

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2015-003645**

**BETWEEN**

**MAHARAJ 2002 LIMITED**

**Claimant**

**AND**

**PAN AMERICAN INSURANCE COMPANY OF TRINIDAD AND TOBAGO LIMITED**

**Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Appearances:**

Mr. Anthony V. Manwah instructed by Mr. Srinivasa Rao Kadem for the Claimant

Mr. Martin G. Daly S.C. and Mr. Kerwyn Garcia instructed by Ms. Alana Bissessar for the Defendant

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**JUDGMENT ON DEFENDANT'S APPLICATION TO STRIKE OUT**

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**I. Background:**

- [1] By Claim Form and Statement of Case filed on the 2<sup>nd</sup> November, 2015, the Claimant sought damages as well as payment of the sum assured on a Term Life Insurance Policy which it entered into with the Defendant on the 8<sup>th</sup> November, 2013 (“the

Policy”). The Claimant was the owner of the Policy and the Defendant agreed to insure one **Tulier Persad**, an employee of the Claimant, in the amount of **\$19,800,000.00**. The Claimant alleged that it paid all the premiums on the Policy up until the death of the insured. Upon his death, which occurred on the 29<sup>th</sup> July, 2014, the Claimant sought, by pre-action letters, entitlement to recover the proceeds of the Policy. The Defendant, however, has denied its liability to the Claimant.

- [2] By its Defence the Defendant alleged that by virtue of an **Assignment dated the 23<sup>rd</sup> April, 2014 (“the Assignment”)**, the Claimant transferred the legal rights to the proceeds of the Policy to one **Oojagaree Jagoo** and therefore, the Claimant is no longer entitled to bring this action. Further, the Defendant alleged that the terms of the Policy allow the Defendant to terminate the Policy for non-payment of premiums beyond a 30-day grace period and that pursuant to this term, the Defendant terminated the Policy due to non-payment of premiums for the months of June and July, 2014. In support of this allegation, the Defendant stated that the cheque payment for the June 2014 premium was dishonoured and therefore, the payment of the July 2014 month was applied to the month of June. Accordingly, the payment for July, 2014 is outstanding and the grace period has elapsed.
- [3] As evident from his oral submissions, the Claimant’s attorney consciously chose not to exercise his options either to seek consent from the Defendant’s attorney before the case management conference pursuant to **CPR Part 10.10(1)(b)** or seek permission of the Court at the case management conference pursuant to **CPR Part 10.10(1)(a)** to file and serve a Reply to the Defence.
- [4] On the 10<sup>th</sup> May, 2016, pursuant to **CPR Part 26.2(1)(c)**, the Defendant filed and served a **Notice of Application (the “Application”)** seeking to have the Claimant’s Claim Form and Statement of Case struck out on the ground that it disclosed no grounds for bringing the claim. The ground of the Application was that by virtue of the Assignment, the Claimant transferred as security, in consideration for the sum of **\$2,300,000.00**, all rights, title and interest in the Policy to one **Oojagaree Jagoo**. Accordingly, having assigned the rights to the Policy, the Defendant averred that the

Claimant possesses neither the right to recover proceeds nor to sue for same and therefore, has no grounds for bringing the Claim.

- [5] By Court Order dated the 12<sup>th</sup> May, 2016, this Court directed that the Claimant file and serve an affidavit in response to the Defendant's Application on or before the 27<sup>th</sup> May, 2016. Thereafter, each party was directed to file and serve written submissions.
- [6] The Claimant, however, failed to file and serve an affidavit in response to the said Application. On the 13<sup>th</sup> June, 2016, both parties filed submissions. On the 27<sup>th</sup> June, 2016, the Defendant filed submissions in reply to the Claimant's submissions of the 13<sup>th</sup> June, 2016.
- [7] The Court must now give its decision on the Defendant's Application to strike out.

## **II. Submissions:**

- [7] The Claimant, in its submissions argued that there was no valid Assignment for three reasons:
  - a. *The Assignment form was not signed by the Policy Owner, Maharaj 2002 Ltd;*
  - b. *The Requisite Stamp Duty was not paid; and*
  - c. *There was no consent by the Defendant.*
- [8] Counsel for the Defendant, in his submissions, argued that:
  - a. *Because the Claimant failed to put in a Reply to the Defendant's Defence or to file an affidavit in response to the Application to strike out, the Claimant is not entitled to make these assertions of fact at the stage of submissions; and*
  - b. *The assertions have no basis because (i) the Policy was signed by the policy owner; (ii) the stamp duty requirement in section 77 pertains to the assignee's right to sue, which is irrelevant to this case as this case concerns the assignor's right to sue; and (iii) the Assignment was signed in the presence of the Defendant and the Defendant's agent which is tantamount to the Defendant's consent.*

### III. Law:

#### The failure to file a Reply:

- [9] Counsel for the Defendant submitted that the issue of the Assignment was raised for the first time in its Defence. Accordingly, having not addressed it in its Statement of Case, the Claimant should have filed a Reply if it wished to challenge the validity of the Assignment. Having failed to do so, counsel submitted that the Claimant cannot now seek to oppose the Assignment in its submissions.
- [10] In addition to not filing a Reply, counsel for the Defendant further argued that the Claimant's failure to file an affidavit in response to the Application to strike out means that there is no evidence of the facts on which the Claimant purports to rely in its submissions<sup>1</sup>. It seems to this Court that this point was conceded at the hearing of the Application where Mr. Manwah stated that the Court must rule on the case presented before it even if it disadvantages the Claimant.<sup>2</sup>
- [11] Mr. Manwah, however, was not as conciliatory on his objection to the validity of the Assignment. He argued that, as it is the Defendant who raised the issue of the Assignment, the burden to prove that the Assignment is valid rests squarely with the Defendant. In this regard, he argued that if one looks at the Assignment, while there is a signature above the title "Policy Owner" and at the top of the document it defines the policy owner as "Maharaj 2002 Ltd", the document is unclear as to whether that signature was made by an agent and/or representative on behalf of Maharaj 2002 Ltd. Further, there is no stamp duty stamp on the document showing that stamp duty was paid on the Assignment. He stressed that the law requires that stamp duty must be paid before there can be a valid Assignment. Accordingly, he submitted that on the face of it, the Defendant has not discharged its burden to prove that the Assignment was a validly executed document<sup>3</sup>.
- [5] The Court must therefore resolve, in the first instance, whether it can accept the written and oral submissions of counsel for the Claimant on the issue of the validity

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<sup>1</sup> NOE Page 4, Lines 33- 35

<sup>2</sup> NOE Page 7, Line 45- Page 8, Line 6

<sup>3</sup> NOE Page 8, Line 15- Page 9, line 17

of the Assignment without any pleaded case or evidence adduced in answer to such issue raised in the Defence. The fact remains that the Claimant has made no case to challenge the validity of the Assignment and as such, pursuant to the new regime of pleadings under the CPR, an attempt to now challenge the Assignment in submissions would amount to an “ambush” to the Defendant. As stated by Madam Justice Pemberton in **Mayfair Knitting Mills v Mc Farlane’s Design Studios**<sup>4</sup> when she cited the learning in **Blackstone’s Civil Practice 2001**, the Claimant should file a Reply when the Defence raises an issue that was not dealt with in the Statement of Case:

*“...a reply may respond to any matters raised in the defence which were not, and which should not have been dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence...Once however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant’s case on that point...”*

Accordingly, any challenge to the Assignment should have been stated in a Reply to the Defence.

[12] Further, while the CPR do not detail the necessity or the effect of not filing a Reply to a defence, this Court agrees with the learning cited by **Madam Justice Judith Jones** (as she then was) in **Nanan v Toolsie** which shows that a failure to file a Reply in cases where one becomes necessary means that the Claimant will be bound by its allegations in its Statement of Case:<sup>5</sup>

*“In the absence of any specific rule with respect to the effect of a failure to file a reply, in my opinion, the fact that the claimant has not filed a reply to a defence while not amounting to an admission of any new facts raised in the defence will prevent the claimant from raising at trial any facts, other*

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<sup>4</sup> CV2007-02865

<sup>5</sup> CV2010-04210 at para 27

*than those already contained in the statement of case, in challenge of those new facts raised in the defence...The effect of the failure of the claimant to file a reply is that the claimant has not sought to challenge by way of the provision of alternate facts any of the new facts raised by the defendants in their defence.”*

Accordingly, the Claimant was required to challenge the validity of the Assignment in its pleadings. In doing so, the CPR provide the Claimant with several options. First, there was the option of seeking to amend its Statement of Case before the case management conference without the Court’s permission pursuant to **CPR Part 20.1(1)** to deal with the Assignment there. Secondly, and it appears to me more suitably, the Claimant could also, at the pre-case management conference stage, seek the Defendant’s consent to put in a Reply (**CPR 10.10(1)(b)**). In the event that it was unsuccessful in securing the Defendant’s consent, the Claimant had the alternative option of seeking permission from the Court at the first Case Management Conference to file its Reply (**CPR 10.10(1)(a)**). Accordingly, having failed to exercise any of these available options, the validity of the Assignment will remain unchallenged in the eyes of the Court.

[13] The failure to file a Reply or an affidavit in response to the Application to strike out means that the Court can only take into account the following evidence with respect to the Assignment:

- a. The affidavit of Kamani Mohammed, Regional Services Manager of the Defendant, stating that there was a valid Assignment and therefore, the Claimant is no longer entitled to the proceeds under the Policy;
- b. The copy of the Assignment with a signature above the title “Policy Owner” along with a stamp from the Registrar at the bottom right of the document which states *“A duplicate of this assignment has been filed with the company on the 23<sup>rd</sup> May, 2014 Pan-American Life Insurance Company of Trinidad and Tobago Ltd.”*

**Whether the Assignment was validly executed:**

[14] Notwithstanding the Claimant's failure to properly set out its case, the Court also finds that the Claimant's submissions against the validity of the Assignment are misconceived.

**Section 77: the stamp duty issue:**

[15] Firstly, counsel for the Claimant has clearly misinterpreted **section 77 Stamp Duty Act Chap. 76:01** in his submissions. He submitted that, pursuant to that section, the absence of a valid stamp duty stamp meant that the assignment of the policy to Mr. Oojagree Jagoo was not valid. However, as correctly submitted by opposing counsel, this provision only serves to prohibit Mr. Jagoo's right (as assignee) to sue for the sum assured on the Policy and has nothing to do with the assignor's right to sue for the sum assured on basis of the invalidity of the assignment itself.

**Section 77** states:

*"No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators or assigns, **any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.**"*

*"If any payment is made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to the State from the person by whom the payment is made."*

[16] Accordingly, even if the Court were to agree that there was no valid stamp duty stamp on the Assignment, such a deficiency does not deal with the Claimant's right to sue for the sum assured nor does it render the assignment void thereby reverting the right to sue, or any rights under the Policy for that matter, back to the Claimant upon Mr. Persad's death.

**The signature of the policy owner:**

[17] Secondly, by submitting that (i) the signature on the Assignment is neither that of Maharaj 2002 Limited nor of a person purporting to act on its behalf<sup>6</sup>; and (ii) that the Assignment form, not having been duly stamped, does not assign any rights<sup>7</sup>, it is uncertain whether the Claimant is essentially implying that the Defendant has either misrepresented the policy owner's signature, which is analagous to forgery, and/or committed fraud by producing a false document so as to deceive this Court in to accepting it as a validly executed Assignment. Counsel for the Claimant in his very brief submissions, both oral and written, fell short of elaborating on whether he was alleging fraud by virtue of forgery, deceit or misrepresentation.

**Black's Law Dictionary**<sup>8</sup> defines **fraud** as "*a knowing misrepresentation of truth or concealment of a material fact to induce another to act to his or her detriment or a misrepresentation made recklessly without belief in its truth to induce another person to act.*"

**Forgery** is defined at **Section 3 of the Forgery Act, Chap 11:13** as follows:

*"... 'forgery' is the making of a false document in order that it may be used as genuine, and, in the case of the seals and dies mentioned in this Act, the counterfeiting of a seal or die; and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided."*

[18] Casting allegations of fraud or forgery are considered to be grave aspersions in the eyes of the law and accordingly, must be specifically pleaded and proved by the one who alleges. **Narine J** (as he then was) referred to several English cases in his judgment in **Singh v Singh and Tai Chew HCA No. 530 of 1991**, to make this point:

*"The burden of proving fraud lies on the person who alleges it. It must be distinctly alleged and distinctly proved. The standard of proof is on a balance of probabilities. However, the standard is flexible, and requires a degree of probability commensurate with the seriousness of the*

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<sup>6</sup> Para 2 of the Claimant's submissions.

<sup>7</sup> Para 3 of the Claimant's submissions.

<sup>8</sup> 8<sup>th</sup> edition at page 685.

*occasion. The more serious the allegation the more cogent is the evidence required to overcome the likelihood of what is alleged. The very gravity of an allegation of fraud is a circumstance which has to be weighed in the scale in deciding as to the balance of probabilities.”*

Accordingly, had the Claimant pleaded his case against the validity of the Assignment, based on the misrepresented signature and the absence of a stamp duty stamp, the burden would have shifted to the Claimant to prove the document’s invalidity. Considering (i) the absence of any evidence adduced by the Claimant to support this onerous allegation and (ii) the presence of a signature on the Assignment above the words “Policy Owner”, which, as submitted by counsel for the Defendant, is, in the absence of any contradictory facts, evidence that the Policy Owner signed the document, it is unlikely that the Claimant would have successfully discharged this burden.

**The Defendant’s consent to the Assignment:**

[19] Thirdly, and in similar fashion, the burden will also rest on the Claimant to prove that the Defendant’s consent was not evidenced on the Assignment. Counsel for the Defendant pointed out that, on the Assignment, there exists a signature below the words “*SIGNED in the presence of*” and above the title “*Hayden Borrell Agency Pan-American Life Insurance Company of Trinidad and Tobago*”. In opposition, counsel for the Claimant provided no evidence to discharge its burden to show that this signature was not that of the Defendant or its representative save and except a bald assertion that “*there is no evidence of such consent*<sup>9</sup>”. Accordingly, had this submission been properly pleaded by the Claimant, it is likely that it would have similarly failed.

**The effect of the Assignment:**

[20] The Assignment states that on consideration of **\$2,300,000.00** loaned by Mr. Jagoo, to the Claimant, the Claimant... “*hereby assigns and transfers all rights, title and interest in and to the above mentioned policy...unto the above named assignee...for*

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<sup>9</sup> Para 5 of the Claimant’s submissions.

*all amounts payable under the said policy shall be a full discharge of all claims thereunder.”*

[21] The meaning of this terminology was suitably clarified in Defence Counsel’s submission by reference to **Section 23(7) of the Supreme Court of Judicature Act** and the equivalent U.K. provision contained in the **Law of Property Act 1925**, which has been interpreted by **Halsbury’s Laws of England 4<sup>th</sup> edition** re-issue at paragraph 21. **Halsbury’s** states that on assignment, ***“the thing in action no longer belongs to the assignor, and he cannot sue for it.”*** [Emphasis added]

[22] Accordingly, I find that the Claimant has no locus standi to bring this claim as it no longer has any rights or interests under the Policy by virtue of the Assignment. Such a conclusion means that, pursuant to **Part 26.2(1)(c) of the CPR**, the Claim is doomed to fail and ought to be struck out as the Statement of Case discloses no grounds for bringing the Claim.

#### **IV. Disposition:**

[24] Accordingly, having considered the facts before the Court, the submissions by both parties and the relevant law, and in light of the above analyses and findings, the order of the Court is as follows:

#### **ORDER:**

- 1. The Claimant’s Statement of Case be and is hereby struck out pursuant to Part 26.2(1)(c) on the basis that it discloses no grounds for bringing the Claim.**
- 2. Costs shall follow the event. Accordingly, the Claimant shall pay to the Defendant its costs of the Application to strike out to be assessed in accordance with Part 67.11 of the CPR, in default of agreement.**

3. In the event that there is no agreement on the quantum of costs by the 11<sup>th</sup> April, 2017, the Defendant to file and serve a Statement of Costs for assessment on or before the 25<sup>th</sup> April, 2017.
4. Thereafter, the Claimant to file and serve Objections to the Statement of Costs, if any, on or before the 9<sup>th</sup> May, 2017.

**Dated this 21<sup>st</sup> day of March, 2017**

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**Robin N. Mohammed**  
**Judge**