IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO HCV 0836 OF 2005

BETWEEN	**UNITED GENERAL OF JAMAICA INSURANCE CO. LTD.**	**CLAIMANT**
AND	**LEROY McDONALD**	**DEFENDANT**

IN CHAMBERS

Mr. Jeffrey Daley instructed by Blackridge Covington for the claimant

Mr. Leonard Green instructed by Chen Green and Company for the defendant

February 9 and 24, 2006

MISREPRESENTATION, BREACH OF INSURANCE CONTRACT, APPLICATION FOR DECLARATION UNDER SECTION 18 OF THE MOTOR VEHICLE ACCIDENTS (THIRD PARTY RISKS) ACT AND RULE 10 OF THE CIVIL PROCEDURE RULES 2002

SYKES J

1. On September 29, 2004, there was an accident along the Chichester Main Road in the parish of Hanover. The bus was owned by Mr. Leroy McDonald and driven by his son. The bus was licensed and insured to carry fifteen passengers. The passengers in the bus have launched claims against United General Insurance Company (UGI). UGI now seeks two declarations by a fixed date claim form. The first is that Mr. McDonald misrepresented to UGI the number of passengers he intended to carry and second, there was a breach of the policy of insurance because more than fifteen persons were in the bus at the time of the accident. This is permitted by section 18 (3) of the Motor Vehicle Insurance (Third-Party) Risks Act (see also ***Barbados Fire & General Insurance Company v Pinder*** (1993) 52 W.I.R. 49).

2. In support of its application UGI has filed an affidavit sworn by Miss Julia Roache in which it is alleged that eighteen persons have filed suit against UGI. These persons, it is alleged, were in the bus at the time of the accident. The defendant says at paragraph 7 of his defence that he does not know whether there were eighteen persons in the vehicle because he was not there. Mr. Daley, like me, finds it odd that the driver was the defendant's son and yet he (defendant) is unable to say the number of persons inside the

vehicle. However, at this stage there is no evidence to find that the defendant is able to take a more definite position. Of course he denies making any misrepresentation.

3. Mr. Daley, understandably, said that, this response is a sham and amounts, at best, to a denial of the claimant's allegation that the vehicle had in more than eighteen persons. He further submitted that since the defendant did not state, unambiguously, that he denied the claimant's allegation when he was in a position to do so I could find that there were eighteen persons in the van at the time of the accident. He submitted further that I find that there was also a misrepresentation, the misrepresentation being that at the time the insured concluded the contract of insurance with UGI he had no intention of carrying only fifteen persons.

Analysis of the submissions

4. I begin by examining rule 10.5 of the Civil Procedure Rules (CPR). The terms are mandatory and in my view there must be full compliance with the rule. ***Must*** in this rule does indeed mean ***must***. This rule was designed in this way because it reflects the view that the new way of litigating relies on and emphasises integrity of the litigants. Parties are expected to admit what can be admitted so as to save time and resources. This is why the defendant and the claimant must have a certificate of truth in the defence or counter claim and the claim. This is the part of the regime of frank disclosure so that the court can exercise its case management functions properly. Unless there is pleading in conformity with the rules the court will not be able to

a. identify the issues at an early stage (rule 25.1(b));
b. decide which issues need full investigation and trial and summarily dispose of others (rule 25.1(c));
c. decide the order in which issues are to be resolved (rule 25.1(d));
d. dismiss or give judgment on a claim after a decision on a preliminary issue (rule 26.1(2)(j);
e. exclude an issue for determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose;
f. give judgment on admissions (rule 14.1).

5. It is noteworthy that under the CPR the expectation is that cases come on for case management after the defence has been filed. Once the defence is filed, then the court can

effectively manage the case with a view to saving costs and disposing of the matter fairly and justly. Even at the stage of the pre-trial review and the trial where statements and documents should have been exchanged the court is still expected to exercise its case management powers in order to dispose of the cases justly and economically.

6. It is my view that once the claimant sets out his case in accordance with rule 8.8 or 8.9, as appropriate, the defendant can only respond in the three ways set out by rule 10. He cannot simply deny the allegations. To put the matter more strongly, bare denials have been abolished. If he denies the allegations he must state the reason for the denial. He must say either, that he denies because they are not true and then set out his version or he neither admits nor denies because he does not know (see rule 10.5 (3), (4) and (5)). Obviously, if he admits the allegations then no reason need be given. It indicates to the claimant that he need not prove the admitted fact which had the effect of saving time and costs. The point then is that in civil litigation under the CPR there are three and only three permissible responses a defendant can make to claim – (a) admit the allegations; (b) deny the allegations and state the reason for the denial and (c) neither admit nor deny and state that the reason why there is no admission or denial is that the defendant does not know whether the allegations are true or false. I should add that in the case of a denial, if the defendant is contending that an allegation is untrue he must advance an affirmative case stating what his version is.

7. The bald denial, one of the severe weaknesses of the old rules, permitted defendants with worthless defences to embark upon the dubious strategy of trying to exhaust the patience and possibly the resources of the claimant in the hope, which sometimes materialised, that the claimant would simply stop pursuing him. Sometimes the defendant may wish to settle on very favourable terms. If he admitted the claimant's case the claimant was then placed in a position to obtain judgment. This would weaken his bargaining position since the claimant could simply ignore all his entreaties and proceed to assessment of damages or pursue any other appropriate remedy.

8. With these considerations in mind I now turn to the submissions of Mr. Daley. I take the pleading point first. The submission is predicated upon the proposition that under the CPR once the defendant does not expressly deny the allegations the court should find that the allegations are proven with the consequence that the court can grant the remedy sought. This is not quite correct because the rules allow defendants to plead ignorance. The

defendant has done that in this case. Therefore non-admission or non-denial because the defendant does not know whether the allegations are true or not cannot, without more, lead to the conclusion that the allegations are true. This does not mean that if it turns out that the defendant should have admitted facts which were known to him, there is no recourse. One possible remedy is an immediate costs order payable on an indemnity basis. Lord Woolf's report, Access to Justice – Final Report, at chapter seven pays a great deal of attention to the issue of costs. He suggested that the courts under the CPR should be more willing to utilise the new power conferred by the rules to make summary assessment of costs. I now quote from paragraphs 23 to 26 of his report:

23 Many respondents called for costs sanctions to deal with the tendency of parties at present to make numerous interlocutory applications. These are generally of a tactical nature which may be of dubious benefit even to the party making the application or which may not be warranted by the costs involved. It was agreed that the answer here is for costs orders to be made at the end of interlocutory hearings, to be payable forthwith by the party who has occasioned the hearing. At present such applications are made with impunity because the liability on the loser to pay is usually postponed until the end of the case when it is lost in the overall settlement of costs.

24. Orders for costs should reflect not only whether the general outcome of the proceedings is favourable to the party seeking an order in his favour but also how the proceedings have been conducted on his behalf. I have already referred to the need to assess compliance with protocols. Judges must therefore be prepared to make more detailed orders than they are accustomed to do now. The general order in favour of one party or another will less frequently be appropriate. Different orders will need to be made on different issues, eg, where there has been a departure from a protocol or an offer to settle that issue has been unreasonably refused.

25. In addition, failure to comply with directions and orders should produce orders for indemnity costs, payable forthwith.

26. Unless the court is prepared to take the time necessary to elevate decisions as to costs above the conventional approach adopted at present, the parties will not take as seriously as they should the obligations which a managed system will place on them. Orders for costs must in future reflect the obligations the new rules place on the parties. In addition the court should have powers to require solicitors to inform their clients of orders which have been made and why they were made.

9. These ideas have been incorporated in the Jamaican CPR at part 64. There one sees a duty given to the courts to examine more closely than before the conduct of parties over the course of the litigation and make such costs awards as appropriate. I make these points so

that the defendant is well aware that should he be found to have been less than frank in his defence the consequences may be quite severe.

10. I now turn to the misrepresentation issue. It is well established that a misrepresentation has to be of an existing fact. The misrepresentation does not have to be fraudulent; an innocent misrepresentation is sufficient (see ***Holmes v Scottish Legal Life Assurance Society*** (1932) 48 TLR 306). Mr. Daley relied on the allegation that eighteen persons were in the van at the time of the accident to say that that 'fact' established the misrepresentation. This is a quantum leap in reasoning. There would need to be good evidence that at the time Mr. Mcdonald concluded the contract with UGI he had no intention of carrying the number of passengers that the vehicle was licensed to carry. For me to come to Mr. Daley's desired conclusion I would have to find as a fact that there were more than eighteen persons in the van at the time of the accident. There are two obstacles to this finding. The first is that the defendant in his defence has neither admitted nor denied this allegation because he does not know if it is true. The second is that there is likely to be much dispute about the facts and consequently a fixed date claim form is not the appropriate vehicle to have this declaration.

11. The declarations sought by the claimant are denied.