mr. Badchkam stated in his witness statement that, on 10th November, 2005, he borrowed Mr. Nelson's vehicle as he is his friend. Mr. Badchkam's evidence in chief continued that, at about 8pm, he was travelling from a friend's house in Retreat, Brown's Town. He then came upon a stationary motor vehicle along the path where he was driving. Mr. Badchkam continued that he stopped, came out of his vehicle and walked over to the stationary motor vehicle as he thought that someone needed help.

[17] Mr. Badchkam stated that as he continued to walk towards the vehicle, a man armed with a gun approach him from behind. The man, he continued, ordered him into the motor vehicle, which was initially stationary. He did as the man ordered. He then stated that two other men entered the vehicle with him, along with the man with the gun, who then began to drive the vehicle. As the vehicle he was in began to drive, he saw that another man entered Mr. Nelson's vehicle and began to drive Mr. Nelson's vehicle behind them.

[18] Mr. Badchkam continued that the men eventually stopped at the intersection of the Retreat Main Road, when he quickly grabbed the door handle and opened the door, then made his escape. He then stated that he received assistance from someone in an oncoming vehicle. That person took him to the Stewart Town Police

Station, and thereafter, to the Brown's Town Police Station where he gave a statement regarding the incident.

Case for the defendant

[19] The defendant's evidence was contained in the testimony of Ms. Leona Remekie, the Assistant General Manager of JIIC. In her examination in chief, Ms. Remekie stated that it is the custom of JIIC to provide its insured with the original certificate of insurance whenever they enter into a new contract of insurance. This was the custom of JIIC, whether the contract of insurance was entered into directly with the insured, or through a broker. In this case, Mr. Nelson entered a contract of insurance with JIIC through a broker, namely, National Property and General Insurance Brokers (NPG). The certificate of insurance, she stated, contained the terms and conditions which governs the insurance contract between Mr. Nelson and JIIC.

[20] Ms. Remekie stated further that, it was also the practice of JIIC that once there has been a claim under the policy, by the insured, an investigation is subsequently done by JIIC. This investigation was done in or around November, 2005, where both Mr. Nelson and Mr. Badchkam were interviewed by JIIC's investigator. In that interview, she stated that Mr. Nelson provided a statement to the investigator, dated 26th November, 2005, in which he indicated that the motor vehicle was being used to do deliveries and that it was in the constant possession of the driver, Dwayne Badchkam, in whose possession it was, at the time of the alleged theft of the vehicle. JIIC, Ms. Remekie continued, gave no authority, nor was it part of the certificate of insurance, for Mr. Nelson's vehicle to be in the constant possession of another driver.

[21] Ms. Remekie, under cross examination, said that at the time of JIIC's acquisition of Dyoll, JIIC received the insurance policies and the names of those persons who were insured with Dyoll at that time. Ms. Remekie explained that, it is the practice in the insurance industry that, at the inception of the insurance period, the

insurance company would issue an insurance policy, along with a certificate of insurance, to the insured.

[22] In the case of Mr. Nelson, Ms. Remekie continued, who obtained insurance through his brokers, NPG, the policy and the certificate, would have been issued to the brokers who would then issue those documents to him. She said that, at the time of JIIC's acquisition of the Dyoll portfolio, JIIC began to reissue their own policies. Since that time, JIIC issued their policies to an insured at the time of the renewal of their insurance. Therefore, according to Ms. Remekie, if Mr. Nelson did not receive JIIC's policy at the time of their acquisition of Dyoll, then he would have received same when he renewed his policy in August, 2005.

Submissions

The claimant's submissions

[23] Mrs. Patterson submitted on behalf of Mr. Nelson that, the policy of insurance, cannot be relied upon by defendants to refuse to indemnify Mr. Nelson for his loss. Counsel submitted that clause 9 of the policy infringed the constitutional right of the claimant to be heard by a court. Additionally, counsel contended, that in any event, an agreement that interferes with the constitutional entitlement of a person, to be heard by a court, must be expressly stated in clear and ordinary language and so agreed between the parties. In that regard, reliance was placed upon the decision of the High Court of Trinidad and Tobago in: **Gary Thomas v Larron Jaipersad and Bankers Insurance Company of Trinidad and Tobago Limited (unreported) Trinidad and Tobago, High Court of Justice Civil** No: CV 2014-02301, judgment delivered 3 March 2016.

[24] Counsel further submitted, relying on **Thompson v Charnock** (1799) 8 Term Reports 139, that it was contrary to law for any clause to operate as to oust the court out of its jurisdiction. Ms. Patterson then submitted that, where an insurance clause refers disputes to arbitration, the clause will not be enforced where the dispute concerns difficult points of law or alleging misrepresentation or fraud. She

placed reliance on the case of **Clough v County Livesstock Insurance Association** (1916) 85L.J.K.B 1185 in support of that argument.

[25] Counsel also made the submission that clause 9 of the policy is unclear. She then placed reliance upon the *Contra Proferentem Rule,* and contended that this court ought to construe the ambiguities of the policy against the insurers. Counsel therefore urged the court to construe clause 9 of the policy in favour of Mr. Nelson, a lay person.

[26] As regards clause 7 of the policy, Ms. Patterson submitted that it does not indicate what would happen if the defendant does not disclose that his vehicle was regularly driven by another person. Counsel submitted however, that the evidence from Mr. Nelson, on the other hand, is that he did not receive a policy of insurance. She however urged, that the court may consider the copy of the policy of insurance, that has been placed before it by the defendant, to ascertain the standard practice in the industry. Nevertheless, she continued, the certificate of insurance permitted that the vehicle may be driven by another person, with Mr. Nelson's permission. That was done in this case.

[27] Ms. Patterson concluded her submissions on whether Mr. Nelson breached the terms stipulated in the certificate of insurance. Counsel firstly cited the dicta of Mangatal, J in **Insurance Company of the West Indies Limited v Malvie Graham,** (unreported), Jamaica, Supreme Court Civil Claim No. 2008HCV05023, judgment delivered 22 October 2010, that the use of a vehicle outside of the stated purpose, amounts only to a limitation of risk and that the insured can recover when the vehicle is being used for the described use, even if it had been used previously for some description not covered. The evidence, counsel argued, disclosed that Mr. Badchkam was taking a friend home, with the permission of Mr. Nelson, which falls within the terms of the certificate of insurance.

The Defendant's submissions

[28] Mr. Gordon submitted, on behalf of JIIC, that Mr. Nelson's case is that of breach of contract which arose out of an insurance policy. The onus, he contended, is on Mr. Nelson, as the claimant, to place before the court the contract and/or policy which he alleged was breached by JIIC. Mr. Nelson has failed to produce to this court, any contract or policy which was breached by JIIC, but has only advanced to this court the certificate of insurance.

[29] Counsel further submitted that JIIC is not denying that it had a contract with Mr. Nelson. There is nothing in the certificate of insurance however, he continued, that outlines terms and conditions which a court could adjudicate on, to determine the issue of whether or not JIIC should indemnify Mr. Nelson for his loss. It was Mr. Nelson that breached the agreement by failing to adhere to the certificate of insurance which stipulated the limitation as to use.

[30] Mr. Gordon concluded that point by arguing that, if the court found that the insurance policy issued by JIIC, was in force at the time of the alleged incident, then the court must consider whether clause 9 was complied with. He argued that, the undisputed evidence before the court was that JIIC refused indemnity by way of a letter dated 16th January, 2008. The twelve months' limitation period, therefore, according to clause 9 of the policy, began to run since that date.

[31] Counsel argued that it is established law that a party to a contract may agree in writing to limit its right to commence a claim. Counsel placed reliance on section 46 of the **Limitation of Actions Act,** to support that submission. Further, Mr. Gordon submitted, clause 9 of the policy of insurance does not run afoul of the law, but rather, the validity and enforceability of this provision is established by law. Counsel placed reliance on **William McIlroy Swindon Ltd, et al v Quinn Insurance Limited** [2010] EWHC 2448, paragraphs 32 & 46.

The claimant's submissions in reply

[32] Ms. Patterson, in reply to JIIC's submissions on clause 9 of the policy of insurance, argued that, although Mr. Nelson was never issued with the said policy, he

nevertheless took steps within the twelve-month window to prompt arbitration proceedings. This he did by way of his instructions to his attorney-at-law, and throughout correspondences, JIIC omitted to furnish a copy of the policy prior to trial.

[33] Mr. Nelson cannot be bound in law, Ms. Patterson continued, to the terms contained in the policy that is now before this court. That is so, as there is no evidence of any documentation, signed by Mr. Nelson, that he was so bound to this policy. Counsel relied on section 46 of the **Limitation of Actions Act** for that position.

[34] Counsel also placed reliance on the case of **Everoy Harris, and Marcia Harris v Jamaica International Insurance Company Ltd.** [2016] JMSC Civ 123, paragraph 42, for the submission that, where the contract is contained in an unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms. JIIC has failed to so prove that Mr. Nelson was either aware or ought to have been aware of the terms of the insurance policy.

[35] Ms. Patterson then submitted that, the present case is to be distinguished from that of **William McIlroy Swindon Ltd,** *supra,* relied upon by the defence. In that case, the insured was issued with the policy, and the instructions were clear as to the steps to be taken when referring a dispute to arbitration. In the present case however, counsel concluded, the terms of clause 9 of the policy are unclear, inconspicuous, and inapplicable. The trial has only unearthed Mr. Nelson's ignorance and lack of opportunity to act on the purported arbitration clause.

Issues for determination

[36] Three issues arise for resolution. First, whether there was a breach of clause 9 of the policy of insurance? Second, whether there was a breach of clause 7 of the policy of insurance? Third, whether there was a breach of section 6 of the Certificate of insurance which limited the use of the subject of the insurance policy?

Was there a breach of the arbitration clause?

[37] The defendant alleged a breach of general condition 9 of the Policy of Insurance. That breach consists in the failure and/or omission of the claimant to refer his claim for indemnity to an arbitrator within twelve months of the defendant's disclaimer. The submissions of learned counsel for the defendant appear to rest on four premises. First, the policy of insurance was incorporated into the contract of insurance between the claimant and the defendant. Second, and consequently, the claimant was aware of the restriction or abridgement of his rights under the ***Limitation of Actions Act***, contained in the general condition 9. Third, seized with that knowledge, the claimant was contractually bound to refer his rejected claim for indemnity to arbitration within twelve months of the date of rejection. Fourth, the claimant failed to refer his claim to arbitration within the contractual limitation period of twelve months. Fifth, and in conclusion, the claimant's claim is therefore to be regarded as a nullity and judgment entered for the defendant.

[38] The first premise raises the question of what documents comprised the insurance contract. The claimant, in his witness statement, said he entered into an agreement with JIIC for the insurance of his motor vehicle under a policy which remained in force until 24 August 2006. Pursuant to that, he only received forms and cover notes in which were outlined neither terms nor conditions. He, however, in his supplemental witness statement, referred to the certificate of insurance and its terms and conditions. He went on to agree to the receipt of the certificate of insurance under cross-examination. Cross-examination never unearthed what other document's he got. The claimant was insistent that he never received a document described as the "policy".

[39] Miss Leona Remekie, Assistant General Manager in charge of claims and legal at JIIC, testified to this issue. At the material time she was the Claims and Operations Manager. She spoke to the insurance policy which is referenced in the certificate of insurance. Her evidence in chief was that the terms and conditions which govern the contract of insurance are detailed in the certificate of insurance. She made no

mention in her witness statement of the policy document being given to the claimant. Miss Remekie amplified what was said in her witness statement concerning the claims process, relevant to a stolen motor vehicle. That is, the process is to collect all documentation from the insured. She adumbrated the documents as follows: certificate of fitness, registration documents, certificate of insurance and the title for the motor vehicle.

[40] It is to be noted that a policy of insurance, so called, does not number among the documentation the insured was required to submit as a part of the procedure to process his claim for the alleged theft of his motor vehicle. It is conspicuously absent from the list of documents. This is significant in light of the fact that the claimant's insurance portfolio was among several assumed by JIIC from the failed Dyoll Insurance Company. Its significance lay in the fact that, according to Miss Remekie, JIIC would not have been the company to issue the policy to the claimant. On her evidence, all insureds are issued with their motor vehicle policy of insurance at the inception of the contractual relationship, directly or, indirectly through a broker. In the peculiar circumstances of assuming Dyoll's portfolio, JIIC embarked on a practice of reissuing to Dyoll's former clients JIIC's own policy, either at takeover or upon renewal of the policy. The claimant's policy had been renewed with the defendant at the relevant time.

[41] Three conclusions may be drawn from the conspicuous absence of the policy from the documentation for the claims. Firstly, JIIC led no evidence, and therefore it cannot be concluded, that whatever policy document Dyoll may have issued to the claimant was in the same terms as the policy document annexed to its defence. So that, secondly, it cannot be positively asserted that the claimant knew, (perhaps he ought to have known, which will be discussed below) that his denied claim should have been referred to arbitration. Thirdly, it supports the claimant's contention that he was never given the policy document. The evidence of Miss Remekie on the issuance of JIIC's policy document to the claimant was at best equivocal, and when it was definitive, its certainty revealed her uncertainty whether he was issued with the document at the renewal of the insurance. These

observations on the evidence lead to the fourth conclusion. That is, the claimant was never issued with a policy document similar to the one annexed to the amended defence.

[42] And so I come to the question of incorporation. It is settled law that the terms of a contract may be contained in more than one document. This is achieved through incorporation. Incorporation is simply "to make the terms of another (esp. earlier) document part of a document by specific reference" (see ***Black's Law Dictionary*** 18th edition). That same work defines incorporation by reference as follows:

> *"[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one".*

[43] Where one term of the contract expressly refers to another document, that is incorporation by express reference (see Treitel ***The Law of Contract*** 12th ed. at para 6-003). For example, in ***Nsubuga v Commercial Union Assurance Co. PLC.*** [1998] 2 Lloyd's Rep 682, at 685 (***Nsubuga***), where it was said that the proposal form, signed by the assured, made it clear that the insurance was subject to the insurer's general terms and conditions. The effect of incorporation is to treat the terms of, what I may style as, the referenced document, as if they had been written into the executed document. To adapt the learning of Lord Esher MR, in ***In re Wood's Estate***. Ex parte Her Majesty's Commissioners of Works and Buildings (1888) 31 Ch. D. 607, at 615, if a subsequent document brings into itself by reference the terms of the earlier document, the legal effect is to write those terms into the new document. Although Lord Esher M.R. was speaking about incorporation of legislation, the legal effect for contract is not dissimilar.

[44] If it is to be decided that the arbitration clause, contained in the policy document, was incorporated into the claimant's contract of insurance, it has to be shown that he either executed or was given another document which made the terms of the policy document part of that which he either executed or received. This brings into focus the media by which it was possible to achieve incorporation in the instant

case. Incorporation could have occurred through either the proposal form, the certificate of insurance or the cover note.

[45] Unlike the situation in ***Nsubuga***, *supra*, the proposal form which the claimant would have signed for the previous insurers, Dyoll, was not exhibited before me. Consequently, no findings of fact can be made concerning the terms by which the claimant may have covenanted to be bound. So then, I turn to examine the certificate of insurance.

[46] I am prepared to hold that the certificate of insurance makes sufficient references to the "policy" to make it clear that it is not a document that stands alone but is companion to another document, the "policy". In fact, it will become clear below that the "policy" is the primary or parent document. Notwithstanding that, there are, however, no words of express incorporation in the certificate of insurance. I will list the references to the "policy". Just below the title of the document, the policy number is cited; the name of the claimant appears as the policyholder; under the heading "persons or classes of persons entitled to drive", there are three indications to what the policyholder or any person with his order or permission may do; under the heading "[l]imitation as to use", among other things, there is a statement of what the policy does not cover; lastly, at the end of the document the defendant company certified that the policy to which the certificate relates is issued in accordance with the ***Motor Vehicles Insurance (Third-Party Risks) Act.***

[47] The law makes it an offence for "any person to use, or cause or permit any other person to use a motor vehicle on a road", unless there is a policy of insurance in force in respect of third-party risks (see section 4 of the ***Motor Vehicles Insurance (Third-Party Risks) Act***). Section 2 of the same Act defines a policy of insurance to include a "covering note". The covering or cover note evidences the interim period during the proposal for insurance and the decision whether to issue the policy during which the insurer provisionally accepts the risk (see ***MacGillivray on Insurance Law*** 10th ed. at paras 4-1 and 4-3).

[48] Furthermore, a policy of insurance has "no effect unless and until" a certificate of insurance is issued to insured (see section 5(9) of the ***Motor Vehicles Insurance (Third-Party Risks) Act***). This subsection mandates further, that the certificate of insurance is required to contain such particulars of any conditions subject to which the policy is issued. So then, as a matter of law, an insurer must issue a policy of insurance once it decides to accept the applicant's proposal for insurance. The policy of insurance so issued is the parent or precedent document from which the certificate of insurance is later issued to the applicant/insured.

[49] This puts in high relief the question of the incorporation of the policy by the certificate of insurance, in spite of the lack of express words of incorporation. From the treatment of the creation of the policy and its interrelationship with the certificate of insurance by the **Motor Vehicles Insurance (Third-Party Risks) Act,** the intention is plainly to combine or unite both into one single contract of insurance. Trietel, in the work referred to earlier speaks of incorporation without specific reference. Therefore, without more, I find that the terms and general conditions of the defendant's policy of insurance were incorporated into its contract of insurance with the claimant. If I am correct in so holding, then it would be quite immaterial whether the claimant had sight of the insurance policy document.

[50] If I am wrong in my conclusion that the terms and general conditions of the insurance policy were incorporated into the contract of insurance, there is a further legal consequence of multiple reference to the policy in the certificate of insurance. Since the policy is so heavily referenced in the certificate of insurance, I am of the opinion that it was reasonable notice to an insured that that document bore some relevance to the relationship with the insurer. If that is acceptable, then it follows that a prudent insured whose claim had been denied, or disclaimed, would immediately demand a copy of the insurance policy, if one had not been previously provided. Even if the basis or bases of the insurer's disclaimer were not disclosed, a prudent insured would wish to know how she might answer the insurer's disclaimer.

[51] Before going on to relate the conduct of the claimant to the prudent insured, I must say something more about the cover note which is included in the legal definition of the policy. I have already found as a fact that the claimant was never given a policy of insurance, although, legally, the insurance contract could not have existed without one. Hard on the heels of denying that he ever received the insurance policy, the claimant admitted that he first got a cover note. As is the well-known practice in the insurance industry, and the evidence is, the cover note was issued to him pending the completion of the full payment of the insurance premium.

[52] What then is the effect of the claimant's admission that he received a cover note? The starting point is the recognition that the cover note that was given to the claimant was not exhibited. That notwithstanding, cover notes in motor insurance are standard forms. Typically, limitations as to use are indicated, as well as the type of proposed cover. In fine print, at the bottom of the document, is usually a clause to the effect that the cover note is issued in accordance with the terms and conditions of the company's policy applicable to the selected type of cover and that acceptance by the insured is deemed to be acceptance of such terms and conditions.

[53] The fact is, no standard form cover note was placed before the court. There is therefore no direct evidence of what a cover note issued by the defendant might have contained. Compounding the matter is the lack of notoriety of the contents of a cover note; so that, it does not fall to be judicially noticed. Had a standard form cover note been placed before me, the expressed reference to the terms and conditions of the company's policy would have incorporated them into the contract of insurance between the parties. However, the fine print of the standard form cover note raises the question which takes me back to the prudent insured.

[54] That said, to totally discount the fact that the claimant admitted receiving a cover note would be to render nugatory the statutory definition, adverted to earlier, which defines "policy" to include "a covering note". Since a covering/cover note is included in the definition of policy, it is an inescapable conclusion that the receipt

of the one is tantamount to the receipt of the other. So, although the claimant never received the policy document, so called, he received its terms and general conditions when he accepted the cover note. At the very least, he had notice of the terms and general conditions of the policy. This takes me back to the prudent insured.

[55] The prudent or reasonable insured in the circumstances is someone who would exercise that level of attention, knowledge and intelligence called for in circumstances where his claim for indemnity has been disclaimed. He would therefore act sensibly, with dispatch and take measured steps to prosecute his claim, especially in circumstances where he has suffered a total loss.

[56] The evidence disclosed the claimant to be a man of about 45 years of age at the time of the trial. He was in business on his own account, operating an ice cream and bicycle shop. It seemed to be a small enterprise, adjudged from the absence of evidence of shop assistants. It is not known for how long he was so engaged and the level of success the business enjoyed; although, it is fair to assume that at the material time it was a going concern. So that, it appears to be a fair conclusion that claimant was seized of some level of business acumen. From his level of articulation and apparent level of comprehension displayed on the stand, I assessed him to be functionally literate (his selective display of literacy skills notwithstanding), appreciably intelligent but someone who had likely had some exposure to secondary education. Not to mention the cunningness he displayed under cross-examination.

[57] Is it a reasonable expectation that this claimant should have acted as the prudent insured would have done in the circumstances? To take the cover note first, although it is strictly not before me, the ordinary man in the position of the claimant would have been more concerned to know that his motor vehicle was insured for a given period. As a result, he may have been less concerned with the fine print which incorporated the terms and conditions of the policy document. That

unconcern would not have been reasonable as a cover note is usually a half page document and the fine print no more than a sentence.

[58] I move on to the certificate of insurance. Even if at the time of receiving the certificate the claimant's only concern was the fact of insurance, when the dispute arose he ought to have requested the policy. I am not of the view that the claimant's level of sophistication would have blinded him to the relevance of the multiple references to the policy in the certificate of insurance. So that, even without express words of incorporation, the claimant, applying the standard of the prudent insured, was guilty of wilful blindness in failing to demand the policy document. The claimant's counsel argued that JIIC omitted to furnish a copy of the policy document before the trial. The significance I place on that is this; that omission was never tied to a request for the policy. If it had been requested, and there is no evidence that it was, I would have expected it to be named among the things the claimant allegedly did "to prompt arbitration". Consequently, I hold that he is bound by the terms and general conditions in the policy.

[59] In fine, I accept that the terms and general conditions of the defendant's policy were incorporated into the contract of insurance. Even if the terms and conditions of the policy were not incorporated, the claimant, as a prudent insured, ought to have called for the document when advised of the defendant's disclaimer. So, if he was unaware of general condition 9 and the duty it imposed on him, he has to shoulder that responsibility.

[60] While the claimant's counsel's major line of attack on the argument for arbitral referral was that the claimant never received the policy document, she contended that "steps" were taken within the twelve-month window to "prompt" arbitration. Those "steps" were described as instructions to his attorney-at-law who, apparently, exchanged correspondences with the defendant. Condition 9 did not call for the claimant to take preparatory steps to arbitration, even if those "steps" could be so characterized. The fact is, no referral was made by the claimant.

[61] General condition 9 is an agreement to submit to arbitration before litigating the claim. It is not an agreement to oust the jurisdiction of the ordinary courts of this fair isle. The law in this area has been settled for well over a century by ***Scott v Avery*** V H.L.C. 811. In that case a similar clause was litigated and it was held that while parties cannot by contract oust the courts of their jurisdiction, any person can contract that no right of action shall accrue until a third person (in this case an arbitrator) has decided on any difference arising between them. Accordingly, I cannot agree with learned counsel for the claimant that general condition 9 raises such an issue. Respectfully, neither can I agree that general condition 9 raises difficult points of law or involves allegations of misrepresentation or fraud.

[62] I come now to the second issue raised in the submissions of learned counsel for the defendant. The essence of this submission was, for the court to properly adjudicate upon a claim for a breach of contract, the claimant is obliged to produce the contract. The statements of case of the parties provide a partial answer to this submission. The claimant averred in his particulars of claim that at the date of the loss, there was in force a comprehensive policy of insurance in respect of the subject motor vehicle, made by the defendant in consideration for the premiums paid by the claimant, insuring the claimant against loss and damage. That averment contained all the elements necessary to show that there was a contract of insurance between the parties.

[63] The foregoing averment was explicitly admitted by the defendant in both its original and amended defence to the claim. Therefore, as learned counsel for the defendant admitted, the case was not fought on the basis that no contract of insurance existed between the parties. Specifically, nowhere in the pleadings was it asserted that the defendant was not contractually bound to indemnify the claimant against the alleged loss of the vehicle, that is, its theft. So, the only point of significance raised by the submission is the extent of the indemnity.

[64] Indemnity seeks to put the insured in the same financial position he was in prior to the occurrence of the loss (see D.S. Hansell ***Elements of Insurance***). Indeed,

indemnity is the rationale of a contract of insurance. As was said by Brett LJ in ***Castellain v Preston*** (1883) 11 QBD 380, at page 386:

> *"The very foundation, …, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance …"*

[65] Bowen LJ concurred in the opinion expressed by Brett LJ when, at page 397, he said both marine and fire policies are contracts of indemnity and, *"[o]nly those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by loss".*

[66] That said, insurance law and practice provide for less than complete or one hundred percent indemnity. There are, invariably, factors limiting the maximum liability of the insurer in a given case. One factor pertinent to the instant case is the sum insured, which may or may not have been equivalent to the value of the subject motor vehicle at the material time. Another consideration is the policy excess. An excess clause is standard in motor vehicle insurance. This is the portion of the loss that the insured agreed to bear before the insurer can be called upon to indemnify the claimant. However, not all insurance companies have an excess clause in relation to theft of the motor vehicle. There may also be the question of under insurance of the vehicle.

[67] Admittedly, these are questions which can only be resolved by reference to the terms of the policy document and not the certificate of insurance. The point may be underscored in the following way. The claim for the loss of the subject motor car is $340,000.00, which is stated to be the value of the insured vehicle. However, in order to make the award the court would have to know whether the defendant's policy with the claimant contained an excess clause and, if it did, the percentage of the loss that the claimant would have to bear. In fine, without the policy document the court would be severely hampered in assessing the limits of the defendant's liability. So, there is some merit in learned defence counsel's

submission. I, however, do not find it necessary to go on to articulate ways in which the assessment challenges may be met, having regard to my conclusion concerning the arbitration clause.

[68] The issues raised by alleged breaches of general condition 7 of the policy and clause 6 of the certificate of insurance may be addressed together. The defendant bears an evidentiary burden in respect of both. The defendant's refusal to indemnify the claimant based on these alleged breaches, has its foundation in the commissioned investigator's report.

[69] Before the trial, the defendant made an unsuccessful application for the statements to the investigator to form part of the trial record. Therefore, the defendant had two options to get the statements into evidence. One, the investigator could have been called or two, the defendant could hope to obtain admissions from the claimants and his witness during cross-examination. The defendant chose the latter and risk-fraught path of miraculous admissions under cross-examination. It was clear to the court that the claimant came prepared to deny being the maker of any written document which bore his signature. So intent he was on this perjurous path that he initially denied his signature on his witness statement. My observations of the claimant and his witness convinced me that their consciences were impervious to the solemnity of the oath.

[70] However, disbelieving them that they gave the statements to the defendant's investigator does not make the contents of those statements evidence. Since the investigator was not called, against the background of the denials of the claimant and his witness, the result was a failure of the defendant at the evidentiary hurdle. Without evidence to support these averments, no burden is cast on the claimant to answer and the discharge of the claimant's legal burden is left unaffected. All of this is perhaps academic in light of my decision in respect of general condition 9.

[71] And so I return to the legal effect of the failure to refer the claim to arbitration. Learned defence counsel says it should be regarded as a nullity. In ***Stacy-Ann***

Rhooms, *supra*, Sinclair-Haynes J (as she then was), accepted that the claim failed consequent upon a failure to act within the time limits specified by the contract. That was a case for summary judgment. The contention was that the claim was hopeless, having been filed after the expiry of limitation periods under the policy. By clause 4 of the policy, the insured was required to commence his action or suit within three months of a rejected claim. Clause 12 insulated the insurer from liability after the passage of twelve months from the date of the loss unless it was the subject of pending action or arbitration.

[72] The insured refused to submit the claim to arbitration after its rejection by the insurer and filed suit instead. The claim was filed, however, beyond three months from the date of its rejection. Learned counsel for Mr Nelson sought to distinguish ***Stacy-Ann Rhooms*** from this case on the basis that this claimant did not receive the policy document. That point, however, will not avail the claimant since I have decided that the policy was incorporated into the contract of insurance or, failing that, he had a duty to call for it having been fixed with notice that the certificate of insurance emanated from the policy. The claimant was therefore bound by the terms and conditions of the entire contract, including what was contained in the policy document. More particularly, he was bound by the arbitration clause.

[73] The next point of attack on the arbitration clause was to argue that the defendant acquiesced in the claimant's failure to make the arbitral referral. This was premised on the defendant's election to defend the claim. It was submitted that in ***Scott v Avery***, the following pronouncement was made (no citation was provided).

> *"However, where the insured commences legal proceedings in breach of such a clause in my view, the reasonable, although not obligatory, course for the insurer to take is to apply to the court for a stay of proceedings pursuant to section 5 of the Arbitration Act. I say this because the insurers themselves could have taken steps to invoke the stipulation as to arbitration"*

[74] Section 5 of the ***Arbitration Act*** (since repealed after the filing of this claim) is quoted below:

> *"if any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the*

> *submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings, apply to the Court to stay the proceedings, and the Court or Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings".*

[75] In my opinion, as was explicitly stated in the quote attributed to ***Scott v Avery***, the application for a stay of proceedings is not mandatory. I am of the view that the section contemplates a claim being filed within the time prescribed for the referral to arbitration. This view is predicated on the conditions precedent to the grant of a stay of proceedings. First, the court must be satisfied of a want of sufficient reason why the matter should not be referred. Second, there was an extant as well as antecedent willingness and preparedness on the applicant's part to take whatever preparatory steps were necessary for the conduct of the arbitration.

[76] Furthermore, the view expressed by the learned judge was based on a shared responsibility to refer the matter to arbitration in that case. In this case, general condition 9 clearly sets out who should refer the matter to arbitration and in what circumstances. Where the claim is accepted and the dispute is over the quantum, the referral seems to be automatic and falls on the insurer. Where the claim itself is disputed, the burden of referral falls squarely on the insured. In the language of general condition 9, "[i]f we disclaim any part of your claim and you do not refer such claim to an Arbitrator…". So, in this case it is pellucid that the responsibility of the arbitral referral was bifurcated.

[77] This claim was filed on 25 November 2009. The defendant advised the claimant by letter 16 January 2008 of its refusal to indemnify him. We do not have to summon Carl Friedrich Gauss or any other great mathematicians to convince us that twelve months had elapsed before the date of filing the claim. Accepting that the contemplation of section 5 of the ***Arbitration Act*** is as articulated above, it would have been a waste of resources to have applied for a stay of proceedings. Even if the first condition precedent was satisfied, I venture to say the application would have foundered at the second. That would have been its fate as it is

inconceivable that the defendant would not have sought to wrap itself in the protective advantage of abandonment of the claim. Hence, it would not have been willing to submit to arbitration. So, respectfully, the argument that there was acquiescence on the part of the defendant is as insubstantial as it is unsubstantiated.

[78] I therefore return to the question of the legal effect of filing this claim without first referring it to arbitration. It is perhaps prudent to advert to some of the much vaunted advantages of arbitration before declaring the legal effect. Firstly, arbitration, it has been said, is a speedier process than litigation. Whereas the passage of a claim may traverse years, an arbitration hearing can be arranged within months. Secondly, an arbitrator may bring to bear expert knowledge on the process as they are usually experts in insurance law and practice, especially where the disputes concerns quantum. He will more than likely have greater knowledge than a judge on matters of valuation of the type of property involved. Thirdly, redounding to insurer, arbitration hearings are in private unlike courtroom trials which are public; so that, the insurer is insulated from adverse publicity. Fourthly, it is arguable that arbitration may result in less costs to the parties. Fifthly, the insured retains the right to litigate after arbitration.

[79] The objects of the ***Arbitration Act, 2017***, although going beyond, give substance to the advantages listed above. Section 5 sets out the objects:

> *"(a) facilitate domestic and international trade and commerce by encouraging the use of arbitration as a method of resolving disputes;*
>
> *(b) facilitate and obtain the fair and speedy resolution of disputes by arbitration without unnecessary delay or expense;*
>
> *(c) facilitate the use of arbitration agreements made in relation to domestic and international trade and commerce;*
>
> *(d) facilitate the recognition and enforcement of arbitral awards made in relation to domestic and international trade and commerce; and*
>
> *(e) give effect to the UNCITRAL Model Law".*

[80] It appears to be the policy of the legislature to encourage the settlement of disputes arising from trade and commerce through arbitration. Against that background, it would seem counterintuitive if parties were allowed to slither out of arbitration by machinations robed as legal technicality. And so I come back to the legal effect of not referring the claim to arbitration.

[81] It seems settled law that the claimant is barred from pursuing this claim: ***Stacy-Ann Rhooms,*** *supra*. His claim was deemed abandoned at the expiration of the twelve months, on or about 16 January 2009. Put another way, the claimant failed to act within the time limit set by the policy. By that agreement, the claim was abandoned and cannot now be pursued. I therefore dismiss the claim and award costs to the defendant to be taxed if not agreed.

Postlude

[82] A full and frank apology to the parties for the inordinate delay in delivering this judgment must be made a part of the record. Having regard to the length of time, an explanation is warranted. The trial was conducted over a period of three days, as stated above. Counsel for the defence was allowed to file written submissions on the issue of arbitration on or before 1 May 2017. Counsel for the claimant was allowed to file a reply to those submissions no later than 15 May 2017. The delivery of judgment was reserved to 28 July 2017. However, in the interim one of the court reporters who recorded the notes of evidence resigned and migrated without completing the production of the notes of evidence. Her portion of the record only became available in July 2019, through the diligence of her colleagues, while I was sitting in the Westmoreland Circuit Court. This is admittedly cold comfort to the parties and so, I unreservedly apologize for the delay.