[2012] JMSC Civ. 90

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM N0. 2010 HCV 00456

BETWEEN	**LLOYD HEMAN**	**CLAIMANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**DEFENDANT**

Mr. Jeffrey Daley instructed by Betton Small and Company for the Claimant

Mr. Manley Nicholson instructed by Nicholson Phillips for the Defendant

Heard: 10 and 11 February 2011

INSURANCE LAW – WHETHER INSURER BREACHED POLICY – EFFECT OF INSURERS BREACH ON THIRD – PARTY – EFFECT OF INSURER'S FAILURE TO NOTIFY CLAIMANT/VICTIM OF ITS APPLICATION FOR DECLARATION – RES JUDICATA – EFFECT OF DECLARATION THAT INSURER IS NOT LIABLE TO SATISFY JUDGMENT ON THIRD PARTY.

SINCLAIR-HAYNES J

[1] The fact that there was an appeal in this matter came to my attention several months after its filing. There was further delay in putting my reasons in writing. I now do so.

[2] Lloyd Hemans, the claimant, seeks a declaration inter *alia* against the defendant, Advantage General Insurance Company Ltd, that its refusal to compensate him constitutes a breach of statutory duty under the Motor Vehicles Insurance (Third -Party Risks) Act. The defendant however claims that the court is estopped from hearing the matter because it is *res judicata.*

BACKGROUND AND SEQUENCE OF EVENTS

[3] On the 30th December 2005, the Claimant, Mr Lloyd Heman, was seriously injured in a motor vehicle accident which claimed the life of the driver. The vehicle was owned by Claudia Palmer, who had authorized the deceased to drive. On the 21 January the claimant's attorney-at-law wrote to the defendant and made a claim for compensation. The defendant responded on the 15 February 2008 by way of letter that it would not indemnify the claimant because the insured, Ms Palmer had breached the policy by allowing the driver who had not held a PPV licence for more than three years, to drive the vehicle.

[4] The defendant filed suit against its insured, Ms. Palmer on the 12 May 2008. It sought a declaration that it was not obligated to indemnify Ms Palmer. On 6th June 2008, Mr. Heman instituted legal proceedings against Ms Palmer and others. Notice of Proceedings was duly served on the Defendant herein, on the 11 July 2008.

[5] On the 20 January 2010, the defendant obtained the following order:

> *"Advantage General Insurance Company Limited is not liable for loss, damage or liability caused or sustained in respect of the motor vehicle accident on the 30th day of December 2005... nor is under any duty to indemnify the (insured)... or to satisfy any judgment obtained against the said Defendant... for at the time of the accident the said insured vehicle was being driven without having the required licence for at least three years."*

The defendant neither informed the claimant of its intention to seek a declaration nor informed him that it had obtained the declaration.

[6] On the 3rd November, 2009, judgment was awarded in the claimant's favour as follows:

i. *Special Damages in the sum of Six Hundred and Twenty-Three Thousand Five Hundred dollars ($623,500.00) with interest at 6% per annum from 30th December, 2005 to 21st June, 2006 and 3% from 22nd June, 2006 to 3rd November, 2009.*

ii. *General Damages in the sum of Three Million Five Hundred Thousand Dollars ($3,500,000.00) with interest at 3% from 21st November, 2008 to 3rd November, 2009.*

iii. *Future medical expenses in the sum of Three Hundred and Seventy-Six Thousand Dollars ($376,000.00).*

iv. *Costs to the Claimant in the amount of $40,000.*

[7] The claimant, armed with his judgment against Ms Palmer, sought to recover from the defendant. The Defendant informed the claimant's attorney that it would not indemnify the insured on the ground that the policy had been breached by her and that the Motor Vehicles Insurance (Third- Party Risks) Act did not obligate it to indemnify the insured. It, however failed to inform the claimant that it had obtained a declaration from the court to that effect.

THE CLAIM

[8] The claimant, by way of Fixed Date Claim Form, which was filed on the 2 February 2010, now seeks, among other things, orders to compel the defendant to honour the claim up to the policy limit and to compensate him. An affidavit in support was also filed on the 2 February. The defendant acknowledged service on the 24 February 2010. It denied the claim but again did not state that it had obtained a declaration. It filed no affidavit in response to the claim.

[9] The matter came up before Rattray J on the 21 July 2010. This was the first hearing of the Fixed Date Claim Form. Rattray J granted the defendant permission to file its affidavit by the 20 September 2010. The claimant was to respond if necessary. The parties were also to file skeleton submissions.

[10] The hearing was set for 10 January 2011. At the hearing; the defendant pulled as it were, its trump card, *res judicata*. In the defendant's written submission, the issue of estoppel by virtue of *res judicata* was raised. No affidavit was filed. The defendant

ignored the order of Rattray J in what appears to be a deliberate plan to ambush the claimant with its claim of *res judicata*.

SUBMISSION BY MR. JEFFERY DALEY ON BEHALF OF THE CLAIMANT

[11] Mr. Daley submits that the Motor Vehicles Insurance (Third-Party Risks) Act was enacted to provide third parties or their estates with protection in the event of injury or death in motor vehicle accidents. Section 18 (1), he submits, confers a duty upon insurers to satisfy judgments against persons insured or killed in respect of third party risks, such as the instant matter. It is his submission that in order to avoid liability and thus deny indemnity the insurer must prove that the policy has been breached.

[12] He submits that none of the exemptions for payment by the insurer as provided by Section 8 (2) of the Motor Vehicles Insurance (Third-Party Risks) Act is applicable in this instance. He further submits that the Defendant has given no valid reason for denying the claim because no affidavit has been filed by the Defendant in support of its position. There is also no evidence before the Court that the Defendant had obtained a declaration that it is entitled to avoid its policy with its insured. The defendant also failed to serve the Claimant in this matter within ten (10) days of commencement of its action against its insured as required by Section 18 (3) of the Act or at all.

[13] He further submits that whilst an insurer may take the prescribed steps to avoid its statutory liability under the policy this release is not automatic. He relies on the Barbadian case of **Barbados Fire & General Insurance Company v Pinder** 52 WLR 49, in which King J, in interpreting Section 43 (3) of the Barbadian Motor Vehicles (Third- Party) Risks Act, which is identical to ours, stated:

> "*It is clear that section 43 (3) gives a right to an insurer to avoid a policy, provided that it satisfied certain conditions. The time frame, before or within three months after the commencement of the injured party's action, is clearly intended to bring certainty to the positions of the parties and to ensure that all the interwoven interests are disposed of at, or about, the same time; why else would it be necessary to give notice to that plaintiff and cite him as a Defendant in the insurer's action?"*

[14] He also relied on the Privy Council decision in the case of **Eagle Star Insurance Company Ltd v Provisional Insurance Plc** 42 WLR 15. In that case, although the insurers were able to repudiate liability of their insured for breach of contract, they could not avoid their statutory liability in relation to the claim of the third party. He points out that the position taken by their Lordships in the **Eagle Star** case has been codified in this jurisdiction by the 2005/6 Amendment to Section 18.1 (A) of the Act.

[15] He also relies on the Court of Appeal cases of **Waltraud East v Insurance Company of the West Indies** SCCA No. 23/2004 (unreported) and **Global Insurance Company of the West Indies v Johnson and Stewart** SCCA 70/99. He contends that the Claimant is entitled to interest at the commercial rate from the date the action was commenced. He places reliance on the Court of Appeal case of **Peter Williams (Jnr), Shereen Williams and Florence Samuels v United General Insurance Company Limited** 35 JLR 627.

SUBMISSIONS BY MR. MANLEY NICHOLSON FOR THE DEFENDANT

[16] Mr. Nicholson contends that by virtue of the Motor Vehicles Insurance (Third-Party Risks) Act, the defendant is under no obligation to indemnify the insured, Ms Palmer, as she breached her insurance policy. The Defendant sought and obtained a declaration from the court that it was under no duty to indemnify the insured because of the breach.

[17] He submits that the declaration which was obtained on the 20th January, 2010, predates the judgment obtained by the claimant. Further, he submits that the defendant's application also precedes the claim filed by the claimant. He argues that by virtue of having obtained the order, the matter is *res judicata*, and the court is estopped from considering the current action.

RULING

RES JUDICATA

[18] The crucial issue for my determination is whether I have the jurisdiction to hear this matter in light of the declaration obtained by the defendant. It is therefore important to firstly examine the law which governs the principle of res judicata.

Millet J in **Crown Estate Commissioner v Dorset CC** [1990] Ch. 291,305 defined the principle thus:

> *"Res judicata is a special form of estoppel. It gives effect to the policy of the law that the parties should not afterwards be allowed to relitigate the same questions over even though the decisions may be wrong. As between themselves, the parties are bound by the decision and may neither relitigate the same course of action nor reopen any issue which is an essential part of the decision. These two types of res judicata are now-a-days distinguished by calling them 'cause of action estoppel' and 'issue estoppel respectively'."*

[19] The learned authors of **Halsbury's Laws of England** Volume 12 (2009) 5th Edition at paragraph 1154 explains the principle as follows:

> *"Every final judgment is conclusive evidence against all the world of its existence, date and legal consequences. The reason is that a judgment, being a public transaction of a solemn nature, is conclusively presumed to have been truly recorded; but this presumption only extends to what has been called the substantive as distinguished from the judicial portions of the record.*
>
> *It is a fundamental doctrine of all courts that there must be an end of litigation, and a party may plead the doctrine of res judicata by way of estoppel. Where a judgment has been given which is a matter of record, an 'estoppel by record' arises and may take the form of cause of action estoppel or of issue estoppel. It may also be said that the cause of action has merged in the judgment."*

[20] Lord Brandon of Oakbrook in **The Sennar** (No. 2) [1985] 1 WLR 490, 499, sets out three requirements necessary to create issue estoppel;

> '*In order to create [an issue estoppel], three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as*

creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action.'

IS THE PRINCIPLE OF RES JUDICATA APPLICABLE?

[21] The question is whether the matter is *res judicata*. In the instant case all the requirements stipulated by Lord Brandon have not been met. The matter was not decided on its merits as neither the insured nor the claimant was present. Further, the parties in the application for the declaration were not all the same. The claimant was not a party to that action. The parties in that application were Advantage General and Claudia Palmer. Mr. Heman was entirely oblivious to the existence of that matter.

[22] Further, it is the view of the court that although the declaration was made before judgment was entered for the claimant; the defendant was notified that the claimant was seeking compensation and therefore, the claimant should have been notified of the application for the declaration. The defendant's conduct of the matter has been less than upright and forthright. At every step of the claimant's proceedings, the defendant was notified yet the defendant failed to accord the claimant the same treatment.

[23] The defendant's letter in response to Mr. Daley's letter in which he sought compensation on the claimant's behalf, merely stated that it would not indemnify the insured "*as his driver at the time did not have the required PPV licence for three years*." It did not inform the defendant that it intended to apply to the court for a declaration. Although the defendant was aware that the claimant had made a claim against it, it failed to notify the claimant that it had instituted proceedings against the insured. This failure, in the opinion of this court is to be deprecated.

[24] Even more unfair, is the fact having been served with notice of proceedings; it remained silent as to the fact that it had applied to the court for such a declaration. Instead it surreptitiously continued its proceeding and obtained the declaration. It is of

note that the defendant/insured, in that matter who was served by way of registered post, did not appear. It was incumbent on the defendant to notify the claimant.

[25] Having obtained the declaration in the manner it did, it further compounded its behavior by failing to notify the claimant. Indeed, even after the claimant had informed the defendant that he had obtained judgment, its response by way of letter dated 24 November 2009, was simply that it was not obligated to pay because of a breach. It failed to inform the claimant that it had obtained a declaration. The claimant first became aware that the defendant was relying on the principle of *res judicata* in its written submission which was filed two days before the hearing of the matter.

[26] By virtue of section 18 (3) of the Motor Vehicles Insurance (Third- Party Risks) Act, the defendant was under a statutory obligation to notify the claimant within ten days of the filing of the application as the claimant was entitled to be joined as party to that suit if he so desired. The defendant has not complied with the requirements of the proviso. It has failed to notify the claimant of the commencement of its action in which it sought the declaration. Its failure to notify the claimant entitles the claimant to ignore the said declaration.

Section 18(3) of the Act reads:

> "*No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by non-disclosure of a material fact or by a representation of that fact which was false in some material particular, or if he has avoided the policy on that ground, that he is entitled so to do apart from any provision contained in it.*
>
> *Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and*

any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto"

WHETHER APPLICATION SHOULD BE MADE TO HAVE DECLARATION OBTAINED BY THE DEFENDANT SET ASIDE?

[27] The declaration of the court still subsists. Is the claimant required to make application to set it aside? The court must give effect to the overriding objective of dealing with cases justly which includes:

(a) ensuring so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;

(b) saving expense;

(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 court's resources, while taking into account the need to allot resources to other cases.

[28] In all the circumstances, it would be unjust to have the claimant incur the costs of an application to set aside the declaration. Further section 18(3) expressly contemplates the possibility of an insurer not being entitled to the benefit of the declaration for want of notification. There is no requirement in the section for the declaration to be set aside in such circumstances. This is an unlettered claimant who has been seriously injured. This court regards it as unjust to prolong the matter because of the actions of the defendant. It would not be furthering the overriding objective by allotting more time to this matter.

[29] Moreover it is such underhanded behavior that the framers of the CPR sought to prevent. With the advent of the CPR, a new dispensation was ushered into effect. Trial by ambush is offensive to the letter and spirit of the CPR. Part 10 which governs 'defence' makes this quite plain. Affidavits are captured by Part 10. Rule 10.5 reads:

"*The defence must set out all the facts on which the defendant relies to dispute the claim."*

[30] Rule 10.5 (6) of the Civil Procedure Rules states:

The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.

Evidently the framers of the CPR intended that claimants should be apprised of all the material facts that the defendant intends to rely on to avoid compensating him. The fact that it obtained an order must be of great importance to the claimant.

[31] Rule10.7 makes it abundantly clear that ambush will not be countenanced. It reads:

"The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."

The defendant has not filed its affidavit. The fact that the defendant obtained a declaration and was relying on the principle of *res judicata* should have been stated in its affidavit or annexed it.

[32] Although it was given an opportunity to file its affidavit out of time it willfully did not. The argument, on which it relied, was only disclosed in its submissions. On the 8 February 2010, the defendant filed its submissions outside of the time specified by Rattray J and just two days before the hearing. Rattray J had ordered that submissions were to be filed before 4:00 pm on the 2 February 2010.

[33] Rule 9.6 is also pertinent to this matter. It states:

"(1) A defendant who-

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction,

may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must

first file an acknowledgment of service.

(3) An application under this rule must be made within the period for filing a defence.

(4) An application under this rule must be supported by evidence on affidavit.

(5) A defendant who-

(a) files an acknowledgment of service; and

(b) does not make an application under this rule court has jurisdiction to try the claim.

[34] It is the defendant's desire that the court not exercise is jurisdiction to hear this matter because it has already been determined. It has filed an acknowledgement of service, but has failed to file any application within the required period. The defendant has also attended the Case Management Conference and indicated its desire to file its affidavit; the defendant has therefore submitted to the court's jurisdiction and should not be allowed to rely on the doctrine of *res judicata.*

WHETHER THE DEFENDANT IS OBLIGED TO COMPENSATE THE CLAIMANT?

[35] This date was fixed for the hearing of the claimant's application. I will now consider that application. The defendant has, however, of its own volition gagged itself. Although Rattray J afforded the defendant time to file its affidavit, it sought not to. Instead, it rests on its submissions.

[36] Section 18 (1) of the Motor Vehicles Insurance (Third –Party Risks) Act states:

> *"If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy had 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 amount of the judgment, whichever is lower, in respect of the liability,*

including an 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."

[37] The certificate of insurance has not been exhibited. In its letter to the claimant's attorney, the defendant however stated that the insured's driver was not licensed as a PPV driver for the required three years. Implicit in that statement is that the vehicle was being operated as a carriage for hire. No evidence has been provided as to whether the vehicle was licensed for multiple purposes, for example hire as well as domestic and pleasure.

[38] There is no assertion that at the time of the accident the vehicle was being used as a carriage for hire. In any event, an isolated act of infringement of a policy will not automatically avoid a policy. The circumstances of the breach are crucial. (See **The Administrator General v NEM** (1988) 25 JLR 459 (CA) in which the court of appeal cited with approval the English House of Lords case of **Albert v Motor Insurers Bureau** (1971) 2 All ER 1345).

[39] In **Albert v Motors Insurers Bureau**, Lord Donovan made the distinction between the giving of a 'lift as a social kindness, even if some recompense is arranged at the outset' and the driver who systematically carry passengers for reward. The defendant has not argued, nor is there a scintilla of evidence that its insured was in the habit of operating the vehicle in a manner prohibited by the policy. There is no evidence or even a suggestion that the deceased driver 'normally or habitually' drove the vehicle whist it operated as a carriage/conveyance for hire or reward.

[40] In the circumstances it is hereby ordered that:

1. the Defendant's refusal to compensate the Claimant amounts to a breach of its statutory duty under Section 18 (1) of the Motor Vehicles Insurance (Third party Risks) Act;
2. the Defendant is bound to honour the Claimant's claim up to the policy limit sum for its insured whose motor vehicle was involved in an accident in which the Claimant was seriously injured, notwithstanding that the Defendant is claiming breach of its policy by its insured the Claimant be

awarded for breach of statutory duty in the sum of the Defendant's policy limit, proof of which is to be submitted to this Honourable Court,

3. interest at the commercial rate of 9% be awarded to the Claimant pursuant to the Law Reform (Miscellaneous Provisions) Act from the date of Judgment in Claim No. 2008 HCV 03460 being the 3rd November, 2009 until payment;
4. costs to the Claimant to be agreed, if not, taxed.

Almarie Sinclair Haynes

9 July 2012