

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2008/0736

BETWEEN:

PRUDENCE ROBINSON

Claimant

and

SAGICOR GENERAL INSURANCE INC.

Defendant

Appearances:

Mrs. Lydia B. Faisal for the Claimant

Mr. Mark Maragh for the Defendant

2012: 18th April

2012: 3rd May orally

2012: 18th June

DECISION

[1] **BELLE.J.** On the 7th January 2009 the Applicant /Claimant filed a Notice of Application asking for the following relief:

- 1.1 That the Claimant be granted summary judgment against the Defendant on the basis that the Defendant has failed to comply with the Case Management Directions made by the Court on the 20th day of October 2008.
- 1.2 That despite the said Order, the Defendant has failed to file and serve its list of documents on or before November 21st 2008, and its witness statement(s) on or before the 19th day of November 2008.
- 1.3 Further the Defence of the Defendant should be struck out as disclosing no reasonable grounds for defending the Claim as it is not in compliance with Section 9 of the Motor Vehicles Insurance (Third Party Risks) Act Chap. 8.02 of the Revised Laws of Saint Lucia.

- 1.4 The Costs of this application and the costs contingent upon the Claim up to the stage of the filing of witness statements.

The grounds of the application are as follows:

- 2.1 That the claimant has failed to comply with the Case Management Order with respect to the filing and service of a list of Documents and Witness Statements.
- 2.2 That there has been no application for Relief from Sanctions.
- 2.3 That there is no merit in the Defendant's Defence in that it is not in compliance with Section 9 of the Motor Vehicles Insurance (Third Party Risks) Act. Rather the defence seeks to introduce irrelevant and extraneous matters which are of no merit and which cannot be allowed to be raised in the proceedings.

- [2] This matter turns on the issue of striking out a statement of case or defence because it does not disclose any reasonable ground for defending the claim. This ground for striking out a defence is to be found in Part 26.3 (1) © of the CPR 2000.
- [3] The attack on the Defendant's statement of case in this matter is on two limbs. Firstly counsel argues that the Defendant failed to comply with a number of case management orders.
- [4] The orders which the defendant failed to comply with are:
 - (a) Failed to file witness statement in time
 - (b) Failed to make standard disclosure.
- [5] Counsel says that the relevant rules do not permit the witness statement filed to be used and do not permit the documents not disclosed to be used.
- [6] Counsel then argues that the Defendant failed to present a defence which is within the statutory grounds provided in Section 9 of the Motor Vehicle Insurance (Third Party Risks) Act Cap 8.02.
- [7] The defendant filed no response to the application other than its own application at a later date. An earlier decision on this matter was met with an appeal and consequently the court of appeal has asked that the applications be case managed and dealt with in order of filing.
- [8] It is not disputed that the Application to strike out the defence for the breaches of the court's orders and the failure to disclose a defence was filed before the Defendant filed another application. I therefore will proceed with the January 2009 application on the order of 18th April 2012.

- [9] I first consider the application relating to the failure to make standard disclosure.
- [10] Counsel drew the court's attention to Part 28.4 of the CPR 2000 which provides that if a party is required by any direction of the court to give standard disclosure , that party must disclose all documents which are directly relevant to the matters in question in the proceedings.
- [11] Counsel emphasized the word "must" which would tend to imply that the rule established a mandatory duty. However it is Part 28.13 which provides the sanction for failing to comply with an order to make standard disclosure.
- [12] Part 28.13 (1)states that a party who fails to give disclosure by the date ordered ,or to permit inspection, may not rely on or produce at the trial any document not disclosed or made available for inspection.
- [13] Part 28.13 (2) provides that a party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.
- [14] Counsel for the Claimant proceeded partly on this basis to apply to the court for the Defendant's defence to be struck out.
- [15] But before going to the authorities in relation to striking out Statements of Case on the ground that it does not disclose a ground for bringing or defending an action I am moved to note that the circumstances arising pursuant to 28.13 (2) could vary widely. For example, at one end of the spectrum there could be a case where there are no documents to be disclosed in the possession of the party whose statement of case is being attacked. There could also be a case where the party is aware that they are in possession of a document but are unable to locate it in time to meet the deadline.
- [16] There could be a case where the party knows where the relevant document is but failed to disclose it by the deadline for standard disclosure. There could also be a case where the party has the relevant document in his or her possession and purposely supresses it.
- [17] In my view striking out would only be fair in the latter two cases. But even in these cases if the defence is arguable whether or not the relevant document is disclosed it would be necessary to look carefully at the effect the absence of the missing document has on the case.

- [18] The sanction for failing to disclose is that the relevant document cannot be used at trial. This is another case in the rules where the likelihood of ambush at trial is being drastically reduced. Without the document the party's case may be severely handicapped or indeed it may really not have a significant impact on the case.
- [19] In my view where the party is unable to establish a case for the Claimant or the Defendant as a result of the absence of a document then it may be fitting to strike out the statement of case.
- [20] However in this case, there is an allegation which goes to the foundation of the Claimant's case. It is an allegation of fact. Counsel says that the Defendant should produce the document which supports his case. But the defence is that it has a cover note, and no further payments were made after the cover note was issued giving coverage to the insured for thirty (30) days. There is no insurance policy document which supports this contention; hence the absence of any document other than the cover note.
- [21] The law in relation to striking out a statement of case because it does not disclose any ground for filing a claim or defence is guided by strong settled opinion which states that such an order should not be granted unless the Claim or defence is totally without merit (in relation to applications). However if there is some evidence or law on which the party can rely to mount a claim or defence the statement of case should not be struck out. Indeed it is necessary to look at the intrinsic justice of the particular case in light of the overriding objective: **Walsh v Messeldine** [2001] CLPR 201, C. A (UK)
- [22] In my view the nature of the defence that there was no insurance policy in existence at the time of the accident in which the Claimant was injured, goes to the root of the section 9 claim since any analysis of the relevant section of the Act would reveal that the prerequisite for the claim to be made is that there was a policy in existence even if the policy was subsequently voided or was voidable. The Defence is not that the policy was voidable but that it was not in existence at the material time.
- [23] As far as the disclosed evidence is concerned it is clearly not a conclusive statement for a third party to be telling someone that they need to renew their insurance policy. The word "renew" could have been used loosely, but persuasively to achieve the desired affect which would be to counsel the relevant parties to ensure that their vehicle was insured.

- [24] In the circumstances I cannot agree with the Claimant that this is a fitting case for striking out the Defendant's defence. Having come to the conclusion that this is not a fitting case for striking out a defence to a Claim I conclude logically that it would not be a case for summary judgment either which would require a successful argument that the Defendant is unable to mount an arguable defence.
- [25] I arrive at the latter conclusion because the relevant sanction for failing to file a witness statement is set out in Part 29.11(1) where it is stated as follows:
- (1) *If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.*
- (2) *The Court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8"*
- [26] Both parties are aware as is the court that the Respondent to this application filed an application on July 10th 2009 which has yet to be heard. The application of July 10th 2009 asks for relief from sanction and for the applicant to be permitted to rely at trial upon the witness summary filed on 16th February 2009 on behalf of the Applicant/ Respondent to this application.
- [27] It would therefore be rather unjust for this court to conclude at this time that the Defendant/ Respondent is unable to mount a viable defence in this matter and enter summary judgment for the Claimant/ Applicant.
- [28] In the circumstances and I would order that the Claimant's application of 7th January 2009 be dismissed, but that there be no order as to costs because of the Defendant's delay in responding to Case Management orders and seeing to it that the case progresses.

Francis H V Belle
High Court Judge