[2015] JMSC Civ. 249

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV04661

BETWEEN	**JN GENERAL INSURANCE**	**CLAIMANT**
AND	**DEBBIE-ANN FAIRWEATHER**	**DEFENDANT**

IN CHAMBERS

K Michelle Reid instructed by Nunes Scholefied Deleon and Co for the claimant

Patrick Peterkin for the defendant

October 21 and December 10, 2015

INSURANCE – WHETHER MATERIAL NON-DISCLOSURE – WHETHER INSURER CAN AVOID POLICY – CLAUSE STATED TO BE THE BASIS OF THE CONTRACT

SYKES J

[1] This is yet another of the seemingly endless stream of applications by insurance companies for declarations that they ought not to pay on the policy because of material non-disclosure or breach of the basis-of-the-contract clause.

[2] Miss Debbie-Ann Fairweather is the insured. The car was purchased with money sent by her then boyfriend Mr Jason Hanson. He was in the state of Florida at the material time and she was in Jamaica. On the proposal form, when asked, who will drive the vehicle? She indicated open. She also indicated that she was the sole owner of the vehicle and also that it would be registered solely in her name. The vehicle was involved in a collision. At the time of the collision Mr Hanson had possession of the car and he had lent it to a friend of his.

[3] The evidence from Miss Fairweather is that on the proposal form she indicated that she would be receiving remittances from abroad to purchase the car. The insurer accepts that that information was given but there was nothing to show that the remittance was not a gift. The court must observe that this response by the insurer displays tremendous ignorance of the Jamaican society. It is well documented and well publicised that many persons in Jamaica either receive remittances as gifts or they receive it in order to transact business on behalf of some person other than themselves. It would seem to this court that if an insurer is told that remittances will be used or has been used to purchase the vehicle then the next common sense question must be or ought to be, 'Is the remittance a gift to you or are you using the money to purchase the car for someone else?' Why would any person aware of the nuances of Jamaican life take at face value that remittances from abroad can only mean and must be that a gift is being made to the recipient?

[4] This very case shows the significant imbalance in the law and how it is really stacked in favour of the insurer. Anglo-Jamaican law is premised on the idea of full disclosure. In that regard our law is not unique. The problem arises because how this principle is effected. The Anglo-Jamaican model requires the insured (even if the insurer with greater experience and expertise did not do so) to think of just about anything material (even if not asked) and spontaneously disclose that material bit of information. As Professor Clarke observed in his book *Policies and Perception of Insurance--an Introduction to Insurance Law* (Clarendon Press, 1997), p.85 (cited in Jing, Zhen ,*Insured's duty of disclosure and test of*

materiality in marine and non-marine insurance law in China, JBL (2006) Oct, 681 – 704, 685:

> *The proposer here may complete the form with scrupulous care, but still find that there was something else material to the prudent insurer which, apparently, the insurer did not think to ask about but which, nonetheless, the proposer was expected to think of and disclose*

[5] It is this imbalance that led Lord Templeman (dissenting) in **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Company** [1995] 1 AC 501, 515 to observe:

> *The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure.*

[6] His Lordship was reacting to the submission by counsel for the undewriters in that case that 'a circumstance was material if a prudent insurer would have "wanted to know" or would have "taken into account" that circumstance even though it would have made no difference to his acceptance of the risk or the amount of premium.' Lord Templeman's complete response was this:

> *If this is the result of the judgments of the Court of Appeal in the C.T.I. case then I must disapprove of that case. If accepted, this submission would give carte blanche to the avoidance of insurance contracts on vague grounds of non-disclosure supported by vague evidence even though disclosure would not have made any difference. If an expert says, "If I had known I would not have accepted the risk or I would have demanded a higher premium," his evidence can be evaluated against other insurances accepted by him and against other insurances accepted by other insurers. But if*

the expert says, "I would have wanted to know but the knowledge would not have made any difference" then there are no objective or rational grounds upon which this statement of belief can be tested.

[7] The issue in the **Pan Atlantic** case was the test of materiality in cases of non-disclosure in marine insurance. It was accepted in that case that the statutory provision in question had accurately captured the common law test applicable to all types of insurance. That case has been accepted and applied by the Court of Appeal of Jamaica in **Insurance Co of the West Indies v Abdulhadi Elkhalili** SCCA 90/2006 (unreported) (decided December 19, 2008).

[8] The requirement of utmost good faith had its origins (according to one writer) in the practices of merchants in the 1700s when the information imbalance was such that marine insurers would not have much information when they were called upon to insure cargo or ships in distant ports.

[9] This is how one writer states the problem (B Soyer, *Reforming the assured's pre-contractual duty of utmost good faith in insurance contracts for consumers: are the Law Commissions on the right track?, JBL, 2008, 5, 385 – 414, 386 - 387*.

Under the general law of contract there is no duty to disclose information that would be likely to affect the other party's decision to conclude the contract. The position is different in a small number of contracts where the law requires parties to act in utmost good faith (uberrimae fidei) in their mutual dealings at the pre-contractual stage. Insurance contracts belong to this exceptional category. Consequently, the doctrine of utmost good faith in insurance contracts not only restates a passive duty to refrain from misrepresentation but also imposes a duty on both parties to volunteer certain information.

Having their origins in the merchant practices used in the 18th century, the common law rules on pre-contractual information

duties found their way into the Marine Insurance Act (MIA) 1906. By virtue of s.18 of the MIA 1906, a person applying for insurance is required to volunteer information to the insurer on material circumstances. A circumstance is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. The remedy for non-disclosure of a material circumstance is that the insurer is entitled to refuse all claims by avoiding the policy. In similar fashion, by virtue of s.20 of the MIA 1906 the insurer can avoid the policy if the policyholder makes a material misrepresentation of fact which turns out to be untrue. ***The remedy of avoidance can be deployed even when the policyholder was acting innocently and had no reason to know the undisclosed facts or that the statement was untrue****.* (emphasis added)

[10] The unfairness of the current law has been recognised in England and Wales. Attempts have been made to curb the harshness of the strict law. Between 1977 and 2000 various attempts were made to mitigate the rigours of the law. So significant were these reforms that some found it possible to speak of a consumer insurance law. B Soyer writes at pages 387 - 390:

As a replacement for law reform in this field, the industry was prepared to develop measures in the shape of self-regulation in an attempt to curb the harshness of the strict law. To this end, the Statement of General Insurance Practice (SGIP) and the Statement of Long-term Insurance Practice (SLIP) was introduced in 1977 by the British Insurance Associationand Lloyd's, under which most insurers undertook not to exercise some of their rights against their policyholders. Even though the Statements of Practice meant a slight improvement in the position of consumers, the main problem was that they were not legally binding and their effectiveness was limited in the absence of a formal complaints mechanism. To

overcome this difficulty, in 1981 three of the biggest insurers set up the Insurance Ombudsman Bureau (IOB) which could make awards of up to £100,000 that were binding on member companies. The service was free to complainants and under its original terms of reference, the IOB was required to make decisions in accordance with "good insurance practices" as well as in accordance with law. The terms of reference were later amended so as to require the IOB to make decisions that were "fair and reasonable in all the circumstances". This led the IOB to take a more sympathetic line towards consumers in good faith cases and also to make use of more flexible remedies.

It is fair to suggest that the protection afforded to consumers has been placed on a firmer legal basis following the introduction of the Financial Services and Markets Act (FSMA) 2000 which resulted in the establishment of the Financial Services Authority (FSA). The FSA is now the sole regulator for the financial services industry and its remit extends to the sale of both life insurance and most forms of non-life insurance. The FSA introduced the Insurance Conduct of Business Rules (ICOB) which impose a range of statutory duties on insurers and intermediaries and in particular require that the insurers cannot unreasonably reject a claim. At this juncture, it has to be stressed that the specific ICOB Rules on misrepresentation and non-disclosure are largely based on the provisions of the SGIP.

Another significant step taken by the FSMA 2000 in its quest to regulate the financial services industry was the introduction of the Financial Ombudsman Service (FOS). The FOS is a statutory body designed to replace eight dispute-resolution mechanisms including the IOB. Like the IOB, it determines complaints by reference to what is "fair and reasonable in all the circumstances of the case".

This means that the FOS is not bound by the strict law and has developed its own jurisprudence. In a nutshell, the approach adopted by the FOS to non-disclosure and misrepresentation cases could be summarised as follows:

- *The FOS will not support an insurer avoiding the policy unless the consumer was asked a clear question about the matter which is now under dispute. The disclosure duty at pre-contractual stage is effectively removed.*

- *If the FOS is convinced that the question answered wrongly induced the insurer, the outcome depends on the policyholder's state of mind at the time the misrepresentation was made. Where a misrepresentation is deliberate or reckless, the FOS allows an insurer to avoid the policy and refuse to pay any claim. Where a misrepresentation is innocent, the claim must be met in full and the policy upheld. Where the consumer acted inadvertently (merely careless), the FOS determines what policy terms would have been offered had the insurer been aware of all the information. If the insurer would have inserted an exclusion into the policy, the FOS considers whether the claim would have been paid had the exclusion been present. If the insurer would have charged a higher premium, he will be asked to pay a proportion of the claim.*

The impact of these various devices is such that in the consumer market the strict letter of the law is not followed any more. Undoubtedly, this provides a degree of protection for the consumers operating in the insurance market. However, owing to the fact that consumer contracts are regulated by a complex patchwork of law, regulations and guidelines, the law is inaccessible for most consumers who find it difficult to understand the extent of their legal rights and obligations.

[11] In this case the argument put on behalf of the insurers is that it was important to know whether any other person had any interest in the car so that it could properly determine (a) whether it would take the risk and (b) if it decided to take the risk, at what premium? The insurers say that the questions, are you the sole owner of the vehicle? and is it registered solely in your name? were the ones designed to elicit whether any other person had any insurable interest in the car. Miss Fairweather answered yes to both questions. Her answer to the second question is actually literally and legally correct. The vehicle was registered solely in her name. Her answer to the first question, in one sense was correct and in another sense incorrect. Miss Fairweather says that since her boyfriend was abroad and would spend most of the time there and he would be here 2 or 3 months out of the year she regarded herself as the owner of the car. On the other hand since the boyfriend provided all the purchase money he was the equitable owner of the car even though legal title was in her name. The insurance company says that since the boyfriend was the sole provider of the purchase money then he was the sole owner. This is not quite accurate. What the law says is that the sole provider of the purchase money of property which is registered in the name of another has a trust in his or her favour unless the circumstances of the purchase show that the provider of the purchase money was not intended to retain any interest (equitable or legal) in the property purchased. Thus in the sense of whether Miss Fairweather was the sole legal owner her answer was quite correct but the circumstances of the purchase show, on the face of it, that her boyfriend at the time may well have good grounds for saying that he was the equitable owner.

[12] It is the view of this court that the questions were badly crafted and having regard to what the insurers said they wanted to find out better questions could have been framed. They could have been framed in either English or Patios. If what the insurers wanted to find out was whether anybody else had contributed to the purchase and so may have a claim to an interest in the vehicle, Miss Fairweather could and should have been asked whether she was the only person who paid

for the car from her own resources or her own money or whether somebody else paid for the car in full or contributed to the purchase money.

[13] As any student of property law knows, ownership is a very elusive concept. We speak very glibly about owning land and owning a bank account and owning a car. The reality is the word 'own' is meaningless unless one knows what precisely the person has in mind. The person may mean that he or she has the 'right to possess, the right to use, the right to manage, the right to income of the thing ...' However a person can have these rights by virtue of being granted rights of possession (see Sarah Worthington, *Personal Property Law: Text, Cases and Materials*, (2000) (Oxford) p 2 citing A M Honoré, 'Ownership' in A G Guest (ed), Oxford Essays in Jurisprudence (1961, OUP, Oxford), pp 7 107, 113, 125 – 8).

[14] If the same proposal form were put to lawyer steeped in property law, he may well have a problem answering the question asking whether he or she is the sole owner. It is just remarkable that an industry that has had so many years experience with insurance could not frame the questions to elicit the information that it thinks is material with greater clarity, precision and comprehensiveness.

[15] Miss Reid suggested that that there is nothing technical about the word own or its derivative, owner and Miss Fairweather should not have had any problem understanding what was meant. The interesting thing here is that Miss Reid relies on the very technical distinction between legal and equitable interest in order to show that Miss Fairweather was not the owner. There cannot be many persons, other than lawyers, when asked, 'Are you the owner of this property?' would reply by asking, 'Are you asking whether I am the owner in law, equity or both?' But ownership, even loosely used, does have this underlying distinction that is made in property disputes everyday by lawyers.

[16] The long standing reason for insisting on treating contracts of insurance as special and subject to the principle of utmost good faith is said to be the lack of information symmetry between the insured and the insurer. The insurer is said to

be operating at an information deficit and relies on the insured to bring all material matters to the insurer's attention. According to Lord Mansfield in **Carter v Boehm** 96 ER 342, 343 '[i]nsurance is a contract on speculation: the special facts usually lie in the knowledge of the insured only. The underwriter trusts to him, that he conceals nothing, so as to make him form a wrong estimate.' This was spoken when insurance was still in its infancy and generally insurance was not extended to the general population. The industry has had several hundred years experience. Surely by now the industry must know what information it needs to have in order to determine whether it will take the risk and at what premium. There is much to be said for this reform suggested by Jing at page 702:

> *(i) Voluntary disclosure should be abandoned altogether and inquiry disclosure be adopted for all types of insurance. Matters which insurers have found generally to be material should be the subject of clear questions on the proposal form. Important questions should be as comprehensive as possible. If there is something important, but it is not included in the proposal form, the insurer cannot defend on the ground that the proposer has not disclosed the material fact which decisively influenced him on decision-making when the contract is concluded.*

[17] Be that as it may, Miss Fairweather's answer to the question of ownership was not entirely accurate. She has been undone by the Anglo-Jamaican law's insistence that the insured must think of what would be material and disclose that information to the insurer even if the insurer had not thought of it. The balance of the law favours the insurer in this context and so Miss Fairweather's incorrect answer to the question of ownership was a material non-disclosure. The insurer can avoid the policy on this basis.

[18] It is also open to parties to include a 'basis of the contract' clause in the proposal form. That was done in this case. In the present case to be decided, the clause just before the proposer's signature states that this proposal form 'shall form the basis the contract between me and the company and shall be deemed as incorporated in the policy to be issued.' The legal approach to this type of clause was considered in the case of **Dawsons Ltd v Bonnin** [1922] 2 AC 413. In that case there was a basis-of-the-contract clause in a contract of insurance. In the **Bonnin** case the insured inadvertently stated that the truck would be 'garaged' at the firm's ordinary place of business when that was not the case. There was a fire and the insured made a claim. The insurer resisted on two grounds. The first was material misstatement and breach of the basis-of-the-contract clause. The insurer failed on the material misstatement point but succeeded in avoiding the claim on the basis-of-the-contract clause. Viscount Haldane explained it in this way at pages 424 – 425:

> *I think that the words employed in the body of the policy can only be properly construed as having made its accuracy a condition. The result may be technical and harsh, but if the parties have so stipulated we have no alternative, sitting as a Court of justice, but to give effect to the words agreed on. Hard cases must not be allowed to make bad law. Now the proposal, in other words the answers to the questions specifically put in it, are made basic to the contract. It may well be that a mere slip, in a Christian name, for instance, would not be held to vitiate the answer given if the answer were really in substance true and unambiguous. "Falsa demonstratio non nocet." But that is because the truth has been stated in effect within the intention shown by the language used. The misstatement as to the address at which the vehicle would usually be garaged can hardly be brought within this principle of interpretation in construing contracts. It was a specific insurance, based on a statement which is made foundational if the parties have chosen, however*

carelessly, to stipulate that it should be so. Both on principle and in the light of authorities such as those I have already cited, it appears to me that when answers, including that in question, are declared to be the basis of the contract this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability.

[19] Viscount Cave said at page 432:

"Basis" is defined in the Imperial Dictionary as "the foundation of a thing; that on which a thing stands or lies"; and similar definitions are to be found elsewhere. The basis of a thing is that upon which it stands, and on the failure of which it falls; and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach.

No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in Anderson v. Fitzgerald and Thomson v. Weems, in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue, the policy should be void; but I think that the effect is the same as if those words had been found in the present policy.

[20] And at page 433:

Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the "basis" clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the

contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered.

[21] Viscount Cave continued at page 434:

In these circumstances it appears to me to be irrelevant to consider the conflicting evidence in the case as to whether a misstatement as to the place of garage is, in the ordinary sense, material or not. The parties have agreed that it shall be deemed material, and that concludes the matter. I must confess that I have little sympathy with the respondents, who seek to profit by a mistake to which their agent contributed; but the case must be decided according to law, and I think that the law is on their side.

[22] As can be seen, even if the insured successfully rebuffs the material non-disclosure point he can still be undone by the basis-of-the-contract clause. Miss Fairweather has been undone by this clause. Her answer that she was the sole owner was not 100% accurate because she had not put up 100% of the purchase price. Unhappily, this court has come to the conclusion that this clause has succeeded there were doubts about the material non-disclosure. The objective and purpose of this clause is to achieve what has happened here: if the material non-disclosure point fails the basis-of-the-contract clause is certainly bound to succeed.

Disposition

[23] The contract of insurance can be avoided because the basis-of-the-contract clause has been breached. Secondly, the non-disclosure regarding ownership was material and therefore the insurer could avoid the contract on that basis also. Costs of this application to the claimant to be agreed or taxed.