IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: G 342/2012

BETWEEN: **WINIFRED RAE BANKS**

Plaintiff

AND **RICARDO PARSONS**

Defendant

Appearances: **Mr. Kyle Broadhurst of Broadhurst LLC for the Plaintiff**
Mr. Michael Wingrave of Dentons for the Defendant

Before: **Hon. Mr. Justice Richard Williams**

Heard: **28 January 2020**

Draft Judgment Circulated: **19 March 2020**

Judgment provided: **23 March 2020**

HEADNOTE

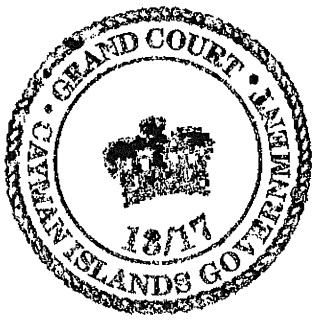
Personal injury - Judgment having already been entered against Defendant - Application by Plaintiffs for Defendant's insurer to be joined to proceedings as a defendant for the purposes of costs

JUDGMENT

The Application

1. I have before me the Summons filed by Winifred Rae Ebanks, the Plaintiff, dated 7 October 2019, which was supported by the affidavit sworn by her on 7 October 2019 and the affidavit sworn by Sally Bowler on 7 October 2019. In her Summons he seeks:

    a. an order that pursuant to GCR Order 15, Rule 6(2)(b) (i) and/or (ii) the Defendant's insurer Cayman First Insurance Company Limited ("the insurer") be joined to these proceedings as a defendant for the purposes of costs only ("the Joinder Application");



b. an order that pursuant to section 24 of the Judicature Law (2017 Revision) there be a hearing to determine whether the Defendant's insurer should be liable to pay the Plaintiff's costs of the proceedings, ("the Substantive Hearing"); and directions to be given, including as to disclosure and the giving of evidence to enable the parties to prepare for the Substantive Hearing.

2. The insurer opposes the application, submitting that it should not be joined and that the Plaintiff's application *"on the present evidence"* is *"hopeless"* and *"should be dismissed out of hand"*. The insurer adds that if the Plaintiff is permitted to provide further evidence, joinder should still be refused at this time, pending the further evidence.

The Background

3. On 8 August 2012 the Plaintiff issued a Writ of Summons against Ricardo Parsons ("the Defendant") for damages caused as a result of injuries received in a motor vehicle accident which occurred on 11 January 2010. On 24 October 2012 the Defendant's Acknowledgement of Service was filed in which it was stated that he did not intend to contest the proceedings but would be arguing quantum. As liability was not being contested, by a consent order dated 22 November 2012, Judgment was entered against the Defendant for an amount to be assessed by the Court, leaving the contested issue of causation to be resolved at a later date.

4. The primary causation issue arose because the Defendant took the position that the Plaintiff's severe headaches were not caused by the accident, but by an addiction to prescribed pain killers which she took after the accident. If the Defendant was right then the injuries would be of a more minor whiplash nature, which would result in a much lower quantum award.

5. The causation hearing was heard on 17 and 18 August 2015. Hall J (ag) released her decision on 16 September 2016 and delivered her Judgment on 28 October 2016. The Learned Judge considered the expert evidence of Dr. Robert Michaels, an orthopaedic surgeon who examined the Plaintiff in June 2014 and Dr. James Akiwumi, a Consultant Neurosurgeon. The Learned Judge also examined the evidence of Dr. Starkman, a Board Certified Neurologist and a Board Certified Pain Medicine Specialist who had been the Plaintiff's treating physician since September 2010. Hall J (ag) found that there was *"no doubt"* that the accident was the direct cause of the Plaintiff's symptoms. The Defendant was ordered to make an interim payment to the Plaintiff in the sum of CI$66,641.83.

6. The quantum hearing was fixed to come on before me on 22-24 January 2019. However, *"on the eve"* of the trial the parties resolved the issues and a consent order was submitted by them, which I approved on 23 January 2019. Judgment was entered in favour of the Plaintiff against the Defendant in the sum of CI$1,000,000.00, gross of the interim payment. Although the Plaintiff felt that her claim was *"far greater"* she agreed to the sum as it was the limit of the indemnity on the Defendant's insurance policy for a third-party bodily injury claim. The Defendant was ordered to pay the Plaintiff's costs on the standard basis. The Plaintiff highlights that, due to the position taken by the insurer who she contends was the one providing the instructions concerning the conduct of the Defendant's case, she had to go to great expense in preparation for the hearings, including the quantum hearing. The Plaintiff also highlights that, by the manner in which the defence was conducted, the insurer sought to obtain a benefit, firstly to limit the amount to be paid out under the policy and secondly to maintain the benefit of the money for as long as they could.

7. Importantly, when one considers the Summons now before me, paragraph 3 of the consent order provided that the Plaintiff would be able to apply for orders to join the insurer to the proceedings for the purpose of a hearing to determine whether a non-party costs order should be made against it. The application would be to address the insurer's liability with the costs order made in that and in previous orders, as well as the payment of CI$63,914.40 paid towards the Plaintiff's costs and the impact of that upon any liability of the insurer.

8. The Plaintiff received CI$869,443.77 in partial satisfaction of the consent order as CI$66,641.83 of the shortfall was the agreed deduction for the October 2016 interim payment.

9. On 5 March 2019 the Plaintiff's attorney wrote to the insurer's attorney to serve her Bill of Costs. They also requested confirmation of the Defendant's instructions in relation to payments of sums outstanding on the consent order. They requested that they draw the bill to the attention of the Defendant and to the insurer because if it was not paid then, pursuant to paragraph 3 of the consent order, it was likely that a non-party costs application would be made.

10. On 7 March 2019 receipt of the letter and the Bill of Costs was acknowledged by the insurer's attorney in an email. In the email it was stated:

> *"I have made it very clear in previous discussions that I have not been in contact with Mr. Parsons. I am therefore not sure how you expect me to "ensure" that he is made aware of your correspondence in those circumstances. I can do no more than use my best endeavors.*
> *You may assume that I take instructions from my insurer client (...) In the usual and fully informed way."* [My emphasis].

11. On 18 March 2019, a further email was sent by the insurer's attorney in which he confirmed that instructions had been received from his (insurer) client. He made clear that no further payments would be forthcoming from his (insurer) client unless there was an order made by the Court, and opined that there was no good foundation for such an application.

12. On 22 March 2019 the Plaintiff's attorneys replied and informed him that, if a response was not received within 21 days, an application for a default costs certificate would be made. They added that, as it appeared that the Defendant would not be paying the remaining amounts due under the consent order and the costs, an application for a third-party costs order would be made.

13. On 29 March 2019 the insurer's attorney replied, indicating that the insurer would wish to be heard on the issues arising out of the Bill of Costs, but only after it had been properly joined once liability for costs had been established. Despite that, they also enclosed a Bill of Costs signed on behalf of the Defendant endorsed at the top of column 4, with a note stating *"see enclosed statement of objections"*.

14. Costs were taxed on 9 January 2020 at CI$84,531.56, so the amount outstanding under the terms of the consent order is CI$63,914.40 plus costs.

15. Sally Bowler sets out in her affidavit the attempts that were made to enforce the order against the Defendant. A search at Land Registry showed no properties registered in the Defendant's name. The process severs who had successfully served the Defendant in 2012 were instructed to try and locate him. Unfortunately, after trying various avenues of investigation, the previous process servers were unable to locate him. The Plaintiff's

attorneys wrote to the Defendant's attorneys, to see if they could provide any contact information, but were told that that the Firm did not have any details for the Defendant. The Security Centre of the Cayman Technology Centre were also tasked with trying to locate the Defendant in Cayman or, following information seen on social media, in Ontario. They were also unable to locate him. Haywood Hunt and Associates in Ontario were asked to investigate, and all they could locate was an Instagram account which did not contain any information about the Defendant's whereabouts. Having regard to the above, efforts which were all undertaken in 2019, I am satisfied that the Plaintiff has undertaken all reasonable efforts to locate the Defendant. In fact, it is conceded by the insurer that the Defendant cannot be located. The position has some similarity to the one in ***TGA Chapman Ltd v Christopher*** [1998] 1 WLR 12[1] where an application was made for an non-party costs order made because the insurance cover was limited under the defendant's liability policy and in a situation which Lord Briggs in ***Travelers Insurance Company Ltd (Appellant) v XYZ (Respondents)*** [2019] UKSC 48 described the Defendant as *"not worth powder and shot"*.

16. The Plaintiff informed the Court that she believed that the Defendant's role in the proceedings was limited to service of the proceedings upon him, with the Defendant's former attorney, Waide DaCosta, and his current attorneys receiving their instructions from the insurer. The Plaintiff stated the following in support of that contention at paragraph 11 in her affidavit:

> *"a. The Defendant has always been represented by a firm of attorneys and (so far as I'm aware) the Defendant's insurer has never been separately represented;*
> *b. Broadhurst have informed me that they do not have any communications or documentation on their file which demonstrates that the Defendant was directly engaged in the litigation;*

[1] Although in that case the cover as insufficient to pay all the damages, let alone any part of the costs.

c. Pursuant to clause 2 of the Policy, the Defendant was contractually obliged to provide every communication or document relating to these proceedings to the Defendant's insurer;

d. Pursuant to clause 2 of the Policy, the Defendant was not permitted to admit liability for the claim without the Defendant's Insurer's permission;

e. Pursuant to clause 3 of the Policy, the Defendant's insurer had a contractual entitlement to take over conduct of the Defence or settlement of these proceedings on the Defendant's behalf;

f. In various letters and emails sent by the Defendant's attorneys to my attorneys in March 2019, which I refer to in more detail below, they assert that they are unaware of the Defendants whereabouts, and that they have received their instructions from the Defendant's insurer, who they now claim to be their client."

17. The insurer has claimed that the Policy is exhausted. The Plaintiff rightly states that the Defendant has failed to pay the full amount due under the terms of the Consent Order and it appears that he will not nor has any means to pay the costs. The Plaintiff argues that, in such circumstances and having regard to the insurer's involvement in the proceedings to date, there should be a costs order requiring the insurers to pay her costs to be assessed on the standard basis.

The Law – Non-Party Costs Order

18. The Court's discretion to make an order against a non-party is wide, with the interests of justice being paramount in that determination. Although the making of such an order may frequently be described in cases as being exceptional, what this means in these circumstances is that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expenses which includes the risk of costs.[2]

[2] See dictum of Lord Browne at para 25 in ***Eaton-under Heywood in Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Associated Industrial Finance Pty, Third party)*** repeated by the Court of Appeal in ***Deutsche Bank AG v Sebastian Holdings Inc*** [2016] EWCA Civ 23; [2016] 4 WLR 17, para 62.

19. The power of the Grand Court to make an order for costs against a non-party is found at GCR Order15, r.6 (2) (b) (i) and s.24 Of the Judicature Law (2017 Revision). Order 15, r.6 provides:

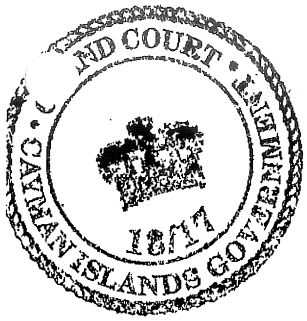
> *"(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application*
>
> *(a) .....;*
> *(b) order any of the following persons to be added as a party, namely*
>
> *(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*
> *(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

Section 24 of the Judicature Law provides:

> *"The Court shall have full power ot determine by whom and to what extent the costs are to be paid."*

20. The above Order and section confers upon the Court a very broad discretion to order by whom costs are to be paid. In the past it was generally thought that a liability insurer would be unlikely to face such an order unless it had taken over control of the litigation for its own purposes and without due regard to the interests of the insured. However, in ***Travelers Insurance Company Ltd (Appellant) v XYZ (Respondents)*** [2019] UKSC 48[3], the possibility arose that a non-party costs order might be available against an insurer in any case in which the insurer's liability for damages and costs exceeds the limit of the policy and the insurer cannot pay. It appears to have been accepted in that case, albeit on

[3] A copy of this case was provided to the parties at the hearing.

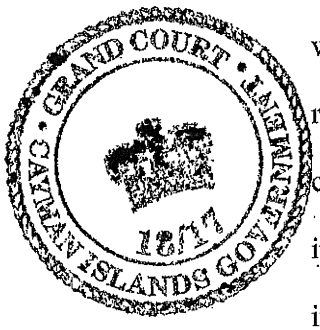


the existing unusual facts, that the possibility of successfully defending, or partly defending a claim, and thus limiting the insured's exposure to costs and damages, could constitute a sufficient benefit to insurers to give rise to a potential liability under s.51 of the Senior Courts Act 1981.[4] A Plaintiff would need to demonstrate that the insurer's funding and conduct of the defence had caused them to incur additional costs.

21. In considering whether a costs order should be made against a non-party the Court takes a two stage approach. The first stage is the stage at which we are in this matter. At this stage the Court considers whether it is appropriate to join the non-party for the purpose of costs only. The threshold is relatively low. The Court should refuse joinder only when it is plain and obvious that the application amounts to a an abuse of process on the ground of delay or other misconduct on the part of the applicant, or when the application is seen to be manifestly and fundamentally misconceived. The Court looks to see if the claim made by the Plaintiff for a non-party cost order is arguable.

22. The role of this Court is not to pre-determine the issue as to whether a non-party costs order will or should be made. That is the second stage when the court will consider whether in the interest of justice a costs order against the non-party should be made taking into account all the relevant factors. There are a number of factors that may well be taken into account by a Court when making that final determination. In this case the Court will have to consider whether the insurer took control of the litigation and became the real defendant. This is what the Plaintiff contends to have happened here, rather than it being contended that the insurers engaged in unjustified meddling. The nature and extent of the insurer's involvement must be assessed on a case by case basis to see

[4] The Senior Courts Act mirrors the discretionary power of the Courts in the Cayman Islands to make non-party costs orders.



whether in all the circumstances it is just to make the order, and whether the insurer's role has gone beyond simply funding the litigation or whether they have had substantial control and will benefit from the proceedings.[5] Of course an insurer must treat their insured fairly and the continued funding of an ultimately unsuccessful defence by insurers who contend that they are liable to only some of the costs may not be sufficient grounds for a non-party costs orders.

Conclusions

23. I am satisfied that the Plaintiff has raised an arguable case and has not made a misconceived application. I do not accept the Defendant's submission that the application is *"hopeless"* and *"should be dismissed out of hand"*. Although not fettering the Court who will hear the stage 2 application evidence, it is arguable that the insurer is the one who had control of the proceedings rather than the absent Defendant. On the evidence before me, the Defendant having not filed an affidavit, there is evidence that the insurer is the one who gave instructions to the attorney and that those instructions had an effect on the conduct of the litigation. There is evidence raised that additional costs may have resulted from the position taken by the Defence during the proceedings[6]. Whether the position taken was a reasonable one to take, or whether it resulted from issues that had still not been clarified between the Plaintiffs, for example arising from late medical evidence to clarify the Plaintiff's condition, will be a matter for the Court at the next hearing. It will also be for that Court to determine whether the insurer's actions were for its own benefit rather than for the insured.

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[5] See ***Dymocks Franchise Systems (NSW)Pty Ltd v Todd and Others*** [2004] 1 W.L.R. 2807, ***Martin Kenney, CC International Limited v ACE Limited*** [2015 (1) CILR 367], ***TGA Chapman Ltd v Christopher*** [1998] 1 WLR 12.

[6] See **paragraph 6** above.

Costs

24. My preliminary view in this matter is that costs should be costs in the cause of the substantive application for determination. If either party takes a different view then that should be communicated to the Court within 14 days after the circulation of this judgment.

Further directions

25. In relation to directions to hearing and for any disclosure I invite the parties to have regard to the Overriding Objective and try to submit a Consent Order. Having regard to the effect on the Courts due to the coronavirus situation, if there are any issues in that regard then they may submit brief written submissions and I will endeavour to make a decision on the papers if that is feasible.

The Hon. Justice Richard N. Williams
JUDGE OF THE GRAND COURT