[2015] JMSC Civ 160

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 003081 of 2010

BETWEEN	**ROYDEL RILEY**	**CLAIMANT**
AND	**EPHRAIM BURKE**	**1st DEFENDANT**
AND	**JULIUS LAWRENCE**	**2nd DEFENDANT**
AND	**EPHRAIM BURKE**	**1st ANCILLARY CLAIMANT**
AND	**JULIUS LAWRENCE**	**2nd ANCILLARY CLAIMANT**
AND	**RUTHANN G. MORRISON ANDERSON**	**1st ANCILLARY DEFENDANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**2nd ANCILLARY DEFENDANT**

Mr. David Johnson, instructed by Samuda & Johnson for the ancillary defendants/applicants.

Ms. Tamiko Smith, instructed by Frater, Ennis & Gordon for the defendants/ancillary claimants/respondents.

Mrs. Alia Leith-Palmer, instructed by Kinghorn & Kinghorn for the claimant.

Application to Set Aside or Vary Order Granting Permission for Filing Ancillary Claim – Whether Appropriate Application – Whether Applicants Should Have Filed Appeal against Order – Whether Ancillary Claim Appropriate Based on the Grounds Stated – Provision in Policy of Insurance for Arbitration – Whether Ancillary Claim Should Await Outcome of Arbitration of Issues – Subrogation – Alleged Negligence of Attorney-at-law.

In Chambers

Heard: May 5, and July 28, 2015.

Coram: F. Williams, J.

Issues

[1] In this matter there are four main issues that arise for the court's determination. They may be stated to be as follows:

i. Whether the first-named applicant ought to be granted leave to intervene in these proceedings for the purpose of making this application;
ii. Whether the applicants have proceeded by means of the appropriate application (that is, to set aside or vary the order); rather than by filing an appeal;
iii. (If the answers to these questions are "yes"), whether the ancillary claim ought to be allowed to stand;
iv. Whether the ancillary claimants' failure first to proceed to arbitration warrants the ancillary claim being stayed or struck out.

The Application

[2] The matter comes before me by way of an Amended Notice of Application dated May 30, 2014 and filed June 2, 2014. These are the two main orders that are being sought - that:

> "1. Permission be granted to the Applicant Ruthann G. Morrison-Anderson to intervene in these proceedings for the limited purpose of pursuing this application;
>
> 2. The order of Master Audrey Lindo made on December 2, 2013 granting permission to the respondents to file an ancillary claim

against the applicants be set aside;

[3] The applicants also seek the costs of this application and any further or other relief that the court deems appropriate.

The Grounds of the Application

[4] These are the grounds on which the application is being made:

> "1. An order permitting the respondents to withdraw the defence admitting liability on their behalf and to file an amended defence was made by Master Audrey Lindo on December 2, 2013;
>
> 2. The respondents' attorneys-at-law duly filed an amended defence on their behalf in this claim on December 10, 2013 denying liability for the accident in issue;
>
> 3. The ancillary claim discloses no reasonable grounds for bringing a claim against the ancillary defendants in light of the said order of Master Lindo and the steps taken by the Respondents in pursuance thereof;
>
> 4. The basis on which an ancillary claim was commenced against the Ancillary Defendants is the alleged breach by the applicant of its contractual duty to the 2nd Respondent under a policy of motor insurance in respect of motor vehicle registered PD 2195;
>
> 5. A difference arising out of the said policy of insurance exists between the applicant(s) and the 2nd Respondent however the said dispute has not been referred to an Arbitrator as required by the said policy;

6. The respondents failed to disclose the said policy of insurance to Master Lindo during the application for permission to commence ancillary proceedings against the applicant;

7. The court's overriding objective will be advanced by the making of the orders sought in this application."

Summary of the History of the Matter

[5] The substantive claim arises from a motor-vehicle accident which occurred on October 26, 2009 along the Walkerswood Main Road in the parish of St. Ann. The claimant filed a claim form and particulars of claim, alleging that he was a passenger in a motor bus registered PD 2195, owned by the 2nd defendant/2nd ancillary claimant and driven by the 1st defendant/1st ancillary claimant. These documents were filed on June 29, 2010.

[6] On November 24, 2010 an acknowledgement of service and defence, both dated November 23, 2010, were filed in the name of Ruthann G. Morrison-Anderson in her capacity (stated in the defence) as "Attorney-at-law and Legal Officer of Advantage General Insurance Company Limited, insurer of the Defendants' motor vehicle…". The defence admitted liability "for the purpose of this claim, but not otherwise…", and sought to contest the quantum of any damages to be awarded.

[7] On or about the 28th day of July, 2011 a judgment on admission was entered (in judgment binder 753; folio 187) against the 2nd defendant/2nd ancillary claimant.

[8] On November 27, 2012 a notice of change of attorneys-at-law was filed on behalf of the defendants; and, on November 29, 2012 a notice of application for court orders to withdraw the admission made in the defence was filed. That application was supported by affidavits deponed to by the defendants/ancillary claimants.

[9] In the affidavits the deponents indicate that the accident occurred when the driver of the insured's motor bus swerved to avoid a head-on collision with an oncoming vehicle which was in the act of overtaking. His vehicle collided with a stone, the tyre burst and the vehicle overturned, falling onto its side. Their defence, in essence, is inevitable accident. Some time in 2010, he (the 1st defendant/ancillary claimant), collected the claim form and particulars of claim from the claimant's attorneys-at-law and delivered them to the insurance company the following day. They heard nothing more about the matter until on or about November 14, 2012, when he received the notice of assessment of damages and other documents. It was on retaining their present attorney-at-law that they learnt that a judgment on admission had been entered.

[10] By the aforesaid order of Master Lindo, they were permitted to file an amended defence, challenging both liability and quantum; and to bring ancillary proceedings against the present ancillary defendants.

The Present Position

[11] The present position, therefore, is that the judgment on admission no longer exists. There is now an amended defence averring inevitable accident, so that the defendants will be able to fully advance their defence at the trial of this matter.

[12] With that being the present position, it is best to consider the grounds of the present ancillary claim.

The Grounds of the Ancillary Claim

[13] In the ancillary claim filed December 10, 2013, these are the four grounds that form the basis of the claim:

1. That contrary to clear instructions given to her by the 1st and 2nd Ancillary Claimants/Defendants in written statements setting out clearly that the incident, the subject of the Claim was an Inevitable Accident, the 1st Ancillary Defendant the

servant and/or agent of the 2nd Ancillary Defendant caused a Defence to be filed herein on November 24, 2010 on behalf of the Ancillary Claimants/Defendants admitting full liability to the Claimants Claim.

2. That the Ancillary Defendants failed to properly advise the Ancillary Claimants/Defendants on the steps that were taken on their behalf in these proceedings and failed to inform them that Judgment on Admission was entered against them.

3. That the 1st Ancillary Defendants (sic) the servant and/or agent of the 2nd Ancillary Defendant failed to properly discharge her responsibilities as legal counsel for the Defendants and had acted wantonly and without any regard to the interest of the Defendants.

4. That as a consequence Judgment on Admission has been entered against the Ancillary Claimants/Defendants and they are liable for an award of damages, interest and cost being made against them herein."

[14] We may now move to an examination of the issues in this case.

The First Issue: Leave to Intervene

[15] Not much was made of this issue in the arguments that were presented before me, the submissions instead focusing on the issue of the sustainability or otherwise of the ancillary claim. However, this aspect of the application seems to have arisen from the first applicant's contention that, although she is named in the ancillary-claim documents, she has not been served.

[16] In the affidavit of Tamiko Nicole Smith filed on November 29, 2012, exhibits TNS1, TNS2, TNS3 and TNS4 are copies of documents bearing the stamp of the 2nd ancillary defendant, admitting service of those documents on that defendant in the proceedings before Master Lindo. The 1st ancillary defendant/ applicant, however, maintains that she was never served.

[17] In these circumstances it is noteworthy that there is nothing that proves service on the 1st ancillary defendant herself, rather than on the 2nd defendant, a limited-liability company and thus a separate entity and legal personality from the 2nd defendant/applicant.

[18] That being the case, the 2nd ancillary defendant/applicant would not (not having been served) have had an opportunity to have advanced arguments at the hearing of the application in which leave was granted for the filing of the ancillary claim. Perhaps more importantly, however, is the fact that there is nothing before me conclusively proving service on her of the ancillary claim form. It therefore appears to me to be meet for her to be allowed to intervene in this application, as she would not properly have been brought into the matter with merely being named in the documents without more.

[19] In fact, rule 18.10(1) indicates and is supportive of this position, that rule providing:

> "**Effect of service of ancillary claim form**
> 18.10 (1) A person on whom an ancillary claim form is served becomes a party to the proceedings if that person is not already a party".

[20] Leave is therefore granted for her to intervene so she might properly participate in this application.

The Second Issue: Whether the Application to Set aside is Appropriate

[21] The matters addressed in respect of the first issue have also shed light on this, the second issue. A perusal of the Notice of Application that was filed by the defendants/ancillary claimants for them to be allowed to withdraw the judgment on

admission and for the filing of the ancillary claim, show that that document was in fact addressed to the Registrar and the Claimant; and not to the now ancillary defendants (even though, admittedly, service was at some stage effected on the 2nd ancillary defendant). It is not immediately apparent that there is a rule in the CPR specifically addressing such a situation – that is for an entity or person that was not a party to earlier proceedings to apply to vary it or set it aside. The rule that most closely approximates the circumstances of the instant case is rule 11.18, which deals with making an application to set aside an order that has been made in a party's absence. That rule reads as follows (so far as is material):

> "Application **to set aside or vary order made in the absence of party**
>
> 11.18 (1) A party who was not present when an order was made may apply to set aside that order."

[22] However, this rule, applies to situations in which an order has been made in the absence of a party who has been served and service was previously proven.

[23] In the absence of a clear provision dealing with the exact factual circumstances with which we are faced, it appears best to deal with the application either pursuant to the court's case-management powers, under rule 26; and/or to treat with it under the court's inherent jurisdiction.

[24] To my mind the fact that the ancillary defendants were not parties to the action as it originally stood, the avenue of filing an appeal would not be open to them (especially the 1st defendant, who, from all indications, was not served at all). It seems to me, therefore, that the courses of action open to the ancillary defendants/applicants were (i) to apply (as they have) to set the order of Master Lindo aside or to vary that order; and/or (ii) to apply to the court to have the ancillary claim struck out pursuant to the court's case-management powers. They have chosen to do the former; and, for this, in my view, they cannot be faulted.

The Third Issue: Whether the Order of the Master Should be Set Aside or Varied

[25] This, the main challenge to the ancillary claim, might be viewed as having two aspects. One is based on a consideration of when an insurer becomes liable to indemnify an insured; and the other hinges on the nature of and reason for making an ancillary claim.

[26] I will be examining the nature of an indemnity first.

Right to Indemnity

[27] It is trite law that an insurer has the right to bring proceedings on behalf of the insured. That right is enshrined in the principle of subrogation. That principle has been defined thus:

> "196. **Nature of the Right**. In the strict sense of the term, subrogation expresses the right of the insurers to be placed in the position of the insured so as to be entitled to the advantage of all the rights and remedies which the insured possess against third parties in respect of the subject matter…"

(See **Halsbury's Laws of England**, 4th edition, Volume 25, paragraph 196).

[28] However, an insurance against liability is a contract of indemnity and no obligation arises on the part of the insurer to pay a claim until the insured has suffered a loss. The majority decision of the UK Court of Appeal in **Post Office v Norwich Union Fire Insurance Society Ltd** [1967] 2 QB 363 held that the insured's right to be indemnified under a liability insurance policy arises only when the insured's liability to the third party claimant has been ascertained and determined by agreement, award or judgment. It does not arise before the occurrence of the event which gives rise to a liability on the part of the insured to the third party.

[29] In the **Post Office** case a contractor company damaged a cable belonging to the Post Office. The contractor, however, denied negligence. Before the matter could be settled or go to trial, the contractor went into liquidation. The Post Office sued the contractor's liability insurers. It was held that that the contractors could not, at the date of the liquidation, have brought an action against their own insurers since their liability had not been established.

[30] The obiter dicta of Lord Denning MR sums up the law relating to the subject matter (at pages 373-374 and 375):

> "It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. Hi liability to the injured persons must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise…."
>
> In these circumstances I think that the right to sue for these moneys does not arise until the liability of the wrongdoer is established and the amount ascertained. How is this to be done? If there is an unascertained claim for damages in tort, it cannot be proved in the bankruptcy, nor in the liquidation of the company. But nevertheless the injured person can bring an action against the wrongdoer… The insurance company can fight that action in the name of the wrongdoer. In that way liability can be established and the loss ascertained. Then the injured person can go against the insurance company."

[31] Lord Denning further supported his position by referencing (at page 374), dicta of Devlin J in **West Wake Price & Co v Ching** [1957] 1 WLR 45, 49 where he (Devlin J), stated that:

> "The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss."

[32] Another case that is to similar effect and more recently decided is **Bradley v Eagle Star Insurance Co. Ltd** [1989] 1 All ER 961. In that case the claimant was an ex-employee of the defendant. She brought an action in 1984 against the defendant's former liability insurers in respect of an industrial injury allegedly suffered between 1938 and 1970 while she was employed with the defendant. The House of Lords held that the claimant could not sue the insurance company for the injury because the defendant's liability to her had not been established.

[33] Moreover clause II, sub-clause (i) of the Insurance policy reads:

> "The Company will subject to the Limits of Liability and the Jurisdiction Clause indemnify the Insured in the event of an accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of…" (Emphasis added).

[34] It is evident from the discussion of the case law and the dicta of Denning MR that the 1st and 2nd ancillary claimants cannot properly bring an action against the 2nd ancillary defendant seeking indemnity until the question of liability is answered by arbitration or litigation and, consequently, the loss ascertained. The position is the same is respect of the 1st ancillary defendant, who, on the allegations being made, would have been acting as the servant or agent of the 1st ancillary defendant.

[35] It should be apparent, therefore, that when viewed from this perspective, the foundation of the ancillary claim is most unsound; and the claim ought to be struck out; or, at the very least, the order granting permission for it to have been filed should be set aside or varied.

[36] However, let us proceed to an examination of the other aspect of this issue, relating to the nature of the ancillary claim.

The Nature of an Ancillary Claim

[37] In relation to that aspect of the challenge having to do with the nature of an ancillary claim, it is best observed at this point that the dictionary meaning of "ancillary" is:

> "…additional but less important; subsidiary…"

(See the **Concise Oxford English Dictionary**, 11th edition).

[38] The natural expectation, then, is that an ancillary claim will be related (in a subordinate way) to the main claim – that is, the one to which it is ancillary. In practice this interdependence between the main and ancillary claims is usually seen in a defendant, for example, bringing an ancillary claim against a party which was not joined in the original or main claim, but whom the defendant believes or contends was the party that was either totally negligent or contributorily negligent in a matter. Normally, by means of the ancillary claim, the ancillary claimant seeks to absolve himself (either fully or partly) from the results of having been declared liable in the main claim.

[39] That this is so is borne out by a perusal of the provisions of rule 18.9, (in particular 18.9 (2)), which details matters to be considered by the court in deciding whether to grant permission for the issuance for an ancillary claim. This is what is stated in that rule:

> "**Matters relevant to the question whether an ancillary claim should be dealt with separately from the main claim**
>
> 18.9 (1) This rule applies when the court is considering whether to –
>
> (a) permit an ancillary claim to be made;
>
> (b) dismiss an ancillary claim; or
>
> (c) require the ancillary claim to be dealt with separately from the claim.

(Rules 26.1(f) and (i) deal with the court's power to decide the order in which issues are to be tried or to order that part of the proceedings be dealt with separately.)

(2) The court must have regard to all the circumstances of the case including-

(a) the connection between the ancillary claim and the claim;

(b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;

(c) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim; and

(d) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings –

(i) not only between the existing parties but also between existing parties and the proposed ancillary claim defendant; or

(ii) to which the proposed ancillary defendant is already a party but also in some further capacity."

[40] As will be seen by the clear provisions of rule 18.9 (2), among the main considerations for a court in deciding whether to permit the making of an ancillary claim, are: (i) a connection between the claims; (ii) whether the remedies being sought in both the main and ancillary claims are substantially the same; (iii) whether the facts in both are substantially the same; (iv) a connection between the subject matters of the two claims.

[41] To my mind, as well, the point is further borne out by another provision – that is, rule 18.11 (2), which states:

> "(2) The ancillary defendant is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim;" (emphasis added).

[42] This provision reflects the tendency of the general rule, which is for the decision in the main proceedings to bind the defendant in the ancillary claim.

[43] We now need to ask whether in the facts and circumstances of the present case, it could ever be reasonable for the ancillary defendant to be bound by any decision in the main claim. This examination will involve as well a consideration of the matters raised in rule 18.9 (2) – such as the connection between the two claims, their subject matter and so on.

[44] In the previously-existing state of affairs, when the judgment on admission was in existence, it would have been easier to comprehend the connection and similarity of subject matter between the main claim (as it then stood), and the ancillary claim. This is so as the contention of the ancillary claimant is that it was breach of contractual duty and/or negligence on the part of the 1st ancillary defendant on her own and/or on behalf of the 2nd ancillary defendant that led to the filing of the judgment on admission.

[45] But has there not been a sea change in circumstances with the order of Master Lindo, allowing the ancillary claimants to withdraw the judgment on admission and permitting them to file an amended defence?

[46] As matters at present stand, the defendants/ancillary claimants are now fully and freely able to advance the defence that they wish to put forward and that they say they would have been prevented from advancing had the now-removed judgment on

admission remained in place. So, with the withdrawal of the judgment of admission, they are now in exactly in the position that they wanted to be.

[47] Two issues arise in this scenario: (i) if the defendants should succeed in their defence, would that not be the end of the matter? If they wished, they could pursue alternative proceedings against the ancillary defendants elsewhere. Whether they could do so successfully, is an open question and not one for me to attempt definitively to resolve. However, is it impossible that that other tribunal might view the matter with reference to the principle *damnum sine injuria*; if any damage should be found to have been caused at all? And, (ii), if the defendants were to lose in putting forward their defence, surely this would be a loss strictly on the merits of the case. What would the connection be between that loss and the fact that, some time before, a judgment on admission had been entered – even if that had been done negligently or in breach of a contractual duty? Once the insurer were to indemnify the ancillary claimants in accordance with the policy, when the amount of such exposure is known, surely that would be the end of the matter? Where is the connection between any claim that the defendants/ancillary claimants might have against the ancillary defendants on the one hand, and the main claim, on the other? It appears to me that there is none. In these circumstances it serves no useful purpose to have the ancillary claim continue in existence. On the basis of these considerations, therefore, I would be minded to grant the application.

[48] However, another point was raised about the existence of an arbitration clause in the policy of insurance and as to whether the matter should first be referred to arbitration before litigation between the insured and the insurer should be allowed to proceed.

The Fourth Issue: The Position in Relation to the Arbitration Clause

The Validity of the Arbitration Clause

[49] Conditions 9 and 10 of the Insurance Policy read:

> "(9) 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 differences 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 so to do 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 meeting 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."
>
> (10) The due observance and fulfillment of the Terms of this Policy in so far as they relate to anything to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make payment under this Policy."

[50] The House of Lords held in **Scott v Avery** (1856) 5 HL Cas, 811, that it is legitimate for insurance policies to have a contractual provision requiring the parties to first submit their dispute to arbitration, so long as that was only a precursor to going to court. In other words, simply put, it is not acceptable to seek to oust the jurisdiction of the court entirely by providing that arbitration was to be used to the exclusion of court proceedings.

[51] Lord Campbell in **Scott v Avery** stated (at pages 851-852), that:

> "In the first place, I think that the contract between the shipowner and the underwriters in this case is quite clear - as clear as the English language could make it - that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and, upon a

> deliberate view of the condition of the policy, I am of opinion that it embraces not only the assessment of damages, the computation of quantum, but also any dispute that might arise between the under writers and the insured respecting the liability of the insurers as well as the amount to be paid. If there had been any question about want of seaworthiness, or deviation, or a breach of blockade had been committed, I am clearly of opinion that upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured.
>
> That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there be some illegality in the contract, the courts are bound to give it effect."

[52] Justice Coleridge agreed with the dicta of Lord Campbell where (at page 841), he states:

> "If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term, that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not may well be questioned; but it has been so long settled, that it cannot be disturbed. The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts."

[53] Upon careful perusal of Conditions 9 and 10 of the Policy of Insurance, it becomes clear that arbitration is merely a condition precedent to litigation. It does not seek to oust the jurisdiction of the Courts whether in a dispute relating to law or facts or even quantum of damages. It is therefore a legally-enforceable provision and effect must be

given to it. It seems to me that the question as to whether the filing of a defence limited to quantum and the subsequent entry of a judgment on admission was properly done, falls within the phrase "differences arising out of this Policy…", within the meaning of clause (9) of the policy. It is, therefore, an issue that is suited to mediation. The only remaining question, therefore, is whether the ancillary claim should be stayed or struck out. Having regard to the other findings that have previously been made in this case, it is my view that the entire ancillary claim must go.

Conclusion

[54] Having considered the issues in this case, it is apparent that the submissions of Mr. Johnson for the ancillary defendants must be accepted and an order granted in terms of the notice of application or a variation of it. The central basis for this is encapsulated in ground 3 of the notice of application. This is to the effect that, the ancillary claim discloses no reasonable ground for bringing a claim against the ancillary defendants in light of the order of Master Lindo permitting the withdrawal of the judgment on admission and the filing of the amended defence, putting right the wrong of which they complained, whether there was indeed a wrong or not. Additionally, it is my considered view that, had the arbitration clause in the policy of insurance been put before Master Lindo, it is likely to have affected the order that she eventually made.

[55] It appears to me that the ancillary claim should be struck out in keeping with the courts powers pursuant to rule 26.3 (1) (c). The orders to be made are therefore as follows:

(i) Ancillary claim struck out.

(ii) Costs of the application to the ancillary defendants to be agreed or taxed.