

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV: 02198 of 2010

BETWEEN

IANTHE WILSON

Claimant

AND

CODELL MARK AND ANOR

Defendants

Appearances:

Mr. Rennie Gosine for the Claimant

Mr. Deena and Mrs. Baiju-Patrick for the Defendants

Delivered on: 28th February 2011

REASONS

A brief history of the proceedings

1. On 18 June 2006, Fabian Andrew Mark Achille was a passenger in a motor vehicle registration number PBA 8191 which was allegedly owned by the first named defendant and insured with the second named defendant and which was involved in an accident along the Churchill Roosevelt Highway. As a result, Mr. Achilles suffered personal injury and died. By letter dated 21 May 2010, a pre-action protocol letter was sent to the second named defendant – see paragraph 7 of the statement of case - which was not specifically dealt with in the defence nor was that allegation of the issue once and service of the pre-action protocol letter denied save for a blanket denial at paragraph 1 of the defence which, respectfully, has no value or meaning in the CPR arena at present.
2. By order dated 2 June 2010, the claimant was appointed to represent the estate of the deceased and these proceedings were commenced on 4 June 2010 – 13 days before the expiry of the limitation period of four years.
3. In the appearance filed by the second named defendant on 24 June 2010, the second named defendant acknowledged service of the claim form and statement of case on 18 June 2010. By then, the limitation period would have expired. A defence was then filed for the second named defendant on 13 July 2010 in which it was said that the insured – who was not therein named – sold and delivered possession of motor vehicle PBA 81912 to the first named defendant in these proceedings. The defence went on to state that at the time of the sale, their insured duly signed, completed and delivered the transfer forms for the vehicle to the first named defendant and, together, their insured and the first named defendant visited the Licensing Authority where they undertook all requisite act and things necessary to transfer and or effectively vest ownership of the said vehicle in the first named defendant's name. Consequently, the second named defendant claimed to be a stranger to the alleged accident and to the negligence alleged in the statement of case. No documents whatsoever were attached to the defence. None of the transfer forms referred to in paragraph 3 of defence or, for that matter, any certified copy showing the change in ownership or any receipt in respect

of the alleged sale was provided by the second named defendant as exhibits to the defence.

4. No application for the extension of time for the filing of the defence to provide any of the documents generally, rather than specifically, referred to in the defence, certifying the alleged change of ownership, was made.
5. Further, paragraph 4 of the statement of case specifically pleaded that the second named defendant was at all material times the insurer of the vehicle in question. Instead of specifically dealing with this allegation, the second named defendant made a blanket denial at paragraph 1 of the defence denying all of the allegations made in the statement of case and then proceeded to embark upon the explanation referred to in the preceding paragraph without ever specifically stating that the defendant in these proceedings was not insured with them. It was left to be implied from the circumstances cited by the second named defendant, and mentioned above, that the first named defendant was not their insured.

The case management conferences

6. By notice dated 15 July 2010, a case management conference was fixed for 11 October 2010 before this court.
7. When the case management conference was held on that date, the court proceeded to then discuss the case before it and further went on to raise the issue as to service of the proceedings on the first named defendant. The claimant's attorney orally informed the court that the first named defendant had been served in September 2010 and that steps were going to be taken to pursue default judgment against the first named defendant. At that case management conference, the claimant's attorney indicated that he was in the process of taking up default judgment against the first named defendant. The court went through the defence filed and raised the following concerns:
 - 7.1. The lack of response to the pre-action protocol letter; and

7.2. The fact that no documents were attached to the defence and the fact that the insured's name was not pleaded.

The matter was then adjourned to 29 November 2010 as the claimant's attorney indicated that the default judgment application would have been made by then and that the parties would attempt to settle the issue of quantum by that date.

8. Judgment in default was taken up by the claimant against the first named defendant on the 15 October 2010.
9. On 29 November 2010, the second named defendant's attorney attended the court at the CMC and indicated that she did not have the file with her as she was unaware that the matter was on for hearing that date. Upon the second named defendant's attorney's application, the matter was adjourned to 28 February 2011.

The application to amend the defence

- 9.1. On the morning of 28 February 2011, the second named defendant filed an application to amend the defence in terms of the draft attached. In the supporting affidavit, the deponent – Natasha K Baiju-Patrick – repeated the post-filing procedural history set out above and, for the first time, specifically deposed in the affidavit to the fact that the vehicle was never insured by the second named defendant. Also for the first time, the deponent named their insured as Dinesh Naipaul. At paragraph 5 of that affidavit, the deponent said:

"That the certified copy of ownership showing the change of ownership from Dinesh Naipaul to Cordell Mark was delivered to my office after the defence was filed in this matter. As a result same was not exhibited to the defence of the second defendant in this matter."

- 9.2. No details were given as to what date the certified copy of ownership was actually delivered to the second named defendant's attorney at law. No explanation was given as to when this information about the transfer of the vehicle became known to the second named defendant and when attempts were made to obtain the certified copy.

The relevant CPR provisions and authorities

10. Part 2 of the CPR includes "**defence**" in the definition of "**statement of case**", Part 10.5 of the CPR imposes the defendant's duty to set out his case, Part 11.10 deals with the general rule that a notice of application must be served at least 7 days before the court is to deal with the application and Part 20.1 deals with the court's powers to amend.
11. The court has also looked at the pre-action protocol practice direction set out at page 484 of the CPR in relation to the failure of the defendant to comply there with.
12. Further, the court has considered the decision of the Court of Appeal in civil appeal number 244 of 2008: *MI 5 Investigations Limited v Centurion Protective Agency Limited* ("MI 5") and this court's discussion of the CMC process in CV 2008-4824: *Premnath Bowlah v The AG*.

The resolution of this matter

Failure to comply with pre-action protocol

13. This action was commenced perilously close to the expiry of the limitation period. It was commenced prior to the 28 days referred to in the final paragraph of the pre-action protocol letter dated 21 May 2010 sent by the claimant to the second named defendant. Paragraph 2.2 of the practice direction and Appendix B to the said practice direction at paragraph 1.8 provides for the circumstance when 28 days would not be possible in the event that the letter is written close to the end of the relevant limitation period. It is

important to note that the second named defendant never acknowledged the pre-action protocol letter, never denied receiving it, never indicated when it was received, never applied for an extension of time for responding thereto and, all in all, failed to comply with the practice direction as set out in paragraph 3.2 of the practice direction. In light of the defence which the second named defendant wished to run, and in light of the impending expiry of the limitation period, this court is of the view that it was incumbent upon the second named defendant to have responded in a timely and expeditious manner to alert the claimant as early as possible in respect of their allegation.

14. Having failed to do so, and to comply with the pre-action protocol, the second named defendant placed the claimant in a very difficult position which was further exacerbated by the second named defendant's conduct which is set out here after.

Failure to comply with Part 10.5 of the CPR

15. The second named defendant was obliged to have fully set out its case in its defence. It ought to have given details as to its insured and it ought to have unequivocally stated that the vehicle in question was not insured with it. The defence, as pleaded, began with a bare denial at paragraph 1 of the entirety of the claimant's allegations and then went on to make allegations about an alleged sale without any supporting documents or information being annexed to the defence. This, to my mind, is not in keeping with the intent of part 10.5 nor is it consistent with the guidance given by the Court of Appeal in **MI 5**.
16. Further, the defendant must identify or annex to the defence any document which he considers to be necessary to his defence. It is inescapably true that for the defence to be successful, the second named defendant was under a duty to identify or annex the certified copy for the vehicle or any other document in relation to the alleged sale – sale receipt, transfer documents, certified copy, etc. None of this was done.

The application to amend

17. It is clear in this court's mind that the first CMC had already been completed on 11 October 2010. In those circumstances, leave of the court was necessary to amend the defence pursuant to part 20.1 (3). Clearly, the second named defendant agreed that that and, consequently, an application was made on the 28th of February 2011 in breach of part 11.10 since that was the very day fixed for the CMC to deal with the issue of quantum.

18. The court has looked at the proposed amendment which purports to annex a copy of the certified copy for the vehicle in question. That certified copy is stamped and dated 2 July 2010 - some 11 days or so prior to the filing of the defence. No explanation is given as to the inconsistency presumed to exist between the given stamped date of 2 July 2010 and the supporting affidavit to the application which stated that the certified copy was only delivered to the second named defendant's attorney's office after the filing of the defence. The obvious questions which arise are – when was this certified copy collected from the licensing authority and when was it delivered to the second named defendant's attorney? To use the words which were so clichéd under the old rules, the second named defendant's affidavit in support of the application never "condescended to particulars" sufficient enough for this court to have seen that the need for this application was inevitable and unavoidable. The court would have expected that some explanation would have been given by the second named defendant's attorneys in the supporting affidavit in relation to the steps taken after the receipt of the pre-action protocol letter. None of that information or assistance to the court was given at all.

19. Part 20(3) provides the condition upon which a court can give permission to amend. Such permission can only be given if the court can be **satisfied** that the change is necessary because of some change in circumstances **which became known after the case management conference** [emphasis mine]. Regrettably, this condition has not been met as the second named defendant failed to so satisfy this court. As pointed out, the certified copy and the named of the insured were seemingly both available prior to

the filing of the defence and, in any event, long before the first CMC. There is absolutely nothing before this court to hold otherwise.

20. Very importantly as well, no explanation is given as to why this application was made on the morning of 28 February 2011 – the date fixed for the CMC – which was:
 - 20.1. approximately 8½ months after the service of the service of the statement of case;
 - 20.2. approximately 8 months after the certified copy was issued by the licensing authority;
 - 20.3. approximately 7 ½ months after the filing of the defence;
 - 20.4. approximately 4 ½ months after the first CMC.

This excessive period of delay, in the circumstances of this case, has gone unexplained by the second named defendant depriving the court of valuable evidence upon which it could exercise any discretion.

21. The thrust of the CPR is embodied in the overriding objective which includes the specific provision to control that cases before the court are dealt with expeditiously. In fact, several of the provisions under the CPR, where the court's discretion is sought to be invoked, include a provision for promptitude – see for example part 13.3 (1)(b), part 26.7 (1), part 40.3. In others, the first CMC is normally designated as the time for which several types of applications must be made - see for example in relation to amendments.

In circumstances where no reason is given for this inordinate delay, this court cannot sanction this "laissez-faire" continuance which was so deprecated by the court of appeal in several of its recent judgments under the CPR.

22. In light of all that has been said in this ruling, this Court found it impossible to exercise its discretion to allow the amendment sought by the second named defendant.

23. Consequently, the application filed on 28 February 2011 was dismissed and, in light of the judgment taken up against the first named defendant, judgment was entered for the claimant against the second named defendant. The matter was then adjourned for further consideration to allow the parties to reach some sort of agreement in relation to the quantum of damages involved.

Devindra Rampersad
Judge