[2016] JMSC Civ.41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 03340

BETWEEN INSURANCE COMPANY OF THE WEST INDIES CLAIMANT

AND OMAR GUSHMAN DEFENDANT

Miss Michelle Shand Forbes for the Claimant.

Miss Jeanne Frances Barnes instructed by the Kingston Legal Aid Clinic for Defendant.

Heard: 8th July, 24th August, 18th December 2015 and 26th February 2016

Insurance Contract – Non-disclosure in proposal form - whether declaration constitutes a warranty - liability of insurers.

CRESENCIA BROWN BECKFORD, J

INTRODUCTION

[1] This claim by way of Fixed Date Claim Form is brought by the claimant, the Insurance Company of the West Indies (ICWI) against the defendant Mr. Omar Gushman in respect of whose 2002 Nissan AD motor vehicle registered 9761 FR the claimant issued a policy of Insurance. This motor vehicle was involved in an accident and the claimant seeks the following relief:

1. A declaration that it is entitled to avoid the Policy of Insurance No. 34740287/1 and not to indemnify the defendant in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident involving the defendant's motor vehicle on the 18th day of July 2010, along Burke Road, Spanish Town in the Parish of

St. Catherine, on the grounds of misrepresentation and/or non-disclosure of material facts.

2. A declaration that the Policy of Insurance No. 34740287/1 is void for breach of warranty of contract by the defendant.

3. A declaration that the defendant is in breach of the conditions of the Policy of Insurance accordingly entitling the claimant to avoid/or repudiate same, and to avoid any liability there under.

BACKGROUND

[2] On the 7th day of January 2010 the defendant applied to the Insurance Company of the West Indies (ICWI) for insurance coverage for a 2002 Nissan AD motor vehicle registered 9761 FR by completing a proposal form in which he proposed that the vehicle would be used solely for social, domestic and pleasure purposes including transit to and from work. He expressly indicated that the vehicle would not be used for the transport of passengers for reward. He further accepted that the policy would only cover the permitted use.

[3] As a result ICWI entered in a contract of insurance for the period 12th April 2010 to 6th January 2011. The policy expressly did not cover use of the vehicle for hire or reward. A Certificate of Insurance was issued to the insured, the defendant.

[4] It is undisputed that on July 18, 2010 the defendant's vehicle, which was being driven by him at the time, was involved in a collision with a Mazda Demio motor vehicle registered 5153 EE on Burke Road in Spanish Town, St. Catherine. The defendant reported the matter to his insurer, the claimant, the following day.

[5] On February 18, 2011, ICWI received a demand letter on behalf of a passenger who was travelling in the Mazda Demio motor vehicle involved in the accident with the defendant. The company received another demand letter on August 10, 2011 on behalf of the owner and driver of the Mazda Demio motor vehicle involved in the collision.

[6] ICWI contends that they are entitled to refuse to indemnify the Defendant in respect of any loss, damage, expense or claims from third parties arising out of the accident as Mr. Gushman was operating his vehicle as a Public Passenger Vehicle (PPV) in breach of the policy of insurance taken out by him.

[7] The defendant has denied that he was operating his motor vehicle as a PPV.

CLAIMANT'S EVIDENCE

[8] The claimant's case is that a Private Commercial Car insurance policy was issued to the defendant to be used in connection with his business as a mason based on the Proposal Form completed and signed by him. ICWI asserts that on the faith of this Proposal Form, and in reliance on the truth of the statements and information contained therein, it concluded a Contract of Insurance with the defendant.

[9] The proposal and declaration made by the defendant formed the basis of the Contract of Insurance and were incorporated into the policy. ICWI's liability to make any payment under the policy would therefore be conditional upon compliance with its terms and conditions by the defendant and upon the truth and accuracy of the information given by him.

[10] The claimant relied on the affidavit of Dwight Cunningham, sworn on the 14th June 2012, which stood as his evidence in chief. He was not cross-examined. Attached as exhibits to this affidavit was the Proposal Form dated 7th January 2010 signed by the defendant, Motor Vehicle Policy Schedule, Certificate of Insurance and Private Commercial Car Policy. Also exhibited was a statement of Miss Jennifer Sterling, one of the passengers in the defendant's motor vehicle at the time of the accident. This statement was purportedly given to an investigator, one Miss Christine Burgess. The statement was admitted into evidence as Exhibit 1. In the statement Miss Sterling outlined that she had agreed to pay $120.00 for the trip in the defendant's motor vehicle. However she had not paid him as yet for the chartered trip when the accident occurred.

[11] Mr. Delona Davis, a private investigator employed to Binoc Visions Investigations Limited (BINOC), the company contracted by ICWI to conduct investigations into the circumstances surrounding the motor vehicle accident, was the next witness. He outlined that he contacted the defendant, who during their conversation admitted that he used his motor vehicle as a taxi plying the Sligoville to Spanish Town route. He further informed him that he charged between $110.00 and $120.00 per person for each trip. Mr. Davis also arranged a chartered trip with the defendant for $5000.00

[12] It is the claimant's contention, based on this evidence, that the defendant was operating his vehicle as a PPV and so operated his vehicle on the 18th July 2010.

DEFENDANT'S EVIDENCE

[13] The defendant admitted that there were three other persons in his motor vehicle at the time of the accident. However, he explained that he was going to the wedding of Miss Tricia Lewinson in which his daughter was participating, and insisted that Miss Lewinson had asked him to transport his passengers, who were her co-workers, to the wedding. He insisted that no financial arrangements were made for their travel. These persons were known to him before. From time to time, though not regularly, he would give them lifts.

[14] Under cross-examination the defendant stated that 'during the time' he drove another car, a Toyota Camry, which he ran as a taxi in the community. He said his occupation was that of a mason. He mainly worked alongside an electrician doing the masonry. When he was not working he would ask if he could drive other people's cars as a taxi. He never drove his own car as a taxi. He said he always worked for other people as a taxi driver. He recalled that drove different vehicles for one 'Bigga' for two years on and off until about 2013.

[15] All three passengers in the defendant's motor vehicle gave evidence regarding the circumstances surrounding them being transported in his vehicle. They are

Tamar McNeil, Tricia Pitt and Jennifer Sterling. They were all to be guests at the wedding of Miss Tricia Lewinson.

[16] Miss McNeil's evidence was that prior to the wedding she spoke to Miss Lewinson who said she would contact the defendant who was also to be a guest at her wedding, and organize for her to travel with him to the wedding. Miss Lewinson later informed her that she had made contact with the defendant and that he agreed to give her a ride to the wedding. There was no charge told to her nor was there mention of any charge from the defendant. She said that she has known the defendant for many years, having grown up in the same community.

[17] On cross-examination Miss McNeil said that it was not her first time travelling in the defendant's vehicle. She knew him to run taxi. She had travelled with the defendant occasionally before from Simon to Spanish Town paying a fare of $120.00 at that time. He stopped driving a taxi after he had an accident with the car. She had also travelled with him in his personal car.

[18] Miss Pitt gave much the same evidence and in cross-examination she said Miss Lewinson told her she could ask him for a ride. This she did, making the request for all three passengers. Miss Lewinson did not make the arrangements with the defendant. Miss Pitt also stated that she was aware that the defendant used to run a red car as a taxi but noted that he apparently stopped. She doesn't recall when he stopped but the last time she travelled with him the fare was $120.00 from Simon to Spanish Town. She expressed that the defendant did not operate the red motor vehicle he used as a taxi for himself, and that the car belonged to someone else. He was someone she knew well being from adjoining communities and having attended the same school.

[19] The next witness was Miss Jennifer Sterling whose evidence in chief was again much the same as the others. In cross-examination she first said she had only taken the defendant's car once, to a shop. When confronted with her statement given to the investigator she admitted travelling with him when he was driving a

red plate taxi. She was not asked for money for the trip to the wedding but volunteered to contribute to gas.

[20] The evidence of Miss Sterling contradicts her statement which is exhibit 1.Under cross-examination she said in cross-examination that she did not recall giving a statement to the investigator. However she recalled that the investigator came to the school where she was employed and asked her about the accident. She denied giving the investigator a statement. When pressed she stated that during the interaction with the investigator she signed something that she did not read what it was that she signed. She eventually admitted to giving and signing a statement.

[21] Miss Sterling denied that on the day of the accident she had chartered the trip with the defendant. She asserted that he did not ask for any money, and that she made the offer to contribute to gas as that was her nature, not liking to take favours from anyone. She denied telling the investigator it was a chartered trip and that what she said was that he used to drive a red plate taxi. She explained that when she spoke of paying $120 she meant when she took the red plate taxi.

ISSUES AND DISCUSSION

[22] The issues that arise firstly for the courts consideration are:

(1) Was the defendant operating his motor vehicle as a taxi at the material time?

(2) Did the defendant operate this vehicle as a public passenger vehicle?

[23] The answer depends upon the view to be taken of the witnesses' credibility and reliability. I note at the outset that all the witnesses have an interest to serve. The claimant's witnesses are the employees or contractors. The defendant's witnesses would stand to gain financially from claims which could be made against the insurers. In the circumstance I therefore examine the evidence of each witness critically.

[24] Mr. Delona Davis was challenged by the defence as to his credibility. He maintained that he did not know the defendant prior and had no personal vendetta against him. That a discussion took place between him and the defendant was not denied nor that the discussion was about the running of a taxi business. His credibility was not shaken in cross-examination. Based on his demeanour I formed the view that he was being truthful and that he could be relied on.

[25] In the defendant's evidence there was lack of precision as to his occupation. He worked substantially as a mason, which he does 5-7 days each week. The longest he has been out of work is a month. He works alongside an electrician. When he is not working he would ask if he could drive taxis for other people. At first he said he said he ran taxi for 2 years before he became a mason. He then said, "In those times I was still a mason". He was employed as a driver to one specific person for 2 years on and off up to about 2013. He also said he never worked with him for a long period and when his boss had mason work he would call him. He never mentioned that he also sold ackees as given in evidence by Miss McNeil, Miss Pitt and Miss Sterling which would suggest this activity was of a substantial nature. It is also interesting that though each mentioned that he worked in construction, none defined his occupation as a mason.

[26] The defendant's witnesses are at variance with him and each other as to who organized the trip. The defendant maintained he made this arrangement with Ms Tricia Lewinson whose wedding they were attending. Miss McNeil states the arrangement for travel were made by the bride. She was not aware of the details of the arrangement. Miss Pitt's evidence is that she made the arrangement for all three passengers on the suggestion of Miss Lewinson. Miss Sterling says it was organized by Miss Lewinson. She does not know if any financial arrangement was made. However, she made an offer to contribute to gas. Having regard to the issues to be determined, this conflict is material.

[27] All witnesses know him to have operated a taxi at some point, each having travelled with and paying a fare on some occasions. Miss McNeil said she used to travel with him as a taxi operator until he was involved in an accident. She could not recall when this was. She used to pay $120.00 from Simon to Spanish Town. Miss Pitt also does not recall when he stopped operating a taxi but recalls the fare was $120.00 from Simon to Spanish Town. Miss Sterling agreed, eventually, that she too took his taxi from Simon to Spanish Town paying $120.00. She also does not recall when he stopped driving taxi.

[28] In this regard the evidence of the Miss Sterling is to be highlighted. She gave a statement to the investigator but said she did not read it over carefully before signing it. In the statement in answer to specific questions she says she chartered the vehicle for which she had not yet paid. She had also travelled with him for payment before.

> *Question: Was this the first time you driving with Omar?*
>
> *Answer: No*
>
> *Question: Where you took the car before?*
>
> *Answer: From Simon to Spanish Town*
>
> *Question: Did you pay for this trip?*
>
> *Answer: Yes I have to pay One Hundred & Twenty Dollars ($120).*
>
> *Question: Did you pay for this trip?*
>
> *Answer: It was a chartered trip but we did not pay him as yet.*

She denied giving these answers.

[29] I note that the demeanour of this witness in cross examination was quite defensive, troubling her credibility. Though the investigator was not available for cross examination, I accept that what was contained in the statement was what was said. Miss Sterling would have had the opportunity to correct any answers incorrectly written or any errors before she signed it. She would have had sufficient understanding of what was written she being a teacher at the time.

[30] Having viewed the witnesses, I accept the claimant's witnesses as more credible and reliable than the defendant's witnesses. I find as a fact that up to the 18th of July 2010, the defendant operated his white Nissan motor car regularly as a public passenger vehicle. In light of this finding the case of Administrator General v NEM Supreme Court Civil Appeal NO: 75/87 does not assist the Defendant.

[31] In this case the defendant had contended that the insurance company that had issued a policy of insurance to the plaintiff was not liable for loss suffered when the vehicle was being used for hire or reward which was excepted in the policy. It was however possible that its admitted use for hire was a single instance instead of it being so used regularly. Thus the defendant had failed to show that the vehicle was being used as a vehicle for hire or reward.

[32] I find also that on the 18th of July 2010, the defendant transported the three passengers for hire. I specifically reject that he was merely giving them a ride as they were all going to the same destination. I find there was an agreement to pay for the trip. I am more inclined to this view, not only because I accept that what Miss Sterling said in her statement to the investigator was true, but also that she admitted in cross examination that she told the defendant she would contribute to gas, thus indicating there was some discussion of money being handed over.

[33] The answers to the questions are therefore in the affirmative.

[34] In view of these findings the further questions that arise are:

(3) Is the use of the motor vehicle a material fact which ought to have been disclosed

(4) What is the effect of the failure to disclose the manner in which the vehicle would be used in the proposal form

[35] A useful starting point is the case of Insurance Company of the West Indies v. Abdulhadi Elkhalili Supreme Court Civil Appeal No. 90 of 2006 where the court considered what constitutes material facts which ought to be disclosed in a

proposal form for motor vehicle insurance and what is the legal effect of the warranty clause in the form.

[36] In that case the insured had not disclosed in the proposal form that a vehicle owned by him had been involved in an accident. The insurance company sought to avoid indemnity under the policy because of the insured's failure to disclose material facts.

[37] The unanimous decision of the court was delivered by Harrison JA. He set out the applicable legal principles which apply to proposal forms and to the conditions of an insurance policy vitiated by fraud or misrepresentation.

[38] Firstly he pointed out that a contract of insurance is one of utmost good faith (*uberrimae fidei),* to be observed by both parties. In the particular circumstances that meant that an applicant for insurance had a duty to disclose to the insurer all material facts within the applicant's knowledge. There is both a duty to disclose and not to misrepresent facts.

[39] This principle was laid down centuries ago in Carter v. Boehm 1558-1774 ALL ER 183. Lord Mansfield C.J. said this:

> *"First insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Keeping back such circumstance is a fraud, and, therefore the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be in at the time of the agreement. ...*
>
> *Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing to the contrary."*

[40] Harrison JA. indicated the test of materiality as settled by the majority of the House of Lords in Pan Atlantic Co. Ltd. Vs. Pine Top Insurance Co. Ltd [1994] 3

All ER 581 where it was held that “a circumstance is material if it would have had an effect on the mind of the prudent insurer in weighing up the risk.”

[41] It was also held that in order that the insurer be able to avoid the policy it must be proven that the representation or non-disclosure was material and that it induced the making of the policy.

[42] As regards the proposal form Harrison JA. stated at paragraph15

> *“The proposal form which precedes the insurance of the policy of insurance is the document which helps the insurer make an informed decision as to whether he will indeed insure the proposer’s risk. In order therefore, to ensure the utmost good faith on the party of the insured, it is common place among insurer to require that the proposal form be filled up accurately and to have the proposer for insurance warrant the accuracy of the answers and statements made on the form.”*

[43] In the instant case the proposer signed a similar proposal as that under consideration by Harrison J. The proposal, exhibited in the affidavit of the claimant’s witness Mr. Cunningham, indicated among other things,

(i) That the motor vehicle would be used solely for social, domestic and pleasure purpose including transit to and from work.

(ii) That the motor vehicle would not be used for the transport of passengers for reward.

(iii) That the policy would only provide cover for the permitted use of the vehicle.

[44] Mr. Cunningham also makes it clear that the premium or cost of insuring the risk was directly aligned with purpose and use of the vehicle. One being used as a public passenger vehicle would be insured at a higher premium as its associated risks were greater. I find therefore that it was a material non-disclosure that the car would be used as a public passenger vehicle. Further the defendant misrepresented that the car would not be used as a public passenger vehicle by his initialling of the clause in the proposal form indicating it would not be so used.

[45] The proposal form also contained the following declaration:

> *"I/WE HEREBY DECLARE that all the above Statements and Particulars are true and I/we further declare that if any such particulars and answers are not in my/our writing the person filling in such particulars and answers shall be deemed to be my/our agent for that purpose. I/We further understand that the Vehicle(s) referred to above is/are in good condition and undertake that the Vehicle(s) to be insured shall not be driven by any person who to my/our knowledge has been refused any motor vehicle insurance or continuance thereof. I/We hereby agree that this Proposal and declaration shall be the basis of any be considered as incorporated in the policy to be insured hereunder which is in the ordinary form used by the INSURANCE COMPANY OF THE WEST INDIES LIMITED for this class of insurance and which I/We agree to accept.*

Harrison JA considered that the critical element in the declaration was the phrase

> *"This proposal and declaration shall be the basis of and be considered as incorporated in the policy."*

At paragraph 15 he says,

> *"The declaration, in my view forms the basis of the contract so that the declaration at the foot of the proposal form that the statements are true, and that the declaration shall be considered as part of the policy of insurance, makes the truth of the statements a condition precedent to the liability of the insurer. A proposer by signing signifies his agreement to it."*

[46] He cited the cases of Corogianis v. Guardian Assurance Co [1921] 2 AC 125 and Dawsons Ltd v Bonnin [1922] 2 AC 413 to affirm the principle that "Where the truth of the statement is made the basis of the contract it is unnecessary to consider whether the fact inaccurately stated is material or not or whether the applicant know or did not know the truth"

[47] With regard to the declaration in the proposal form he said that the declaration or "basis" clause was a warranty and so the truth of the statement contained in this proposal was a condition precedent to the liability of the insurer. This was separate to the question of materiality. Quoting Viscount Findlay in Dawson's case, he pointed out that the law does not require the word 'warranty' to be used in declaration."

> *"any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty the materiality of the facts in themselves is irrelevant; by contract their existence made a condition of the contract."*

[48] Harrison JA concluded that breach of the warranty entitled the insurer to terminate the contract of insurance and avoid the policy.

[49] There was no contest that the representations were made on the proposal form. These representation would amount to a warranty given by the defendant. Use of the vehicle as a public passenger vehicle would constitute a breach of the warranty. There is therefore no need for the claimant to satisfy this court that the representation or misrepresentation was material.

[50] The defendant having signed the Declaration on the proposal form warranted that the vehicle would not be used for the transportation of passengers for reward and that the policy would only over the permitted use. In using the vehicle to carry passengers for a fare he breached the warranty/condition which was a condition precedent entitling the insurer to avoid the contract

(5) Is the Claimant entitled not to indemnify the Defendant against 3rd parties.

[51] The Privy Council decision in the case of the Insurance Company of the Bahamas Ltd v. Eric Antonio [2015] UKPC 47 is instructive. The Board there considered the question of whether the insurer was liable to indemnify a driver who was not named where there was a named driver policy.

Lord Mance delivering the judgment of the Board at the outset stated,

> *"Insurance is based on an assessment of the risk undertaken and of the premiums appropriate to cover such risks."*

[52] The Board discussed what was considered to be an issue of great general public importance, which was whether s.12 (1) of the Road Traffic Act *invalidates so much of any policy which purports to limit the insurers third party liability*.

[53] This section is identical to s.18(1) of the Motor Vehicles Insurance (Third Party Risks) Act, which states as follows,

> *"If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in*

> *respect of any such liability as is required to be covered by a policy under subsections (1), (2), and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgement the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of liability, including any amount payable in respect of costs and any sum by virtue of any enactment relating to the interests on judgments.'*

[54] The Board considered that the Court of Appeal was wrong in its conclusion that "any restriction on the scope of cover afforded is of no effect as against a third party victim of negligent driving, abstaining a judgment against the insured."

[55] Lord Mance stated,

> *"Nothing in the language of section 12(1) of the Road Traffic Act makes the insurers liable to meet a third party liability judgment against their insured regardless of any restriction in the scope of cover."*

He considered the bracketed qualification *(being a liability covered by the terms of the policy)* critical to this determination.

[56] Though dealing with judgments obtained, Lord Mance's declaration would be equally applicable in this instance.

[57] This was the principle stated in the Administrator-General v. NEM where Forte J.A. considered Section 18 of the Motor Vehicle Insurance (Third Party Risks) Act. He said this:

> *"If the use to which the vehicle is put is contrary to the contract of insurance between the inured and insurer, then it is my view that its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user. Any liability arising out of such a user, would therefore not be covered by the terms of the policy."*

[58] The insurers could not be made liable to indemnify the defendant against third party claims. This would entitle the claimant to the declaration sought in paragraph 1 of the Fixed Date Claim Form in respect of 3rd parties.

CONCLUSION

[59] For these reasons **it is hereby declared that** the claimant Insurance Company of the West Indies is entitled to avoid the Policy of Insurance No. 34740287/1 and not to indemnify the defendant Omar Gushman in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident involving the defendant's motor vehicle licence no 9761 ER on the 18th day of July 2010.

It is also ordered that:

1. Judgment for the claimant.

2. Costs to the claimant to be taxed if not agreed.

3. Claimant to prepare, file and serve the final order.