THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NUMBER: SVGHCV2017/0099

BETWEEN: RUTHLIN ROBINSON

CLAIMANT

AND

JEROME PETERS
ANTHONY JOHN

DEFENDANTS

Before: MASTER ERMIN MOISE

APPEARANCES:
Mr. Grenville John of counsel for the Claimant
Ms. Rose-Ann Richardson for the insurers

2018: November 21
2019: May 22

JUDGMENT

[1] Moise, M.: This claim arises out of a motor vehicular accident which occurred on 29th May, 2014. The claimant has obtained judgment in default against the 1st defendant who was then the driver of the motor vehicle in question. She has now filed an application for an order that the service of the claim form and statement of claim as well as a default judgment entered against the 1st defendant be deemed properly served on the insurers in accordance with the provisions of section 8 of the Motor Vehicle (Third Party Risk Act)[1]. I have decided to deny the application and these are my reasons for doing so.

THE FACTS

[2] The claimant filed this action as a representative of the estate of the late Raphael Oliver who was her father. On 17th July, 2014, Mr. Oliver unfortunately succumbed to injuries which he sustained

[1] CAP. 309

during a motor vehicular accident which occurred on 29th May, 2014. It is alleged that Jerome Peters was the driver of motor vehicle registration number HM903 which collided with Mr. Oliver, who was a pedestrian at the time. This vehicle was owned by Mr. Anthony John, who is the 2nddefendant in this action. It is further alleged that the vehicle was insured by Metrocint General Insurance Company Limited.

[3] On 14th July, 2017, the claimant filed an action against the defendants on behalf of the estate of the late Raphael Oliver and on behalf of his dependents. By way of affidavit filed on 4th July, 2018, Mr. Marvin Mulcaire, Bailiff of the High Court, stated that he served a copy of the claim form and statement of claim on the 1stdefendant on 2nd August, 2017. A further affidavit was filed by Mr. Lester James which indicates that the claim form and statement of claim were served on the 2nddefendant on 12th July, 2018 by delivering those documents to his servant Mr. Hosni Garrick at Kingstown. On that same date the claimant also served a copy of the claim form and statement of claim on the insurers. This much was sworn to in an affidavit filed on behalf of Mr. Lester James on 9th August, 2018.

[4] Neither defendant filed a defence and the claimant made a request for entry of judgment in default on 18th September, 2018. This request was not granted by the Registrar of the High Court. The matter was instead listed for consideration before the master's court on 20th September, 2018. On that date, the court observed that the claim form and statement of claim were served on an agent of the 2nd defendant an entire year after it was filed. This was contrary to the CPR which states that a claim is only valid for 6 months. The rules also require that a claimant who wishes to be granted an extension of time within which to serve the claim form and statement of claim must make an application for such an order prior to the expiration of the claim form. As such, service of the claim on an agent of the second defendant was not valid given that the claim form had by then expired and that this was not personal service. It is also of note that the claim from served on the insurers on that very date would have also been expired.

[5] In light of the foregoing, I made an order striking out the claim as against the 2nd defendant and remitted the request for judgment in default against the 1stdefendant to be considered by the registrar, given that the request would then relate to only one defendant. Judgment was therefore entered against the 1stdefendant on 24th September, 2018.

[6] On 10th October, 2018 the claimant filed the current application. The grounds for this application are:

(a) That subsequent to the filing of the claim, but before service could be effected on the 2nd defendant and the insurance company, the claimant's legal practitioner was appointed to the office of attorney general;

(b) That there was a long transition period which resulted in delays in the matter. During this period the applicant made several attempts to collect the case file from her former attorney's office so that she may engage the services of a different attorney. This was not successful;

(c) That the claimant was only able to obtain her case file on 27th June, 2018. On 28th June, 2018, she engaged the services of her current attorneys. By that time the stipulated period to effect proper service had already lapsed.

[7] On these facts, the claimant requests an order that service of the claim form and statement of claim on the insurers which was made on 12th July, 2018 be deemed proper service. She also seeks an order that service of the default judgment against the 1st defendant on the insurers on 18th October, 2018 be deemed to be proper service.

THE LAW

[8] For the purpose of these proceedings the relevant legislation is sections 8 and 9 of the Motor Vehicle (Third Party Risks) Act (The Act). Section 8(1) and (2) state 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 apolicy, 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) 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 proceedin****gs…"***

[9] Having secured judgment in default against the 1st defendant, the claimant now wishes to rely on section 8 of the Act to secure payment of the damages awarded from the insurers. She also seeks to rely on the provisions of section 9 of the Act which states as follows:

"*Notwithstanding any provision of any other Act, a third party who has obtained judgment against a person to whom a policy of insurance has been issued under the 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 by the act."***

[10] The difficulty which the claimant faces is that section 8(2) makes it mandatory that the insurers have notice of the proceedings either before or within a period of 10 days from the date of the commencement of the proceedings in which the judgment was entered. This is perhaps not the same as saying that the claim must, of necessity, be served on the insurers. What is necessary is for the claimant to prove that the insurers had notice of the claim form. However, in my view, the most effective way for the claimant to ensure that section 8(2) of the Act is complied with is to ensure that the insurers were served with notice of the intention to file an action or with an actual copy of the claim within ten days of its commencement. In this case service was not effected on the insurers until an entire year after the commencement of the proceedings. There is also no evidence to prove that there was any pre-action letter notifying the insurers of the intention to commence legal action. However, the claimant argues that this is not fatal to the application given that the section expressly states that the period for providing notice to the insurers may also be ***"some***

other period as the court deems fit." The argument is therefore that the court has a discretion to determine the period within which notice should be provided to the insurer and to extend this period beyond the 10 days referenced in section 8(2) if it is just to do so.

[11] Counsel for the claimant seeks to rely on Rule 26.1(2)(k) of the CPR which states that ***"except*** *where these rules provide otherwise, the court may -* ***… extend or shorten the time for*** *compliance with any rule, practice direction, order or direction of the court even if the* ***application for an extension is made after the time for compliance has passed."***The claimant also relies on the overriding objective of the rules which encourages the court to deal with cases justly when exercising its discretion. Counsel refers to Blackstone's Guide to the Civil Procedure Rules where it states that ***"the main concept*** *in the overriding objective means that the primary concern of the court is to do justice. Shutting a litigant out through a technical breach of the rules will not often be consistent with this, because the primary purpose of the civil courts is to decide cases on their merits, not to reject them for procedural* ***default."***The authors of Blackstone's referred to the cases of *Jones v. Telford et al*[2] and *Chilton v. Surrey County Council*[3]. In both cases it was determined that the court must not lose site of the fact that its primary objective is to do justice and that dealing with a case justly involves dealing with the "real claim" and not shutting the litigant out due to minor breaches of the rules.

[12] Counsel for the applicant also refers the court to the case of *F.G. Hawkes (Western) Ltd v. Beli Shipping Company Ltd*[4]*.* in support of the argument that the better the reason for not having served on time the more likely that an extension will be granted. Counsel makes the argument that the court can grant an extension prospectively or retrospectively. The court was referred to the case of *James Herbert v Nelisa Spencer*[5] where Master Glasgow (as he then was) noted that ***"…*** *it will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period. A claimant who* ***experienced difficulty should normally be entitled to the court's help."***Counsel goes on further to refer to the case of *Pacific Electric v. Texan Management*[6] where Lord Collins stated that ***"in the pursuit of justice, procedure is a servant not a master"*** and invites the court

[2]The Times, 29th July, 1999
[3][1999] EWCA Civ 1666
[4][2009] EWHC 1740
[5]ANUHCV 2014/0391
[6] UKPC [2009] 46

therefore to grant an order which deems service of the claim form on the insurers a year after the date of its filing to be proper notification for the purpose of section 8(2) of the Act.

[13] For my part, I rather doubt that the sections of the CPR and the authorities referred to by counsel for the claimant are applicable to the instant case. The claimant does not seek an extension of time within which to comply with a rule, practice direction, order or direction of the court as is set out in rule 26.1(2)(k) of the CPR. What is sought is tantamount to an extension of time to comply with the provisions of a specific enactment; that is section 8(2) of the Act. It is therefore important to determine whether the court has a discretion to grant the relief which the applicant seeks and also the basis upon which such relief is to be granted. In order for the submissions of the applicant to be accepted the court must determine that the words *or some other period as the court deems fit* as contained in section 8(2) of the Actis to be interpreted in a manner which includes the power to extend the time period for notification of the insurers, after the claimant has failed to comply. I have some doubt as to whether that would be a correct interpretation.

[14] The authorities referred to by the applicant addresses a number of circumstances where the rules or the legislation in question make specific provision granting a discretion to the court and outlining the manner in which this discretion is to be exercised. This does not seem to be the case with the provisions of section 8(2) of the Act. This section specifically states that no amount shall be payable by an insurer under the provisions of section 8(1) 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 insurers had notice of the claim. The issue of notice has always been an important feature in insurance contracts. Within the contract itself there are normally specific provisions which make it mandatory for the insured to provide notice of the occurrence of an event covered by the policy as well as notice of pending litigation. As it relates to the former, the Supreme Court of Alabama in the case of *The Travelers Indemnity Company of Connecticut v. James Miller*[7]explained the general purpose behind the requirement to provide notice in the following manner:

> *"An insurer must have timely notice of an event or occurrence in order to form an intelligent estimate of its rights and liabilities under the policy, to afford it an*

[7]December 02, 2011

opportunity to investigate, to allow it to participate in the litigation, and to prevent fraud."

[15] The duty to provide notice of the event would often rest with the insured and not the injured party. However, to my mind, the general purpose behind the requirement of notice is relevant to the general discussion currently before this court. As it relates to notice of court proceedings the court in Alabama went on to state that the purpose of providing notice to the insurer ***"was** to give the insurer the opportunity to control litigation on which its contractual liability **hinges."*** The purpose therefore was to ensure that the insurers were not shut out from the litigation process from an early stage, given their obvious interest in the outcome of the proceedings and the need to control the process on which its liability may hinge.

[16] Whilst these provisions were normally contained in the contract of insurance, the laws of Saint Vincent and the Grenadines, as is the case in similar legislation across the OECS sub-region, sought to specifically legislate for such notice to be provided to the insurers, whether by the insured or by the third party. Therefore, a third party who commences litigation must ensure that the insurer has notice of the court proceedings, either before or within 10 days from the date of commencement of the proceedings, unless the court deems a different time period to be more acceptable. In the case of *Nawaz v. Crow Insurance Group*[8] the Court of Appeal of England and Wales came to consider a somewhat similar provision to that of section 8(2) of the Act. In his contribution to the judgment Lord Justice Kennedy stated the following:

> *"It is important that anyone acting for a claimant in a personal injuries claim who hopes ultimately to rely on section 151 of the Road Traffic Act 1988 gives clear notice to the relevant insurers as required by section 152(1)(a). The reason for the requirement of notice is obvious. The insurers need to know that proceedings are being commenced so that at the proper time they can have the opportunity, if so advised, to take an active part in those proceedings."*

[17] Kennedy LJ therefore outlines the general purpose of the notice provisions provided for in the legislation and encourages that where there is an intention to rely on provisions similar to sections 8 and 9 of the Act, clear notice must be provided to the insurers in accordance with those

[8][2003] EWCA Civ 316

provisions. The insurers must have an opportunity to actively participate in the proceedings, given the obvious liability which exists to indemnify the insured, or any one covered under the terms of the policy, in the event that the claim is successful.

[18] In the case of *Whiley v. Wake*[9] Lord Justice Kennedy also noted that ***"the essential purpose of*** *the requirement of notice is to ensure that the insurer is not suddenly faced with a judgment which he has to satisfy without having any opportunity to take part in the proceedings in which that judgment was obtained."* Therefore, the provisions requiring that notice be provided prior to or within 10 days from the date of commencement of proceedings must be interpreted with the clear purpose of these provisions in mind. In light of that Wolf CJ noted in *Nawaz* that ***"the*** *effect of section 152(1) is that if there is no proper notice served on an appropriate person* ***for the purposes of the section, then the liability of an insurer comes to an end."***

[19] It stands to reason therefore that unless the claimant can satisfy this court that there was proper notice provided to the insurers, this application must fail. The argument put forward is that in the legislation in Saint Vincent and the Grenadines the court has a discretion to stipulate a later period than the ten day limitation placed in section 8(2) of the Act. I express doubt as to whether this provision allows the court to do so retrospectively. It would seem to be best practice for a litigant to approach the court prior to the expiration of the 10 day period in order to establish a more appropriate time frame than what was contained in the Act; provided that there are clear reasons for doing so. In any event, even if I were to be wrong, there are a number of factors which, to my mind, would militate against the exercise of that discretion in the manner put forward by the claimant at this stage in the proceedings.

[20] Firstly, the claim was served on the insurers an entire year after it was filed; so much so that by that time the claim had already expired. It is worth noting that even the insured himself had not received notice of the claim until 12th July, 2018 and even then it was by way of service on an agent and not personal service. This compounds the challenge faced by the claimant as the court can very well infer that the insured had not provided notice to his insurers of the claim as he would have been required to do under the policy. By the time he was served the instructions attached to

[9] [2000] EWCA Civ 349

the claim form would have informed him that the claim had no validity if it was served beyond six month from the date of its filing.

[21] Further, at that point the 1st defendant, who was served within the requisite time, had not filed an acknowledgement of service nor a defence to the claim and the claimant would have therefore been entitled to judgment in default against him; subject only to consideration of the provisions rule 12.9 of the CPR. In fact, by the time this matter was listed for status hearing in September, 2018, a request had already been made for the entry of judgment in default. The current application before this court was also made subsequent to the entry of judgment in default. I am of the view that the circumstances of this case would not have fulfilled the general purpose behind the provisions contained in section 8(2) of the Act. The insurers would certainly have not been able to take an active part in these proceedings and to seek proper advice on the manner in which to proceed. Even if the court were to have a discretion to retroactively extend the period for service of notice on the insurer, a period of an entire year would certainly be outside of the range of what is acceptable, given that the claim was expired and the 1st defendant had played no part in the proceedings up to that point. In those circumstances, I am not of the view that the court should deem service on 12th July, 2018 as proper notice on the insurer for the purpose of section 8(2) of the Act.

[22] I wish however to address a submission made by counsel on behalf of the insurers. Counsel argues that given there is no judgment against the insured the insurers cannot now be held liable to pay the judgment in accordance with the provisions of sections 8 and 9 of the Act. According to counsel the basis of the insurer's liability is that the 2nddefendant would have been held vicariously liable for the 1stdefendant's negligence. There being no judgment against the 2nddefendant, the provisions of section 9 would be of no avail to the claimant and that the application should be rejected for that reason. It is argued further that the court, having struck out the case against the 2nd defendant, is *functus officio* and that in filing the current application the claimant now seeks to reopen litigation which was stuck off its record. I do not agree with that submission. I note for example that the Honourable Chief Justice addressed this issue in the case of *Eastern Caribbean Insurance v. Edmund Bicar*[10] where she states the following:

> ***"****Mr. Monrose being a permitted driver fell within the class of persons specified in the policy in respect of which the Insurer became liable to indemnify under the policy. This*

[10]SLUHCVAP 2008/014

right of indemnity then operates in much the same way as the indemnity afforded to the policyholder were he the one who incurred the liability. What this shows is that even though the liability may arise under the same policy, it is recognised that the liability of the policyholder/motor vehicle owner, may arise as a separate and distinct liability to ***that of the authorised driver and thus the Insurer****'s liability to indemnify the policyholder is also a separate and distinct obligation to that of the indemnity obligation arising in respect of an authorised driver."*

[23] The Honourable Chief Justice went on to state the following at paragraph 16 of her judgment:

"It follows from what I have said above that 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 dependant on a finding of liability on the part of the policyholder by employing the principles of vicarious liability. The obligations may arise, though connected, quite separately and independently of the other once it can be shown that the driver falls within the category of persons specified under the particular policy as being covered thereunder."

[24] Therefore, the insurers can in fact be held liable to satisfy the judgment even though there was no judgment entered against the policy holder. That much seems, to my mind, to be one of the general purposes of the third party risks Act. If this matter were to have proceeded to trial then it would be for the claimant to satisfy the court that the 1st defendant was authorized to drive the motor vehicle and was doing so with the permission of the 2nd defendant. If that was established then the insurers would have an obligation to satisfy the judgment even though there was no judgment entered against the policy holder. However, as I have stated earlier, it was incumbent on the claimant to ensure that the insurer had adequate notice in keeping with the provisions of section 8(2) of the Act in order to pursue an action against it for satisfaction of the judgment. As Wolf CJ notes ***"****if there is no proper notice served on an appropriate person for the purposes* ***of the section, then the liability of an insurer comes to an end."***

[25] I therefore come to the conclusion that there was not proper notice provided to the insurers. In fact, the insured as well as his insurer was not served until the claim had expired and the claimant was

entitled to judgment in default against the 1st defendant. I do not agree that the court can deem this service to amount to adequate notice sufficient to maintain the insurer's liability to satisfy the judgment in this claim. Despite this, I wish to state that I have come to this decision with some measure of reluctance. The circumstances under which the claimant now finds herself is more than unfortunate and it is important for the court or register its own sentiment in that regard. I observe that far too often litigants are left to suffer negative consequences when attorneys at law embark on a change of career without adequate arrangements being made to ensure that their client's interests are properly protected and that their files are handed over to them or passed on to another attorney within reasonable time. Adequate attention must therefore be paid to such circumstances as the claimant in this case has come to this state in her claim through no fault of hers. However, I am obligated to decide as a matter of law that the application must fail and in the circumstances I make the following orders and declarations:

(a) The application is dismissed, with no order as to costs.

(b) The matter is to be listed for the court's decision on the assessment of damages against the 1st defendant during the Master's sitting in the week commencing 10th June, 2019.

Ermin Moise
Master

By the Court

Registrar