

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-04036

BETWEEN

MECALFAB LIMITED

Claimant

AND

FURNESS ANCHORAGE GENERAL INSURANCE LIMITED

Defendant

Before the Honourable Mr Justice Seepersad

Date: 19 July 2021

Appearances:

1. Mr Ravindra Nanga and Ms Alana Bissessar, Attorneys-at-law for the Claimant.
2. Mr Keston McQuilkin and Ms Nalini Jagnarine, Attorneys-at-law for Defendant.

DECISION:

1. Before the Court for its determination is the Claimant's Claim Form and Statement of Case filed on the 7 October 2019 by virtue of which the Claimant seeks the following relief:
 - a. Damages for breach of contract of insurance pursuant to which the Defendant agreed to indemnify the Claimant in respect of losses suffered pursuant to its policy of insurance dated 4 June 2009 as renewed by cover note and certificate of renewal dated 16 March 2010 and 23 April 2010 respectively.
 - b. The sum of \$324,935.13 representing sums paid by the Claimant in satisfaction of the liability to the estate of Kevin Randy Dabreau, pursuant to the order of the Honourable Mr Justice Boodoosingh (as he then was) dated 30 October 2017 and consequential sums paid as a result of the Defendant's breach.

- c. Further and/or in the alternative, a declaration that the Defendant is liable to indemnify the Claimant in the sum of \$324,953.13.
- d. An order that the Defendant pay to the Claimant the sum of \$324,953.19.
- e. Costs.
- f. Interest at the rate of 9.75% per annum from the 6 September 2018 to the date of payment or alternatively, pursuant to the Supreme Court of Judicature Act Chap. 4:01 or at such other rate as the Honourable Court may deem fit.
- g. Such further or other relief as the Honourable Court may deem just in all the circumstances.

The Claimant's facts:

2. The Claimant ("Mecalfab") and the Defendant ("Furness") entered into a Policy of Insurance dated 4 June 2009 whereby Furness agreed to insure Mecalfab with respect to, *inter alia*, its liability to its employees against personal injury by accident or disease arising out of the course of their employment during the period 8 March 2009 to 7 March 2010. It was also agreed that Furness would indemnify Mecalfab against any sum for which Mecalfab became liable with respect to personal injury as well as all costs and expenses incurred, with Furness' consent, in defending any such claim. The policy was extended to include employees of contractors/subcontractors for which Mecalfab was legally liable and it was renewed for the period 8 March 2010 to 7 March 2011.
3. On 21 April 2010, an employee of Mecalfab's subcontractor, one Kevin Dabreau ("Dabreau") fell from a roof at a job site during the course of his employment and died.
4. After this unfortunate occurrence there was a series of litigation.

History of Litigation:

5. Dabreau's estate instituted a claim against Mecalfab by **CV2014-01322 Joan Jennifer Dabreau (The Appointed Representative Claimant of the Estate of Kevin Randy**

Dabreau, deceased) v Mecalfab Limited (“the first action”) and claimed against Mecalfab the following relief:

- a. Damages for personal injuries and consequential loss and expenses occasioned by the Claimant caused by the negligence and/or breach of the Employers duty of the Defendant, its servants and/or agents on Vemco Limited compound at Factory Road, Diego Martin on the 21 April 2010.
 - b. Damages under the Compensation for Injuries Act Chap. 8:05 of the laws of Trinidad and Tobago.
 - c. Damages under the Supreme Court of Judicature Act Chap. 4:01 of the laws of Trinidad and Tobago for the benefit of the said deceased for the loss of expectation of life and consequential loss caused by the said deceased by the negligence and/or breach of Employers duty of the Defendant, its servants and/or agents on Vemco Limited compound at Factory Road, Diego Martin on the 21 April 2010 whereby Kevin Randy Dabreau (deceased) received severe personal injuries as a result of which he died on the 29 April 2010.
 - d. Costs.
 - e. Interest at such rate and for such period as the Honourable Court shall think fit.
 - f. And further and/or other relief as to this Honourable Court may deem just.
6. Furness exercised its right of subrogation and took control of the litigation on Mecalfab’s behalf. The company was represented by Ramnarine Mungroo and Keston McQuilkin, Attorneys-at-law who now represent the Defendant in the instant claim (Mecalfab’s first attorneys). Boodoosingh J (as he then was) on 30 October 2017 ordered Mecalfab to pay damages to the estate of Dabreau in the sum of \$221,500.00 in addition to prescribed costs.
7. Prior to the order of the Court dated 30 October 2017 Mecalfab’s first attorneys instituted an Ancillary Claim against the subcontractor Mr Wilbor Bailey (“the Ancillary Defendant”). Dabreau’s estate was not a named party and the Ancillary Claimant prayed for the following relief:

- a. A declaration that the Ancillary Defendant shall fully indemnify the Ancillary Claimant against the Claimant's claim, interest and all costs including the Ancillary Claimant/Defendant's costs of the substantive claim and this action.
 - b. Alternatively, a declaration that the Ancillary Defendant shall contribute as determined by the Honourable Court to any judgment obtained by the Claimant inclusive of interest and costs of the substantive claim against the Ancillary Claimant/Defendant and the costs of this action.
 - c. Interest pursuant to Section 25A of the Supreme Court of Judicature Act Chap. 4:01.
 - d. Costs.
 - e. Further and/or any other relief as the Court thinks just and appropriate.

8. The Ancillary Claim was undefended and by order of the Court dated 9 December 2014 Boodoosingh J (as he then was) ordered that:
 - a. There be judgment for the Ancillary Claimant on its Ancillary Claim in default of appearance and/or Defence, against the Ancillary Defendant, the Ancillary Defendant having been deemed to admit the Ancillary Claim filed on the 19 September 2014 pursuant to Part 18.12(2)(a) of the CPR 1998 as amended.
 - b. An order that the Ancillary Defendant do satisfy any judgment obtained by the Claimant against the Ancillary Claimant/Defendant.
 - c. That the Ancillary Defendant do pay to the Ancillary Claimant/Defendant the costs of the substantive claim, the Ancillary Claim and costs of this application.

9. On 9 November 2017 attorneys for Dabreau's estate wrote to Mecalfab's first attorneys and sought payment on the judgment dated 30 October 2017. By letter of 17 November 2017 Furness instructed the attorneys to respond and they denied liability to pay the judgment debt and asserted *inter alia* that the Ancillary Defendant was liable to pay same.

10. As a result of Furness's unwillingness to satisfy the judgment debt, Dabreau's estate filed a writ of execution on 2 May 2018 and levied upon Mecalfab on the 6 September 2018.

On that very day Mecalfab sought injunctive relief against the Dabreau estate by virtue of **CV2018-03195 Mecalfab Limited v Jennifer Dabreau (The Appointed Representative Claimant of the Estate of Kevin Randy Dabreau, deceased)** (the second action) and Boodoosingh J (as he then was) made, *inter alia*, the following order:

- a. The Defendants are restrained whether by themselves or through their servants and/or agents from entering upon any of the Defendant's premises removing items and/or belongings owned by the Claimant.
11. Before the injunction was served, a Marshall of the Supreme Court executed the levy. Mecalfab thereafter alleged that this levy affected its operations and caused it to suffer loss and damage.
12. After an unsuccessful attempt for the return of the levied goods, Furness through the Mecalfab's first attorneys instituted **CV2018-03455 Mecalfab Limited v Jennifer Dabreau (The Appointed Representative Claimant of the Estate of Kevin Randy Dabreau, deceased) and Paul Carr** (the third action). The third action sought damages for trespass for the detention and/or conversion of the goods as well an order for the delivery up of said goods. Mecalfab however, did not await the trial of this action as it claimed that its operations were disrupted and it, again, unsuccessfully called upon Furness to the payment the judgment debt.
13. Mecalfab outlined that it was not functioning properly and in an effort to mitigate its losses, it paid attorneys for Dabreau's estate the sum of \$274,402.00. The instant action was thereafter instituted as Mecalfab now seeks to recover that sum together with all the other resulting costs relative to the levy and other expenses including:
- a. The sum of \$1,068.00 to the Registrar to facilitate the release of its goods;
 - b. The sum of \$10,000.00 for salaries paid to employees of Mecalfab on 6 September 2018 who were unable to work;
 - c. The sum of \$15,561.38 for hiring of external custom's broker;
 - d. The sum of \$17,17153.75 for legal fees paid to obtain release of goods;
 - e. The sum of \$6,750.00 ASYCUDA customs software suite loaded onto one CPU.

The Defendant's facts:

14. Furness pleaded that the requirement to indemnify Mecalfab was always subject to the exception where it receives an indemnity against any sums which the Claimant shall be liable to pay inclusive of costs and expenses. The Defendant says that its right to subrogation was exercised because the first action was covered by the policy of insurance but the liability to indemnify the Claimant was absolved when the Ancillary Defendant was found liable for the loss referenced in the first action.

15. Furness also pleaded that Mecalfab never indicated that it did not wish to await the trial of the third action and although it did everything to assist Mecalfab, the company acted unilaterally.

The evidence:

16. At the virtual hearing the Court heard evidence from Mr Kent Costa, Mr Kelvin Rampersad, Mr Michael Charles, Ms Giselle Busby and Ms Sheena Ragoobar.

Issues:

17. In this matter the Court has to essentially determine the following primary issue namely whether Furness breached its policy of insurance with Mecalfab and if it did what quantum of damages should be paid to Mecalfab.

18. To resolve this issue the Court has to consider the effect of the Ancillary judgement on the claim advanced in the first action and reconcile the Ancillary judgement with the order dated 30 October 2017 which was issued in the first action.

Resolution:

19. The procedural history demonstrates that in the first action Furness instructed Mecalfab's first attorneys and they had full control of the proceedings. One of Mecalfab's first attorneys now submit, *inter alia*, that the substantive claim against Mecalfab should have been dismissed. It is therefore difficult to comprehend why this issue was not addressed by them prior to the issue of the order dated 30 October 2017.

20. Part 18.12(2) of the CPR 1998 as amended provides as follows:

Special provisions relating to judgment on failure to file to ancillary claim:

Part 18.12(2):

(2) The party against whom the ancillary claim is made—

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and

(b) subject to paragraph (4) if judgment under Part 12 is given against the ancillary claimant, he may enter judgment in respect of the ancillary claim.

21. Furness relies on the Court of Appeal decision **CA No. P198-2015 Satnarine Maharaj v Great Northern Insurance Company Limited and Margaret Garraway Fenton** and the Court's interpretation of Part 18.12 (2) of the CPR 1998 as amended.

22. In *Satnarine Maharaj* (supra) the appellant filed a claim form and statement of case against the respondents and claimed damages arising from a vehicular accident. Both the first respondent (who was joined in the proceedings as insurer) and second respondent filed a joint defence in which they denied liability and the second respondent counterclaimed for the damage done to her vehicle. The allegations in the counterclaim were identical to the defence and were intimately wrapped up with the defence. The appellant failed to file a defence to the counterclaim and the respondents then applied for, *inter alia*, an order that the claim be struck out. Thereafter the appellant sought to extend time for filing of the

defence but the trial judge refused this application, struck out the claim and ruled that the appellant was deemed to have admitted all the averments as contained in the counterclaim.

23. The appellant's appeal was allowed. The Court of Appeal opined that notwithstanding the deemed admissions consequent upon the failure to file a defence to the counterclaim, there was a live issue on the claim, as there was no admission that the accident, was not in any way, the fault of the second respondent : (per Mendonça JA at paragraph 27). In addition the issue of contributory negligence was also unresolved.
24. *Satnarine Maharaj* (supra) is an authority for the principle that the decision in the ancillary claim may be binding on the main/substantive claim. However, the effect of an admission in the ancillary claim must be analyzed in the context of and relative to its impact on the main/substantive claim.
25. From the factual matrix in the first action the following issues had to be resolved :
 - a. Whether Mecalfab was negligent;
 - b. Whether the Ancillary Defendant was an independent contractor; and
 - c. Whether Dabreau was contributorily negligent.
26. The main issues on the Ancillary Claim between Mecalfab and the Ancillary Defendant were:
 - a. Whether the Ancillary Defendant was an independent contractor;
 - b. Whether the Ancillary Defendant was negligent; and
 - c. Whether he had to indemnify Mecalfab.
27. The operative circumstances demonstrate that the only overlapping issue between the first action and the Ancillary Claim was whether the Ancillary Defendant was an independent contractor.

28. In effect, the Ancillary Defendant's failure to defend the ancillary claim meant that he was deemed to have admitted the claim in accordance with Part 18.12(2)(a) of the CPR. However, there was no connectivity between the Ancillary Defendant and Dabreau's estate as the estate brought no action against the Ancillary Defendant. Further, notwithstanding the Ancillary Defendant's liability as an independent contractor, there were distinct allegations of negligence advanced by the estate as against Mecalfab. Consequently, the admission of liability on the Ancillary claim did not place the Ancillary Defendant in the same position as the original defendant in the first action nor did it completely resolve all the issues in the first action so as to automatically make the Ancillary Defendant solely liable to the Dabreau estate.

29. The failure by Mecalfab's first attorneys to strike out the claim against Mecalfab after judgement was obtained in the Ancillary Claim, given the position that they have taken before this Court, was inconsistent with the guidance of Mendonça JA where at paragraph 24 of *Satnarine Maharaj* (supra) the Justice of Appeal said as follows:

“24. ... We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the counterclaim can result in the dismissal of the claim. *One such case is where the effect of the claimant admitting the counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue. To permit the claimant to proceed with the claim in those circumstances would be an abuse of process.*”

(Emphasis Court's)

30. The resolution of the issue as to Mecalfab's alleged negligence, however, remained a separate issue from the issue of the Ancillary Defendant's negligence, until it was determined by the Court on 30 October 2017. At paragraph 23 of *Satnarine Maharaj* (supra) Mendonça JA said as follows :

“23. There of course need be no connection between the claim and the counterclaim (see rule 18.5(2)). In such a case it is unlikely that the failure to defend the

counterclaim will have any significant impact on the claim. Where, however, the counterclaim is wrapped up in the claim and intimately connected to it the position can be expected to be different.”

31. Having reviewed the law this Court is resolute in its view that there was no connectivity under the Ancillary Claim between the Ancillary Defendant and the Dabreau estate. The relief sought in the Ancillary Claim was for indemnification of either the entirety or a portion of any damages awarded to the Dabreau estate. Consequently, there was no legal requirement for the Ancillary Defendant to directly satisfy the estate’s claim and the order for liability issued in the first action did not amount to an abuse of process.

32. Furness argues that it did not breach the policy of insurance while Mecalfab contends otherwise. There is no dispute as to the fact that a judgment was registered against Mecalfab and that same was obtained while Mecalfab’s first attorneys had conduct of the first action.

33. Pursuant to the policy of insurance which was exhibited at page 27 of the Trial Bundle, there was an agreement between the parties that “if at any time during the Period of Insurance any employee in the Insured’s immediate service shall sustain personal injury by accident or disease arising out of and in the course of his employment by the Insured in the Business and if the insured shall be liable to pay compensation for such injury either under the law(s) set out in the Schedule or at common law then subject to the terms exceptions and conditions contained herein or endorsed hereon ***the Company will indemnify the Insured against all sums for which the Insured shall be so liable and will in addition be responsible for all costs and expenses incurred with its consent in defending any claim or such compensation***”. (Emphasis Court’s)

34. The exception which Furness relies on is as follows:

The Company shall not be liable under this Policy in respect of:

(e) any sum which the Insured would have been entitled to recover from any party but for an agreement between the Insured and such party.

35. In the Court's view, this exception references a circumstance where there is an attempt by the Claimant to limit recovery from a third party and make the Defendant liable when there existed another recovery recourse avenue in respect of loss suffered. Notably, in none of the multiplicity of instituted actions, was there, as between Mecalfab and Furness, any pleading that any such agreement existed. It is therefore difficult to comprehend how this exception can be applied.
36. At the material time, during the currency of the first action, Furness exercised its rights of subrogation and seemingly accepted its liability under the policy of insurance. Before an insurer exercises its rights of subrogation, the following conditions precedent must be satisfied:
- a. the insurance is an indemnity insurance;
 - b. he has made a payment under it; and
 - c. his rights of subrogation are not excluded by a term of the parties' contract. (see **MacGillivray on Insurance Law, 13th Edition, page 707, para. 24-024**).
- 37. By exercising its right of subrogation, Furness accepted that it would be liable to pay any established award to the Dabreau estate under the first action in accordance with the policy of insurance. It assumed full conduct of the proceedings and then initiated an ancillary claim thereby taking for itself the benefit of the claim for an indemnity.**
- 38. The order generated in the Ancillary Claim was issued under Part 18.1 of the CPR and determined that the Ancillary Defendant "do satisfy any judgement obtained by the Ancillary Claimant/ Defendant". This order did not and could not absolve the Ancillary Claimant/ Defendant of the obligation to pay to the Claimant any sums awarded but merely provided for the indemnification of any sums so paid by the Ancillary Claimant/Defendant.**
- 39. The position adopted by Furness as articulated by Mecalfab's first attorneys is frankly illogical, manipulative and unfortunate. In the circumstances, this Court is**

resolute in its view that Furness breached the policy of insurance when it refused to indemnify Mecalfab.

40. Having established that there was a breach of the policy of insurance, the Court must now determine the quantum of damages which should be awarded.

41. On the evidence there is no dispute that Mecalfab paid \$272,402.00 and \$1,068.00 but there is a dispute as to the applicable interest, the salaries claimed, the cost associated with the hiring of a Custom Brooker and the associated costs in relation to the ASYCUDA software.

42. In its Statement of Case, Mecalfab outlined that it suffered loss as it had to expend sums to satisfy the judgement debt in the first action and it outlined and pleaded the premise for its assertion that it is entitled to the quantum of interest claimed. Kent Costa and Ms Busby both testified that the instant Claimant had an overdraft facility and given the nature of the policy of insurance it cannot be denied that the instant Claimant operated as a commercial entity.

43. In **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and another [2008] 1 AC 561**, at page 581 E – F, paragraph 16 the court stated:

“The reality is that every creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest. It is a short step to say that interest losses will arise “in the ordinary course of things” in such circumstances.”

44. The evidence before the Court does not establish that the policy of insurance provided for the payment of interest at a stipulated rate and although an overdraft facility was in place, there is no evidence that same was actually used. Consequently, the Court is not inclined to award interest at the claimed rate of 9.5% but prejudgment interest shall be awarded at

the rate of 2.5% and the statutory rate of interest will apply from the date of judgment until payment.

45. In relation to the claims with respect to salaries, the hiring of the custom broker and the ASYCUDA software costs, the Court feels a distinct degree of disquiet with the position advanced on behalf of the Defendant.

46. In the third action, Mecalfab's first attorneys prepared and filed documents and had Mr Costa certify that Mecalfab was entitled to the very remedies which they now challenge. The position advanced before this Court, though masked with a veneer of legitimacy, is disappointing and the conduct which has been revealed may be indicative of a significant conflict of interest as well as possible breaches of client confidentiality. Mecalfab may therefore wish to consider the institution of disciplinary proceedings as against its first attorneys. The tendency to engage in protracted and overtly technical, disingenuous and dilatory litigation is unacceptable and attorneys must remain acutely aware of their obligation to respect the sanctity of the client/ Attorney relationship as well as their obligation to assist the Court and uphold the Administration of Justice.

47. Before this Court, sufficient evidence has been led so as to establish that although salaries were paid by Mecalfab, its employees were unable to engage any of its work immediately after the levy. The Court also accepted Mr Costa's evidence that the software system was not installed until October 2018 and that a custom broker had to be hired, as Mecalfab did not have access to its software after the levy. The Court further accepts the evidence that new software had to be purchased and uploaded and given the reality of connectivity issues, it is plausible to conclude that the Claimant relied upon an installed system as opposed to an online system. Ultimately, the Court finds as a fact that it was eminently reasonable for the Claimant to acquire new software .

48. For the reasons outlined the Court hereby orders as follows:

- a. The Defendant shall pay to the Claimant the sum of \$274,402.00 representing sums paid by the Claimant in satisfaction of the liability to the estate of Kevin Randy Dabreau, pursuant to the order of the Honourable Mr Justice Boodoosingh (as he then was) dated 30 October 2017 as well as the consequential sums paid as a result of the Defendant's breach in the sum of \$50,533.13.
- b. The Defendant shall also pay to the Claimant costs calculated on a prescribed costs basis on the sums awarded.
- c. Pre judgment interest shall accrue at the rate of 2.5% per annum from the 6 September 2018 to the date of judgment.
- d. Interest at the statutory rate of interest will accrue on the judgement sum from the date of this judgement until payment.

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FRANK SEEPERSAD
JUDGE