IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 6034

IN CHAMBERS

BETWEEN	INSURANCE COMPANY OF THE WEST INDIES	CLAIMANT
AND	MICHAEL CAMPBELL	DEFENDANT

Miss Camille Wignall instructed by Nunes Scholefield DeLeon & Co. for the Claimant

Miss Kayann Balli for the Defendant

Insurance Law – Return of premiums – Motor policy - Policy avoided for non-disclosure and misrepresentation – Whether insurer obliged to refund premiums paid under the policy – Whether insurer entitled to rely on allegation of fraud said to be committed by the assured – effect of the renewal of the policy prior to discovery of the misrepresentation

26 November, 2010 and 7 January, 2011

BROOKS, J.

The Insurance Company of the West Indies (ICWI) has brought the present claim seeking to have a motor vehicle insurance policy, which it issued to Mr Michael Campbell, declared null and void. ICWI claims the declaration on the basis that Mr Campbell breached the requirement of utmost good faith by failing to fully and truthfully answer a question on the policy proposal form.

At the hearing of the claim, Mr Campbell, through his counsel Miss Balli, conceded that he did, in fact, fail to declare relevant facts. Based on his concession, it was accepted, applying the principle of utmost good faith, which assured and insurers owe to each other, that ICWI is entitled to avoid the policy, which it issued to Mr Campbell.

In formalizing the orders to be made, the question arose as to whether or not, the policy having been declared null and void from the beginning, ICWI was obliged to return the premiums which Mr Campbell had paid.

Miss Wignall, for ICWI, asserted that ICWI had no obligation to return the premiums. She submitted that Mr Campbell is guilty of fraud and in those circumstances he is not entitled to a refund of the premiums.

Miss Balli submitted that the issue of fraud was only raised by ICWI, after her concession, mentioned above. Learned counsel argued that ICWI did not plead fraud and accordingly it could not raise it as an issue in the course of closing submissions.

Two broad questions arise to be determined. The first is whether, in cases of fraud by an assured, an insurer is entitled to forfeit premiums paid in non-marine insurance policies. The second is whether the insurer must specifically plead and prove fraud in order to secure that entitlement.

The Law

Are premiums returnable where there is fraud by the assured?

The general principle is that where a policy is obtained by misrepresentation or non-disclosure of material facts, it is voidable on the election of the insurer (see *Jester-Barnes v Licenses and General Insurance Co. Ltd.* (1934) 49 Ll. L. Rep 231). The principle was accepted in our Court of Appeal in *Insurance Company of the West Indies v Elkhalili* SCCA 90 of 2006 (delivered 19 December 2008). Further, if the insurer elects to avoid the policy, it is void from the very beginning, as if there had been no policy whatsoever. The parties are therefore to be replaced in the positions which they held at the instant before the contract was made. This means that all premiums paid, are to be returned to the assured and the insurer is deemed not to have been at risk in respect of the subject matter of the policy (see *Stevenson v Snow* (1761) 3 Burr. 1237, 1240; 97 ER 808).

That general principle is based on the fact that the power, to declare the policy void, lies in the equitable jurisdiction of this court. The equitable maxim, "he who seeks equity, must do equity", is normally applied in those circumstances. As such, if an insurer seeks to avoid the policy it must be willing to return the premiums which it has collected. This is because, applying the principle of avoidance, it was never at risk in respect of that

policy, and therefore had not earned the premiums. That *quid pro quo* was recognized in the case of *London Assurance v Mansel* [1879] 11 Ch D 363. At page 372 of the report, Jessel M R stated:

> ""The order will be – The Plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the Plaintiffs of the Defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled."

There are certain exceptions to the principle concerning the return of premiums. Among those is the rule, specifically the subject of legislation in marine insurance, that if the policy were obtained by fraud, the assured would not be entitled to benefit from his fraud, by claiming a refund of the premium. Section 89 (1) of the Marine Insurance Act states:

> "Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured."

It is accepted that, generally speaking, the Marine Insurance Act represents a codification of the common law regarding insurance (see *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EHWC 237 at paragraph 53). There is, however, some difference of opinion as to whether, in non-marine insurance, the insurer is entitled to forfeit the premiums paid, where the assured has been guilty of fraud in securing the policy.

This difference has perhaps arisen from the fact that there was some variance in the approach used by different courts in the early years of

insurance law. According to the learned editors of *MacGillivray on Insurance Law*, 10th Ed. at paragraph 8-28, two very early cases in the Court of Chancery seem to be the source of "the proposition that where the insurers came to a court of equity for cancellation the premium should be returned even if the policy were cancelled on the ground of the fraud of the assured". The cases cited in support are *Whittingham v Thornburgh* (1690) 2 Vern. 206; 23 ER 734 and *De Costa v Scandret* (1723) 2 P.Wms. 170; 24 ER 686. The former involved a life insurance policy and the latter was a case involving marine insurance. The learned editors of *MacGillivray* admit, however, that the reporting of those two cases is less than satisfactory.

In the latter case the Lord Chancellor decided that the assured had "not dealt fairly with the insurers", by failing to disclose certain intelligence which he had about his ship. He ruled that the concealing of the intelligence was "a fraud". He therefore ordered "the policy to be delivered up with costs, but the *premium* to be paid back and allowed out of the costs".

A similar approach, whereby the premium was used to defray the costs, was used in *The Prince of Wales etc. Association Company v Palmer* (1859) 25 Beav. 605; 53 ER 768. In a gross case of fraud, effected by Mr William Palmer, "as a part of a scheme to get large sums of money from

various insurance offices", it was held that Mr William Palmer had no insurable interest in the policy. Romilly MR ruled:

> "…the company is entitled to have the policy delivered up to be cancelled, and to have a declaration that it was obtained by fraudulent means or for fraudulent purposes, and that nothing is due upon it.
>
> **As to the £710. paid them for the premium, that must be applied in payment of the costs**…and the residue paid into court with liberty to apply." (Emphasis supplied)

It was the custom, and it was expected, that an insurer seeking to avoid the policy, would pay the premiums into court. It was, however, not fatal if the insurer did not do so, provided that the insurer's willingness to repay the premiums could be inferred. The issue was raised in *Barker v Walters* (1844) 8 Beav. 92; 50 ER 36. There Lord Langdale MR at page 96 outlined the issue and resolved it in these terms:

> "This bill contains sufficient allegation of equitable matters, to form the foundation for relief against the Defendant Croft and Mary Walters, but they have filed demurrers on technical grounds, for want of equity and for want of parties.
>
> **The want of equity is, that the Plaintiffs have not, by their bill, offered to repay the money received by way of premiums on the policy**…
>
> First, it is to be observed that the prayer of the bill is, that the policy may be delivered up to be cancelled, "or that the Plaintiffs may be relieved in such manner as the Court may think fit." **The Plaintiffs, therefore, have, by their bill, in effect, asked for relief, on such terms and in such manner as the Court may seem fit. If it were necessary to make the offer, this, I own, seems to me to be sufficient. It is, in form, submitting to the judgment of the Court the terms on which the relief is to be granted**. I think that this is sufficient, and it is, therefore, unnecessary, in this case, to make any observation on the general principle…namely, as to the necessity of submitting by the bill to account. The demurrer for want of equity must consequently be overruled."

The above extracts were intended to show the practice existing in equity.

At common law, however, the situation evolved where it was generally accepted that a fraudulent assured could not recover the premium. The proposition was clearly stated by Gibbs J in the case of *Feise v Parkinson* (1812) 4 Taunt. 640; 128 ER 482. This was also a case involving marine insurance. The learned judge said at page 641 of the report:

> "Where there is fraud, there is no return of the premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium."

Later in the nineteenth century, the same point was made in the case of *Rivaz and others v Gerussi Brothers and another* (1880) 6 Q.B.D. 222, also a case involving marine insurance. That case concerned the assured "systematically and fraudulently" undervaluing the shipments sought to be insured. The insurer sought to have the policies set aside on the basis of the fraud and concealment. A jury found in favour of the insurer. On appeal, the court ruled that the jury was entitled to come to the view which it had. Having expressed himself in those terms Brett LJ said at pages 229-230:

> "Being therefore fraudulent, it seems to me there should be no return of the premium, and that the verdict and judgment are both right, and should not be disturbed."

The situation, in respect of non-marine insurance, resulting from the diverse attitudes between equity and the common law has been described by

the learned editors of *MacGillivray,* cited above. At paragraph 8-30 they state:

> "In non-marine insurance there have been tentative expressions of avoidance for fraud. While a claim by the assured for a return of premium might be defeated on the ground that he was driven to rely upon his own fraud, it is arguable that the insurer cannot seek the equitable remedy of rescission without offering to make restitution by tendering a return to premium. It seems unsatisfactory, however, that the insurers' liability to return the premium in the case of fraud by the assured should turn on the nature of the action in which the issue arises. **The courts are more likely to apply the marine insurance principle in a non-marine context, on the ground that insurance is a contract of utmost good faith and this justifies an exception from the general equitable requirement of restitution as a precondition of rescission.**" (Emphasis supplied)

The learned editor of *Colinvaux's Law of Insurance* 7th Ed. is of a similar view. The point is addressed at paragraph 7-16 of that work:

> "The modern view, however is that the insurer has, in the case of fraud, the right to obtain an order for rescission and to retain the premiums, as there appears to be no recent case in which the contrary has been held."

I find much force in the opinion of the learned editors and accept it as the correct position that a court should hold, in assessing questions such as these, in cases involving insurance policies other than marine policies. I find support for this position in the case of *British Equitable Insurance Company v Musgrave* (1887) 3 TLR 630, which was a case involving life insurance. In that case, Kay J found that the defendant had "purposely concealed", from the insurer, that he suffered from a serious medical condition. The learned judge "made a declaration that the policies were void and the premiums paid

by the defendant forfeited." He ordered the policies to be cancelled and the defendant to pay the costs of the action.

I now turn to the second issue.

Does the insurer have to specifically allege fraud in order to avoid returning the premium?

"[I]t is well settled that actual fraud must be precisely alleged and strictly proved" (paragraph 13 of the Privy Council decision in *Crawford v Financial Institutions Ltd* PCA No 34 of 2004 (delivered 2 November 2005). It has been accepted that allegations of fraud should not be pleaded unless there is clear and sufficient evidence to support it (see *Associated Leisure Ltd. v Associated Newspapers* [1970] 2 All ER 754 at page 758). That was the principle under the previous rules of procedure. Section 170 of the Judicature (Civil Procedure Code) Law required that pleadings which aver fraud were required to be supported by particulars. In the context of that section, addressing the issue of pleadings concerning fraud, K. Harrison JA stated at page 34 of the judgment in *Bastion Holdings Ltd. and another v Jorril Financial Inc* SCCA 14/ 2003 (delivered 29 July 2005):

> "The mere averment of fraud in general terms is not sufficient for any practical purpose in the prosecution of a case. It is necessary for particulars of the fraud to be distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct."

I have found no similar provision in the Civil Procedure Rules (2002) (the CPR), I doubt, however, that the principle stated by K. Harrison JA has

been altered by the advent of the CPR. In the *Bastion Holdings* case complaint was made that where fraud is alleged, the issues ought to have been the subject of pleadings and a trial rather than being contained in affidavits pursuant to an Originating Summons. The Court of Appeal rejected the argument. Cooke JA, at page 13 of the judgment, looked at the substance of the matter. He said:

> "The rival positions of the contending parties were put before the court with sufficient precision. The evidence to support those positions was fulsome albeit by way of affidavits. There was opportunity for cross-examination. I am at a loss to conceive of any deficiency occasioned by the procedural framework utilized in this case which would have been cured [by pleadings and a trial in open court]."

It seems, therefore, that the important factor, when considering the question of allegations of fraud, is not necessarily the use of the terms "fraud" or "fraudulently", but the particularising of the circumstances which it is alleged amount to fraud.

In the context of insurance, the question which arises is, when does concealment or misrepresentation become fraudulent? Lord Mansfield in *Carter v Boehm* (1766) 3 Burr. 1905 at page 1909; 97 ER 1162 seemed to be of the view that the answer lay in the intention of the guilty party:

> "The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does riot exist, and to induce him to estimate the risque, as if it did not exist.
> **The 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 under-writer is deceived, and the policy is void**; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement." (Emphasis supplied)

Miss Wignall submitted that "[a] fraudulent misrepresentation (or non-disclosure) in the context of insurance is one which is made dishonestly, (knowing the representation to be false, or reckless as to whether or not it is true or false,) with the intention that the insurer will act upon it (see paragraph 9)". I am prepared to accept that definition as accurate. It is in keeping with the classic formulation set out in *Derry v Peek* (1889) 14 App Cas 337, at page 374.

In seeking to rely on the fraudulent act or omission of the assured therefore, the insurer must speak to the intention of the assured in the concealment or misrepresentation by the assured. This may be done by affidavit or in pleadings but the assured must be given an opportunity to respond directly to the specific allegations. The opportunity for cross-examination, given the gravity of what is alleged, should also be present. This is not to say that the standard of proof is higher than the civil standard, but, as was accepted in *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970, a greater degree of probability may be required depending on the gravity of the allegations.

An issue of fact, in such a situation, ought to be resolved after cross-examination (see *Chin v Chin* (2001) 58 WIR 335).

The issue of the renewal of the policy

Where a policy has been renewed, the rescission of the renewed policy does not affect the original policy. This is because the renewal produces a new contract. The rescission replaces the parties in the position they occupied just prior to the renewal. Upon rescission, there is, therefore, no need to consider premiums paid under the previous agreement.

The learned editors of *Halsbury's Laws of England* 4th Ed. Reissue Volume 25 at paragraph 449, in my view, state the relevant law accurately:

> "If, where there has been no fraud, [the insurers] elect to repudiate a continuing insurance, they nullify the contract from the very beginning and thereby sacrifice any premiums which they have collected. However, in the case of a renewable insurance each renewal is a new contract and the premium returnable is limited to that paid for the last renewal, as the risk has, in fact, been fully borne by the insurers throughout the earlier years."

Applying the law to the instant case

In the instant case, the affidavit evidence concerning the concealment and misrepresentation, was that Mr Campbell, in answer to the question on the proposal form, "Give particulars of all accidents or losses during the past three years (whether insured or not) in respect of all vehicles owned, used or driven by you", checked the box marked "N", indicating that he had had no such accident or loss. He also answered, in the negative, the question "Has the motor vehicle been modified from the manufacturer's specifications?". I am unimpressed by ICWI's attempt to make use of the latter answer and so I

shall confine myself to the matters flowing from the former. Mr Campbell was in fact the driver of a vehicle which was involved in a collision just two months prior to his completing the proposal form. His statement, therefore, amounted to non-disclosure and misrepresentation of relevant facts. It is important, however, to note Mr Campbell's declaration at the end of the proposal form.

> "**I/WE HEREBY DECLARE that all the above Statements and Particulars are true**… I/We agree that this Proposal and declaration shall be the basis of and be considered as incorporated in the policy to be issued 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." (Emphasis supplied)

The fixed date claim filed by ICWI, sought the following declarations:

1) "…that it was entitled to avoid [Mr Campbell's policy] and to refuse to indemnify [him] in respect of loss, damage, expenses or claims from third parties as a result of [a particular accident], on the grounds of misrepresentation and/or non-disclosure of material facts."

2) "…that [Mr Campbell's policy] is void for breach of warranty of contract by [him]."

3) "…that [Mr Campbell] is in breach of the conditions of [his policy], accordingly entitling [ICWI] to avoid any liability thereunder."

A number of affidavits were filed in support of the fixed date claim. None alleged fraud against Mr Campbell. I shall quote the relevant sections of each. They refer to Mr Campbell as "the Defendant". In the first, Ms Gretchen Garriques stated at paragraphs 17, 18 and 19 respectively:

> "17. That in light of these findings I verily believe that the Defendant withheld these material facts from the Claimant at the time when he applied for

coverage, and that his negative answers to the requests for same on the Proposal Form therefore amounts to a misrepresentation and non-disclosure of material facts."

18. That in the premises, I also verily believe that the Defendant breached his warranty as to the truth of the statements and particulars contained in the Proposal Form."

19. That in light of the Defendant's misrepresentation, non-disclosure and breach aforesaid, I verily believe that the Claimant is entitled to avoid the Policy of Insurance issued to the Defendant and accordingly is not liable to satisfy any claim whatsoever…"

In the second affidavit, Ms Marcia Jarrett, at paragraph 48, stated:

48. "That Michael Campbell renewed his policy of insurance for one year effective January 15, 2008 and made no changes or endorsements to the information detailed in his proposal form."

In a later affidavit Ms Jarrett stated, at paragraph 31:

"31. That ICWI's underwriting policy…would have precluded the acceptance of the risk if any information specifically identifying Michael Campbell as the Defendant had been posted, particularly since he had failed to disclose the information on the proposal form himself when asked about it and had instead **falsely** represented that he had no previous accidents…." (Emphasis supplied)

In yet another affidavit, Ms Patrice Hamilton stated, in her contribution to the evidence that she asked Mr Campbell about the non-disclosure. She stated at paragraph 9 thereof:

"9. That in response to my said question the Defendant indicated and I did verily believe that he was involved in an accident on November 30, 2006 in Richmond Park and further that he had not disclosed that accident in his 2007 proposal form **because he thought it was minor and did not need mentioning**." (Emphasis supplied)

Miss Hamilton is the only deponent who seems to have had any personal contact with Mr Campbell.

Mr Campbell responded to the allegations. He stated at paragraph 9 of his affidavit:

> "9. I agree that when I first applied in 2007 for insurance from the Claimant I did not put on the proposal form that I had been involved in the 2006 accident but that was because **I thought that the question was being asked in respect of vehicles which I had owned or for accidents which were my fault**. That even though I did not put the 2006 accident on the proposal form I do verily believe that ICWI already had knowledge of the said accident since it involved a vehicle that was insured by them. My boss' Ford pick-up was insured by ICWI. Also, the brokers Fraser Fontaine & Kong Limited who were dealing with me were the same brokers for ICWI who were dealing with that 2006 accident, submitted the claim and knew that I was involved. " (Emphasis supplied)

Miss Wignall, not unreasonably, made heavy weather of Mr Campbell's various explanations (emphasised above). In paragraph 10 of her written submissions she stated:

> "The misrepresentation in this case meets the criteria [of fraudulent misrepresentation or non-disclosure]. Firstly, the Defendant was clearly being dishonest when he responded to the question on his proposal form about previous accidents. The explanation he has put to this court for that statement in order to suggest otherwise is not credible given the clear and unambiguous…language used for the question. There was no basis for the interpretation he has proffered, and he could not have genuinely believed that that was all that [was] required of him."

In deciding the question of whether there was fraud, it must be remembered that ICWI did not specifically claim a declaration that it was entitled to the return of the premium. In that context, the concession having been made, that ICWI was entitled to rescind the policy, it was not necessary for Mr Campbell to be cross-examined concerning his intentions at the time of completing the form. In my view, Ms Jarrett's assertion that Mr

Campbell "falsely represented that he had no previous accidents", can only be viewed as meaning that the statement was not true. It is not her purview to determine the moral aspect of the term "false". Indeed, it does not appear that she had any personal contact with Mr Campbell, but even if she did, the question of falsity, is one to be determined by the court.

In respect of the proper approach to the question of fraud, Miss Balli submitted that "the Court cannot make a finding of fraud without it having been expressly pleaded and there being facts proven upon which such a finding can be grounded". Miss Wignall's approach was stated at paragraph 16 of her written submissions. She submitted:

> "There was no express pleading as to fraud on the part of the Claimant in this case, but we submit that the court has the discretion to make a finding in that regard, given that it is borne out on the evidence presented on both sides, especially since if (sic) a decision is to be made as to the return of the premium."

I cannot accept Miss Wignall's submission as being correct. As demonstrated above, the issue of fraud carries wide implications. I accept Miss Balli's submission that a finding as to fraud cannot be merely implied or assumed. In *Derry v Peek* cited above, Lord Herschell stated, at page 374, that in order to sustain an action of deceit, "there must be proof of fraud, and nothing short of that will suffice". In the absence of cross examination, particularly of Mr Campbell, I am not prepared to find that his untrue statements were fraudulently made. It does not follow that I accept

his explanation as true; I am simply not prepared to make a finding, in the absence of his being tested on the point.

Based on that view and on the fact that the issue of the return of the premium was not specifically raised by the fixed date claim form, I am of the view that ICWI is not entitled to forfeit the premium paid. Although ICWI did not specifically offer to return the premium, its claim form sought "[s]uch further and/or other relief as this Honourable Court deems just". On that basis, it is entitled to have the declarations it seeks. I would order, however, in light of Mr Campbell's untrue statement, that the premium paid on renewal be applied toward the costs to which ICWI is entitled.

Conclusion

Mr Campbell's statement to ICWI concerning whether he had had previous accidents were untrue. As a result, ICWI is entitled to repudiate the policy and to treat it as being void from the very beginning.

In its claim, ICWI did not seek a declaration that it was entitled to forfeit the premiums paid by Mr Campbell. The policy did not stipulate that it was so entitled, in the event that he had made an untrue statement. Whereas, ICWI would have been entitled to a declaration that the premium paid, be forfeited if it had proved that Mr Campbell had fraudulently made the untrue statements, ICWI did not allege that the statements had been so

made. There was no cross examination of Mr Campbell on the point. Fraud cannot be implied or assumed by the court without a specific allegation to that effect and an opportunity being given to address the point.

In the circumstances I find that ICWI is entitled to the declarations which it seeks but that it may not forfeit the premiums paid upon the renewal of the policy. In accordance with the authorities, the premiums must be used to defray its costs of the claim.

It is therefore declared that:

1. The Claimant is entitled to avoid the Policy of Insurance No. 34102221/1/N and to refuse to indemnify the Defendant in respect of loss, damage, expenses or claims from third parties as a result of an accident involving the Defendant's motor vehicle Licence No. 1694 EY on March 2, 2008, along Dunrobin Avenue, in the Parish of St. Andrew, on the grounds of misrepresentation and/or non-disclosure of material facts;

2. Policy of Insurance No. 34102221/1/N is void *ab initio* for breach of warranty of contract by the Defendant and the parties thereto are entitled to be replaced in the positions they respectively held immediately prior to the renewal of that policy;

3. The Defendant is in breach of the conditions of Policy of Insurance No. 34102221/1/N, accordingly entitling the Claimant to avoid any liability thereunder.

It is further ordered that:

1. Costs to the Claimant to be taxed if not agreed;

2. The premium paid by the Defendant in respect of the renewal of Policy of Insurance No. 34102221/1/N shall be used towards defraying the Claimant's costs herein.