



[2016] JMSC. Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV07062

BETWEEN INSURANCE COMPANY OF THE WEST INDIES CLAIMANT
AND RONALDO WILLIAMS DEFENDANT

IN CHAMBERS

Ms. Kemesha Graham, Ms Marcia Jarrett and Mr. Harold Leslie for claimant.

Ms. Charmaine Patterson and Ms. Keneisha Baker instructed by Charmaine Patterson and Associates for the defendant.

Heard: 30th September 2015 and 19th January 2016

**Insurance - Motor vehicle policy - Whether claimant entitled to avoid policy-
Whether vehicle under the care and control of the insured - Proposal form -
Whether there was material misrepresentation or non disclosure.**

BERTRAM-LINTON, J (Ag.)

[1] On 7th February 2013 the defendant's motor vehicle which is insured with the claimant company, was involved in an accident. It was being driven by Lancedale Brown. ICWI has sought the following relief.

1. "A declaration that is entitled to avoid the policy of insurance No. 35516469 and to refuse to indemnify the defendant in respect of loss, damages, expenses or claims from third parties incurred as a result of an accident involving the defendant's motor vehicle licence No. 6355 GE on 13th February 2013, along

Brown's Town main road, in the parish of St. Ann on the grounds of misrepresentation and/or no disclosure of material facts.

2. A declaration that the Policy of insurance No. 35516469 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 and/or repudiate same, and to avoid any liability thereunder.

4. Costs

5. Such further and/or other relief as this honourable court deems just.

THE CLAIMANT'S CASE

[2] The application is supported by affidavit and supplemental affidavit from Marcia Jarrett filed on 31st December 2013 and 31st July 2014 respectively and the affidavit of Harold Leslie filed on 24th October 2014.

[3] Miss Jarrett is the Customer Service Centre Manager at the Head office and a senior underwriter. She says that Mr. Williams the defendant in applying for insurance completed and submitted a proposal form, which formed the basis for the issuance of the Policy of insurance. It is the information in this Proposal that is assessed in order to decide if the risk exposure is acceptable and under what circumstances it is to be underwritten. It is the position of the company that the defendant in his proposal asserted that he:-

- I) was the owner of the motor vehicle in question,
- II) would be the main driver of the motor vehicle,
- III) would have complete custody and control of the vehicle and
- IV) the vehicle would be parked overnight at his address and in his carport.

[4] When the accident was investigated and the report, including the statement of the defendant received, the insurer concluded that the defendant was not truthful about the above issues above, and these were material facts which influenced their decision to issue a policy to him.

[5] They further assert that his misrepresentation was a breach of the warranty as to the truth of the statements contained in the proposal and renders the policy null and void. In this regard counsel for ICWI, Ms Graham in her submissions point directly to the declaration contained in the Proposal that had been completed and submitted by the defendant. It recites (where relevant):

“I/ We the undersigned, do hereby declare and warrant that the above answers and particulars which I/We have read over and checked are true, that I/we have not suppressed or misstated any material fact ... I/We agree that this proposal and any declaration form(s) completed by other drivers shall form the basis of the contract between me/us and the insurer, and shall be deemed as incorporated in the policy to be issued”

[6] Marcia Jarrett on cross examination said among that main driver means primary driver and the person under whose control the car is. She agreed that though the proposal form indicates the car would be car ported there was no specification as to where it is to be car ported.

Investigator Mr. Harold Leslie in his affidavit spoke of his interview with the driver of the vehicle; he attaches the statement from Mr. Lancedale Brown which speaks to him having the vehicle for a period of at least two months on loan from his friend the defendant. It is with this information that the claimant has some difficulty as it is their contention that this is proof that the defendant was not the main driver and did not have custody, on their interpretation of the policy.

[7] The defendant maintains that there was no misrepresentation or non disclosure. He has filed two affidavits in this matter on 10th July 2014 and October 6th 2014. He asserts that he at no time did he say or give any warranty that he would be the only driver of the vehicle and this is supported by the fact that the policy for which he paid facilitated “open coverage” which anticipates others could drive when so authorized by him. This, he further states, is suggestive of the fact that

he may not always have physical custody and control over the vehicle when someone else had it in their possession. He wholeheartedly rejects the claim that he is not the owner of the vehicle or that he at anytime gave any warranty that the vehicle would exclusively be in his physical possession. The proposal form as he had filled out discloses that he owns other vehicles and as such it was reasonable to believe that while he may well be the main driver, he may not be the only driver. This in his view did not make the situation susceptible to an interpretation that he had given up control of his vehicle or that he had not acted in good faith when he answered the questions on the proposal form.

- [8]** He maintains that he is the owner of the vehicle and his lifelong friend only had temporary care of it because he was assisting him during his period of recuperation. He freely admitted to having several vehicles and contends that this was disclosed at the time of the proposal without any objection from ICWI. If it was the proposal form that influenced the granting of the coverage then this fact, he says, was clearly stated on it and so did not prevent approval of the issuance of a policy at the time.
- [9]** Several interesting issues were explored in the cross examination of the defendant. In his answers he was careful to point out that he was a car lover/enthusiast who enjoyed working on his cars. He however had not seen this car after the accident and neither did he assist with the repairs which amounted to some \$450,000.00. When directed to the statement he gave during the investigations (MJ-3) he agreed that he had not seen his car up to 13th April 2013 several months after the accident in February and that even though his friend had the option of driving other vehicles owned by the friend's family member he has lent him this vehicle on more than one occasion, and in this instance his friend had borrowed it for over two months before the accident, and had been the person using it continuously.
- [10]** In her submissions on behalf of the insurance company Ms. Graham says that that it was a term of the policy which was issued that the applicant was "under a

duty of utmost good faith which requires him to disclose every fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether to take the risk-material facts.” She relies on the principle enunciated in several cases on the point but in particular points to its endorsement by the Jamaican Court of Appeal in **ICWI v Elkahili SCCA No.90 of 2006 (delivered in December 2008)**. by Karl Harrison J.A.

- [11] His responses she says indicated that no one else would have custody and control of the vehicle and that would be the main driver. The result of the investigation did not conflate with his responses, as his friend seemed to have the vehicle for an extended period in another parish and it was not being housed in his carporte.
- [12] ICWI therefore submits that since the statements were untrue in relation to the Proposal form, it amounted to a breach of the warranty, and ICWI was entitled to avoid liability under the policy.
- [13] The defendant’s lawyer submits in response that all the questions were answered truthfully and that the claimant was adding criteria to the definitions stated in their proposal form. They contend that “The claimant has now added to their statement of claim the additional words “primary physical” in defining the level of control they expect the defendant to exercise over the vehicle.” The fact of someone else having the vehicle in their physical control did not mean that the defendant did not at all time exercise custody and control over it. Neither did it speak to ownership, since he is still registered in that capacity.
- [14] The Company had full knowledge that the defendant owned several vehicle and that he was requesting an ‘open driver’ policy which was indicative that other persons may drive the vehicle and at the very least this spoke to physical control by other persons. There was also no evidence that a specification had been sought as to where the vehicle would be housed and so to raise the issue of the geographical location of the carport was at the very least imputing a misrepresentation where none existed. ICWI then had failed to show that there

was any misrepresentation on the matters complained of or that at the time the proposal form was done there was any attempt to be untruthful or to mislead.

ISSUES FOR DETERMINATION

- [15] 1. Whether there was a non disclosure or misrepresentation of material fact, pursuant to Section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act.
2. If there was, whether this misrepresentation or nondisclosure of facts material such that ICWI would be entitled to avoid the Policy of Insurance.
3. Whether there are grounds for a claim of breach of warranty of contract of the policy of insurance.

DISCUSSION AND ANALYSIS

- [16] The defendant had indicated on the proposal form that he would be the main driver; the Claimant has maintained that the defendant had no custody or control of the car for some four months and failed to disclose this to the Insurer. The defendant contends the proposal form of Mr. Williams indicate he had the open driver option selected. It was also indicated that the defendant would be the main driver. The form does not indicate as well that the control must be physical.
- [17] Pursuant to section 18(3) Motor vehicle Insurance (Third Party Risk) the insurer may avoid an insurance policy if it may be shown that there was some fraud or misrepresentation that was material to the determination of granting an insurance policy. Materiality is defined in section 18 (4) of the same act as, 'of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk, and if so, at what premium and on what conditions.'

Uberrimae Fidei- Doctrine of good faith

- [18] A contract of insurance is one of utmost good faith and as such the requirement of good faith must be observed by both the insurer and the insured throughout the existence of the contract. In practice this simply means the insurer all

material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts.

[19] The fact that someone is given permission to drive the insured car is not a material fact that would normally require informing the insurer particularly where there is an open driving option as part of the insurance policy. However if it is that the person being given permission to drive is now the main driver it becomes a material piece of information to be disclosed to the insurer. This is distinct from a case such as was in **Andrene Brown v ICWI** where the wife though her name appeared on the policy her husband was always the regular driver of the insured vehicle. This case before us may be distinguished on the point that the car has been insured with the claimant since 2007 and since then the defendant has loaned Mr. Brown the car for a continuous period from December 2012 until February when the accident happened. He has also indicated that since 2010 Mr. Brown has borrowed the car from time to time. The main driver throughout this time was always the defendant. The question then is whether for the continuous period the car was loaned to Mr. Brown did the defendant have control of the motor vehicle.

[20] Control however is not exclusive to physical control. Control has not been defined by the relevant proposal form used by the insurance company and may be given its ordinary meaning. Control means 'the power to influence or direct people's behaviour or the course of events'. Consequently if it could be shown that though the defendant did not have physical control of the vehicle he was the person directing what was to be done to the car, the care that was to be given and the person who ultimately made any important decision relating to the car. The defendant on cross examination gave evidence to say he was not responsible for gas or the cleaning of the car along with ensuring it was in a car port during the time Mr. Brown had the car, these are minor points and does not go one way or the other in determining control since Mr. Brown had physical custody of the car. In response to when was the last time the car was serviced, the defendant responded by saying, 'ask Brown' The defendant has indicated

that he has not seen the car since the car was in the accident or has not made any payment towards the repair of the car thus far. This is important in determining whether the car was actually under the control of the defendant to determine if he was the main driver. The defendant has said that each time the car was driven he was told about it and this was about four times. There is no evidence before me to refute this. Considering all these things it can be said that for these months the defendant was not the driver, but what is the criteria for determining who the 'main' driver of a vehicle is. Certainly this would need to be clearly stated and there is no indication on the proposal form as to the interpretation of this phrase. It would seem then that it may well be that the person in control may rightfully reserve this status for himself.

SECOND ISSUE

- [21] Whether there are grounds for a claim of breach of warranty of contract of the policy of insurances.

RESOLUTION AND FINDINGS

ISSUE 1

- [22] Whether there was none disclosure or misrepresentation pursuant to Section 18(3) of the Act.
- [23] In my judgment based on the affidavit evidence, the cross examination of the various parties and the law I find as a fact that Mr. Williams at the time of answering the questions on the proposal form represented the true facts as was his duty of 'uberimae fidei'. It is true that he subsequently put the vehicle into the physical possession of someone else for an extended period but I have no evidence to conclude that he was not the true owner of the vehicle at the time of the accident or that he did not exercise sufficient control over it to direct its use. I have given much thought to the issues raised by ICWI as to his possession and control of the vehicle ,but could not find sufficient evidence as presented from which I could conclude that Mr. Williams was not in control. I am guided to this

view by the learning in the 10th edition of MacGilvray on Insurance Law paragraph 16-43:

“If the applicant makes a representation as to present or past fact and not ‘de futuro’ relating to something within his control, it may very well be upon its true construction an expression of his then existing intention to see that something shall be done without amounting to a promise that it will be realized, It is then not a representation as to the future at all but a representation of present intention and it will be a misrepresentation in law only when it is shown that the applicant never entertained the intention which he represented himself as having. The only statement of fact involved in a statement of intention is that the stated intention is currently present in the mind of the applicant. It follows that a subsequent change of intention or acts done contrary to the expressed intention will not invalidate the policy”

[24] In my view Mr. Williams freely admitted to owning other vehicles and applied for ‘open coverage’ on this one. This could not have meant for any of the parties that he would not allow other persons to drive this vehicle. I will concede that the replies to the questions as the main driver and the housing of the vehicle are material and instructive as to the setting of premiums and the underwriting risk but an open policy must be premised on the criteria laid down by the form itself which specifies in the area for “Proposer/Driver’s Information

“To the best of your knowledge and belief will any intended driver be:-

- using the vehicle to learn to drive
- the holder of a full licence for less than two years
- under twenty one (21) years of age [PMC]
- under twenty five (25) years of age [CMC] [PPV]
- over seventy (70) years of age.

To all of these Mr. William’s response was in the negative and this has not been disputed.

There is no evidence as well that the use to which the vehicle was put was any different than what was expected by Mr. Williams himself

[25] I have also spent a great deal of time in considering whether ICWI should have been informed that the driver would have the vehicle for an extended period. I resolved this issue squarely in favour of the defendant as there is no evidence that the vehicle was being used in a manner inconsistent with the terms of use as laid down in the policy and as stated before an open policy of necessity must also contemplate use by other drivers within the ambit specified and on the basis upon which the premium was calculated.

[26] There is no evidence before me that during the course of a policy of insurance such as this if one finds it necessary to lend one's car to a relative or friend who does fall outside of the stated criteria in the proposal form that there is a contractual obligation to go back to the insurance company. There is no evidence that the driver herein was ever refused insurance or that Mr. Williams knew on any issues relating to him which would have rendered the policy in any material way to not be applicable to the driver in the way that it was to him.

[27] I find then that there was no evidence of the giving up of command over the vehicle such that it would represent a change in the circumstances under which the vehicle was proposed. In any event there is no evidence that at the time the proposal was done there was an intention to represent a situation which did not exist.

ISSUES 2

[28] If there was, whether this misrepresentation or nondisclosure of facts material such that ICWI would be entitled to avoid the Policy of Insurance.

Having found that there was no misrepresentation or nondisclosure of material facts it is the finding of the court that ICWI is not entitled to avoid the policy of insurance

ISSUES 3

[29] Whether there are grounds for a claim of breach of warranty of contract of the policy of insurance.

It is unnecessary then to go on to issue 3 in the circumstances of the above finding of fact

Therefore my orders are as follows:

1. The claimant's application filed on December 31st, 2013 is refused in its entirety with costs to the defendant to be agreed or taxed.