THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NUMBER: SVGHCV2018/0030

BETWEEN

MERCEDES DELPLESCHE

CLAIMANT

AND

METROCINT GENERAL INSURANCE COMPANY LIMITED
SAMUEL EMANNUEL DEROCHE

DEFENDANTS

BEFORE: MASTER ERMIN MOISE

APPEARANCES:
Mr. Cecil Williams of Counsel for the Claimant
Ms. Rose-Ann Richardson holding for Mr. Duane Daniel of Counsel for the 1st Defendant

2018: October 29
2019: February19

JUDGMENT

[1] Moise, M.: On 31st July, 2012, the claimant obtained judgment in the sum of $23,815.00 together with interest and costs in case number SVGHCV2012/0041. In that case it was alleged that the claimant was injured in an accident involving a motor vehicle owned and driven by the 2nd defendant, against whom the judgment was entered. The claimant now states that the 2nd defendant has only paid $3,600.00 towards the judgment debt and brings these present proceedings against the 1st defendant pursuant to section 8 of the Motor Vehicle Insurance (Third Party Risks) Act 2003 (hereinafter referred to as "The Act"). The 1st defendant duly filed a defence on 27th February, 2018, claiming that it is not obligated to satisfy the judgment debt. This defence was subsequently amended on 19th September, 2018 with leave of the court.

[2] When the matter first came for case management, the 2nd defendant was not a party to the claim and the court granted leave for the claimant to include the 2nd defendant as a party to the

proceedings, given that the outcome of the case may very well have an effect on him. The 2nd defendant was therefore added as a party and served via substituted service with leave of the court. When the matter came for case management on 19th September, 2018, the court observed, and the parties agreed, that the facts in the matter are not generally in dispute and the contention is on a narrow point of law as to whether the 1st defendant is obligated to pay the claimant on the peculiar facts of the case in keeping with sections 8 and 9 of the Act. Given that the there was no application for summary judgment and that the issues were initially raised on the court's own motion, with subsequent consent of the parties, the issue for determination therefore, is whether the defence, or parts thereof, ought to be struck out on the basis that the defendants have no real prospect of successfully defending this claim. The parties duly filed legal submissions on the issue, except that the 2nd defendant has not participated in these proceedings.

[3] Rule 26.3 of the CPR gives the court the powers to strike out a statement of case, or part thereof, if it discloses no reasonable ground for bringing or defendant the claim. In this instance the claimant has filed this action pursuant to section 8(1) of the Act. The section states as follows:

> *(1) Where, after a certificate of insurance has been issued in favour of the person by whom a policy has been effected judgment in respect of any liability required to be covered by a policy, has been entered, then, notwithstanding that the insurer may be entitled to avoid, cancel or may have avoided or cancelled the policy, the insurer shall, subject to this section and to any limitations on the total amount payable under the policy in consequence of that subsection, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment* ***relating to interest on judgments."***

(2) Section 4 of the Act sets out the requirements in respect of insurance policies under the Act with subsection (4) mandating the issuance of a certificate of insurance which contains any conditions to which the policy is subjected. The claimant also refers the court to section 9 of the Act which states as follows:

"Notwithstanding any provisions of any other Act, a third party who has obtained a *judgment against a person to whom a policy of insurance has been issued under this Act may, subject to section 8, recover the full amount of the judgment from the insurer even though the third party is not a party to the contract and the liability* ***covered by the policy is not required to be covered under this Act."***

(3) In the case of *Eastern Caribbean Insurance Ltd. v. Edmund Bicar*[1], George-Creque JA (as she then was) stated that the purpose of third party risk legislation, such as the one under consideration, was "*to create a statutory exception to the general contractual principles with regard to privity so as to afford an avenue to a third party to recover compensation from an insurer even though the third party or the driver per se are not strictly speaking privy to the contract of insurance between the policyholder and his insurer.***"** Therefore, section 8(1) of the Act creates an avenue through which a third party may directly claim payment of a judgment obtained against an insured or a driver, against the insurer, despite him not being privy to the contract. As the Privy Council noted in the case of *Matadeen v. Caribbean Insurance Co Ltd (Trinidad and Tobago)*[2] an action under this section of the Act ***"is*** *an action on a statutory cause of action created by the section. It is not subject to defences that the insurer might have* ***been able to raise if sued by the insured."***

(4) Claims such as the present are commenced so as to enforce this statutory right against an insurer, despite there being no transfer of a contractual obligation in favour of the claimant. The claimant's success in such an action is not generally dependent on any defence which the insurer may be entitled to rely on against the insured had the claim been brought by him. Despite this, the Act itself creates some exceptions to the enforcement of this statutory right and it is on these that the 1st defendant rests its submissions.

(5) The main issue raised by the 1st defendant is that the liability giving rise to the judgment against the 2nd defendant is not covered by the terms of the policy of insurance. In that regard, it is argued that the 1st defendant is entitled to rely on the provisions of section 8(1) of the Act and avoid liability to indemnify the 2nd defendant. The 1st defendant submits that the 2nd defendant is an authorised

[1] SLUHCVAP 2008/014
[2] [2002] UKPC 69

driver of the motor vehicle which was the subject of the insurance policy. However, the policy specifically states that this authorisation is subject to the insured or any other person holding a valid current driver's license and being permitted in accordance with the licensing or other laws or regulations to drive the motor vehicle; and is not disqualified from doing so. It is pleaded that the policy specifically states that the ***"company shall not be liable in respect of; 1: any loss, damage or liability caused, sustained or incurred … (iii) being driven by or is for the*** *purpose of being driven by any person who does not hold a valid licence to drive the* ***insured vehicle."*** Although not specifically pleaded in the amended defence, counsel for the 1st defendant notes in written submissions that the policy extends this restriction to the 2nd defendant, notwithstanding the fact that he is an authorised driver named in the policy.

(6) At paragraph 5 of its amended defence, the 1st defendant has pleaded that the motor vehicle bore the number plate H6243, which indicates that it is a motor vehicle for hire. The 1st defendant asserts that at the time of the accident the 2nd defendant, though the holder of a valid driver's licence number D-2074, was not endorsed to drive a motor vehicle for hire. On that basis it is argued that the circumstances of this accident were not covered by the policy and the 1st defendant is therefore not entitled to pay the claimant under the provisions of section 8(1) of the Act.

(7) In the case of *Presidential Insurance Company Ltd. v Mohammed et al*[3] the Privy Council came to consider circumstances which were somewhat similar to those of the present case. Their Lordships considered the effect of section 10(1) of the Third Party Risks Act of Trinidad and Tobago which is written in similar terms to section 8(1) of the Act currently under consideration. At paragraph 14 of that judgment the Privy Council noted that ***"[t]****he starting point is section 4(1), which sets out the nature of the insurance policy that is required in order to comply with the Act. It expressly leaves it to the parties to the insurance contract to determine who is* ***covered by the policy when it speaks of "such person, persons or clas****ses of persons as* ***may be specified in the policy".*** Having considered the issues raised in relation to that section, Their Lordships went on to note the following at paragraph 16 of that judgment:

> *Section 10(1) also does not alter the fundamental position set out in section 4(1).* ***The reference in section 10 to section 4(1)(b) and the words in parenthesis, "(being a***

[3] [2015] UKPC 4

liability covered by the terms of the policy)", make it clear that the section does not *prevent an insurance company from pleading successfully the defence that the claim is not covered by the terms of the policy. The subsection prevents the insurer, which has had timely notice of the action against its insured, from avoiding or cancelling the policy, e.g. on ground that the insured obtained the policy by non-disclosure or through misrepresentation of a material fact**...*** *Otherwise, section 10(2) and (3) set out the circumstances in which the insurer, whose policy covers the relevant liability of the insured, can resist a claim to satisfy the judgment against* ***the insured. Subject to those circumstances, if the insured's liability is covered by*** *the policy, the insurer must pay.*

(8) In essence, the court noted then that section 10(1) allows the insurer to plead and prove that the liability for which the judgment had been entered was not covered under the policy and in such circumstances the insurer is not liable to satisfy the judgment. As Master Actie noted in the case of *Joseph Cadette v St. Lucia Motor & General Insurance Company Limited*[4]***, "****the claimant is not entitled to an indemnity in respect of a risk that is not covered by the policy of insurance. Section 9 of the MVIA did not impose a liability on the insurer which it had not undertaken in the policy of insurance. The policy of insurance provides a clear condition that unlicensed drivers were not covered. Section 9 of the MVIA did not transfer a right to the claimant which the insured was not entitled to in the first place.****"**

(9) This is, in effect, the argument made by the 1st defendant in the current proceedings. It is asserted that although the 2nd defendant was the driver of the motor vehicle, at the time of the accident he was not endorsed to drive a vehicle for hire, given the license plate which was carried by the motor vehicle at the time. This, it is argued, is specifically contrary to the terms of the policy which states that although the 2nd defendant is an approved driver, his liability is only covered if he is driving with the properly endorsed driver's licence.

(10) However, a closer examination of the judgment of *Presidential Insurance Company Ltd. v Mohammed et al* and the specific provisions of the Act are necessary in order to put this matter

[4] SLUHCV2017/0066

into context. Firstly I make reference to paragraph 15 of the Privy Council's judgment in *Presidential Insurance Company Ltd. v Mohammed et al* which states as follows:

> ***"…** If the policy covered as drivers the insured and his employees or agents generically, the vicarious liability of the insured could fall within its terms, so long as other conditions in the policy (such as that the driver was driving with the **insured's permission, or that the driver was licensed to drive the vehicle) did not** exclude liability. In contrast with, for example, sections 8(1), 12 and 12A, section 4A does not override the language of the insurance policy to extend its cover.*

(11) Reference here to section 12 of the Trinidadian legislation is of particular importance. What that section seeks to do is to make void certain limitations placed within the policy of insurance itself and prevents the insurer from denying liability to satisfy third party claims on the basis of these restrictions. In effect, as the Privy Council acknowledges, this section works to override the language of the insurance policy to extend its cover. In the case of *Presidential Insurance Company Ltd. v Resha St. Hill*[5] the Privy Council went further to explain the relevance of section 12 in the Trinidadian Legislation. Their Lordships state the following at paragraph 15 of that judgment:

> ***"… s.12(1) invalidates in respect of claims by injured persons policy** restrictions relating to matters such as the age or physical or mental condition of persons driving the vehicle, or the condition of the vehicle, or the number of persons or weight or physical characteristics of the goods that the vehicle carries, or the times at which or areas within which the vehicle is used, etc. Again, there is in s.12(2) a protective provision, to the effect that nothing in s.12(1) obliges the insurer to pay any sum other than in discharge of the liability to the injured person and that an insurer who pays any such sum only by virtue of s.12(1) may recover the same from the person whose liability is thereby discharged.*

(12) I observe that section 12 of Trinidadian legislation is in similar terms to section 14 of the Act in force in Saint Vincent and the Grenadines, except that the legislation in Saint Vincent and the

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[5] [2012] UKPC 33

Grenadines is broader and goes somewhat further in subsection (1) (h). The section states as follows:

> *Where a certificate of insurance has been issued under subsection (4) of section 4 in favour of a person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the person insured by reference to any of the following matters:-*
>
> ***...***
>
> *(h) persons named in the policy who may or may not drive a motor vehicle*
>
> *Is void with respect to the liability required to be covered by a policy under section 4(1)*

(13) To my mind, and giving due consideration to the decisions of the Privy Council referred to above, it seems to me that section 14 of the Act invalidates the very restrictions which the 1st defendant is relying on in its defence. This restriction is not contained in the Trinidadian legislation, therefore providing some distinction between the facts of the cases already referred to and the present. I also observe that in *Joseph Cadette v St. Lucia Motor & General Insurance Company Limited,* the driver of the motor vehicle was not the insured. Although the issues of section 14(1)(h) did not arise it seems to me that the driver may not have been a person named in the policy and the defendants were therefore entitled to argue that the judgment was not obtained for a liability covered under the terms of the policy. Here the 2nd defendant is not only a person named in the policy, he is in fact the policy holder and authorised to drive the motor vehicle. The restrictions under the policy to which the 1st defendant refers relate to a person named in the policy who may or may not drive a motor vehicle. Under section 14 this restriction is void and, as the Privy Council notes, the section works to *override the language of the insurance policy to extend its cover*. Subsection (3) of section 14 goes on to make provision for the insurer to recover the amount paid to the third party from the insured. What the insurer is not entitled to do is rely on this restriction in the policy as a means of circumventing the third party claim and this restriction is overridden by the content of section 14(1)(h) of the Act.

(14) In the circumstances, I am of the view that even if the 1st defendant were to prove that the 2nd defendant was not endorsed to drive the motor vehicle in question it cannot escape the claimant's action to pay the judgment debt under the provisions of section 8(1) of the Act. For these reasons I also find that paragraph 5 of the amended defence, even if proven at trial, does not raise any real prospect of successfully defending the claim and is to be struck out under the provisions of Rule 26.3 of the CPR.

(15) The 1st defendant also raises the provisions of section 8(2) of the Act which creates an obligation on the part of the claimant to have served notice on the insurer of the initial proceedings against the insured. The subsection states as follows:

> *(2) No amount shall be payable by an insurer under subsection (1) or section 9* **–**
>
> *(a) In respect of any judgment, unless before or within ten days from the date of commencement of the proceedings in which the judgment was given or some other period as the court deems fit, the insurer had notice* ***of the bringing of the proceedings…"***

[18] In its written submissions, the 1st defendant argues that the claimant has not provided any evidence to prove compliance with section 8(2). I note that at paragraph 3, 4 and 5 of the statement of claim, the claimant clearly pleads that this notice was provided. The claimant goes further to state that, in the months following the filing of the claim, a number of correspondences were exchanged between the 1st defendant and the claimant as proof of its knowledge of the proceedings against the 2nd defendant. These pleadings go as far as to provide details of the claims consultant who acted on behalf of the 1st defendant in these negotiations. The 1st defendant, on the other hand, has not provided an adequate response to these pleadings. In its amended defence the 1st defendant neither admits nor denies this allegation and puts the claimant to strict proof. This does not seem to me to adequately comply with the provisions of Rule 10.5 of the CPR, which requires that the 1st defendant ***"must set out all the facts on which the defendant relies to dispute the claim"***. The rule goes on to mandate that a defendant must either admit or deny the allegation and if it is so denied, then reasons for this denial must be provided. The only

circumstance under which a defendant may neither admit nor deny the allegation made in the statement of claim is if he or she does not know whether the allegations are true.

[19] I note that the 1st defendant does not assert that it is unaware as to whether the content of paragraphs 3, 4 and 5 of the statement of claim are untrue. In these circumstances it is not open for the 1st defendant to put the claimant the strict proof as it has done. Further, I express some difficulty in accepting that the 1st defendant is unable to properly respond to the claimant's assertions that notice of the claim was served on them. Although it is argued that the claimant has not attached an affidavit of service, I am of the view that such issues can be addressed after case management directions for disclosure. However, given the claimant's direct assertions in the paragraphs in question, it is my view that the 1st defendant ought to adequately respond to the assertions made by the claimant that they were provided adequate notice of the proceedings in which judgment was obtained against the 2nd defendant. The purpose of the pleadings of both parties is to assist the court in the just disposal of the matter. Failure to comply with Rule 10.5 does not assist this purpose. Paragraph 3 of the defence must therefore be struck out for its noncompliance with the provisions of Rule 10.5 of the CPR.

[20] However, although I am of the view that the claimant has sufficiently pleaded the facts on which it is relying to prove compliance with section 8(2) of the Act, it is still a fact which must be proven and it would not be appropriate to enter judgment at this stage without the documentary evidence to prove that which has been pleaded. In essence, the claimant can only succeed in her claim if she can show that the provisions of section 8(2) has been complied with; in that the 1st defendant was served notice of the proceedings in which judgment had been entered against the 2nd defendant. I am also of the view that the 1st defendant should be given an opportunity to amend its defence to bring it in compliance with Rule 10.5. In that regard, the 1st defendant must state whether the allegations contained in sections 3, 4 and 5 of the statement of claim are admitted or denied. If the facts are denied, then an alternative set of facts must be pleaded. The 1st defendant is only entitled to put the claimant to strict proof if it is pleaded that they do not know whether the pleadings are true or not. Leave is granted to the 1st defendant to make the necessary amendment. However, this is limited to the pleadings relating to the provisions of section 8(2) of the Act.

[21] In the circumstances I make the following orders and declarations:

(a) Paragraph 5 of the amended defence filed on 19th September, 2018 is struck out as it does not disclose any reasonable ground for defending the claim;

(b) Paragraph 3 of the amended defence filed on 19th September, 2018 is struck out for its failure to comply with Rule 10.5 of the CPR;

(c) The 1st defendant is grated leave to further amend its defence for the limited purpose of bringing paragraph 3 into compliance with Rule 10.5 of the CPR;

(d) The amended defence is to be filed and served within 14 days from the date of delivery of this judgment;

(e) The claimant is granted leave to file a reply to the defence within 14 days from the date of service of the amended defence filed by the 1st defendant in compliance with order (d) above;

(f) The matter will thereafter be listed for further case management of the outstanding issues in this claim.

Ermin Moise
Master

By the Court

Registrar