EASTERN CARIBBEAN SUPREME COURT
ST. CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2012/0335

BETWEEN:

SHERYL EVANS

Respondent/Claimant

And

KEITHLYN BERGAN

Applicant/Defendant

Appearances:

Mr Sylvester Anthony and Ms Angelina Gracy Sookoo of Sylvester Anthony Law Offices for the Respondent/Claimant
Ms Keisha Spence of Kelsick Wilkin & Ferdinand for the Applicant/Defendant

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2013: April 12th

2013: June 28th

DECISION

[1] THOMAS J (AG) The matter of decision arises from a Notice of Application filed by the applicant on 25th February 2013. In the application orders are sought in relation to the following:

(1) Paragraphs 6, 16, and 17 of the claimant's Statement of Claim be struck out:

(a) pursuant to Rule 26.3 (1)(a) and/or (c) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ('CPR 2000');

(b) further or in the alternative, pursuant to section 119 of the Evidence Act, No. 30 of 2011;

(c) further or in the alternative, paragraphs 16 and 17 are in breach of the common law rules of privilege;

(d) further or in the alternative, that paragraphs 16 and 17 are irrelevant in that they refer to communications between the claimant and a third party is not before the court; and

(2) Costs; and

(3) Such further or other relief that the Honourable Court may deem just

[2] The following are the grounds upon which the orders are sought:

"1. Rule 26.3(1)(a) of CPR 2000 provides that:
'In addition to any other power under the Rules, the court may strike out a statement of case as part or part of the statement of case it appears to the court that –
(a) There has been a failure to comply with a rule, practice direction, order of direction given by the court in the proceedings'
Paragraph 6 is a statement of opinion and not a statement of fact as required by Rule 8.7 of CPR 2000.

2. Rule 26.3(1)(c) of CPR 2000 provides that:
'In addition to any other power under the Rules, the court may strike out a statement of case as part of the statement of case if it appears to the court that –
(c) the statement of case or part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings'.
Paragraph 6 is irrelevant and of no probative value and is likely to obstruct the just disposal of these proceedings

3. Section 119 of the Evidence Act provides:
Evidence shall not be adduced of
(a) A communication made
(i) Between parties to a dispute, or
(ii) Between one or more parties and a third party, being a communication made in connection with an attempt to negotiate settlement of the dispute; or
(b) a document that has been prepared in connection with an attempt to negotiate a settlement of a dispute, whether or not the document has been delivered.
Paragraph 16 and 17 refer to discussions and correspondence that would have taken place during an attempt to negotiate settlement of the matter.

4. Further, paragraphs 16 and 17 make reference to communications between the Claimant and a third party that is not a party to these proceedings and as such the said paragraphs are of no probative value and are only likely to obstruct the just disposal of these proceedings. Also, exhibit 'H' was not prepared by the Defendant but by a third party that is not before the court hence, of no probative value in these proceedings and ought to be struck".

[3] The applicant also filed an Affidavit in Support of the application which for the most part addresses the impugned paragraphs 16 and 17 of the Statement of Claim. This Affidavit will be brought into greater focus at a later stage.

[4] The issue for determination is whether paragraphs 6, 16, and 17 of the claimant's Statement of Claim should be struck out.

Paragraph 6

[5] Paragraph 6 of the Statement of Claim is in the following terms:

> "The impact of the collision was also so strong that it caused the defendant's vehicle to bounce off the rear of the claimant's vehicle and collide with motor vehicle registration number PA 3662 which was behind him".

Submissions

[6] In submissions on behalf of the applicant/defendant[1] reliance is placed on Rules 26.3(1)(a) and (c) of CPR 2000. It is also submitted on behalf of the applicant that paragraph 6 is a statement of opinion and not a statement of fact as required by Rule 8.7 of CPR 2000. Also that the allegations in the said paragraph are irrelevant of no probative value and are likely to obstruct the just disposal of the proceedings. And further still, that the said paragraph provides no probative factual assertion as to the cause of the collision or relating to the alleged loss and damage in the claim.

[1] It is to be noted that the court ordered written submissions to be filed in the matter but while there was compliance by the applicant/defendant there was none on behalf of the respondent/claimant. However, submissions were made at the Chamber hearing.

[7] It is further contended that "the allegations in the said paragraph cannot be verified under cross examination and the claimant has not filed a witness statement for the driver of PA3662. Also, the claimant has not alleged that she saw when this alleged collision between the car driven by the defendant and the motor vehicle PA 3662 occurred hence she is not in any position to provide any evidence on this allegation which is not being litigated in this claim".

[8] In terms of the Evidence Act, it is submitted that reliance on sections 69 and 70 thereof by the respondent is misconceived as there is no contention that paragraph 6 contains hearsay evidence.

[9] In oral submissions on behalf of the respondent/claimant the contention is that paragraph 6 contains facts in issue as required by Rule 8.7 of CPR 2000. According to learned counsel, they are facts on which the claimant relies and which can be tested by cross examination as the facts speak to the intensity of the impact. And finally it is submitted that the said paragraph 6 is more probative than prejudicial.

[10] In a Notice of Objection filed by the claimant/respondent, the following is stated in relation to the said paragraph 6

> "iv. Paragraph 6 is contained in the Police Road Accident Report which is before the court as an Agreed Document (see defendant's list of documents filed on January 4, 2013 and the List of Agreed Documents filed on January 30, 2013).
>
> v. The Police Accident Report is a document which forms part of the record compiled by PC Carey acting under his duty as a member of the Royal St. Christopher and Nevis Police Force from statements made by persons who had personal knowledge of the matters dealt with in that information".

Analysis and Conclusion

[11] Rules 26.3(1)(a) and (3) provide as follows:

> "26.3(1) In addition to any other power 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

(a) there has been a failure to comply with a rule practice direction order or direction given by the court in the proceedings;
(b) the statement of case of the part to be stuck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings".

[12] It is clear to the court, that apart from the mention of 'collision' the remainder of paragraph 6 is not factual and the court agrees with the submissions on behalf of the applicant that the said paragraph contain an opinion as to the strength of the impact and its effect it had on the defendant's vehicle. And the court also finds that the said paragraph draws a conclusion as to the effect of the impact, as distinct from 'a probative factual, assertion as to the cause of the collision', which is properly the province of the court. The foregoing lays to rest the submission on behalf of the claimant/respondent that paragraph 6 contains facts. Further the court accepts the following submission on behalf of the applicant:

> "It is submitted that the allegations as paragraph 6 are neither facts nor facts in issue in this Claim. As stated above, the allegations in the said paragraph 6 are merely the Claimant's opinion. The allegations in the said paragraph cannot be verified under cross examination as the Claimant has not filed a Witness Statement for the driver of PA3662. Also, the Claimant has not alleged that she saw when this alleged collision between the car driven by the Defendant and the motor vehicle PA3662 occurred hence she is not in any position to provide any evidence on this allegation which is not being litigated in this Claim.
> Furthermore, even if the allegation in the said paragraph contains statements of knowledge and belief, this would not make such a pleading permissible".

[13] The failure to satisfy Rule 8.7(1) of CPR 2000 is fatal in that it does not contain facts on which the claimant relies. In turn, this failure to comply with a rule, empowers the court to strike out a statement of case or part thereof.

[12] In terms of section 69 and 70 of the Evidence Act the court also agrees that these sections are not applicable and, as submitted on behalf of the applicant, there is no pretence on behalf of the respondent/claimant that hearsay evidence is contained in paragraph 6.

[13] Accordingly, paragraph 6 of the Statement of Claim is struck out.

Paragraphs 16 and 17

[14] On behalf of the applicant/defendant the contention is that paragraphs 16 and 17 of the Statement of Claim should be struck out pursuant to section 119 of the Evidence Act. In this connection the contentions are:

(1) Paragraphs 16 and 17 refer to a discussion and correspondence that concerns attempted negotiations of a settlement with a third party;

(2) Further or in the alternative, paragraph 16 and 17 make reference to communication between the claimant and a third party that is not a party to the instant proceedings.

(3) In view of the respondent's contention that paragraphs 16 and 17 of the Statement of Claim reflect the fact of an agreement between the claimant and the defendant's insurance company, the applicant's contention is that no evidence has been provided to support this allegation.

(4) At paragraph 3 of the applicant's affidavit in support the defendant states that he had no knowledge of the discussion or letter referred to in paragraphs 16 and 17 of the Statement of Claim.

(5) The respondent has failed to provide any evidence to support the allegation that the pleadings at paragraphs 16 and 17 of the Statement of Claim reflect the facts of an agreement reached between the claimant and the defendant. Nor has the respondent established the exact terms of the alleged agreement.

(6) Paragraph 16 and 17 are not protected by sections 86 and 87 of the Evidence Act since the allegation is that the contents of the said paragraphs were made by SNIC which has not been shown to be a party to these proceedings.

(7) The respondent has failed to provide any evidence to support the allegation that SNIC was acting as the applicant's agent on his behalf.

[15] On behalf of the respondent it is contended that 16 and 17 are protected by sections 86 and 87 of the Evidence Act. Reliance is also placed on the authorities of RDF Enterprise Ltd v National Insurance Board[2] and Jennifer Prescott v Aldrick Parris and John et al.[3]

[16] Additionally, in the Notice of Objection the following is advanced at paragraph 3 hereof:

> "3. That the subject paragraphs do not breach Section 119 of the Evidence Act, 2011 in that:
>
> (i) Paragraphs 16 and 17 do not fall within Section 119 as this Section deals with communications made in an attempt to negotiate settlement of the dispute;
> (ii) Paragraphs 16 and 17 and any attachments therein reflect facts of an agreement reached between the Claimant and the Defendant's insurance company acting on his behalf and/or as his agent;
> (iii) Paragraph 16 and 17 are protected under Sections 86 and 87 of the Evidence Act;
> (iv) Paragraphs 16 and 17 refer to admission and/or representations made by the Defendant's insurance company on his behalf and is therefore more probative than prejudicial;
> (v) Alternatively paragraph 16 and 17 are facts in issue and/or statements of knowledge and belief, the basis of which could be verified on cross examination;
> (vi) Paragraphs 16 and 17 refers to communications made by the Defendant's insurance company on his behalf and ought not to be struck having regard to Sections 43,55,63,86 and 87 of the Evidence Act".

Analysis and conclusions

[17] Paragraphs 16 and 17 of the Statement of Claim allege as follows:

> "16. In or about 2006 to 2010, SNIC held a number of discussions with the Claimant in relation to compensating the Claimant for the damages she suffered due to the negligence of the Defendant. In 2006, after the accident SNIC paid for repairs to the claimant's vehicle caused by the said accident.
> 17. In or about 2010, SNIC also pressed the issue of compensating the claimant for personal injuries in order to bring this matter to an

[2] Claim No GDAHCV2011/0103
[3] Claim No SLUHCV2007/0172

end. SNIC also offered the claimant the sum of $12,000.00 to compensate her for her personal injuries suffered. The said sum was rejected based on the nature and severity of the injuries suffered by the claimant. A true copy of the letter dated October 22, 2010 from SNIC is annexed as 'H'".

[18] Paragraphs 16 and 17 aforesaid survive or fall in view of the provision of section 119 of the Evidence Act which bears the rubric" "Exclusion of evidence of settlement negotiations".

[19] The essential prohibition of that section of the Act is contained in subsection (1) which reads thus:

> "(1) Evidence shall not be adduced of
> (a) a communication made
> (i) between parties to a dispute, or
> (ii) between one or more parties to a dispute and a third party, being a communication made in connection with an attempt to negotiate a settlement of the dispute; or
> (b) a documents that has been prepared in connection with an attempt to negotiate a settlement of a dispute, whether or not the document has been delivered".

[20] It is of some importance to note that section 119(1) excludes evidence applicable to one or more parties to a dispute and a third party relating to communication concerning an attempt to settle a dispute. This bears on many of the submissions advance on behalf of the applicant in this regard.

[21] But subsection 119(2) of the said Act prescribes a number of circumstances in which the adducing of evidence of settlement negotiations is permitted. Such is paragraph (c):

> "(c) the communication or document
> (i) began or is part of an attempt to settle the dispute; and
> (ii) included a statement to the effect that it was not to be treated as confidential...".

[22] Learned counsel for the respondent/claimant contends that section 119 of the Evidence Act does not apply to paragraphs 16 and 17 as they deal with communication made in an attempt to negotiate settlement of dispute. This cannot

be correct as subsection (1) makes such an express application and the said paragraphs take the matter a step further by what is sought to be pleaded. And there is express mention of a letter dated "22nd October 2010[4]".

[23] It is clear to the court that paragraphs 16 and 17 aforesaid are built around the said letter and as such can only survive if section 119(2)(c) of the Evidence Act is satisfied.

[24] The import of the said letter of 22nd October 2009 is clear in that it is addressed to Sheryl Evans in the caption it refers to "Accident of 15th August 2006...", "compensation for your injuries and [bringing] closure to this long outstanding matter of your personal injuries".

[25] The foregoing would satisfy subparagraph (c)(i) but (c)(ii) remains. In this regard the said letter does not contain a statement to the effect that it was not to be treated as "confidential".

[26] The court interprets section 119 of the Evidence Act as being aimed at excluding from evidence communication relating to a dispute so as to avoid an advantage to one side in the event that the court proceedings are instituted in the same matter. This explains to some extent the prescription of section 119(2)(c) which requires in part, a statement excluding confidentiality in which case the prohibition of section 119(1) would not apply in that regard.

[27] Therefore, given that paragraphs 16 and 17 of the Statement of Claim concern relate to settlement negotiations coupled with the letter of 22nd October 2009 for Sheryl Evans which does not state that it was not to be treated as confidential the prohibition of section 119(1) of the Evidence Act applies to exclude the said paragraphs 16 and 17 of the Statement of Claim. Accordingly the said paragraphs 16 and 17 of the Statement of Claim are struck out.

[4] In fact the letter is dated "22nd October 2009".

Costs

[28] Pursuant to Rule 65.11 of CPR 2000 the respondent/claimant must pay the applicant/defendant costs of $1000.00

ORDER

[29] IT IS HEREBY ORDERED as follows:

(1) Paragraph 9 of the Statement of Claim is struck out pursuant to Rule 26 for failure to comply with Rule 8.7(1) of CPR 2000;

(2) Paragraphs 16 and 17 of the said Statement of Claim are struck out since their content, relating to evidence of settlement negotiations, are excluded from evidence by section 119 of the Evidence Act No. 30 of 2011;

(3) The respondent/claimant must pay the applicant/defendant costs of $1000.00.

Errol L Thomas
High Court Judge [Ag]