IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2022/COM/com/00021

IN THE MATTER of Section 28(1) of the Insurance Act, Ch 347, Statute Laws of the Commonwealth of The Bahamas ("The Insurance Act")

AND IN THE MATTER of the Insurance General Regulations, 2010

AND IN THE MATTER of the Certificate of Registration of Sagicor issued pursuant to Section 29 of the Insurance Act

BETWEEN

ORRY J SANDS & CO LTD

Claimant

AND

INSURANCE COMMISSION OF THE BAHAMAS

(In its personal capacity and in its capacity as agent for Sagicor General Insurance Inc.)

Defendant

Before the Honourable Justice Simone I. Fitzcharles

Appearances: Mrs Gail Lockhart-Charles KC with Mrs Syann Thompson-Wells and Ms Tatyana Maynard for the Claimant

Mr Dawson Malone with Ms Raven Rolle and Ms Miquel Cleare for the Defendant

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RULING

FITZCHARLES, J.

Introduction

[1] This is my brief ruling on an application by the Defendant, the Insurance Commission of The Bahamas (the "**Defendant**" or "**the ICB**") to strike out or alternatively obtain summary judgment against the Claimant in this action. The strike out application, made pursuant to **Part**

26.3 of the **Supreme Court Civil Procedure Rules 2022** (the "**CPR**") and/or the inherent jurisdiction of the Court, and summary judgment application, made pursuant to **CPR 15.6** were brought by Notice of Application filed on 21 September 2023.

[2] The applications are brought on the grounds that:

(1) the Claim Form does not disclose reasonable grounds for bringing a claim because the Claimant has no standing to bring it; and
(2) the claim has no real prospect of succeeding.

Background

[3] The Claimant is Orry J Sands Company Ltd, a Bahamian firm of general insurance brokers and agents, who have been in operation since October 1985 (the "**Claimant**" or "**OJS**"). As managing agents, OJS is in the business of representing overseas and local insurers as exclusive agents. One such relationship was with Sagicor General Insurance Inc, a foreign company ("**Sagicor**") which operated in The Bahamas through the Claimant as its General Agent.

[4] OJS applied for registration for Sagicor to the ICB pursuant to **section 28(1)** of the **Insurance Act** (the "**Act**") and the First Schedule to the Insurance (General) Regulations 2010 (the "**Regulations**"), Form 1. The Court has not yet seen the complete evidence in relation to this application, which is promised by OJS to be produced at trial.

[5] Sections 18 and 19 of Form 1 require the following information:

> "18. Where an overseas company operates or proposes to operate in The Bahamas through the medium of a local agent or agents, a summary of the main arrangements pertaining to the agency agreement(s) and the extent and system of supervision and control to be exercised by the principal representative. (Attach statement if necessary).
>
> "19. Where the company proposes to operate in The Bahamas on a Branch basis, details of the organization and structure of the Branch arrangements. (Attach statement if necessary)."

[6] The parties agree that Sagicor is an overseas company which operates in The Bahamas exclusively through its General Managing Agent, OJS.

[7] OJS provided the responses and information necessary to answer questions at sections 18 and 19 of Form 1 to the ICB. A Certificate of Registration dated 2 September 2016 was issued to Sagicor pursuant to **section 29** of the Act (the "**Certificate**").

[8] The Certificate provides in part:

> "...**CERTIFICATE OF REGISTRATION OF AN INSURANCE COMPANY**
>
> Registration No. **23008**
>
> This is to certify that **SAGICOR GENERAL INSURANCE INC.**, whose principal office in The Bahamas is situated at **300 East Shirley Street, Nassau, Bahamas**, has been registered as a Branch of a foreign company as at **2nd September, 2016**, under

the **Insurance Act, 2005**, to carry on the following classes of insurance business in The Bahamas:

i. **Property Insurance**
ii. **Liability Insurance**
iii. **Pecuniary Loss Insurance**
iv. **Accident**
v. **Marine, Aviation, and Transport**
vi. **Motor Insurance**

Dated this **2nd** day of **September, 2016**…".

[9] The main difference between the parties is over the designation of Sagicor as a "Branch of a foreign company". The Claimant avers that the Defendant has insisted that Sagicor's operations in The Bahamas are carried out as a branch of a foreign company, rather than through the medium of a local agent, OJS. The Claimant contends that this is erroneous and the Defendant has failed to correct this view although the Claimant has attempted over years to persuade the ICB that the true interpretation of the facts and law is that Sagicor is an overseas company operating in The Bahamas through the medium of a local agent.

[10] In the circumstances, by its Originating Summons filed on 30 March 2022, OJS seeks declarations from the Court as to the correct interpretation of Sagicor's operations in The Bahamas in order to clarify the distinction between an agency and a branch of a foreign company for the purposes of registration under the Act. Such guidance, OJS submits, will clarify the relationship with Sagicor and future agency relationships that might be entered into between OJS as general managing agent and foreign insurers who wish to operate through the medium of local agents.

[11] Sagicor is not a party to the action.

[12] I have read the Originating Summons filed on 30 March 2022, the First Affidavit of Orry J Sands filed on 1 December 2022 ("**Sands 1**"), the Notice of Application filed on 21 September 2023, the Affidavit of Sharanda Humes-Forbes filed on 21 September 2023 ("**Forbes 1**"), the Second Affidavit of Orry J Sands filed on 6 March 2024 ("**Sands 2**"), the Second Affidavit of Sharanda Humes-Forbes filed on 7 March 2024 ("**Forbes 2**"), the Defendant's Submissions, the Claimant's Submissions and the Defendant's Further Submissions.

[13] I do not here repeat the contents of those documents in any detail, although the submissions and evidence thus far of each party have assisted the Court in coming to its decision as to whether the Claimant has standing to bring this application and whether the case may be described as not having a reasonable prospect of success or disclosing no reasonable grounds.

Standing to Apply

[14] The Defendant argues that the Claimant's Originating Summons should be struck out because:

(1) the Claimant is not seeking declaratory relief as to its own legal rights and interests but those of Sagicor, the latter of which is not a party to these proceedings and is not seeking relief;

(2) unless the Claimant can show that this claim passed to it by subrogation, there is no basis for OJS to bring, in its own name, a claim on behalf of its principal; and

(3) the Claimant has no interest in or right to seek this relief.

[15] The Claimant contends that OJS has always been authorized to deal with all matters relating to the registration of Sagicor as an insurer in The Bahamas and Sagicor's operations have always been through the medium of OJS as Managing General Agent. The Claimant states that the Defendant has not explained why it would accept that OJS has standing to make the application for registration of Sagicor, but challenge the standing of OJS to dispute the manner in which the Defendant has dealt with that application for registration.

[16] The Court observes that while Sagicor, who disagreed with the ICB's designation that it is operating as a 'Branch of a foreign company', has opted not to participate in this action or to take legal action against the ICB, there has been no statement by Sagicor to OJS that OJS should not do so. Further, it is noted from Sands 1 that the responses of the Claimant to the questions in Form 1 indicated that OJS had full binding authority within treaty limits to commit Sagicor in respect of each class of insurance business to be carried on by Sagicor in The Bahamas for the period stated. Further, it appears that OJS as Managing Agent had exclusive control over all details of the organization and structure of Sagicor's operations in The Bahamas. Sagicor's policy and practice relating to the settlement of claims was stated to be under the control of OJS. In addition, OJS handled registration of Sagicor exclusively.

[17] A court's approach to locus standi is generally flexible, allowing claims where the claimant has a genuine interest in the issue, even if they are not directly affected, provided they are not acting as mere meddlers or volunteers.

[18] The Defendant relies on the English case of **PM Law v Motorplus** [2016] 1 Costs LR 143 and the South African case of **De Wet Nel v Jacoba Susanna Johanna Susara et al** Case Number 207/19, which the Court has considered. While the references to the general law concerning whether certain agents (in these cases, solicitors) had standing to bring applications on behalf of their principals are accepted, the Court did not find them directly relevant to this particular situation involving OJS and the ICB.

[19] The Claimant argues that it has standing and that the case cries out for declaratory relief. OJS relied upon **Financial Services Authority v Rourke** [2001] All ER (D) 266 (Oct) where Neuberger J stated:

> "The court's power to grant a declaration is to be found in Civil Procedure Rules 1998 Pt 40.20, …in these terms:
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> > 'The court may make binding declarations whether or not any other remedy is claimed.'

Accordingly, so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the right, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order...

In Messier-Dowty Ltd and another v Sabena SA and others [2001] 1 All ER 275...the issue was whether a negative injunction should be granted. Lord Woolf said this:

> 'The deployment of negative declarations should be scrutinized and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved, the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice...
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> 'So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper bounds by the exercise of the courts' discretion.'

<u>It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration</u>."

[20] In this jurisdiction, the Supreme Court has broad powers to grant declarations. I adopt the remarks of *Klein J* in **Mike Holmes** v **The Attorney General of the Commonwealth of The Bahamas** CLE/gen/00443 of 2023 relating to such power where the Court stated:

> "26. The Court's jurisdiction to grant declaratory relief is very wide and derives both from statute (Supreme Court Act, ss. 15, 16, 19), the inherent jurisdiction, and Rules of Court. ... It is observed in passing that there does not appear to be any provision in the CPR 2022 corresponding to what used to be R.S.C. 1978 Ord. 15, r. 17, which provides that: "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the Court may make a binding declaration of right whether or not any consequential relief is or could be claimed." However, this is no way diminishes the wide and inherent power of the Court to grant declarations of right."

[21] The issue of sufficient interest is fact-sensitive and depends on the legal and factual context. The courts have moved away from a rigid requirement that the legal right being declared must belong to the claimant personally, so long as the claimant has a genuine and legitimate interest and the issue is justiciable. In **Milebush Properties Ltd v Tameside Metropolitan Borough Council** [2011] EWCA Civ 270 the English Court of Appeal discussed the broad modern test on standing to obtain declaratory relief. In this regard, the following principles were identified:

(1) there should generally be a real and present dispute;
(2) each party should generally be affected by the determination;
(3) non-party status is not fatal if the claimant is directly affected; and

(4) the court must ask whether declaratory relief is the most effective way to resolve the issue.

[22] I consider that the circumstances in which courts will be prepared to grant declaratory relief are now wider than they were once thought to be. In this case OJS does not have a merely financial interest in seeing that what it views as the correct designation of its principal is accurately reflected in the Certificate of Insurance. OJS's interest is genuine and direct in the sense that it solely conducts Sagicor's business in The Bahamas. If the Defendant characterizes this as a Branch of Sagicor in The Bahamas, OJS is being deemed to be the office of a Branch of Sagicor. OJS contends it is not carrying on the business of providing a Branch office for Sagicor. Moreover, OJS insists that it is not in the business of being the Managing General Agent of a Branch of a foreign insurance company.

[23] The designation affects the Claimant's legal and financial position. Moreover, the broader implications of the declaratory relief sought by OJS in this matter are such that they may affect the proper regulatory scheme and the circumstances in which foreign companies may conduct business through local agents in the insurance industry in The Bahamas.

[24] It is apparent that OJS is seeking declarations in relation to Sagicor's designation by the ICB as a Branch of a foreign insurance company because this affects its own recognized role in the registration process and it is directly affected by the Defendant's position as to Sagicor's role. Both the lawful structure of the local agency's arrangements and the proper interpretation of **section 28(1)** and the registration regime under the Act are affected by the declarations sought by the Claimant.

[25] Applying the flexible approach of courts generally, and considering the facts of the case which have been disclosed thus far, I am of the view that the Claimant has sufficient standing to bring this claim and seek the relief set out in its Originating Summons filed on 30 March 2022.

Reasonable Grounds and Prospects Questioned

[26] In relation to this head of relief applied for by the Defendant, it is contended that the claim has no real prospect of succeeding because it is based on a "mistaken premise that operating as a Branch of a foreign company is inconsistent with carrying on insurance business through an agent. The Defendant contends that this is based on a mistaken reading of section 28 of the Act. Further, it is argued that there is no compelling reason for this matter to be dealt with at trial. No issues of fact exist and no oral evidence is called for.

[27] The Defendant relies upon **CPR 26.3** which in part provides that the Court may strike out a statement of case or any part thereof "which does not disclose any reasonable ground for bringing or defending a claim."

[28] The Defendant, by its Notice of Application alternatively seeks summary judgment under **CPR 15.6**. This Rule provides as follows:

> "15.6 Powers of Court on Application for Summary Judgment

"(1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.

"(2) Where the proceedings are not brought to an end the Court must also treat the hearing as a case management conference."

[29] Sands 2 identifies the crux of the dispute placed before the Court stating:

> "At the heart of this dispute is the fundamental disagreement between Orry J Sands & Co Ltd and the Defendant as to the interpretation of S 28 of the Act. Orry J Sands & Co. Ltd has an interest in the resolution of this dispute, which affects Orry J Sands & Co Ltd., as it speaks to the manner in which the insurer is operating in The Bahamas i.e. through the medium of a local agent (in this case Orry J Sands & Co. Ltd) or on a branch basis. Orry J Sands and Co. Ltd, as Managing General Agents have asserted the position that there is no branch (virtual (whatever that means)[1] or otherwise) operating from their premises 300 E Shirely St. Nassau Bahamas."

[30] Forbes 1 and Forbes 2 seek to satisfy the Court that the Defendant's definition of 'Branch' is correctly used in the context of the registration of Sagicor by OJS.

[31] In its Further Submissions the Defendant argues:

> "41. Operating 'on a Branch basis' is merely the terminology used to refer to a foreign insurer operating in The Bahamas not through a Bahamian subsidiary company.
>
> 42. The Insurance Commission of The Bahamas Branch Operations (Foreign Companies) Statement of Principles published September 2011 (the "Statement of Principles"), defines the reference to 'branch' as "an insurance company that is incorporated outside of The Bahamas registered to carry on insurance business in and from within the jurisdiction." In accordance with the Statement of Principle, "[a] branch is fundamentally different from other structures in that it is not a separate legal entity; rather it is an extension of the legal entity."
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> ...
>
> 46. [A] foreign insurer that has not incorporated a subsidiary company [i.e. a separate legal entity] within The Bahamas is required once registered, to sell and distribute its insurance business through a registered insurance intermediary and is also required to appoint a principal representative, who may or may not be affiliated with the insurance intermediary, to operate or administer its business in The Bahamas in accordance with sections 24 and 56 of the Act.
>
> ...
>
> 48. A foreign insurer operating in this way (whether or not it has a local office in The Bahamas) is referred to as operating in the Bahamas as a 'Branch of a foreign company'. <u>'Branch' here is not a legal term of art it simply means the terminology used by the Defendant and the term itself has no legal effect beyond describing a situation where a</u>

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[1] This description of a 'virtual' branch was introduced by the ICB in correspondence to Counsel for the Claimant in connection with this matter.

foreign insurer operates in the insurance market in The Bahamas without having incorporated a subsidiary company in The Bahamas."

(Emphasis added).

[32] The Act contains no definition of 'branch' although the term is used in sections 30(5), 138(1) and 207(1), for example. The Statement of Principles and its effect on the Claimant and its principal must be explored. The ICB uses the term 'branch' and contends that it is not used as a legal term of art and has no legal effect except to describe a certain situation. However, the fact that Sagicor has disagreed and has soon thereafter sought to wind up its affairs in The Bahamas, coupled with the insistence of OJS in maintaining this application, are factors which reveal that the designation of a foreign insurer as having a 'branch' in The Bahamas, when it is contended it operates through a general managing agency, is not taken lightly.

[33] In some jurisdictions, in the context of cross-border insurance, the designation of 'branch' may carry regulatory, legal and tax implications, whether it refers to a direct 'brick and mortar' extension of the foreign insurer's head office or not. Further, how the Claimant conducts its agency business and advises foreign insurers which approach it to act as General Managing Agent are some of the factors directly affected by the Defendant's designation.

[34] In the circumstances, to confer the designation of 'branch' upon the operations of the foreign insurer and the Managing General Agent without reference to a legal meaning for that term, where such legal meaning may otherwise exist and give rise to other implications, readily invites the enquiry submitted by the Claimant. Unsurprisingly, the Claimant therefore asks this Court, by its Originating Summons, for the following declarations:

> "(i) A Declaration that, pursuant to The Insurance (General) Regulations, 2010 and S 18 of the Form 1 Application made thereunder [and] upon the true construction of S 28(1) of the Insurance Act, Sagicor General Insurance Inc.'s operations in The Bahamas are through the medium of Orry J Sands & Co Ltd as its representative in The Bahamas and not as a branch of a foreign company;
>
> "(ii) A Declaration that Sagicor General Insurance Inc. is entitled to have its certificate of registration amended to reflect the fact that it is not operating in The Bahamas as a branch of a foreign company;
>
> (iii) A Declaration that a foreign company that has satisfied the requirements of S 28 of the Insurance Act may operate in The Bahamas through the medium of a local agent without the need to establish or maintain a branch in The Bahamas."

[35] In my view, the answers depend upon the facts of the arrangement between OJS and Sagicor, and upon the applicable legal framework in The Bahamas. The question is also ripe for resolution in this jurisdiction as to whether under the Insurance Act, the ordinary meaning of 'branch' equates to operations through an agency which is separately owned. Any fault which is found in the formulation of the questions (and perhaps the constitution of parties) in the Originating Summons, in my opinion, ought to be remedied in amendment and not a strike-out, the latter of which is an unwarranted nuclear option.

[36] The Court has not fully heard all of the facts which may be relevant to the classification of Sagicor as operating through a branch on the one hand, or alternatively, an agency on the other. I consider also that the answers to the questions posed by the Claimant are not as obvious as contended by the Defendant, although I make no determination now as to the correctness of either party's approach. Arguments from both parties in full as to what is the legal and/or ordinary meaning of those designations in the context of the Act for the purpose of deciding whether they are different or the same in The Bahamas have not yet been proffered. Further, the Court has not seen evidence of the operations of Sagicor in order to ascertain what the true legal relationship is amongst (1) the foreign parent, (2) the part of Sagicor which is operating through and controlled by OJS and (3) with OJS.

[37] While the Court admires scholarship, looking at the 460-page Further Submissions, amongst others produced, the Court is wary of engaging in the conduct of a mini-trial of the issues on affidavits. The Court is guided by the decision of **Swain v Hillman** [2001] 1 All ER 91 CA, to interpret 'real' in the requirement of having a 'real prospect of success' as the opposite of fanciful. Further, if there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes success is improbable.

[38] I do not agree at this point that the application discloses no reasonable grounds or that the prospects of success are fanciful and not real. As I consider the wording of questions 18 and 19 in Form 1 (quoted in paragraph 5 of this ruling), each question prima facie appears to address two separate kinds of organizational structure. The Claimant argues that these are separate and one is not a sub-set of the other on a true interpretation of the facts and law, which exercise must be carried out by the Court. The Defendant argues that there is no reason why one category (that is, a branch) as designated by the ICB cannot include the other (that is, operating in The Bahamas through a general managing agency). Who is right on an interpretation of the Act? The answer is not purely academic, and whatever it may be, it seems to me that the issue gives the Claimant at least a concrete commercial and regulatory interest. Therefore, I am of the view that the Court should answer the questions posed and refrain from short-circuiting the process by a strike-out or summary judgment, both of which are inappropriate in the circumstances.

[39] The Notice of Application is dismissed. Costs of this application shall, in the usual manner, be paid to the successful party. The parties shall be given case management directions pursuant to the extant application of the Claimant.

Dated 30 June 2026

Simone I Fitzcharles

Justice