**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2004 HCV 2227**

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| **BETWEEN** | **ANDERSON'S HAULAGE SERVICES LTD.** | **CLAIMANT** |
| **AND** | **UNITED GENERAL INSURANCE COMPANY LTD** | **1ST DEFENDANT** |
| **AND** | **COVENANT INSURANCE COMPANY LTD** | **2ND DEFENDANT** |

**IN CHAMBERS**

Mr. Rudolph Francis instructed by Lightbourne & Hamilton for the 1st Defendant /Applicant.

Mr. Abe Dabdoub and Mr. Lawrence Philpotts-Brown instructed by Clough Long & Co. for the Claimant/Respondent.

**Heard:** 1st & 10th October, 2008.

**Mangatal J:**

1. The application which I heard was a Further Amended Notice of Application for Court Orders filed September 26 2008 on behalf of the Applicant Advantage General Insurance Company Limited. At the start of the hearing I pointed out to the parties that at some point Advantage General Insurance Company Limited needs to be substituted for United General Insurance Company Limited "U.G.I." since I understand that U.G.I. no longer exists. If I use names interchangeably "U.G.I." or 1st Defendant or Advantage General Insurance Company Limited or

Applicant in this judgment it is just as a matter of convenience and in order to deal with this application urgently, which I feel I ought to.

2. The Orders sought in the Application are as follows:

    1. *That the execution of the Writ of Seizure and Sale against the goods and chattels of the First Named Defendant herein be set aside.*
    2. *That the sum of $10,234,522.87 paid by the First named Defendant/applicant to the Bailiff of the Resident Magistrate's Court for the Corporate Area in the execution of the Writ of Seizure and Sale be held in escrow pending the result of the hearing of this application and the hearing of the Appeal.*
    3. *That the Default Cost Certificate issued by the Registrar on the 19th day of August 2008 be set aside.*
    4. *That the money paid into Court by the Bailiff of the Resident Magistrate's Court for the Corporate Area in execution of the Writ of Seizure and Sale be held in escrow pending the result of the hearing of the Appeal.*
    5. *Such consequential orders as this Honourable Court deems fit.*

3. The grounds on which the Applicant seeks these orders are as follows:

    *(i) That no enquiry was held by the Registrar into the amount paid by the Claimant to finance the premium which is the subject of the claim, and the date of payment of such premium.*

*(ii) That no certificate was issued by the Registrar certifying how much money was paid by the Claimant as premium and therefore the Writ of Seizure and Sale was irregularly obtained.*

*(iii) The order requested is necessary to do justice between the parties and to dispose fairly of the claim herein, and to save costs.*

**Background**

4. This Lawsuit involved a claim by the Claimant against the 1st Defendant U.G.I. as insurers and against the 2nd Defendant Covenant Insurance Brokers as Insurance Brokers. The claim is for breach of contract in respect of certain motor vehicle insurance coverage which the Claimant said it had contracted for. The Particulars of Damages pleaded as special damages were for (a) Insurance premiums paid in the sum of $1,073,946.68 and(b) Costs of financing insurance premiums in the sum of $103,831.76. The 1st Defendant in its Defence stated that the Claimant was in breach of certain conditions of the policy, involving untrue statements in proposal forms and failure to disclose material facts. U.G.I. also claimed that the Claimant was in breach of conditions subsequent, i.e. that there was breach of the condition of the policy requiring, amongst other matters, that the insured give certain notice to the insurance company of any occurrence which could give rise to a claim under the policy. The 2nd Defendant also filed a Defence but that is not relevant for the purposes of these proceedings and this application involves only the Claimant and U.G.I.

5. On the 22nd of May 2008 Mrs. Justice Beswick handed down Judgment as follows:

    1. *Judgment for Anderson's Haulage as against UGI in the sum of $1,073,946.88 plus the amount spent to finance that sum. The Registrar is to enquire into the amount paid to finance the premium and the date of payment of premium and so certify.*
    2. *Interest at a rate of 46.43 % from the date of borrowing money to finance premium to today.*
    3. *Costs to Anderson's Haulage Services Limited.*
    4. *Judgment for Covenant Insurance Brokers as against Anderson's Haulage Services Ltd.*
    5. *Costs to Covenant Insurance Brokers.*
    6. *All costs to be borne by U. G. I.*
    7. *Costs to be agreed or taxed.*

6. By letter dated the 28 May 2008 the Claimant's Attorneys wrote a letter to the Registrar of the Supreme Court referring to the order of the learned Judge that the Registrar carry out certain enquiries. The letter also referred to the aspect of the Judgment where interest was ordered to be paid at the rate of 46.43 % per annum. What is expressly termed a "submission" in the letter was made, to the effect that that rate was not the appropriate applicable rate, and indicated that the award of interest at that rate appeared to be an oversight. The letter further asked the Registrar to convey a list of average interest rates computed from the Bank of Jamaica Statistical Digest to Mrs. Justice Beswick so that this "oversight may be corrected before the judgment is perfected". This letter

was copied quite properly to Messrs. Clough Long and Co., the Attorneys on Record for the Claimant.

7. Clough Long and Co. in turn, by letter dated June 2, 2008 wrote to the Registrar, copied to Counsel Mr. Francis, restating that Mrs. Justice Beswick had ordered that the Registrar enquire into the date of obtaining the financing for premium. The said letter went on to state that this was as a result of a question arising as to whether or not the date of obtaining the finance was 17th May 1996 or 17th May 1997. The letter goes on to indicate, amongst other things, that the Claimant would accept the date as being the 17th May 1997.

8. It seems to me that it cannot properly be denied (especially when one looks at the documentation exhibited to this application), that this question of which of these two dates should be used, was one of the reasons that the learned judge saw it fit to direct an enquiry by the Registrar. It is also apparent, that by stating that they would accept the date of 17th May 1997, instead of May 17 1996, the Claimant was accepting a later date and for the purposes of calculation of the interest awarded, was prepared to accept the lesser of two potential sums. This would clearly enure to the benefit of the 1ST Defendant who is liable for payment of the Judgment sum.

9. The Supreme Court File indicates certain handwritten calculations of interest. Clough Long and Co. had on the 22nd August 2008 filed an Order for Seizure and Sale to be signed by the Registrar. This document contained calculations of interest which were

somewhat higher than what was contained in the Order which was eventually signed by the Registrar and applicable for different periods.

10. On the 27th August 2008 Clough Long and Co. then refiled an Order for Seizure and Sale which contained all of the handwritten modifications made on the Supreme Court file. This Order for Seizure and Sale of Goods was signed by the Registrar of the Supreme Court. The Order contained amongst other things, a calculation of the interest from 16th May 1997(really should be from 17th not 16th perhaps), the later date proposed on behalf of the Claimant in the letter of June 2nd 2008, to the date of Judgment, 22nd May 2008. It indicated a total sum( addition of sum awarded in Judgment for premiums paid, i.e. $1,073,946.88 plus interest as awarded and worked out using May 16 1997 as starting point together with a sum of $2,581,202.40 for costs) of $9,150,681.10 together with interest on that total sum at 6 % per annum from the 23rd May 2008 until payment. I shall return to the matter of the Costs.

11. The Bailiff for the Resident Magistrate's Court for the Corporate Area according to the Applicant attended on the Applicant's premises on the 1st September 2008 for the purpose of executing the Order for Seizure and Sale (para. 4 Affidavit of Dwayne Forbes sworn 2/9/08). According to the Applicant, (para. 5 said Affidavit), the First Defendant was forced to pay over the full judgment sum of $10,234,522.87 to the Bailiff. On the 8th September 2008 the Bailiff paid into the Accountant General, the public officer/department

responsible for receiving Judgment sums obtained by way of execution, the sum of $9,304,111.70 on account of this Claim. The Applicant says that the sum collected from them was $10,234,522.87. I am not really concerned with this difference or what accounts for it, whether fees or otherwise; any order I make under this application as framed has to be concerned with the sum of $9,304,111.70 now held by the Accountant General.

12. The Claimant's Bill of Costs was filed on the 26th May 2008 along with Notice to Serve Points of Dispute as required by The Civil Procedure Rules 2002 "C.P.R." and these documents were served on the firm of Lightbourne & Hamilton, on record for the First Defendant on the same day, i.e. 26th May 2008.

13. The 1st Defendant filed a Notice of Objection to the Claimant's Bill of Costs on, it seems, the 10th June 2008 but did not serve this Notice on the Claimant's Attorneys until the 9th of July 2008. It is the contention of the Claimant that this Notice of Objection does not conform with the requirements of C.P.R. Rule 65.20 and also that it is outside of the time prescribed by Rule 65.21.

14. On the 19th August 2008 the Registrar issued a Default Certificate. The Final Judgment and this Default Certificate were served on the First Defendant's Attorneys on the 20th August 2008. It is this Default Certificate which the 1st defendant's Attorneys-at-Law now ask me to set aside.

15. The application by the 1st Defendant was first filed early in September and has undergone a number of

amendments. Initially the matter came up ex parte before Mrs. Justice Cole-Smith on the 2nd September 2008. Cole-Smith J. ordered, amongst other matters, that the sum paid by the 1st Defendant to the Bailiff be held in escrow pending the result of the hearing of this inter partes application.

**Whether the Order or Writ of Seizure and Sale Should Be Set Aside**

16. Mr. Francis for the 1st Defendant referred me to Rule 43.3(1) of the C.P.R. which states that a person who has a judgment subject to the fulfillment of a condition may not enforce the judgment unless the condition is fulfilled or the court gives permission for the judgment to be enforced. He submits that neither fulfillment nor permission have happened here.

17. I do not agree with Mr. Francis that the Judgment of Beswick J. was a judgment subject to a condition. Beswick J. made a determination as to the relative rights and entitlements of the parties, i.e. that the Claimant was entitled as against the 1st Defendant to damages for breach of contract, including repayment of insurance premiums and costs of premium financing together with interest. The judgment further outlined a procedure for ascertainment of certain relevant details of the judgment. Whilst I agree that after the judgment was given certain things remained to be done, notably by the Registrar, I do not think that in principle that makes it a judgment subject to the fulfillment of a condition. It does mean however, that the full terms of the Judgment were not complete

and contemplated that the Registrar would carry out certain enquiries to bring the judgment to completion.

18. To my mind, whilst what Mr. Francis also argues about the need for enquiry, may be technically true, i.e. that the judgment contemplated that the parties would together interact with the Registrar for this enquiry to take place, it seems to me that where one party indicates that it will forego the need to ascertain which of two dates are the applicable date, by foregoing the date which was more beneficial to them, then there would be nothing wrong with the Registrar accepting that indication and acting on it. Indeed, what else should the Registrar do? Should she summon a hearing/meeting with its attendant time and cost consequences, to discuss a matter which has already been conceded to the benefit of the 1st Defendant? The position would to my mind be different if there was for example, a whole range of dates, or a date not yet raised or explored during the trial, for the Registrar to embark upon ascertaining. But where as here, although the Judgment does not spell out the two dates possible, it is clear that that was the issue under consideration, then there was nothing wrong with the Registrar proceeding as she did. In effect, when the Registrar signed the Order for Seizure and Sale after the exchange of correspondence, I accept Mr. Dabdoub's argument that that was in effect a certification of the date from which the interest was to be calculated, i.e. the date of payment of the premium, which premium Beswick J. had already awarded in favour of the Claimant. I accept that it would have

been desirable for some more formal certification by the Registrar to have taken place, however, in so far as there is no Law or Rule or indeed, any express detail in the judgment as to the manner or form of the certification, then I am of the view that the Order for Seizure and Sale was not on this ground rendered irregular.

19. I accept that the Registrar does not appear to have carried out the exercise of enquiring into the amount paid to finance the premium, as opposed to the date of payment of premium, the relevance of the date of payment being to calculate the date from which interest on the premiums would run. However in my judgment, that does not prevent the Claimant from seeking to execute the Judgment in so far as it has been finalized, i.e. for the sum paid for premiums and interest thereon from May 16 1997, whether or not abandoning the claim for the amount paid to finance the premium. It is however appropriate to treat the Claimant in the circumstances, having proceeded to finalize the Order for Seizure and Sale, as having abandoned any claim to the financing cost.

20. I am therefore of the view that this Order for Seizure and Sale was not irregularly obtained.

21. Mr. Francis also cited an extract from Halsbury's Laws of England, Vol. 17, 4th Edition, on Execution and a case therein cited, but although these authorities speak about irregular execution, and rights against Bailiffs who execute, even there it seems that the execution in certain circumstances may not be wrongful ab initio. The execution may remain good

although the Bailiff may be liable in some other way. These authorities do not assist me in determining whether, the Bailiff having proceeded to carry out collection pursuant to the Order for Seizure and Sale, and paid it into the Accountant General, I would still have power to set aside the execution. However, it seems to me that even if I have power to set aside the execution, that would not be an appropriate relief in the circumstances of this case. There is in my view nothing irregular about the Order for Seizure and Sale and in any event, the 1st Defendant did not at an appropriate stage, as it was entitled to do, apply for a stay of execution of the judgment whether under Rule 42.13 of the C.P.R. or otherwise. I am inclined to the view that at this stage it would not be appropriate to set aside execution because it has already taken place. What the court can do is to stay further proceedings under the judgment, or deal with the funds collected. I discuss this relief below.

22. **Whether Default Costs Certificate Should Be Set Aside**

I now intend to deal with the question of whether the Costs Certificate should be set aside before I deal with the question of whether the sum paid in to the Accountant general should be held in escrow pending the outcome of the Appeal.

23. Having looked at Rule 65.20(2) which requires the Points of Dispute to be very specific, I agree with Mr. Dabdoub that the Notice of Objection filed on behalf of the 1st Defendant does not comply with the Rule. As one refers to Statements of Case as containing "a bare

denial", so too here I would refer to this Notice of Objection as a "bare dispute" which is not permissible under the C.P.R.

24. Further, under Rule 65.20 (3) of the C.P.R. the Points of Dispute are required to be filed and served 28 days after the date of service of the Claimant's Copy Bill. Whilst the Points of Dispute appear to have been filed in time, they were not served in time since more than 28 days elapsed between the date of service of Claimant's Bill of Costs, i.e. 26th May 2008 and the date of service of points of dispute, i.e. 9th July 2008.

25. Rule 65.2(4) states that a party who files and serves points of dispute after the 28 days may not be heard further in the taxation proceedings unless the registrar gives permission.

26. Rule 65.20(5) states that the party entitled to costs may file a request for a default costs certificate if the 28 days period referred to in sub-paragraph (3) has expired and no points of dispute have been served on the costs entitled party.

27. Rule 65.20(6) states:

> *If any party (including the paying party) serves points of dispute before the issue of the default costs certificate the registrar may not issue the default costs certificate.*
>
> Rule 65.21 (1) and (2) and 65.22 state:
>
> ``` *65.21 (1) A receiving party who is permitted by rule 65. 20 to obtain a default costs certificate does so by filing-*
>
> *(a) an affidavit proving –*

*I. service of the copy bill of costs; and*

*II. that no points of dispute have been received by the receiving party; and*

*(b) a draft default costs certificate in form 26 for signature by the registrar.*

*(2) The registrar must then sign the default costs certificate.*

*65.22 (1) The paying party may apply to set aside the default costs certificate.*

*(2) The Registrar must set aside a default costs certificate if the receiving party was not entitled to it.*

28. Rules 65.26 and 65.27 together indicate that an appeal from a decision of the registrar is to a judge of the court.

29. The Claimants' Attorneys on the 2nd July filed a Default Costs Certificate. On the 3rd July they filed an Affidavit of Service indicating the date the Bill of Costs was served on the 1st Defendant's Attorneys at Law. Although up to that date the Claimants' Attorneys had not in fact been served with the 1st Defendant's Notice of Objection, the Affidavit of Service of Georgia Tate, sworn to on the 3rd July 2008 does not say so. Nevertheless, the registrar on the 19th day of August 2008 issued the Default Costs Certificate, by which date the 1st Defendant's Objection containing Points of Dispute had been filed and served.

30. In my judgment, as tardy and as deficient as the Points of Dispute filed and served on behalf of the 1st Defendant certainly were, there are legitimate questions as to whether the Default Certificate ought

to have been issued at all, or alternatively there are grounds for consideration by the registrar as to whether the Default Costs Certificate ought to be set aside.

31. Mr. Francis submitted that as a Judge, I can exercise the powers of the Registrar to set aside the Default Costs Certificate since in any event an appeal from a decision of the registrar is to a judge of the Supreme Court. I find this a dicey question because the court must not appear to be trampling on the powers given to the registrar. In any event, if even one were to consider this application an appeal, again the 1st Defendants appear to be riding roughshod over the Rules of the C.P.R, in particular Rule 65.28 as to the Appeal procedure. The court has to draw the line somewhere. Counsel really have a duty to assist the court and absolutely no authority in relation to this question has been cited to me, so I am not prepared to do what would be an unorthodox step of setting aside the default costs certificate or treating the application to set aside as an appeal. The 1st Defendant's Attorneys at law must go and sort out the appropriate steps to take. However, the circumstances in relation to the default certificate will be addressed by me in another way later on in this judgment in terms of whether the sums in respect of costs should be held in escrow.

32. To my mind, the 1st Defendant's Attorneys at Law should in this application really have concentrated on the fact that they have filed an appeal against the judgment of Beswick J. and focused on convincing me

that there is a sound basis for having the funds paid in by the Bailiff to the Accountant General held in some way pending the outcome of the appeal. Instead, the application and a substantial portion of Mr. Francis' arguments have been focused on the argument that the Order for Seizure and Sale was irregular and should be set aside. As a result of this, the application before me and the Affidavit evidence does not address certain matters which should ordinarily be addressed when a court is effectively being asked to stay execution of a judgment or proceedings pending appeal.

33. What I have in mind are the principles set out in the case of Hammond **Suddard Solicitors v. Agri-Chem International Holdings Limited** [2002] E.W.C.A. Civil 2065, a decision of the English Court of Appeal where at paragraph 22, Clarke L.J. stated:

> *Whether the court should exercise its discretion to grant a stay will depend upon all of the circumstances of the case, but the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of an appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?*

34. Before the court even moves to consider the balance of risks, the person appealing must show that the appeal has real prospects of success. I have looked at the Notice and Grounds of Appeal filed in this matter, and it seems to me that this case involves issues to do with indemnity under insurance policies and interpretation of conditions of policies and also procedural and evidential points as to whether, and if so, in what circumstances a person who is an employee of a corporate entity who was not employed to the entity at the time of the relevant.transaction should be allowed to give evidence of transactions from the records. These points raised in the grounds of appeal, from what I have seen of the papers relating to the case, seem to have a real prospect of success, though if there is a range within the concept of real prospect of success, I would say that these grounds are at the lower end of the range, or on the borderline. However, I think that the ground of appeal with the most real prospect of success on the face of it ( I say on the face of it because the Claimants lawyers argue that it is the 1st Defendant's Lawyer himself who asked the learned trial judge to use interest at the rate of 46.43% per annum) is that set out in paragraph 2(iii) and 3(e) of the Notice and Grounds of Appeal dated 19th September 2008. 2 (iii) reads:

> *The award of interest at the rate of 46.23% on the insurance premiums of $1,073,946.88 is not supported by the Statistical Digest for the year 2007, issued by the Bank of Jamaica ,which gave the average annual interest rate for the period*

*1997-2007 to be 29.83%. The learned trial judge had it at her disposal before she made the award. The award is therefore based on an erroneous application of the information contained in the Statistical Digest.*

35. On balance, therefore, I find that the appeal has real prospects of success. However, perhaps because of the way that the application has been put forward, there is not much, if any, evidence before me as to whether the appeal would be stifled if a stay is refused. Nor whether if the stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, there are risks of the 1st Defendant being unable to recover any monies paid from the Claimant. As a matter of fact, when I asked Mr. Francis about this very point, his candid response was that even if such information had been addressed in the Affidavits, he does not know that the 1st Defendant could accurately say that they would not be able to recover the sums paid from the Claimant.

36. It seems to me therefore that in all the circumstances, the just order to make is to allow a sum of $1,073,946.88 plus interest at the rate of 29.83% from May 17 1997 to May 22nd 2008, totaling approximately in a rounded off way (using interest at 30% per annum for 11 years) the sum of $4,618,946.88 to be paid out to the Claimants' Attorneys at Law for payment over to the Claimant. The balance remaining at the Accountant General would therefore be approximately $4,685,164.82. The monies at the Accountant General do not as far as I am aware attract interest at

commercial rates. The parties in this matter are corporate entities who had engaged in commercial contracts. To my mind, all would benefit if the balance were to be placed in an account where commercial interest would accrue.

37. My order on the Amended Notice of Application for Court Orders filed September 26 2008 is therefore as follows:

(1). The sum of $4,618,946.88 is forthwith to be paid out of the amount of $9,304,111.70 which was paid to the Accountant General by the Bailiff in respect of execution of the Order for Seizure and Sale, same to be paid out to Messrs. Clough Long and Co. as Attorneys at Law for the Claimant.

(2) The balance remaining, i.e. $4,685,164.82 is also to be paid out forthwith to Messrs. Clough Long and Co. to be placed within 7 days of receipt in an interest bearing account with a reputable financial institution. This financial institution is to be agreed between the parties, and the said sum is to be placed in an account in the joint names of the Attorneys at Law Clough Long and Co. and Lightbourne & Hamilton in trust for Anderson's Haulage Services Limited and Advantage General Insurance Company Limited, to be so held pending the outcome of the appeal.

(3). Costs of this application to the Claimant/Respondent to be taxed if not agreed.

(4). Liberty to apply.