IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 159 of 2021

BETWEEN

JEROME MCKENZIE

Plaintiff

-and-

(1) CAYMAN STRUCTURAL GROUP
(2) LESFORD MARTIN

Defendants

-and-

BRITISH CAYMANIAN INSURANCE COMPANY LIMITED

Interested Party

IN CHAMBERS

Appearances:	**Mr. Clayton Phuran of CP Attorneys, for the Plaintiff** **Mr. Rupert Wheeler of KSG corporate counsel for the 1st Defendant** **Mr. Paul Keeble of Hampson & Company for the Defendants**
Before:	**Hon. Mme Justice Marlene Carter, Acting**
Heard:	**30 August 2021**
Judgment Delivered:	**17 September 2021**

HEADNOTE

Injunction - Mandatory injunction - Related Cause of Action

REASONS FOR DECISION

1. On the 30th of August 2021 this court dismissed the Plaintiff's summons in which he sought injunctive relief. The Court was asked to sit to hear the application on an urgent basis. The following are the Court's reasons for its decision.

2. The Plaintiff filed an "*ex-parte application on notice for mandatory injunction*." The application was brought by summons dated 27th August 2021. The Plaintiff sought the following relief:

"1. *A mandatory injunction is granted in favour of the Plaintiff that Cayman Structural Group to maintain health insurance in favour of the Plaintiff and facilitate the Plaintiff making payments towards health insurance premium such that he can benefit under the provision of Section 15 of the Health Insurance Act.*

2. *British Caymanian Insurance do facilitate the Plaintiff making payments the health insurance maintained by Cayman Structural Group whether such payment be made through Cayman Structural Group or Directly.*

3. *That having considered that the Plaintiff has not benefitted from the provisions of Section 15 that such health insurance maintained in favour of the Plaintiff be maintained from date of reinstatement by the Cayman Structural Group for the minimum period set out in the legislation, namely 90 days.*

4. *Should Cayman Structural Group fail to maintain health insurance as set out and required by Section 15 of the Health Insurance Act then they are to indemnify the Plaintiff for all medical claims that would have fallen within the scope of the Plaintiff health insurance policy just prior to the date of default.*

5. *Service of the Writ be affected on the 1st Respondent by alternative means pursuant to Order 65, r.4 namely on the 1st Respondent by service on his place of business or by email. Should prior service be ineffective then service by publication in a statewide distributed newspaper.*

6. *The costs of this application be summarily assessed and paid by the Defendant.*

7. *Such further and other relief, as this Honourable Court deem just and equitable.*"

3. The summons was supported by the affidavit of the Plaintiff filed on the same date. In brief the Plaintiff related in his affidavit that he was employed by the 1st Defendant. He was injured while working at the 1st Defendant's work site on the 2nd of September 2019. His collar bone was broken when a steel beam fell on him. He was diagnosed as having a non-union displaced clavicle amongst other injuries. He was unable to work after he sustained this injury and was scheduled to have surgery to repair the injury on the 31st of August 2021, the morning immediately following this application, hence the urgency of the hearing.

4. It was asserted in the Skeleton produced for the hearing on the Plaintiff's behalf that: "*the specialist UK doctors may not be returning within the next 3 months.*" I note here that apart from this bare assertion there was nothing before the court to substantiate that the surgery was to be performed on

the 31st August or that the UK surgeons were on island and would not return before 3 months had passed. The medical evidence presented relates to dates in February and March 2021. While the medical evidence confirms the need for surgery, and that the Plaintiff was "*on the surgical list for repair*", the urgency of the procedure is not detailed still less confirmation of the date of such surgery.

5. The Plaintiff related at Paragraph 6 of his affidavit in support that he reached out to his employer through his attorney in June 2021 to ensure that his health insurance was being maintained and that his employers confirmed that coverage was current. This communication from the Plaintiff's attorney was exhibited to his affidavit in support. On the 28th of June 2021, the Plaintiff's attorney inquired of the 1st Defendant's insurance adjustors as follows: *"Please note our client is now presented with surgery date for 18th August 2021. Please confirm that your client in accordance with the Health Insurance Act, namely section 15, has continued to maintain his coverage.*

6. The Plaintiff further stated in his affidavit in support of the application that the 1st Defendant terminated his employment in July 2021 and ceased his health insurance coverage *"despite section 15 of the Health Insurance Act that my attorney pointed out to my employer by email through the loss adjustor, Mr. David Merriott, on 28 June 2021... Mr Merriott confirmed that my health insurance was current as can be seen by his email reply on 28 June 2021 found at exhibit JM01 page 26."*

7. The exhibited correspondence confirms that the loss adjuster, in response to the query from the Plaintiff's attorney, exhibited a page which showed that Health Insurance for the Plaintiff was active from *"11 September 2017 – Present"*.

8. The Plaintiff went on to relate that he only became aware that he did not have health insurance in place through his employers when, in preparation for his surgery, his doctors reached out to the health insurance company, British Caymanian Insurance Co. Ltd. The Plaintiff visited at the insurance company's offices and made attempts to pay premiums for health insurance directly. However, he was told that such payments must be made through the First Defendant.

9. He then made attempts to call his previous employer's office. The offices were closed. The director of the First Defendant was off island. The Plaintiff went on to state:

> *"Further, I was advised that on a call to Cayman Structural Group by Mr. Lamar Haynes of British Caymanian Insurance to arrange with them the normalization of my health insurance, they indicated to Mr. Lamar that I was fired more than 90 days earlier."*

10. The Plaintiff stated that he believed that he was covered by Section 15 of the ***Health Insurance Act***, as 90 days had not passed since his dismissal or termination on the 1st of July 2021, and therefore the First Defendant was acting contrary to the Act. The Plaintiff related that he has made a complaint to the Health Insurance Commission. However, he has felt the need to make the instant application because:

> *"...I do not have the luxury of time and my health and ability to return to work, albeit suggested not be to in the same kind of strenuous work, is dependent on my getting this surgery. I am not earning and is suffering now significant hardship including my inability to access the medical treatment I need."*

11. Counsel for the Plaintiff in his written submissions before the Court referred to the authority of *American Cyanamid Co. Ethicon Ltd.* Counsel submitted that:

    a. There was a serious question to be tried on the merits.

    b. Damages would not be an adequate remedy. *"Damages in the present circumstances will not suffice to compensate. The Plaintiff is not able to have remedial surgery because the Defendant has not maintained the Plaintiff's health insurance as required by the Health Insurance Cat. Due to this the Plaintiff will continue to suffer pain and suffering."* Counsel also submitted that the Plaintiff may be unable to get other health insurance coverage because of this now pre-existing condition.

    c. That there was no necessity for an undertaking in damages since *"The Defendant is not being put to any expense and the Plaintiff is seeking a mandatory injunction for the Defendant to do what it is obliged at law to do. In any event the Plaintiff is prepared to give an undertaking in respect of damages for the defendant to maintain the Plaintiff on its group insurance policy."*

    d. Counsel urged that the balance of convenience which is in essence *"the court seeking to determine whether the granting or refusing of the injunction will cause irreparable prejudice and to what extend*[t]" should be exercised in the Plaintiff's favour since he would suffer in terms of his pain and suffering, his inability to return to employment, as well as the loss of opportunity for the surgery. The status quo required the Defendant to maintain the Plaintiff's health insurance. The Plaintiff further submitted that the legislation

(Health Insurance Act) and the public interest in all persons being insured weighs heavy in the scale of the balance of convenience. Additionally, the strength of the Plaintiff's underlying claim for personal injury and the fact that Parliament made the failure to maintain insurance as set out in Section 15 an offence were further matters for the court to weigh in the balance

12. The Defendants' position as submitted by Counsel on their behalf was to the effect that:

a. The Plaintiff's employment was terminated effective 1st July 2021.

b. That by the terms of Section 15 of the ***Health Insurance Law***, health insurance coverage continues for an employee so terminated for three months post-termination if requested by the employee and upon payment of the premium by the employee.

c. The employer received no request/notification from the employee, nor any response to a letter of the 2nd July 2021, enquiring whether the employee required coverage to continue for that three month period. There was no tender of payment of the premiums to the employer by the Plaintiff.

d. The employer first became aware of the position upon receipt of the Plaintiff's then unfiled summons on the 27th August 2021.

e. The employer's only obligation under s.15 (4) is not to fail or refuse to extend the coverage, when requested so to do by the employee and upon receipt of premium payments by that employee. The employer/1st Defendant has not failed in his obligation. Instead, the Plaintiff has failed to notify the employer that he required coverage to continue.

f. Counsel for the Defendants stated: "*It remains that now the employee has belated notified the 1st Defendant that he requires coverage to continue, upon payment of the premium ($198.51 per month - $595.53 total) the 1st Defendant will remit that to CG BritCay and ask that the health insurance coverage be continued for the statutory three-month period, i.e. through to 2 October 2021 - three months from termination of employment on 1 July 2021.*"

13. Counsel for the Defendants submitted that the Plaintiff had failed to satisfy the demanding requirements for grant of a mandatory interlocutory injunction.

14. He submitted further that:

> "*There has been an almost complete failure of full and frank disclosure of the position, as appears from the letter of 2 July 2021 attached. This surgery said to*

be scheduled for 31 August 2021, must necessarily have been scheduled weeks or months previously and coverage/payment arrangements pre-approved. There is no independent confirmation that in the absence of health insurance coverage this surgery on 31 August on the Plaintiff, a Caymanian, will be cancelled. The Plaintiff's unparticularized and unsupported assertions at paragraphs 8 through 11 of his affidavit, including bald and embarrassing claims that Mr. Sofield has been evading service[1] are grossly deficient for an affidavit in support of an injunction application."

COURT'S ANALYSIS AND CONCLUSIONS

15. The Plaintiff referred this Court to the principles for the Court's consideration upon the grant of an interlocutory injunction, outlined at paragraph 11 above.

16. While these principles remain the most relevant considerations, courts have been mindful of the fact that features which justify describing an injunction as mandatory will usually also have the consequence of creating a risk of greater injustice if it is granted rather than withheld at the interlocutory state, unless the court feels a high degree of assurance that the plaintiff would be able to establish his right at trial.[1]

17. In *Zockoll Group v Mercury Communications Ltd,* the summary of the law on this point by Chadwick J. in *Nottingham Building Society v Eurodynamics* was commended. The principles referred to are as follows:

> "*First, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense of granting an interlocutory injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. Secondly, in considering whether to grant a mandatory injunction, the Court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate where a mandatory injunctions is sought, to consider whether the Court does feel a high degree of assurance that the plaintiff will establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But finally, even where the court is unable to feel any high degree of assurance that the plaintiff will ultimately establish his right, there may still be circumstances in*

[1] See Films Rover International v Cannon Films Cells Ltd (1988) Financial Times, June 10 Hoffman J.

which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

18. The crux of the Plaintiff's submission that the 1st Defendant should be ordered to ensure the continuance of health insurance coverage for the Plaintiff rests with Section 15 of the **Health Insurance Act.**

> *"15. (1) An approved insurer shall not terminate, fail or refuse to renew a standard health insurance contract except where-*
>
> *(a) the premiums under the contract are thirty days or more in arrears, in which case the contract shall terminate on the last day of the month for which premiums were fully paid;*
>
> *(b) the contract was obtained-*
>
> *(i) by non-disclosure of a material fact; or*
>
> *(ii) by representation of a fact that was false in some material particular; or*
>
> *(c) the employer has given written notice to the approved insurer that-*
>
> *(i) a new contract of health insurance has been effected with an approved insurer; or*
>
> *(ii) the employer's business has been taken over by or amalgamated with another employer.*
>
> *(2) A standard health insurance contract terminates on the first day of the month next following the date of termination of employment of an employee; but if that employee does not become compulsorily insured with any other employer, cover under the contract shall continue for a period of three months from the date of termination of employment or until he becomes employed, whichever is earlier.*
>
> *(3) An employee shall be liable to pay the total cost of the premiums payable under a contract of health insurance which has been continued pursuant to subsection (2).*
>
> *(4) An employer who, having been notified by his former employee that he is not employed and that he is not compulsorily insured, fails or refuses to extend the cover under the contract as provided in subsection (2) commits an offence and is liable on summary conviction to a fine of thirty thousand dollars."*

19. Paragraph 3 of the Plaintiff's skeleton argument states as follows:

> *"Injunctions are only remedies, and therefore there must be a substantive cause of action (The Siskina [1979] AC 210). Lord Diplock said at page 256 para. C:*
>
> > *"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."*

20. The Plaintiff fails in this application for the essential reason that his statement of claim alleges Negligence and/or Breach of Statutory Duty against the Defendants. There is no cause of action against the 1st Defendant regarding the Defendant's failure to ensure health insurance coverage as per Section 15 of the *Health Insurance Act*. As the Counsel for the Defendant points out in his submissions, *"if the Plaintiff reasonably believed he had any cause of action against the 1st Defendant in regard to health insurance coverage it begs the question why it was not included in the relief sought in the writ and statement of claim filed by him on the 29th July 2021."* The application for injunctive relief bears no relation to the writ and the substantive action filed by the Plaintiff.

21. The factual matrix cannot support the Plaintiff even were the court to have found that there was a serious issue to be tried and for which injunctive relief was necessary. Counsel for the Plaintiff submitted that his inquiry on the Plaintiff's behalf whether health insurance coverage remained in place on the 28th of June 2021 was sufficient notice/notification to the Defendant that the Plaintiff was seeking to have his health insurance coverage extended even after termination. I am unable to agree with this submission. On the 28th of June the Plaintiff had not yet been terminated from his employment. Although he had received a letter on the 27th of May asking that he return to work within 14 days or termination could result, on the 28th of June, the 1st Defendant had not acted on that indication. There was, at that date, no termination of the Plaintiff's employment. The evidence that David Merriott confirmed that Health insurance coverage was in place on that day does not therefore assist the Plaintiff as factually it remained the case on the 28th of June 2021 that the Plaintiff was covered.

22. A plain reading of Section 2 of the Act makes it clear that the Section is concerned with the extension of coverage *after termination*. I note also that Section 15 (2) contemplates that insurance coverage must continue for up to one month after termination, further emphasizing that Merriott was correct since, by law, coverage for the Plaintiff would have continued at least until the 1st of August 2021. The Plaintiff cannot rely on his inquiry of Merriott on the 28th of June as notice or notification that he was seeking extended coverage.

23. The Plaintiff's affidavit evidence is that he only attempted to make payment of the premiums on or about the 17th of August 2021. His employment was terminated on the 1st of July 2021. His coverage would have been discontinued on the 1st of August 2021. It is not clear to this court why the Plaintiff had never attempted to make payment of the premiums for the extended coverage before this time.

24. The Plaintiff accepts that he received the termination letter dated 1st July 2021. There was also before the court a letter dated the 2nd of July 2021. This letter purports to have been sent by the 1st Respondent to the Plaintiff by the same means by which the termination letter was communicated to him, however the Plaintiff states that he never received it. This letter informs the Plaintiff of the need for him to notify the 1st Defendant and to pay the premiums if he wished insurance coverage to be extended beyond the termination date. There was no response to this letter. In any event, I do not need to make a finding on whether the letter was received or not, since the Plaintiff must be taken to know the law. There is no obligation on an employer to inform a terminated employee of the provisions of Section 15(2). In the instant case I note that the Plaintiff was represented by counsel during the relevant period.

25. In all the circumstances therefore no cause of action arises under section 15. Section 15(4) which mandates that an employer must maintain coverage under penalty of a hefty fine of thirty thousand dollars, is triggered when "*having been notified by his former employee that he is not employed and that he is not compulsorily insured,* [the employer] *fails or refuses to extend the cover under the contract...*" This court is satisfied that the Plaintiff neither notified his former employee that he was not employed nor that he was not compulsorily insured.

26. There is no statutory right of the Plaintiff that is threatened by the actions of the Defendant regarding his health insurance coverage. More particularly, this court is not prepared to grant an

injunction which has no relation to the relief to which the Plaintiff's cause of action may entitle him. The application is refused as being unnecessary to be granted to preserve the status quo pending the ascertainment by this court of the rights of the parties in this cause.

27. Counsel for the Defendants has helpfully given an undertaking to this Court that "... *now the employee has belated notified the 1st Defendant that he requires coverage to continue, upon payment of the premium ($198.51 per month - $595.53 total) the 1st Defendant will remit that to CG BritCay and ask that the health insurance coverage be continued for the statutory three month period, i.e. through to 2 October 2021 - three months from termination of employment on 1 July 2021.*" The Plaintiff would be wise to do what is required to take advantage of this undertaking.

28. Counsel for the Defendants sought costs on an indemnity basis. Such costs are awarded if the court considers that the party has conducted the proceedings improperly, unreasonably, or negligently. This court having heard counsel for the Defendants and for the Plaintiff found that the proceedings had been conducted in an unreasonable manner. The Defendants were subjected to unnecessary costs in these proceedings because of the conduct of the Plaintiff.

29. Counsel for the Defendants stated to the court that the Defendants were only alerted to the Plaintiff's wish for further insurance coverage when they were served a then unfiled copy of the Plaintiff's ex-parte application on notice for mandatory injunction in this matter on the afternoon of Friday the 27th of August 2021 at approximately 4:37pm.

30. The Plaintiff's evidence of his attempts to pay health insurance premiums and the result of such efforts are set out at paragraphs 8 and 9 above. The Writ of Summons in this matter was served on the Defendants at the 1st Defendant's site office on the 26 August 2021, the day before the issue of the ex-parte application on notice for the mandatory injunction.

31. The Plaintiff's evidence is that a Mr. Haynes of British Caymanian Insurance Co. Ltd made contact with Cayman Structural Group by telephone to seek to "a*rrange with them the normalization of my health insurance.*" The Plaintiff was told by Mr. Haynes that the 1st Defendant advised that it was in excess of 90 days since the Plaintiff's termination. This was clearly incorrect since the Plaintiff was terminated on the 1st July 2021. There was no further attempt at direct communication with the Defendants by the Plaintiff or his attorneys to correct this misapprehension. The Plaintiff and

his attorneys were in possession of the letter of termination dated 1st July 2021 confirming that 90 days had not passed since that termination. There is no issue that the Plaintiff and his attorneys had the Defendant's contact details including the contact details of the Defendant's loss adjuster, David Merriott with whom the Plaintiff's attorney had previously corresponded.

32. In circumstances where no cause for action arises on the Writ of Summons for damages for non-payment of health insurance or related matter, the Plaintiff's application is unwarranted, and the response of the Defendants described at paragraph 27 above further points to the unreasonable decision to bring the present application.

Hon Mme Justice Marlene Carter (Actg.)
Judge of the Grand Court