[2022] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE BROWN JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00008

BETWEEN	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**APPELLANT**
AND	**ALESSANDRA LABEACH**	**1st RESPONDENT**
AND	**ANTHONY ALEXANDER POWELL**	**2ND RESPONDENT**

Mrs Suzette Campbell instructed by Burton Campbell and Associates for the appellant

John Clarke instructed by Bignall Law for the 1st respondent

26, 27 April and 20 May 2022

BROOKS P

[1] I have read in the draft the reasons for judgment of my brother Brown JA and agree. There is nothing I wish to add.

BROWN JA

[2] This is an appeal against the decision of a judge of the Supreme Court ('the learned judge'), made on 15 January 2021, refusing the appellant's application to intervene to set aside a default judgment entered against the defendant, its insured. After considering the submissions made by the parties, we made the following orders:

1. "The appeal against the decision of the learned judge refusing leave to intervene is allowed and the decision of the learned judge is set aside.

2. The appellant, Advantage General Insurance Company Limited, is permitted to intervene in claim number 2016 HCV 03468.

3. The learned judge's order as to costs is set aside.

4. The appellant's application to set aside the judgment in default entered against Mr Anthony Alexander Powell in the said claim is to be set for hearing in the Supreme Court before another judge.

5. Costs of the appeal and in the court below to the appellant, to be agreed or taxed."

[3] Before setting out our reasons for doing so, we provide a background to the events which gave rise to the appeal.

Background

[4] On 4 July 2016, the respondent, the claimant in the court below, was a passenger on the back seat in a Toyota Camry motor car registered PE 2530 which was owned by the defendant. At, or in the vicinity of, the Total service station in New Kingston, the Toyota Camry motor car rear- ended a Toyota Isis motor car, causing the respondent to suffer whiplash injury and consequential losses. On 18 August 2016, the respondent filed a claim against the defendant, Anthony Alexander Powell, in the Supreme Court, to recover damages for negligence for the personal injury suffered as a result of the motor vehicle accident. On the date of filing her claim, the respondent's attorneys-at-law served the appellant with a notice of proceedings under the Motor Vehicles Insurance (Third-Party Risks) Act. The appellant is the insurer for the Toyota Camry motor car.

[5] The respondent next filed an affidavit of service on 10 April 2017. The affidavit was sworn to by Clayton Guscott, a process server employed to the respondent's attorneys-at-law. Clayton Guscott swore that he effected personal service upon the defendant of the claim form and particulars of claim on 26 August 2016, at 74 Whitney Drive, Kingston 20, in the parish of Saint Andrew.

[6] Following on that, a judgment in default of filing an acknowledgment of service was entered on 28 April 2017, with damages to be assessed, and awarding costs to the respondent, to be agreed or taxed. Service of the default judgment, together with the respondent's witness statement, notices of intention to tender documents and of the hearing for assessment of damages (filed 23 July 2018), was effected by registered mail on 8 August 2018 on the appellant, and was evidenced by an affidavit of service filed on 7 March 2019.

[7] The claim proceeded to the entry of final judgment on 30 May 2019. Special damages were awarded to the respondent in the sum of $219,162.09, with interest at the rate of 3% per annum from 4 July 2016 to 30 May 2019. General damages were assessed and awarded in the sum of $2,500,000.00, with interest at the rate of 3% per annum from 10 April 2017 to 30 May 2019. Costs were summarily assessed at $80,000.00.

[8] Subsequently, the respondent sought to enforce the judgment against the appellant by the filing of a fixed date claim form, on 3 March 2020, under the provisions of the Motor Vehicles Insurance (Third-Party Risks) Act. By that fixed date claim form, the respondent asked for a declaration that the appellant was obliged to pay her the judgment sums, together with the statutory interest (and a corresponding order for payment). The fixed date claim form was supported by the respondent's affidavit.

[9] The appellant filed an acknowledgement of service, of the fixed date claim form, on 13 March 2020, indicating that it intended to resist the claim in whole. Prior to this, on 11 March 2020, the appellant filed a notice of application for court orders, which was fixed for hearing on 30 September 2020. In that notice, the appellant sought three principal orders: (a) permission be granted to the applicant to intervene and/or be heard in the claim; (b) a stay of execution of the judgment entered on 30 May 2019 until the hearing of the application; (c) the setting aside of the default judgment and all proceedings flowing from it. This notice of application was filed in the names of the parties to the claim (the respondent as claimant and Anthony Alexander Powell, defendant).

[10] An affidavit in support of the notice of application for court orders was filed on 20 March 2020. This affidavit was sworn to by Ms Vanessa Nesbeth, another legal officer employed by the appellant. Ms Nesbeth spoke to the service of the notice of proceedings on the appellant on 19 August 2016 and said up to that date the appellant had received no report from the defendant about the motor vehicle accident. She repeated Ms Anderson's assertion that no report was received from the defendant at the date of the service of the final judgment (see para. 5 of the affidavit filed on 20 March 2020). The noteworthy addition to the evidence by Ms Nesbeth was this: based on the appellant's rights of subrogation and its contractual relationship with the defendant, she believed the appellant to be entitled to be heard in the claim and to act on behalf of the defendant.

The hearing in the court below

[11] The hearing of the notice of application filed on 11 March 2020 commenced, as scheduled, on 30 September 2020. The hearing was part-heard and adjourned to 4 December 2020 and the parties ordered to file written submissions on or before 30 October 2020. The learned judge also ordered a stay of execution of the final judgment entered on 30 May 2019 until the determination of the application. Subsequent to the making of these orders, the learned judge also ordered the appellant to file and serve a further affidavit on or before 7 October 2020 "which speaks to the date the policy of insurance on which it asserts the right to intervene was taken out by the Defendant in the claim". Leave was granted to the respondent to reply, if necessary, on or before 19 October 2020. It was ordered that Mr Clayton Guscott was to be made available for cross-examination. These orders were communicated to the parties by letter dated 2 October 2020, under the hand of a registrar of the Supreme Court.

[12] The appellant duly filed a further affidavit on 9 October 2020, sworn to by Ms Vanessa Nesbeth. Her evidence was that the policy under which the respondent was seeking to recover damages was issued on 5 October 2015 to cover the defendant's vehicle. Miss Nesbeth also said that the motor vehicle policy of insurance comprised four documents, namely: the motor insurance proposal form, certificate of insurance, policy

schedule and motor vehicle policy booklet. Only an unsigned motor vehicle policy booklet, stamped, "specimen" was exhibited to this affidavit. At para. 6 of her affidavit, Ms Nesbeth quoted section X(5) of the exhibited document which, in essence, speaks to the appellant's legal rights under the policy.

[13] A reply to Ms Nesbeth's further affidavit was filed on 18 November 2020, sworn to by Vaughn O Bignall, attorney-at-law for the respondent. The reply was prolix and cast in the vein of legal submissions. At its core, the affiant took issue with the failure of the appellant to establish a proper foundation on which to seek permission to intervene. He noted that there had been no clear indication or adequate reference to the specific policy of insurance in question. Mr Bignall found it significant that the policy was said to have been issued posthumously and questioned who exactly was the appellant's insured. He urged the learned judge not to allow the appellant to intervene.

[14] When the matter came up for continuation on 4 December 2020, it was adjourned at the request of the appellant to 11 December 2020. The learned judge extended the time for compliance with her orders made on 30 September 2020, to 9 December 2020, "to enable the [appellant] to file and serve any further Affidavits on or before 4:00 p.m. on 7 December 2020".

[15] The appellant filed another affidavit on 7 December 2020, sworn to by Ms Ava Payne, an underwriter employed to the appellant. Ms Payne said Spectrum Insurance Brokers Limited acted on the appellant's behalf in effecting insurance with Anthony Alexander Powell. On 26 August 2010, the appellant received from that broker a motor insurance proposal form, signed by Anthony Alexander Powell, cover note, broker binder showing the premium breakdown, driver's licence and vehicle documents for the application for insurance coverage for a "Toyota Corolla [sic] motor car licenced [sic] PE 2530". Since the insurance coverage was applied for through a broker, Anthony Alexander Powell was not required to personally attend the appellant's offices.

[16] These documents were reviewed by the underwriting department and a contract of insurance, MPPTP-562686 was issued by the appellant for the period 26 August 2010 to 25 August 2011. Four documents together made up the policy of insurance: (i) the signed proposal form, certificate of insurance, policy schedule and policy booklet. The certificate of insurance, "[i]ssued on 7th day of December 2020 [sic]" to policyholder "Est. Anthony Alexander Powell" for the period 26 August 2010 to 25 August 2011, and the policy schedule for the same period were exhibited together as "AP 1". The proposal form could not be located.

[17] Ms Payne explained that the policy booklet is a standard form document. The appellant supplied a copy of this document to its insured on the first occasion that the policy is effected. The policy booklet was not issued in duplicate and the insured was not required to sign for it. Reference was made to the copy exhibited to Ms Nesbeth's affidavit. On each renewal, only the certificate of insurance is issued to the insured.

[18] Ms Payne further outlined the history of the coverage. The insurance coverage was renewed annually on its expiration up to August 2014. The coverage lapsed between the end of August 2014 to 3 October 2014. On the latter date it was renewed for one year to October 2015. In October 2015 an application for renewal of the insurance was submitted through the same brokers, together with the relevant documents. Having found the documents to be in order, Ms Payne authorized the renewal of the insurance coverage for the period 5 October 2015 to 4 October 2016 (exhibited as AP 3). At the time of this authorization, Ms Payne said she did not know that Anthony Alexander Powell was deceased, and had no way of knowing as the process of renewal did not require a personal visit to the appellant's offices.

[19] When the policy was again due for renewal in October 2016, the brokers submitted the application for renewal and a death certificate for Anthony Alexander Powell. The application for renewal was at the instance of a Ms Fay White who produced a marriage certificate and a letter from Samuels & Samuels, her attorneys-at-law. The exhibited letter (AP 4) referred to Ms White as "Mrs Fay White Powell"; disclosed that she was taking

steps to administer her husband's estate and asked that the policy be renewed "in the interim so that the motor vehicle can be used while the Administrative [sic] process takes its course". Ms Payne asserted that this was when the appellant became aware of the death of Anthony Alexander Powell.

[20] Ms Carolyn Wright, one of the respondent's attorneys-at-laws, swore to and filed an affidavit in response on 9 December 2020. The crux of Ms Wright's evidence was a complaint that the respondent was not made aware of the death of the appellant's insured although they had, at every stage, given notice to the appellant of the proceedings.

The decision in the court below

[21] In her written judgment, delivered on 15 January 2021, the learned judge made reference to what she described as "a threshold issue", on which the parties were allowed to make written submissions. This pivotal issue was whether the appellant should be permitted to intervene to set aside the default judgment without notice to, or permission from, the estate of Anthony Alexander Powell. Firstly, the learned judge found that the appellant had no right to intervene as the policy on which the right was based was not entered into between it and the "Deceased Defendant" (Anthony Alexander Powell). Secondly, since the application was made in the sole name of the appellant, the leave of the court was required. In the absence of evidence that the estate of Anthony Alexander Powell had no interest in defending the claim, leave should be refused for the appellant's failure to make the estate a party to the application.

[22] In giving the reasons for deciding as she did, the learned judge relied on the learning in **Linton Williams v Jean Wilson, Harris Williams and Insurance Company of the West Indies** (1989) 26 JLR 172, ('**Williams v ICWI**') a decision of this court. The learned judge also found guidance from two cases referred to in that judgment: **Jacques v Harrison** (1884) 12 QBD 165 and **Windsor v Chalcraft** [1938] 2 All ER 751.

[23] According to the learned judge, **Williams v ICWI** decided that someone who enjoyed a contractual relationship with the defendant, which was governed by the Motor Vehicle Insurance (Third Party Risk) Act, like the respondent insurance company, could intervene in a suit as of right and not by mere liberty, on its own motion and in its own name. However, on appeal, the order permitting the insurers to intervene was set aside but the order setting aside the default judgment was upheld. The learned judge found that **Windsor v Chalcraft** was similarly circumstanced as the application before her. The insurer's successful application before the master to set aside the default judgment was reversed by a judge. The Court of Appeal restored the master's order and further held that the nominal defendant had bound himself by the policy of insurance to allow the insurer to use his name. Consequently, the insurer was entitled to be heard on the application.

[24] The learned judge considered the submission made on behalf of the appellant that this case is distinguishable from **Williams v ICWI** and **Windsor v Chalcraft** on account of the default judgment being irregularly obtained. It was the learned judge's view, however, that the procedure to apply to intervene remained the same, whether the default judgment was regularly or irregularly obtained. For this position, the learned judge relied on the two methods laid down by Bowen LJ, and his exposition of the principles in **Jacques v Harrison**, at pages 167-168. One method is to obtain the permission of the defendant to use his name, if the defendant did not previously bind himself to the use of his name. The application is then made in the name of the defendant. The second method, in the event of no entitlement to use the name of the defendant, is for the insurer to take out a summons in its own name but, service must be effected on the claimant and defendant. By this summons, permission is sought to have the judgment set aside and to have the liberty either to defend the action on behalf the defendant, on terms of indemnification, or to intervene in the claim as dictated by statute. Bowen LJ declared that the requirements of justice made the addition of the defendant in the second method indispensable. As the defendant had a right to object to the application

to intervene and; to be heard on the question of being indemnified in relation to any risk or costs adverse to him.

[25] The learned judge then referred to the evidence about the death of Anthony Alexander Powell and the renewal of the policy of insurance. She observed that the name of the person who requested the renewal of the policy of insurance was not disclosed by the appellant, "even after the adjournments over the course of several months". The learned judge went on to say, at para. 21:

> "From the authorities which have been referred to, the right of the insurer to intervene to set aside a default judgment which has been entered against its insured has its foundation in contract. It is therefore my view that where the contracting party is someone other than the nominal Defendant the Applicant would have no such right to intervene."

Although the learned judge was of the view that this finding was sufficient to dispose of the application, she went on to consider the propriety of the procedure the appellant adopted in seeking to intervene.

[26] The learned judge found that the application was not made in the name of either the defendant or his estate. The application also fell afoul of the second method as, although the notice of application for court orders was served on the respondent, there was no evidence of similar service upon the estate of the defendant. The learned judge accepted that this failure was not necessarily fatal. However, the learned judge was of the view also that the circumstances of this case did not warrant a departure from the prescribed procedure.

The appeal

[27] The appellant filed the following 11 grounds of appeal:

> "(1) The learned judge erred in law when she failed to give effect to Section X (5) of the contract of insurance, made pursuant to [T]he Motor Vehicle[s] Insurance (Third Party

Risk[s]) Act, between the Applicant and Defendant which gave the Applicant a right to intervene in the claim in its own name.

(2) The learned judge failed to recognize that the Applicant had a right to intervene in the claim to protect its own interest since it was liable by virtue of Section 18 (1) of the Motor Vehicle[s] Insurance (Third Party Risks) Act to pay the judgment awarded to the Claimant.

(3) The learned judge failed to understand that the Applicant's right to intervene in the claim to set aside the [default] judgment was independent of any right the defendant may have.

(4) The learned judge failed to consider that the purpose of the contractual provision was to preserve the right of the insurer to protect its own interest where an insured/Defendant was unable to act due to circumstances beyond his control.

(5) The learned judge failed to appreciate that the insurer could in its own name intervene in the claim for the purpose of setting aside a [default] judgment against the Defendant.

(6) The learned judge failed to appreciate that the insurer did not need to act in the name of the Defendant or give notice of the application to intervene to the Defendant since it was only seeking to set aside the default judgment and did not intend to file a defence to the claim.

(7) The defendant would not have been negatively affected by the application and it was therefore unnecessary to serve notice on him.

(8) The judge failed to recognize that notice to the Defendant was an impossibility since he was deceased.

(9) The judge refused to exercise her case management powers under rules 26.2 and 26.9 of the Civil Procedures Rules to allow service of the Notice of Application for Court Orders on the Defendant and/or his estate if deemed necessary so that the substantive application could be heard.

(10) The judge refused to exercise her case management powers to consider the application under rule 42.12 of the Civil Procedure Rules.

> (11) The learned judge failed to exercise her case management power under rule 13.2 (2) of the Civil Procedure Rules and the inherent jurisdiction of the court to set aside the default judgment which was blatantly irregular."

Issues

[28] This appeal raises two principal issues for determination. The first is whether the appellant had a right to intervene in the claim in its own name, and without giving notice to the defendant or his estate (grounds 1-8). The second issue is whether the learned judge was correct in refusing to exercise her case management powers under rules 26.2; 26.9; 42.12; and 13.2(2) of the Civil Procedure Rules 2002 ('CPR') (grounds 9-11).

Issue #1: whether the appellant had a right to intervene in the claim in its own name, and without giving notice to the defendant.

[29] Although the applicant desired to intervene under rule 13 of the CPR, which deals with applications to set aside default judgments, it is Part 19 of the CPR that provides for the addition and substitution of parties after proceedings have been commenced. The relevant part of rule 19 is rule 19.2(3) which is cited below:

> "19.2(3) The court may add a new party to proceedings without an application, if –
>
> a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

The English equivalent is captured in Stuart Sime's A Practical Approach to Civil Procedure 11th edition, at para 17.60. According to the learned author:

> "Under CPR, r 19.2(2), a non-party may intervene and be added as a party on the ground either:

a) that the presence of the intervener before the court is desirable to ensure that all matters in dispute can be resolved; or

b) that there exists a question or issue between the intervener and an existing party which it would be desirable to determine at the same time as the existing claim."

[30] The learned author gives three examples where the court's discretion to allow a person to intervene may be exercised. One of those examples is apposite to the present appeal. That is, cases in which the intervener's legal, property, or financial rights will be directly affected. The authority relied on for that example is **Gurtner v Circuit and Anor** [1968] 2 QB 587, a decision of the English Court of Appeal.

[31] In **Gurtner v Circuit**, the defendant could not be found for service of the writ in an action where the claim was for personal injuries arising from a running-down accident. The claimant obtained an order for substituted service on an insurance company from the master. Subsequently, the Motor Insurers' Bureau applied to be added as a defendant, under RSC Ord 15, rule 6(2)(b), which is similarly worded as rule 19.2(3) of the CPR, as they might be liable in damages to the claimant and to otherwise challenge the claim. The master allowed the bureau to be added. The claimant appealed to a judge who set aside the master's order. The bureau appealed to the Court of Appeal.

[32] In a unanimous decision, the Court of Appeal restored the master's order adding the bureau as a defendant. Lord Denning MR, at page 595, after quoting from the rule just cited, went on to say:

> "… It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to 'be effectually and completely determined and adjudicated upon' between all those concerned in the outcome."

[33] Diplock LJ (as he then was), in his concurring judgment, noted that the legal obligation of the bureau (enforceable in the first instance by the Minister and collaterally by the plaintiff) was not the same as an ordinary insurer under the Road Traffic Act, 1960. In the case of the latter, the obligation to satisfy the judgment debt is statutory and directly enforceable against the insurer. In any event, Diplock LJ conceptualized the application to intervene as an expression of the rules of natural justice. At pages 602-603, Diplock LJ said:

> "Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, … effectually and completely 'adjudicated upon' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third-party liability policy give to the insurer the contractual right to conduct the defence of the running-down action in the name of the assured ..."

In Diplock LJ's view, at page 603, as long as the liability to satisfy the judgment is legally enforceable against the third party, "the court has a discretion to add that person as a party and ought normally to exercise its discretion by granting the application to be added".

[34] The principles in **Gurtner v Circuit** were considered and applied by this court in **Jamaica Citizens Bank Limited v Dyoll Insurance Company Limited and Leon Reid** (1991) 28 JLR 415 ('**JCBL v Dyoll'**). That was an appeal against the order of the master refusing the appellant mortgagee's application to intervene. The application before the master was made on the ground that, as mortgagee, its rights and interest in the subject property would be adversely affected. Although **JCBL v Dyoll** was decided under section 100 of the now repealed Judicature (Civil Procedure Code) Law, it remains good law as the change in the wording of the modern rule is not substantive.

[35] Then, as now, the rule contemplates two situations. Under paragraph (a) the addition of the new party is allowed to facilitate the resolution of all matters in the dispute; that is, the whole dispute. On the other hand, paragraph (b) aims to add a new party to allow the court to resolve a specific issue connected to the matters in dispute. The intent of rule 19.2(3) is compendiously expressed in the language of the repealed section 100, "to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter".

[36] In **JCBL v Dyoll**, as in this case, the issue is whether the situation contemplated under paragraph (b) is pertinent to this appeal. Carey P (Ag) (as he then was) cited the English rule referred to above, as well as the passage already quoted from the judgment of Lord Denning MR, reviewed the authorities then explicitly adopted the liberal interpretation of the rule advanced by Lord Denning MR. At page 417, Carey P (Ag) said:

> "... there need be no cause of action between the intervener and one of the parties; it is enough that the intervener has some direct interest in the subject matter. In the instant case, the party who wishes to be joined is the mortgagee of the premises. In my opinion, the mortgagee has a far more substantial interest in the outcome of the action ..."

It is, therefore, clear that the proposition that a third-party with a financial interest in the outcome of a claim is entitled to intervene, is not a matter in the frontier development of the law. In this case, the learned judge accepted this but found that the appellant's basis was unsupported by the evidence. Was the learned judge plainly wrong or, to adopt the language of Viscount Simon in **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 at page 584, was her decision "unsound"?

[37] A discussion of this issue will, of necessity, require a review of the learned judge's finding of fact that the appellant "[did] not have a right to intervene as the policy on which it asserts that right was not entered into between it and the then Deceased [sic] Defendant". In light of that, it is appropriate to remind myself of the well-established principle of appellate restraint when called upon to set aside a judge's findings of fact.

To this end, I reproduce Lord Thankerton's three bases upon which an appellate court may so interfere in **Watt (or Thomas) v Thomas**, at page 587:

> "(i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (ii) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because, it unmistakeably so appears from the evidence, may be satisfied that he has not seen and heard the witnesses, and the matter will then become at large for the appellate court."

These principles have been accepted and applied by both the United Kingdom Privy Council and this court in a number of decisions (see, for example, **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 23 JLR 35, at page 39; and **Dr Veon Wilson v Victor Thomas** [2020] JMCA Civ 28, at paras. [67]-[68]). It is to be noted, however, that the application in the court below was supported by affidavit evidence which, in so far as was material to the application, was undisputed.

[38] With those principles in mind, I turn to the learned judge's findings and the evidence that was before her. In my opinion, the notice of application for court orders filed on 11 March 2020, sought three discreet orders from the learned judge, two of which demanded independent consideration. The first was the question of intervention. The basic factual premise on which the application to intervene was made was that the appellant was the insurer at the date of the accident giving rise to the claim. The respondent asserted this position, most notably, by the service of the notice of proceedings upon the appellant. Although the appellant had been, to be unforensic for a

moment, at ease in Zion until the service of the fixed date claim form, it now came forward and acknowledged the truth of the respondent's assertion in that regard.

[39] This takes me to the learned judge's predicate finding that the insurance contract was with "someone other than the nominal defendant". This became the focal point of Mrs Campbell's attack upon the learned judge's order. Mrs Campbell argued that this conclusion is misconceived and drew the court's attention to the affidavit evidence of Ms Ava Payne, to which the policy documents were exhibited (as set out above). Learned counsel argued that the facts stated by Ms Ava Payne were not impugned. That is, the situation when the claim was filed and up to the time of this appeal, was that there was one contract of insurance in Anthony Alexander Powell's name; and, in so far as the respondent is aware, she is suing under that contract of insurance.

[40] Therefore, counsel agued, one contract was issued to Anthony Alexander Powell and it is by that contract that the appellant is seeking to intervene. In Mrs Campbell's submission, the learned judge erred by focusing too much on how the contract came about, rather than accepting the existence of the contract. These submissions resonate with the court.

[41] Respectfully, the learned judge misconstrued the evidence on the point. The affidavit evidence disclosed an insurance contractual relationship with Anthony Alexander Powell that was unbroken from 25 August 2010 to 4 October 2016, save for the lapsed period of August 2014 to 3 October 2014. Of critical importance, the insurer was not trying to avoid or repudiate the contract of insurance, as the appellant's counsel submitted. Therefore, I think it of little moment at whose instance the renewal was effected for the period 5 October 2015 to 4 October 2016, after Anthony Alexander Powell's death. The fact is that the appellant was legally exposed at the date final judgment was entered, having approved the renewal and issued a certificate of insurance.

[42] Section 18(1) of the Motor Vehicles Insurance (Third-Party Risks) Act puts the liability of the appellant in these circumstances beyond doubt. The section is extracted below:

> "If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment, the amount covered by the policy or the amountof the judgment, whichever is lower, in respect of the liability, including any amount payable in respect of costs and any sums payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

[43] Therefore, it is clear, as Lord Denning MR opined in **Gurtner v Circuit**, the determination of the dispute between Anthony Alexander Powell and the respondent would "directly affect [the appellant] in [its] legal rights or in [its] pocket" (see para. [32] above). Or, as Carey P (Ag) said **JCBL v Dyoll**, the appellant has some direct interest in the subject of the claim (see para. [36] above).

[44] More to the point, as Diplock LJ observed in **Gurtner v Circuit**, in contrasting the position of the Motor Insurers' Bureau and the ordinary insurer, the appellant's obligation to satisfy the judgment debt is a statutory obligation which is, evidenced by the issue of the fixed date claim form, directly enforceable against the appellant. In these circumstances, Diplock LJ's appeal to the principles of natural justice is irresistible. I would also reiterate his entreaty that in these circumstances, the discretion to add a person who stands in the position of the appellant ought normally to be exercised affirmatively.

[45] In **Williams v ICWI**, as in this case, it was the insurer who sought to intervene and set aside a default judgment. On the first appeal, the complaint was that the

respondent insurance company had no standing to make the application to set aside the default judgment since it had not first obtained permission from the court to do so. This court, relying on **Jacques v Harrison** and **Windsor v Chalcraft**, decided that the intervention of someone in the position of the respondent insurance company is as of right. Due to the contractual relationship which sprang from the Motor Vehicles Insurance (Third-Party Risks) Act, the respondent insurer could intervene on its own and in its own name. Rowe P's articulation of the point, at page 173, is worthy of repetition:

> "… an Insurance Company in the position of the respondent's had a right to intervene in the action, and not just a liberty to do so. Consequently the respondent's [sic] could intervene as of right to seek leave to set aside the default judgment. In other words, the Court was of the view that a person in the position of the respondent's [sic] who had a contractual relationship with the defendant governed by the Motor Vehicle Insurance (Third Party Risks) Act, could on its own motion and its own name intervene in a suit, if there was a possibility that such an Insurance Company could be liable on a judgment by virtue of section 18(1) of the said Act. The Insurance Company did not as a first stage require leave of the Court to intervene and as a second stage, such leave having been granted, to then apply to have the judgment set aside."

Accordingly, when the case returned to the court below, the default judgment (which was regularly obtained) was set aside upon the respondent insurance company's application.

[46] On the second appeal to this court, the primary question was the addition of the respondent insurance company as a defendant in the claim to which it was a stranger. From a reading of Rowe P's judgment and the submissions of counsel for the appellant, it appears the respondent insurers wished to be added to the claim to contest grievances which it had with its insured. This, Rowe P found to be absolutely forbidden. The insurers could have but a singular interest in the original claim, namely, to show that the defendant was not liable or, if liable, to ensure the damages awarded were appropriate.

[47] This was the necessary backdrop to the decision to modify the order of the court below, by rescinding the order for their joinder. Rowe P drew a distinction between

exercising a right to intervene to set aside a default judgment and being added as a party to the original claim. At page 178, the learned jurist said:

> "The stranger, such as the respondents, who obtained an interest by virtue of obligations prescribed by Section 18 on the Motor Vehicles Insurance (Third-Party Risks) Act can apply in the name of the defendant for leave to set aside the default judgment, or can apply in his own name for a similar Order but thereafter can only defend the [claim] in the name of the defendant on the record. But I do not think that the respondents can be permitted to raise a defence peculiar to itself which has absolutely nothing to do with the original [claim], which is not available to the defendant in the [claim] and therefore cannot be raised by such defendants. It is one thing to have a judgment set aside so that the questions in issue between the parties can be fairly tried but quite another thing to contend that collateral issues irrelevant to the [claimant's] claim against the defendants can be litigated as part of the original [claim]. I do not think that a person who has a right to intervene to set aside a default judgment necessarily has the further right to be added as a party to the [claim], e.g. as a defendant, and in the instant case I can see no basis on which the addition of the respondents as a defendant can be justified ..."

[48] It is important to note that the premise upon which Rowe P set aside the order for joinder of party had nothing to do with how the application was made; that is, whether in the name of the insurer or the defendant's. The not so subtle point of **Williams v ICWI** is that the insurer was allowed to intervene and successfully apply to have the default judgment set aside, although it had not complied with the accepted procedure laid down in **Jacques v Harrison** and followed in **Windsor v Chalcraft**. That is, although the insurer had not served the defendants, which the court considered a serious, but non-fatal, irregularity, the hearing on the summons in the court below was allowed to continue, as the defendants could still have been allowed audience, if they desired it, through an adjournment.

[49] Notwithstanding that accommodation in **Williams v ICWI**, the court, at page 173, expressed itself as "being in respectful agreement with the decisions in both cases" (**Jacques v Harrison** and **Windsor v Chalcraft**). This means, although the appellant

has a right to intervene (**Gurtner v Circuit** and **JCBL v Dyoll**); the procedure by which it does so is dictated by **Jacques v Harrison** which this court explicitly endorsed in **Williams v ICWI**.

[50] The complaint in the appellant's first ground of appeal is that the learned judge did not give effect to section X(5) of the contract of insurance. This section, the appellant contends, entitles it to intervene in the claim in its own name. Section X(5) reads:

> "No admission offer promise or payment shall be made by or on behalf of the insured without the written consent of the Company **which shall be entitled if it so desires to take over and conduct in its name the defence or settlement of any claim or to prosecute in its name for its own benefit any claim for indemnity or damages or otherwise** and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the insured shall give all such information and assistance as the Company may require." (Emphasis added)

[51] A similar provision came up for judicial consideration in **Vandyard Dacres and Carla Dacres v Tania Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 103/2000, judgment delivered 11 April 2003 ('**Dacres v Reid'**). In that case, the respondent attempted to move this court to strike out the appellant's notice and grounds of appeal. It is sufficient to advert to two of the grounds of the motion. Ground (a) alleged that the appeal was filed on the instructions of the insurers in a purported exercise of its subrogation rights and ground (c) asserted that the appeal was filed without the consent of the defendants/appellants or an order of the court. Approximately five days before the filing of the notice and grounds of appeal, the insurers had advised the respondent's attorney-at-law that their insureds could not be found.

[52] The essence of the argument in support of the motion was that the insurers had no right to file the appeal, save by subrogation, which did not arise as they had not indemnified the insured. Further, their right to intervene under the Motor Vehicles Insurance (Third-Party Risks) Act did not extend to appellate proceedings. Counsel for the insurers conceded that subrogation did not arise. He, however, cited para. 2 of the

conditions of the policy contract (similar to section X(5)) and argued that it provided the insurers sufficient authority to conduct proceedings, from its defence to appellate conclusion. This court agreed that:

> "… The insurers were entitled to do so, in light of the contract of indemnity without resort to the principle of subrogation ..."

The appellants in that case submitted that since the court allowed the prosecution of the appeal to go ahead without notice to the insureds, implicitly, the court ruled that the right of the insurers to act was independent of notification to the insureds.

[53] Among the cases relied on by respondent in **Dacres v Reid** in its failed motion, was **Williams v ICWI**. Although the ground covered in **Williams v ICWI** was not again traversed in **Dacres v Reid**, it cannot be said that the decision in the latter was arrived at without bearing the applicable principles in mind (*per incuriam*), since the court was referred to it. While the report of the case does not specifically say so, it does appear that the appeal had been filed in the name of the insureds. If that is correct, by virtue of condition two in the policy contract, the insureds would have previously bound themselves to the insurers using their name. This would fall within the ambit of Bowen LJ's first category in **Jacques v Harrison**, which does not require notice to the defendants (insureds). In short, the principle to be extracted from **Dacres v Reid** is that the ambit of condition two allowed the insurers to take over and conduct the proceedings in the name of the defendant, even on appeal.

[54] **Ramsook v Crossley** [2018] UKPC 9, a decision of the United Kingdom Privy Council ('UKPC') from the Court of Appeal in Trinidad and Tobago, is to a similar effect. In that case, the Mrs Crossley's insurers, apparently without her knowledge and consent, entered an appearance on her behalf in a personal injury claim, followed by the filing of a defence which admitted liability. A sum representing the statutory policy limit $1,000,000.00), though not the policy contract limit $1,500,000.00) was paid into court by the insurers. The attorney-at-law acting on behalf of the insurers made an offer to settle the claim up to the statutory limit, which was rejected. Damages were eventually

assessed in the sum $3,614,197.90. and payment out of the $1,000,000.00 ordered. Mrs Crossley became aware of these events through a letter to her from Mr Ramsook's counsel. Steps were taken subsequently to have her declared bankrupt.

[55] Mrs Crossley successfully applied to have the judgment set aside, along with all succeeding processes, on the basis that she was never served with the claim documents. That order was upheld on appeal to the local Court of Appeal. On further appeal to the UKPC, reliance was placed on clause 15 in the policy which was in terms similar to condition two in **Dacres v Reid**. Although their Lordships disapproved of the insurers' conduct of the matter, vis-a-vis Mrs Crossley, in the opinion of Lord Mance, at para. 23, the insurers were "entitled under clause 15 to take over and conduct the defence and settlement of that claim".

[56] In both **Ramsook v Crossley** and **Dacres v Reid**, under the relevant policy condition the insurer was "entitled if it so desires to take over and conduct **in the insured's name** the defence or settlement of any claim for indemnity or damages" (my emphasis). Therefore, as was said above, as a matter of procedure, the insurer would be acting in the name of the insured, and thereby obviating the need for notice to the insured.

[57] In this case, however, section X(5) is different. That is, whereas the condition in **Ramsook v Crossley** permitted the insurer to proceed in the name of the insured, in this case the condition speaks to the insurer proceeding in its name. Worded as it is, the condition in this case falls squarely within Bowen LJ's second category in **Jacques v Harrison**. Therefore, as the learned judge found, and as Mrs Campbell for the appellants appears to concede, procedurally, service upon the defendant or his estate was a requirement of the application. Mrs Campbell demonstrated her alertness to the necessity of giving the notice by highlighting the financially ruinous position in which the insurer in **Ramsook v Crossley** placed that defendant by proceeding all the way to final judgment without any word to the defendant.

[58] In light of that acknowledgment, Mrs Campbell stated that the death of Anthony Alexander Powell distinguishes this case from the authorities cited. However, counsel did not tarry along that path. From the premise in **Jacques v Harrison**, underlined by Rowe P's observation in **Williams v ICWI**, at page 175, that the requirement of notice redounds to the protection of the defendant, Mrs Campbell submitted that in this case the defendant would not be prejudiced. In this submission, the application to intervene was made under rule 13.1(2) solely to set aside the default judgment which was irregularly obtained. The appellant, learned counsel argued, was not seeking to file a defence. The consequence of this posture is that there would not be any prolonged litigation. Indeed, counsel urged, there would be no judgment which translates to no prejudice.

[59] Mr Clarke in his written submissions, addressed grounds six, seven and eight together under the heading, "notice arguments". Learned counsel opined that these grounds stem from the appellant's "firmly held belief that [they] have a contractual right to intervene". This, he submitted, the learned judge in the exercise of her discretion and based on the facts before her, did not blindly accept. It was counsel's conclusion that the appellant has failed, factually and legally, to show that the learned judge erred. Respectfully, these submissions do not assail the submissions of counsel for the appellant.

[60] In **Ramsook v Crossley**, where the UKPC lambasted the insurer for wholly keeping the insured in the dark, the similar policy condition entitling the insurer to act in the name of the insured, imposed no duty of notice as it fell under Bowen LJ's first method of procedure. In my view, there is a stronger case to adhere to the requirement for notice to the defendant, when, as here, the application to intervene is in the intervener's own name. I would therefore hold that although the appellant had a right to intervene, and to do so in its own name, a corollary to the exercise of that right was service upon the defendant or his estate. On the authority of **Williams v ICWI**, the application suffered from the irregularity of not making the defendant, or his estate, a party to the application.

The learned judge was therefore correct in this finding. That takes me to the second issue.

Issue #2: Whether the learned judge was correct in refusing to exercise her case management powers

[61] Before embarking upon an analysis of the issue, it is appropriate to advert to the parameters within which an appellate court may set aside a decision arrived after the exercise of a discretion in the court below. An appellate court is cautioned to defer to the judge's exercise of discretion and refrain from interfering with the decision exercise merely because members of the court would have exercised the discretion differently: **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042. The principles in **Hadmor Productions Ltd v Hamilton** have been accepted and applied by this court in a number of its decisions, perhaps most notably **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 (**'Attorney General v John McKay'**). Morrison JA (as he then was), relying on **Hadmor Productions Ltd v Hamilton**, at para. [20], said:

> "This court will therefore only set aside the exercise of a discretion by a judge … on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it.'"

It is, therefore, through those lenses that the learned judge's exercise of her discretion will be reviewed.

[62] Learned counsel for the appellant did not seek to argue that the defendant, or his estate, was not entitled to notice. Rather, learned counsel's contention was that, citing **Jacques v Harrison**, a procedural breach does not mean that the application has to be refused. Learned counsel pitched her submissions along two intersecting lines. First, the CPR clothed the learned judge with the power to put right procedural breaches. Rule 26.9(3) was underlined for our consideration. Additionally, **Jamaica Defence Force Co-**

operative Credit Union v Georgette Smith [2019] JMCA Civ 7 was cited ('**JDF Co-op v Smith**').

[63] The second track of the submission concerned the court's inherent jurisdiction. In Mrs Campbell's submission, the court has an inherent jurisdiction to deal with cases justly. A part of this inherent jurisdictional terrain, is service. As a general proposition, the absence of service is a breach of the principles of natural justice as a party could become exposed to liability in the face of ignorance that proceedings had been instituted. In this case, however, counsel submitted, notwithstanding that there was no service, since the court was faced with the death certificate, and an affidavit of service alleging service on a posthumous date, that should have indicated a blatant irregularity. It was therefore open to the learned judge, counsel contended, to use her inherent jurisdiction to deal with that substantive matter, rather than dismissing the application simply on the basis that the insurer had no right to intervene.

[64] In his written submissions, Mr Clarke pointed to rule 11.13 as a hurdle the appellant had to overcome. The appellant, he argued, had to show that it was incumbent upon the learned judge to make an order which was not sought in the notice of application. While conceding that the learned judge had the discretion under this rule to order service, no oral application was made to that effect. Reliance was placed on **Joy Phillips v Donovan Phillips** [2015] JMSC Civ 20 ('**Phillips v Phillips**').

[65] The learned judge accurately characterized the failure to serve the defendant as a procedural breach; and accordingly, was not always fatal. The learned judge, however, refused to entertain an invitation to first permit the appellant to intervene then consider the application to set aside on a subsequent date. The bases upon which the learned judge declined, as it were, to come to the aid of the appellant, are as follows: (a) in cases where the procedural breach was remedied, the nominal defendants showed disinterest in the claims which left the insurers without a remedy, as in **Jacques v Harrison**; (b) in **Williams v ICWI**, the defendants themselves had failed to have the default judgment set aside and were aware of, and supported the application to intervene; (c) unlike in

Jacques v Harrison, the appellant has other recourse to challenge apart from the present application; (d) the applicant was unheedful of the court's advice regarding the absence of service upon the defendant; and (e) the appellant was less than forthcoming in making relevant disclosures.

[66] Before examining the learned judge's reason's for refusing to take the application on a bifurcated track, as she was urged to do, it is appropriate to refer to the overriding the objective of the CPR. These rules replaced rules under the Judicature (Civil Procedure Code) Law which had been in place since 1 June 1889. The framers of the CPR were therefore anxious to project their hope and aspiration of ushering different ways of conducting litigation. Therefore, rule 1.1(1) is declaratory of that hope and aspiration. It reads, "[t]hese Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly". According to the learned author of A Practical Approach to Civil Procedure 11th edition, at para. 3.28:

> "The main concept in CPR, r.1.1, means that the primary concern of the court is doing justice. Shutting a litigant out through a technical breach of the rules will not often be consistent with this, because the primary purpose of the civil courts is to decide cases on their merits, not to reject them through procedural default ..."

The learned authors of Commonwealth Caribbean Civil Procedure 3rd edition, at page 5, are of a similar view. Two of the examples provided there in which claims should not be stymied for want of proper form are worth mentioning: where a party commences with the incorrect form, or relies on a wrong statutory provision as in **Thurrock Borough Council v Secretary of State for the Environment** (2000) The Times, 20 December.

[67] When the learned judge's exercise of her discretion is viewed against the background of these principles, Mrs Campbell's submissions on the court's inherent jurisdiction assume much force. To be fair to the learned judge, the decision to refuse the application to intervene had substantially been made when this issue arose. But, it appears, had the contractual determination been otherwise made, the application would

have been refused in any event, for the appellant's failure to serve the estate of Anthony Alexander Powell.

[68] I will now examine the learned judge's reasons for the negative exercise of her discretion. Respectfully, reasons (a) and (b) (see para. [66] above) were properly part of the factual matrix of those cases. In that vein, they cannot be elevated to the standard of principles of general application, and subsequently become the touchstone by which succeeding cases are judged. A more expansive reading of Rowe P's decision in **Williams v ICWI** makes it clear that the basis for allowing the application to continue, in the face of the failure to serve the defendants, had more to do with the competence of the lower court to adjourn to give the defendants audience, than with their awareness and support of the application.

[69] Equally flawed is the third reason ((c) above), that the appellant has other recourse. Two reasons may be shortly stated. Firstly, the recognition of the right of a party in the position of the appellant to intervene is not circumscribed by the absence of any other recourse. It is not a right of last resort. It is simply a right which a person in the position of the appellant has, with the corresponding liberty to exercise it, within the procedural circumscription of **Jacques v Harrison**. Secondly, as a matter of law and logic, it is a difficult proposition to sustain in private law that a right should be denied on the premise that the person may avail himself of other rights.

[70] This takes me to the learned judge's fourth reason ((d) above). This reason appears to be a veiled criticism of counsel appearing below for either a lack of astuteness, or humility, to act upon the court's concerns regarding the omission of service. However well-founded this criticism may be, I do not think it a sufficient basis upon which to avoid giving effect to the overriding objective of the CPR.

[71] Finally, I examine the finding that the appellant was less than forthcoming. Counsel for the appellant went some distance down the road of a concession, in submitting that the manner in which the information was provided "muddied the water". However, the

central issue before the learned judge was whether the appellant had a right to intervene to set aside the default judgment. With all due deference to the learned judge, that inquiry did not encompass an investigation into the identity of the person at whose instance the renewal of the policy was effected. As was submitted by counsel for the appellant, there was sufficient evidence, particularly from Ms Ava Payne, that established the fact of an existing insurance contract from which the right to intervene was claimed. The identity of that person could not have changed the factual existence of the contract of insurance. Neither could the discovery of that information affect the appellant's exposure under the policy which gave them a right based on the decision in **Gurtner v Circuit** or under the Motor Vehicles Insurance (Third-Party Risks) Act to intervene. In short, the learned judge took into her consideration irrelevant matters.

[72] I turn now to the submissions concerning the learned judge's case management powers. Part 26 of the CPR gives the court wide case management powers. Rule 26.9 bears the subheading "General power of the court to rectify matters where there has been a procedural error" and is in the following terms:

> "1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> 2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> 3) Where there has been an error of procedure or a failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> 4) The court may make such an order on or without an application by a party."

[73] Rule 26.9(3) is the applicable rule in this case. Four preliminary points are noteworthy. Firstly, the powers given to the court under this rule are exercisable only in the absence of specified consequences for the want of compliance with the particular rule, practice direction or court order. Secondly, by virtue of rule 26.9(4), the court is

given power to act under this rule either on its own or upon the application of a party. Thirdly, on a plain reading of rule 26.9(3), the court is called upon to exercise its discretion by the use of the word "may"; the rules being a statutory instrument, the ordinary rules of statutory interpretation apply (see Blackstone's Civil Practice 2019 The Commentary, at para. 1.14). Fourthly, whenever the court is interpreting or exercising any power under the rules, the court is enjoined to give effect to the overriding objective (see rule 1.2).

[74] At para. [23] of her judgment, the learned judge noted that while the appellant had served the respondent, neither the person who contracted for the renewal of the policy nor the defendant's (Anthony Alexander Powell) estate had been served. In essence, the appellant had failed to make either of the latter two parties a respondent to its notice of application. As was said earlier, **Jacques v Harrison** required the defendant to be served, since the appellant application was made in its name. Therefore, the appellant was required to make, at the very least, the estate a respondent to its application and, in accordance with rule 11.8(1) give notice to the estate when it served the respondent. The appellant's failure in that regard placed it in breach of the requirement for service.

[75] A similar situation arose in **JDF Co-op v Smith**, referred to us by the appellant's counsel. In brief, the respondent in that case filed a claim for administrative relief, utilising Form 1, described as a "claim form", instead of Form 2, described as a "fixed date claim form". The latter was a requirement of rule 56.9(1). Additionally, rule 56.11(3) that made service of the claim form upon the Attorney General mandatory, was not complied with. Both were acknowledged to be procedural errors. In the face of an application to strike out the claim for these breaches, the decision of the learned judge at first instance to refuse the application, based on his powers under rule 26.9 to rectify matters, was upheld.

[76] McDonald-Bishop JA referred to paras. [20], [21] and [22] of the learned judge's judgment, then went on to say, at para. [38]:

> "The learned judge was correct in his assessment at paragraphs [20] and [22] that the respondent had run afoul of the requirements of Part 56. He was also correct in stating that he was empowered, in furthering the overriding objective to deal with the case justly, to actively manage it, which would include, among other things, the power to rectify matters where there had been a procedural error. In short, the learned judge was correct in his declaration that he was empowered to invoke his general powers of case management, particularly those conferred on him by rule 26.9 of the CPR, in treating with error in procedure."

In this case, as was submitted, the learned judge was similarly cloaked by the CPR to exercise her discretion to allow rectification of the procedural error.

[77] Rule 11 is silent on the question of sanction for non-compliance. By that token, the court's powers under rule 26.9(3) were triggered. The learned judge had the power to part hear the application (as she did for other reasons), it having commenced on 30 September 2020, and direct that service be effected on the estate of the defendant. Instead of advising the appellant of "the court's concern about the lack of involvement of the Defendant's estate", the learned judge had the power to make that advice the subject of instructions or an order. The exercise of either option did not depend on the position of the appellant, as rule 26.9(4) allowed her to act on her own initiative. Blackstone's Civil Practice 2019 The Commentary (cited at para. 72), at para 32.25 says:

> "As part of the ethos of active case management, the courts are encouraged to exercise their powers on their own initiative where this is appropriate."

Juxtaposed with the enjoinder to deal justly with cases, it appears that taking the initiative to adjourn to allow service on the estate was a course that met with the justice of this case, rather than refusing the application. In this vein, the learned judge could have also considered appointing someone to represent the estate of the defendant for the purpose of the proceedings, under rule 21.7 of the CPR, instead of dismissing the application.

[78] In passing, I make a brief reference to Mr Clarke's submission on rule 11.13. Under that rule, "[a]n applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission". The situation in **Phillips v Phillips**, to which we were referred, is palpably different from this case. In that case, the learned judge considered that the injunctive order being sought was framed so wide that it was neither proper nor just to grant it. It was against that background that the learned judge pointed to the constraints of rule 11.13. In this case there was no question of the order that the appellant sought in its application for court orders. Instructing or ordering service upon the estate in the exercise of case management powers, on even a restrictive interpretation, could properly be said to fall within the contemplation of rule 11.13 as an order.

Conclusion

[79] So then, in my opinion, the learned judge was plainly wrong in finding that the contracting party was someone other than the nominal defendant and therefore the appellant had no right to intervene. Equally, without being ungracious, the learned judge injudiciously exercised her discretion when she refused to grant the appellant an opportunity to remedy the procedural breach. The bases of the learned judge's refusal, compendiously stated, were incorrect for having been either irrelevant or inappropriately elevated from distinguishing facts to principles.

[80] In respect of the learned judge's dispositive finding of fact (no contract between the insurer and insured), the evidence before her cannot reasonably be said to justify the conclusion at which she arrived. That conclusion was not arrived at on conflicting testimony after seeing and hearing witnesses. As was said above, the evidence was all on affidavit. Consequently, in the assessment of that evidence, the learned judge enjoyed no advantage of which this court was deprived (**Watt v Thomas**). As it concerns the learned judge's exercise of her discretion, as I endeavoured to show, was moored upon grounds which were demonstrably wrong (**Attorney General v John McKay**). Accordingly, we were constrained to make the orders set out at para. [2] above.

LAING JA (AG)

[81] I too have read the draft reasons for judgment of my brother Brown JA. I agree and have nothing to add.