IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

Action No.: CL 35/18

BETWEEN: **COMPASS POINT HOLDINGS, LTD.**

PLAINTIFF

AND

1. NAGICO INSURANCE COMPANY, LTD.

2. NW HAMILTON INSURANCE SERVICES, LTD.

DEFENDANTS

RULING

Before: **Mr. Justice Carlos W. Simons QC**

Appearances: **Mr. Wendal Swann of Swann & Swann, Attorneys for the Plaintiff**

Ms. Deborah John-Woodruffe of Misick & Stanbrook, Attorneys for the First Defendant

Mrs. Nayasha Hatmin of Stanfield Greene, Attorneys for the Second Defendant

Hearing Date: **Tuesday, 27 April 2021**

Venue: **Court No. 5, Graceway Plaza, Providenciales**

Background

1. This action has had a troubled procedural history. In the following background summary, I give only the highlights in so far as I consider those to be relevant to this Ruling.

2. The action started life as a claim in negligence against the second defendant only. The plaintiff's complaint arises out of property damage caused during the hurricanes of September 2017. The writ and statement of claim were filed on 13 April 2018 claiming damages for negligence. The second defendant acknowledged service on 11 May 2018 but by 12 June 2018 had not put in a defence. The plaintiff filed for default judgment on 13 July 2018, but this was set aside by consent on 5 October 2018.

3. Inexplicably, a full seven (7) months later, an amended writ of summons and (what is described as) an amended statement of claim was filed by the plaintiff on 23 May 2019. I use the words in brackets to indicate that there are none of the usual markings on the statement of claim to show amendments from the original pleading. The first defendant was now joined. Mr. Swann says that was with the leave of the court. However, the only indication of leave having been granted is a notation in red type at the foot of the writ that reads:

   "This Writ is amended this 12th day of March 2019, pursuant to leave granted by Her Ladyship, Chief Justice Margaret Ramsay-Hale on 27th January 2019."

4. It appears this note is erroneous and should read "27th February" which is the date mentioned in Mr. Swann's cover letter to the Registrar on 23 May filing the documents. It is puzzling why leave to amend, granted on 27 February was not taken up until three months later! At any rate, no formal order granting leave to join the first defendant (as opposed to mere leave to amend), or any direction requiring the joinder of the first defendant, has been produced and the court's minute of order signed by the former learned Chief Justice following the 27 February hearing makes no mention of joinder of the first defendant. This seems to have been a hearing of NW Hamilton's (then the sole defendant) summons to strike out the statement of claim. It is also not clear that any draft amended writ or statement of claim was placed before the court at the time.

5. In addition, I have looked at Mr. Swann's written submissions opposing the strike out application by NW Hamilton and that also makes no mention of joining the first defendant. However, this is not to say that there was no discussion between counsel and the learned Chief Justice regarding the matter. This line of investigation is important because when asked, counsel for the Plaintiff says that the court directed the joinder of the first defendant, and he repeats that assertion in his Skeleton Argument opposing the first defendant's summons. However, as mentioned above, no written indication of that direction has come to my attention and in any event, I am bound to apply the procedural rules of the court regarding joinder as I find them.

The Plaintiff's claim Against the First Defendant

6. The kernel of the plaintiff's claim against the first defendant is at paragraph 8 of the amended statement of claim where the plaintiff pleads:

"The first defendant, wrongfully, and in breach of the contract of insurance with the plaintiff, has refused to settle the [plaintiff's] claims, citing irregularities in the procedure adopted by the second defendant in placing the cover."
And at paragraph 9:
"The first defendant, by its refusal to settle the claim under the policy of insurance, has breached the contract of insurance between itself and the plaintiff, and by doing so has caused the plaintiff loss and damage."
On this basis the plaintiff claims damages, interest and costs as set out in the prayer for relief. It is noteworthy that there is no particularization of the alleged loss and damage, nor is there any differentiation as between the first and second defendants as to individual liability for any part thereof, nor as to the cause of action against either.

7. It is also noteworthy that notwithstanding paragraphs 8 and 9, no breach of contract is specifically pleaded against the first defendant. Paragraph 5 comes close but can hardly be said to amount to a specific, full throated allegation of breach of contract such as is required by the principles of pleadings. The consequence is obvious – first principles would suggest that a litigant will not normally be allowed to lead evidence of an allegation he has not pleaded.

8. The first defendant filed its defence on 26 July 2017. The fact that these pleading deficits are not addressed, except tangentially at paragraph 8, and are not specifically complained of in the first defendant's application does not preclude the court from taking note of them of its own motion and weighing them in the balance of the outcome of the first defendant's summons.

9. By an amended summons for directions on 22 September 2020 the first defendant sought *inter alia* to amend its defence. Again, no point was taken on the pleading deficiency – I suppose because as I indicated earlier, an allegation of sorts can be teased out of the language. However, in addition to denying the existence of a contract, the first defendant now pleaded in the alternative, contractual time bar – quoting paragraph 8 (c) of the proposed amended defence:
"Liability under the contract expired twelve months from Hurricane Irma, which occurred on 6 & 7 September 2017. Proceedings were commenced against the 1st Defendant on 23 May 2019, this being over twenty months after Hurricane Irma."
Following a full hearing of the 1st defendant's summons for directions, leave to amend was granted by the Learned Chief Justice in paragraph 1 of a Directions Order made on 1st December 2020 and signed on 8th December 2020.

The First Defendant's Summons

10. This then, is the context in which the first defendant brings its application. By summons filed on 11 March 2021 the first defendant seeks the following relief:
    i. Striking out of the plaintiff's claim against it under RSC O. 18 r. 19 (1) (b) and (d) and/or under the inherent jurisdiction of the court; and/or
    ii. That the first defendant should cease to be a party to the proceedings forthwith pursuant O. 15, r. 6 (2) (a), having been improperly joined by the plaintiff.

11. The summons is supported by the first affidavit of Shantae Francis which exhibits some of the material upon which the first defendant relies and to which references will be made over the course of this judgment.

Striking Out

12. O. 18 r. 19 (1) (b) provides that the Court may at any stage of the proceedings order to be struck out or amended any pleading…on the ground that it is scandalous, frivolous, or vexatious; and paragraph (d) of that rule allows striking out etc. if the offending pleading is otherwise an abuse of the process of the Court. In either case the Court may order the action to be dismissed.

13. The first defendant initially denied the existence of a contract of insurance between it and the Plaintiff and in the alternative, if a contract of insurance exists, the Plaintiff failed to perform its duties thereunder and it is not liable to the Plaintiff whatsoever. But having now pleaded the contractual time bar in the alternative, Ms. John-Woodruffe relies on that to make her case under the rule. She told me that when the defence was initially filed she had not identified the contractual time bar clause at paragraph 19 of the "NAGICO Insurances Fire & Extended Perils Policy" (the policy document) that was exhibited to her affidavit in support of her amended summons for directions, referred to in paragraph 9 above.

14. Clause 19 of the policy document is in the following terms:
"In no case whatever shall the Company [the first defendant] be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."
Ms. John-Woodruffe submits that, if which she continues to deny, there is a contract between the Plaintiff and the first defendant (as the plaintiff contends) then this clause is a clear and unambiguous bar to the plaintiff's claim, such as to bring it within the strike out purview of RSC O. 19 r. (1) (b) and (d). She further submits that "as soon as an unanswerable time bar is pleaded the 1st Defendant is not a proper party to the proceedings and is entitled to an order that it cease to be a party…"

15. In support of her contention in this regard Ms. John-Woodruffe relies *inter alia* on the English Court of Appeal case of *Riches v. Director of Public Prosecutions* [1973] 1WIR 1019. There the court considered the defendant's application to dismiss on grounds that included the assertions that the action was frivolous etc., or that it was statute barred under the Limitation Act 1939, and she quotes the following passage from the judgment of Stepheson LJ:
"…it would be absurd for the court, faced with an application…to strike out…a claim as an abuse of process…to shut its eyes to the fact that there is going to be raised an apparently unanswerable plea of the Limitation Act 1939…Why should such a claim not be an abuse of the process of the court? Why should not the court exercise its inherent jurisdiction to stay or dismiss an action which must fail?"
And this:
"In my judgment, Justice requires that no further time or money should be wasted by either party on litigation which can only end with the failure of the plaintiff's clam…" and so "both in justice and in mercy, we ought to put an end to it now by dismissing this appeal."

16. Ms. John-Woodruffe further submitted that the time bar defence is not limited to statutory limitation periods but is also applicable to contractual limitation periods. In support of that contention, she relied on the judgment of Sir Ross Cranston (sitting as a judge in the Queen's Bench Division of the Commercial Court) in the case of *Boskakis Offshore Marine Contracting v. Atlantic Marine and Aviation LLP (the Atlantic Tonjer)* [2019] EWHC 1213 (Comm).

17. In that case the principal issue was whether an invoice "due date" contractual time bar, on its proper construction, precluded charterers from raising defences to owners' invoices where they (charterers) failed to notify the owners by the due date that they believed the invoices to be incorrect. After citing recent case law authorities extolling long accepted principles of contractual interpretation, the learned Judge had this to say at paragraph [21]:
"The principles of contractual interpretation are well known…The aim is to ascertain the objective meaning of the parties' language by considering the contract as a whole in its wider context. One asks what a reasonable person…would understand was meant. Where there are rival meanings, the court can consider which one is consistent with business common sense."

18. Paragraphs [22], [23] and [24] are also instructive:
"The courts have long required a clarity of language with provisions which restrict the rights and remedies normally available to a party…parties do not normally give up valuable rights without making it clear they intend to do so." [paragraph 22]; and: "Giving up contractual rights can take various forms. One example is the exclusion or limitation clause. The courts have exhibited a traditional hostility to such clauses." but "at least in commercial contracts made between parties of equal bargaining power, exclusion and limitation clauses are an integral part of pricing and risk allocation and must be interpreted as with any contract term." [paragraph 23]; and also: "Another example is the time bar clause; claims have to be advanced within a specified period to be valid." but the clause must not be ambiguous as it might then offend "the fundamental rule that a contractual clause intended to cut down the rights which a party to a contract would otherwise enjoy, must be expressed in clear and unambiguous language." [paragraph [24].

19. The court in this case found the clause under consideration to be "clear and unambiguous." such that "A reasonable person…would understand that invoices had to be paid within 21 days of their being received…The language that payment 'shall be received within the number of days stated in Box 24 from the date of receipt of the invoice' is precisely equivalent…to what might be equally stated in the negative form, namely, that charterers are barred from disputing the payment of invoices unless done within the 21 days referred to in the contract."

20. Finally, I was shown the case of *Bhatia Shipping and Agencies PVT Ltd v. Alcobex Metals Ltd.* [2004] EWHC 2323 (Comm), a decision of Mr. Julian Flaux QC sitting as a Deputy High Court Judge in the Queen's Bench Division of the Commercial Court. Here the meaning of a time bar clause if proceedings were not commenced within nine months of certain events fell to be considered. After discussing the occurrence of the event from which time ran, the learned Judge said:
"It necessarily follows that the 9-month period for the bringing of an action under cl 22 expired, at the latest on 17 February 2003. Once that date had passed, any right of Alcobex to bring an

action against the Claimant was extinguished. No authority is needed for this self-evident proposition…that the English courts will construe time-bar clauses as extinguishing the right to bring a claim…"

Improper Joinder

21. Under O. 15 r. 6(2) (a), at any stage of the proceedings in any cause or matter the Court may…on application order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party. It is not necessary for me to comment on the Plaintiff's attorney's insistence that the former learned Chief Justice ordered or directed the joinder of the first defendant. What is clear from the court record is that the time bar clause was never shown to her. The red inked note at the foot of the Plaintiff's Amended Writ of Summons indicates that leave to amend the writ and statement of claim was granted on 27 January 2019 (or 27 February 2019) if we take the date mentioned in the covering letter dated 23 May 2019 filing the amended pleadings). Either way, a copy of the policy document did not come on to the court file until the first defendant's summons for directions and affidavit in support were filed on 27 July 2020. Even then, as thorough as she has been in this matter, Ms. John-Woodruffe seems to have missed clause 19, necessitating the filing of an Amended Summons for Directions on 22 September 2020, in which she sought, and was granted leave to file an amended defence to plead the time bar clause.

22. Counsel for the first defendant relied on the discussion of the rule at note 15/6/7 (p. 224) of the White Book 1999 and the case of *Liff v. Peasley* [1980] 1 W. L. R. 781 which is cited as authority for the proposition that the joinder of a person as a defendant when the claim against him is time-barred is contrary to the rule of practice and that the added defendant is entitled to an order that he cease to be a party to the action properly or necessarily joined.

23. Finally, I take note of the contents of, and the correspondence exhibited to the First Affidavit of Shantae Francis sworn on 10 March 2021 and filed on 11 March 2021 in support of the first defendant's summons presently under consideration. The points of law are dealt with in the 1st Defendant's Skeleton Argument and the correspondence and other factual matters reflect substantially the state of the court file.

24. In paragraphs 6 through 9 Ms. Francis makes the point that no application was made to add the first defendant as a party to the action and that no leave was granted for this to be done. Given the stage the proceedings had reached by this time, such leave would have been required on any reading of O.20 rr. 1 and 5. However, I do not agree as Ms. Francis suggests that no leave was granted for the amendment of the statement of claim. The first limb of the Minute of Order: "1. Plaintiff to deliver proposed / draft Amended Statement of Claim to Defendant on or before 13 March 2019." clearly suggests that leave to amend the pleading was granted, though no perfected order would seem to have been prepared by counsel for issuance.

The Plaintiff's Case on the Summons

25. When the parties first came before me on 19 April, I invited counsel for the plaintiff to submit a skeleton argument with authorities on the basis of which he resists the first defendant's summons, and I granted an adjournment for that to be done.

26. The time bar is dealt with at paragraphs 9 and 10 of the Plaintiff's counsel's Skeleton Argument. First, at paragraph 10 he says:
"The court must determine as a fact, whether there is a contract of insurance between the plaintiff and the 1st defendant. This determination cannot be made without an investigation into the facts. Consequently, the court must not deal with the matter under O. 18. (19), as the defendant is required to satisfy the court that the plaintiff is bound to fail. But the court is prohibited from holding a mini trial in order to come to that conclusion."

27. In fact, the court does not have to determine whether there is a contract of insurance between the plaintiff and the first defendant. The first defendant pleads its case in the alternative – it denies the existence of the contract alleged by the plaintiff but says that even if it exists, it is contractually time barred. A defendant is perfectly entitled to do that; it is a common pleading format and to do so is not to blow hot and cold, which is generally not permitted. So, for the purposes of its application on the instant summons, the first defendant effectively concedes that the contract exists but pleads the time bar in its defence. If I find that the time bar is unanswerably then no factual inquiry is needed; the first defendant must be released from the proceedings because the case against it is bound to fail.

28. Secondly, at paragraph 13 of his Skeleton Argument, Mr. Swann says:
"The 1st defendant relies heavily on the expression, *A reasonable person with the background knowledge available to the parties at the time of the contract.* But the plaintiff had sight of the contract for the first time in July 2020, when it was exhibited to the affidavit of the 1st defendant's attorney…By this test then the plaintiff had no background knowledge available to it, since before the policy document was prepared, the damage had already occurred…"
This misstates the point. The test is an objective, not a subjective one – it is, what would a reasonable man think the parties to have intended? It is "the man on the Clapham omnibus" test that has been immortalized in English jurisprudence. The TCI equivalent might be the man in the Five Cays jitney – no offence to Five Cays as I am sure none was intended to Clapham.

29. At paragraph 14 the plaintiff submits that Condition 19 [clause 19 of the policy document] "does not say that court proceedings may not be started *after the expiration of twelve months from the happening of the loss or damage,* as is advanced by the 1st defendant. Rather it says that the insurer avoids liability under the policy, if a claim against the policy is made after that time."
Mr. Swann goes on to assert that:
"Time limits for initiating court proceedings are usually governed by statute. So, in the majority of cases cited by the 1st defendant…the bar is the result of…the statute of limitations. In the context of the Turks and Caicos Islands, where there was no national statute of limitations, we rely on the practice and procedure of the UK, under which the limitation of actions for breach of contract in insurance matters is six years from the date on which the cause of action accrues."

30. There seems to me to be clear answers to these two submissions – first, there is no difference between saying that an action may not be brought after twelve months from the event of loss or damage and saying that the defendant is not to be liable if a claim is made after that time. Expressed either way the defendant is not liable and is improperly joined. Secondly, the case of *the Atlantic Tonjer* discussed earlier in this Ruling, and at greater length in Ms. John-Woodruffe's Skeleton Argument is highly persuasive recent authority for the proposition that the time bar defence is not limited to statutory periods but extend to contractual limitation periods as well.

31. At paragraph 18 of his Skeleton Argument Mr. Swann refers to the March 2021 case of *Hongfa Shipping Co. Ltd. v. Ms. Amlin Marine NV* decided by Judge Mark Pelling QC in the Queen's Bench Division. It is unfortunate that the full text of the judgment is not available, as the Court could only have been further enlightened by having sight of it. However, it is to be noted that Mr. Swann's reference in the paragraph is to an "exclusion clause" and not to a "contractual time bar clause", which is somewhat of a different animal.

32. Mr. Swann insists at paragraph 19 of his Skeleton Argument that it was the Court that directed the amendment of the proceedings to include the first defendant and he draws my attention to O. 15 r. 6 (2) (b) which gives the court power of its own motion to add a party to proceedings before it. He says:
"The 1st defendant was added as a party on the direction of the court."
The problem with this contention is that there was no application before the court for joinder of the first defendant and there is no perfected order to show that leave to do so was granted. The application before the court on 27 February 2019 was the second defendant's application to strike out the plaintiff's statement of claim. It is unlikely that on such an application there could have been anything more than casual conversation between the bench and counsel regarding the joinder of the first defendant. At any rate it is clear that the court's attention was not directed to the policy document and the time bar clause. And in any case *Liff v. Peasley*, referred to above is high authority against joinder in such circumstances.

33. I do not consider that the discussion of note 15/6/2 of the White Book that Mr. Swann undertakes at paragraph 20 of his Skeleton Argument takes the matter any further, nor do the points made over paragraphs 21 to 23 of his submissions and the email correspondence attached. In particular, paragraph 22 is just wrong in law.

34. I also note but have not found it necessary for the purposes of this Ruling to refer to the First Defendant's Responsive Submissions filed on 24 April 2021. I must however apologize for taking Ms. John-Woodruffe's submissions on striking out and improper joinder in reverse order. I did so because I considered that if, on its proper construction, the contractual time bar clause led to the conclusion that the plaintiff's action against the first defendant must fail, then the joinder of the first defendant must, of necessity have been improper and the order prayed that the first defendant cease to be a party must be granted.

35. Although the matter did not directly concern the second defendant, its counsel Mrs. Hatmin was kind enough to provide the Court with her written submissions and case law reference, generally in support of the position of the first defendant. For that I am grateful.

Decision

36. I therefore order that the first defendant shall have the relief prayed in its summons filed on 11 March 2021 on the basis that the plaintiff's claim against it offends RSC O. 18 r. 19 (1) (b) and (d); and that the first defendant has been improperly joined in the proceedings within the meaning of RSC O. 15. r. 6 (2) (a) and should forthwith cease to be a party.

Costs

37. In principle and in ordinary circumstances, there is no reason why the first defendant should not have its costs against the plaintiff. However, given the controversy surrounding the circumstances in which the first defendant came to be joined, I will consider the parties' written submissions on costs, received within three days of the circulation of this draft Ruling.

38. I am deeply indebted counsel all round for their assistance, their diligence, and their courtesies.

Decision on Costs

39. For the reason indicated at paragraph 37 above, I invited counsels' written submissions on costs. I have those now and have reviewed them. As I expected, Ms. John-Woodruffe's are well-reasoned and based soundly in legal precedent and principle. However, I must do justice between the parties as best I can, and in that effort in the exercise of my discretion, I make no order as to costs for the following reasons:

    a) As Mr. Swann notes at paragraph 1 of his submissions, the first defendant did not always take the position it now does. Indeed, the first defendant initially appointed claims adjusters to assess the plaintiff's claim, following which an offer of settlement was made; and

    b) The first defendant was therefore late in bringing on the applications upon which it has now succeeded so resoundingly but which if, brought on earlier might have saved considerable time and costs.

40. For these reasons I consider that as between the plaintiff and the first defendant each the party should bear its own costs. Of course, the second defendant is not involved in this aspect of the dispute and so has no standing in the matter of costs at this stage.

21 May, 2021

Sgd.

Mr. Justice Carlos W. Simons, QC

Supreme Court Judge