JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO. 15/2004

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE H. HARRIS, J.A.(Ag)

BETWEEN UNITED GENERAL INSURANCE CO. LTD. APPELLANT

A N D SEBERT HUTCHINSON RESPONDENT

Donald Gittens instructed by **Piper and Samuda** for the appellant

Arthur Williams instructed by **Arthur Williams & Company** for the respondent

June 28, 29 and November 3, 2005

SMITH, J.A:

This is an appeal from a judgment of His Hon. Mr. Oswald Burchenson, Resident Magistrate for the parish of Manchester. By this judgment the learned Resident Magistrate dismissed an application by the appellant to strike out the respondent's plaint entered against the appellant for damages for breach of a contract of insurance. The issue in this appeal is whether the respondent, the insured, is bound by the provisions of the insurance policy which was never delivered to him or brought to his attention.

On November 2, 1996 the appellant issued a certificate of insurance in respect of a motor car with registration number 4601BM. The

respondent was the insurer. The policy number as stated on the Certificate was 96MPC/H4276/10MDAO. The effective commencement date of the insurance was stated to be 22nd October, 1996 and the date of expiry was 21st October, 1997. A Schedule A document, which recites the policy number and which was signed by the appellant on the 9th December, 1996 was also delivered to the respondent. This document contains particulars of the insured, the period of insurance, the premium, the type of cover, description of the insured vehicle and the limits of liability.

The insurance policy referred to in the Certificate and Schedule A was not delivered to or brought to the attention of the respondent.

In the month of March, 1997, the insured motor vehicle overturned in the parish of Manchester. As a result of this accident the said vehicle was damaged beyond repair. According,to the respondent, inspite of numerous requests by letters and telephone calls, the appellant neglected or refused to pay the respondent's claim or any sum whatsoever under the terms of the contract.

As a consequence the respondent, on the 28th January, 2002, filed a plaint in the Resident Magistrate's Court for the parish of Manchester claiming damages against the appellant for breach of contract. On the 2nd December, 2002, the appellant filed a Notice of Application to Strike

Out the respondent's plaint for want of jurisdiction. The ground of this application was that:

> "A condition precedent to the right of action by the plaintiff against the defendant has not been fulfilled."

In paragraph 2 of the affidavit in support of the application the appellant through Miss Myrtle Smalling, the Manager of the appellant's Mandeville branch, stated as follows:

> "2. The standard form of insurance policy or contract, under which the plaintiff claims against the defendant, set out on page 8, paragraph 9, an Arbitration Clause which provides as a Condition Precedent, that the Plaintiff must invoke Arbitration Proceedings against the Defendant before any right to sue the Defendant can accrue."

She exhibited to her affidavit a copy of the Arbitration Clause. She further stated in paragraph 3 of her affidavit that:

> "No step whatsoever was taken before the filing of this Plaint (or indeed after its filing), either by the Plaintiff (or indeed by Defendant) to invoke or initiate the Arbitration Proceedings."

The respondent in his affidavit in reply, swore:

> "3. That in relation to the insurance, apart from the receipt for payment of the insurance through the Defendant's Brokers at Manchester Road, Mandeville in the parish of Manchester, the only documents I received are Certificate of Insurance in duplicate dated 2nd November, 1996 and Schedule A dated 9th December , 1996, which I handed to my Attorneys, Messrs. Owen Crosbie and Company (copies annexed and marked exhibit 'SH I').

> 4. That I am not aware of the insurance policy or contract mentioned in paragraph (2) of the affidavit of Myrtle Smalling dated 2nd December, 2002.
>
> 5. That my attorneys sent correspondence and made numerous telephone calls to the Insurance Company, but got no response so I gave instruction for suit to be filed against the Defendant.
>
> 6. That after the accident, I reported the accident to the Insurance Broker who made contact with Murray's Garage and sent me to Miss Smalling of United General Insurance Company, Mandeville and she took me in her car to the garage."

The Arbitration Clause

Paragraph 9 of the standard form of Insurance Policy to which Miss Smalling referred in her affidavit reads:

> "All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and the making of an award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calender months from the date of such disclaimer have been referred to arbitrator

> under the provisions herein contained then the claim shall for all purposes be deemed to have abandoned and shall not thereafter be recoverable hereunder."

As would be expected, the above Arbitration Clause is only applicable when there is a "difference arising out of the policy" or where the company disclaims liability for any claim under the Policy.

The affidavit evidence does not in my view directly speak to any "difference" between the parties or disclaimer of liability. And I do not think that the failure of the company to reply to the respondent's letters and telephone calls necessarily implies any such "difference" or disclaimer.

In those circumstances, assuming that the Policy governs the parties' relationship, there would be no basis for the respondent to invoke or initiate arbitration proceedings. The filing of the plaint would not be in breach of the clause. There may be good reason why this point was not taken before the magistrate or before this court. I only make mention of it en passant.

The Magistrate's Decision

In refusing the appellant's application to strike out the respondent's claim the learned Resident Magistrate held:

> "The portion of document exhibited by the Applicant Defendant could not be viewed as a Contract of Insurance between the Plaintiff and the Applicant Defendant. To say that it is part of a standard form Contract, without more, does

not in any way make the Plaintiff contractually bound by it.

The Plaintiff has exhibited a complete Contract between the parties. This exhibit established a contractual relationship between the parties.

Further if the Court should countenance the document exhibited by the Defendant's manager in her affidavit then under the clause raised, the Defendant had sufficient time to invoke the provisions under claim 9 and not appeared to be trying to oust the Court's jurisdiction in the matter.

Therefore the Court is of the view that the Applicant Defendant cannot be said to have come with clean hands to court."

On Appeal

Six grounds of appeal were filed on behalf of the appellant. I should add that these grounds were filed before the Statement of Reasons for the Magistrate's order was lodged. These grounds are:

"(1) The Learned Trial Judge erred in law in that he unreasonably failed to appreciate the effect of and/or accept the evidence contained especially in paragraphs 2 and 3 of the affidavit of Myrtle Smalling in support of the said application.

(1) The Learned Trial Judge erred in law in that he failed to appreciate and/or accept that paragraph 5 of the affidavit of Sebert Hutchinson did not say and was insufficient to support every reasonable inference that the Respondent had invoked the arbitration clause in the policy of insurance.

(2) The Learned Trial Judge erred in law and was unreasonable in finding as a fact that the Appellant and Respondent were of unequal status.

(3) The Learned Trial Judge erred in law in that he failed to appreciate and/or accept that even if (it) were so, it was irrelevant to the issue before him that the Appellant and the Respondent were of unequal status.

(4) The Learned Trial Judge erred in law in unreasonably finding that the Appellant did not "come to court with clean hands", because, as he stated in explaining this finding, the Appellant could have itself invoked the arbitration clause in the policy of insurance.

(5) The Learned Trial Judge erred in law in that he failed to appreciate and/or accept that, it was irrelevant that the appellant could have itself invoked the arbitration clause in the policy of insurance."

Submissions

Counsel for the appellant in his written and oral submissions stated that the essential issue for the determination of this Court was whether the learned Resident Magistrate erred in law in making the following findings of facts:

(i) That the Policy of Insurance in so far as it was exhibited by the Appellant "could not be viewed as a Contract of Insurance between the Respondent and the Appellant."

(ii) That the Certificate of Insurance exhibited by the Respondent is a "...complete Contract between the parties".

The submissions of Mr. Gittens on behalf of the appellant may be summarized as follows:

(a) The Certificate of Insurance exhibited by the respondent shows clearly that it was not the complete contract between the parties in that it refers to a Policy No. 96MPC/H4276/10MDO and certifies that the Policy is issued in accordance with the provisions of the law.

(b) The Schedule A form exhibited by the respondent also clearly shows on its face that the Certificate of Insurance was not the complete contract between the parties in that it refers to the "lettered" and "numbered endorsements" on the policy.

(c) The Particulars of Claim annexed to the Respondent's claim for damages for breach of Contract of Insurance refers to Policy No.96MPC/H4276/10MDAO. This shows that the Respondent relied on the policy as distinct from the Certificate of Insurance.

(d) The learned Resident Magistrate, in finding that the parties were of unequal status, failed to take into account that the broker

to whom the Respondent proposed the insurance was in law the agent of the insured and not the agent of the insurer and that any omission or default in the process of effecting the insurance policy or contract lies at the feet of the broker. He relied on ***Chez Franchot Ltd. v Halifax Insurance Co. Ltd. et al*** [1978] 15 JLR 282 at pp. 294 I to 295F and ***Hopeton Wilson v. N.E.M. Ltd.*** I [1981] 18 JLR 334. He also cited section 82 of the Insurance Act and submitted that the express selection by Parliament of only one aspect of the relationship between the broker and the insured makes it clear that Parliament did not wish to disturb the general common law principle that the broker is the agent only of the insured. The maxim ***expressio unius exclusio alterius*** applies to section 82.

(e) Where pre-contractual matters are negligently handled the court will hold that the broker was acting as the agent of the proposer.

(f) There is a duty on the insured to seek out the policy. There can be no doubt that the respondent knew of the policy and that the policy is a different document from the Certificate of Insurance. The failure of the broker to deliver the policy to the insured can be no more blameworthy than the failure of the insured to seek it.

(g) The principle in ***Scott v Avery*** is well established. The personal hardship that might be visited upon a litigant should not affect the validity of the legal principle which resulted in that hardship.

The submissions of Mr. Arthur Williams in summary form are as follows:

1. There is no evidence that the Respondent received the policy or that the policy was sent to him.

2. The Appellant is not claiming that they had provided the Respondent with the policy document from which the extract which contains clause 9 was taken. It is not enough to say that it formed part of the "Standard Insurance Policy".

3. The Certificate of Insurance and the Schedule A constitute a contract which is distinct from the contract comprised in the policy. Accordingly, the rights and liabilities of the parties fall to be determined by the document which was in existence at the time of the event giving rise to the claim – see **Halsbury's Laws of England 4th Edition Vol. 25** para. 402. The cover note is the same as the Certificate of Insurance.

4. Until the policy is delivered to the insured it is the Certificate and the Schedule A which govern the relationship between the parties – see ***Roberts v Security Co.*** [1895 –9] All ER Rep.1177.

5. The term contained in the standard policy of insurance is not applicable to the Respondent as he was not aware of any such term as the insurance policy document allegedly containing that term was not

communicated to him prior to the event giving rise to the claim – ***Re Coleman's Depositories Ltd. et al*** [1904-7] All E.R. Rep. 383 at 387 A& B.

6. Counsel agrees that where the insured goes to a broker the broker is his agent. However, he contends that when the proposer has completed his proposal form with utmost good faith and paid his premiums, the duty that remains is for the insurer to inform him of the terms upon which he is being insured.

Mr. Gittens in reply

(1) Paragraph 402 of **Halsbury's Laws of England** (supra) supports appellant's contention that the Certificate of Insurance and the Schedule to the insured, which were delivered, incorporate the policy. The Certificate of Insurance and the Schedule make express reference to the policy.

(2) ***Coleman's*** case supports the appellant's argument that where the insured proposes the contract of insurance to the agent of the insurer or to the insurer itself, the agent is acting in his obvious capacity as agent of the insurer. In the instant case the insured went to a broker; in the circumstances the broker is the agent of the insured. This demonstrates the importance of the opportunity to know.

Analysis of submissions, the evidence and the law

Both counsel agree that the critical issue in this appeal is whether the learned Resident Magistrate erred in holding that the respondent was

not contractually bound by the Policy of Insurance as alleged by the appellant.

In my judgment the Magistrate did not err in finding as he did. It is not in dispute that the Policy of Insurance relied on by the appellant was not put in evidence. There is no evidence that this policy was delivered to the respondent or his agent. There is also no evidence that the contents of this Policy and in particular the Arbitration Clause were communicated to the respondent by reference or otherwise before or at the time of the event giving rise to the claim. Even if the submissions of counsel for the appellant, that there is a duty on the insured respondent to seek the policy and that the respondent knew of the policy, were accepted as correct that would not remove the obligation of the appellant to produce the policy in court. In any case, such as this, in which any question turns upon the contents of a document it is important that the actual document should be produced and exhibited – see ***Hodge Industrial Securities Ltd. v Cooper*** [1962]1W.L.R 209. In the cases cited by Mr. Gittens the policies in question were tendered in evidence. I cannot accept the submission that the production of a photocopy of page 8 paragraph 9 of "the standard form of insurance policy or contract" was sufficient for the purposes of the appellant's application to strike out the respondent's claim. In my view the Policy of Insurance should have been put before the court. The finding of the learned Magistrate that "the

portion of document exhibited by the appellant could not be viewed as a contract of insurance" is in my view unassailable. So too, is his conclusion that "to say that it is a part of a standard form of contract without more does not in any way make the plaintiff (respondent) contractually bound by it".

What I have just stated is sufficient in my view to dispose of this appeal, however, I feel constrained to deal with two points raised in the submissions of counsel. The first point is the contention of Mr. Williams that until the Policy is delivered to the insured it is the Certificate and Schedule A which govern the relationship between the parties. He made this submission in response to Mr. Gitten's argument that it is the duty of the insured to seek out the policy and that since the broker is the agent of the insured any omission on the part of the broker cannot be attributed to the insurer, in this case the appellant. In ***Chez Franchot Ltd. v Halifax Insurance Co. Ltd. et al*** (supra) Parnell, J. held that a broker who assisted the proposer in filling up the proposal form for the purpose of submission to an insurer was the agent of the proposer and of no other person." Parnell J relied on a statement in **22 Halsbury's Laws of England** (3rd Edn.) 201 para. 382 as a summary of the true position:

> "If a person wishing to obtain insurance of a non-marine character employs an insurance broker, as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility

> of the proposer for the acts and omissions of the broker."

This statement, which Mr. Williams accepts as a correct statement of the law, does not in any way support Mr. Gitten's submission that any default or omission in the process of effecting the insurance contract lies at the feet of the broker and not of the insurer. By what principle of law or process of reasoning could a broker, who is the agent of the insured, be held liable for the failure of the insurer to deliver the policy to the insured or his agent? I can think of no such principle and in my view this defies reason. The decision in ***Re Coleman's Depositories*** (supra) is helpful. The facts as they appear in the head note are as follows: "On December 28, the assured applied to the insurers for insurance against Workmen's Compensation Act risks, and received from their agent a receipt signed by him and bearing the words "covered from date." On January 2, a workman of the plaintiff's was injured by accident, and became entitled to compensation. On January 10 a policy was delivered to the assured insuring them as from January 1, and containing conditions that "immediate notice" of any accident causing injury to a workman should be given and that "the observance and performance of the times and terms before set out are the essence of the contract".

The assured gave notice of the accident to the insurers on March 14, when the insurers repudiated liability on the ground that the conditions contained in the policy had not been fulfilled." The arbitrator held that

the insurer had a good defence to the claim. Bray J reversed the decision of the arbitrator. The insurer appealed. It was held by Vaughan Williams and Buckley L,JJ (Fletcher Moulton LJ dissenting) that "there was no evidence that the assured knew or had the opportunity of knowing, the conditions of the policy before the contents of the policy had been communicated to him by delivery of the document, which did not take place until after the accident, and therefore, the conditions in the policy did not become applicable to the particular risk, and the insurers were liable."

In his judgment Vaughan Williams LJ quoted with approval the following statement of Bray J (p.385 E):

> "The association chose to act, as we know all companies do; they agreed that the risk should be covered as from a certain date that is, the date of receipt of the proposal. They chose to do that, and they did not send a copy of the policy to the assured. They did not say that the risk should be covered in accordance with or subject to the terms of the policy. They say it should be covered. How is the assured to know of these conditions unless they inform him?"

The learned Lord Justice was of the view that it could not have been contemplated by the parties that the condition as to immediate notice should apply until the contents of the policy had been communicated to the employer.

Buckley LJ was of the same view. He said:

> "...the employer had no knowledge of the condition... It was impossible therefore, that he should comply..."

He referred to the facts and continued:

> "...upon these facts the true inference, in my opinion, is that the insurance office, as regards this risk which had resulted in a claim before knowledge of the condition was created, never imposed that condition."

In the instant case there is no evidence that the respondent knew or had the opportunity of knowing the contents of policy of insurance. The stipulations contained in the Arbitration were never imposed. It is common ground that in the insurance business the established practice is that the parties enter into an interim contract pending the issue of the policy of insurance. See **25 Halsbury's Laws of England** 4th Edn. para. 401.

The interim contract comes to an end when the policy is executed and delivered to the insured. The usual form in which interim insurance is granted is by a document known as a covernote – see para. 402 ibidem. A cover note may incorporate the terms and conditions of the insurer's standard form of policy either by express reference or by reference to a signed proposal which in terms incorporates the standard form– para. 402 ibidem. In the absence of such incorporation of the standard terms and conditions, if the proposer is to be bound by them, it must be shown that in some other way he has agreed to accept them - ***Re Coleman's***

Despositories (supra). Subject to the incorporation of the standard terms and conditions, a cover note is a contract of insurance distinct from the policy of insurance even when the policy is in fact issued – see ***Queen Insurance Co. v. Parsons*** [1881] 7 App. Cas. 96 P.C.

Although the interim contract comes to an end when the policy is delivered, the parties' rights and liabilities in respect of any loss which happens before the delivery of the contract comprised in the policy normally fall to be determined by reference to the former and not to the policy contract – see ***Re Coleman's Depositories*** (supra).

What was put before the learned Resident Magistrate by the respondent were the Certificate of Insurance and the Schedule A form. These presumably have much more details than a cover note would. There is no doubt in my mind that these documents constitute an interim contract distinct from the policy. The appellant tendered a copy of paragraph 9 of the standard form of insurance policy. There is no evidence that the conditions provided by this clause were brought to the attention of the respondent or that the respondent had knowledge of them by express reference or otherwise. Accordingly, I agree with the submissions of Mr. Williams.

The second point has to do with the validity of the Arbitration Clause which was exhibited by the appellant. I will not be long with this

point since it is not necessary for the proper disposal of this appeal and indeed Mr. Williams did not make an issue of this.

Mr. Gittens in his submissions referred to what is known as a ***Scott v Avery*** clause in an arbitration agreement. In ***Scott v Avery*** [1856]5 H.L. Cas. 811 all of their Lordships stated the principle that an agreement to oust the jurisdiction of the Court is invalid. However, their Lordships held that an agreement that the rights of the parties shall be determined by arbitration as a condition precedent to an action is not an agreement ousting the jurisdiction of the court.

Similarly, a clause sometimes called an "***Atlantic Shipping***" clause, which bars all claims unless a claim is made in writing and an arbitrator appointed within a limited period of time, has been held to be valid – see ***Atlantic Shipping and Trading Co. Ltd. vs Dreyfus & Co.*** [1922] 2AC 250.

Thus it seems safe to say that para. 9 of the standard form of policy, which comprises the Arbitration Clause, if incorporated into the policy of the contract of insurance, would not be struck down as invalid on the ground that it ousts the jurisdiction of the Court.

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 stipulations as to arbitration. More importantly it seems that such clause does not put on hold the limitation period.

It is of interest to note that section 3 of the Arbitration Act provides that:

> "A submission unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court or a Judge and shall have the same effect in all respects as if it had been made an order of Court."(emphasis supplied).

"Submission" is defined in section 2 as "a written agreement to submit, present or future differences to arbitration whether an arbitrator is named therein or not."

In the light of the proviso that the "submission" is to be treated as an order of the Court, the question is, can the Court enlarge the time within which the claim shall be referred to the arbitrator? I should not proffer a definite opinion on this question without the benefit of arguments of counsel. I will content myself by saying that, in my view, it is arguable that the Court may enlarge the time.

Conclusion

1. The learned magistrate was correct in holding:

   (a) that the document exhibited by the appellant "could not be viewed as a contract of insurance" between the parties.

(b) That the Certificate of Insurance and Schedule A form exhibited by the respondent constitute "a complete contract between the parties."

2. There is no evidence that the Certificate of Insurance and Schedule A incorporate the terms and conditions of the appellant's standard form of policy.

3. There is no evidence that the policy of insurance which the appellant claims is binding was delivered to the respondent or that the appellant knew or had the opportunity of knowing its terms and conditions.

Accordingly, I would dismiss the appeal and affirm the order of the Learned Resident Magistrate with costs to the respondent.

K. HARRISON, J.A.:

I agree.

HARRIS, J.A. (Ag.)

This is an appeal from a decision of His Honour Mr. Oswald Burchenson, Resident Magistrate for the parish of Manchester, refusing an application by the Appellant to strike out a claim brought by the Respondent.

Sometime in 1996 the coverage of risks in relation to a motorcar owned by the respondent was underwritten by the Appellant for the period October 22, 1996 to October 21, 1997. The transaction was conducted through Associated Owners Insurance (Agents) Ltd., insurance brokers.

In or about March 1997, the respondent's motor vehicle overturned and was damaged beyond repair. The Appellant failed to respond to various requests from the Respondent to honour a claim arising from the accident. As a result, the Respondent issued a plaint against them on January 28, 2002 claiming damage for breach of contract.

On December 2, 2002 the Appellant filed an application to strike out the plaint for want of jurisdiction on the ground "that a condition precedent to the right of action by the plaintiff against the defendant had not been fulfilled".

In support of the application, the Appellant relied on an affidavit sworn by Myrtle Smalling the manager of their Mandeville branch. An averment in paragraph 2 of the affidavit states as follows:-

> "2. *The standard form of insurance policy or contract, under which the Plaintiff claims against the Defendant, sets out on page 8, paragraph 9, an Arbitration clause which provides as a condition Precedent, that the Plaintiff must invoke Arbitration Proceedings against the Defendant before any right to sue the Defendant can accrue. I exhibit*

> *hereto marked "MS 1" for identification, a photocopy of the said page 8 paragraph 9, and crave leave to refer thereto and rely thereon."*

Exhibited to the affidavit was an extract showing the contents of an arbitration clause.

It was also averred by her that no steps had been taken before the filing of the plaint to invoke or initiate arbitration proceedings.

The Respondent, in an affidavit in response, declared having no knowledge of the policy of insurance to which the Appellant made reference. He acknowledged however the receipt of a Certificate of Insurance dated 2nd November, 1996 and a document headed Schedule A dated 9th December, 1996. Both documents were exhibited by him.

The Learned Resident Magistrate, in refusing the application, held that the document exhibited by the Appellant was not a contract but that the documents exhibited by the Respondent amounted to a complete contract between the parties. He also held that the Appellant had not come before the court with clean hands.

Six grounds of appeal were filed by the Appellant. It will be convenient for grounds 1 and 2 to be considered simultaneously.

Ground 1. "The Learned Trial Judge erred in law in that he unreasonably failed to appreciate the effect of and/or accept the evidence contained especially in paragraphs 2 and 3 of the AFFIDAVIT OF

MYRTLE SMALLING in support of the said application.

Ground 2. The Learned Trial Judge erred in law in that he failed to appreciate and/or accept that paragraph 5 of the AFFIDAVIT OF SEBERT HUTCHINSON did not say and was insufficient to support any reasonable inference that the Respondent had invoked the arbitration clause in the policy of insurance."

Mr. Gittens contended, inter alia, that the Certificate of Insurance was not a complete contract between the parties as it refers to a policy numbered 96 MPC H4276/10MDO and certifies that it was issued in keeping with the provisions of the law. He also submitted that Schedule A demonstrates, prima facie, that the Certificate of Insurance is not a complete contract. It was his further submission that the particulars of claim by the Respondent alludes to the identical policy number as stated on the Certificate of Insurance and the Respondent accordingly placed reliance on the policy as opposed to the Certificate of Insurance in the pursuit of this claim.

Mr. Williams submitted that the Contract of Insurance as well as Schedule A comprise a contract which is separate and distinct from the contract contained in the policy and that the rights and liabilities of the parties must be decided within the context of the document existing at the time the cause of action arose.

It is necessary to outline the documents exhibited before the Learned Resident Magistrate. They were the extract containing an arbitration clause, the Certificate of Insurance and the Form Schedule A.

The extract states as follows:-

> "9 All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon on a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitrator under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The Certificate of Insurance was couched in the following terms:

"**JAMAICA**

THE MOTOR VEHICLES INSURANCE (THIRD PARTY RISKS) LAW. CAP 257

CERTIFICATE OF INSURANCE

Certificate No. H4276 POLICY NO. 96MPC/H4276/10MDAO

1 Index Mark and Registration Number of Vehicle insured 4601BM Engine No: JA36646 Chassis No: WFOAXXGAGAJA36646

2. Name of Insured

HUTCHINSON, SEBERT

3. Effective date of the commencement of Insurance for the purposes of the law 22/10/96

4. Date of expiry of insurance 21/10/97

5. Persons or classes of persons entitled to drive

HUTCHINSON, SEBERT

ANY PERSON WHO IS DRIVING ON THE INSURED'S ORDER OR WITH THEIR 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 FOR THE INSURED'S BUSINESS

THE POLICY DOES NOT COVER

USE FOR HIRE OR REWARD OR FOR COMMERCIAL TRAVELLING, RELIABILITY TRIAL, SPEED TESTING, THE CARRIAGE OF GOODS OR SAMPLES IN CONNECTION WITH ANY TRADE OR BUSINESS OR USE IN CONNECTION WITH THE MOTOR TRADE.

(Limitations rendered inoperative by Sect. 6(2) of the Law are not included under this heading.)

I/We hereby Certify that the Policy to which this Certificate relates is issued in accordance with the provisions of the abovementioned Law,

Issued this 2 day of November 1996

UNITED GENERAL INSURANCE COMPANY LIMITED

Checked by Authorised Signature

NOT VALID WITHOUT AUTHORISED SIGNATURE"

The Schedule A form states among other things:

(i) the particulars of the insured.
(ii) the Period of insurance.
(iii) that the insurance is subject to certain endorsements shown on the policy.
(iv) The description of the insured vehicle.
(v) The limits of liability.

After reviewing the affidavit and the documents exhibited the Learned Resident Magistrate, said among other things:-

> "The portion of document exhibited by the applicant defendant could not be viewed as a contract of
>
> Insurance between the plaintiff and applicant defendant. To say that it is part of a standard form contract, without more does not in any way make the Plaintiff contractually bound by it.
>
> The plaintiff has exhibited a complete contract between the parties. This exhibit established a contractual relationship between the parties."

The initial questions arising are, whether the Certificate of Insurance and Schedule A incorporated the policy of insurance, or whether the Certificate of Insurance and Form Schedule A amounted to a contract between the parties separate and apart from the policy?

In treating with a contract of insurance the learned authors of

Halsbury's Laws of England 4th Edition volume 25 paragraph 398 stated:

> "A contract of insurance, like any other contract, is created where there has been an unqualified acceptance by one party of an offer made by the other. So long as the matter is still under negotiation, there is no contract, although it is open to the parties, pending conclusion of negotiations, to enter into an interim contract of a limited nature, for example in the form of a cover note."

It cannot be open to dispute that in the world of commerce interim insurance coverage is issued by insurers. Such coverage may be made subject to the completion of detailed proposals or pending consideration of a proposal which has been submitted to insurers. Generally interim insurance is issued by way of a cover note.

The terms and conditions of the insurer's standard form of policy may be incorporated in the cover note. Failing this, the proposer can only be bound by the terms and conditions of the standard policy if it is shown that he agreed to accept them: See **Coleman's Depositor's Ltd. & Ors** [1904-7] ALL ER Rep 383.

A cover note constitutes a separate contract from a policy of insurance, subject to the incorporation of the standard terms and conditions even in circumstances where a policy was issued – See **Mackie v European Assurance Society** (1869) 21 LT 102.

If the terms and conditions of a standard form of policy are not incorporated with the cover note then the cover note would operate as

the document governing the contractual rights of the parties until the policy becomes effective.

In the instant case the Certificate of Insurance and form Schedule A are in effect, a cover note. They were both executed under the hand of a duly authorized officer of the appellant. The terms and conditions as set out in the Certificate of Insurance do not incorporate an arbitration clause, neither do the contents of the Form Schedule A.

Additionally, a standard Form of Insurance to which the Appellant referred was never exhibited. They chose to exhibit an extract containing an arbitration clause. Although specific mention was made by Mr. Gittens to the policy number being recorded in the Certificate of Insurance and the Form Schedule A, the mere reference to the policy number being recorded does not in any way show that these documents were part and parcel of the policy. The contents of those documents constitute a definitive acceptance by the Respondents of those terms and conditions agreed upon. The Certificate of Insurance in itself stands detached from the policy of Insurance and creates contractual relations between the parties.

So far as the policy of Insurance is concerned, there was no evidence before the Learned Resident Magistrate to establish that the Certificate of Insurance and Schedule A contained the terms and conditions of the policy. Further, the extract containing an arbitration

clause would not have been sufficient to determine that when read in conjunction with the Certificate of Insurance and Schedule A, the Respondent would have been contractually bound by the policy of insurance.

The Learned Resident Magistrate was correct when he found that the part of the document exhibited by the Appellant could not be viewed as a Contract and the Respondent could not be bound by it. He was also correct in finding that the Contract of Insurance and Schedule amounted to a contract.

I now turn to grounds 3, 4, 5, & 6, which I will consider together.

Grounds 3 "The Learned Trial Judge erred in law and was unreasonable in finding as a fact that the Appellant and the Respondent were of unequal status.

4 The Learned Trial Judge erred in law in that he failed to appreciate and/or accept that even if were so, it was irrelevant to the issue before him that the Appellant and the Respondent were of unequal status.

5 The Learned Trial Judge erred in law in unreasonably finding that the Appellant did not "come to court with clean hands", because, as he stated in explaining this finding, the Appellant could have itself invoked the arbitration clause in the policy of insurance.

6 The Learned Trial Judge erred in law in that he failed to appreciate and/or accept that it was irrelevant that the Appellant could have itself invoked the arbitration clause in the policy of insurance."

Mr. Gittens argued that where there is negligence on the part of a broker in dealing with precontractual matters the court will hold that the broker was acting as the proposer's agent. He went on to state that the Learned Resident Magistrate failed to give consideration to the fact that the broker was the insured's agent and it would be the responsibility of the broker to ensure that the policy was delivered to the insured.

It was argued by Mr. Williams that the Respondent is not subject to the terms of the policy of insurance as he was unaware of the contents purportedly laid down in the document. He further submitted that the terms were not brought to his attention before the accident and the Certificate of Insurance and Schedule A govern the parties' relationship.

The Respondent denied knowledge of the contents of the standard policy of insurance. There is no evidence that the policy was delivered to him or that its contents had come to his knowledge.

It is settled law that consequent on the completion of proposal for insurance coverage, by a broker, the broker becomes the agent of the

insured. It is true, as urged by Mr. Gittens, that it is the duty of the broker to effectively bring the contract of insurance into existence.

In keeping with the foregoing proposition, Mr. Gittens cited the following cases: **Chez Franchot Ltd. v. Halifax Insurance Co et al** – 15 JLR 282 **Wilson v. National Employers Mutual** (1978) 18 JLR 334.

These cases do not assist the Appellant. In both cases there was evidence that the policies of insurance were before the court and there was evidence of negligence on the part of brokers with respect to precontractual matters which were material to the policies issued. In the instant case, there is no evidence that the policy to which the Appellant referred was before the Learned Resident Magistrate nor is there evidence that the policy had been issued to Associated Owners Insurance Agents Ltd, the broker through whom the Respondent's vehicle was insured. It is obvious that if a policy had been issued to the brokers Ms. Smalling would not have failed to make mention of this in her affidavit.

It was obligatory on the part of the Appellant to have made available to the brokers the policy for delivery to the Respondent. For the Respondent to be bound by the policy, it would have had to be shown that the Appellant, through the broker, brought to his notice the contents of the policy of insurance, and in particular the arbitration clause, prior to the accident.

In the case of **Coleman's Depository Ltd.** (supra) cited by Mr. Williams, the insured applied through brokers to insurers for insurance coverage against Workman's Compensation risks, on December 28, 1904 and received a receipt from the brokers with the words "covered from date" endorsed thereon. Five days later the Plaintiff's workman who sustained injuries became entitled to compensation.

A policy which was transmitted to the Plaintiff on January 10 insuring them from January 1, contained certain conditions. On the assured informing the insurers of the accident, they disclaimed liability on the ground that the condition in the policy remained unfulfilled.

It was held that the insurers were liable, as there was no evidence that the assured had knowledge or the opportunity of knowing the terms of the policy prior to its delivery. The contents of the policy were communicated to the insured after the accident and the conditions of the policy did not apply to that risk against which the plaintiff was insured.

In the case under review, there is nothing to show that the Respondent had known or had the opportunity of knowing that the policy contained an arbitration clause prior to the accident. Mr. Gittens contended that he should have made investigations with respect to the policy. In my view it was not incumbent on the Respondent to have made inquiries regarding the policy. It was the duty of the insurers to ensure that the policy was sent

to the brokers for delivery to the Respondent. There is no evidence that this was done.

The Certificate of Insurance and Schedule A comprised the contract between the parties. The parties would be bound by the terms and conditions of the Certificate of Insurance and the Schedule A pending delivery of the policy to the Respondent. There is no evidence that the stipulations outlined in arbitration clause were expressly or impliedly communicated to the Respondent at the time of the accident. It cannot be said that the Policy of Insurance, specifically the provisions of the arbitration clause is binding on the respondent.

In passing, I should mention that Mr. Gittens made reference to the case of **Scott v. Avery** [1843 –1860] ALL ER 1. That case establishes that parties cannot contract to oust the jurisdiction of the court but that a term in the contract that a dispute be referred to arbitration as a condition precedent to a right of action is valid. It cannot be said that the arbitration clause if contained in Standard Form of policy of insurance would offend the principle laid down in **Scott v. Avery** (supra).

However, in light of the fact that the question of the validity of the arbitration clause is not essential to the determination of this appeal, I do not think it necessary to give further consideration to it.

In my Judgment the Learned Resident Magistrate was correct in his findings and in subsequently refusing the application.

SMITH, J.A.

ORDER;

Appeal dismissed. Order of the Learned Resident Magistrate affirmed with costs to the respondent fixed at $15,000.00.