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Your ref: PL/JEA/EB/MIAH/79351/16

14 May 2018

Dear Sir/Madam

Re: Case Number: D84YJ861 Mr Md Dulah Miah v Mr Sorin Minea

Please find attached the Final Judgment in this matter.

Yours sincerely,

Mr Gareth Bluett
Judicial Support Section
Ext 2286

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General Form of Judgment or Order

In the County Court at Liverpool	
Claim Number	D84YJ861
Date	14 May 2018

THE COUNTY COURT

MR MD DULAH MIAH	**1st Claimant** **Ref** PL/JEA/EB/ MIAH/79351/16
MR SORIN MINEA	**1st Defendant** **Ref** RSAP0538297200
ROYAL & SUN ALLIANCE (PROPOSED 2ND DEFT)	**2nd Defendant** **Ref** MHL NHG 2018780 277

Amended pursuant to Section 40.12 CPR 1999

Before District Judge Baldwin sitting at the County Court at Liverpool, Liverpool, Civil And Family Courts, 35 Vernon Street, Liverpool, L2 2BX.

Upon the Court being informed that no issues of costs remains

IT IS ORDERED THAT

1) Application dated 27th October 2017 is dismissed.

Dated 26th April 2018

Amended 14th May 2018

Case No: D84YJ861

IN THE COUNTY COURT
SITTING AT LIVERPOOL

35 Vernon Street
Liverpool
L2 2BX

Hearing Dates: 23rd November 2017
8th March 2018

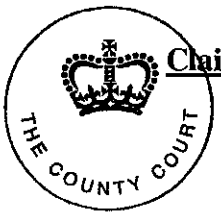
Before:

DISTRICT JUDGE BALDWIN

- - - - - - - - - - - - - - - - - - - -

Between:

MD DULAH MIAH — **Claimant**



-and-

SORIN MINEA — **Defendant**

-and-

ROYAL & SUN ALLIANCE INSURANCE PLC — **Proposed Second Defendant**

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Mr Andrew Hogan (instructed by Armstrongs Solicitors Limited)
for the Claimant
Mr Steven Turner (instructed by DWF LLP) for the Proposed Second Defendant

JUDGMENT (Approved)

Introduction and background

1. This is my decision in relation to the application of Royal & Sun Alliance plc ("RSA") in these proceedings, dated 27th October 2017. The application is supported by 3 witness statements of Mark Holmes, solicitor with conduct on behalf of RSA, dated 27th October 2017, 13th November 2017 and 21st November 2017 respectively. The application is opposed by the Claimant who relies upon the witness statement of David William Morris of the Claimant's solicitors dated 17th November 2017. I also have before me a written note of submissions from Mr Hogan for the Claimant and a copy of *Gentry v Miller* [2016] EWCA Civ 141, upon which the Claimant relies heavily and I have benefited from helpful submissions from both counsel at both hearings in relation to this part heard matter.

2. By way of background, RSA is the acknowledged motor insurer of one Daniel Sandu in relation to a vehicle with registration number T387 GKO, a VW Passat, at the material time. The relevant policy was incepted on 10th March 2016 utilising an address in Fordingbridge, Hampshire. The Claimant alleges that on 13th March 2016 he was riding his motorcycle, seemingly in the course of his employment as a fast food delivery driver, when the Passat was driven into collision with its rear. The Claimant contends the Passat was being driven at the time by the current Defendant, who, however, was not a named driver on the policy. "Due to information received", RSA avoided the policy by letter to Mr Sandu dated 17th March 2016, but nevertheless now accepts that it retains a contingent liability to satisfy any relevant judgment arising out of matters occurring during the period when it was on risk.

3. The Claimant issued proceedings on 1st June 2017 upon the Defendant at his last known address, namely 8 Bath Road, London E7 8QQ, claiming general damages for personal injuries together with special damages, the

vast majority of which comprised a claim for hire of an alternative vehicle at a credit rate, amounting to £61,124.64 at the date of service of proceedings and continuing at the rate of £97 per day net of VAT. There was also a claim for the pre-accident value of the motorcycle in the sum of £1,060.

4. Proceedings went unacknowledged and a regular default judgment was accordingly entered on 29th July 2017 for an amount to be decided and costs. On 16th August 2017 the court gave notice that the claim was listed for a disposal hearing on 12 October 2017 at 2 p.m. On 14 September 2017 the Claimant issued an application for an interim payment in relation to the pre-accident value of the motorcycle together with recovery and storage charges which, by notice dated 19th September 2017 was listed for hearing on 5th October 2017 at 3.45 p.m.

5. At the hearing of the interim payment application, which was unopposed, despite the imminence of the disposal hearing, the court granted an interim payment. Nevertheless, by the time of the disposal hearing the hire claim had increased to £84,029.04, according to an updated schedule of loss dated 12th October 2017. On 9th October 2017 the court received the Claimant's bundle for the purposes of the disposal hearing and on 12th October 2017, in the absence of any attendance on behalf of the Defendant or RSA, Deputy District Judge Davies granted judgment in the total sum of £88,499.63 and ordered the Defendant to pay the Claimant's costs in the sum of £26,925.49.

The application

6. Accordingly, by way of the above application RSA seeks to be joined into these proceedings as Second Defendant and applies for both the final judgment and the default judgment to be set aside and for provision to be made for the service of a Defence. In that regard, I also have before me Mr Turner's draft Defence.

7. That draft makes the following averments:-

(i) The address of Mr Sandu on the policy does not exist;

(ii) there is no trace of the Defendant ever having been resident at his last known address;

(iii) RSA will have at least a contingent liability as an Art. 75 insurer;

(iv) RSA adopts a strict non-admission stance, putting the Claimant to strict proof of his claim, in the context of other matters of concern or indicators of fraud in addition to the foregoing, namely:-

(a) motor trader searches were carried out on the Passat on 11th March 2016, suggesting an intention to dispose of the vehicle;

(b) the Claimant, potentially dishonestly, failed to disclose his full accident history for the period 2014 to 2015.

8. RSA accepts that it is not in a position positively to plead fraud, but reserves the right to serve an amended Defence, should further investigations justify the same. By way of counter schedule, RSA avers that the sum claimed for hire is manifestly excessive and representative of a gross failure to mitigate loss, particularly when seen in the context of the alleged pre-accident value of the motorcycle and that no reasonable person would have incurred such a level of charges, if spending their own money. In addition the Claimant is put to strict proof of need, period and rate in relation to the hire claim.

The court's approach and the tests to be applied

9. It is common ground that the court should proceed to consider the application to set aside the default judgment pursuant to CPR r 13.3 and, if satisfied, thereafter r 3.9, applying the "Denton" criteria (*Gentry*) and then, if judgment is not at that stage set aside, proceed to consider the application to set aside the final judgment (quantum only) pursuant to r 39.3(5) and, if satisfied, thereafter once again r 3.9 (*Gentry*). Should both judgments be set aside, there is no issue that RSA should be joined as a Second Defendant with permission to rely upon its Defence.

The application to set aside the default judgment

10. In order for the default judgment to be set aside I must be satisfied that the defence has a real, as opposed to fanciful prospect of success and I must have regard to whether the application has been made promptly. If considering setting aside judgment pursuant to that test, I must nevertheless also apply the Denton three stage test or "serious or significant breach", "why the default occurred" and "all the circumstances of the case", giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders.

Relevant chronology and associated evidence

11.

13/3/16	D provides insurance details for the purposes of Police report at scene "RSAPO0538297200 Royal & Sun Alliance"
5/9/16	D convicted of "No Driving Licence" but not "No Insurance"
24/11/16	C sends CNF to RSA as insurer (reference to engineer's report)
25/11/16	RSA rejects the claim and it exits the Portal (no reason given / evidenced – once a rejection takes place, RSA wipes its records)
17/1/17	C sols > RSA enclosing copy hire agreement & requesting payment of PAV and hire[1] (Policy no. quoted)
14/3/17	C sols > RSA – repeat letter Second letter – request for recovery & storage payment
3/4/17	Armstrongs receive copies (not originals) of both 14/3/17 letters back with handwritten endorsement from RSA explaining no cover in force and "converts to Article 75"

[1] CNF entitled to stand as letter of claim, see PAP for PI Claims para. 5.5

5/4/17	C sols return copies of 14/3/17 to RSA asking for confirmation of insurance status within 7 days, or proceedings would be commenced with notice to the MIB
4/5/17	RTA88 s. 152 notice > RSA (claimed not received)
1/6/17	Date of Issue
7/6/17	Letter serving proceedings on D C Sols > D further letter requesting hire & PAV (hire totals £62,625.12; no mention of proceedings having been issued)
6/7/17	RSA > D (quoting insurer claim number 20106030373) "neither the insured nor the vehicle was insured under any RSA policy at the date/time of the incident...we have proceeded to close our file"
29/7/17	Default judgment
16/8/17	Notice of Disposal
28/9/17	C serves costs schedule in relation to interim payment application upon D and RSA (schedule contains Claim No, Court, date of application and date of hearing, but not time of hearing)
4/10/17	Correspondence which is accepted as being received by RSA scanned onto the claims history; because insurer "claim number" not used, this "at the very least" delays correspondence being put on the correct file
1/11/17	RSA app to set aside received by the Court

Real prospect of success

12. Mr Turner, on behalf of RSA, submits that there is more than a fanciful prospect of the defence succeeding, in particular in the context of the apparent concealment from the medico legal expert by the Claimant of his accident history. Therefore, he would effectively suggest, this is a "put to proof" with some teeth to it.

13. Mr Hogan, for the Claimant, submits that in the absence of a pleading of fraud, it being accepted that there is no evidence currently to support the

same, a non-admission or put to proof type of defence is insufficient post-judgment and that there is a specific burden upon RSA to raise a positive defence on the issues.

14. I start by observing that it does not automatically follow that, because there are concerns as to one of the drivers or vehicles involved in an alleged collision, there is a more than fanciful prospect of the driver of the other vehicle lacking credibility per se. In my judgment, for the test to be satisfied there needs to be something concrete of specific concern about, in this instance, the Claimant for there to be a prospect of the test being satisfied. The only matter of concern raised by RSA in relation to the Claimant in the draft Defence is the suggestion that he has been less than honest about his medical history when being examined by Dr Ather on 6th May 2016.

15. It is correct to note that in Dr Ather's report he only records a declaration of one previous accident in 2014 involving the Claimant's neck and left knee, from which he is said to have made a full recovery within 7 to 8 months. I then turn to the evidence relied upon by RSA in support of this aspect of the application. This, it seems to me, and insofar as it has been translated to the draft Defence, consists of the averments made by Mr Holmes at paragraph 41.5 of his first witness statement, namely that RSA is aware that the Claimant has in fact been involved in road traffic accidents on 26th August 2014, 25th January 2015 and 20th June 2015 in addition to the index accident, pursuing a claim for injury on each occasion. I find it thoroughly surprising, in the context of an application of this importance to RSA, that this part of the evidence relied upon in support of the application is entirely unsupported by the documentation presumably giving rise to this particular contention.

16. As is pointed out by Mr Hogan, it is quite apparent from the sentiments expressed by the Court of Appeal in *Gentry* that professional litigants such as large insurers of the type to which RSA belongs may legitimately be expected to be in a good position to protect themselves from becoming victim to the vicissitudes of the procedures of litigation, particularly when

they are seeking the Court's indulgence. I find the failure of RSA to support the contention in paragraph 10(e) of the draft defence by annexing supporting documentation to the witness evidence, concerning to say the least and as such, in the absence of any other evidenced concerns as to the potential veracity of the Claimant, taking into account the positive contemporaneous notes available in the police report, I fail to be persuaded that the information before me gives rise to a defence on liability with more than a fanciful prospect of success.

17. As such, on the issue of setting aside the default judgment, there is no need for me to proceed any further in the potential stages of the test and that part of the application stands dismissed.

The application to set aside the judgment at disposal

18. In order for this judgment at trial to be set aside I must be satisfied:-

(a) that RSA acted promptly when they found out that the judgment had been given;
(b) that RSA had a good reason for not attending the disposal hearing; and
(c) that RSA has a reasonable prospect of success on issues of quantum.

Thereafter, the "Denton" test must also be applied.

19. In relation to (a), Mr Hogan concedes that 15 days is sufficiently prompt for this limb of the application.

20. In relation to (b), Mr Turner submits that RSA had a good reason for not attending, in that they did not know nor did they have any realistic means of finding out that there was a disposal hearing listed in this claim on 12th October 2017. It would be unrealistic, he contends, to expect RSA to conduct an in-depth research in order to try to connect what is said to have been fragmentary documentation received with an ongoing claim when it would have been entirely straightforward for the Claimant to alert RSA specifically to the existence of the fixture for the hearing.

21. He refers to the evidence of Mr Holmes in his first statement at paragraphs 18 – 20. It is said that the disposal bundle was not in fact received until the day of disposal hearing and any delay in analysing the contents or import of any documentation received by RSA from Armstrongs ought to be seen in the context of Armstrongs only quoting the policy number as opposed to the insurer claim number upon such correspondence, despite having been supplied with a claim number towards the beginning of July 2017.

22. Further, in the context of RSA accepting that limited documentation was scanned onto the system on 4th October 2017, it is urged that it would be to set the bar too high to expect real progress to be made by RSA in understanding what was going on, in the 6 working days available prior to the date of the disposal hearing.

23. In opposition, Mr Hogan submits that there are multiple failures on the part of RSA to engage with this claim, to be seen in the context of its position as a professional litigant and, as such, clear opportunities both to put the insurer into a more informed position and ultimately to attend the disposal hearing. What can be seen, in reality, it is suggested is the insurer, without a legitimate reason, burying its head in the sand.

24. In my judgment, I remain unpersuaded that there was a good reason for RSA not attending the disposal hearing. I agree with Mr Hogan that RSA was failing to act reasonably in terms of (i) rejecting the CNF without retaining a record of its contents, (ii) responding in manuscript form to one of the Claimants letters of 14th March 2017 without further taking steps to protect its position in terms of the nomination of solicitors or, at the very least, in terms of then providing the insurer claim number with a clear request that this should be used in any future correspondence, (iii) closing its file on 6th July 2017 and (iv) most materially, failing to act (or failing to evidence any real difficulty in taking action) upon receipt of the costs schedule, accepted by Mr Holmes at paragraph 3 of his third statement as being received, seemingly by the 4th October 2017 at the latest, when at

that point as a result of its contents I am satisfied RSA had sufficient information before it in order to make proper enquiries of the court as to the nature of proceedings and the timing and existence of any forthcoming hearings, namely the title of the claim, the claim no. and the court in which the claim was proceeding. Alternatively, RSA could have attempted to communicate with the Claimant's solicitors for further information, but the evidence from RSA currently before me is entirely silent as to any steps taken upon receipt of the costs schedule, other than scanning it onto the claims history and, at some stage prior to the 27th of October 2017, supplying Mr Holmes with a copy of the file such as it was. In any event, at the very least, it seems to me, upon receipt of the disposal bundle on 12th October 2017, RSA could have instructed counsel or an agent to attend the 2 p.m. hearing to ask for directions or an adjournment. Once again, I have no evidence before me to explain to me why this was not a realistic course of action.

25. As such, therefore, there is no need to proceed to any residual parts of the test to be applied and this limb of the application also stands dismissed.

26. Finally, insofar as it may assist matters going forward and insofar as it has been contended within this application that there has been no proper service of the s. 152 notice, on 4th May 2017, it has been contended on behalf of RSA that a considerable number of items of correspondence have not been received, evidenced by their failure to be included upon the scanned claims history. This contention is, in my view, manifestly shown to be unreliable in the context of the return of the letter dated 14th March 2017, which letter did not itself feature on the scanned file, despite the original having been received and seemingly retained by RSA in order for a copy of the same to be returned to Armstrongs. As such I am entirely satisfied on the balance of probabilities that the s. 152 notice was both sent and received by RSA, the evidence before me as to RSA's system of dealing with mail received being entirely inadequate in my view. Mr Holmes' use of the phrase at paragraph 5 of his third statement, "This, at the very least, delays correspondence being put on to the correct file" in

relation to correspondence not containing the insurer claim number seems to me (i) to suggest that it might, at the other end of the scale, involve the loss of received correspondence altogether and (ii) to be inviting trouble, when in claims of this sort there is the obvious and/or apparent potential for an extensive amount of correspondence being received before a claim number is even allocated and, even then, it appears that there is also the potential thereafter for no request by RSA for the claim number to be used in future correspondence to be made in any event.

27. In conclusion, upon the failure of paragraphs 2 and 3 of RSA's application, the remainder of the application falls away and it seems to me, upon dismissal of the entire application, without having heard submissions on costs, that RSA should be ordered to pay the Claimant's costs of and occasioned by this application, which, if no issue arises as to the principle of costs, can be summarily assessed that the formal handing down of this judgment, in default of agreement.

District Judge Baldwin

21st March 2018
