

SCB

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
CLAIM NO. C.L. 1999/W – 039**

BETWEEN	GARY WILLIAMS	CLAIMANT
AND	CARLTON DAWKINS	DEFENDANT

Miss Phyllis Dyer for the claimant

Miss Raquel Dunbar for the defendant

Miss Deidre Powell in person

**Mr. Jeffrey Daley instructed by Blackridge Covington for United
General Insurance Company**

February 23, 2005 and March 31, 2005

WASTED COSTS ORDER HEARING

Sykes J

- 1.** At the hearing of this matter on February 23, 2005, I had delivered my decision but undertook to express my reasons in writing. These are my reasons.
- 2.** Miss Powell was instructed by United General Insurance Company to appear for Mr. Carlton Dawkins, the defendant. She attended the case management conference on October 27, 2003, at which November 3 and 4, 2004, were set as trial dates.

3. On November 3, 2004, Miss Raquel Dunbar, who then appeared for the defendant, applied for an adjournment on the basis that she was recently instructed in the matter and needed more time to prepare her case. She said that, based upon her preparations, she would need to have another witness who was unavailable for the trial but who would be available should an adjournment be granted.
4. The issue then arose of who should bear the costs of the adjournment. The claimant was prepared and ready for trial. From the submissions that were made at the application for the adjournment it could have been inferred that Mr. Dawkins was placed in this embarrassing position because of the conduct of Miss Powell, his former attorney, and United General Insurance Company. I then decided to conduct a wasted costs hearing under rule 64.9(1) of the Civil Procedure Rules (CPR). In accordance with rule 64.9(3), Miss Diedre Powell and United General Insurance Company were notified of the hearing. The rule also requires that all other parties to the action be informed. This was done. Having heard the submissions of all counsel and having read the affidavits submitted by Miss Powell, Miss Rarane Campbell, Claims Manager for United General Insurance Company and Mr. Dawkins, I have concluded that Mr. Dawkins, the defendant, should bear the costs.
5. I will begin by succinctly stating the evidence that was placed before me.

Miss Powell's evidence

6. Miss Powell said, via affidavit evidence, that she was instructed, in a letter dated September 19, 2003, by United General Insurance Company to

represent the defendant in this matter. She filed a notice of change of attorney on September 22, 2003. Up to then, the firm of McGlashan, Robinson and Company was on the record for the defendant. The defendant was contacted and all parties attended a case management conference on October 27, 2003.

7. Miss Powell's next significant act was a conference with the defendant on December 17, 2004. At that conference, she found out that Mr. Dawkins had breached the insurance policy. The legal significance of this was that he might not be able to recover under the policy although he might successfully defend the issue of liability. At that point, she informed Mr. Dawkins that even though he had a good defence on the facts, she had to inform United General of the breach of policy. She further explained that he might have to retain other counsel because she was directly instructed by United General Insurance Company. Miss Powell informed United General about the breach in a letter dated December 17, 2004.

8. Mr. Dawkins' response was that of a rugged, self-made man. He said that since he was not at fault, he would represent himself. Miss Powell counseled him against that ill-advised course of conduct. She explained to him that having regard to the rules of the Supreme Court and the issues involved, he would need the services of an attorney.

9. On May 3, 2004, Miss Powell received a letter from Ms Nicole Roberts instructing her to remove her name from the record. On receiving these instruction, Miss Powell, on May 3, 2004, wrote to Mr. Dawkins in these terms:

*Mr. Carlton Dawkins
May Day District P.O.
Manchester*

Dear Mr. Dawkins

Re: *Suit No. C.L. 1999/W – 039*

Gary Williams v Carlton Dawkins

I refer to the captioned matter.

Kindly be advised that I am receipt of instructions from United General Insurance Company Limited to remove my name from the record as your attorney at law.

In light of the above, kindly indicate in writing the name of the attorney-at-law that (sic) will be representing you, in order for me to do a Notice of Change of Attorney.

Should you have any queries, please feel free to contact the undersigned

Yours faithfully

Diedre S Powell

10. There is nothing complicated about this letter. It could hardly be clearer. Thereafter, Miss Powell took steps to remove her name from the record. The matter came up on July 15, 2004, but was not heard because Mr. Dawkins was not served as required. Miss Powell had told him that she would not be his attorney. The application was heard, eventually, on September 21, 2004 and the order granted by the Master.

11. In a letter dated September 27, 2004, Miss Powell again wrote to Mr. Dawkins reminding him of the November 3 and 4, 2004, trial dates. She urged him to tell her who was his new attorney so that she could send the file to him. She closed by suggesting to him that if he had any queries he could contact her. The files were handed over to Miss Raquel Dunbar in late October 2004 because Mr. Dawkins did not retain her until October 25, 2004.

Mr. Dawkins' evidence

12. Miss Powell's evidence has been largely confirmed by Mr. Dawkins. He admits that Miss Powell contacted him in 2003. He recalled that she told him about the breach of the policy and that she would have to report that fact to United General Insurance Company. He cannot recall when this conversation took place. Mr. Dawkins admits receiving, from Miss Powell, the letter dated May 3, 2004.

13. Mr. Dawkins admitted that he attended court on two occasions and the judge told him to get a new lawyer and he said he told the judge that he would represent himself because he was not at fault.

14. Mr. Dawkins even admitted that Miss Powell told him that although she felt he had a good case on the merits he would need a lawyer to represent him because of the nature of the case and the rules of the Supreme Court.

15. There could hardly be a better case of total corroboration of another witness' testimony.

Evidence from United General Insurance Company

16. Miss Rarane Campbell, Claims Manager for United General Insurance Company, said in her affidavit that the company instructed Miss Powell and then left it up to her to handle the case using her best professional judgment. She says that the company, by letter dated April 28, 2004, advised Miss Powell to remove her name from the record as representing the defendant. This was done after Miss Powell advised the company of the defendant's breach of the insurance policy.

The Submissions

17. Miss Powell submitted that she had done all that could be expected of her in the circumstances. I agree with her. The evidence above supports this submission. She intimated to Mr. Dawkins from as early as December 2003 that he might have to retain his own counsel having regard to the alleged breach of the policy. Mr. Dawkins was told verbally and in writing in May 2003 that he should retain counsel. She submitted that Mr. Dawkins had more than ample time to retain counsel of his choice.

18. Mr. Daley's submissions were similar to Miss Powell's. He submitted that, assuming the insurance company failed to speak to Mr. Dawkins directly on the matter, the fact of the matter is that Miss Powell expressly told Mr. Dawkins that he needed new counsel. This was followed up in writing seven months before the trial.

19. The consequence of these submissions is that neither Miss Powell nor United General Insurance Company should pay the claimant's costs of November 3 and 4, 2004.

20. Miss Dunbar, on the other hand, submitted that Mr. Dawkins should not pay the costs because in this case, he was not a free agent with the legal ability to retain counsel of his choice. She submitted that unless and until he was "cut loose" by the insurance company, he was not much more than a ventriloquist's dummy – he appeared to speak but in actuality he did not and could not speak independently because the insurance company, under the insurance contract, dictated to, controlled, proscribed and prescribed Mr. Dawkins' conduct. According to Miss Dunbar, it was not until September 21, 2004, (the date of the order removing Miss Powell's name from the record) that Mr. Dawkins' self determining autonomy was restored. Until then, he was not free to retain counsel.

21. This submission is at variance with the evidence. Mr. Dawkins stated in his affidavit that on his two appearances at court, a judge informed to retain new counsel but he said he would represent himself. This suggests a fully autonomous human being with unimpaired capacity. He had decided to represent himself but it would appear that as the trial date drew nigh, he, quite sensibly, had more than second thoughts about the matter. It seems to me that it was his late change of heart that led to the delay.

22. Miss Dyer, for her part, reminded the court that last November was the third trial date in the matter and regardless of what happened in the past, she and her client were ready for trial and ought to be awarded costs for the lost days. She added, quite significantly, that the witness Miss Dunbar said she needed was known to all from as far back as 2002. This seems to be so because the documents do mention her being in existence at a very early stage of the proceedings. According to Miss Dyer, had the defendant

and/or counsel, done what was required, this witness would have been to hand two years ago and the trial would have been able to commence.

Conclusion

23. I accept the point made by Miss Dyer. I also accept the submissions of Mr. Daly and Miss Powell. I agree that Mr. Dawkins was given more than adequate warning that he may need a new attorney and that he was clearly told this in May 2003. There is no doubt that had Mr. Dawkins acted upon Miss Powell's urgings to retain his counsel, the trial could have taken place. It is true that Miss Powell's name was on the record until September 21, 2004, but that did not prevent Mr. Dawkins from retaining counsel. He could have done so and that counsel, if retained, could have filed a notice of change of attorney and served it on the relevant parties. This would have prevented the necessity of an order being made to remove Miss Powell's name from the record.

24. After examining all the evidence before me I conclude that Mr. Dawkins is the maker of his predicament. Costs are awarded to the claimant in the sum of \$18,000.