SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2009/008

BETWEEN:

SAINT LUCIA MOTOR & GENERAL INSURANCE CO. LTD.

Appellant

and

PETERSON MODESTE

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Janice George-Creque — Justice of Appeal
The Hon. Mr. Davidson Baptiste — Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore of Theodore and Associates for the appellant
Ms. Carol Gideon Clovis for the respondent

2009: October 21;
2010: January 11.

Civil Appeal – Civil Procedure – Illegality – the principle of ex turpi causa – whether the non-statutory defence of illegality could be pleaded in the instant case - whether the master failed to consider or consider adequately the defence of illegality – fraud – whether particulars of fraud must be set out in pleadings – purpose of pleadings – summary judgment – whether defence had a real prospect of success – Motor Vehicles Insurance (Third Party Rights) Act Cap. 8.02 of the Revised Laws of Saint Lucia – Civil Procedure Rules 2000

The respondent ('Mr. Modeste") and Innocent St. Claire ("the Insured) were involved in a motor vehicular accident as a result of which Mr. Modeste suffered loss and damage. The Insured was insured with the appellant ("the Insurer") against such third party risks. Following dilatory conduct by the Insurer in carrying out their own investigations on the collision, Mr. Modeste filed and served a claim ("the First Action") against the Insured. A notice of filing of the First Action was also served on the Insurer. The Insured filed an acknowledgment of service admitting the claim but the Insurer took no action. No defence

was filed and judgment in default was entered. The Insurer sought to set aside the judgment, which application was refused. Mr. Modeste made demands for payment of the outstanding judgment debt but received no response from the Insurer. Mr. Modeste accordingly filed a claim ("the Second Action") for payment of the judgment debt. The Insurer joined the Insured to the Second Action and filed a defence in which it was stated that Mr. Modeste and the Insured had colluded with each other so that the claim was a fraudulent one, which triggered the application of the illegality or ex turpi causa principle. Mr. Modeste successfully applied for summary judgment; against which decision (for which no reasons were given by the learned master) the Insurer has appealed.

Held: dismissing the appeal and affirming the decision of the learned master with costs in the appeal to the respondent:

1. Where no reasons are given for a decision which is appealed, an appellate court can, in the circumstances, consider the matter afresh and exercise its own discretion.

   Employers International et al v Boston Life and Annuity Company Ltd. British Virgin Islands HCVAP 2007/005 and **Amazing Global Technologies Limited v Prudential Trustee Company Ltd.** Saint Christopher and Nevis HCVAP 2008/008 followed.

2. An insurer is not limited to pleading the statutory defences as set out in section 9 of the **Motor Vehicles Insurances (Third Party Rights) Act** Cap. 8.02 but may rely on the common law principle of illegality, that is, the ex turpi causa principle. This principle is also part of the law of Saint Lucia.

   Moore Stephens (A Firm) v Stone & Rolls Ltd. [2008] EWCA Civ. 644 applied. **Attorney General of Saint Lucia v Donavan Isidore** Saint Lucia Civil Appeal No. 20 of 2003 (unreported) followed.

3. The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it.

4. Illegality must be properly pleaded. Notwithstanding the fact that the **Civil Procedure Rules 2000** ("CPR") does not contain a specific rule with regard to the manner in which allegations of fraud are to be pleaded, the principle that where an allegation of fraud is made particulars must be given, is a long and well settled principle which does not require restating in CPR for giving it force. The instant case is devoid of any factual or evidential background to substantiate the allegations of fraud or dishonesty so that the illegality defence cannot, in the circumstances, be entertained.

   East Caribbean Flour Mills Limited v Ormiston Ken Boyea Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 which applied **Three Rivers DC v**

Bank of England (No. 3) (Summary Judgment) [2001] UKHL 16 and **McPhilemy v Times Newspapers Ltd.** [1993] 3 All ER 775, followed.

5. Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown is that the claim or the defence has no "real' (i.e. realistic as opposed to fanciful) prospect of success. Having regard to the deficiency of the pleadings and the evidence, the defence of fraud/illegality is unlikely to meet with any degree of success so that the case is a suitable one for the entry of summary judgment.

   Swain v Hillman [2001] 1 All ER 91 applied.

JUDGMENT

[1] **GEORGE-CREQUE, J.A.:** This appeal arises from a decision of the learned master, wherein she entered summary judgment in favour of the respondent against the appellant ("the Insurer") on 17th February, 2009. No reasons for the decision were apparently given by the master, neither is there any note of the proceedings when the application for summary judgment came on for hearing before her. The parties are agreed however, that the master gave directions for the filing of written submissions, and on that basis the matter was decided. This court has on numerous occasions lamented the difficulty which an appellate court faces when no reasons are given for a decision;[1] particularly when such reasons cannot be readily discerned from a transcript (if available) of the proceedings. The best that an appellate court can do in the circumstances therefore, is to consider the matter afresh and exercise its own discretion where necessary.

The Background

[2] In order to place this appeal in context it is necessary to set out some background facts as to how the matter arose.

[1] See: Rawlins CJ in Employers International et al v Boston Life and Annuity Company Ltd. British Virgin Islands HCVAP 2007/005 (unreported), paras.[33] and [34]; Gordon JA (Ag.) in Amazing Global Technologies Limited v Prudential Trustee Company Ltd. Saint Christopher and Nevis HCVAP 2008/008 (unreported), paras. [8] to [10].

(1) The Respondent (Mr. Modeste) and one Innocent St. Clair ("the Insured"), each being the driver of motor vehicles, collided on the road along the waterfront in Castries, Saint Lucia on 13th February, 2008. Mr. Modeste suffered loss and damage as a result of the collision.

(2) The Insured was insured with the Insurer against Third Party Risks pursuant to the **Motor Vehicles Insurance (Third Party Risks) Act**[2] ("the Act").

(3) The police investigated the collision and prepared a report. Mr. Modeste submitted a copy of the police report to the Insurer on two occasions and also sent to them a letter of claim. Mr. Modeste and the Insurer engaged in correspondence in which the Insurer asked for time to carry out their own investigations. Time was granted but nothing was forthcoming from the Insurer.

(4) Mr. Modeste filed a claim form and statement of claim against the Insured on 27th June 2008 which was served on him on 29th June, 2008. This was claim No. 662 of 2008 ("the First Action").

(5) A notice of the filing of the First Action was served on the Insurer in accordance with section 9 of the Act on 30th June, 2008.

(6) The Insured filed an acknowledgement of service on 9th July, 2008 admitting the claim.

(7) The Insurer took no step in the action. They merely sent various communications to their Insured. The Insured did not file or serve a defence.

(8) On 29th July, 2008 Mr. Modeste applied for judgment in default. Judgment was entered on 15th September, 2008.

[2] Cap. 8.02 of the Revised Laws of Saint Lucia

(9) The judgment was served on the Insurer on 18th September, 2008. The Insurer then sprang into action and sought to intervene in the First Action by applying to set aside the default judgment. The Insurer's application was refused by Cottle, J. The Insurer did not appeal this refusal.

(10) Mr. Modeste thereafter, demanded payment of the outstanding amount under the judgment. There was no response from the Insurer.

(11) Mr. Modeste thereafter, on 7th November, 2008, filed claim No. 1095/2008 ("the Second Action") against the Insurer for payment of the judgment debt obtained in the First Action, pursuant to the Act. The Insurer acknowledged service of the Second Action and stated its intention to defend.

(12) The Insurer then filed a Defence and also joined the Insured claiming as against them, essentially, an indemnity.

(13) The gravamen of the Insurer's defence in the Second Action was that Mr. Modeste and the Insured had colluded with each other and the claim was accordingly a fraudulent one.

(14) Mr. Modeste applied for summary judgment in the Second Action and was successful. The Insurer has appealed.

The grounds of appeal

[3] The Notice of Appeal contained six grounds of appeal. In my view, they may be succinctly summarized as follows:

(1) That the master failed to consider or consider adequately the Insurer's defence of illegality which would involve findings of fact which might favour the Insurer notwithstanding that there may be substantial evidence in support of the case for Mr. Modeste and thus was not an appropriate case for the entry of summary judgment.

(2) That the master erred in law by ordering summary judgment notwithstanding that the facts disclosed a suspicion of deviousness on the part of the respondent.

(3) That the master erred in law in ruling in effect that the Insurer's defence of illegality had been discounted when Cottle J. failed to set aside the default judgment in the First Action.

For completeness I mention that the Insurer had also raised the point of lack of Notice to the Insurer on the filing of the First Action but this was quite properly abandoned by counsel at the hearing, in light of the documents contained in the record.

Refusal to set aside the default judgment in the First Action

[4] I propose to deal with the last stated ground of challenge first.

[5] This challenge, in my view, is without merit for these reasons:

(1) Firstly, it is clear from the submissions of the parties, written and oral before this court, that the reasons for Cottle J.'s refusal to set aside the default judgment in the First Action was not a matter strictly before the master, and therefore cannot be said to be the basis of her decision;

(2) Secondly, it is also not clear the basis for Cottle J.'s refusal to exercise his discretion in favour of setting aside the default judgment, since it appears from the arguments of counsel, that myriad factors would have weighed in the scale, such as delay, as well as the key question of locus standi of the Insurer;

(3) Thirdly and most importantly, there was no appeal from the refusal of Cottle J. and accordingly this is not a matter which can engage this court.

The Insurer's defence in the Second Action

[6] The remaining two challenges to the master's decision require a consideration of the salient parts of the Insurer's defence. Apart from denying that the collision occurred and complaining generally of the Insured's lack of cooperation, paragraph 15 contains the essence of the Insurer's defence and warrants recital. It states:

> "The Defendant [appellant] denies that it is liable to pay the judgment on the grounds that the Defendant was not notified within 7 days of the bringing of the claim that a claim had been filed and further that the Claimant [respondent] colluded with the Ancillary Defendants [the Insured] to make a fraudulent claim and cannot benefit from his own wrongful act.
>
> *PARTICULARS OF FRAUD AND COLLUSIOM*
>
> (1) The driver of Motor Vehicle No. PE6833 and the First Ancillary Defendant staged the accident;
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> (2) When the Defendant repudiated liability under the defendants' (the insured) policy the Ancillary Defendants colluded with the Claimant not to notify the Defendant [the Insurer] of their receipt of the claim so that judgment may be entered against the Ancillary Defendants which they expected that the Defendant (the Insurer) would be liable to pay under section 9 of the Motor Vehicles and Road Traffic (Third Party Risks) Act;
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> (3) The Defendant (the Insurer) will also contend at the trial that the alleged accident could not have happened in the way described by the Claimant and the Ancillary Defendants, and hence the claim was fraudulent."

The arguments advanced in support of summary judgment

[7] It is also useful to set out the main grounds advanced by counsel for Mr. Modeste for summary judgment, gleaned from the written submissions contained in the

record.[3] Unfortunately, the application for summary judgment and the affidavit in support do not form part of the appeal record[4].

[8] Counsel for Mr. Modeste contended that summary judgment was sought on the basis that the Insurer had no defence in law, *"that has been advanced…in good stead, in order to entertain the purported defence."*[5] At page 76 of the Record counsel went on to deal specifically with the allegation of fraud. Reliance was placed on CPR Part10.5 (6) which in effect says that the defendant must identify or annex to the defence any document which is considered necessary to the defence. This was no doubt cited with reference to the request for time by the Insurer for conducting their separate investigations when the claim giving rise to the First Action arose. Counsel then went on to submit that it was necessary for the Insurer to show the basis for its allegation of fraud; particulars of the alleged fraud; and particulars showing how the alleged collusion between Mr. Modeste and the Insured is said to have taken place. Otherwise, she submitted, the court must see the defence for what it is – **"a fanciful defence"**. Counsel relied on dictum of Saunders CJ (Ag.) in the case of **Bank of Bermuda Ltd. v Pentium**[6].

The statutory defences under section 9 of the Act and the defence of illegality (the "ex turpi causa" principle)

[9] Thereafter, counsel addressed in her submissions the statutory defences available to the Insurer under Section 9 of the Act. One of these defences concerns the time frame for giving notice to an Insurer of the bringing of a claim. As I said above this was, quite wisely, not pursued. It is also common ground that the Insurer, apart from the abandoned statutory defence, did not seek to rely on any of the other statutory defences contained in section 9 of the Act. I do not consider any useful purpose will be served by setting them out as nothing turns on them.

[3] Record of Appeal, pp. 74-77
[4] On request these were later furnished.
[5] Record of Appeal, p. 75, para.8
[6] British Virgin Islands Civil Appeal No. 14 of 2003 (unreported)

[10] The point that counsel for the Insurer sought to make on appeal was that an insurer was not limited to pleading the statutory defences and that it was perfectly open to an Insurer to plead, as in this case, illegality. He relied on a number of authorities[7]. I consider it to be trite law, being an ancient principle of the common law and also the law of Saint Lucia[8] that no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act[9]. In **Moore Stephens (A Firm) v Stone & Rolls Ltd.**[10], Rimer LJ delved at some length into the history of the "ex turpi causa" principle. It is well established that it is not a principle of justice but one of policy whose application is indiscriminate leaving no room for the exercise of a discretion in favour of any party. This case also appears to say that the principle applies to all causes of action including claims in tort. In essence, it establishes that:

> "…whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff [claimant] seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal act."[11]

[11] I do not understand Counsel for Mr. Modeste to be suggesting that the principle of ex turpi causa cannot apply in a case such as this. Rather, she takes issue on the question as to whether the principle has been sufficiently engaged or at all in this case. This requires a return to the Insurer's pleaded case of collusion and fraud as this is the basis on which the Insurer says that this principle has been triggered.

[12] There was, admittedly, no further evidence put forward by the Insurer at the time of consideration of the application for summary judgment despite having notice of the application. This was an option available to the Insurer under CPR 15.5 (2). The record does not disclose that the Insurer took any steps to amend its

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[7] See: Colinvaux's Law of Insurance, 4th Ed., para. 9-32, Moore Stephens (A Firm) v Stone & Rolls Ltd. [2008] EWCA Civ 644, para. 17

[8] As Gordon JA found in construing article 994 of the Civil Code of St. Lucia in The Attorney General of Saint Lucia v Donavan Isidore Saint Lucia Civil Appeal No. 20 of 2003 (unreported)

[9] Per Lord Mansfield CJ in **Holman v Johnson** (1775) 1 Cowp 341, at 343 (cited in **Moore Stephens** by Rimmer LJ at para. 12

[10] *Supra*, n.6

[11] per Rimer LJ in **Moore Stephens** at para. 17

statement of case at any time. It is reasonable to conclude that the Insurer was content to rely on its case as pleaded.

[13] Counsel, in further written submissions[12] to the master, returned to the allegation of fraud pleaded by the Insurer and pointed out that there was no evidence before the court by which it could be swayed that the allegation of fraud could be made out. She relied on three further authorities; **Smikle v Nunes**[13], the **Three Rivers**[14] case and **Thomas v Stoutt and Others**[15], a decision of this court. In **Thomas,** Byron, CJ (as he then was) at page 117 had this to say:

> "The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest."

He then cited the **1970 Rules of Court (Order 18 Rule 12(1)(a))** which have now been repealed by the introduction of CPR, and also cited with approval the dictum of Lord Selborne LC in **Wallingford v Mutual Society and Official Liquidator**[16] as follows:

> "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice."

[14] The cases of **Thomas** and **Wallingford** were pre **CPR 2000**. CPR did not reproduce a specific rule as that under the old **Order 18 Rule 12(1)(a)** referred to above. CPR 10.5 deals with a Defendant's duty to set out his case. I refer to two rules thereunder which I consider quite apt to this case. Firstly, rule 10.5(1) states that the defence must set out all the facts on which the defendant relies to dispute the claim. Secondly, rule 10.5 (4) states that if a defendant denies any allegations in the claim form or statement of claim, the defendant must state the reasons for

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[12] Record of Appeal, pp. 79 - 82

[13] (2007) Supreme Court, Jamaica, No CL S178 of 2002 (unreported)

[14] Three Rivers DC v Bank of England (No. 3) (Summary Judgment) [2001] UKHL 16, [2003] 2 AC 1

[15] (1997) 55 WIR 112

[16] (1880) 5 App. Cas 685 at pg. 697

so doing, and if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version **must** (*my emphasis)* be set out in the defence.

[15] With this in mind, I return to the 'particulars' of fraud and collusion as pleaded by the Insurer and specifically subparagraph (3). The Insurer, having pleaded that "the alleged accident could not have happened in the way described by the Claimant and the Ancillary Defendants and hence the claim was fraudulent", was, in my view, duty bound to comply with CPR 10.5(4) and put forward its version of how it says the accident occurred. This could not simply be left to be sprung upon Mr. Modeste or the Insured at trial.

[16] Notwithstanding the fact that CPR does not contain a specific rule with regard to the manner in which allegations of fraud are to be pleaded, the principle that where an allegation of fraud is made particulars must be given, is a long and well settled principle which does not require restating in CPR for giving it force. In **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**[17], a post CPR decision of this court, Barrow JA, in delivering the judgment of the court cited with approval paragraph 51 of the judgment of Lord Hope of Craighead in **Three Rivers** in which Lord Hope said this:

> "….. as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. **The point is well established by authority in the case of fraud** (my emphasis)".

[17] With the utmost of respect to counsel for the Insurer, the pleaded "particulars" of collusion and fraud, in my view, are not particulars at all. To say that the accident was staged without setting out the factual basis on which such a conclusion can be drawn serves no useful purpose. It is similarly unhelpful to say that the Insured colluded with Mr. Modeste not to notify the Insurer of the receipt of the claim by the Insured, without setting out the facts, or matters said or done or not done from

[17] Saint Vincent and the Grenadines Civil Appeal No. 12 of 2006 (unreported), para. 39

which such a conclusion can be drawn. Accordingly, I am in agreement with counsel for Mr. Modeste that to merely assert such allegations which are in essence conclusions unsupported by a factual basis must inevitably lead the court to the view that the defence is merely 'a fanciful defence'. No account can be taken by the court of the allegation of fraud and collusion, as pleaded.

[18] Having so concluded, there is nothing left in the defence on which the principle of "ex turpi causa" can be engaged. As counsel for Mr. Modeste, in essence put it, the Insurer cannot simply make an unfounded allegation and then seek to raise a defence based on that unfounded allegation.

[19] Whilst I agree with counsel for the Insurer that illegality is a well recognised defence, it must nevertheless be properly pleaded. In **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd**[18] Saville LJ said that the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. This was a pre CPR case, but the principle nonetheless essentially remains intact under the current CPR regime. This was recognized and accepted by this court in **East Caribbean Flour Mills** where Barrow JA cited with approval the dictum of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**[19] which stated the current position thus:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

[18] [1994] 72 BLR 26 at 33-34 .
[19] [1993] 3 All ER 775 792-793

[20] I consider that it must also be remembered that normally a party would not have prior sight of an opposing party's witness statement until he/she has no doubt prepared and filed his/her own. CPR 29.7 speaks to the exchange of witness statements, and for filing witness statements in a sealed envelope where the opposing party is not yet ready to exchange. In my view, it would be grossly unfair and embarrassing to a party to learn of the factual basis on which a mere allegation of fraud or dishonesty is made on the pleading, only at the time when a witness statement is exchanged. I do not consider that the statement of Lord Woolf in **McPhilemy** and referred to by Lord Hope in **Three Rivers** and adopted in **East Caribbean Flour Mills** is to be understood in any other way than to make clear that the factual basis underpinning the allegation of fraud or dishonesty and the like, must be set out in the pleading; even if the details of those averments may properly be left to be fleshed out in the witness statements. The instant case is simply devoid of any factual basis for making the averment and cannot in the circumstances be entertained.

Summary Judgment – the governing principles

[21] CPR 15.2 says in essence that the court may give summary judgment on the claim or on a particular issue if it considers that (a) a claimant has no real prospect of succeeding on a claim, or (b) a defendant has no real prospect of defending the claim or the issue. As I referenced earlier, this Rule provides for the filing of evidence on such an application[20]. Counsel for the Insurer referred to the cases of **Baldwin Spencer v The Attorney General of Antigua & Barbuda**[21], **The Attorney General of Antigua & Barbuda v Antigua Aggregates Limited et al**[22], **Swain v Hillman**[23] and also the text **Blackstone's Civil Practice.**

[21] The principle distilled from these authorities by which a court must be guided may be stated thus: Summary judgment should only be granted in cases where it is

[20] In the case of the claimant it is mandatory, whereas in the case of the respondent it is merely permissive.
[21] Antigua and Barbuda Civil Appeal No. 20A of 1997 (unreported)
[22] Antigua and Barbuda High Court Claim No. 492/2005 (unreported)
[23] [2001] 1 All ER 91

clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in **Swain v Hillman** is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment.

[22] In this case, once the allegations of fraud and collusion are discounted for the reasons given above, what is left is a defence akin to a table without legs. It would, in my view be quite difficult to see how such a defence would meet with any degree of success. Accordingly, in the exercise of my discretion I hold that it is a suitable case for entry of summary judgment.

Conclusion

[23] For the foregoing reasons I would dismiss this appeal and affirm the decision of the learned master. The costs of this appeal shall be two thirds of the costs awarded below in accordance with CPR 65.13.

Janice George-Creque
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]