

TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA NO. 2927 OF 1997

BETWEEN

VENA LUCY CARRINGTON
(THE LEGAL PERSONAL REPRESENTATIVE OF
THE ESTATE OF HENRY GEORGE CARRINGTON – deceased)
Plaintiff

AND

GUARDIAN LIFE OF THE CARIBBEAN LIMITED
Defendant

Before: The Hon. Justice Nolan Bereaux

Appearances: Mr. G Armorer for the Plaintiff
Mr. S de la Bastide for the Defendant

REASONS

The defendant by summons filed 5th February, 1999 sought to strike out the following from the plaintiff's statement of claim.

- (a) Paragraph 8
- (b) The particulars of paragraph 6 and so much of paragraph 6 as reads “alleging an entitlement to do so based on the defendant allegedly never giving an acceptance of the deceased's proposal in writing because of an alleged discrepancy in the information provided by the deceased in the proposal/application in respect of other existing life insurance on the life of the deceased;”

- (c) The particulars of paragraph 4 and so much of paragraph 4 as reads “The plaintiff will rely on the representation to the plaintiff of one Marcus Lynch an agent of the defendant in March or April 1994 that the policy was up-to-date and in good standing.

The summons was issued pursuant to Order 18 rule 19(1) of the Rules of the Supreme Court 1975 as well as under the Court’s inherent jurisdiction, on the ground that the paragraphs disclosed no reasonable cause of action and were otherwise an abuse of process.

The substantive action

The substantive action is a claim by the plaintiff for breach of contract by the defendant’s failure to pay the sum of \$600,000.00 as “Double Accident Benefit” under a policy of insurance on the life of the late Henry George Carrington. The plaintiff alleges that the sum became payable upon the death of the deceased from a cause other than natural causes or suicide. She also claims in negligence by what she contends was:

“the failure of the defendant, its officers, servants or agent for failing to complete in a timely manner the processing of an application by the deceased for a life insurance policy with the defendant on the life of the deceased.”

The summons was amended with leave of the court on 17th March, 2000 to reflect the fact that the statement of claim had been amended.

The plaintiff by her amended statement of claim contends that on or before 3rd February, 1993, Mr. Carrington applied for a life insurance policy with coverage of \$300,000.00 and with a double accident benefit. He signed and submitted a proposal form which had been completed by Mr. Sean Gordon, an agent of the

defendant. He also paid to the defendant the sum of \$267.00 as the first monthly premium towards the policy and passed a medical examination conducted by a medical doctor acting on behalf of the defendant. The plaintiff contends that the policy was issued by the defendant and a number assigned to it, but the policy was not sent to the deceased. She alleges that one of the terms of the policy was payment to the estate of Mr. Carrington of the sum of \$600,000.00 double accident benefit in the event of his death otherwise than by natural causes or suicide. She states that Mr. Carrington was shot and killed on 29th January, 1994 but the defendant wrongfully and in breach of contract has failed to pay that or any other sum to the estate.

The plaintiff alleges in the alternative that if the defendant did not give an acceptance proposal in writing, the defendant owed a duty of care to the deceased to service and process the proposal correctly and in a timely manner and to seek clarification in a timely manner from the deceased of any discrepancies on the proposal. The failure to give the acceptance in writing was caused by the negligence of the defendant.

The summons to strike out

The defendant's challenge was to certain parts of paragraphs 4 & 6 as well as the particulars thereof and the whole of paragraph 8 including the particulars. The paragraphs read as follows:

Paragraph 4

"The policy was issued by the defendant and assigned the policy No. ET60163375 but not sent to the deceased. The plaintiff will rely on the representations to the plaintiff of one Marcus Lynch, an agent of the defendant in March or April, 1994 that the policy was up-to-date and in good standing.

Particulars

- i) *The said Marcus Lynch on a day in March or April 1994 at 65, Elm Avenue, Bayshore at about 7.00 pm informed the plaintiff that he represented the defendant and that he had come to service the policy.*
- ii) *The said Marcus Lynch informed the plaintiff that the policy was up-to-date and in good standing when the plaintiff inquired if it was so.*
- iii) *The said Marcus Lynch showed the plaintiff a computer print-out of the information in respect of the policy which stated, inter alia, that the policy's number was ET60163375 and was for the sum of \$300,000.00 with a Double Accident Benefit provision.*
- iv) *The said Marcus Lynch for a second time said the policy was up-to-date.*
- v) *The said Marcus Lynch, on being informed of the deceased's death and being shown by the plaintiff a copy of the brochure distributed at the deceased's funeral service wrote his name, telephone numbers and the policy's number on the brochure, left his call-card and informed the plaintiff he would contact her the next morning.*

Paragraph 6

“The deceased died on 29th January, 1994 after he was shot by a person committing a crime but the defendant wrongfully and in breach of contract has failed and/or refused to pay the sum of \$600,000.00 or any sum to the estate of the deceased alleging an entitlement to do so based on the defendant allegedly never giving an acceptance of the deceased's proposal in writing”

because of an alleged discrepancy in the information provided by the deceased in the proposal/application in respect of other existing life insurance on the life of the deceased.”

Particulars

The proposal/application stated that the deceased had other life insurance in the sum of \$50,000.00 when in fact the other life insurance was in the sum of \$500,000.00

Paragraph 8

“In the alternative, if, which is not admitted, the defendant did not give an acceptance of the proposal/application in writing, the plaintiff says the defendant by its officers, servants and/or agents owed a duty of care to the deceased to service and process the proposal/application correctly and in a timely manner and to seek clarification in a timely manner from the deceased of any discrepancies on the proposal/application and the failure to give the acceptance in writing was caused by the negligence and/or breach of duty of the defendant, its officers, servants and/or agents. Further or in the alternative the negligence and/or breach of duty of the defendant, its officers, servants and/or agents caused the deceased to not have the opportunity to state that his other life insurance was \$500,000.00 and not \$50,000.00 and thereby obtain the acceptance in writing by the defendant of the proposal/application.

Particulars of Negligence

- (i) Failing to communicate in writing or otherwise with the deceased in a timely manner and/or within a reasonable time of the submission of the proposal/application in order to seek clarification of the information in it.*

- (ii) *Failing to process the proposal/application of the deceased in a timely manner and/or within a reasonable time of its submission.*
- (iii) *Receiving the proposal/application since 3 February, 1993 and failing to communicate to the deceased the defendant's position on the proposal/application before the deceased died on 29 January, 1994*
- (iv) *The plaintiff will rely on the defendant's sending to the plaintiff of a cheque for \$267.00 made payable to "Henry T Carrington" on or about 13 September 1994 after the death of the deceased and after the representations by the said Marcus Lynch an agent of the defendant (which cheque the plaintiff returned to the defendant).*
- (v) *The plaintiff reserves the right to add to these particulars after discovery herein.*

Submissions of counsel

Mr. de la Bastide contended that the second sentence of paragraph 4 and the entire particulars was evidence which went to proof of the allegations. He submitted that under Order 18 rule 19(1) (c) and (d) and under the inherent jurisdiction of the court, that sentence and the particulars should be struck out as it may prejudice, embarrass or delay the fair trial of the action. He submitted that to allow that evidence to remain as pleadings, put the defendant at risk since the defendant too would have to plead evidence.

He added that the relevant part of paragraph 6 to which he objected was also evidence and it was an abuse of process. He relied on the learning in the **1993 Supreme Court Practice** at Order 18 rule 7.

As to paragraph 8, Mr. de la Bastide submitted that it disclosed no reasonable cause of action. The servicing and processing of an application for life insurance

cover and the clarification of related matters could not form the basis of a duty of care in tort. Those are issues of contract negotiation. The plaintiff in effect was making the absurd contention that the defendant had a duty to carry out efficiently the negotiation and processing of the application for insurance coverage. Further, he submitted the claim in paragraph 8 could not succeed because it dealt with pure economic loss which as a general rule was not recoverable where such loss did not flow directly from injury to person or damage to property, even if the loss were foreseeable.

In reply Mr. Armorer submitted that an allegation of fact was made in paragraph 4 which required that the general purport of the conversation alleged therein be pleaded and particularised. Subsidiary facts which assist in proving the primary allegation had to be pleaded so as to inform the defendant and ensure that they are not taken by surprise. Mr. Armorer added that even if the court were of the view that the facts pleaded were unnecessary, that of itself was not a sufficient ground to strike out the paragraph since no harm was likely to result to the defendant.

Paragraph 6, he submitted, was relevant because it related to the reasons given by the defendant for not paying the sum claimed. He added that justice required a full ventilation of the facts and no harm would be suffered by the defendant.

Mr Armorer saved the bulk of his submissions for his defence of paragraph 8. I shall summarise them in the terms set out hereinafter. He submitted that in completing and processing the application, the defendant was providing a service and the issue was one of tortious liability arising out of that service. It was just and reasonable to impose a duty of care in such a circumstance because.

- (1) the proposal form had been submitted;
- (2) it had been completed by the insurance company's agent;

He added that those factors required an inquiry which should be done at the trial and not summarily by summons.

As to the operation of Order 18 rule 19, he submitted the court exercises its discretion with the greatest of circumspection and only in the clearest of cases. Paragraph 8 raised an issue of general importance for the insurance industry. The fact that there may be difficulty in proving the allegation does not mean that the action should be dismissed.

He submitted further that the summons to strike out was not made promptly and should be dismissed. The summons was filed almost two months after the amended statement of claim was filed and some three weeks after the issue of the summons for direction.

The Law

The learning with respect to applications under Order 18 rule 19 is that it is to be invoked only in plain and obvious cases. In Volume 1 of the **1993 Supreme Court Practice** 332 under the rubric “**Exercise of powers under this rule,**” it is stated that:

“the summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously ‘unsustainable’. It cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. The court must be satisfied that there is no reasonable cause of action.”

It goes on to provide at page 333 that the court should strike out, if it is:

“satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial.”

A reasonable cause of action means an action which has some chance of succeeding when the allegations on the pleadings are examined. The fact that the case may be weak or difficult to prove is not sufficient reason to strike out the pleading.

As to the question of pleadings which may “*prejudice, embarrass or delay the fair trial of the action*”, Bowen L J in Knowles v Roberts (1888) 38 Ch. D 263 at pg. 270 stated:

“the rule that the court is not to dictate to parties how they should frame their case, is one ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law;”

It is not every unnecessary pleading which will be struck out. If it is otherwise harmless or innocuous the pleading will not offend Order 18 rule 19. Similarly, the court will prevent the “improper use of its machinery” and will strike out pleadings which are sufficiently vexatious and oppressive in the process of litigation.

“The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances..... (Supreme court Practice (supra)) at pg 332”

The exercise of the court’s inherent powers to prevent its process from being abused in such a case, is discretionary.

The question for me was whether the relevant parts of paragraphs 4, 6 and paragraph 8 ought to have been struck out having regard to the rules of practice as set out above.

Findings and decision

In my judgment, neither paragraph 4 nor 6 offended Order 18 rule 19. Mr. Armorer was correct in saying that paragraph 4 and the particulars thereof were secondary facts which go towards establishing the plaintiff's claim as to the issuing and existence of the life insurance policy by the defendant and towards establishing the cause of action. I did not consider it to be evidence per se.

In any event, I saw no prejudice, embarrassment or delay arising out of paragraph 4. Mr. de la Bastide submitted that his client would suffer prejudice by having to respond to the unnecessary pleading of evidence but I do not agree that the mere fact of having to respond to the allegations necessarily prejudices the fair trial of the action of the defendant's case. Indeed, the recent approach is towards full disclosure and away from "trial by ambush". Further, the fact that the plaintiff's pleadings contain unnecessary material is not a sufficient ground to strike out, if, as in this case, the facts pleaded are otherwise harmless. No prejudice could result to the defendant by their inclusion.

As to paragraph 6, that too is neither prejudicial nor embarrassing nor likely to delay the fair trial of the action. The plaintiff is simply stating the basis upon which she contends that the defendant rejected the claim. I do not understand that to be evidence but rather as providing particulars of the basis on which the plaintiff understood the refusal of payment to have been made

As to paragraph 8, Mr. Armorer cited several authorities in defence of his submissions. I mean no disrespect to him, but there is no necessity for any long and involved analysis of the cases in, deciding this issue.

The plaintiff's claim on its face is that the defendant owed a duty of care to the deceased to service and process the proposal correctly and in a timely manner and to seek clarification from the deceased in a timely manner of any discrepancies on

the proposal. She contends that the failure to give the acceptance in writing was caused by the negligence of the defendant.

The particulars of the claim are set out in the paragraph.

No evidence is admitted to attack or defend the substance of the pleading. It stands or falls on its own. The question for me was whether paragraph 8 on its face disclosed any reasonable cause of action. Mr Armorer cited several authorities in support of his submission that there was basis for the matter proceeding to trial. He stated that the law of negligence was in a state of “fluidity” and cited the observations of Permanand J A in **Bank of Commerce v Lakhan**, Civil Appeal No. 23 of 1991. Consequently, he submitted, the issue of the existence of a duty of care in this case should be determined at trial. He cited several other authorities in support of his submission as to the direction the law of negligence has taken.

As I have stated earlier, I see no need to resort to any deep analysis of all the authorities cited by Mr Armorer. Some of the cases do suggest that a duty of care may be found by the court where it is “fair, just and reasonable that the law should impose such a duty.” (See **Charlesworth & Percy** on negligence, 9th edition at pages 79 to 87. See also **White v Jones** 1995, 2 WLR 187). In my judgment however, whether it is fair, just and reasonable to impose such a duty must depend on the facts and circumstances of each case and the best test of whether such a duty exists remains the “proximity” test laid down by Lord Atkin in **Donoghue v Stevenson**.

The nature of the relationship between the deceased and the defendant does not admit of any degree of proximity within the test in **Donoghue v Stevenson**. The authorities cited by Mr Armorer are not indicative of any significant shift in the test of “proximity” laid down in that case. Each case turns on its own facts. In **White v Jones** (supra), the House of Lords, by a three to two majority, found

that a duty of care existed between a solicitor and beneficiaries of a testator, where the solicitor failed to carry out the testator's instructions to the detriment of the beneficiaries. This was so inspite of the fact that there was no contractual relationship between them.

In my judgment, the likelihood of beneficiaries suffering adversely due to an act or omission of a solicitor is neither farfetched nor improbable and there is a sufficient proximity between them to give rise to a duty of care on the part of the solicitor. That it was just and reasonable for the court to find that a duty of care existed in that case is a function of the facts and circumstances of the case in question, and this was so inspite of the fact that there was no contractual relationship between the parties. I do not understand the decision to lay down any principle of general applicability or to have carved out or broken new ground.

I agree with Mr. de la Bastide that the defendant was not providing a service to the deceased but rather was seeking its own interest by attracting business for its own benefit and in those circumstances, I cannot for myself conceive of any duty of care arising between parties who are in the process of establishing a contractual relationship. The particulars of negligence as pleaded advance the plaintiff's case no further. Indeed, they suggest that the deceased is as much to blame for the failure to process the proposal by himself failing to enquire of the processing of the application.

The failure timeously to process the application of the deceased or to communicate the clarification of the information some eleven months after the application reveals at best an inefficient system of administration by the defendant company. But it is also reflective of a lack of initiative, if not interest, on the part of the deceased. There can be no duty of care arising in those circumstances nor can it be just and reasonable to impose one. There may at best be an estoppel, if at all.

No reasonable cause of action was thus disclosed by the pleading in paragraph 8 and the striking out of the paragraph in my judgment would substantially “*reduce the burden or preparation of a trial.*”

Mr. Armorer sought to argue that leave be given to the plaintiff to amend the statement of claim in order to cure any defect the court may have perceived in the pleading. The court may give leave to amend the pleading (even where no draft amendment is provided) where there is reason to believe that the case can be improved by an amendment. In my judgment, an amendment would not in any way have improved the plaintiff’s alternative claim.

As to Mr. Armorer’s submission that the summons to strike out was not made promptly, I did not consider that in all the circumstances of this case, the application was inordinately delayed. In this case the plaintiff filed an amended statement of claim on 10th December, 1998. A substantial amendment was made to paragraph 8 which bore the brunt of the defendant’s submissions on his summons to strike out. That summons was filed on 5th February, 1999 less than two months later and was prompted by the defendant’s concern that it may have to amend its defence in response. I did not consider that in those circumstances there was undue delay in the filing of the summons.

In those circumstances, I struck out paragraph 8 of the plaintiff’s statement of claim but rejected the defendant’s claim to strike out paragraphs 4 and 6 thereof. I ordered the plaintiff to pay two-thirds of the defendant’s costs on the summons.

Dated this 21st day of February, 2000

NOLAN P. G. BERAUX
Judge