[2013] JMSC CIV. 118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006/HCV 02566

BETWEEN INSURANCE COMPANY OF THE WEST INDIES LIMITED CLAIMANT

AND MARGARET FORREST DUNCAN DEFENDANT

CLAIM NO. 2008 HCV01667 CONSOLIDATED WITH

BETWEEN MARGARET FORREST DUNCAN CLAIMANT

AND INSURANCE COMPANY OF THE WEST INDIES LTD 2nd DEFENDANT

AND BINOC VISIONS INVESTIGATIONS LIMITED 4th DEFENDANT

Mr. Gavin Goffe and Miss Natasha Richards instructed by Myers Fletcher & Gordon for the 2nd Defendant and the 4th Defendant

Miss. Oraina Lawrence and Mrs. Allia Leith Palmer instructed by Kinghorn & Kinghorn for the Claimant

Heard: June 5 and September 16, 2013
Application to amend Defence in respect of Claim No 2008 HCV 01667

McDONALD J.

[1] By way of Fixed Date Claim Form filed December 3, 2007 in Suit No. HCV 01667 the Insurance Company of the West Indies sought the following declarations:

(i) That it is entitled to avoid the policy of Insurance No 34152032/1 and to refuse to indemnity the insured Margaret Forrest- Duncan in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident (which took place on the 11th of June 2007) involving the insured's motor vehicle licensed No. 5850 EY on the grounds of misrepresentation and/or non-disclosure of material facts.

(ii) That the said policy of insurance is void for breach of warranty of contract.

(iii) That the insured is in breach of the conditions of the policy of insurance, thereby entitling ICWI to avoid and/or repudiate any liability under the policy.

[2] ICWI sought these Declarations after the insured "admitted" in writing to using her motor car, contrary to her policy of insurance viz, that the motor car was being used for hire and/or reward.

[3] In response to ICWI's Fixed Date Claim Form, the insured filed a defence which is identical in material respects to a subsequent claim brought by her - Claim No 2008 HCV 01667. This Claim Form was filed on 3rd April 2008. In this Claim she has sought damages for breach of contract, damages for fraud, duress and undue influence against all the Defendants. She has also sought declarations from the Court:-

(i) That the correspondence of the 23rd October 2007 ie. "the purported confession" written and signed by her was fraudulently produced by the Defendants and is consequently null void for fraud.

(ii) That the correspondence of 23rd October 2007 was produced by duress and is therefore null and void.

(iii) That the said correspondence was procured by undue influence.

(iv) A valid and legally enforceable contract of insurance still exists.

(v) ICWI is obliged to honour the terms of the Agreement and to provide compensation for damages and losses suffered by her and provide indemnity for her in respect of loss, damage, expenses or claims made by third parties arising out of the accident on 11 July 2007.

(vi) She is not in breach of her contract of Insurance
Both claims were consolidated on the 23rd July, 2008.

[4] On April 23, 2012 the Defendants filed Notice of Application to amend their Defence to plead and make reference to condition 8 of the Private Car Policy which set for hearing on November 12, 2012. This application was adjourned to 28th November 2012 and again adjourned to May 22nd 2013 and then to June 5, 2013. The grounds on which the applicant is seeking the order are: that the amendment is necessary to decide the real issues in controversy between the

parties; the Claimants will not be prejudiced if permission is granted to amend as this matter is not scheduled to be tried until November 12, 2013 and it is fair in all the circumstances of the case.

[5] The Notice of Application is supported by affidavit of Kamesha Graham filed on April 23, 2012 with draft amended defence of the 2nd and 4th Defendants attached.

The amendments in the draft defence read as follows

(1) On October 29, 2007 the Claimant was advised by the 2nd Defendant that it would not be granting indemnity under policy of insurance.

(2) On the 3rd of December 2007 the 2nd Defendant served the Claimant with a Fixed Date Claim Form and Affidavit in support which included a copy of the Private Car Policy which forms a part of the policy of insurance.

(3) Condition number 8 of the Private Car Policy among other things, provides that all differences arising out of this policy shall be referred to the decision of an Arbitrator and that if the 2nd Defendant disclaims liability to the Claimant for any claim and "such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable."

(4) The Claimant, in breach of her contract/policy of insurance failed to refer her dispute with the 2nd Defendant to an Arbitrator within twelve calendar months of the letter dated October 29, 2007 referred to in paragraph 1.

(5) Accordingly, the 2nd Defendant avers that the Claimant is deemed by her policy of insurance to have abandoned her claim with the 2nd Defendant.

[6] There is no dispute that 29th October 2007 represents the date the dispute existed between the parties under the Insurance Policy and the twelve month period mentioned in Condition 8 would start to run from that date. The Claimant filed the Claim Form on 3rd April 2008 and the Defendants filed their Defence on 15th May 2008 all within the twelve month period.

The Defendants/Applicants Case

[7] Mr. Goffe submitted that part 20.4 of the Civil Procedure Rules provides that a statement of case may only be amended after a case management conference with the permission of the Court. The Court in exercising its discretion must have regard to the overriding objective (Part 1.1 of the Civil Procedure Rules) which includes dealing with cases justly. This takes into consideration the importance of the case as well as ensuring that cases are dealt with expeditiously and fairly.

[8] He asserted that a case is dealt with justly when each party is allowed to put forward every relevant point of their case. A party that is prevented from advancing all arguments or evidence in support of their case will understandably feel that an injustice is perpetuated on him.

ICWI and BIWOC will face a grave injustice if the amended defence is not permitted, as the amendment includes a fundamental point which favours their case. This point, if determined by the Court in their favour, would bring these proceedings to an end.

The amended defence points to the fact that the Claimant must be deemed to have abandoned her claim by not referring the dispute to arbitration as required by Condition 8 of the Private Car Policy which forms a part of her insurance policy. The use of the word "shall" in condition 8 makes mandatory the referral of all differences arising out of the policy of insurance to arbitration. If there was an intention for the arbitration clause to be a remedy available at the option of either party, as an alternative to the litigation, it would have clearly said so. By not referring the dispute to arbitration the Claimant is now barred from seeking payment under the policy in this court.

[9] Mr. Goffe referred the court to the case of **William McIlroy Swindon Ltd and another v Quinn Insurance Ltd 2010 EWHC 2448** (TCC) where the court determined whether an arbitration clause of a similar nature was an exclusive remedy. The court accepted the position of the Attorney representing the Defendant, the Insurance Company. The Defendant's Attorney submitted that the use of the word 'shall' in the arbitration clause indicated that the arbitration clause was a mandatory mode of dispute resolution, and not an optional mode. If it had been intended to be a remedy available at the option of either party, as an alternative to litigation, the clause would have said so. Further, in the presence of the time bar and the reference to the claim being deemed to have been abandoned if arbitration is not brought in time is a clear contra-indication of either party having the right to start court proceedings as opposed to arbitration under

the terms of the clause. The court held that the arbitration clause was a mandatory mode of dispute resolution, with a time limit within which that mode of dispute resolution can be exercised, failing which a claim in respect of that dispute is no longer recoverable. The second sentence of the clause makes it abundantly clear that it is intended to provide an exclusive remedy.

[10] Section 3 of the Arbitration Act gives the effect of a submission and states that a submission, unless contrary intention is expressed therein, shall be irrecoverable, except by leave of the court or a Judge, and shall have the same effect in all respects as if it had been made an order of court. The effect and importance of an arbitration clause in a contact is supported and recognised in case law as well as statute and should not be ignored by the court in the instant case.

[11] The Claimant will face no inconvenience or injustice if the court grants permission to amend the Defence, as the amendments do not include any new evidence or complex issue which the Claimant is not familiar with. It was made clear to the Claimant that her policy of insurance was void from the commencement of both proceedings and ICWI and BINOC maintain this position.

[12] The amendment is necessary to determine a fundamental issue between the parties and the parties will not be prejudiced as the tenor of the rules is that a trial should only take place if necessary. This submission was accepted by the Court of Appeal in the case **Topaz Jewellers and Raju Khemlani v National Commercial Bank Jamaica Limited (2011) JMCA Civ 20.**

[13] The Claimant will not be inconvenienced as the amendments are being sought prior to the trial, which was delayed as a request of the Claimant not being ready to proceed to trial in November 2012.

[14] Mr. Goffe asserted that with five months to go, there is more than enough time for further statement to be filed and Rule 20.3 (2) CPR makes provision for consequential amendments. He said that the only prejudice there could be is not irreparable but compensatable by way of order of costs in respect of consequential amendments.

[15] In respect of the issue of costs. Mr. Goffe said that there was no basis in law for the court to make an award for costs thrown away in the circumstances, neither should the court award costs of this entire application to the Claimant since there is already a cost order against her for the said application.

Claimants Case

[16] Miss Lawrence referred to Halsbury Laws of England Vol. 36 paragraph 76 and 78 which set out principles governing the amendment of Statements of Case in particular she emphasized the following:-

> "If owing to the way in which the pleadings has been framed, the other party has been put into such a position that an injury would be done to him by an amendment, the court will not give leave for it; and "An amendment should not normally be allowed if it would change the whole nature of the action."

She also quoted from Harris JA in NCB Jamaica Limited v Scotia Bank Jamaica Limited SCCA no 22/08 delivered December 19, 2008 at paragraph 23 which stated "the authorities have made it abundantly clear that the court will not depart from the prescribed rule of refusing an amendment where the amendment sought is one involving new consideration or new set of facts."

[17] Miss Lawrence submitted that to now include a defence which relies on an arbitration clause is a complete change to what the 2nd Defendant first presented in its pleadings. The 2nd Defendant's case had always been that there is no breach on its part of the contract and that it is the Claimant who has breached the contract. The Claimant has pleaded her case and prepared her entire case on this premise. The prejudice to the Claimant would be irreparable should this material and substantial amendment be granted and the instant matter proceed to trial with such an inclusion.

[18] The amendment presents an entirely different point in the defence and therefore it is as if the Claimant would have to re-start the claim from the inception. The granting of such an order would not give sufficient time to start over the claim to comply with the trial dates and certainly a case management conference would have to be set and a further witness statement filed.

[19] The application for amendment comes four years after the defence was filed and there was no mention of the arbitration clause until this late stage. The Defendant had enough time to amend the defence. The Attorney's understanding of condition 8 is that either party could have taken the matter to arbitration and this was not done by either party and therefore the Clause should not place the sole

obligation on the Claimant. There is no reason why the matter was not brought to arbitration by the 2nd and 4th Defendants.

[20] It was submitted that in light of the foregoing the 2nd Defendant's application should be refused with costs to the Claimant and that the matter be allowed to proceed to trial on the 11th-13th November 2013 without further delay. Alternatively, should the court be minded to grant the amendment, the court is asked to order substantial costs against the 2nd Defendant for unexplained lateness with which the application has been made. Costs should include the cost of the application as well as costs thrown away from the stage of the filing of the Defendant's Defence to the stage of trial.

The Law

[21] The power of the court to grant amendments to a Statement of Case is allowed under part 20 of the Civil Procedure Rules (CPR). In a case such as this, an amendment can only be allowed with the permission of the court as stated in part 20. 4 (2) of the CPR as it is being sought after the case management conference.

[22] Amendments to pleadings are a matter of discretion of the court and will be viewed liberally by the court if it causes no injustice to the other side and if their side can be compensated adequately by way of costs. They may be made at any stage of the trial and if made very near to, during or at the end of the trial this is considered in weighing whether the amendment was made in bad faith and whether it should be permitted in the interest of justice.

[23] In **Cropper v Smith (1884) 26 ChD 700** it was held that amendments to pleadings generally, may be made by a court at any stage of the trial for the purpose of bringing forward and determining the real question and issues in controversy between the parties.

[24] In **Gloria Moo Young et al v Geoffrey Chong Dorothy Chong and Family Foods (in liquidation) SCCA 117 of 1999, delivered March 23, 2000.** Harrison J.A stated "the court will view the exercise of this discretionary power quite liberally, as long as it will not do any injustice to the opponent of the party seeking the amendment and particularly, if the said opponent may be adequately compensated in costs, consequent on such amendment." An amendment granted before a trial commences, is usually viewed more liberally as permissible, than one at the end of the trial. In the latter case it should not be made, if the result would be to give an apparently unsuccessful defendant an

opportunity to renew the fight on an entirely different defence' (per Lord Griffiths in Ketteman v Hansel Propels (1988) 1 All ER 38 at page 62.

[25] In his book A Practical Approach To Civil Procedure 9th edition at paragraph 143 the author Stuart Sime sets out how the court should assess applications to amend:

> "A court asked to grant permission to amend will therefore base its decision on the overriding objective. Generally dealing with a case justly will mean that amendments should be allowed to enable the real matters in controversy between the parties to be determined."

[26] As indicated by Rule 1.2 of the CPR, the exercise of discrection has to be governed by the overriding objective under Rule 1.1 of the CPR, that of "enabling the court to deal with cases justly."

Dealing justly with a case includes: a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position; (b) saving expenses; (c) dealing with it in ways which take into consideration (i) the amount of money involved; (ii) the importance of the case. (iii) the complexity of the issues; and (iv) the financial position of each party (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the courts resources while taking into account the need to allot resources to other cases.

[27] The authority of **Charlesworth v Relay Road Limited (1999) 4 All ER 397** states that in considering whether an application to amend a statement of case is to be granted, the Courts assessment of the justice of the case involved two competing factors; Firstly, it is desirable that a party be allowed to advance every point he reasonably desires to put forward, so that he does not believe he has suffered injustice especially if the decision goes against him. If any damage suffered by the opposing party may be compensated by costs a powerful case would normally be made out for the amendment to be allowed. Secondly, the court had to consider whether the success of an application to amend or to call new evidence would interfere with the administration of justice and the interest of other litigants who had cases waiting to be heard.

[28] In considering whether prejudice is caused, the recent case of **Topaz Jewellers Raju Khemlani v National Commercial Bank Jamaica Ltd SCCA No127/2010**

delivered 30 June 2011 provides guidance that ignoring a fundamental, point in a party's case could not properly be expected. In that case, the appeal to overturn an amendment of defence was dismissed. Panton P said "it is difficult to understand how the appellants could properly expect the respondent to ignore a fundamental point in its favour. There is no good reason for the respondent to wish the continuance of legal proceedings that may have been brought out of time. The principle that there has to be an end to litigation ought not to ignored in circumstances such as these."

[29] I find that it is in the same way that the amendment of the defence to include condition 8 in the instant case would provide the Defendants with the opportunity to bring forward a fundamental point in its case and also bring an end to litigation that should not have started. There is a possibility that the Defendant would be able to bring an application for striking out as there would have been "no reasonable grounds" for the case to continue in the face of arbitration clause or for summary judgement. There is no application for the latter and so if the defence is to succeed it must succeed at a trial.

[30] There is debate between the parties as to the proper interpretation of the arbitration clause and whether it does indeed require solely the Claimant to refer the matter to arbitration. The question for determination being whether the arbitration clause disallowed the Claimant from bringing a claim against the defendants. Since there is conflict as to the interpretation of the arbitration clause this calls for judicial interpretation which is best left to the trial judge to determine its true meaning and effect.

Conditions 8 in its entirety reads:-

[31] "All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing to do so by either of the parties or in cases the Arbitrators do not agree of an umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall

for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

[32] The Defendants has not stated any reason for the delay in making the application for the amendment although they have said they would have been ready to proceed with it at the time when the matter was adjourned in November 2012 at the Claimant's request. There is no requirement in the rules for an explanation to be given for the delay in making the application, neither is there any requirement for evidence to be given in support of the application. In cases where an explanation is sought, there are specific provisions in the rules for that- see e.g. Rule 11.18 and 13.3 CPR.

[33] It is not correct for the Claimant to say that there was no disclosure pertaining to this arbitration clause. The Private Car Policy forms a part of the terms of the insurance policy under which the Claimant insured her motor vehicle and should be read in conjunction with all terms and conditions of the policy. The Private Car Policy was attached to ICWI's affidavit in support of the Fixed Date Claim Form in Claim No. 2007 HCV 04909. This is unchallenged.

[34] The claim being one for breach of contract it is only fair that the Defendant is allowed to rely on all provisions of the contract.

[35] No issue as to the deprivation of a right to rely on the Limitation of Actions Act arises in this case.

Conclusion

[36] I find that in the interests of justice the amendment is necessary to decide a fundamental issue in the case. It will give the Defendant an opportunity to fully and properly present their case.

[37] Adopting Mr. Goffe's submission the order granting the amendment will also have a far- reaching effect on public interest because it will give effect to the parties contract and result in a clear authority to be applied to similar claims under insurance policies. This will have an impact on the use of the court's resources as claims involving contracts containing a clear and exclusive mode for dispute resolution will not be referred to court without first attempting resolution by arbitration.

Costs of the application to amend the defence, and the costs of and occasioned by the amendment to be paid by the 2nd Defendant to the Claimant to be taxed if not agreed (excepting cost order made on 12/1/12 and 22/5/12 against the Claimant in the instant application.)