

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2008/736

BETWEEN:

PRUDENCE ROBINSON

Claimant/Applicant

and

SAGICOR GENERAL INSURANCE INC.

(formerly Barbados Fire & Commercial Insurance Company Ltd.)

Defendant/Respondent

Before:

The Hon. Mr. Ephraim Georges

High Court Judge [Ag.]

Appearances:

Ms. Lydia Faisal for the Claimant/Applicant

Mr. Mark D. Maragh for the Defendant/Respondent

2010: November 18.

JUDGMENT

- [1] **GEORGES, J. [AG.]:** This is an application by the claimant/applicant (“the applicant”) for summary judgment against the defendant/respondent (“the respondent”) filed on 7th January 2009 pursuant to Rules 15.2(b) and 26.3(1)(a), (b) and (c) of the **Civil Procedure Rules 2000 (CPR)** on the grounds that the respondent had failed to comply with case management directions made by a Master on 20th October 2008 the allegation being that the respondent had failed to file its list of documents on or before 21st November 2008 and its witness statement(s) on or before 19th November 2008 (sic).
- [2] The applicant also applied to have the respondent’s defence struck out as disclosing no reasonable grounds for defending the claim as it was not in

compliance with section 9 of the **Motor Vehicles Insurance (Third-Party Risks) Act** Chap. 8:02 of the **Revised Laws of Saint Lucia 2001** ("The **Third-Party Risks Act**").

[3] Section 9(1) of the said Act stipulates that:

"If, after a certificate of insurance has been duly delivered under this Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy of insurance under section 4(1)(b)(being a liability covered by the terms of the policy to which the certificate relates) is obtained against any person who is insured by the policy then, although the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, he or she shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

[4] CPR 2000 Rule 15.2(b) states that the court may give summary judgment on a claim or on a particular issue if It considers that the dependant has no real prospect of successfully defending the claim or the issue and Rule 26.3 gives the Court power to strike out the whole or part of statement of case if it discloses no reasonable ground for defending the claim.

[5] The claim arose as a result of a motor vehicular accident which occurred at the junction of Lumbard Road (in Mon Repos) and the Castries/Vieux Fort Highway on the afternoon of 28th October 2000 when Mazda motor truck registration number TC4725 jointly owned by Francis Charlery and Nelson Smith was being driven by Cyril Jn. Baptiste and collided with an on-coming car which veered out of control and struck the applicant (a pedestrian) causing him severe injuries including loss of a leg.

[6] An action in negligence (Claim No. SLUHCV 2003/794) was brought on behalf of the applicant on 17th October 2003 against Jn. Baptiste (the truck driver) and Charlery and Smith (the truck owners) and judgment in default of acknowledgment of service was entered for the claimant/applicant against all three defendants on

21st March 2005 for an amount to be decided by the Court and damages to be assessed together with interest at the statutory rate and costs. The Court notes that apart from counsel for the claimant only Mr. Jn. Baptiste was present at the assessment of damages the owners of the truck being absent and unrepresented.

[7] Damages were duly assessed on 29th July 2005 by Master Brian Cottle (as he then was) as follows:

- “1. Special damages to the claimant in the sum of \$60,962.54.
2. General damages to the claimant assessed for pain suffering and loss of amenities in the sum of \$190,000.00.
3. Interest on special damages at the rate of 3% per annum from October 17th 2003 to today.
4. Interest at the rate of 6% on the global sum of \$250,962.54 from July 29th 2005 until payment.
5. Costs in the sum of \$28,000.00 to the claimant being 60% of the prescribed costs on a full trial.”

[8] It is that judgment which the applicant seeks to enforce by way of summary judgment in this action alleging that the amount of damages awarded by the Master plus interest and costs of the claim are payable to him pursuant to a contract of insurance which existed between the defendant (insurer) and Francis Charlery and Nelson Smith at the date of the accident. The claim itself is brought pursuant to section 9(1) of **The Third-Party Risks Act**.

[9] As at 18th July 2008 the date of the instant claim damages interest and costs stood at \$335,890.70 with interest accruing at the daily rate of \$47.53. Attached to the statement of claim is a photocopy of the relevant proposal form and a Cover Note No. SL 1142 (in bold capitals at the top right hand corner) which incorporates a Certificate of Insurance (in bold capitals) below which is the statement:

“I/We hereby certify that this covering note is issued in accordance with the provisions of the abovementioned Act.”

[10] In its defence filed on 12th September 2008 the defendant/respondent denies liability stating at paragraph 3 that neither Charlery nor Smith (the owners of TC4725) was at the material time (28th October 2000) its insured and elaborated at sub-paragraphs (i) to (iv) that:

- “(i) No contract of insurance was ever issued or agreed to be issued to ‘the insureds’ Francis Charlery and Nelson Smith as alleged;
- (ii) The Defendant issued to the said alleged ‘insureds’ a ‘cover note’ No. SL 1142 dated 6th September 2000, the said alleged insureds having agreed to pay the requisite premium to be held covered in terms of the Company’s usual form of comprehensive own goods policy for a period of thirty (30) days from the said date unless sooner terminated by the Defendant. The said alleged insureds never paid the premium;
- (iii) Accordingly in the premises that the thirty (30) day cover period had expired prior to the date of the accident on 28th October 2000 wherein the Claimant suffered loss the Defendant was not on risk as the interim cover had duly expired;
- (iv) Any cover granted which is not admitted expired on the effluxion of thirty (30) days from the issue of the cover note on 6th October 2000.”

[11] On 20th October 2008 upon the matter coming on for case management Master Pearletta Lanns ordered and directed that:

- “1. There be Standard disclosure by the parties on or before 21st November 2008.
2. The parties are to file and exchange Witness Statements on or before 19th December 2008.
3. Witness Statements shall stand as examination in chief.
4. The Claimant is at liberty to call 7 witnesses.
5. The Defendant be at liberty to call 5 witnesses.
6. All witnesses shall attend the hearing for cross examination unless such attendance has been dispensed with by notice in writing.
7. The parties shall comply with Part 38.5 of the CPR 2000 in relation to the preparation of the pre-trial memorandum.
8. Pre-Trial Review shall take place on 9th July 2009.
9. Trial to take place on 27th July 2009.
10. Estimated length of trial is one day.
11. Any further application must be filed by 31st December 2008.
12. Court Office to send out Listing Questionnaire to the parties within 21 days of today’s date.”

[12] By notice of application filed on 7th January 2009 the claimant/applicant applied for summary judgment under Rules 15.2(b) and 26.3(1)(a), (b) and (c) CPR as indicated in paragraphs 1 and 2. The grounds of the application substantially repeat the application itself.

- [13] The Court notes that the defendant/respondent in actual fact filed its list of documents which included a cover note on 10th December 2008 instead of on or before 21st November 2008 and a witness summary on 16th February 2009 instead of on or before 19th December 2008 and applied on 9th July 2009 for relief from sanctions for the late filing of the witness summary and to be permitted to rely at trial upon it.
- [14] The point is made in the supporting affidavit that the late filing of the witness summary was due to the change in Claims Manager of the defendant insurer and his unforeseen unavailability at the time to give evidence on behalf of the defendant. The witness summary it was said was filed as soon as reasonably practicable on 16th February 2009 after realisation of the situation and some five months before the trial date of 27th July 2009.
- [15] Failure to file the witness summary on time it was submitted was, in the circumstances not intentional and would not prejudice the respondent and would not compromise the trial date. The applicant it was pointed out had otherwise generally complied with all other rules, orders and directions.
- [16] It has not passed unnoticed that the claimant's own application for summary judgment is itself in breach of Direction 11 of the Case Management Order which enjoined that all further applications must be filed by 31st December 2008 the obvious purpose being to expedite the case and where possible avert the necessity for a trial and thus save time and costs. The claimant's application to strike out the defendant's defence as disclosing no reasonable grounds for successfully defending the claim as it was not in compliance with section 9(1) of **The Third-Party Risks Act** is directly in point.
- [17] Be that as it may, the application by the claimant for summary judgment came before the Court on 17th February 2009 when counsel were ordered by consent to file and exchange written submissions within 14 days for decision by the Court in March 2009.

- [18] Claimant counsel filed written submissions comprising 34 paragraphs dated 27th January 2009 (sic) on 27th February 2009. The order was in fact made on 17th February 2009. No submissions were filed by the defendant who on application filed 10th July 2009 applied to be permitted to rely upon the sole witness summary of Petrona King filed on 16th February 2009 for and on behalf of the applicant and to be granted relief from any sanctions for the late filing of the witness summary.
- [19] Referring to paragraph 2 of the judgment of Acting Chief Justice Adrian Saunders (as he then was) in the **Treasure Island Company and David Sims v Audibon Holdings et al** (BVI Civil Appeal No. 22 of 2003) relating to the Court's approach regarding the flouting of the **Civil Procedure Rules 2000** claimant counsel urged that the defendant should not be permitted to manipulate the hands of the court by attempting to circumvent the claimant's right to summary judgment by tactfully filing a witness summary which cannot be ratified by the court without more.

There the learned judge declared that:

"It must not be assumed that a litigant can intentionally flout the rules and then ask the court's mercy by invoking the overriding objective ... the overriding objective does not in or of itself empower the court to do anything or to grant any discretion. It is a statement of principle to which the court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the court must be found not in the overriding objective, but in the specific provision itself."

- [20] Judging from the reasons given for late filing of the witness summary in the supporting affidavit of Petra King I am fully satisfied that they were not by any means intentional and that the explanation proffered for failure to do so within the stipulated time was a good one and that the defendant had generally otherwise complied with all other rules, practice directions, orders and other directions. The sole witness summary had been filed five months before the trial date and would not have compromised the trial itself.
- [21] In the selfsame **Treasure Island Company** case Saunders JA at paragraph 13 of his judgment in reviewing the trial judge's analysis of the facts in that situation

noted that whilst the judge was sympathetic to some of the points argued by appellant counsel:

“in the end she noted that the witness statements had been filed almost three months prior to the date for trial. The Judge took the view that she had a discretion given to her by the overriding objective of the rules. She also had regard to the Court’s general powers of case management and in particular the general power to dispense with strict compliance with the rules. The Judge found that, as no delay or injustice had been caused by the breach, the witness statements should be deemed to have been validly filed.”

The learned judge’s approach and conclusions were upheld by the Court and I would for myself having regard to all the circumstances of this case order that the witness summary of Petra King be deemed to have been validly filed with relief from sanctions.

[22] Reliance was also placed by counsel for the claimant/applicant on the decision of Barrow J (as he then was) in the Grenada High Court Civil Suit No. 84 of 1999 in **Kenton Collinston St. Bernard and the Attorney General et al** where (as in the instant case) Saunders JA in the **Treasure Island Company** case (at paragraph 20) found the facts far removed from the circumstances there. There the claimant had filed his witness statement three days before the trial date and his own witness statement on the morning of the trial. The Court found that no good reason had been adduced for the failure previously to apply for relief from sanctions and the witnesses were precluded from giving evidence.

[23] In her supporting affidavit Ms. King averred that the defendant’s defence essentially rested on two legal grounds namely:

(1) that the claim against it for breach of statutory duty (i.e. section 9(1) of **The Third-Party Risks Act**) was prescribed since it was not filed and served within the three year period stipulated by law;

(2) that in any event the 30 day temporary cover issued to the insureds had expired prior to the date of the claimant's loss and as such the defendant was not at risk or liable to any third party thereafter.

[24] On the issue of the alleged failure of the defendant to file a list of documents in accordance with the case management directions of 20th October 2008 that list was in actual fact filed on 10th December 2008 and included Cover Note No. SL 1142 dated 6th September 2000 as well as a completed proposal form of even date.

[25] By letter dated 4th November 2004 to the Claims Manager of the defendant insurer the claimant's then attorney acknowledged that a copy of Cover Note No. SL 1142 had been issued to Francis Charlery and Nelson Smith on 6th January 2000. The cover note which is exhibited as #4 is in fact dated 06/09/2000.

[26] Scrutiny of that cover note shows that it clearly is a photocopy of the defendant insurer's standard printed cover note which on the proposer(s) having paid or agreed to pay the appropriate premium for the type or class of motor vehicle policy desired/required is thereby offered cover for a period of thirty days commencing from the date of the cover note to the thirtieth day after such date unless the cover should be terminated by the company by notice in writing in which case the insurance will thereupon cease etc etc.

[27] From the foregoing it is patently clear that even before the defendant's disclosure on 10th December 2008 a copy of the cover note in question was already in the possession of the insureds who had transmitted it to the claimant's attorney. **No policy of insurance had yet and indeed was ever issued by the defendant insurer to anyone.** [My emphasis]

[28] For it is trite law that insurers often agree to enter into an interim contract of insurance pending proper consideration of the insured's proposal and issue a cover note recording the agreement. The cover note enables the vehicle to be licensed and provides "Act cover" so that it may be legally driven for a **limited**

period of time. This is well established motor insurance law and practice. [My emphasis]

- [29] Since the cover note represents an independent contract it affords the insurer the opportunity to consider whether or not to take on the risk for the full period desired while not depriving the insured of cover.
- [30] So that the issue of failure by the defendant to disclose its list of documents does not arise and more especially in relation to the cover note which as I have indicated was in any case already in the possession of the claimant's attorney.
- [31] The gravamen of the claimant's case (as set out at paragraph 6) is that he is entitled pursuant to section 9(1) of **The Third Party Risks Act** to the amount of damages interest and costs awarded by Master Cottle against the three individual defendants in Suit No. SLUHCV 2008/794 by virtue of the fact that at the date of the accident which resulted in his severe physical injuries and loss there existed a contract/policy of insurance between the defendant insurer and Francis Charlery and Nelson Smith the owners of TC4752.
- [32] This is vigorously denied by the defendant for reasons adumbrated at paragraphs 10 and 19. According to the claimant attorney the policy of insurance ran from 6th September 2000 to 5th January 2001 so that it was in force at the date of the accident of TC4752 which it allegedly covered on 28th October 2000. This the claimant attorney submitted was reinforced by the fact that by letter dated **8th January 2001** the Manager of National Commercial Bank of Saint Lucia Ltd. Bridge Street Branch to whom Policy No. SL 1142 was assigned wrote Francis Charlery informing him that their records indicated that his motor insurance policy was due to expire **on 5th January 2001** and that he should make necessary arrangements to renew it by the date advised. In my view it passes as more than a little strange that at the date of the letter "the policy of insurance" had in fact already expired. No policy of insurance had ever in actual fact been issued by the defendant insurer to the insureds and the cover note/certificate of insurance relied upon by the claimant cannot in my view be properly classified as such.

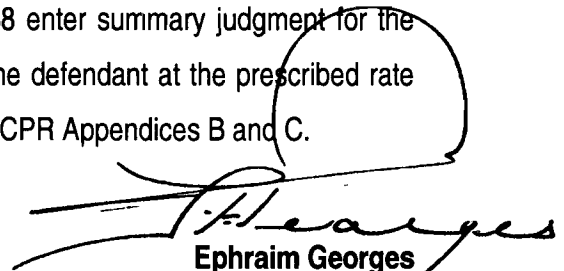
- [33] A photocopy of the policy in question which is headed Cover Note No. SL 1142 in capitals at the right top corner is dated 06/09/2000 and clearly recites in print that the insureds were held covered in terms of the Company's usual form of comprehensive own goods policy applicable thereto for a period of thirty days from the above date to the thirtieth day after such date.
- [34] There follows a heading in capitals captioned "Schedule" and in the schedule is shown the Make Cubic Capacity or Horse Power of the vehicle Registration No. and Chassis No., Estimated Value and Purpose or Use of Vehicle.
- [35] Next to the heading captioned "Schedule" in capitals is handwritten 00/09/06 – 01/01/05. Almost at the foot of the document is printed: "I/We hereby certify that this covering note is issued in accordance with the provisions of the abovementioned Act" – the Act being the **Motor Vehicle Insurance (Third-Party Risks) Act** No. 24 of 1988.
- [36] Inscribed beneath this and handwritten are what purports to be the Engine and Chassis Numbers of the insured vehicle. Those details do not appear on the copy cover note issued by the defendant insurer to the insured (i.e. Exhibit #4). Nor are they on the proposal form where the Engine Number is specifically requested. These are details which in normal course would be within the peculiar knowledge of the owner(s)/insured(s). I say no more.
- [37] Suffice it to say that on the preponderance of the evidence adduced and displayed I am satisfied on a balance of probabilities that on 6th September 2000 the defendant insurer issued a cover note of motor insurance for "comprehensive own goods policy" to Francis Charlery and Nelson Smith the owners of Mazda Truck Registration No. TC4725 for a period of thirty days.
- [38] When therefore the said vehicle was involved in an accident on Lumbard Road and the Castries/Vieux Fort Highway on the afternoon of 28th October 2000 owing to the negligence of its driver Cyril Jn Baptiste as a result of which the claimant suffered personal injury and loss the 30-day contract of insurance ("Act Cover")

had by then expired and the vehicle TC4725 was not insured and the defendant insurer was therefore no longer at risk or liable.

[39] That should effectively dispose of this case but in addition in its notice of application filed 10th July 2009 under Parts 6.6(1), 9.7 and 15 **CPR 2000** the defendant sought a declaration/order that the claimant's cause of action by virtue of Article 2122(2) of the **Civil Code** was altogether prescribed and both right and remedy thereof were absolutely extinguished.

[40] The claim in this instance was served by registered post slip dated 25th July 2005 which was outside of the three year period permitted by law and it is therefore prescribed by law and both the right and remedy are extinguished.

[41] I would accordingly grant the order sought and strike out the claimant's statement of case for the reason set out at paragraph 38 enter summary judgment for the defendant against the claimant with costs to the defendant at the prescribed rate of 70% of the full trial costs as per Part 65.5(1) CPR Appendices B and C.



Ephraim Georges
High Court Judge [Ag.]