



[2021] JMSC Civ.99

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2018 HCV 04761**

<b>BETWEEN</b>	<b>THE INSURANCE COMPANY OF THE WEST INDIES</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>OMAR PLUNKETT</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mrs. Michelle Shand Forbes and Ms. Annekia Samms for the Claimant

Mr. John Jacobs instructed by Jacobs Law for the Defendant

Heard: May 13, 2021 and June 18, 2021

**Carr, J (Ag.)**

**Introduction**

**[1]** The Insurance Company of the West Indies Limited (ICWI) seeks a declaration from the court –

- a) That it is entitled to avoid the Policy of Insurance No. MPCTJ-35555328 and not to indemnify the Defendant in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident involving the Defendant’s motor vehicle Licence No. 8994 GP on the 5<sup>th</sup> day of February 2017, along Colorane Main Road in the parish of St. Mary, on the grounds of misrepresentation and/ or non-disclosure of material facts.

- b) That the Policy of Insurance No. MPCTJ-35555328 is void for breach of warranty of contract by the Defendant.
- c) 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.

## **Background**

- [2] Omar Plunkett engaged the services of the Insurance Company of the West Indies (ICWI) to provide insurance in respect of a 1994 Toyota Corolla Station Wagon registered 8994 GP. In furtherance of this, he completed a motor vehicle insurance proposal form on February 12, 2014. On that form he indicated that he was a barber and that the vehicle was owned by him. He also expressed that the vehicle would be used solely for private, domestic, social and pleasure purposes and would not be used for commercial purposes or for hire or reward.
- [3] Mr. Plunkett renewed the policy twice thereafter and never advised ICWI of any changes to the use of the vehicle. On the 8<sup>th</sup> of February 2017 he reported to the insurance company that the said vehicle was involved in an accident on the 5<sup>th</sup> of February 2017. A Notice of Proceedings was served on ICWI and as is standard practice, the company carried out investigations into the accident. The investigations revealed that Mr. Plunkett did not speak the truth on his application form and as such ICWI brought this action to avoid the policy.

## **Issue**

- [4] The sole issue of fact for determination is whether Mr. Plunkett misled ICWI on the proposal form.

- [5] The sole issue of law is whether a failure to disclose information on a proposal form can result in ICWI avoiding the policy and thereby repudiating the indemnity provided thereunder.

### **Submissions on behalf of the Claimant and the Defendant**

#### **Claimant**

- [6] The Claimant's attorney-at-law submitted that the court should have no difficulty in finding that the Defendant misled the insurance company as to the use of the motor vehicle. The proposal form which was completed by Mr. Plunkett in 2014 contained numerous questions as to the use of the motor vehicle for which he was seeking insurance coverage.

- [7] His response to those questions were clear and ought to be accepted by the court.

- a. *Will the motor vehicle be used solely for social, domestic and pleasure purposes including transit to and from work?*

*Answer: Yes.*

- b. *If no, will the vehicle be used for:*

- i. *Commercial travelling in connection with your business?*

*Answer: No*

1. *The transport of goods in connection with your business?*

2. *Answer: No.*

- [8] In a statement that he gave to the investigators following the accident he was asked the following questions:

Q. *What do you drive this car to do?*

*A. To transport my chickens to various restaurants in Annotto Bay and surrounding areas and I have been doing this ever since I purchased the car and even before. I do this like three times per week.*

**[9]** It was submitted therefore in relation to the factual issue, that Mr. Plunkett was not truthful in his dealings with ICWI and failed to disclose his chicken business and by extension that the vehicle would be used in the transportation of his goods in keeping with his business.

**[10]** In respect of the legal issue. Counsel submitted that the law is clearly established. Once the insured has failed to make a disclosure of a material fact the policy of insurance is void ab initio. In the event that the court is not minded to accept that view, Counsel also submitted that the failure to answer truthfully on the proposal form resulted in a breach of the warranty which was a part of the contract of insurance. Mr. Plunkett agreed to tell the truth in providing his information on the proposal form. His failure to do so is sufficient to breach the warranty and render ICWI indemnified against a third party claim on the policy. They further argue that Mr. Plunkett failed to advise ICWI that there was a change in the use of the vehicle which would have resulted in a breach of the policy conditions so that in any event the policy would be void and of no effect.

### **The Defendant**

**[11]** Counsel on behalf of the defendant rested his submissions on the factual issue. He contended that the burden of proof was upon the Claimant to establish that Mr. Plunkett was using the motor vehicle for commercial purposes. None of the witnesses presented on behalf of the Claimant was able to establish this. Mr. Plunkett himself strongly denied that he was using the vehicle for any other purpose apart from his own use. He also categorically denied telling the Investigator that he used the vehicle to transport chickens. The Claimant presented no evidence to substantiate their claim that Mr. Plunkett was using his vehicle for

any other purpose but that which was stated on the form. ICWI therefore had no basis upon which to void the policy.

## **Analysis and Discussion**

### **Misrepresentation**

[12] The right of an insurance company to avoid a policy on the basis of misrepresentation is well settled in law.

**“Insurance is a contract upon speculation and the special facts, upon which the contingent chance is to be computed, is usually within the sole knowledge of the Insured. The Insured therefore has an obligation to frankly disclose all material information and not to misrepresent any material facts. If the Insured conceals material information the Insurer is entitled to avoid the policy.”<sup>1</sup>**

[12] This principle has been codified in statute as per Section 18 of the **Motor Vehicles Insurance (Third Party Risks) Act**. Although there is a duty on the part of an insurance company to satisfy judgments entered against their insured, there are exceptions to this rule.

*“ (3) No sum shall be payable by an insurer...if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:*

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<sup>1</sup> Insurance Company of the West Indies and Margaret Forest- Duncan consolidated with Margaret Forest-Duncan and Insurance Company of the West Indies and Binoc Visions Investigations Ltd. [2016] JMISC Civ. 136 p. 11

*(5) In this section the expression "material" means 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, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy."*

- [13]** The statute and the cases confirm that the burden is on the Insurer to prove to the court that the insured misrepresented himself and thereby induced the insurer to provide a service based on false information. The information must have affected the decision of the insurer. It must therefore be established that had the insurer been made aware of the information he would have either offered the coverage at a higher premium or chosen not to take the risk. The test is an objective one and the question to be determined is whether a prudent underwriter given the correct information would have acted differently?
- [14]** The evidence on behalf of the Claimant came from two witnesses who swore to Affidavits and were subjected to cross-examination. Mr. Kevin Graham was the investigator assigned to unearth all the details of the accident. He obtained two statements one from Mr. Plunkett and another from Ms. Shenakaye Martin who was purported to be Mr. Plunkett's girlfriend.
- [15]** At the commencement of the trial, Counsel for the Defendant objected to the statement of Ms. Martin as she was not a witness before the court and he argued that the document was inadmissible as hearsay. The objection was upheld and the statement as well as any reference to it was struck from the Affidavits of the two witnesses on behalf of ICWI.
- [16]** In his statement to the investigator Mr. Plunkett indicated that he was a livestock farmer and that he raised chickens and goats in Gibraltar, St. Mary. This is in stark contrast to the occupation which he gave on the proposal form for insurance. On that form, which was exhibited to the affidavit of Ms. Sandra Touzalin, he gave his

occupation as a barber. He also ticked “no” in response to questions as to whether the vehicle would be used for business purpose, commercial travelling in connection with his business, or for the transportation of goods in connection with his business.

- [17] Ms. Touzalin averred at paragraph 22 of her Affidavit, “*that at the time of proposing for insurance the Defendant did not disclose that he intended to use the vehicle for commercial purposes...He expressly declared that the vehicle would not be used for hire or reward or for the transport of goods in connection with his business.*”
- [18] She went further to say at paragraph 23 “*that by not disclosing these factors I as the underwriter was not able to properly assess the risk presented. A vehicle used for commercial purposes ...presents a far greater risk due to the uncertainty of drivers, susceptibility of theft and the frequency on the road as opposed to a barber who works at a set location and lives at a disclosed place and intends the vehicle for his private purposes.*”
- [19] The unchallenged evidence is that Mr. Plunkett completed the Motor Vehicle proposal form in 2017. He subsequently renewed the policy on at least two occasions. He made no changes to the information which ICWI had on file for him and at no point did he indicate that he was anything other than a barber.
- [20] In cross examination he denied telling the investigator that he used the motor vehicle to transport his chickens. He was shown the statement and he admitted that it was his and that it was in fact his signature. However, he was adamant that he did not tell the police about transporting chickens because he had never done so. He admitted that prior to giving his statement he was a livestock farmer since 2010 and that he did not tell the insurance company that was his occupation. He also accepted that he told the insurance company that he was a barber.
- [21] I observed his demeanour as he gave his evidence and I did not find that he was forthright in relation to his occupation and the information he disclosed to ICWI. I

did not accept him as truthful. Further, the investigator was never challenged as to the statement. He was never asked whether the statement was fabricated. It was never suggested to him that the impugning section was a lie and that Mr. Plunkett never said so. There was no denial of any other aspect of the statement Mr. Plunkett gave except in regard to his transportation of chickens.

**[22]** In the circumstances, I find and accept that Mr. Plunkett gave the statement to the investigator and that contained in that statement was his own admission that he was a livestock farmer and that he used the vehicle to transport his chickens to various restaurants in Annotto Bay and surrounding areas. I accept and find as a fact that he has been doing this since he purchased the vehicle and that he does so at least three times per week.

**[23]** It is pellucid from the evidence presented to the court that Mr. Plunkett was less than honest with ICWI as to his business and the use of his motor vehicle. I find as a fact that he did use the motor vehicle to transport his chickens to the various restaurants, and that the chickens were goods that he delivered as a part of his poultry business.

**[24]** Mr. Plunkett's failure to disclose this information is considered material in keeping with the definition as per the Insurance Act. I accept that the underwriter would have charged a higher premium had she been aware of that information. ICWI are therefore within their right to avoid the policy on this ground.

### **Breach of Warranty**

**[25]** It was also submitted that Mr. Plunkett breached the warranty as per the insurance proposal form. Contained in the proposal form is a declaration that follows at the end of the document. It states "*I/We declare that all the above statements and particulars are true and I/We further declare that if any 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.”*

[26] The Court of Appeal decision of **Eikhalili v. ICWI** <sup>2</sup> endorsed the view that once the declaration contains the words “basis of the contract” that the insured is warranting the truth of his statements. Once the insured fails to answer truthfully he has breached the warranty and the insurer is entitled to repudiate the liability on the policy regardless of materiality.

[27] I have already accepted as a fact that Mr. Plunkett did not speak the truth in respect of his proposal form. He failed to advise ICWI that he was a livestock farmer and he also did not indicate that he would be using his vehicle to transport goods in support of his business. He has therefore breached the warranty and ICWI is not liable to indemnify him in respect of any claims arising out of the accident which occurred on the 5<sup>th</sup> of February 2017.

### **Breach of the Conditions of the Policy**

[28] A copy of the Policy was exhibited to the Affidavit of Ms. Touzalin. Under the conditions of the policy at clause 10 which is entitled “change in the use of the vehicle”, the insured is required to inform ICWI immediately upon any change in the use of his vehicle. There is also a requirement that the insured shall, in that event pay any additional premium required from the date of notification. The policy schedule was also exhibited and under the heading “Limitations as to Use” it states, *“Use only for social domestic and pleasure purposes. THE POLICY DOES NOT COVER:- Use for hire or reward or for commercial travelling or racing pace-making reliability trial speed testing the carriage of goods or samples in connection*

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<sup>2</sup> SCCA No.90 of 2006

*with any trade or business or use of any purpose in connection with the motor trade.*” Mr. Plunkett on his own statement has indicated that he was a livestock farmer and that he used the vehicle to transport his chickens to restaurants. He was clearly using the vehicle for the purpose of advancing his business and in support of his trade.

**[29]** His failure to advise ICWI of his intention to use the vehicle for such a purpose is also a breach of the conditions of his policy.

### **Conclusion**

**[30]** For the reasons expressed above there can be no doubt that ICWI is entitled in law to avoid the policy and also to repudiate the indemnity therein.

### **Order:**

1. The Claimant is entitled to avoid the Policy of Insurance No. MPCTJ-35555328 and not to indemnify the Defendant in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident involving the Defendant’s motor vehicle Licence No. 8994 GP on the 5<sup>th</sup> day of February 2017, along Colorane Main Road in the parish of St. Mary.
2. Costs to the Claimant to be agreed or taxed.