[2021] JMSC Civ 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 03468

BETWEEN	**ALLESSANDRA LABEACH**	**CLAIMANT/RESPONDENT**
AND	**ANTHONY ALEXANDER POWELL**	**DEFENDANT**
	ADVANTAGE GENERAL INSURANCE COMPANY LIMITED	**INTERVENOR/APPLICANT**

IN CHAMBERS

Ms. Suzette Campbell and Ms. Claudine Stewart-Linton instructed by Burton-Campbell & Associates, Attorneys-at-Law for the Applicant, Advantage General Insurance Company Limited.

Mr. Lance Lamey instructed by Bignall Law, Attorneys-at-Law for the Claimant/Respondent.

Heard: 30th September, 4th and 11th December 2020, 15th January 2021

Civil Procedure - Whether insurer has the right to intervene or must obtain the leave of the court - Sufficiency of interest - Defendant deceased when insurance policy in respect of motor vehicle renewed by the insurer - Whether insurer should be permitted to intervene to set aside default judgment in the absence of notice or permission of the Defendant's Estate as policy holder - Identity of the person who applied for renewal of policy of insurance not disclosed by the insurer.

C. BARNABY, J

[1] This is an application by Advantage General Insurance Company Limited (the Applicant) dated and filed on the 7th February and 11th March 2020 respectively. The Applicant seeks the following relief:

1. *That permission be granted to the Applicant to intervene and/or be heard in the claim herein.*

2. *That there be a stay of execution of the final judgment entered herein on the 30th day of May 2019 until the hearing of the application herein.*

3. *That the default judgment entered against the Defendant and all proceedings flowing therefrom be set aside.*

4. *The cost of this application be awarded to the Applicant.*

5. *Such further and/or other relief as this Honourable court deems just. [sic]*

[2] Notwithstanding the phrasing of the order numbered 1, which is reproduced in full in the preceding paragraph, it is the position of Counsel for the Applicant that it does not wish to be heard in the claim, but to intervene solely for the purpose of setting aside the default judgment entered against the Defendant. It is the Applicant's position that the said judgment was irregularly obtained, the Defendant being dead at the date on which initiating documents were said to have been served.

[3] The hearing of the application commenced before me on the 30th September 2020, but owing to the insufficiency of the time allotted and the enquiry from the court as to whether the absence of a representative of the Estate of the Defendant should affect the outcome of the application to intervene, the hearing was scheduled to continue on the 4th December 2020. The parties were ordered to file written submissions for oral presentation to address the court in that regard.

[4] Directions were also issued to the parties after the 30th September 2020 through the Registrar, requiring the Applicant to file further affidavit evidence to specifically address the policy of insurance pursuant to which it asserts the right to intervene, with leave to the Respondent to file evidence in response. These directions were issued because I harboured doubts as to the completeness of

the disclosure made by the Applicant in the proceedings. On the Applicant's evidence, the Defendant would have been dead on the date of the accident which is the subject of the claim, and on the date initiating documents were said to have been personally served upon him. The Applicant therefore asserted that the default judgment was irregularly obtained and ought to be set aside as of right. It was beyond curious that in these particular circumstances, the Applicant admitted that it had a policy of insurance with the Defendant but failed to exhibit any policy document or give any indication of the date on which it renewed the policy of insurance. It had merely been stated that a policy of insurance had been issued to the Defendant in 2010 in respect of his motor vehicle and was subsequently renewed on several occasions.

[5] On the 4th December 2020, Counsel Mrs. Campbell appeared for the Applicant, who was previously represented by Counsel Mrs. Stewart-Linton, both of Burton-Campbell & Associates. An adjournment was sought to enable the Applicant to file another affidavit, further to that which had been filed in purported compliance with the directions issued by the Court. This follows the advice of the Court that it had raised a particular concern at the hearing on the 30th September 2020 and had issued directions thereafter, which concern and directions remained unaddressed in the documents subsequently filed on behalf of the Applicant. The adjournment was granted to enable the Applicant to file a further affidavit to put into evidence the contract of insurance between the Applicant and the Defendant on which the former relied to intervene; and to address the circumstances under which it came to be entered into, several months after the Applicant says the Defendant was no longer among the living. An affidavit was duly filed.

[6] The application was therefore supported by the Affidavit of Vanessa Nesbeth in Support of Notice of Application for Court Orders sworn and filed 20th March 2020 (the First Affidavit); the Further Affidavit of Vanessa Nesbeth in Support of Notice of Application for Court Orders sworn and filed 9th October 2020 (the Second Affidavit); Affidavit in Support of Notice of Application for Court Orders sworn and filed on 7th December 2020 (the Third Affidavit). The Claimant, in opposing the application, relied on the Affidavit of Vaughn O. Bignall in

Response to Notice of Application for Court Orders sworn and filed 16th November 2020; and Affidavit in Response to Defendant's Third Affidavit in Support of Notice of Application for Court Orders sworn and filed on the 9th December 2020.

[7] The hearing of the application resumed on the 11th December 2020. During the course of submissions, the parties were referred to the decision of Rowe P in **Linton Williams v Jean Wilson, Harris Williams and Insurance Company of the West Indies** (1989) 26 JLR 172; and were permitted to make written submissions in response ahead of my determination of what I regard as a threshold issue. That is, whether the Applicant should be permitted to intervene to set aside the default judgment entered against the Defendant without notice to or permission from his Estate.

[8] Having considered the evidence, applicable law and the competing submissions of the parties the application is dismissed. I find that the Applicant does not have a right to intervene as the policy on which it asserts that right was not entered into between it and the then Deceased Defendant. Further, the Applicant having made the application in its sole name, leave of the court would be required to intervene. There being no evidence before the court that the Estate of Anthony Alexander Powell (the policy holder of the certificate of insurance issued for the relevant period) has no interest in defending the claim against the nominal Defendant, leave to intervene to set aside the default judgment should be refused in light of the Applicant's failure to make the said Estate a party to the application. I arrive at these conclusions for reasons which appear below.

REASONS

[9] Pursuant to CPR 13.4 (1) any person who is directly affected by the entry of a default judgment may make an application to set it aside. While the CPR does not prescribe the procedure which is to be adopted by such a person in making the application, the matter has been the subject of judicial determination.

[10] In the **Williams case**, to which the parties were referred and on which they have responded by way of written submissions, Rowe P in delivering the

judgment of the court affirmed an earlier decision of the court which involved the same appellant. The decision was that a person in the position of the respondent insurance company in that case, who had a contractual relationship with the defendant governed by the *Motor Vehicle (Third Part Risks) Act* could intervene in a suit as of right and not by mere liberty, on its own motion and in its own name. This was on account that it was possible that the insurance company could be liable on the judgment pursuant to the Act.

[11] The defendants in **Williams case** entered appearances but failed to file any defence to the claim. Additionally, their own applications to set aside default judgments for failing to file defences were refused and they had no goods against which to levy. While the defendants did not receive notice of the application, they were aware of it and had in fact filed affidavits in support. Reckford J who heard the application to intervene and set aside the default judgment granted the order sought and proceeded to add the insurer as a defendant with time limited to file a defence. On appeal, the order setting aside the default judgment was upheld, permission given to the defendants to file their defences within a specified time, and the respondent insurer was ordered bound by the decision of the court on a trial of the claim. The addition of the respondent was found to be improper and that particular order was set aside.

[12] In the course of judgment, the decisions in **Jacques v Harrison** (1884) 12 Q.B.D. 165 and **Windsor v Chalcraft** [1838] 2 All ER 517 were cited with approval. Like the **Williams case**, the defendants did not have an interest in defending the claim. In consequence, the third parties were permitted to intervene and the default judgments which were regularly obtained were set aside in favour of the equitable mortgagee and insurers respectively.

[13] In **Jacques v Harrison** (1884) 12 Q.B.D. 165, the plaintiff brought a claim for recovery of possession of land and premises against the nominal defendant following breaches of covenants in a lease. The defendant had no interest in the claim and allowed judgment in default to be entered against him and writs of possession were issued. The equitable mortgagees, who were not in possession and therefore not joined as parties had an interest in the suit as the judgment remained a blot upon their title. They succeeded in an application to

set aside the default judgment and writs of possession on terms, notwithstanding that the defendant had not been served with the application. The defendant did not have an interest in defending the claim.

[14] **Jacques v Harrison** was followed by the majority in **Windsor v Chalcraft** which, like the instant case, was concerned with a motor vehicle accident. The defendant there failed to enter an appearance and a default judgment was therefore entered against him, damages assessed and the insurers asked to satisfy the judgment debt. While the insurer was notified that a claim had issued against its insured, it had not been notified of service of the writ upon the defendant or that the matter was fixed for trial. Master Burnand set aside the default judgment on the insurer's application but was reversed by du Parcq J. The insurers appeal against the latter's decision was allowed and the order of the Master restored. The court found that the nominal defendant had bound himself, by the policy of insurance, to allow the insurer to use his name and it was therefore entitled to be heard on the application to set aside.

[15] As contended for the Applicant, the instant case is distinguishable from the preceding authorities in that there is evidence before the court that the Defendant was dead at the time the claim was said to have been served on him personally so that the entry of the default judgment could be said to have been irregularly obtained. I do not believe this distinction disturbs in any way the procedure to be adopted on an application by an intervene to set aside a default judgment which was set out in **Jacques v Harrison**. I believe the procedure is equally applicable to regularly and irregularly obtained default judgments. Bowen LJ in delivering the courts judgment stated the matter thus at 167-168,

> *There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside; and these two modes are amply sufficient to protect any such stranger in all cases in all his rights.* ***He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply***

to have the judgment set aside on such terms as the judge may think reasonable or just*. **Or** he may, **if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, subs. 5****. By one or other of these two modes all that justice requires in any case can be done. **But it is of the essence of the intervention of the third person, if he adopts the latter course, that the defendant should be made a party to the application. This is not a mere form, but an essential requirement of justice.** The defendant has thought it more consistent with his own interest to submit at once to the plaintiff's claim instead of contesting it further. **If at the instance of a stranger to the action the litigation is sought to be revived, the defendant has a right, in the first place, to dispute the title of the applicant to interfere. He has no opportunity of doing so unless he is made a party to the summons. In the second place, he has a right to be heard upon the question whether, if a litigation is to be prolonged against himself in invitum which he desired to have closed by his submission, he should not be indemnified against any risks or costs to which he may be otherwise exposed by its prolongation. Until the applicant has made the defendant a party to the application by service upon him of the summons, the applicant remains a mere stranger to the action.***

[Emphasis added]

[16] This brings me to the facts of the of the instant case. In the First Affidavit, where a copy of the Defendant's Death Registration Form is exhibited, I am advised that the Defendant was dead as at the 15th January 2015. However, it was not

until the filing of the Second Affidavit, in purported compliance with a direction from the court, that the Applicant disclosed that the policy of insurance under which it says it has the right to intervene was issued on the 5th October 2015. This was almost nine (9) months after the date of death of the Defendant. In the circumstances the Court was preoccupied with the question - how the policy of insurance renewed by the Applicant with a defendant who was dead?

[17] The answer was supplied in the Third Affidavit which was filed with leave of the court.

[18] It is averred that when the Applicant received the application for renewal of the insurance policy in respect of the Defendant's motor vehicle from an insurance broker, the Applicant was not advised by the said broker that the Defendant had died on 15th January 2015. I am further advised that since the Defendant was not required to attend the Applicant's offices on renewal of the policy, it had no way of knowing that the Defendant was dead. The Affiant avers that she was not aware that the Defendant was dead at the time she authorised the renewal of the contract of insurance. The proposal form which would have been submitted by the insured could not be located in the time limited by the court for the filing of the further affidavit as it is manually stored and the Applicant was in the process of changing storage facilities. The court was therefore without that document.

[19] Notwithstanding this knowledge deficit at the time the policy was renewed, exhibited as "AP 3" is a copy of a *"Certificate of Insurance"* with the *"Est. Anthony Alexander Powell"* stated as the name of the policy holder. It also states the effective commencement date of the insurance as *"October 5, 2015 1:43 PM"* and the date of expiry of insurance as *"October 4, 2016 11:59 PM"*. The accident to which the claim relates occurred on the 4th July 2016. There is no explanation as to how the copy of the Certificate of Insurance which was issued on the 5th October 2015 by the Applicant came to have the Defendant's Estate as the policy holder where there was said to be no knowledge of his death on the occasion. I am not delayed by this however as the dead Defendant could hardly have contracted with the Applicant himself to renew the policy of insurance in respect of the motor car registered in his name.

[20] I observe that the name of the party who requested the renewal of the policy of insurance has not been supplied by the Applicant, even after the adjournments over the course of several months.

[21] From the authorities which have been referred to, the right of the insurer to intervene to set aside a default judgment which has been entered against its insured has its foundation in contract. It is therefore my view that where the contracting party is someone other than the nominal Defendant the Applicant would have no such right to intervene. That is sufficient to dispose of the application, but I will nevertheless go on to consider whether the process adopted by the Applicant to intervene is proper.

[22] Nowhere on the application filed by the Applicant is it said to be made in the name of the Defendant or his Estate. If the application was so made and there exists a relevant contract of insurance between the Applicant and either of them which permitted that course, the Applicant could apply to have the default judgment set aside as of right on such terms as the court thinks reasonable. That is the first option available on the authority of **Jacques v Morrison**, of which the Applicant did not avail itself.

[23] The second option is for the Applicant to take out a summons in its own name and serve it on both the defendant and the plaintiff. Under the CPR, we have moved away from making applications by way of summonses, which have been replaced by notices of application for court orders. While the Claimant was served with the application, there is no evidence of it having been served on the party with whom the Applicant contracted for renewal of the policy of insurance, which as previously indicated, has not been supplied by the Applicant. The most that is available is that the Defendant's Estate is the policy holder of the relevant policy. There is no evidence of service upon the said Estate although the Applicant was advised, as far as October 2016 when it received an application for another renewal of the policy of insurance in respect of the deceased Defendant's motor car, that the deceased's wife, Fay White Powell was taking steps to administer the same.

[24] A defendant is made a party to the application to intervene to set aside a default judgment when it is served upon him. **Jacques v Harrison** makes it clear that it is not merely a matter of form but an essential requirement of justice that the defendant is served with the application. This is so because of the defendant has a right to dispute the application to interfere in the first instance; or to be heard on whether or not he should be indemnified against any risks or costs to which he may be exposed by the prolonged litigation which he may wish to have closed on his submission. It is my view that this right, where a defendant is deceased, would lie with the personal representative.

[25] As observed by Rowe P at 175-176 in the **Williams case** *"[the] explicit words of Bowen, L.J. [which have been previously reproduced], would prima facie mean that the respondents not having made the defendant a party to the Summons to set aside the default judgment, the application should be dismissed."*

[26] The foregoing withstanding, I accept, as borne out by the authorities and as submitted on behalf of the Applicant, that the failure to serve the defendant is not always fatal and that the court may, in an appropriate case remedy the procedural breach. It was submitted that the defect could be remedied here by permitting the Applicant to intervene and thereafter proceed with the hearing of the substantive application to set aside. I do not agree with this submission.

[27] Where the court has taken the step to remedy the failure to serve the defendant it has been on the basis that the nominal defendants had themselves failed to demonstrate any interest in defending the claim, leaving the insurer without remedy. In the **Williams case** the defendants were themselves precluded from having the default judgments set aside but were aware of the application of the insurer and had filed affidavits in support of the application to intervene to set aside the default judgment. In **Windsor v Chalcraft** all the parties, including the defendant were served before the application came on for decision before the Master. The defendant in **Jacques v Harrison** had no interest in defending the claim and the court ordered that notice be served on the defendant forthwith by the insurer, with liberty to the defendant to apply for a variation or discharge of the order.

[28] The Applicant, a total stranger to the claim is seeking to have it revived in circumstances where the Defendant's Estate has not been given any right to exercise, in the first place, the right to dispute the applicant's title to interfere if such a course is advised; or to submit that the litigation should end, including by way of compromise; or whether it should be indemnified in respect of prolonged litigation which it does not wish to pursue.

[29] While the approach of the court in **Jacques v Harrison** appears attractive, I do not believe its adoption is recommended here, having regard to the particular facts of this case.

[30] An application by the Applicant to intervene to set aside the default judgment is not the only course available for challenge, which was the position of all the insurers in the cases referred to in the course of this judgment including **Jacques v Harrison**. There is nothing to suggest that the Defendant's Estate however administered, has no interest in pursuing the claim, including the making an application of its own on account that the default judgment against the Defendant was irregularly obtained.

[31] In addition to the foregoing, the Applicant was advised of the court's concern about the lack of involvement of the Defendant's Estate in the proceedings since the 30th September 2020, when the application first came on for hearing. The Applicant, unlike the Claimant and the Court would have known at this stage that the relevant Certificate of Insurance was issued to the Estate of the Defendant as policy holder but has made no effort, even out of an abundance of caution, to serve the said Estate.

[32] The Applicant was also served with a Notice of Proceedings on the 19th August 2016, one day after the claim was filed and on its own evidence became aware, at latest 6th October of 2016, that the nominal Defendant was dead. This was never disclosed to the Claimant until the court insisted on being supplied with certain information over the course of the hearing of the application, even though the Attorneys-at-Law for the Claimant had made enquiries of the Applicant in that regard. The Claimant did not file her request for default judgment until the 28th April 2017, months after the Applicant knew the

Defendant was dead. Final judgment was only entered on the 30th May 2019. I, for my own part, find that in pursuing its application, the Applicant has been less than forthcoming in making relevant disclosure. To date, the party with whom it contracted in renewing the relevant policy of insurance remains a mystery.

[33] A departure from the prescribed procedure does not recommend itself in the circumstances of this case. In the absence of service of the application on the policy holder and the person with whom it contracted for the renewal of the policy of insurance by which its asserts the right to intervene to set aside the default judgment, the Applicant's application to intervene is dismissed.

ORDER

1. The Application to intervene to set aside the default judgment is refused without consideration of the merits or otherwise of the substantive application to set the said default judgement aside.

2. Leave to appeal is granted.

3. The execution of the judgment entered against the Defendant is stayed until the determination of the appeal or further order.

4. Costs thrown away to the Claimant/Respondent, to be taxed if not sooner agreed.

5. The Attorneys-at-Law for the Applicant are to prepare, file and serve this order.