[2021] JMSC Civ.93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO: SU2020 CV 01376

BETWEEN	**SAMUEL ROSE**	**CLAIMANT**
AND	**GALAXY LEISURE AND TOURS LTD**	**1ST DEFENDANT**
AND	**FRANKLIN BOSHEUVEL**	**2ND DEFENDANT**

HEARD: May 6, 2021 and May 21, 2021

Mr Lance Lamey instructed by Bignall Law for the Claimant/Respondent.

Jacqueline Cummings and Matthew Palmer instructed by Archer Cummings and Co for the Defendants/Applicants.

Civil Procedure - Application to strike out claim for an abuse of the process of the Court - application for an extension of the validity of the claim form - the impact of a Notice of Discontinuance - whether the hirer under a rental car agreement is vicariously liable for the negligent acts of the hiree of the rental car – CPR 26.3(1)(b), CPR 8.15(1). CPR 37.7

CORAM: MOTT TULLOCH-REID J (AG)

[1] There are two applications before me. They are the Defendant's application to strike out the claim for an abuse of the Court's process and the Claimant's application to extend the validity of the claim form. The Claimant tried to have his

application to consolidate claim number 2015HCV00825 Samuel Rose v Galaxy Leisure and Tours Limited and Franklin Bosheuvel, with this claim heard at today's hearing but counsel for the Defendant, Ms Cummings, objected to this course of action as she was not served with the application and was therefore not in a position to respond to it. I need not concern myself with that latter application in any event as claim number 2015HCV00825 is no longer before the Court as a Notice of Discontinuance concerning that claim was filed on September 11, 2020 and served on the Defendants' attorneys-at-law. Since that claim was discontinued, there is therefore nothing to consolidate. I need not consider the application to extend the validity of the claim form because Mr Vaughn Bignall in his affidavit in response to the Defendant's affidavit in support of the application to strike out claim, has indicated that he now discontinues the application made on behalf of the Claimant to extend the validity of the claim form as serving the 2nd Defendant "*will be an exercise in futility*". This would therefore bring us back to the position the parties would have been in the 2015 claim, for in this claim, the parties still remain Samuel Rose against Galaxy Leisure and Tours Limited and Franklin Bosheuvel.

Notice of Discontinuance

[2] I wish to however comment on the effect of filing and serving a Notice of Discontinuance. CPR 37.7 provides that

> "*Where –*
>
> *(a) a claimant discontinues a claim after the defendant against whom the claim is discontinued has a filed a defence; and*
>
> *(b) the claimant makes a subsequent claim –*
>
> *(i) against the same defendant;*
>
> *(ii) arising out of the facts which are the same or substantially the same as those relating to the discontinued claim; and*
>
> *(iii) the claimant has not paid the defendant's costs of the discontinued claim,*
>
> *the court may stay the subsequent claim until such time as the costs of the discontinued claim are paid."*

The Claimant has discontinued the 2015 claim which he brought against the First and Second Defendants. This was not with the consent of the Defendants and has in essence filed the same claim against the same two Defendants. With respect the claim 2015, the Claimant has not yet paid the costs associated with that claim. This has brought into play CPR 37.7 and as such, since the Defendants will be asked to face the same claim under a new suit, and would have incurred costs for defending the 2015, claim it is only fair that before the new proceedings are continued against them, the Claimant is made to pay the costs associated with the 2015 claim.

Application to strike out the claim

[3] CPR 26.3(1)(b) provides that:

> "*In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings"*

The Defendant says the Claimant's case should be struck out because the filing of this claim is an abuse of the process of the court when another claim exists. The other case does not exist as it has been discontinued. The point is therefore moot. I would therefore in the circumstances not strike out the claim.

Whether a hirer under a car rental agreement is vicariously liable for alleged negligent actions of the hiree of the rental car

[4] Ms Cummings raised an interesting point in her oral submissions on the hirer/hiree contract in a rental agreement. I wish to comment on it. She argues that the person who rents a car from a rental car company is not the servant and/or agent of the rental car company. I agree with this point because when a person rents a motor vehicle, he is using it for his own purposes and benefit and not for the purpose and benefit of the rental car company. Ms Cummings continues by arguing that if you are in the business of renting car and can prove you had a

contract of hireage you are not liable vicariously. This is also correct as vicarious liability arises in situations of master/servant and agency, that is, when the servant or agent of the owner is driving on the instructions of or for the benefit of the owner of the motor vehicle.

[5] Ms Cummings relies on the case of **Avis Rent-A-Car Ltd v Maitland [1980] 32 WIR 294** to support her argument. In that case the appellant rented its car to the second defendant who used it for his own purposes of conducting private investigation. The second defendant drove the car in a negligent manner so that it crashed and the passenger in the car was killed. The trial judge held that the rental car company was liable as the second defendant was driving as its agent. The Court of Appeal disagreed with the finding of the trial judge and held that there was no agency relationship between the second defendant and the rental car company as the second defendant was not driving the motor vehicle for the benefit of the rental car company, albeit that the rental car company would have benefitted by earning an income from the rental. The Court of Appeal's reasoning and decision are supported by the case of **Morgans v Launchbury [1973] AC 127** in which Lord Wilberforce said

> *"For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty… The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes."…*

[6] The position as set out in the **Avis Rent-a-Car case** is established law as it relates to the issue of a hirer/hiree situation where the claimant in his pleading pleaded

agency. Where however agency is not pleaded but the pleadings reveal that the hiree was driving the hirer's motor vehicle as an authorised/permitted driver, then other considerations can be made. Why else is a motor vehicle insured but to indemnify the owner or the owner's authorised driver against any claims that arise if it is proved that the owner or his authorised driver was negligent. To hold a different understanding of the law and governing statute (i.e. the Motor Vehicles Insurance (Third Party Risk) Act) would be unfair. The insurance company which insures a rental car company's motor vehicle and in that insurance agreement has agreed to indemnify driver X so named on the policy of insurance, would always escape paying out on the policy in instances where a hiree is negligent, this to the detriment of a claimant who is not at fault.

[7] So we look to the pleadings to make a determination as to whether the pleadings are helpful in setting out a proper case on behalf of a claimant who wishes to be compensated for his loss in a situation where the alleged vehicle at fault was owned by a rental car company and driven by someone who rented the motor vehicle. The Claim Form filed states that

> *"… where the second defendant whether in his own right or as the servant and/or agent and/or authorised driver of the First Defendant, so negligently…"*

Paragraph 3 of the Particulars of Claim reads as follows:

> *"The second defendant Franklin Bosheuvel was at all material times the driver of the motor vehicle numbered and lettered 9121GB and the servant and/or agent and/or authorised driver of the First Defendant."*

[8] I return to the case of **Launchbury v Morgans [1971] 2 QB 245** at the Court of Appeal when Lord Denning said

> *"The owner only escapes liability [i.e. vicarious liability] when he lends it [his motor vehicle] out or hires it out to a third person to be used for purposes in which the owner has no interest or concern."*

[9] To succeed on a claim, the Claimant would properly have to plead that the defendant was an authorised driver pursuant to a rental agreement between the defendant and the rental car company and would therefore be covered under an insurance policy. Professor Gilbert Kodilyne in his book Commonwealth Caribbean Tort Law 5th ed said:

> *"If the negligent driver is a person covered by the policy, it will not normally be necessary for the claimant to invoke the doctrine of vicarious liability in order to make the owner of the vehicle liable, as the insurance company will compensate the claimant under the terms of the policy and in accordance with its statutory obligation, under the motor insurance legislation."*

It would be surprising to me that the Galaxy Leisure and Tours Ltd, would not have reported the accident to their insurers especially in circumstances where based on the injuries allegedly sustained by the Claimant, the accident would have had to have been so serious as to cause damage to the motor vehicle. In addition, I would like to think that when the hiree returned the vehicle damaged, he would have had to provide a report or explanation as to the circumstances in which the motor vehicle came to be damaged.

If the hiree is found to be negligent then the insurance company would compensate the claimant under the terms of the policy in so far as it is able to so indemnify the claimant. If the amount insured does not cover the extent of the award of the damages, I would not think that the hirer would be liable to cover any outstanding amounts as it is not liable for the actions of the hiree. What covers the claimant is the fact that the hirer named the hiree as an authorised/permitted driver of the motor vehicle and so authorised the insurance company to indemnify him in the

event that he drove the motor vehicle in a negligent manner and so caused harm to the claimant.

[10] I am aware that Court of Appeal decisions in the Eastern Caribbean do not bind this court, however, I find that the case of **Eastern Caribbean Insurance Ltd v Bicar (2010) Court of Appeal, Eastern Caribbean States (St Lucia) No 2008/014,** is helpful in setting out how issues of this nature are to be resolved. In the case, the appellant issued a policy of insurance to John Noel in respect of his motor vehicle. The policy was issued pursuant to the Motor Vehicles Insurance (Third-Party Risks) Act (St Lucia) (the "Act"). The certificate of insurance provided that the persons or classes of persons entitled to drive were the policyholder and "*any other person who is driving on the policyholder's order or with his permission*". During the period of coverage, Mr. Monrose, expressed an interest in purchasing the motor vehicle but needed to obtain his employers' approval as they were to assist with the purchase. Noel consented to Monrose driving the car home on the weekend with the intention that the sale would be completed on the following Monday. Monrose however had an accident on the weekend. The Respondent, Mr Bicar, was injured in the accident. Bicar sued Noel and Monrose but the Court did not find Noel liable as Monrose was not driving the car as his servant or agent. The Court, however, found Monrose liable as he was driving with the permission of Noel. Neither Monrose nor the appellant paid the judgment debt due to Bicar. The appellant contended that they could not be liable as no judgment had been obtained against their insured, Noel, and that Monrose was "*not a person who is insured by the policy*". Cottle J found, applying section 4(7) of the Act, that the Insurer had contracted to indemnify Noel and any authorised driver. Monrose was such an authorised driver so that the Insurer was liable to pay Bicar on account of the judgment debt.

[11] The Insurer appealed on the ground that Monrose was not an authorised driver. The Court of appeal dismissed the appellant's appeal. It held that an "*insured person*" or "*person insured by the policy*" under section 4(1)(b) of the Act includes not only the policyholder but any other person or class or persons as specified in

the policy. The policy of insurance between the Insurer and Noel extended to the policyholder, to any other person driving on the policyholder's order (in essence, his servant or agent) and to any person driving with the policyholder's permission (although not as his servant or agent) as this was so specified in the policy, as evidenced by the certificate. There was no distinction in principle between a driver who is "permitted" and one who is "authorised". **English and American Insurance Co. Ltd. v Stanley McDermott and Motor and General Insurance Co. Ltd. (1974) 22 WIR 451 (Court of Appeal, Jamaica)**, distinguished

[12] The Court of Appeal also held that Section 4(7) of the Act requires the Insurer to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons. Section 9(1) of the Act requires the Insurer to pay to the person(s) entitled to the benefit of the judgment any sum payable in respect of liability incurred "against any person who is insured by the policy". Section 4(7) ensures that an authorised driver is in the same position as the policyholder in respect of the right to an indemnity from the insurer. The grounding of liability of the Insurer to pay a judgment debt in respect of which the authorised driver has become legally liable to pay is not dependent on a finding of vicarious liability on the part of the policyholder but the obligation arises once it can be shown that the driver falls within the category of persons specified under the particular policy as being covered thereunder. Monrose, being a permitted driver, fell within the class of persons specified under the policy as being a "person insured by the policy". Accordingly, Monrose would be entitled to be indemnified by the Insurer in respect of the liability arising as against him in favour of Bicar in respect of the judgment debt, pursuant to section 4(7). **Matadeen v Caribbean Insurance Ltd. [2002] UKPC 69 (Trinidad and Tobago)**, followed.

[13] I find the case helpful as sections 4(7) and 9 of the St Lucia statute are similar to sections 4(8) and 18 of the Jamaican statute, wherein an insurer is liable to indemnify "*the persons, or classes of persons, specified in the policy, in respect of any liability the policy purports to cover, in the case of those persons or classes or*

persons" (s4(8)) and it is the duty of insurers to satisfy judgments against persons insured in respect of third party risks (s 18).

[14] Given all of the above, a claimant who is injured because of the negligent acts of a person who rents a motor vehicle can be compensated by the insurance company if the Court finds in his favour. What is important is that the pleadings must be set out in such a way as to properly show the relationship between the person who rents the car and the owner of the car. Also of importance is the fact that the person who is driving the rented vehicle of the time of the accident, must be so authorised by the rental car company and is noted as an authorised driver on the insurance policy, and the driver of the motor vehicle, that is, the hiree, must be found liable by the Court.

[15] The application before me is to strike out a claim for an abuse of Court's process on the grounds that a similar claim is already before the court. I do not find that that is true anymore as a Notice of Discontinuance on the first claim filed has been filed and served. As both counsel raised issues as it related to the renting cars and liability, I thought it prudent to try to clarify those issues as this should assist both parties in the handling of their respective cases going forward.

[16] My orders are as follows:

a) Franklin Bosheuvel is removed as a party in the claim, having not been served with the initiating documents.
b) The application filed by the First Defendant to strike out the Claimant's claim is refused.
c) The Defendant is to file and serve a Defence to the Claim on or before July 6, 2021.
d) Subsequent to the filing of the Defence, the claim is stayed until the Claimant pays the First Defendant's costs in claim number 2015HCV00825 Samuel Rose v Galaxy Leisure and Tours Limited and Franklyn Bosheuvel, such costs are to be taxed if not agreed.

e) The Defendant is to pay the Claimant costs in the application, such costs are to be taxed if not agreed.

f) The Defendant’s attorneys-at-law are to file and serve the Formal Order.