IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 397/1989

BETWEEN	ERROL MUNROE	PLAINTIFF
A N D	N.E.M. INSURANCE COMPANY JAMAICA LIMITED	DEFENDANT

Miss Ingrid Mangatang of Perkins, Grant, Stewart, Phillips and Company for Plaintiff.

Mr. David Henry instructed by Nunes, Schofield, DeLeon and Company for the Defendant.

Heard: January 18 and 23, 1990

Pitter, J:

In this action the Plaintiff seeks the following orders:-

(1) A declaration that Policy of Insurance No. 018693 affords comprehensive insurance coverage to the Plaintiff by the Defendant.

(2) A declaration that the Defendant is liable pursuant to sub-clause 1(a) and/or sub-clause 1(b) and/or sub-clause 1(c) of Section 2 of the aforesaid Policy of Insurance, for damage to 1987 BMW motor car licence No. 5804 AI resulting in the circumstances herein outlined.

(3) A declaration that the damage herein outline does not fall within any of the "General Exceptions" specified in the aforesaid Policy of Insurance.

The present application is one made by the Defendant pursuant to Section 5 of the Arbitration Act for an order that the proceedings in this action be stayed until the dispute or disputes, the subject hereof have been settled by way of arbitration by virtue of Section 5 of the Arbitration Act. It is the contention of the Defendant that Clause 6 of the general conditions of the contract of Insurance between the Defendant and the Plaintiff makes it specifically clear that the Plaintiff has agreed that any dispute including the subject of this suit shall be referred to Arbitration.

The relevant contract of Insurance has been produced by the Defendant. It is not disputed that the said contract is valid and subsisting and was entered into between the parties in this case, nor is it disputed that its terms and conditions constituted a binding contract between the parties. Also it is not disputed that there is in that contract, an arbitration clause; namely Clause 6 of which provides as follows:

> "6. 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 case 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."

Section 5 of the Arbitration Act reads:

> "5. If any party to a submission, or any person claim through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof,

> is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and the applicant was, at the time when the proceedings were commenced, still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Miss Mangatang, the Plaintiff's Attorney in opposing the application submits that:-

(1) The Defendant has not alluded to what dispute, if any, has arisen between the Plaintiff and the Defendant as to facts.

(2) The Defendant has not proven to the Court's satisfaction that he was ready and willing to arbitrate at the time of commencement of the proceedings.

(3) The matters to consider are essentially questions of law and not facts.

In the case of Oliver v. Hillier (1959) 2 AER pg. 220 it was held that " the burden of proof is on the Plaintiff to pursuade the Court, not that he has a right to continue, but that he aught to be allowed to continue the action." This is a judicial discretion to be exercised in relation to the particular facts of the case.

On the facts in the instant case, it is clear that a dispute has arisen on the facts. This is borne out by the Plaintiff having filed an Originating Summons against the Defendant seeking Declaratory Orders and Relief in respect of the said policy of Insurance containing the arbitration clause. To buttress this is the unchallenged evidence of Gloria Bryan, the Claims Manager of the Defendant Company, that the Plaintiff has made a claim on the Defendant in respect of a motor car arising out of an incident which occured on the 2nd March, 1989, and that the Defendant has denied indemnity in respect of the said claim.

This evidence has not been rebutted by the Plaintiff.

The main thrust of Miss Mangatang's submission is that there is no proof that the Defendant was "ready and willing" to arbitrate. She argues that the burden of proof lies on the Defendant to satisfy the Court of this, and that there are no sufficient particulars or details from which the Court could draw such an inference. The mere assertion by Miss Bryan in her Affidavit "that the Defendant is and has been at all times ready and willing to do everything necessary to the proper conduct of the arbitration of the dispute between the parties" is not enough she says.

Mr. Henry the Defendant's Attorney, contends that the authorities cited do not support this line of argument. He relies on the Affidavit of Miss Bryan which he submits fulfils the obligation of the Defendant.

The case of Piercy v. Young (1879)14 Ch. D 290 is authority that the Defendant Applicant must show such readiness and willingness by Affidavit. Jessel M.R. at page 209 observed:-

> "I think it is right to say that the Court should have required an affidavit to be produced of readiness and willingness to refer to arbitration at the time when the motion was held in the Court below."

I have given full consideration to the cases cited in this regard, and nowhere in any of them is to be found any rule of law as to any particular acts or steps to be taken by the Applicant before the Court could find that he was ready and willing to arbitrate. The authorities do not establish that there is any need for the Applicant to particularise or give details of steps taken by him to indicate his readiness and willingness to arbitrate. The requirement therefore is satisfied once it is shown by Affidavit that the Applicant is ready and willing to arbitrate. Paragraph 9 of Miss Bryan's Affidavit dated 3rd January, 1990 sufficiently indicates this to the Plaintiff.

On the 3rd limb of Miss Mangatang's submissions, I find that the dispute involve questions of mixed law and facts. Where questions of law are mixed with technical questions of fact, the convenient course may well be for the technical experts to try the questions of fact, sending the questions of law to the Court on a stated case.

See Rowe v. Crossley (1912) 108 LT 11.

There is also complaint by Miss Mangatang that the Defendant is guilty of delay, and urges the Court to exercise its discretion against the Defendant in refusing his application. I reject this as the Defendant acted promptly by entering appearance and filing his summons for stay of proceedings within a matter of days of the service of the Plaintiff's Summons.

The Case of Kock v. Caledonian Insurance Company (1965) 8 WIR is instructive. It was cited and relied on by both Attorney to support their respective arguments. The case itself particularly remarkable in its content as is the instant case.

On the facts in this case I find that the necessary condition for obtaining a stay of proceedings have been fulfilled:

(a) That there is a valid arbitration in the Clause 9 of the Contract which provides that any differences arising out of the Policy should be referred to arbitrate and that the parties are asserting that they entered into a binding contract which is in writing and subsisting.

(b) That proceedings in the Court have been commenced by a party to the argument.

(c) That the proceedings are in respect of a dispute so agreed to be referred.

(d) That the application to stay is made by a party to the proceedings.

(c) That the application is made after appearance by that party and before he has delivered any pleadings or taken any other "step in the proceedings."

(f) That the Applicant was and is ready and willing to do everything necessary for the proper conduct of the arbitration.

In the result I am satisfied that there is no sufficient reason why this matter should not be referred to arbitration in accordance with the agreement the subject of this case and hereby, pursuant to Section 5 of the Arbitration Act, order that all further proceedings in this action be stayed.

Cost to the Defendant to be agreed or taxed.