[2016] JMSC Civ. 212

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV00827

BETWEEN	**INSURANCE COMPANY OF THE WEST INDIES LIMITED**	**CLAIMANT**
AND	**EDWARD MARSHALL**	**DEFENDANT**

Insurance Law – Whether failure to disclose previous accident amounts to misrepresentation and/or non-disclosure of material facts – Breach of warranty of contract – Avoidance of policy by Insurer – Whether insurance broker is the agent of the insurance company

Mrs. Michelle Shand-Forbes and Mr. Miguel Palmer for the Claimant

Miss Tashelle Powell instructed by Zavia Mayne and Company for the Defendant

IN CHAMBERS

HEARD: 22nd September, 7th November and 29th November, 2016

COR: V. HARRIS, J

Introduction

[1] This claim concerns a policy of insurance number MPCCJ-35500233/ECC which was issued by the claimant, the Insurance Company of the West Indies (ICWI), to the defendant Mr. Edward Marshall on or around January 2012 in relation to his 2002 BMW X5 motor vehicle registered 3778 GA.

[2] This motor vehicle was involved in an accident in August 2012. ICWI's position is that it is entitled to avoid the policy and refuse to indemnify Mr. Marshall in respect to any losses, damages, expenses or claims from third parties arising from this accident because the policy of insurance was obtained on the basis of misrepresentation and/or non-disclosure of material facts. Additionally, it is claiming that the policy of insurance is void for breach of warranty.

[3] ICWI relies on the following grounds:

i) The insurance coverage of the said vehicle was granted on the strength of a motor vehicle proposal form ('proposal form') that was completed and submitted by Mr. Marshall on November 04, 2011;

ii) Mr. Marshall named himself as the proposer in the proposal form and provided the information contained in it;

iii) Item (f) of the proposal form required that Mr. Marshall provide details of all accidents and losses that he had in the three years prior to the date that he signed the form. This included accidents which involved either vehicles owned by him, whether he was the driver or not at the material time; or were not owned by him but had been driven by him;

iv) In response to item (f) Mr. Marshall indicated that he had had no accidents or losses in the relevant period;

v) Mr. Marshall also signed the declaration at the end of the proposal form which expressly stated that the information contained in it was true;

vi) The contents of the proposal form, along with the declaration, formed the basis of the contract between ICWI and Mr. Marshall; and

vii) ICWI relied on the responses Mr. Marshall gave in the proposal form when it assumed the risk and issued the policy of insurance to him.

The Evidence

[4] Mr. Marshall obtained this policy of insurance through Spectrum Insurance Brokers (the broker). He has alleged that the broker was ICWI's agent. The proposal form was signed by Mr. Marshall on November 4, 2011. He said that he was handed the form and instructed to fill in the areas that were concerned with his personal information while the remainder of the form was completed by the broker.

[5] His sister Miss Rosemary Marshall gave evidence on his behalf. Her evidence supported that given by him. She assisted Mr. Marshall by completing certain sections of the form as well. This was due, they both said, to Mr. Marshall's poor penmanship. After this was done, the form was handed to the broker, who completed it by asking him certain questions which he answered. The answers to those questions were recorded by the broker.

[6] One of the questions Mr. Marshall said that he was asked by the broker was, "Have you ever been in accident before?" He responded, "I just buy the van and have never driven it so that must be no." He said that he understood this question to be related to the vehicle that he was about to insure. He told the Court that he was never asked by the broker if he had ever been in an accident in three years prior to November 04, 2011 whether he was the owner and/or the driver of the vehicle or not.

[7] However, the undisputed evidence was that on June 24, 2011, a little over four (4) months before November 04, 2011 Mr. Marshall had in fact been involved in an accident. He was the driver of a motor vehicle that was not owned by him. The vehicle that he was driving collided with one that was stationary. This fact was not disclosed when the proposal for the contract of insurance was being done.

[8] He admitted that it would not then be true to say that he had not been in an accident three (3) years prior to this date. However, he reiterated that the manner

in which the question was framed by the broker caused him to form the impression that it was in reference to the vehicle that he was about to insure.

[9] Mr. Marshall stated that the broker, who made himself out to be the agent of ICWI, completed the proposal form without giving him the opportunity to read the document and as a result he was not aware of the question that was stated at item (f) on page two (2) of the proposal form.

[10] He blamed the broker for the incorrect or misleading information that was at item (f). Mr. Marshall said that the broker appeared to be more interested in obtaining the 'new business' rather than taking the time to go through the form properly with him.

[11] Mrs. Marcia Jarrett, customer service centre manager and senior underwriter employed to ICWI gave evidence on its behalf. She indicated that all information concerning previous accidents was material in the underwriting process. This, she said, was relevant to the assessment of the risk that was to be undertaken by the insurance company.

[12] She stated that when a proposed insured declared that he/she had not been involved in an accident three years prior to being insured this was a strong indication that the risk to be undertaken was minor. Had Mr. Marshall disclosed that he was previously involved in an accident, she said, she would have either not have assumed the risk of insuring him or if she did, the premium that was applied would have been different. (I took this to mean that more than likely higher premium would have been charged).

[13] Mrs. Jarrett also told the Court that even if a proposed insured was not liable for an accident, she would still require information about it as this would have some bearing on the exercise of her discretion in making the decision whether or not to issue a policy of insurance. She went on further to say that once a person had been involved in an accident, whether liable or not, the risk of insuring that person was not considered to be normal.

[14] In other words, it was Mrs. Jarrett's evidence that the information that was contained in the proposal form was "what induced the underwriter to conclude that the risk of exposure was small and this led to the acceptance of that risk."

[15] The proposal form, she said, formed the basis of the contract between ICWI and Mr. Marshall. ICWI also relied on its content as being true. The declaration was considered the warranty in the policy.

[16] She also disputed that the broker was an agent of ICWI because ICWI had no authority or control over what the broker did or how they operated.

[17] The questions at item (f) of the proposal form were:

> *"Have you had any accident or losses during the past three years (whether insured or not) involving vehicles:*
>
> *(i) owned by you, whether or not you were the driver at the material time?*
>
> *(ii) not owned by you, but driven by you or in your custody at the material time?"*

[18] The declaration at the end of the proposal form and which was just above Mr. Marshall's signature stated inter alia:

> *"I/WE HEREBY DECLARE that all the above Statements and Particulars are true and I/we further declare that if any of the particulars and answers are not in my/our writing the person or persons filling in such particulars and answers shall be deemed to be my/our agent for that purpose...I/We hereby 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."*

Issues

[19] The following are the issues that are to be resolved by the Court:

i) Whether the broker is the agent of ICWI (issue one);

ii) Whether Mr. Marshall's response to item (f) on the proposal form constitutes misrepresentation and/or non-disclosure of a material fact (issue two);

iii) If the answer to ii) is yes, is ICWI entitled to avoid the policy of insurance;

iv) Whether Mr. Marshall's failure to disclose the accident that he was previously involved in amounted to a breach of warranty of contract which renders the policy of insurance void (issue three).

Submissions

[20] Learned counsel, Mrs. Michelle Shand Forbes, submitted on behalf of ICWI that the broker who assisted Mr. Marshall to complete the proposal form was not ICWI's agent. She posited that it was settled law that the insurance broker was the agent of insured (in this case Mr. Marshall) for the purpose of securing insurance coverage. She relied on the authorities of **Anglo-African Merchants Ltd & Exmouth Clothing Company Ltd v Bayley** [1969] 1 Lloyd's Report 268 and **Wilson v Avec Audio-Visual Equipment Ltd** [1974] 1 Lloyd's Report 81.

[21] She further contended that since the broker was the agent of the insured any information given by the insured to the broker could not be imputed to the insurer. She cited the case of **Kenneth Roberts v Patrick Selwyn Plaisted** [1989] 2 Lloyd's Report 341 as supportive of her submission.

[22] Mrs. Shand Forbes also put forward that this principle extended to situations where the broker in assisting the insured presented inaccurate information to the insurer, even if the correct responses/answers had been given to him by the insured. She relied on **Newsholme Brothers v Road Transport and General Insurance Company Ltd** [1992] 2 K.B. 356 as the authority for this argument.

[23] She asserted that Mr. Marshall's response to item (f) constituted misrepresentation and/or non-disclosure of a material fact which entitled ICWI to avoid the insurance contract. This, she continued, was based upon the long settled legal principle that an insurance contract was one that was based on the utmost good faith and if this was not adhered to by one of the parties, the contract may be avoided by the non-offending party. The cases of **Carter v Boehm** [1774] 1 All ER 183, **ICWI v Abdulhadi Elkahili** SCCA 90/2006 delivered on December 19, 2008, **Pan Atlantic Insurance Ltd & Another v Pine Top Ltd** [1995] 1 AC 501 were relied on.

[24] Mrs. Shand Forbes further advanced that the misrepresentation and/or non-disclosure also amounted to a breach of Mr. Marshall's warranty as to the truth of his statements in the proposal form which rendered the policy of insurance void. She cited **Elkahili** (supra) as being supportive of this point.

[25] Miss Tashelle Powell, learned counsel for Mr. Marshall, submitted that the broker was authorized to issue cover notes on behalf of ICWI without consultation. Once a cover note was issued it would bind ICWI in respect of any liability which may arise during its tenure. This, she said, was evidence which was sufficient to show that the broker was ICWI's agent. **Bawden v The London, Edinburgh and Glasgow Assurance Company** [1892] 2 Q.B. 534 was cited as the authority which supported this submission.

[26] She conceded that Mr. Marshall under cross examination admitted that he had been the driver of a motor vehicle that was involved in an accident three years prior to the completion of the proposal form. He was also aware of this fact, she said, but did not disclose it.

[27] However, Miss Powell argued, this situation arose due to the conduct of the broker who misrepresented the question concerning previous accidents. This caused the false information to be given because Mr. Marshall was led to believe that the question was in reference to the vehicle that was about to be insured by

him. If the Court accepted that the broker was ICWI's agent, the argument continued, ICWI was at fault for the non-disclosure that resulted. Consequently, it should not be allowed to avoid the contract of insurance.

[28] Miss Powell put forward that in any event the non-disclosure was not material. Mr. Marshall, she maintained, was not liable because he had collided with a stationary vehicle to avoid a head on collision. In those circumstances, she said, it was impossible to see how any reasonable insurer would find that that accident "coloured the risk of insuring Mr. Marshall in a different light which would warrant any deviation from the coverage that was actually granted."

[29] She insisted that since the warranty was signed by Mr. Marshall on the understanding that the question asked by the broker referred to the motor vehicle he was about to insure, then he ought not to be held liable for the non-disclosure because the answers he gave at item (f) would have been true. In other words the non-disclosure was due to inadvertence.

[30] Miss Powell also asserted that there was no provision in the declaration that the policy would be void or voidable if the contents of the proposal form were untrue. This ought to have been specifically stated in the proposal form, she concluded. Miss Powell was unable to find any authorities to support this submission. However, she directed the Court to the dissenting opinions of Viscount Finlay and Lord Wrenbury in **Dawsons Ltd v Bonnin** [1922] 2 AC 413.

Issue One

The Law

[31] The learned authors of **Chitty on Contracts Volume II 27th edition at paragraph 31-017** define the principle of agency as it relates to insurance agents and brokers:

> *"The agent of an insurance company, working on commission or as an employee, normally acts for the*

> *company though his authority may not extend far beyond the submission of proposals. It has however been held that he may become the agent of the proposer if he assists in the completion of the proposal form. An insurance broker, on the other hand, is prima facie an agent of the assured and not of the underwriter..."*

[32] In **Newsholme** (supra) the actual agent of an insurance company inaccurately recorded the answers given to him orally by the proposed insured on a proposal form. Thereafter, a policy was issued by the company. The insurance company later repudiated the contract on the ground that the written proposal contained untrue statements.

[33] It was held that the agent was not authorised by the company to fill in the proposal form and in doing so must be regarded as the agent of the proposer. Therefore the knowledge of the agent that the answers to certain questions in the form were not true was not notice to the company.

[34] In the unreported decision of **United General Insurance Company Ltd v Sebert Hutchinson** RMCA 15/2004 delivered on November 03, 2005 the Court of Appeal approved the decision of Parnell J in **Chez Franchot Ltd v. Halifax Insurance Company Ltd et al** [1978] 15 JLR 282. Smith JA said at page 13 of the judgment:

> *"A broker who assisted the proposed in filling up the proposal term for the purposes of submission to an insurer was the agent of the proposer and of no other person."*

At pages 30 to 31 Harris JA (Ag.) (as she then was) had this to say:

> *"It is settled law that consequent on the completion of proposal for insurance coverage by a broker, the broker becomes the agent of the insured."*

[35] The same principles were articulated in **Anglo-African Merchants Ltd** and **Wilson** (supra).

Analysis and disposal

[36] Having considered the authorities discussed at paragraphs 31 to 35 I find that the broker who assisted Mr. Marshall with filling out the proposal form would have been Mr. Marshall's agent and not ICWI's agent. His sister, Ms. Marshall, would also have been his agent because she completed certain sections of the form for him.

[37] In any event, two factors are determinative of this issue. Firstly, even if the argument that the broker was ICWI's agent had merit, the outcome stated at paragraph 37 would have been the same in light of the decision in **Newsholme**. Secondly, it is expressly stated in the declaration that "if any of such particulars and answers are not in my/our writing the person or persons filling in the particulars and answers shall be deemed to be my/our agent for that purpose." (See paragraph 19 above) This phrase would capture both the broker and Ms. Marshall.

[38] **Bawden** (supra) on which Mr. Marshall relied was unhelpful to him because it is distinguishable on its own facts. The facts of that case are that a policy of insurance was effected through the insurance company's agent who was paid a commission for any insurance policies he procured on their behalf. (This was not the situation in the case at bar). Mr Bawden was illiterate and could only write his name. He had lost the vision in one of his eyes and the agent was well aware of this fact. However, the agent did not communicate this to the company.

[39] By the terms of the policy the company agreed to pay Mr. Bawden 500*l.* on the complete and irrecoverable loss of sight in both eyes. Mr. Bawden met in an accident and completely lost the sight in his other eye. It was held that the knowledge of the insurance company's agent in those circumstances was the

knowledge of the company. The insurers were therefore not allowed to avoid the contract of insurance.

[40] Applying those principles to the present case, if it is assumed that the broker was indeed the agent of ICWI, the evidence did not establish, which I consider to be the critical factors which led to the decision in **Bawden**, that the broker knew that Mr. Marshall had been involved in an accident three years prior to the completion of the proposal form and had failed to disclose this fact to its 'principal' ICWI.

Issue Two

The Law

[41] It has long been settled that a contract of insurance demands the utmost good faith (*uberrimae fidei*). This is so because such a contract is based on facts which are usually in the exclusive knowledge of the insured. Full disclosure of material facts is therefore essential because those material facts will influence the insurer whether or not to accept the risk and determine the premium to be paid.

[42] The genesis of this principle comes from the dictum of Lord Mansfield in **Carter** (supra) which was cited with approval and applied by the Court of Appeal in **Elkhalili**.

[43] In the latter case Harrison JA at paragraph 12 of the judgment stated:

> *"A contract of insurance is one of utmost good faith (uberrimae fidei) and, as such, the requirement of good faith must be observed by both the insured and the insurer throughout the existence of the contract. In practice, the requirement of uberrimae fidei means simply that an applicant for insurance has a duty to disclose to 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 to not misrepresent facts."*

[44] In **Pan Atlantic** (supra) it was held that an insurer proved that a policy was obtained by misrepresentation and/or non-disclosure of material facts where:

i) It showed that there was a misrepresentation or non-disclosure on the part of the insured;

ii) In the case of non-disclosure, the fact was known by the insured;

iii) The fact which was misrepresented or not disclosed was a material one; and

iv) The insurer was induced by the misrepresentation or non-disclosure to accept the risk in question.

[45] Harrison JA in **Elkhalili** at paragraph 14 puts it succinctly in this manner:

> *"... a circumstance is material if it would have had an effect on the mind of the prudent insurer in weighing up the risk... for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure, the alleged misrepresentation or non-disclosure must be material and must have induced the making of the policy."*

Analysis and disposal

[46] I find that Mr. Marshall failed to disclose a material fact to the insurer when he answered no to the questions at item (f) of the proposal form. I say so because:

(1) Mr. Marshall had been in an accident during the three year period prior to the completion of the proposal form on November 4, 2011 while driving a vehicle that did not belong to him;

(2) He failed to disclose this fact to ICWI;

(3) The fact that he failed to disclose was known to him;

(4) The fact is material because it would have affected a prudent insurer's decision as to whether or not it would accept the risk of insuring him and I find that it did in fact induce ICWI to accept that risk.

[47] It was the contents of the proposal form which caused ICWI to decide whether it would insure Mr. Marshall's risk. Mrs. Jarrett's evidence, which I accept, was that if she had been aware of this previous accident, given its circumstances, it is likely that she would not have taken the risk of insuring him. However, she went on to say that even if she did, this fact would have played a pivotal role in determining the rate of the premium.

[48] Mr. Marshall did not challenge that he failed to disclose the fact that he had been in an accident previously. His argument, which proceeded on an erroneous foundation, was that it was the agent of ICWI who misled him by asking an ambiguous question (my words) and this was what caused the non-disclosure. Therefore, vicariously ICWI was to be faulted. He also argued that the non-disclosure was not material. I disagree.

[49] The question that he said was asked of him by the broker, if accepted, I find was in general terms. It was, "Have you ever been in accident before?" I do not find this question to be ambiguous or specifically related to the motor vehicle that he was about to insure.

[50] Mr. Marshall's evidence was that he had not driven the motor vehicle in question. He also said that he was aware that it could not be driven without first being insured. Therefore, how he concluded that the question asked by the broker referred to a vehicle that he had acquired some three weeks before November 4, 2011, had not driven and was insuring for the very first time is simply incomprehensible to me.

[51] In any event, he stated that after he had answered the questions asked of him by the broker, the proposal form was returned to him. He said that he went through it before he signed it. If this is accepted, which it is, he was given the chance to

read over the form. This would have provided him with the opportunity not only to view the questions at item (f) in their entirety but also to correct any erroneous information that was stated there.

[52] Furthermore the evidence given by Ms. Marshall on this issue was inconsistent and confusing. She told the Court in cross-examination that the employee of the broker informed them that he was not the insurance agent but the broker. My response to this aspect of the evidence was that they both knew from the outset that the broker was not ICWI's agent. It was therefore difficult for me to accept their evidence that he (the employee of the broker), as they said, made himself out to be the 'insurance agent'. However, this is not to say that I have not considered that as lay persons they may well have not appreciated the legal implications of those two distinct terms.

[53] ICWI, in my opinion, is therefore entitled to avoid the policy of insurance for non-disclosure of a material fact. However, in the interest of justice, I have gone on to consider whether there was a breach of warranty.

Issue Three

The Law

[54] In **Elkhalili** Harrison JA at paragraph 15 of the judgment stated:

> *"...it is commonplace among insurers 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. Thus, as in this appeal, the proposer was required to sign and did sign the declaration...The critical element in the declaration is the phase which state that "this proposal and declaration shall be the basis of and be considered as incorporated in the policy..." This 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 it, signifies his agreement to it."*

[55] The authorities also established that where a proposal form contained a declaration of this kind, the insurer was entitled to terminate the contract of insurance and avoid the policy, if any of the statements in the form were not true. It was not necessary, in those circumstances, to determine whether the inaccurately stated fact was material or not, or whether the proposer knew or did not know the truth. (See **Bonnin** (supra) and **Condogianis v Guardian Asssurance Co** [1921] 2 AC 125, a decision of the Judicial Committee of the Privy Council which was applied in **Elkhalili**).

[56] Lord Shaw in **Condogianis** (supra) at page 129 of the judgment said:

> *"The case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves - by making the fact the basis of the contract, and giving a warranty - that as between them their agreement on that subject precluded all inquiry into the issue of materiality."*

Analysis and disposal

[57] The evidence disclosed that Mr. Marshall was required to sign the proposal form and he did so. The significant component in the declaration was the phase which stated, "I/We hereby agree that this Proposal and declaration shall be the basis

of and be considered as incorporated in the policy to be issued hereunder..." Those words converted the answers and statements made in the proposal form into conditions of the policy.

[58] The answers given by Mr. Marshall to the questions at item (f) were untrue. There is no dispute that he had been involved in an accident some four months before he signed the declaration. By signing the declaration he was indicating to ICWI that the statements in the proposal form were true and he warranted that the answers he gave were true as well.

[59] The declaration formed "the basis of and was incorporated in the policy". This made the truth of those statements a condition precedent to ICWI's liability. By making the false representation Mr. Marshall was in breach of the express condition of the insurance policy.

[60] As a result, it is not necessary for me to determine whether the fact that was inaccurately stated was material or not. Neither is it relevant if this was done inadvertently or not. It is immaterial whether Mr. Marshall knew or did not know the truth (although in this case he did).

[61] It is therefore my view that ICWI is also entitled to avoid the policy of insurance for breach of the warranty.

Orders

[62] Judgment for the Claimant.

[63] It is hereby declared that the Claimant is entitled to avoid Policy of Insurance No. MPCCJ-35500233/ECC on the ground of non-disclosure of a material fact.

[64] It is also declared that the Policy of Insurance No. MPCCJ-35500233/ECC is void for breach of warranty of contract by the Defendant.

[65] Costs to the Claimant to be taxed if not agreed.