THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2017/0436

BETWEEN:

(1) FRANCIS DARIAH
(2) JEANETTE DARIAH

Claimants

and

EASTERN CARIBBEAN INSURANCE LIMITED

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mrs. Lydia Faisal for the Claimants
Ms. Patricia Augustin for the Defendant

2018: April 23;
June 29.

JUDGMENT

[1] **CENAC-PHULGENCE J**: The claimants, Francis Dariah and Jeanette Dariah ("the Dariahs"), husband and wife, filed a fixed date claim against the defendant, Eastern Caribbean Insurance Limited ("ECIL") for an order setting aside the arbitration award dated 29th May 2017 made by arbitrator, Mr. Dexter Theodore ("the Arbitrator"). The claim is filed pursuant to section 19 of the **Arbitration Act**[1] ("the Act").

[1] Cap. 2.06 of the Revised Laws of Saint Lucia, 2008.

[2] The gravamen of the claimants' complaint is that the arbitrator misconducted himself in the conduct of the proceedings when he: (1) sought to deal with an issue which had not been pleaded; and (2) received from the defendant the claimants' share of the fees without informing the claimants, which would lead the fair-minded and informed observer to conclude that there was conflict of interest and the real possibility that the Arbitrator was biased when he rendered his decision of 29th May 2017.

[3] ECIL filed a defence to the claim and denied that there was any misconduct on the part of the Arbitrator or in the conduct of the proceedings. ECIL alleged that there was no evidence upon which an allegation of bias could be sustained. ECIL denied that the fact that the Arbitrator received the claimants' portion of the fees from them amounted to a conflict of interest. ECIL filed a counterclaim in which it seeks to recover the sums paid to the third party pursuant to section 9 of the **Motor Vehicles Insurance (Third Party Risks) Act**[2] and the sum of $8,970.00 representing the final instalment of the fees due to the Arbitrator which was paid by ECIL.

Background Facts

[4] The claimants' minibus was insured with ECIL for the period 30th April 2013 to 29th April 2014. During that period, the minibus was involved in an accident and sustained damage, as well as a vehicle belonging to a third party and injuries were also sustained by third parties. ECIL denied liability under the policy on the basis that the driver was not an authorized driver and that the policy had been cancelled for non-payment of premiums. As a result of ECIL's denial of liability under the policy, the Dariahs filed a claim against them. That claim was referred to arbitration by the High Court judge. As part of the process, the parties and their legal practitioners signed Terms of Appointment of the Arbitrator and also entered into an arbitration agreement which contained the terms of reference for the Arbitrator. The arbitration took place on 12th December 2015 and the parties were

[2] Cap. 8.02, Revised Laws of Saint Lucia 2008.

required to submit closing submissions. The Arbitrator delivered his award on 29th May 2017.

Issues

[5] The sole issues for the Court's determination are: (1) whether the Arbitrator misconducted himself or the proceedings when he decided an issue which had not been pleaded and (2) whether the Arbitrator was biased.

The Applicable Law

[6] Section 19 of the Act states as follows:

> "19. Power to set aside award
> (1) Where an arbitrator or umpire has misconducted himself or herself or the proceedings, the Court may remove him or her. However, before making any such order the arbitrator or umpire may, if the Court so directs, be given an opportunity of showing cause against such order.
>
> (2) Where an arbitrator or umpire has misconducted himself or herself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside."

[7] The Act does not define misconduct and so one must look to case law to determine whether there has been misconduct on the part of an arbitrator in the given circumstances of a case. The Privy Council in **National Housing Trust v YP Seaton & Associates Company Limited**[3] in relation to the term misconduct stated as follows:

> "As Atkin J remarked with regard to the word "misconduct" in Williams v Wallis and Cox [1914] 2 KB 478, 485: "That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."
>
> Or as Russell on Arbitration (20th ed (1982)) put it at p 409:
>
> > "Misconduct' is often used in a technical sense as denoting irregularity, and not any moral turpitude. But the term also covers cases where there is a breach of natural justice. Much confusion

[3] [2015] UKPC 43 at para. 51.

> is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside."

[8] There must be more than a mere error of law or fact. As Sir John Donaldson MR in **Moran v Lloyd's (A Statutory Body)**[4] put it:

> "For present purposes it is only necessary to say, … that the authorities established that an arbitrator or umpire does not misconduct himself or the proceedings merely because he makes an error of fact or law. …"

[9] In the Jamaican case of **R.A. Murray International v Brian Goldson**,[5] the Court said:

> "…"the expression "misconduct" is of wide import and does not necessarily connote that the arbitrator has been guilty of moral turpitude. It ranges from a fundamental abuse of his position, i.e. "on the one hand, that which is misconduct by any standard, such as being bribed or corrupted, to "mere 'technical' misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure amounts to misconduct". Our Act does not define misconduct, and it is tolerably clear that it is difficult to define exactly what this term means."

Decision on an Un-pleaded Issue

[10] The claimants' contention is that the parties having agreed to be guided by the **Civil Procedure Rules 2000**, the Arbitrator was not entitled to decide matters which (1) were not included in the parties pleaded cases and (2) were not followed through with evidence in their witness statements.

[11] A look at the background facts is important to appreciate the claimants' contention. I will attempt to briefly outline the relevant facts.

[12] By letter dated 2nd November 2012 referring to the vehicular accident which had occurred on 5th October 2012, ECIL advised the Dariahs that they could not accept liability in the matter because (1) at the time of the accident, the vehicle was being

[4] [1983] 1 QB 542 at p. 549F.
[5] Claim No. 2012 CD 0046 at para 19.

driven by someone who was not a named driver under the policy and (2) the policy had been cancelled on 25th September 2012, notice of which cancellation had been sent to them by registered post.

[13] The letter also stated that ECIL had not received the affidavit, authorization letter notarized by a Justice of the Peace along with a copy of picture ID which they had requested on 19th October 2012.

[14] By letter dated 4th December 2012, ECIL wrote to the solicitor for the Dariahs and indicated that it was satisfied that the cancellation of the policy in relation to the Dariahs or termination of their contract was legitimate and as a result ECIL had no authority to provide an indemnity to the Dariahs for the claim which was now being submitted.

[15] The terms of reference which the Dariahs and ECIL signed stated at clause 6 that 'the procedure to be followed in the Arbitration shall be as agreed between the parties and the Sole Arbitrator **in accordance with the Rules of Arbitration attached to the (1) Arbitration Agreement and to the extent applicable (2) the Civil Procedure Rules 2000**'.

[16] The parties also signed an Arbitration Agreement in which it stated as follows:

> "The Claimant and the Respondent are in dispute as to whether the Respondent was entitled to disclaim liability to provide an indemnity to the Claimant under the said Policy of Insurance, for the loss sustained by the Claimant arising from the accident which occurred on the 5th day of October 2012 on the grounds that at the time of the accident:
>
> The Claimant's contention:
> (i) Whether Anthony Felix … driver of the insured vehicle at the time of the accident, was driving the said vehicle contrary to provisions of Clause No. 5 of the policy of insurance at the time of the accident; or whether such qualification was null and void by virtue of Section 11(1)(i) of the Motor Vehicle Insurance (Third Party) Act (the MVIA).

(ii) Whether the policy of insurance which the Defendant alleges was cancelled on 25th September 2012 was in fact cancelled; and if whether such cancellation was in keeping with the provisions and requirements of the MVIA; the applicable principles of contract, and the laws as to service by post?

(iii) Whether a party who claims that there was no policy of insurance in force at a given time, can rely on the arbitration clause within the (non-existing) policy of insurance to determine issues between the parties?

(iv) *What constitutes the making of a claim; and whether this allegation was communicated to the Claimants in the Defendant's letter of December 4th 2012 which contains the reasons for the denial? Is the Defendant estopped from raising that issue?*

Grounds upon which the Respondent disclaims liability:

(i) The vehicle was being driven by Anthony Felix …contrary to the provisions of item 5 of the Certificate of Insurance thereby constituting a breach of the policy of insurance.

(ii) The policy was cancelled on September 25th, 2012 and notice of the cancellation was sent by registered mail to the address of the Claimant and his agent S & A Insurance Brokers Ltd.

(iii) *The Insured Francis Dariah failed to submit a claim to the Respondent for consideration pursuant to section (2) of the General Conditions of the Policy of Insurance."* (my emphasis)

[17] According to the evidence of Mrs. Girard, subsequent to the signing of the terms of reference and arbitration agreement, deadlines for the exchanging of various documents were given. The parties were to serve a list of documents by 9th October 2015; the claimant to deliver its claim to the arbitrator by 16th October 2015; the respondent its reply by 23rd October 2015; the claimant its reply by 30th October 2015; the parties witness statements were to be exchanged by 16th November 2015 and skeleton arguments exchanged and delivered to the Arbitrator by 30th November 2015. The arbitration took place on 12th December 2015.

[18] The Arbitrator in his award dated 29th May 2017, stated as one of the issues for his consideration the following: "Whether the Respondent was entitled to repudiate liability under the policy on the ground that the claimant failed to provide full written particulars of his claim."

[19] The Arbitrator outlined Condition 2 of the policy which stated that 'in the event of an occurrence which may give rise to a claim under the policy the insured shall give notice thereof to the insurer company with full particulars as soon as possible.' The Arbitrator then considered the evidence which had been presented in the witness statement of Mrs. Girard and her answer in cross-examination when it was put to her that Anthony Felix, the driver, had come to her office to report the accident immediately after it happened. In answer, Mrs. Girard had said that Anthony Felix came to notify of the accident and that he came a year later with the claimant to try to fill in the claim form. The Arbitrator appeared to be satisfied that the respondent had been notified of the accident. He went on to consider whether the claimant had provided full particulars and also to explore whether the respondent could have been said to have waived its right to insist on compliance with the obligation to provide full particulars.

[20] The Arbitrator concluded that it was his view that the respondent was entitled to repudiate liability under the policy on the ground that the claimant, in breach of condition 2 of the policy, failed to provide full written particulars of the claim.

[21] The Arbitrator also looked at the question of whether the respondent was estopped from repudiating liability on a ground not stated in their letter to the claimant and concluded relying on the authority of **Super Chem Products v American Life and General Ins Co. Ltd**.[6] that "Contract law cannot and does not prevent an insurer resisting a claim on alternative bases."

[6] [2004] 2 All ER 358.

[22] Counsel for the claimants, Mrs. Lydia Faisal ("Mrs. Faisal") submitted that the parties were to be guided by the **Civil Procedure Rules**. Mrs. Faisal argued that whereas ECIL first gave two bases for denying liability under the policy of insurance, in the Arbitration Agreement, ECIL added a further contention that the insured had failed to submit a claim pursuant to section 2 of the General Conditions of Policy of Insurance. Then Mrs. Faisal argued that contrary to the **Civil Procedure Rules**, that last allegation was not carried into ECIL's pleadings and their witness statement contained no evidence on this issue. That being so, Mrs. Faisal's contention is that ECIL was deemed to have abandoned that last issue and the Arbitrator could not properly have made a finding on it.

[23] Mrs. Faisal further argued that this issue called for a clearly pleaded case and particulars of fact, since ECIL had produced a claim form and a letter dated 31st October 2012 which showed that a claim had been made on behalf of the Dariahs. In that regard, ECIL had failed to prove that no claim was made.

[24] Mrs. Faisal argued that had ECIL pleaded the allegation that the insured failed to submit a claim to ECIL pursuant to section 2 of the General Conditions of the Policy of Insurance then it would have afforded an opportunity to decide issues which were not ventilated e.g. the effect of the claim form signed by Anthony Felix and how that claim failed to satisfy the requirements of the policy among others. Counsel argued that the Arbitrator determined the matter in the absence of pleadings and evidence. The contention is that ECIL having produced no pleadings and evidence on the issue relied on a single statement in cross-examination to state in closing arguments that the failure of the claimant to report a claim is contrary to condition 2 under the General Conditions of the Insurance Policy. Counsel further argued that the Arbitrator relied upon that statement in the closing arguments when that matter had not been pleaded.

[25] Mrs. Faisal argued that the Arbitration Agreement, insofar as it contained the terms of reference of the Arbitrator, was replaced by the pleadings, and after the submission of the pleadings, the Arbitrator's jurisdiction was limited to the relief prayed for in the claimant's statement of claim and the defendant's counterclaim and not otherwise. Counsel was of the view that ECIL had abandoned its third contention put forward in the Arbitration Agreement when it raised a fresh contention in the counterclaim which was not in the Arbitration Agreement - the claimants' failure to disclose that Anthony Felix would be the driver of the vehicle and whether this entitled the defendant to avoid the policy of insurance.

[26] Relying on CPR 10.5(1) and 10.7, Mrs. Faisal submitted that these rules (a) made it mandatory for ECIL to set out all the facts on which it was relying to dispute the claim and (b) prevent ECIL from relying on any allegation or factual argument which is not set out in the defence, but which could have been set out there. Therefore, since ECIL did not include the particular issue in its pleadings, the issue was not before the Arbitrator as an issue to be decided. Counsel's contention was that the Arbitrator both created and adjudicated the issue without jurisdiction, which could be seen from the vacillations between the issue being whether the claimants had provided full particulars, to whether they had provided full written particulars.

[27] The essence of the claimants' contention is that all the issues raised by ECIL on its counterclaim were dismissed by the Arbitrator. Had he not created and adjudicated the issue in relation to whether a claim was reported/submitted pursuant to clause 2 of the General Conditions of the Insurance Policy, ECIL's case would have been dismissed and it is only because of this issue that the Arbitrator found for ECIL.

[28] ECIL in its submissions contended that the issue of whether a claim had been made pursuant to clause 2 of the General Conditions of the Insurance Policy was properly before the Arbitrator and he correctly dealt with it. Counsel for ECIL, Ms. Patricia Augustin ("Ms. Augustin") submitted that the parties including the Arbitrator made no change to the agreed statement of facts and the parties proceeded to arbitration with a binding agreement. Counsel argued that the salient question was whether the CPR could apply to oust what was in effect a binding contract between the parties, ECIL having failed to make mention of the issue in its defence and witness statement.

[29] It was accepted and agreed by both parties at the hearing that there were no Rules of Arbitration attached to the Arbitration Agreement.

[30] The question therefore is what is the meaning to be given to the words in the Arbitration Agreement that the **Civil Procedure Rules** ("CPR") would apply where applicable? It seems to me that this does not suggest a wholesale application of the CPR, but an approach where if a matter arises which can be addressed using the CPR, then that is what would apply. So that in relation to disclosure, where an issue was raised in relation to reliance by ECIL on a certificate of insurance which had clearly not formed part of the bundle of disclosed documents and the Dariahs had objected, the Arbitrator applied the rules relating to disclosure in CPR to determine that the certificate of insurance could not be relied upon or adduced into evidence.

[31] In the Arbitration Agreement, the claimants stated as one of the issues 'what constitutes the making of a claim' and whether ECIL was estopped from raising that issue which it had not raised prior which suggests to me that from inception the claimants knew that this was one of ECIL's positions, albeit they did not think that ECIL could simply raise a new reason for denying their claim at that point.

[32] ECIL in its contentions in the Arbitration Agreement raised as one of its reasons for denying the claimants' claim that they had failed to report a claim in accordance with clause 2 of the General Conditions of the Policy of Insurance.

[33] Interestingly, in the Dariahs' claim placed before the Arbitrator, it stated at paragraph 14(3) that 'the defendant is estopped from raising in a piecemeal manner, issues inconsistent with its initial representations to the Claimant as to the reasons for the purported cancellation of coverage.' Indeed, Mrs. Faisal is correct when she stated that ECIL in its reply did not address the issue of making a claim or reporting a claim.

[34] In Mr. Dariah's witness statement at paragraph 19 put before the Arbitrator, it referred to the assertion of ECIL that no claim was ever made regarding the accident and of the existence of a claim form signed by Anthony Felix which was sufficient to show otherwise. Mr. Dariah went on to state that when he went to ECIL's office in November 2012 to complete the claim form, ECIL failed to produce the claim form already signed by Anthony Felix and instead reiterated its position that the policy had been cancelled. This despite, Mrs. Faisal's contention that there were no pleadings and evidence on the issue. Indeed, there were no pleadings from ECIL on the matter of making or reporting a claim but the matter had certainly been addressed by the claimants. Mrs. Girard's witness statement before the Arbitrator did not address the issue of the claim form at all.

[35] Despite the claimants' contentions about the fact that ECIL must have been deemed to have abandoned the issue of the claim not being submitted pursuant to clause 2 of the General Conditions of the Policy of Insurance, in closing arguments they addressed the issue of what constitutes the making of a claim and the fact that ECIL should be estopped from using this as a ground for denying the Dariah's claim. Nowhere in the closing arguments did counsel address the fact that since the issue had not been pleaded then ECIL could not be permitted to rely on it. In fact, the argument in closing was that the addition of these new heads of denial in

a piecemeal manner was not in keeping with the duty of good faith and demonstrated that ECIL was making up a case as it went along in order to frustrate the expectations of the claimant.

Discussion and Analysis

[36] The cases of **Motor Union Insurance Co Ltd. v Linzey**[7] and **Sullivan v Compton**[8] to which Mrs. Faisal referred all deal with matters which were before a court as opposed to an arbitrator and I do not find them particularly helpful. Both counsel referred to the case of **Joe Chulie v Gordon Mc Intosh et al**.[9] The facts relative to **Chulie** were that the Co-operative Society had allocated certain lands to Chulie and requested him to pay a certain sum which he objected to. That dispute was referred to McIntosh as arbitrator and having heard evidence and visited the lands, he confirmed the amount requested by the Society. Chulie appealed to the Commissioner that the visit to the land had taken place in his absence. The Commissioner affirmed the arbitrator's decision and expressed the view that the visit to the lands was unnecessary. Chulie appealed to the High Court on essentially the same grounds as he had appealed to the Commissioner. The High Court declined jurisdiction and so Chulie appealed to the Court of Appeal. The Court of Appeal held that in his statement of claim in the appeal to the High Court, Chulie made no allegation that he was unaware of the date and time of the visit and so he could not complain that his absence had effectively vitiated the trial. Mrs. Faisal has used this pronouncement in support of the claimants' case. It is to be noted however, that the Court of Appeal's pronouncements were not in relation to the pleadings before the arbitrator but the pleadings filed in the High Court. This is therefore of no relevance to the case at bar.

[37] On the other hand, Ms. Augustin relies on **Chulie** to the extent that it was held in that case that the arbitrator failed to exercise the jurisdiction which had been vested in him by the terms of reference and therefore his award was a nullity in

[7] (1959) 1 WIR 534.
[8] Civ. No. 6970 Third Dist. Nov 26, 1943.
[9] (1979) 27 WIR 152.

support of her argument that the Arbitration Agreement is what defines the arbitrator's jurisdiction and he must have regard to it. I agree with Ms. Augustin's submissions that no one party could unilaterally determine that a particular term of reference was abandoned.

[38] ECIL in closing arguments spoke to the claimant's failure to provide full particulars and although this may appear to be a different issue, it is caught by clause 2 of the General Conditions of the Policy of Insurance which requires notice with full particulars to be given. The fact that the Arbitrator may not have regurgitated the issue exactly as a party stated it does not in my view diminish the fact that the issue had been raised on the Arbitration Agreement and was therefore to be addressed by the Arbitrator.

[39] As I have already stated, I am of the opinion that the CPR did not apply in all its facets and certainly a failure to include an issue which had been put to the arbitrator in an arbitration agreement and had not been followed up in a party's pleadings cannot preclude the arbitrator from dealing with the issues identified in the Arbitration Agreement, as well as those raised on the pleadings. At the end of it all, the purpose of arbitration is to seek to resolve the parties' dispute.

[40] The vacillation between the terms 'make a claim' and 'report a claim' I think created a bit of confusion. However, it certainly was the case that the issue of whether the Dariahs failed to submit a claim pursuant to clause 2 of the General Conditions of the Policy of Insurance was put before the Arbitrator by the terms of the Arbitration Agreement and I so find. The Arbitrator was bound to have regard to the issue and I find that he did do that. As to whether he adequately addressed the matter that is another question altogether which is not a matter for my consideration. I do not have to determine whether the result of the Arbitrator's enquiry on this issue was correct or not. When one examines clause 2 of the General Conditions of the Insurance Policy it states that every notice or communication to be given or made under this policy shall be delivered in writing.

Therefore the formulation of the issue as to whether the claimants had provided full written particulars was not outside the scope of the clause or the terms of reference.

[41] The support for my conclusion that the Arbitrator was not confined to the pleadings before him but that his remit was circumscribed by the arbitration agreement and the pleadings comes from a case of the Singapore Court of Appeal which although not binding on this Court is of persuasive authority. In the case of **PT Prima International Development v Kempinski Hotels SA and other appeals**,[10] the Court of Appeal of Singapore clarified the role of pleadings and highlighted the less formalistic approach taken in arbitration compared to that taken in litigation. In the **PT Prima** case, arbitration had commenced in respect of a breach of contract claim and a new fact arose which was both ancillary to the main claim and known to both parties but which was not formally pleaded, the Court of Appeal reversed the decision of the High Court and held that despite the lack of formal pleadings, this did not put the new fact outside the scope of the parties' submission to the arbitrator.

[42] It had been argued in the case that the arbitrator had decided issues that had not been formally pleaded, thereby acting beyond the scope of his authority. The High Court judge had held that the purpose of the arbitration agreement between the parties was to bind parties to submit the disputes arising under the management contract to determination by arbitration and did not imply that parties would be free at any time during the proceedings to raise material and unpleaded points. The Court found that the pleadings were an essential part of a procedurally fair hearing before a court and an arbitral tribunal, and particularly so in arbitration proceedings where the right of appeal was limited. The High Court therefore set aside the arbitrator's awards on the basis that the new fact, which had a significant impact on the arbitrator's decision, had not been specifically pleaded.

[10] 2012 SGCA 35 (Singapore, Court of Appeal, 9th July 2012).

[43] The Singapore Court of Appeal observed that pleadings are required under the UNCITRAL Model Law and The SIAC Rules 2007, and provide a convenient way for parties to define the jurisdiction of the tribunal by setting out the nature and scope of the dispute. However, the Court of Appeal went on to note that 'any new fact or change in law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which was known to all the parties to the arbitration is part of the dispute and need not be specifically pleaded.'[11] The Court therefore found that although Prima had not formally amended its pleadings, Kempinski was not prejudiced, and the failure to do so was therefore immaterial and did not provide a basis to set aside the award.

[44] In the case at bar, the matter of whether the claimants had made a claim in accordance with clause 2 of the General Conditions of the Policy of insurance had been clearly stated in the Arbitration Agreement which defined the scope of the Arbitrator's mandate and this was known to the claimants who signed that document. It is the claimants who determined on their own that since there was no pleading by the defendant to that effect in the pleadings that followed, that the defendant had abandoned that issue. That was never a matter decided or pronounced upon by the Arbitrator. The claimants cannot say that they were prejudiced by the fact that the Arbitrator dealt with that issue in his award as they were aware of it from inception. Unlike **PT Prima**, this case was not about a new issue but an issue which had been set out in the Arbitration Agreement but which did not make its way to the pleadings. However, the principle in **PT Prima** is in my view very applicable to the circumstances of the claimants' case.

Conclusion

[45] Based on the foregoing discussion, I conclude that the Arbitrator did not misconduct himself or the proceedings by making a decision on the issue of whether the claimants had failed to make a claim in accordance with clause 2 of the General Conditions of the Policy of Insurance.

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Acceptance of fees from ECIL

[46] As relates to the second issue identified at paragraph 5 above, the claimants' evidence was that they had difficulty raising the balance of the fees requested by the Arbitrator which was $8,970.00. They said they informed their legal practitioner that they would have been in a position to pay the said amount in full by 19th June 2017. This was communicated to the Arbitrator by email dated 25th June 2017 by their legal practitioner to which the Arbitrator raised no objection. On 25th May 2017, a copy of a letter dated 24th May 2017 was served on the claimants' legal practitioner. The letter was directed to the Arbitrator and expressed concern over the length of time it was taking to receive the decision. It advised that ECIL had met its portion of the fees and the Dariahs had not and that the settlement or non-settlement of the third party claims was dependent on the decision. The letter went on to advise that 'in order to speed things up and in anticipation that the Claimant will refund to the Defendant the sum of $8,790.00 amounting to the portion of the fees we forward to you same by way of Scotia Bank cheque … We trust that upon receipt of same we will receive the decision without delay'.

[47] ECIL's evidence through its Managing Director, Mrs. Gina Girard was that while the arbitration was going on there was a third party claim filed against ECIL in relation to the accident of 5th October 2012. ECIL's position was that it did not have to pay the third party since the Dariah's insurance policy had been cancelled and this was a matter which was to have been decided by the Arbitrator. The third party claim had been adjourned several times pending the Arbitrator's award and this Mrs. Girard said was proving onerous as ECIL had to maintain attendance at Court hearings of the third party claim. Her evidence was that in January 2017 the Arbitrator presented his invoice in the sum of $17,940.00 and advised that the decision was ready but would not be released until the payment had been made in full. The agreement she said was that the amount would be paid equally by both parties.

[48] According to Mrs. Girard's evidence, ECIL paid their half of the fees to the Arbitrator on 29th March 2017. In an effort to resolve the situation as the Dariahs had indicated they needed some time to come with the money, ECIL paid the Arbitrator the other half of the fees by a cheque dated 26th May 2017 accompanied by the letter of 24th May 2017. Mrs. Girard stated in her witness statement that this was done without malice or contemplation of bribery and the intention was solely to alleviate the situation caused by the delay in receiving the Arbitrator's award.

[49] The Arbitrator having delivered his decision on 29th May 2017, Mrs. Girard indicated that the third party claim was settled fully on or about 12th June 2017 having made an initial payment on that claim on 1st June 2017.

Discussion and Analysis

[50] The Dariahs' contention is that the Arbitrator ought not to have accepted payment of the claimants' share of the fees of the arbitration in the sum of $8,970.00 from ECIL without first requiring ECIL to confer with the Dariahs and obtain their consent. They further contend that the payment of the claimants' fees by ECIL and the Arbitrator's acceptance of it (a) having been apprised that the Dariahs were having financial difficulties and had given an undertaking to pay by a certain date and (b) without the prior knowledge of the Dariahs would cause a fair-minded and informed observer to conclude that there was a conflict of interest and the real possibility of bias on the part of the Arbitrator when he delivered his decision on 29th May 2017 after receiving payment from ECIL on 24th May 2017. The Dariahs claimed that the Arbitrator revisited the award to order them to pay ECIL the amount paid by ECIL which they were to have paid and he ought not to have done so in the absence of their consent. The claimants contended that this amounted to misconduct.

[51] Mr. Dariah in his evidence stated that when Mr. Theodore was suggested as the arbitrator he agreed. This despite Mr. Theodore's indication in his letter of acceptance that he did work for ECIL from time to time but he did not think that this would colour his judgment in any way.

[52] Counsel for the Dariahs, Mrs. Faisal in her written submissions suggested that the claimants did not believe that the letter of 24th May 2017 was the first and only communication made between the Arbitrator and ECIL on the matter, and they were of the view that the letter was a culmination of previous discussions from which they were excluded. There are several flaws with this submission. Firstly, neither of the claimants gave evidence to this effect and is tantamount to evidence being introduced in submissions. Secondly, this is mere speculation and the Court cannot rely on spurious allegations to sustain any finding.

[53] Mrs. Faisal further submitted that the Arbitrator's award was revisited after the payment from ECIL was received on 25th May 2017 despite the fact that the Arbitrator had advised of the availability of the award prior to that date. The Dariahs did not say when the first notification of availability of the award was given and so I accept the uncontroverted evidence of ECIL that that notice was first given in January 2017 along with the invoice.

[54] Mrs. Faisal submitted that under the Act, the Arbitrator did not have power to revisit the award except for the purpose of correcting a clerical error or mistake arising from any accidental slip or omission[12] and in any event, he should have heard the Dariahs.

[12] Section 15 of the Arbitration Act.

[55] The terms of appointment of the Arbitrator at clause 3(4) stated that the Arbitrator's fee for preparation and delivery of the award would be paid by the parties in equal proportions, 50% to be paid at the close of the hearing and the other 50% prior to the delivery of the award.

[56] Paragraph 128(2) of the Arbitrator's award stated as follows:

> "I further award and direct that the parties shall bear their own cost of the arbitration but, since the respondent has paid a certain portion of my fee as arbitrator, that the claimant shall pay to the respondent, the sum of $8,970, representing the final installment of my fee which was due from the claimant but which was paid by the respondent on 26th May 2017."

[57] The test for bias was laid down in the case of **Potter v Magill**[13] in which Lord Hope indicated that the 'question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

[58] Lord Hope approved a statement that a court assessing whether there had been bias, should take all relevant circumstances into account:

> "The ultimate question is whether the proceedings in question were and were seen to be fair. If on examination of all the relevant facts, there was no unfairness or any appearance of unfairness, there is no good reason for the imaginary observer to be used to reach a different conclusion."

[59] In the case of **Panday v Virgil**[14] the High Court of Trinidad said that it would characterize the informed and fair-minded observer, generally as one exemplifying balance, intelligence and restraint. The court went on to say that the informed and fair-minded observer is the sort of person who will always reserve judgment on every point until he or she has seen and fully understood both sides of the argument. He or she is not unduly sensitive or suspicious.

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[13] [2001] UKHL 67.
[14] TT2009 HC 260 at [62].

[60] The enquiry to determine whether apparent bias had infected the process was a two-stage one: (a) to determine the facts and circumstances which give rise to the allegations that the Arbitrator might not be impartial; and (b) to determine whether the well-informed and fair-minded observer would conclude that the Arbitrator was biased.

[61] Mrs. Faisal argued that a fair-minded and informed observer would conclude that there was a real possibility that the Arbitrator was biased having regard to the fact that he: (1) received the fees from ECIL; (2) reopened the award and added to it without hearing the Dariahs; and (3) created and adjudicated in ECIL's favour a remedy not claimed by them in their counterclaim.

[62] It is clear from the evidence that no objection was made to the appointment of Mr. Theodore even after his declaration of his 'from time to time' representation of ECIL. Mrs. Faisal sought to raise this together with the fact that the Arbitrator had accepted their portion of the fees from ECIL as supporting its contention that the Arbitrator was biased. However, the Dariahs cannot now seek to use this along with the payment of their portion of the fees by the defendant to lay a basis for a finding of bias. They had an opportunity to object and passed that up whatever the reason is.

[63] Counsel for ECIL, Ms. Augustin argued that the allegations of the Dariahs are totally unfounded. Counsel referred to **Russell on Arbitration**[15] where it states that when the award is ready for delivery, the tribunal notifies the parties that it is available on payment of its fees. Either party or both may take up the award on payment of the fees. It does not concern the tribunal which party pays the fees. Counsel argued that an arbitrator has the jurisdiction to collect the fees from either party and where a party has paid fees which another party is liable to pay he may recover those costs from that party.

[15] 21st edition at p. 140.

[64] Ms. Augustin argued that the Arbitrator did not act improperly when he sought to request that the Dariahs reimburse ECIL for the monies which they had paid on his behalf and added this to the award. Counsel further submitted that there was nothing on the facts which could lead to a finding of bias as the Arbitrator had not acted without jurisdiction.

Conclusion

[65] Section 15 of the Act to which Mrs. Faisal referred is applicable where the award has been delivered to the parties and in such a case it can only be revisited to correct clerical errors or omissions. In the instant case, when the Arbitrator would have included the paragraph relating to repayment by the Dariahs of the half of the fees paid to him by ECIL, he had not delivered the award and therefore was not functus officio and section 15 was not applicable.

[66] The salient question is whether the fair-minded and informed observer would conclude taking all the circumstances into account that the Arbitrator was biased. The fair-minded and informed observer must look at all the circumstances. He would have to accept the evidence of ECIL that it required closure on the arbitration in order to deal with the third party claims as this evidence is uncontroverted. The evidence clearly shows that ECIL moved swiftly once they received the award to settle the third party claim which had been pending.

[67] The fair-minded and informed observer would see that there was no evidence to suggest any impropriety on the part of the Arbitrator. The award was not completely in ECIL's favour as the Arbitrator found that whereas they had a basis for denying the Dariahs' claim, they could not deny the third party claims. The suggestion that because the Arbitrator received the second half of his fees from ECIL and did not consult the Dariahs he is biased is unfounded. A fair-minded and informed observer would assess the circumstances and recognize that the Arbitrator was not the one who initiated payment of the balance of the fees, but it was ECIL who approached the Arbitrator in an effort to secure delivery of the

award. The fact that the Dariahs had indicated that they would have paid in June is of no moment.

[68] I do not see that the Arbitrator had any duty to convene a hearing when he received the cheque dated 25th May 2017. I am of the view that a fair-minded and informed observer rather than viewing the Arbitrator's behavior as suggestive of bias, would say that the Arbitrator exercised prudence and openness by ensuring that the award reflected correctly that ECIL had paid the fees which the Dariahs should have paid and therefore these fees rightly ought to be reimbursed to ECIL by the Dariahs. The fair-minded and informed observer may also wish to say that perhaps when the Arbitrator received the letter from counsel for ECIL, the Arbitrator should have advised the parties in writing that he would be proceeding to deliver the award. This would have left no room for speculation and suspicion but not having done this, I am still of the view that this cannot amount to bias.

[69] There is no evidence to suggest that the award was tainted with bias and was in any way altered. As was said in the **Panday** case, the fair-minded and informed observer is not unduly suspicious. Most of the submissions of the Dariahs are based on mere speculation and apprehensions given that the award was not in their favour. The mere fact that a party is of the view that an arbitrator adjudicates a matter wrongly or the arbitrator is found to have been wrong does not suggest bias albeit because of his error, his decision may be in favour of a particular party. An allegation of bias on the part of the arbitrator is a serious matter and there must be evidence which would lead a fair-minded and informed observer to conclude that there is a real possibility of bias. I do not find that there is such evidence in this case.

Defendant's Counterclaim

[70] The defendant filed a counterclaim in this case in which it claimed against the claimants the sum of $91,683.05 paid to third parties pursuant to section 9 of the

Motor Vehicle Insurance (Third Party) Risks Act ("Third Party Risks Act").[16] However, this claim against the insured is not an automatic right of the insurer and only arises if a third party claim is paid in the circumstances set out in section 11 of the Third Party Risks Act. Where the restrictions outlined in section 11 apply to a policy, the insurer must pay the third party but the insurer may recover the amount paid to the third party from the insured. In this case, the Arbitrator found that there was no breach in respect to the person named in the policy who could drive the vehicle and that Anthony Felix was driving with the permission of the insured. There was no restriction on the policy which only allowed the named person to drive the vehicle. As the Arbitrator found, the policy allowed for the named person and any person driving with his permission. There was therefore no breach by the insured. The defendant has therefore not shown how it is entitled to claim the amount paid to the third parties from the insured.

[71] The defendant also claimed the sum of $8,970.00 which the Arbitrator had awarded by way of reimbursement representing the final instalment of his fee which was due to him by the claimants. Again, this cannot be a counterclaim in this action. The Arbitrator's award already made this a part of the award[17] and it is now a matter of enforcement of that part of the award pursuant to section 20 of the Act.

Conclusion in Relation to the Claim

[72] Based on the foregoing discussion, I therefore find that the Arbitrator did not misconduct himself or the proceedings.

Conclusion in Relation to the Counterclaim

[73] In the premises, the defendant's counterclaim will be dismissed.

[16] Cap. 8.02, Revised Laws of Saint Lucia, 2008.
[17] Para 128(2) of the Arbitrator's award dated 29th May 2017.

Final Order

[74] The Order is as follows:

(1) The claimants' claim for an order to set aside the award of the Arbitrator dated 29th May 2017 is dismissed.

(2) The claimants are to pay the defendant prescribed costs on the claim in the sum of $7,500.00.

(3) The defendant's counterclaim is dismissed.

(4) The defendant is to pay the claimants prescribed costs on the counterclaim in the sum of $15,081.63.

[75] I thank counsel for their helpful submissions.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar