[2010] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 87/2010

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MRS JUSTICE HARRIS JA
THE HON. MRS JUSTICE McINTOSH JA

BETWEEN	**BRITISH CARIBBEAN INSURANCE COMPANY LIMITED**	**APPELLANT**
AND	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**1ST RESPONDENT**
AND	**GUARDIAN INSURANCE BROKERS LIMITED**	**2ND RESPONDENT**

Gordon Robinson and Jerome Spencer instructed by Miss Linda Mair of Patterson Mair Hamilton for the appellant

Michael Hylton, QC and Miss Jo-Anne Jackson instructed by Michael Hylton & Associates for the 1st respondent

28 October; 11 November & 20 December 2010

PROCEDURAL APPEAL

PANTON P

[1] On 11 November 2010, we made the following order in this matter:

> "Appeal dismissed. Order of Anderson, J affirmed. Costs to the 1st respondent to be agreed or taxed."

The following are our brief reasons.

[2] The appellant was granted leave to intervene in the suit brought by Advantage General Insurance Co Ltd against Guardian Insurance Brokers Ltd. In that suit Advantage General is claiming the sum of $123,231,806.79 collected by Guardian Insurance as insurance premiums on behalf of Advantage General by virtue of a broker agreement. These sums ought to have been paid over to Advantage General net of commission within 30 days of the month in which the insurance transaction was effected. Advantage General is claiming that there has been a breach of the broker agreement, and in addition to claiming the sum mentioned above, is also seeking damages for breach of fiduciary duty and for fraudulent conversion of the sums received from policy holders on its behalf.

[3] The suit by Advantage General was filed on 16 March 2010. On that date, Beckford J made an ex parte order to last until 13 April 2010, restraining Guardian Insurance from disposing of, withdrawing, transferring or diminishing in any way any funds in its accounts save in so far as such funds exceed the sum claimed. This order was extended by Morrison J until 13 May 2010. At the hearing before Morrison J both parties were represented as well as an intervening third party, NEM Insurance Company (Jamaica) Limited.

[4] On 29 April 2010, Guardian Insurance filed an application seeking the lifting or varying of the freezing order in respect of its accounts, numbered

211842466 at National Commercial Bank, 381-2014 at First Caribbean International Bank, and 135-8068 at First Global Bank Company Limited. On 14 May 2010 this application was refused by Pusey J, who ordered that the freezing order should remain in force until the trial of the matter. Both parties were represented, as also was another intervening third party, Jamaica International Insurance Company Limited. Leave to appeal was granted.

[5] The appellant herein filed an application on 14 May 2010 seeking permission to intervene in the proceedings and for an order to vary the freezing order to allow Guardian Insurance to pay over to the appellant the sum of $3,354,841.46 out of its accounts at First Caribbean International Bank and National Commercial Bank. This application was heard on 6 July 2010 by Anderson J who granted permission to intervene but denied the application to vary the freezing order. He granted leave to appeal. It is this appeal that has captured our attention.

[6] Anderson J took the view that the application had already been determined by Pusey J and that the appellant and Guardian Insurance had a privity of interest, thereby rendering the appellant's application an abuse of the process of the court.

[7] The appellant managed to file as many as five grounds of appeal in respect of this matter. They are as follows:

"1. The Learned Judge erred in determining that the issue to be determined on the Intervening Third Party's/Appellant's application to vary Freezing Order filed on May 14, 2010 was the same issue determined by the Honourable Mr. Justice Pusey on the Second Respondent's Notice of Application for Court Order filed on April 20, 2010 in the absence of any evidence as to what was determined by the Honourable Mr. Justice Pusey.

2. The learned Judge erred in deciding that the Intervener/Appellant's application was barred by virtue of issue estoppels when on the face of it the matter decided by the learned Judge the Honourable Mr. Justice Pusey had been contested by parties other than the Intervener/Third Party who had not participated in that application as it was not then a party to the proceedings.

3. The Learned Judge erred in barring the Intervener/Appellant's application to vary the Freezing Order based only on vague and generalized submissions made by learned Queen's Counsel for the Claimant/Respondent as to what were the issues raised in the earlier similar application by the Second Respondent and without any specific information being laid before him as to what those specific issues were and how they might differ from the issues raised by this Intervener in its separate application.

4. The Learned Judge erred in refusing to permit the Intervener/Appellant to

proceed with its application to vary when, had he enquired or asked for evidence to be adduced on the subject, he would have discovered that the issue being raised by this Appellant in its application to vary namely that the funds in question were held in trust by the Second Respondent for the Intervener was not raised by the Second Respondent in its earlier application to vary nor was it considered by the Learned Judge the Honourable Mr. Justice Pusey. The sole issue raised by the Defendant in its earlier application was whether or not a payment to the intervener would be a payment made in the normal course of business.

5. The Learned Judge erred in concluding that Appellant's application was an abuse of process *ipso facto* that the same issues may have been determined and there was a privity of interest."

[8] Mr Gordon Robinson for the appellant submitted that there was nothing before Anderson J to indicate what was the issue or the evidence before Pusey J. In the circumstances, there was no factual basis for it to be considered that the application before Anderson J amounted to a re-litigation of the issue that had been before Pusey J. In refusing the application on a preliminary objection, according to Mr Robinson, the learned trial judge deprived the appellant of its constitutional right to raise an issue not yet raised on its behalf. Mr Robinson sought to show that the applications were different by comparing and

contrasting the grounds on which they were made. In the case of the appellant, he said that the issue that Anderson J was asked to determine was whether the premiums held by Guardian Insurance were held on trust for it whereas in the application by Guardian Insurance there was no indication that Guardian Insurance was taking the position that the premiums belonged to the various insurance companies.

[9] Mr Hylton, QC, for Advantage General, submitted that the single issue was whether the appellant, being one of 11 insurance companies, was entitled to payment of sums collected on its behalf and held in the identified accounts. This issue, he said, was before both judges.

[10] It seems to us that whether the sums are held in trust or not is irrelevant in determining this issue. It is a fact that Guardian Insurance has collected monies on behalf of the appellant and other companies. An order was made forbidding and restraining dealing with the accounts. Guardian Insurance applied for a removal of that order. That is the same thing the appellant is seeking. Guardian Insurance's application was refused. There is nothing further to litigate. Allowing the appellant to pursue what is in fact the same course with the same purpose would amount to a waste of the court's time and resources. Anderson J was correct to have upheld the preliminary objection. There has to be an end to litigation. The parties may now concentrate their efforts in having

the case tried as early as possible as there is nothing further to be gained by repeating these applications.