



[2012] JMSC Civ 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2010 HCV 02707

BETWEEN ADVANTAGE GENERAL INS. CO. LTD. CLAIMANT

AND SHEREEN ANDREA HENRY DEFENDANT

Ms. Suzette Campbell instructed by Campbell & Campbell for the Claimant

Ms. Damila Gayle instructed by Oswest Senior Smith & Company for the Defendant

Heard: July 19, 2012 and October 4, 2012

*Motor Vehicle Insurance – Insurable  
Interest - Misrepresentation/Non disclosure –  
Breach of Warranty*

**Straw J**

The claimant, Advantage General Insurance Company Limited, is seeking declarations and orders against the defendant, Shereen Henry as follows:

- i. A declaration that the defendant had no insurable interest in Toyota Corolla motor car licenced 8172FD on the 4<sup>th</sup> day of December 2007 when she applied for insurance coverage of same and on the 5<sup>th</sup> day of February 2008 when the said vehicle was involved in an accident along the Kent Village main road, Bog Walk in the parish of St. Catherine.
- ii A declaration that by virtue of the order at one [1] above, the defendant is not entitled to and cannot claim an indemnity under the motor insurance policy

numbered MPCC-43646 issued by the claimant to the defendant providing coverage of the motor car licenced 8172FD.

- iii. A declaration based on the common law and pursuant to section 18[3] of the Motor Vehicles Insurance [Third Party Risks] Act that the said motor insurance policy numbered MPCC-436461 is void *ab initio* as it was obtained by misrepresentation and /or non disclosure of material facts.
- iv. A declaration that the warranty as to the truth of the statements contained in the proposal form by which the defendant applied for insurance is a condition precedent to liability under the policy.
- v. An order that the defendant is in breach of the warranty mentioned at four [4] above and cannot claim an indemnity under the policy of insurance.
- vi. An order that the claimant is not liable to satisfy any judgment entered against the defendant as a result of the said accident.

### **Background**

[1] The declarations are being sought on the basis that the policy was obtained by misrepresentation and/or non disclosure of material facts and also that the defendant was in breach of the warranty she gave on the proposal form by which she applied for insurance.

[2] The factual circumstances are not in dispute and are summarized as follows:

*On the 4<sup>th</sup> December 2007, Ms Henry completed, signed and submitted to the representative of Advantage General, an insurance proposal form in which she applied for coverage of a Toyota Corolla motor car licensed as aforementioned. She was issued with the said policy of insurance based on the representations in the proposal form.*

*The policy comprehensively insured the said motor car for the period 4<sup>th</sup> December 2007 to 3<sup>rd</sup> December*

2008. On the policy form, she answered "yes" in response to the following questions:

Do you own the vehicle?

Is it/are they registered in your name?

- [3] On the 25<sup>th</sup> March 2008, Advantage General received a Notice of Proceedings informing the company that a claim had been filed in the Supreme Court against Ms. Henry to recover damages arising from an accident involving the said motor car on the 5<sup>th</sup> February 2008.
- [4] Up to that date, Ms Henry had made no report to Advantage General concerning the accident as required by the terms of the policy. Advantage General hired Priority Investigations Services to carry out investigations and as a result, a statement was collected from Ms. Henry who made the following disclosure:

*"Stanford Johnson, now deceased was my brother. He was the owner of --- the Toyota Corolla ---. He purchased the car along with others and placed them in my name. I did not contribute to the purchase of this car. It was kept by my brother who was living in Linstead."*

She also stated that she did not know of the accident until she was informed by Advantage General.

#### **Claimant's Submission**

- [5] Mrs. Suzette Campbell, counsel for Advantage General, based her submissions on three limbs.

Firstly, that Ms. Henry had no insurable interest in the motor car; secondly that her misrepresentation and non disclosure of the facts concerning the true ownership of the motor vehicle entitles Advantage to avoid the policy and thirdly, that she breached the warranty given as to the truth of her statements on the proposal form.

I will deal with each of these issues in turn.

### **Insurable Interest**

- [6] A working definition of insurable interest as applied in English law is given in the text, MacGillivray on **Insurance Law**, 10<sup>th</sup> Edition, Paragraphs 1- 49, pg 25:

*"Where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognized by law or in any legal liability there is an insurable interest in the happening of that event to the extent of the possible loss or liability."*

- [7] The want of insurable interest is a question going to the root of the contract and an insurer is entitled to raise the defence that the assured either has no interest or an insufficient interest to constitute an insurable interest in law. **Macaura v Northern Ireland Assurance Co. Ltd and others** (1925) AC 619 at pg 631-632.

- [8] MacGillivray describes the nature of insurable interest loosely as the assured's pecuniary interest in the subject - matter of the insurance arising from a relationship with it recognized by law [para 1-11, pg 67].

- [9] In relation to insurable interest in property, MacGillivray speaks to the two requirements for the possession of a valid insurable interest identified in English law which have been derived from the case law [para1-120, pg 55].

Firstly, the assured must be so situated to the insured property that he will suffer economic loss as the proximate result of its damage or destruction. The author distils this requirement from the leading case of **Lucena v Craufurd**, [1806] 2 Bos. & Pul. [N.R.] 269, where Lawrence J, gave his classic description of an insurable interest at pg 302:

*"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it ... and a man is so circumstanced with respect to matters exposed to*

*certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."*

- [10] Lord Eldon in **Lucena** spoke to the second requirement of a legal relationship between the assured and the subject matter [pg 321]:

*"...nor am I able to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."*

- [11] In **Routh v Thompson** [1809] 11 East 428, the requirement was described as possession of a legal or equitable right in property [per Lord Ellenborough C.J. pg 433], Lord Eldon's test was subsequently summarized as requiring a legal or equitable interest in the insured property. **Moran, Galloway & Co. v Uzielli** [1905] 2KB 555, 562; **Macaura v Northern Ass. Co.**, pg 630.

#### **Did the defendant have an insurable interest?**

- [12] Is the defendant's legal title sufficient under the circumstances of this case to find that she had an insurable interest?

Counsel for the claimant contends that it is not sufficient as she did not contribute to the purchase of the vehicle and had no pecuniary interest in it.

She posits the principle that a bare legal title either to land or goods does not necessarily give the holder an insurable interest [see **Kennedy v Boolara Butter Factory Pty, Ltd**] [1953] VLR 548, 554.

- [13] Counsel also submits that the defendant had no reasonable expectation of some financial benefit. She had stated that that the car was kept by her brother who was living in Linstead. There is no evidence to suggest that she should take or have a financial interest in the vehicle. According to counsel, the evidence

confirms that she was without custody and possession of the vehicle from the time it was insured to the date of loss in the accident. Further, she was unaware of the accident until informed by the claimant and she failed to notify the insurers of the accident. Finally, she took no action to enforce the policy of insurance to recover an indemnity under the policy.

[14] Considering all the above circumstances, counsel has therefore submitted that the court should come to the conclusion that she had no interest at the time when the event insured against occurred and cannot recover anything under an indemnity policy.

[15] Counsel for the defendant, Ms. Gayle, has submitted that the court considers other common law jurisdictions which have dispensed with the requirement of legal or equitable interest. In **Constitution Insurance of Canada v Kosmopoulos** [1987] 34 DLR [4<sup>th</sup>] 208, the Supreme Court of Canada held that a moral certainty of economic advantage from property was a sufficient ground of insurable interest therein.

[16] This definition, however, would not assist Ms. Henry as she cannot be said to have any moral certainty of economic advantage from the motor vehicle.

[17] Ms. Gayle has also relied on **Feasey v Sunlife Insurance of Canada** (2003) Lloyd's Rep. IR pg 637 in which Waller LJ at para 80 outlined the following factors to be taken into consideration regarding insurable interest:

*“When one examines the authorities therefore one sees that the court is concerned to analyse by reference to the terms of the policy what is the subject of the insurance; to analyze what insurable interest a person has in the subject matter of the policy; and to consider whether the subject embraces that (insurable) interest... .”*

[18] Based on this analysis, she has asked the court to consider that the subject matter is a motor vehicle and the defendant is the legal owner of the vehicle. In

relation to the answers to the two questions asked, Ms. Henry became a suitable candidate for the issuance of the policy as her disclosed interest was covered by the terms of the policy.

- [19] She has further submitted that Ms. Henry's statement (at a later date) that her brother was the owner of the vehicle was nothing more than an admittal of his equitable interest in the property. As there may be a multiplicity of different interests in the same property, her being the title holder provided sufficient link to the asset to validly insure it.

### **Legal Analysis of Authorities**

- [20] **Feasey**, as well as **Kosmopoulos** is not binding in the Jamaican jurisdiction as they are decisions of the Canadian Courts. However, the English authorities were examined.

It is important to note that in **Feasey**, Waller J placed the cases dealing with insurable interest into groups. Group 1 concerned cases where the court had defined the subject matter as an item of property and where there must be a real or equitable interest in the property for the insured to suffer loss which he can recover under the policy. He placed both **Lucena and Macaura** in this group [para 81].

- [21] In **Lucena**, the subject was certain identified ships. The perils insured against were loss of the ships. It was held that the assured had no legal or equitable interest in the ships but a mere expectation. The expectation could not be insured so the subject did not embrace the insurable interest. In **Macaura**, the subject matter was identified timber owned by a company. The assured was a shareholder of the company. It was held that the shareholder had no interest in the timber as he would suffer no pecuniary loss from the timber as such but any loss would have been as a shareholder and his profits as shareholder were not the subject of insurance.

[22] Waller LJ summarized the principles that he extracted from the authorities dealing with all the categories. He stated that it was not a requirement of property insurance that the insured must have a legal or equitable interest in the property as those terms might normally be understood. For e.g., it would be sufficient for a subcontractor to have a contract, that relates to the property and a potential liability for damage to the property [par 97].

[23] However, MacGillivray has submitted that the English law requirement of a legal interest or obligation regarding the property cannot be dispensed with except by a reforming statute or by restatement of the law by the House of Lords [para 1-121, pg 57].

[24] It is not necessary for this court to strain the decision in **Lucena** or **Macaura** in relation to sufficiency of interest. Ms. Henry has the legal title. The vehicle was comprehensively insured in her name.

The fact, however, that she did not purchase the vehicle or obtained any economic advantage from its existence is not decisive of the point that there was no insurable interest. The subject is a motor vehicle. By law, motor vehicles must be insured, at the least, in relation to third party risks. As long as she is the legal owner, the vehicle would have to be insured in her name. She is the legal owner as against third parties and would be subject to financial prejudice if the driver operating the vehicle under the comprehensive policy proved to be negligent in relation to third parties. This is in effect what has happened as there is a suit pending against her.

[25] A common sense approach to the broad definition could not be that she should satisfy each of the following conditions of benefit from its existence, prejudice from its destruction in light of the law relating to motor vehicle insurance.

The broad brush of the law supports that Ms. Henry had a sufficiency of insurable interest at the time of the accident as this interest commenced as soon as the vehicle was registered in her name.



[26] In **Stock v Inglis** (1884) 12 QBD 564, 571, Brett MR summed up this broad brush approach which I find to be of great merit in the circumstances of this case:

*"In my opinion it is the duty of a court to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer."*

[27] I am therefore of the opinion that Ms. Henry had an insurable interest in the motor car at the time of the accident in February 2008.

### **MISREPRESENTATION/NON DISCLOSURE**

[28] The second issue for determination is whether there was misrepresentation or non disclosure by Ms. Henry in relation to the information given by her on the proposal form.

[29] Counsel for Advantage has submitted that when Ms. Henry stated that she was the owner of the vehicle and that it would be secured in a private garage, she was not speaking the truth. According to counsel, she knew she did not purchase the vehicle and was not the owner and also she had no control over the vehicle as to where it would be kept. Both these statements were therefore misrepresentations.

[30] Counsel has further submitted that Ms. Henry failed to disclose the following facts:

- The Toyota Corolla motor car was only registered in her name.
- The true owner of the motor car was Stanford Johnson who had provided all the purchase money for the vehicle.
- The Toyota Corolla motor car was and would be in the custody and possession of Stanford Johnson.

- The Defendant had no custody or control of the said motor vehicle.

[31] She states that ownership, custody and possession are material facts which would be taken into consideration by a prudent insurer in weighing up the risk and determining whether to issue the policy of insurance. By virtue of the common law and the provisions of the Motor Vehicles Insurance [Third Party Risks] Act, Advantage General is entitled to an order that the policy is void *ab initio*.

### **The Legal Principles**

[32] A contract of insurance is one of utmost good faith [*uberrimae fidei*] and good faith must be observed by both the insured and insurer throughout the existence of the contract. On the part of the assured, that duty requires full disclosure of every material fact which may affect the insurer's decision to accept the risk involved in entering into the contract. An insurer is entitled to avoid liability if the insured has breached the duty of full disclosure, either through misrepresentation of fact, [even if done in innocence] or failure to disclose any material fact. [See **Jester-Barnes v Licenses and General Insurance Co. Ltd.** {1934} 49 Ll. L. Rep. 231 at pages 234-5 per MacKinnon, J].

[33] There is a duty therefore to disclose any circumstance that may influence the insurer's opinion as to the risk he is incurring, whether he will take it or what premium to charge. The obligation to disclose depends on the knowledge possessed by the assured and his opinion of the materiality of the knowledge is inconsequential. [See **Joel v Law Union and Crown Insurance Co.**, [1908] 2 KB 863, pg 883 - 884 per Fletcher Moulton, LJ].

[34] The onus is on the insurer to prove that the non disclosure or misrepresentation is a material factor as also that the non disclosure or misrepresentation actually induced it to accept the risk on the terms that it did. [**Pan Atlantic Insurance Ltd and Another v Pine Top Ltd.** [1995] 1 AC 501]. It is important to note that

the inducement must be proved by the insurer. [**Drake Insurance v Provident Insurance** {2003} EWCA Civ 1834].

[35] Counsel for Ms. Henry submits that she clearly indicated she was the owner and that there were no follow up questions as to whether other individuals had interest in the property. She argues further that the claimant is trying to penalize the defendant for its own failure in asking a general question as to ownership and registration. The issue therefore is whether Ms. Henry would understand the question to be asking specific information about the interest of others.

**Was there misrepresentation or non disclosure on Ms. Henry's part?**

[36] As was stated previously, the factual issues are not in dispute. It is clear that Ms. Henry, based on her answers to the investigator, appreciated that she was not the owner of the vehicle and that it would not at any time be placed in her custody or possession but for some undisclosed reason would be registered in her name.

[37] On the face of the proposal form, it may be argued that there was no misrepresentation of the facts as she was in fact the legal owner by virtue of the registration of the vehicle in her name. However, there were two distinct questions asked about the ownership of the vehicle and whether it was registered in her name. This ought to have alerted her to clarify the issue of ownership. If she had stated that she was not and the policy agreement completed as is, she would have done all she was obliged to do at that time.

[38] If she had alerted the insurers on the proposal form about the issue of ownership, then she could have argued successfully that the proposal form failed to request information as to whether other individuals had any kind of interest. There was no ambiguity as described by Kingsmill Moore J in **Sweeney v Kennedy** [1949] 82 LR, 294:

*"In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer to such a question which is upon a fair construction a true answer, it is not open to the*

*insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by courts of law."*

[39] I am of the opinion that Ms. Henry would have understood the distinction being made between registration in her name and ownership. She indicated her understanding of the distinction to the investigator at a later date.

**Was the misrepresentation or non disclosure material?**

[40] Counsel for Ms. Henry has agreed that the information that the vehicle would have been driven by another party is material information which would have influenced the judgment of the insurer in fixing the premium or determining whether to take the risk. However, she submits that when the defendant disclosed in the proposal form that she desired to be comprehensively insured, she was stating that she wanted coverage for other drivers. Ms. Henry had therefore disclosed her intention for other drivers to operate the vehicle. The claimant was therefore placed in a position to decide at what amount to fix the premium. The failure to name her brother as another driver was not sufficiently material to warrant the contract being void.

[41] Section 18 [5] of the Motor Vehicles Insurance {Third Party Risks} Act defines information as material when it is of such a nature as to influence the judgment of a prudent insurer in determining whether he should accept the risk and if so, at what premium.

[42] Based on the definition, it is my opinion that it was material information that the vehicle was merely in Ms. Henry's name and that Mr. Johnson would have possession, custody and control of the vehicle.

[43] In relation to where the vehicle would be housed, the claimant has not proven that this was a misrepresentation as it could have been in her knowledge that it would be kept in a private garage by her brother. The real mischief is in the issue of ownership from which the insurers would have drawn inferences in relation to custody and control. It is not that she would have been the primary driver at any time. It was never contemplated that she would be driving the vehicle or that it would be driven on her behalf. In order to assess the risk and whether to take it, this is information that was peculiarly within her knowledge and ought to have been disclosed.

[44] To this extent, I am of the opinion that the information regarding ownership was a misrepresentation of material fact. It was also a failure on her part to disclose material facts on the proposal form.

**Has the Claimant discharged the burden of proving that the misrepresentation or non disclosure induced them to take the risk?**

[45] The claimant has led no evidence whatsoever on the issue of inducement except that the affidavit of Ruth Ann Morrison, on behalf of Advantage asserts that the policy was issued based on the representation of Ms. Henry. Counsel has submitted the issues are material facts which would be taken into consideration by a prudent insurer.

[46] My brother, Brooks J, discussed this issue in **Hillary Smith Thomas v Insurance Co. of the West Indies**, Claim No. 2006 HCV 01883 [judgment delivered on 24<sup>th</sup> November 2008] pg 12-13. He stated that while the principle that the inducement must be proved by the insurer is valid there is some divergence as to the level of evidence which would satisfy that duty. Brooks J also referred to an excerpt from Vol 31 of **Halsbury's Laws of England**, 4<sup>th</sup> Ed at paragraph 1067 which speaks to the presumption of inducement:

*"Inducement cannot be inferred from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of*

*fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a prima facie one and may be rebutted by contrary evidence.”*

- [47] The factual circumstances of each case therefore will determine whether the insurer has proved on a balance of probabilities that the non disclosure induced the contract i.e., that the undisclosed material would have caused an increase in premium or caused the insurer not to take the risk.
- There are some circumstances where the court will not make the finding of inducement unless evidence is presented from the underwriter [**Mark Rich & Co. AG v Portman** [1996], 1 Lloyd’s Rep. 430. In others, the court upheld the presumption despite the absence of an underwriter. [**St Paul Fire & Marine Insurance Co. [UK] v Mc Connell Cowell Constructors Ltd and others** [1995] 2 Ll. L.R., 116
- [48] If the court finds that there is a presumption of inducement, there is an evidential shift to be satisfied by the insurer to displace the presumption. See **Redgrave v Hurd** [1881] 20 CH D 11.
- [49] I am prepared to find that the presumption of inducement applies as there is a grave distinction between Ms. Henry as the owner with custody, control and possession as distinct from Mr. Johnson. In other words, Advantage at no time had the person with custody, control and possession before them while the proposal form was being filled up. Neither did they have that information. Ms. Henry therefore has the burden to displace the presumption.
- [50] In her affidavit, she attempts to do this by asserting that she requested comprehensive coverage. It was therefore open to her to allow others to drive the vehicle and an indication to the insurers that she is contemplating the use of the vehicle by others. There was no legal obligation to list the names of every person that may at some point be a driver.

[51] In my opinion, [no pun intended] this is the point. The issue as she well knew was not 'at some point.' Her brother took custody and control of the vehicle from the outset. At no time did she retain possession. The vehicle was never intended to be used for her advantage. She did not know that the vehicle was involved in an accident until she was so informed by Advantage General. I am therefore of the opinion that she has not displaced the presumption of inducement.

### **Breach of warranty**

[52] Finally, the insurers required that the proposal form be filled up accurately and signed by the insurer in the following terms:

*I/We the undersigned, do hereby declare and warrant that the above answers which I/We have read over are true...I/We desire to effect an insurance with the Insurer in the terms, conditions and exceptions of the policy to be issued by the insurer. I/we agree that this proposal and any declaration form ... 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.*

[53] In essence, the assured is required to warrant the accuracy of the answers and statements made on the form.

The declaration makes the truth of the statement a condition precedent to the liability of the insurer and by signing it, the assured signifies his agreement to it.

[**Insurance Co. of the West Indies v Abdulhadi Elkhalili** SCCA No. 90 of 2006 per Harrison, J.A., para 15, pg6, 7].

[54] In **Condogianis v Guardian Assurance Co.**, [1921]2 AC 125, the Judicial Committee of the Privy Council held that where the truth of the statements 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 knew the truth or not.

Any breach of the warranty would therefore entitle the insurer to terminate the contract of insurance and avoid the policy. [**Insurance Company of the West Indies** para 22].

**Did Ms. Henry breach the warranty?**

[55] The claimant contends that she did by virtue of her answers to the questions of ownership and where the garage would be kept overnight.

Again, based on her answers to the investigator, Ms. Henry recognized that she was not the owner of the vehicle, it was not given to her as a gift neither was she a co owner.

[56] In *MacGillivray* pars11-1, the authors speak to the ordinary meaning of words and quote the words of Greene MR in **Hutton v Watling** [1948] Ch. 398, 403:

*“The true construction of a document means no more than that the court puts on it the true meaning, and the true meaning is the meaning which the party to whom the document was handed or who is relying on it would put on it as an ordinary intelligent person construing the words in the proper way in the light of the relevant circumstances.”*

[57] It is clear and it is my opinion that Ms. Henry breached the warranty by stating that she was the owner of the vehicle without more, without any indication of the reality of the situation. She clearly understood as the circumstances revealed that while the vehicle was registered in her name, it was not contemplated that she would be the owner. Again, I am not of the opinion that the answer that the car would be kept in a private garage was inaccurate as there is no evidence to suggest it was not so kept although the defendant had neither custody or possession.

[58] However, her answer to the question of ownership was a misrepresentation or at the least a non disclosure of a material fact. She had a duty to disclose this material fact to the insurers. She also had a duty not to misrepresent the facts which she did. The declaration at the foot of the contract which made it clear that



the statements were true and that the declaration formed the basis of the policy made the truth of the statements a condition precedent to the liability of the insurer. Her failure to accurately state the fact concerning ownership was a breach of the express condition of the insurance policy.

The claimant is therefore entitled to avoid the policy of insurance.

[59] The Fixed Date Claim Form is therefore granted in the following terms:

1. The claimant is entitled to avoid policy numbered MPCC-43646 as it was obtained by misrepresentation and/or non disclosure of material facts and is not liable to indemnify the defendant against any loss or damage resulting from the accident that took place on the 5<sup>th</sup> February 2008 involving the abovementioned motor car licensed 8172FD.
2. The claimant is entitled to avoid the said policy of insurance for breach of warranty.
3. The claimant is not liable to satisfy any judgment entered against the defendant as a result of the said accident.
4. The defendant is to be refunded the full amount paid to the claimant under the policy agreement.
5. Costs to the claimant to be agreed or taxed.