[2023] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00049

BETWEEN	**THE INSURANCE COMPANY OF THE WEST INDIES**	**APPELLANT**
AND	**CLIFTON DODD**	**RESPONDENT**

Ms Suzette Radlein for the appellant

The respondent in person

6 and 31 March 2023

BROOKS P

[1] The Insurance Company of the West Indies' ('ICWI') has appealed the decision of a judge of the Supreme Court handed down on 24 June 2020. The learned judge refused ICWI's application for summary judgment on Mr Clifton Dodd's claim against it for breach of contract. He ruled that Mr Dodd, the respondent to the appeal, had a real prospect of succeeding in his claim against ICWI.

[2] ICWI contends that the learned judge incorrectly interpreted an arbitration clause in a contract of insurance between Mr Dodd and itself, whereby it insured Mr Dodd's BMW X6 motor vehicle ('the BMW'). ICWI asserts that a proper interpretation of the clause would result in a finding that Mr Dodd failed to refer his claim for indemnity, for the loss of the BMW, to arbitration, within the required time and he would be deemed to have abandoned the claim. Accordingly, ICWI states, his claim in the Supreme Court against it

for breach of contract for failing to indemnify him for the loss, was doomed to fail. It was on that basis that ICWI had applied for summary judgment against Mr Dodd.

[3] Having read and heard submissions from counsel for ICWI and heard Mr Dodd's oral response, the court took the view that the learned judge erred in his interpretation of the clause and as a result it ordered:

> "1. The appeal is allowed.
>
> 2. The orders of the learned judge of the Supreme Court handed down on 24 June 2020 is set aside.
>
> 3. Summary judgment is hereby granted against the respondent, Mr Clifton Dodd, on the basis that he has no real prospect of succeeding on his claim consequent on his failure to refer the matter to arbitration pursuant to the provisions of clause 9 of the policy of insurance.
>
> 4. Each party is to bear its own costs of the appeal and in the court below."

[4] At the time of giving the decision we promised to put our reasons in writing and we now fulfil our promise.

The background to the appeal

[5] There were few, if any, disputed facts between the parties. Mr Dodd asserted that on 8 December 2014, he was attacked while driving the BMW. He fled the vehicle and escaped into a nearby cane piece. He later heard gunshots and subsequently saw the BMW in flames. The fire brigade and police were summoned. The fire brigade extinguished the fire, but the police prevented Mr Dodd from removing the BMW. The following day, ICWI's investigators took pictures of the vehicle that was at the location, but, by 10 December 2014, it had disappeared without a trace. It has not been seen since.

[6] Mr Dodd filed a claim on the policy of insurance, but ICWI asserted that it needed proof that the vehicle that was destroyed was the BMW. Correspondence passed between the parties over the course of the next 10 months, with Mr Dodd and his attorneys-at-

law seeking to convince ICWI to pay the claim and ICWI stating that it was not satisfied with the material that had been provided as proof.

[7] On 27 November 2015, Mr Dodd's attorneys-at-law wrote to ICWI asking that the matter be referred to arbitration. No progress was made in that regard and, on 10 May 2016, Mr Dodd filed his claim in the Supreme Court. ICWI filed a defence and the case proceeded through the course of being prepared for trial.

[8] On 12 February 2020, ICWI filed its application for summary judgment. It asserted that it had disclaimed liability by a letter to Mr Dodd dated 16 February 2015. It said that Mr Dodd failed to refer the claim to arbitration within 12 months of the date of that letter and was, therefore, deemed to have abandoned the claim. ICWI asked for summary judgment as a result. The learned judge heard and determined the application on 24 June 2020. As mentioned above, the learned judge refused the application, but, he granted ICWI leave to appeal and vacated the trial dates that had been reserved for the case.

The clause

[9] The clause in question is clause 9 of the insurance contract. It reads:

> "**All differences** arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against [ICWI]. **If [ICWI] shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder**." (Emphasis supplied)

The learned judge's decision

[10] In his written judgment, the learned judge concentrated on an interpretation of the term "differences", as used in clause 9. His interpretation of the term led him to find that there had to be an "unequivocal difference" between the parties to allow for clause 9 to be activated. He found that the correspondence between the parties did not reveal an unequivocal disclaimer of liability by ICWI and, therefore, when Mr Dodd filed the claim, time had not yet begun to run to allow for clause 9 to be activated. He, accordingly, refused ICWI's application for summary judgment.

The submissions

[11] Ms Radlein for ICWI asserted that the learned judge's interpretation of the term "all differences" was not in accordance with the standard process of judicial interpretation. She contended that the learned judge erroneously sought to impose a commercial efficacy to the term, when in fact a common sense interpretation of the term was unambiguous and clear. In that regard, learned counsel submitted that the learned judge erred when he ignored the fact that several other judges of the Supreme Court had interpreted the identical clause in similar contracts of insurance and had applied the common sense approach to its interpretation.

[12] Learned counsel submitted that ICWI's letter of 16 February 2015 was clear in its terms and could not be said to be equivocal. Accordingly, she argued, time began to run as of that date. She added that Mr Dodd did not refer the matter to arbitration within the period of 12 months and, therefore, his claim for indemnity was deemed to have been abandoned. She contended that his claim in the Supreme Court, therefore, had no hope of success and the learned judge should have struck it out.

[13] In answer to the court, Ms Radlein submitted that Mr Dodd's attorneys-at-law's request for arbitration was not a reference as required by clause 9 and, therefore, it did not prevent time from running toward a bar of Mr Dodd's claim.

[14] She cited numerous cases in support of her submissions.

[15] Mr Dodd represented himself at the hearing of the appeal. He took the approach that the learned judge was correct in interpreting the clause as he did and asked this court to affirm the learned judge's decision.

The analysis

[16] The court agreed with Ms Radlein that the learned judge erred in his interpretation of the arbitration clause (clause 9). Our approach was somewhat different from the learned judge's and learned counsel's, in that we did not share their view of the importance of the term, "all differences", in the resolution of the matter. That portion of the clause was a generalisation, which became more specific when the issue of claims was addressed. In our view, the correct stress was on the more specific portion of the clause that spoke to whether there had been a disclaimer and the consequence of that action. The relevant portion of the clause, in our view, is repeated for context:

> "If [ICWI] shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration…"

[17] In our view, the resolution of the issue before the court below required the learned judge to decide whether:

a. the letter of 16 February 2015 constituted a disclaimer of liability in order to invoke the operation of clause 9, so that time would begin to run against the insured, Mr Dodd;
b. the subsequent correspondence between the parties, particularly by ICWI constituted a waiver of the time bar created by clause 9 or whether ICWI was estopped from raising the time bar as a defence to Mr Dodd's claim; and
c. the letter of 1 September 2015, from Mr Dodd's attorneys-at-law and their subsequent email of 24 November 2015 constituted a referral to arbitration to satisfy the requirements of clause 9.

[18] Although all of ICWI's letters to Mr Dodd and his attorneys-at-law were headed "Without Prejudice" it has relied on them, and no issue has been taken to the letters being referred to in evidence. Those letters will be referenced below.

The disclaimer of liability

[19] The learned judge fell into error in finding that the letter of 16 February 2015 was not a disclaimer of indemnity. The letter was addressed to Mr Dodd and, in our view, was plain in its meaning. It said, in part:

> "**Regrettably, indemnity will not be granted in respect of the alleged loss**, as we are unable to verify that the burnt vehicle was indeed the subject matter of your policy of insurance.
>
> It is the insured's obligation in the event of a loss, to safeguard the subject matter of the policy and ultimately, to prove the loss sustained. In this case, the alleged circumstances attendant on the loss, leave many questions unanswered and have left us without verification of the identity of the vehicle involved in the incident." (Emphasis supplied)

The subsequent correspondence

[20] He also erred in finding that the subsequent correspondence between the parties demonstrated that ICWI's position was equivocal on the issue of providing an indemnity. In its second letter on the matter of the claim (16 March 2015), ICWI declined to meet with Mr Dodd's attorneys-at-law but said, "[i]f however, you have information which could provide fresh insights into the matter at hand, please be kind enough to provide us with this new information". Its third letter, dated 23 April 2015, was along the same line:

> "The documentation supplied does not provide any further insight into the matter. If you have any information which would enable us to identify the subject matter of the alleged loss, or in other words which can confirm that the vehicle involved in the fire was the insured's vehicle, then we welcome same."

[21] Mr Dodd changed his attorneys-at-law during that year. His new attorney-at-law understood the import of ICWI's correspondence. In a letter dated 1 September 2015,

the new representative said in part "[m]y client's loss was on December 8, 2014. You have since refused, without reason, to honour his legitimate claim". On 24 September 2015, ICWI replied to that letter and informed Mr Dodd's new attorney-at-law that "unless the details to be provided will contain confirmation that the vehicle involved in the loss was the insured's vehicle, then our position will remain as previously indicated". ICWI's last letter, dated 9 December 2015, did not adjust its position. It said in part, "[p]lease also be good enough to provide us with confirmation that the vehicle involved in the loss was the insured's vehicle".

The request for arbitration

[22] Mr Dodd's attorney-at-law made two written references to arbitration. In his letter dated 1 September 2015, referenced above, the attorney-at-law referred to the arbitration clause in the insurance policy. He said:

> "…If, however, we are unable to arrive at a settlement my instructions are that the arbitration clause in the said insurance contract must be invoked and the matter referred to arbitration at the earliest."

[23] The second reference was in an email dated 27 November 2015. The attorney-at-law stressed the point by saying "[l]et the record show that I had asked that the matter be referred to arbitration".

[24] ICWI made no specific response to those references. It is accepted, however, that the request was not sufficient to trigger the operation of the arbitration clause. The relevant portion of the clause is repeated for context:

> "All differences arising out of this Policy shall be referred to the decision of **an Arbitrator to be appointed in writing** by the parties in difference…" (Emphasis supplied)

[25] The clause required Mr Dodd to nominate an arbitrator, or at least request ICWI to nominate an arbitrator for his consideration. In the absence of that specific communication, there was no referral of the matter to arbitration as was required by the clause.

Conclusion

[26] Based on that analysis, Mr Dodd's claim for indemnity must be found to have been abandoned. Accordingly, his claim in the Supreme Court, being a claim for damages against ICWI for "its failure to indemnify [him] following the loss of [the BMW]", had no real prospect of success. Summary judgment was, therefore, appropriate in the circumstances. The learned judge should have granted it.

[27] It is for those reasons that I agreed to the orders mentioned above.

STRAW JA

[28] I have read the draft reasons for judgment of Brooks P. I agree and have nothing useful to add.

EDWARDS JA

[29] I too have read the draft reasons for judgment of Brooks P. I agree and have nothing to add.