



[2019] JSMC Civ 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 04245

BETWEEN	LEROY EDWARDS	CLAIMANT
AND	MIGUEL GONZALES	DEFENDANT

IN CHAMBERS

Mr. Richard Reitzin instructed by Reitzin and Hernandez for the Claimant Applicant.

Ms. Pauline Brown Rose for the Defendants/Respondent.

Heard 27th March, 2019

Application for inspection of Document - Whether the Defendant has a right to Withhold Inspection - Rules - 28.1;28.2;28.7;28.12

Oral Judgment

A. THOMAS, J.

Introduction

[1] In this Amended Notice of Application for Court Orders filed on the 26th of March 2019 the Claimant seeks the following orders -

- i. The Motor Vehicle Report Form prepared by the 2nd Defendant dated 7 February, 2008 and submitted by the Defendants to their insurance

company be made available for inspection by the Claimant's attorneys within 7 days of the date of this order.

- ii. If the court considers it necessary or expedient, the court exercise its discretion requiring the Defendants to produce the Motor Accident Report Form to the court to decide whether the Defendants' claim of right to withhold inspection on the grounds of privilege is justified.
- iii. In the event that the Defendants intend to rely on Mrs. Stacia Pinnock Wright's affidavit sworn to on the 15th of March, 2019 on any hearing of this application, that she be required to attend for cross-examination.
- iv. The Defendants shall pay the costs of this application

[2] The grounds for the application are stated as follows:

- i. The Defendants have disclosed the said Motor Accident Report Form. They "disclosed" it in the sense contemplated and defined by Rule **28.1(3)** of *the Civil Procedure Rules, 2002* in that they revealed that the document exists. In particular, the Defendants disclosed the said document in
 - a. Mrs. Pauline Brown Rose's affidavit sworn to on the 16th of September, 2015;
 - b. Miss Nicole Dummet's affidavit sworn to on the 21st of September, 2015; and
 - c. The Defendants' list of documents filed on the 30th November 2015 pursuant to an order of the court requiring

the parties to give standard disclosure made on the 5th of October, 2015;

- ii. The Defendants have claimed a right to withhold inspection of the said document on the grounds that it is privileged from production for inspection. The Claimant is a person who does not agree with the Defendant's claim of right to withhold inspection of the Motor Accident Report Form- within the meaning **of Rule 28.15(5)** of the **Civil Procedure Rules**. The court cannot be satisfied that there is a right to withhold inspection of the document within the meaning of **Rule 28.15(6)**. Unless the court is so satisfied, the court must make an order pursuant to **Rule 28.15(6)** of the **Civil Procedure Rules, 2002** that the document be made available for inspection
- iii. By reason of **Rule 28.17**, the Claimant has a right and/or will have accrued the right to inspect the document. As to Order 2, the court has been expressly granted this power by **Rule 28.15(7)** of the **Civil Procedure Rules, 2002**. As to Order 3, on 15 March, 2019, Mrs. Stacia Pinnock Wright swore to an affidavit in these proceedings in which she denies certain aspects of a conversation with the Claimant's attorney concerning whether privilege attaches to motor vehicle accident report forms. The Claimant has a bona fide interest in cross-examining her

Discussion

[3] Mr. Reitzen has filed two affidavits in support of this application. He indicates that on the 28th of May 2018 he spoke to Ms Stacia Pinnock-Wright, legal officer of Jamaica National Group Insurance(JNGI). He alleges that in that conversation Ms Pinnock-Wright told him that:

Motor Vehicle Accident Report Forms are collected by JNGI in every single case where a claim is being made by or on behalf of an insured or an

accident is being reported by or on behalf of an insured. A very low percentage of claims or cases where accident are reported ever reach the stage of litigation. The report forms are collected for a number of reasons. Those reasons include; to register the claim on JNGI's computer system; to enable JNGO to decide what to do with the claim or report (i.e. how deal with or to "treat" with the claim or report) in the ordinary course of JNGI's business; for example - to ascertain whether the vehicle was in fact covered by JNGI, i.e. to determine whether JNGI was on risk, at the relevant date. This depended upon a number of factors including the date of the accident (i.e., whether it was during the period of cover). who was driving (i.e. whether the driver was properly licensed and whether the driver was authorized to drive under the terms of the policy), the purpose for which the vehicle was being driven at the time (i.e., whether the purpose was within the terms of the policy); to inform the relevant person whether he/she/it was insured with JNGI or not at the relevant date; to enable JNGI to seek further information, if necessary; to investigate the claim, if considered necessary; to pay the claim; and to decline the claim. The main reason for collecting the report form is to register the claim on JNGI's computer system

All motor vehicle accident report forms are privileged.

[4] Mr. Reitzin further asserts that:

In these proceedings, the Defendant's and Attorneys-at-Law Pauline Brown-Rose and Nicosie Dummett acting on their behalf voluntarily disclosed the Motor Accident Report Form on at least 3 separate and distinct occasions in writing twice before any order or discretion was made and once in compliance with an order for standard, not specific, disclosure made on 5 October, 2015, from which order there was no appeal. By the time Mr. Justice Palmer made his order on 5 October, 2015 for standard disclosure, the defendants had already disclosed the Motor Accident Report Form ie they had already revealed its existence. They had done so voluntarily. They had thereby effectively voluntarily given specific disclosure

of the Motor Accident Report Form at least twice before the order for specific disclosure was even made. Having given specific disclosure of the Motor Accident Report Form ie having revealed its existence, the order for specific disclosure was dead letter. At the time Mr. Justice Palmer made his order on 5 October, 2015 for standard disclosure, the defendants had already disclosed the Motor Accident Report Form ie they had already revealed its existence. They had done so voluntarily. They had thereby effectively voluntarily given specific disclosure of the Motor Accident Report Form at least twice before the order for specific disclosure was even made.

[5] He takes the position that:

Having given specific disclosure of the Motor Accident Report Form ie having revealed its existence, an order for specific disclosure was dead letter as it related to the Motor Accident Report Form. It was otiose. Specific disclosure had, by 16 September, 2015, the date of swearing and filing Mrs. Brown-Rose's affidavit, become a non-justiciable issue. The appeal against the order for specific disclosure was, thus, entirely misconceived. The Court of Appeal, having read the affidavits of both Mrs. Brown-Rose and Miss Dummett did not appreciate that by revealing therein the existence of Motor Accident Report Form, the order for specific disclosure of the same document was otiose. It was of no form or effect. The order had been voluntarily complied with even before it was made. The whole of question specific disclosure was a non-justiciable issue. No court would have deliberately ordered the defendants to do something which they had already done. It appears that the Court of Appeal never saw, or never considered, or both, the defendant's list of documents. Had it done so, the Court of Appeal may very well have appreciated that the defendants had disclosed the Motor Accident Report Form in the sense of having revealed its existence. The Court of Appeal may very well have then gone on to appreciate as a necessary logical consequence, that the order for specific disclosure was no longer a justiciable issue at the time of filing the notice of

appeal and the amended notice of appeal (and, even before those dates). There are some passages in the Court of Appeal's judgment which show that its use of the word "disclosure" is not the use contemplated and define by rule 28.1(3). The Court of Appeal appears to have used the word disclosure in the sense of "produce for inspection. "The judgment of the Court of Appeal does not govern or control this application. The Court of Appeal held that the court below could not have been satisfied on the evidence before it that ;the motor vehicle accident report form was directly relevant to the matters in questions in the proceedings; and/or that specific disclosure was necessary in order to dispose fairly of the claim or to save costs The entire question of whether or not the Motor Accident Report Form was directly relevant or not could, under the rules, only have arisen in relation to an order for specific disclosure.

[6] He states that this is a fresh application with fresh evidence and fresh argument. The only real question that is now before the court, that is whether the Defendants have established that the Motor Vehicle Report Form is privileged from production for inspection as contemplated by the Civil Procedure Rules

The Court of Appeal did not consider, and did not make any ruling whatsoever on the question of whether the Motor Accident Report Form was privileged from production for inspection on the grounds of litigation privilege or attorney/client privilege or any other form of privilege.

[7] The defendant is opposition to this application contends by way of the Affidavit evidence of Stacia Pinnock that:

- i. By way of and Amended Notice of Application for Court Orders filed on the 17th September, 2015 the Applicant/Claimant has sought an order for specific disclosure of the following documents:

“... all motor accident claim forms submitted to insurance companies

... all investigators reports concerning the accident which is the subject of these proceedings”

- ii. The application was heard by the Honourable Mr. Justice D. Palmer (Ag.) who ruled on the 25th October 2015 as follows:

“All motor vehicle accident claim forms submitted to the Defendants’ Insurers concerning the accident to be made available for inspection by the Claimant within 7 days of the order herein

“All motor vehicle accident claim forms submitted to the Defendants’ Insurers concerning the accident to be made available for inspection by the Claimant within 7 days of the order herein

- iii. By way of an Amended Notice of Appeal filed on the 20th November, 2015 the Defendants sought to set aside the order made by the Honourable Mr. Justice D. Palmer (Ag.) That the Appeal was allowed, setting aside the order made by the court below with cost to the defendants. That in light of the decision of the Court of Appeal it is now surprising that the claimant is making another application for the inspection of the said Motor Vehicle Accident Claim Form

- iv. On May 28th 2018 Mr. Reitzin did telephone the JNGI’s Legal Department in the afternoon to speak with Ms. Pinnock. Mr. Reitzin enquired of the purpose of the JNGI motor vehicle accident report form to which she responded that it was used by JNGI’s Insured to report an accident. She knows that the Motor Vehicle Accident Claim form are available for the Insureds to complete for JNGI to determine whether to resist or avoid proceedings. She did say that the accident forms are used for a number of reasons with one such

being to register the accident claim. However, she denied other aspects of the conversation. She further asserts that in any event she believes that the issue of specific disclosure and inspection of the defendants' motor vehicle accident report forms has been settled by the Court of Appeal, accordingly the claimant's application is an abuse of process of the court. Consequently, she asked the Court to dismiss the Claimant's application

Issue

[8] The issue that falls for me to determine in this application is

Whether the Claimants have a right to the Inspection of the Motor Vehicle Accident Claim Form or stated in the alternative:

Whether the Defendants can successfully establish a claim of right to withhold the production of the document from inspection by the Claimants.

[9] The Provisions of the Supreme Court of Jamaica Civil Procedure Rules (The Rules) relating to Disclosure and Inspection of Documents read as follows:

Rule 28.1 (1) This Part contains rules about the disclosure and inspection of documents.

(2) In this Part "**document**" means anything on or in which information of any description is recorded; and "**copy**" in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

(3) A party "**discloses**" a document by revealing that the document exists or has existed.

(4) For the purposes of this Part a document is "**directly relevant**" only if –

- (a) the party with control of the document intends to rely on it;
- (b) it tends to adversely affect that party's case; or
- (c) it tends to support another party's case.

Duty of disclosure limited to documents which are or have been in party's control

Rule 28.2 (1) A party's duty to disclose documents is limited to documents which are or have been in the control of that party.

- (2) For this purpose a party has or has had control of a document if
- a) it is or was in the physical possession of that party;
 - (b) that party has or has had a right to possession of it; or
 - (c) that party has or has had a right to inspect or take copies of it.

Rule 28.7 (1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

(2) It must have regard to-

- (a) the likely benefits of specific disclosure;
- (b) the likely cost of specific disclosure; and
- (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event.

[10] It is clear that the Defendants in resisting this application is doing by a claiming a right to rely on the order of the Court of Appeal setting aside the order of Palmer J for specific disclosure and inspection of document. Mr. Reitzin has not denied that the Judgment of the Court of Appeal relates to the same documents for which he is seeking inspection. However, he argues that when Palmer J made the order on October 5th 2015 for standard disclosure the defendant had already revealed the existence of the form.

[11] Therefore, I find that **Rule 28.12 (1) (b)** is applicable to the to the issue under consideration.

It states that “When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, **except documents for which a right to withhold from disclosure is claimed.**”

[12] It is apparent on a reading of this rule that the mere fact that documents are disclosed does not translate into an automatic right of inspection. The party can claim a right to withhold inspection. In my view this right is not necessarily limited to professional privilege. In the instant case the Defendants are relying on a right by an order of a court of higher jurisdiction setting aside the order of the lower court for specific disclosure and inspection. Therefore, as long as that order remains in effect, that is in the absence of any subsequent order for specific disclosure and inspection it is my view that the defendants can successfully claim this right.

[13] Therefore, I will have to determine whether this issue as it relates to the inspection of the aforementioned documents was already addressed in the Order of Justice Dale Palmer that were later set aside by the Court of Appeal. The order of his Lordship Mr Palmer and which went on Appeal before the Court of Appeal was not limited to specific disclosure, but also included an order for inspection of documents. F Williams J A. in judgment of the Court of Appeal noted that the Judge’s Order that was on appeal was:

*“By an amended notice of appeal filed on 20 November 2015, the appellants seek to set aside an order of a judge of the Supreme Court (hereafter referred to as “the learned judge”) for **specific disclosure and inspection contained in case management orders dated 5 October 2015. The order was to the effect that: “1. All motor vehicle accident claim forms submitted to the Defendants” Insurers concerning the accident to be made available for inspection by the Claimant within 7 days of the order herein;**” (see paragraph 3)*

[14] This issue of privilege was raised before both before his lordship Mr. Palmer and the Court of Appeal. Despite the fact that the Court of Appeal did not find it necessary to consider the question of privilege the court found that there was insufficient evidence before the Judge to demonstrate direct relevance of the documents for which specific disclosure was sought. The Court of Appeal did set aside the Order for Specific Disclosure and Inspection I note that in the instant application, Mr Reitzin is not seeking Specific Disclosure. Essentially, he appears to be restricting this application to inspection of documents.

[15] However, despite the fact that Mr. Retzin has indicated that this is a fresh application with fresh evidence it is my view that the issues addressed by the Court of Appeal impinge directly on the issues before me. It is in fact correct that the Court of Appeal did not find it necessary to make a pronouncement on the issue of professional privilege. Mr. Reitzin has also sought to introduced new information on the issue of professional privilege based on alleged information from Ms, Pinnock-Wright which the Defendants are challenging. However, before I can even attempt to address these allegations I will have to address the effect of the order of the Court of Appeal on these proceedings.

[16] Mr. Reitzin indicates that the order of the Court of Appeal was otiose. However, the factors that he has used to support this conclusion are all matters which predate not only the application for appeal but also the order of the Court of Appeal. These are matters that could have and should have been raised before the Court

of Appeal. Additionally, the Court of Appeal would have had the benefit of the file. Therefore, it is not unreasonable for me to presume that the Court of Appeal would have been seized of the relevant information. Mr. Reitzin seem to be asking me to review the decision of the Court of Appeal. However, respectfully I am not in a position to do so. I can't make a decision as to what the Court of Appeal could have or should have considered in its decision. The decision remains binding on the parties. The fact is, I can't see how I can make an order for inspection of documents where there still remains in effect an order from the Court of Appeal allowing the withholding of specific disclosure and Inspection of the same documents. To my mind an order on this application would only serve the purpose of circumventing the order of the Court of Appeal. This is especially in light of the fact that inspection is a step further than disclosure. It allows the party to inspect the document to acquire the intimate knowledge of its contents.

[17] Mr Reitzin argues that:

The entire question of whether or not the Motor Accident Report Form was directly relevant or not could, under the rules, only have arisen in relation to an order for specific disclosure. This application is a fresh application with fresh evidence and fresh argument in relation to whether or not the Motor Vehicle Report Form is privileged from production for inspection.

[18] While I accept that the Court of Appeal did not find it necessary to make a ruling on the issue of litigation privilege, I find the reasoning of the court this regard of great import. At paragraph 37 of that judgment Frank JA stated;

“...it not having been demonstrated by the respondent that the documents were "directly relevant", it was not required of the learned judge to have proceeded to the other hurdle of considering whether the document would have been privileged or not. Or, if he could properly have done so, the appellants' opposition to the documents being disclosed would have been

strengthened by the failure to satisfy the required prior consideration of whether the test of direct relevance had been satisfied”.

- [19]** My understanding of the reasoning of the court is that the Applicant will have to cross the first hurdle of direct relevance before the court can be moved to make an order for inspection in the face of opposition from the other side. Since this matter has been before the Court of Appeal there has been no change in circumstances as it relates to direct relevance of the documents in question. In spite of whatever disclosure occurred before the matter went on appeal, it is my view that any disclosure in compliance with the order of Justice Palmer, which has been set aside, would have been rendered ineffective by the decision of the Court of Appeal. Essentially the Claimant cannot rely on these for any subsequent orders. Therefore, in any subsequent application the Claimant would still have to cross the hurdle of direct relevance. Despite the fact that in this case affidavit evidence has been filed by Mr. Reitzin there is now no new application and still no evidence to establish direct relevance in relation to the documents in question. Therefore, the same deficiency that was observed by the Court of Appeal, which made it unnecessary to consider the issue as it related to the inspection of documents still prevails.
- [20]** The Claimant’s application for inspection of documents is grounded on the fact that he does not agree with a claim of right to withhold inspection or disclosure of a document. However, this claim of right is based on an order of the superior court which still remains in effect. Additionally, despite the fact that I appreciate the distinction between an order for standard disclosure, specific disclosure and inspection of documents I can’t see how an order for inspection of documents could be effected where an order permitting non-disclosure subsists. Both orders would stand in stark contradiction of each other. This court has no jurisdiction to set aside an order of the Court of Appeal.
- [21]** Where there is a fresh application with fresh evidence for specific disclosure, in light of the provisions of the rules for ongoing disclosure, and the fact that these

proceedings are interlocutory, this court would have to consider such an application. However, in the absence of such an application an order for inspection of documents would render the order of the Court of Appeal of none effect. That is the Defendants are entitled to rely on the order of the Court of Appeal setting aside the order for specific disclosure and inspection of documents.

[22] In light of the aforementioned reasons I do not find it necessary at this stage to make a determination on the issue of professional privilege. However, I will venture to say that the fact that a document has been disclosed prior to an order of the court does not prevent that party from relying on that right to withhold inspection. I make this observation in light of the fact that even where documents have been voluntarily allowed to be inspected, Rule **28.16** makes provision for the restriction on the use of information. **Rule 28.16** speaks to the inadvertent disclosure of documents.

[23] In light of the aforementioned reasons I do not find it necessary at this stage to make a determination on the issue of professional privilege. However, I will venture to say that the fact that a document has been disclosed prior to an order of the court does not prevent that party from relying on that right to withhold inspection. I make this observation in light of the fact that even where documents have been voluntarily allowed to be inspected, Rule **28.16** makes provision for the restriction on the use of information. **Rule 28.16** speaks to the inadvertent disclosure of documents.

It states

“Where a party inadvertently allows a privileged document to be inspected, the party who has inspected it may use it or its contents only with -

(a) the permission of the court; or

(b) the agreement of the party disclosing the document”

Conclusion

[24] The Defendants have established that they have a right to withhold inspection and specific disclosure of the motor vehicle accident report form in light of the order of the Court of Appeal, setting aside the order of Palmer J for specific disclosure and inspection of the same relevant document. This application is for inspection of the same documents. However, there has been no fresh application or subsequent order for specific disclosure rendering this order of the Court of Appeal obsolete. Consequently, an order for Inspection of documents in relation to the same documents where there is an order, effectively permitting the parties to withhold specific disclosure would be absurd. Consequently, this application for inspection of documents fails.

Orders

[25] The Claimant's Application for Inspection of Documents is denied.
Cost to Defendants to be agreed or taxed.
Leave to Appeal denied.