[2017] **JMSC Civ. 208**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 01114

BETWEEN	**DUHANE AUDRE LEMARD**	**CLAIMANT**
AND	**KEY INSURANCE COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Ian Davis instructed by Davis, Robb & Co for the Claimant

Caroline Hay and Neco Pagan for the Defendant

Heard: 17th and 22nd May 2017 Delivered: 15th December, 2017

Breach of Contract – Application to strike out statement of claim – Whether the court has jurisdiction to hear matter – Insurance policy – Applicability of arbitration clause.

BERTRAM LINTON, J

Introduction

[1] Duhane Lemard and Key Insurance Company Limited entered into a contract of insurance where Key was to comprehensively insure Mr Lemard's vehicle for any damage done in accordance with the agreement. The motor vehicle in question was subsequently damaged and Key refused to indemnify Mr Lemard on the basis that the loss was not covered under the policy agreement. In light of this, Mr Lemard sued Key insurance for breach of contract.

[2] In response, Key filed a Notice of Application seeking the following orders:

1. *That the Supreme Court of Jamaica has no jurisdiction to try this claim;*

2. *That service of the Claimant's Claim Form on the Defendant on March 16, 2016 be set aside;*

3. *That the Claimant's Claim Form and Particulars of Claim filed herein on March 15, 2016 be struck out and that these proceedings be stayed;*

4. *Further or alternatively, that the requirement for filing a Defence in this matter be stayed pending the hearing of this Application;*

5. *Cost;*

6. *Such further and other relief as this Honourable Court deems fit.*

Background

[3] On the 3rd June, 2014, Mr Lemard was driving his 2013 Toyota Hilux (the vehicle insured by Key Insurance) on the Sligoville Main Road when he says that he saw smoke coming from the vehicle. He stopped, ran out of the car then alerted the Fire Brigade. He later reported the matter to Key insurance and received a Fire Report. The Fire Report concluded that the cause of the fire was unknown.

[4] Sometime after the matter was reported, Key Insurance conducted their investigation and interviewed the Claimant in relation to the incident. They found that the fire was not caused by *'external explosion, self-ignition or lighting'* and wrote to Mr Lemard informing him of the decision to disclaim liability. As a result, Mr Lemard engaged the services of an Attorney at Law who wrote to the insurance company on his behalf, demanding that further investigation be done. This investigation was done and the findings remained the same.

[5] Mr Lemard brought a claim against Key Insurance seeking to be compensated for the losses he sustained and for which he says he should be indemnified. This claim was filed on the 15th March, 2016. Key insurance acknowledged service on the 21st March, 2016 but no defence was filed. Instead, they filed an application contesting the court's jurisdiction and asked the court to strike out the claimant's statement of case.

Submissions

A. *The Applicant's Case*

[6] The claimant submits that the court has no jurisdiction to try this case. This argument was buttressed by their interpretation of case law and the court's apparently clear view from the cases, that arbitration clauses are not illegal and do not oust the jurisdiction of the court but merely set a time within which action can be taken by an aggrieved party to an insurance contract. Counsel relied on the cases of ***Hopeton Wilson v National Employers Mutual General Insurance Association Ltd*** *(1981) 18 JLR 334 (SC)* and ***William Clarke v Bank of Nova Scotia Jamaica Limited*** *[2012] JMCC Comm 2* in which the courts have upheld the validity of arbitration clauses of the same nature as that outlined in the present insurance contract, and it is therefore clear that the court has no jurisdiction to try this matter.

[7] The applicant contended that the claim was barred based on Clause 9. He had a total of twelve calendar months to initiate arbitration proceedings, if he felt that his position was different from that of Key's. The wording of the clause proposes a time limit, which the parties are free to agree to when contracting. To support her arguments Counsel cited the cases of:

a. ***Everton Harris & Marcia Harris v Jamaica International Insurance Company Ltd*** *[2016] JMSC Civ. 123;*

b. ***The Insurance Company of the West Indies v Dalvester Wray*** *Suit No. CL 2000 I-051 delivered January 18, 2002;*

c. ***S&S Entertainment Limited and the Orchid Colony v Caribbean Home Insurance Company Limited and Others*** *Suit No. CLs 330/1987 delivered March 1, 1996;*

d. ***Hopeton Wilson v National Employers Mutual General Insurance Association Ltd*** *(1981) 18 JLR 334 (SC)*

[8] Thirdly, the applicant argued that the respondent was given adequate notice of clause 9. Counsel tracked the chronology of the matter and submitted that Key disclaimed liability on two different occasions; in July 2014 (the initial disclaimer) and later in October 2014 (after further investigation only confirmed the initial investigation). As such, based on the clause the claimant could have initiated arbitration proceedings arguably any time between July 2015 – October 2015. Since the claimant was given a physical copy of the policy document on June 2015, he would have anywhere between 1- 4 months to institute arbitration proceedings. Therefore, the claimant had adequate notice, especially since he had already retained the services of Counsel.

[9] Lastly, the applicant said that it was correct in finding that the damage reported was not one covered by the insurance policy. Based on their own investigation, Key found that the fire was not caused by circumstances covered under the policy. Furthermore, counsel submitted that the burden of proving that the fire was covered under the policy rests on the claimant, as the cause of the fire was unknown, he therefore had no reasonable prospect of success on this issue and since he has failed on this vital point, there was no reasonable ground for bringing the claim and his statement of claim should be struck out.

B. *The Respondent's Case*

[10] The respondent relied on the case of ***Everton Harris & Marcia Harris v Jamaica International Insurance Company Ltd*** *[2016] JMSC Civ. 123* and quoted extensively from Lindo J findings. However, I do not find it necessary to regurgitate or summarise the quotes as they do not assist the respondent's later submissions.

[11] The case in question was very similar to the one we are now considering and Lindo J very succinctly disposed of the arguments raise by the claimants in the case to the effect that she found at paragraph 50:

> *The court has also taken into consideration the question of whether the defendant did what was reasonably sufficient to give notice of the clause 9 to the claimants. To the extent that the clause is one which would regularly be found in contracts of*

> *the nature entered into by the claimants and the defendant, and the claimants indicate that this was a renewal of a contract of insurance, I find further that the claimants cannot succeed in their contention that they had no knowledge of the clause, and in Counsel's submissions that it was not incorporated into the contract. Since this was a renewal of a policy, the claimants had a fair opportunity of knowing what the terms and conditions of the policy were.*

[12] In his skeleton submissions in response, it was contended that Mr Lemard did not receive proper notice of the arbitration clause in question. He made the point that though his client signed insurance documents as far back of February 2013, he did not receive an actual copy of the insurance policy until June 2015, over two years after entering into a contract with Key. He maintained that at the time he was given the policy document, he was not given adequate notice of the arbitration clause and so, he is being put at a disadvantage in relation to clause 9. Counsel said that it was not Mr Lemard's duty to request the policy document but that of the insurance company to provide him with a copy of it. Further, since Key disclaimed liability on July 14, 2014 and he received the policy document June 2015, he has only one month's notice of the arbitration clause and this was not enough time to take action.

[13] Counsel also contended that Key did not send him an email denying liability on October 22, 2014. He says that based on the submissions presented by Key it is clear that the email address that the letter was sent to was incorrect. He maintained therefore that Key's disclaimer letter in July 2014 would have been vitiated by their follow up letter in August 2014 to say they would do further investigation. He also argued that there was no official letter of disclaimer so that the court would have jurisdiction in the matter.

Issues

[14] The issues for determination are:

a. Does the court have jurisdiction in this matter; and

b. Should the court strike out the claim.

Law and Analysis

(1) Does the court have Jurisdiction?

[15] In determining whether the court has jurisdiction, I must examine Clause 9 of the insurance policy to determine its validity and the implications of it validity on the application made before me. Clause 9 of the insurance policy is that:

> *All differences arising out of this Policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or of the cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing to do so by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference the Umpire shall sit with the Arbitrators and preside at their meeting and the making of an award shall be condition precedent at any right of action against the Company. If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.*

[16] Section 3 of the Arbitration Act says that:

> *3. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court.*

[17] The general stance of the court is to allow parties to contract freely and the court will not normally intervene unless there is a clear reason to do so. This principle was the core feature of Orr J decision in the case of ***Douglas Wright T/A Douglas Wright Associates v The Banks of Nova Scotia Jamaica Limited*** *(1994) 31 JLR 351*. In this case, the court considered the ownership of a deposit placed towards the purchase of BMW car. In particular, the court considered whether it had jurisdiction or whether the matter ought rightly to be arbitrated. It was said that:

> *"The authorities reveal that the basic stance of the court has been that parties who have agreed to arbitrate should be held to their agreement."*

[18] Key Insurance and Mr Lemard are obviously at odds as it relates to whether the policy covers the damages to the claimant's car. I have no difficulty therefore in finding that there was a difference of opinion and that clause 9 of the policy should

have been triggered. I will concede that based on the ***Arbitration Act*** and ***Douglas Wright*** case, the court does not normally interfere with a party's clear contractual agreement. There is nothing on the evidence to suggest that Mr Lemard had any problems with Clause 9 of the policy before the dispute arose. However, the issues of fact which now need to be reconciled in order to fully ventilate the issue of jurisdiction is:

a. When would time start to run in relation to a dispute that would trigger clause 9; and

b. Did the claimant have notice of clause 9

(a) *When would time start to run*

[19] Based on the wording of Clause 9, Mr Lemard had 12 months within which to initiate arbitration proceedings. The clause does not stipulate when time begins to run but it is reasonable to infer that it would be as at the date that there is a clear difference in opinion. This would of course be when Key disclaimed liability.

[20] Both parties do not agree on when the time should be calculated from. However, I have looked at the evidence and I have noted that following events occurred on these dates:

a. June 3, 2014 - Damage done to car

b. June 9, 2014 - Report made to Key re damage

c. July 14, 2014 - Key insurance denies liability

d. August 28, 2014 - Key says further investigations will be done

e. October 27, 2014 - Key further denies liability via email

f. June 2, 2015 - Claimant receives copy of policy

I must highlight that though the claimant has denied that an email was sent to him on the 27th October, 2014, I have perused the documents tendered and I have noted that even though there is a clear misspelling of the claimant's attorney's email address in the body of the submission, the actual email as attached in the affidavit of Treveen Little filed on 8th October, 2016 has the correct spelling of the email. In the circumstances, I am prepared to find that the email was sent and for all intents and purposes received by the attorney, I therefore find that it was safe to assume that it was communicated to the claimant.

[21] The claimant says he was not aware of section 9 in the policy document until he received a physical copy. This took place in June 2015. Based on the dates highlighted above, I find that the time would start to run from October 27th 2014 when the email was sent finally disclaiming liability. Twelve calendar months from October 27th 2014 would end in October 27th 2015. Therefore, the claimant, having received the policy document in June of 2015, would have had approximately four months to institute arbitration, but this was not done.

(b) *Notice of Clause 9*

[22] One of the claimant's major arguments surrounded whether he had notice of clause 9 and even if he did whether the notice period was adequate. The argument was that a clause of this nature could not be inferred from the proposal forms signed by the claimant in 2013 when the insurance contract was entered into. This argument I find has some merit; so that without a physical copy of the document it would be reasonable to say that Mr Lemard had no notice of the procedure to settle differences. Even if I were to find though that the 12 calendar months would begin at the point that the policy was received in June 2015 it would mean that the claimant would then have until June 2016 to trigger Clause 9 and go to arbitration. This was not done either. The claim was filed in March of 2016.

[23] I find that the arbitration clause is not an unusual clause in this type of contract but it is not one that can be inferred. Mr Lemard's signing of the proposal form in 2013

without requesting the policy document was a lapse in judgment on his part. As a party signing onto the contract, he had the duty to ensure that he was clear on all the terms and policies of the insurance. It could be said that it is his own negligence which has led him to be in a position where he was without a copy of the policy for all of two years. It was also the duty of the company to ensure that he was supplied with the document. I am prepared to find that Mr Lemard got notice of the clause when he received the document in June of 2015.

[24] After receiving the policy document, it would have been incumbent upon Mr Lemard and the lawyer to peruse it and become familiar with the terms. I do not see why four months would not be adequate enough to institute arbitration of the matter as the contract contemplated, or why the clause was not triggered up to June 2016 when it could be argued that there was now notice of it and that a twelve month period had begun to run. In all the circumstances, it is clear that it is the lack of understanding of Mr Lemard and his attorney that has caused the period of referral to arbitration to have now passed. The clause is very clear as to the consequence in these circumstances*" ...the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."*

[25] Since it is clear that Mr Lemard had enough time to institute arbitration proceeding, his lack of compliance with his insurance policy would mean that he has abandoned his claim. When clause 9 is read in conjunction with section 3 of the Arbitration Act and in considering the discourse, It is clear that the court now has no jurisdiction in this matter.

(2) <u>Should the claim be Struck Out</u>

[26] Part 26.3 of the Civil Procedure Rules outlines that the court is empowered to strike out a party's statement of case in prescribed instances. The part says:

> *26.3*
>
> *(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*

> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
>
> *(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

[27] In the case of ***Alpha Rocks (Solicitors) v Alade*** *[2015] 1 WLR 4534* Vos J considered the issue of striking out and warned against the court lightly striking out a case, especially at the early stages.

> *[1] "… **striking out is available in [cases where a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise] at an early stage in the proceedings, but only** where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and **where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. The other available remedies for such a default follow the proceedings once they have run their course, but are none the less important.** They include costs and interest penalties and proceedings for contempt of court or criminal prosecution." (emphasis added)*

[28] In the case of ***Elaine Dotting v Carmen Clifford and The Spanish Town Funeral Home Ltd*** *Claim number 2006 HCV 0338 delivered March 19, 2007*, McDonald-Bishop, J (as she then was) had this to say in relation to how the court is to exercise is discretion as it relates to striking out:

> *In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substances or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based. (**Three Rivers District Council v Bank of England (No.3) [2003] 2 AC 1**). It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain among other things, whether the claimant's pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the fact pleaded are capable of satisfying the requirements of the tort alleged. The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be, essentially, the*

> *same as that in granting summary judgment, that is, is the claim against the defendant one that is not fit for trial at all?*

[29] The applicant has said that the claimant's case should be struck out on the basis that there is no reasonable ground for bringing the claim. The Insurance Company's position is that the contract is clear as to the procedure to be followed as it relates to disputes. As such, having not adopted the contractual procedure, Mr Lemard has forfeited his right to claim for the fire damage done to the car. Naturally, the claimant holds otherwise. Mr Lemard's contention is that even though he signed onto the contract, he did not adopt the arbitration clause but says that the insurance is still contracted to indemnify him for the damage to his motor vehicle.

[30] The claimant has brought a claim for breach of contract. The question which arises is, how can he then rely on the same contract which he has impugned? The simple answer is he cannot. It does not make logical sense for Mr Lemard to not trigger arbitration which has the consequence of the abandonment of his claim under the contract and then bring this matter before the court seeking the court's adjudication of an issue that could have been resolved had he followed the procedure outlined. He cannot ignore the procedure under the contract and then seek a remedy based on the same contractual claim that he has been deemed to have abandoned.

[31] Further, it cannot be said that Key has breached the contract of insurance by disclaiming liability. They have the right to do so where they are of the view that the policy does not cover the damage in question. In the same way, Mr Lemard had the right to institute arbitration proceedings but did not.

[32] In keeping with the authorities, I have come to the conclusion that a trial of this matter was be a waste of the court's resources as the claim is not one fit for trial. Mr Lemard is not in a position to prove that Key breached his contract of insurance. He has abandoned his right and the court cannot revive it. There can be no reasonable ground for bringing this claim. I therefore find that the claimant's case

should rightly be struck out and that service of the claim form on the defendant should be set aside.

Conclusion

[33] The court makes the following orders:

a. The Supreme Court has no jurisdiction to try this claim;

b. The Claimant's Claim Form and Particulars of Claim filed herein are stuck out;

c. Service of the Claimant's Claim Form on the Defendant on March 16, 2016 is set aside; and

d. Cost to the defendant to be taxed if not agreed.