CJ
10.6.97
Insurance

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 80/96

BETWEEN:	BRITISH CAYMANIAN INSURANCE COMPANY LTD.	PLAINTIFF
AND:	ANNE BRENDA DAWSON	1ST DEFENDANT
AND:	CAROLYN VIOLET CARTER	2ND DEFENDANT

For the plaintiff: Mr. D. Murray
For the first defendant: Mr. R. Alberga Q.C. and Mr. Taylor
For the second defendant: Mr. C. Allen

BEFORE DOUGLAS, J

RULING

On 24th April 1997 I dismissed this application by the plaintiff British Caymanian Insurance Company Ltd. (BCI) for an order that all further proceedings in this action be stayed under the inherent jurisdiction of the Court until after the determination of cause No.

29 of 1996 and R v. Anne Brenda Dawson (collectively "the other proceedings"). At the request of the applicant I promised to give this written ruling.

The application was based on five grounds which were as follows:-

1. (a) the question of whether the plaintiff herein shall be required to indemnify the first defendant will not fall to be considered until after determination of Cause No. 29 of 1996;

   (b) that certain questions of fact and law arising herein shall be dealt with by and upon the determination of the other proceedings;

   (c) that the first defendant may incriminate herself or generally otherwise suffer prejudice in the other proceedings if these proceedings are not stayed;

   (d) that it is otherwise necessary and in the interests of justice that a stay be granted;

   (e) that a stay of these proceedings will result in a saving of costs;

Cause No. 29 of 1997, the first of the <u>other proceedings</u> mentioned, is a Writ of Summons filed in the Grand Court by Carolyn Violet Carter (Administratrix of the estate of the late Vendrys Carter) against Anne Brenda Dawson and her son Douglas Dawson. In that action the plaintiff, who is the second defendant herein, is seeking a considerable sum in damages for negligence against the Dawsons on behalf of her deceased husband's estate. It must be noted that both

the plaintiff and the defendant are parties to this action, being the first and second defendants respectively. The second proceedings mentioned is a criminal prosecution in the Summary Court against Anne Dawson for unlawfully permitting her son Douglas to drive without insurance.

BCI the applicant, has instituted this action pursuant to the provisions of Section 15 (3) of the Motor Vehicle Insurance (Third Party Risks) Law, 1990, The section provide as follows:-

> "No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do, apart from any provision contained in it:
>
> PROVIDED that an insurer who has obtained such a declaration as aforesaid in an action shall not hereby become entitled to the benefits of this subsection as respects any judgment contained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the

> said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given, shall be entitled, if he thinks fit, to be made a party thereto."

The applicant having decided to avoid the policy, was constrained by Section 15 (3) (ibid) to file this action seeking a declaration. It is a legal obligation by which the validity of the policy is determined independently and unencumbered by the issue of liability. Without this requirement it would become necessary for injured parties, in many instances impecunious ones, to join the insurance company as a co-defendant, thereby exposing themselves to exorbitant costs should they be unsuccessful in the suit. Taking this one step further, it is reasonable to ask why should such a party, having suffered loss by virtue of a motor vehicle accident, be exposed to the expense of instituting an action in negligence without knowing whether the insurance company will indemnify the defendant who may be a man of straw. This is the position in which Mrs. Carter, the plaintiff in Cause No. 29 of 1996 finds herself. The defendant has signified her intention to declare bankruptcy should she be held liable without the assurance of being indemnified by BCI. With this in mind Mrs. Carter is fully aware that the continuation of that action could prove to be an expensive exercise in futility. Hence the declaration sought by BCI would be of inestimable value to her. In **Zurich General Accident and Liability Insurance Co. Ltd v. Morrison and others,** 1942 A.E.R. annotated, P. 529 at P. 532, as in this matter, the insurance company sought to deny liability on the ground of material misrepresentation and non-disclosure, Atkinson J. had this, inter alia, to say, "a plaintiff about to sue or suing a motor car owner is to be told early on that the insurance company is going to repudiate liability. The plaintiff has to make up his mind whether to go on or not. If the grounds indicated are perfectly clear and he knows the defendant he is suing is not worth powder and shots, he does not waste money in the action...." In the present case the protection of such litigants

must have been paramount in the minds of the enactors of the legislation, and a stay of Cause 80 of 1996, to borrow another phrase of Atkinson J, would be "going in the teeth of parliament."

Having complied with the requirements of the Section by filing this declaratory action, BCI by this application sought to have it stayed. Under its inherent jurisdiction the court has power to order a stay where it is just and convenient to prevent undue prejudice occasioned to a party or to prevent the abuse of process (see Halsbury's Laws of England, 4th Ed. Vol. 37 par. 437).

Before I go into the merits of the grounds of this application there are two observations which I am constrained to make which, in view of the authorities cited, are of fundamental importance. Firstly, I can find no precedence for the filing of an application to stay proceedings by a party who is not a party to the other proceedings. Secondly, this is one of those rare occasions where a litigant is applying to have his own proceedings stayed. In all such matters, the party making the application fears that undue prejudice may result to himself in some other proceedings should his application to stay not succeed. A number of authorities were cited. In each case the applicant was a party to both proceedings, and sought a stay in the interest of justice to his own benefit. In **Jefferson Ltd. v. Bhetcha** (1979) All. E.R. 1108 the defendant who applied for stay of the civil proceedings until the conclusion of the criminal proceedings, was a defendant in both matters. He feared that certain disclosures which would be made in the civil matter would disclose the defence to the criminal charges and prejudice the trial. In another matter, that of **T. Ltd v. Attorney General** (also known as the Avalon case) reported at 1994-95 CILR p. 280, there were related civil and criminal proceedings in which the question in both courts was the same, and the plaintiff, a party to both proceedings, feared that in the other proceedings he would be unduly prejudiced should the matter, the subject of his application, not be stayed. This also was the consideration in the Jamaica case of **Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica** referred to as Suit No. C.L. 1993/D-046 in which the defendant, who

was party to both proceedings, made an application to stay the civil proceedings in fear of his criminal trial being prejudiced by disclosures in the civil proceedings. In another case, that of **Jefferson v. Bhlecha** (1979) 2 All. E.R. 1107 in which the plaintiff was applying for summary judgment, the defendant applied for stay a of the civil proceedings until the conclusion of the criminal proceedings. Here the contention was that the affidavit in opposition to the Summons for Summary Judgment would disclose the defence to the criminal charges and thereby prejudice the trial. None of these authorities can be considered to be of assistance to the plaintiff who is a stranger to the **other proceedings.**

The first ground is based on an inaccurate assumption. It contends that the question of indemnity will not arise until after the determination of Cause No. 29 of 1996. This is clearly not the case. In these proceedings the plaintiff has already applied to the court for judgment against Douglas Dawson the driver of the vehicle, and there appears to be no valid reason why such judgment will not be entered. In such circumstances the question of establishing liability is practically over. If this is established, it will not be necessary to go further and establish that he was the servant or agent of the insured. In order to avoid liability Mrs. Dawson has denied that the insurance policy covers anyone driving with permission or assent of the policy holder. In any event, the insurance will reimburse her unless it is established that no policy covered the car at the time of the accident.

This takes us to the second ground of this application which, in substance, is a submission that certain questions of fact and law arising herein shall be dealt with by and upon the determination of the other proceedings. In this action the plaintiff, BCI, merely seeks declarations that neither the driver, Douglas Dawson, nor the vehicle involved in the accident were insured by it, that there was no effective policy of insurance in force at the material time, and that it is therefore entitled to avoid the said policy of insurance. To put it briefly, BCI seeks a declaration stating that it is not liable

to indemnify anyone on that policy. I cannot see how any question of law or fact arising in this matter could be dealt with by, and upon determination of any of the **other proceedings.** In the criminal court the onus will be on the driver Douglas Dawson to prove, albeit to the balance of probability, that he was driving under a valid policy of insurance. Surely the declaration sought in Cause No. 80 of 1996 would be of the utmost assistance in the determination of that issue.
As far as the other civil proceedings are concerned we have already seen that a default judgment has been applied for against the driver of the vehicle which will then only leave the issue of indemnity.

The third ground argued can be of no concern to the applicant. For BCI to submit that the first defendant may incriminate herself or generally otherwise suffer prejudice in the other proceedings if these proceedings are not stayed, displays a remarkable, but ill-conceived degree of altruism. The only real prejudice to which the defendant is likely to suffer would be as a result of proceeding with the action without an assurance that she will be indemnified should the judgment in Cause No. 29 of 1996 go against her. This ground has absolute no merit. I find it somewhat ironic that those in whose interest BCI so altruistically claims a stay, strongly oppose the application.

I now come to the fourth ground. Here I was urged to grant the stay in the interest of justice. This is precisely the ground on which I have made the order. In this matter justice demands that all the parties to the other proceedings know whether BCI will, or will not honour the policy. Hence in the interest of justice any application to stay the declaratory proceedings ought not to be granted. In this regard I am constrained to adopt the words of Carey J.A. in Dextra Banks and Trust Co. Ltd (supra) when he said "I would state the rule thus, the court in the exercise of its inherent jurisdiction to control its own proceedings is required to balance prejudice between the parties taking account of all relevant factors". As can be seen so far, there is little to tilt the balance of justice in favour of stay of these proceedings.

This brings me to the fifth and final ground, one which appears to be the real motive behind this application. No one can deny that the stay sought would result in a saving of horrendous costs to BCI. This ground is based on the assumption that should Cause No. 29 of 1996 proceed, and Mrs. Carter the plaintiff be unsuccessful, there would be no need for BCI to go forward in this matter, for only should judgment be obtained against Mrs. Dawson will the question of liability be an issue. The fallaciousness of this argument becomes blatantly obvious in view of the reality of the situation. Douglas Dawson, the first defendant in Cause No.. 29/96 and son of Anne Dawson the second defendant, has already pleaded guilty on the indictment for causing death by dangerous driving. He has not filed a defence in the civil action and an application has been made for judgment in default. Having established liability against him all that is left is to establish whether he was her servant or agent. The question whether the vehicle was covered by insurance is a separate one.

In support of this application it has also been submitted that the resolution of the other proceedings, both criminal and civil, will crystalise the issues in this action, making this action easier and hence, less costly. This contention is chimeric. I have already determined that the only issue in these proceedings is that of the validity of the policy. Issues such as liability and negligence which may arise in the other proceedings are not relevant to this matter.

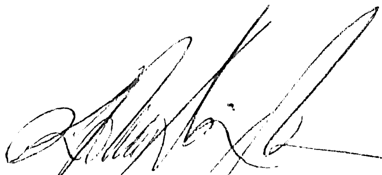
In a final effort to induce the court to order a stay it was suggested that there is a possibility that the amount awarded in Cause No. 29/96 could be less than the costs of the declaratory proceedings in which case BCI may settle. It seems to me that if BCI's fear of excessive costs is genuine it is open to them to take the "bull by horn" and endeavour to settle the matter at an early stage. In this manner a tremendous amount of costs could be saved.

Apart from all the other injustices that could result, the stay which is sought would clearly assist the applicant to defeat the intent of

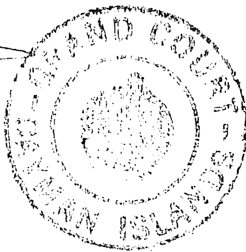
Section 15 (3) (supra). In any event the law does not prevent claimants who wish to proceed to judgment without the benefit of a declaration from so doing. This could be attributed to the fact that not every defendant in such actions is unable to meet the amount claimed without indemnity by their insurance. However when a plaintiff in a negligence action is faced with a situation in which the validity of the defendant's policy of insurance is challenged by the insurer, it would neither be just, nor convenient, for the court to order a stay of the declaratory proceedings.

Accordingly I dismissed the application.

Costs to respondents to be taxed or agreed.



Kipling Douglas
Judge of the Grand Court



10th June 1997