IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV 03080

BETWEEN	**EVEROY HARRIS**	**1ST CLAIMANT**
AND	**MARCIA HARRIS**	**2ND CLAIMANT**
AND	**JAMAICA INTERNATIONAL INSURANCE COMPANY. LTD**	**DEFENDANT**

Mr Canute Brown instructed by Brown Godfrey & Morgan for the Claimants

Mr Jeffrey Mordecai for the Defendant

Heard: February 26, 2016 and July 19, 2016

Motor vehicle Insurance - Failure of insurance company to indemnify motor vehicle owners - Claim for Breach of contract

LINDO J.

[1] The claimants are the joint registered owners of motor vehicle registered 4433DU which was involved in an accident on October 25, 2006 whilst it was being driven by Suzette Dewar. At the time of the accident they had a policy of comprehensive insurance with the defendant company, the certificate of insurance, in respect of which was issued on September 15, 2006.

[2] The defendant failed to provide the indemnity under the contract of insurance indicating that investigations revealed that there was a breach of the policy by the claimants. The claimants have denied such a breach.

[3] On May 4, 2011, the claimants filed a claim and particulars of claim claiming damages for breach of contract, damages to include exemplary damages and special

damages for the value of the motor car on a total loss basis and for loss of use for thirty days at $4,000.00 per day.

[4] By its defence filed on August 23, 2011, the defendant disputes the claim on the basis that the claimants breached the contract of insurance that they failed to pursue arbitration or other proceedings against the defendant within twelve months of being informed that the claim for indemnity was denied.

[5] In the particulars of breach of contract, the defendant avers that the claimants used or permitted the use of the motor vehicle for hire, failed to ensure that the motor vehicle was used according to the use permitted by the policy and that they mis-represented and/or failed to disclose facts material to the defendant's decision to contract with them or to continue to contract with them.

[6] At the trial of the matter, the following documents were agreed and admitted in evidence:

> *Proposal Form*
> *Certificate of Insurance issued 15th September 2006.*
> *Letter dated March 1, 2007 from JIIC to Associated Owners (Agent).*
> *Letter dated January 30, 2008 from JIIC to Everoy Harris.*
> *Motor policy insurance booklet*
> *Minutes of order of the Supreme Court in Claim No. 2007 HCV 01099, dated July 17, 2008*

The evidence

[7] The 1st Claimant's witness statement stood as his evidence in chief. His evidence is that in 2006 both claimants received a notice informing them of the renewal date of their insurance policy and that on August 26, 2006 a proposal for insurance was prepared by the agent of the insurance company and signed by them. He further states that the proposal directed him to read the policy which could be obtained at the

Insurance Company's head office and that at no time was he told of the contents of the policy or advised of the clause relating to arbitration.

[8] He also states that under the policy of insurance either policy holder was permitted to drive the vehicle, they were permitted to allow an authorised person to drive it and that they loaned the car to Suzette Dewar on or about October 25, 2006. He further states that at the time of coverage, the motor car was valued at $350,000.00 and since the failure of the defendant to "honour its obligations under the contract, I lost use of my motor vehicle"

[9] Under cross examination, he agreed that the basis of the case is in contract and that it was important for the court to have that contract. He stated that he could not say that his case was filed based on the insurance policy booklet and when asked when he had knowledge of the twelve month period in which the matter should have been referred to arbitration he said, "I just learned of it, I don't remember."

[10] He admitted to having received the letters dated March 1, 2007 and January 30, 2008 and that both letters were denying coverage under the policy and then reluctantly agreed that from 2007 he was aware that JIIC had denied indemnity. He also admitted that he took no steps to review the terms and conditions of the policy and indicated that what led to the delay of four and a half years was that he was trying to settle with the insurance company. He also indicated that the insurance company was always consistent that they would not indemnify them.

[11] He agreed that General Condition 9 of the insurance policy (Clause 9) which states in part *"...If we disclaim any part of your claim and you do not refer such claim to an Arbitrator within twelve (12) months from the date of such disclaimer the claim shall for all purposes be deemed to have been abandoned and cannot be pursued again",* is part of the contract of insurance.

The Defendant's Evidence

[12] The witness statement of Ms Petagae McCook, Senior Legal Officer of the defendant was admitted as her evidence in chief. She notes that the case at bar is not the first proceeding resulting from the collision in which the claimant is a party.

[13] She admits that the defendant denied liability to indemnify the claimants and that the denial was based on "its confidential investigation of the Claimants' claim...which concluded that the claimants' vehicle had been hired to the driver at the material time contrary to the terms of the policy of insurance..."

[14] When cross examined, she stated that she was not sure if the proposal form is retained by the insured or if a copy is given to the insured when signed. She noted that the proposal form is assessed by an underwriter and that one has to look on the back of the form for the address at which the policy can be examined. She indicated that the policy document had a date, June 2009, which is a date after the proposal form was signed by the claimants.

Submissions

[15] Counsel for the claimant, Mr Canute Brown, submitted that there was no evidence produced by the defendant which proved the alleged breach of the insurance contract warranting a refusal to indemnify. He further submitted that the arbitration clause referred to by the defendant was not incorporated in the contract of insurance as the incorporation of new terms must be done by notice at or before the time of contracting and that if it is held to be incorporated, the defendant, by taking steps to defend the claim instead of applying for a stay of the proceedings, has acquiesced to the proceedings.

[16] In support of his contention that the defendant had not taken any reasonable steps to bring the limitation clause to the attention of the claimants, Counsel referred to the decision in **Thornton v Shoe Lane Parking** [1971] 1 All ER 686 and also cited the judgment of Bingham LJ in the case of **Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.** [1989] 1QB 433.

[17] He expressed the view that the statement by the defendant, that indemnity was denied because a confidential report by the defendant's investigators concluded that the vehicle had been hired to the driver at the time of the accident, was inadmissible, since it would offend the rule against hearsay.

[18] In considering the cases cited by Counsel for the defendant, Mr Brown indicated that they had to be examined as to the facts and as to the issue of whether the insured had 'reasonable opportunity' to get knowledge of the limitation clause which the insurer invoked.

[19] He stated that the cases were decided when the Insurance Act of 1971 was in force and that the Regulations made under the Act required the Insurance Company to issue and deliver an insurance policy to the insured and that the proposal form must be attached to it. He added that the Insurance Act of 2002 and the Regulations made thereunder, do not mention this requirement but that Regulation 126 of the Insurance Regulations, 2002 states that the insurance contract consists of the proposal form and the policy.

[20] He indicated that the proposal form is the only evidence of whether an opportunity was given to the claimants to know of the existence of the limitation clause. He also submitted that the statement on the proposal form in relation to the fact that details of the policy can be obtained at the Head Office and that there is no substitute to reading the policy, assumes that the claimants would be "favoured with their policy". He therefore expressed the view that unless given the document, one is not likely to be able to read and review it.

[21] He referred to factors enumerated in **William McIlroy Swindon & Anor v Quinn Insurance Limited** [2010] EWHC 2448 as being relevant to the determination as to whether the insured had notice of the incorporation of the clause in the policy and to show that the instant case can be distinguished on its facts.

[22] He concluded that there was no evidence in proof of the claimants' breach of the contract of insurance and that the defendant having refused to indemnify them in respect of the loss, and the claimants not having had an opportunity to have knowledge

of the limitation clause that was not incorporated by reference, judgment should be entered in favour of the claimants.

[23] Mr Mordecai on behalf of the defendant submitted that it is the claimants who breached the contract of insurance by failing to bring arbitration or other proceedings within twelve months of the defendant denying indemnity and that the onus is on them to contest the denial of indemnity within the period stated in General Condition 9.

[24] To buttress his contention that the claimants were aware of the defendant's denial of liability, he noted that Exhibit 6, the Minutes of Order in Claim No 2007 HCV 01099, was admitted into evidence by consent and that the affidavit of Jeffrey S. Mordecai, attached as Appendix 5 to the Witness Statement of Petagae McCook, was not challenged.

[25] In response to the claimants' assertion that the provisions of the policy were never brought to their knowledge, Counsel for the defendant submitted that the claimants cannot base their claim on the terms of the policy and then attempt to disregard specific provisions of the policy which were not observed by them. Counsel drew attention to the fact that in the witness statement of the 1st claimant, Evroy Harris, he admitted in paragraph 29 his failure to comply with the Clause 9 of the policy and admitted that he signed the proposal form which expressly states that the claimant accepts the terms and conditions of the policy of insurance.

[26] Mr Mordecai cited the case of Hopeton **Wilson v National Employers Mutual General Insurance Association Ltd** (1981)18 JLR 334, where the insured failed to seek arbitration, under the terms of a contract with terms similar to the terms in the policy in the case at bar, and this failure was held to prevent him from recovering and pursuing his action against the insurer, even where the court found that the defendant insurer had acted incorrectly in denying liability.

[27] In seeking to refute the 1st claimant's claim that Clause 9 was never brought to his attention, Counsel for the defendant referred to the case of **The Insurance Company of the West Indies v Dalverster Wray Suit** No CL 2000/ I-051 unreported, delivered January 18, 2002. In this case the claimant sought a declaration that condition

8 of the private car insurance policy issued by the claimant was legally binding on and enforceable by or against the insured and that on a true construction of this condition the expiration of the time stated for referral of disputes barred the insured under the policy from bringing any proceedings whatsoever. Condition 8 states, in part, as follows:

> *"...If the company shall disclaim liability to the insured for any claim hereunder, and such claim shall not within twelve calendar months from the daye of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."*

[28] Counsel indicated that Anderson J noted that the insured claimed that the clause was not brought to his attention, but relied on the fact that the insured retained the services of an attorney at law to represent him against the insurance company and there had been discussions and this is similar to the position in the case at bar, where the 1st claimant complained that after they retained attorneys, the position of the insurance company never changed in the period prior to the proceedings.

[29] Counsel also noted that there is a claim for special damages but there is no pleading or any expert evidence as to the market value of the vehicle at the time of the loss and no evidence provided as to expenses incurred in relation to the alleged loss of use.

[30] It falls to be determined whether the claimants' failure to pursue arbitration or other proceedings within twelve months of the date the defendants indicated that indemnity would be denied, precludes them from filing the instant claim.

[31] The claimants are seeking damages for, *inter alia*, breach of contract. The burden of proof is on the claimants to show, on a balance of probabilities, that they had a valid policy of insurance and that the defendant's denial of indemnity is a breach of that contract and it has caused them to suffer loss and damage.

[32] The main thrust of the evidence and indeed the submissions presented to the court was on whether the claimants had knowledge of the clause and should have pursued arbitration

[33] I note that the claimants are saying the general Conditions 9 of the policy was not brought to their attention. In their statements of case, they have not stated that General Condition 9 was not incorporated in the certificate of insurance neither have they stated that they were unaware of the provisions although it was submitted on their behalf that the condition was not incorporated. In fact, the 1st claimant under cross examination agreed that General condition 9 is part of the contract of insurance although he stated that he had no knowledge of arbitration and that he took no steps to review the terms and conditions of the policy.

[34] In relation to Counsel's contention that the Insurance Regulations required the Insurance Company to issue and deliver an insurance policy to the insured and that the proposal form must be attached to it, and that the Insurance Act of 2002 and that Regulation 126 of the Insurance Regulations, 2002 states that the insurance contract consists of the proposal form and the policy, I find that there would be a time lapse between when the parties sign the proposal form and when the certificate of insurance is issued, as I accept the evidence of the defendant's witness that the proposal form has to be assessed by an underwriter.

[35] The question would therefore arise as to at what stage, and or whether, the claimants had adequate notice of the terms of the policy

[36] I find that as they were issued with a Certificate of insurance in which they were insured under the policy of insurance, the claimants had sufficient notice and they would be bound by the terms and conditions of that policy. Further, this is not a case where the claimants were taking out a new insurance coverage. They have admitted in the evidence of the 1st claimant that they had in fact renewed the policy of insurance in August 2006 and that they signed the proposal form stating that they accepted the terms and conditions of the policy.

[37] The case of **S & S Entertainment Ltd. The Orchard Colony v Caribbean Home Insurance Co. Ltd., British Caribbean Insurance Co. Ltd., Motor Owners Mutual Insurance Association Ltd. and Globe Insurance Co Ltd.** Suit No CL1998/S330, unreported, a case referred to in **Wray,** was decided on somewhat similar facts. There the court found that since this was a renewal of a previously held policy which had an identical provision, it could not be said that the plaintiff had no opportunity of knowing the terms of the policy.

[38] In the case of **Hopeton Wilson,** *supra,* cited by Counsel for the defendant, the insured failed to seek arbitration under the terms of a contract with terms which are also similar to the terms in the policy in the case at bar and this failure was held to prevent him from recovering and pursuing his action against the insurer.

[39] In the course of his submissions, Counsel for the claimant had also contended that Clause 9 of the policy was not incorporated into the insurance contract as it was not a term at the time of signing and that reasonable steps were not taken to bring it to their attention.

[40] I reject this submission. I accept that having signed the proposal form, the claimants' signatures have the effect of incorporating the clause into the contract, and find that it is irrelevant that the 1st claimant indicates that he did not read the policy.

[41] The law as it relates to clauses of this nature, was discussed in the case of **L'estrange v F. Graucob, Limited** [1934] 2 KB 304**.** In this case, the buyer of an automatic slot machine signed and handed to the sellers who also signed the contract, an order form containing the essential terms of the contract. The contract contained certain special terms, one of which excluded warranties from the contract which was in small print. The machine did not work satisfactorily, and the buyer brought an action against the sellers for breach of an implied warranty that the machine was fit for the purpose for which it was sold. The sellers pleaded that the contract expressly provided for the exclusion of all implied warranties. The buyer replied that at the time when she signed the order form she had not read it and knew nothing of its contents.

[42] In adjudicating this case, Scrutton and Maugham L.JJ. cited and reaffirmed Mellish L.J. in **Parker v South Eastern Railway. Co.** [1877] ...where he said:

> *"In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature and in the absence of fraud it is wholly immaterial that he has not read the agreement and does not know its contents. In cases in which the contract is contained in an unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed."*

[43] In the later case of **Spriggs v Sotheby Parke Bernet & Co Ltd** [1984] 2 EGLR 24 the court applied and cited the case **L'Estrange v F Graucob Ltd.**, *supra.* The court ruled that the claimant was bound by the contract she signed which stated that the defendant was not responsible for loss or damage of any kind whether caused by negligence or otherwise and that the property was being accepted at owner's risk. In reaching its decision the court said:

> *"However, it seems to be well established that, in the absence of fraud or misrepresentation, a party signing a document like this is bound by it and it is wholly immaterial whether he has read the document or not."*

[44] Although in the case at bar the terms of the “contract” signed by the parties were not contained in the proposal form itself, by virtue of the incorporation of such terms, the claimants are bound by it.

[45] In relation to insurance contracts specifically, in the case of **Hopeton Wilson,** *supra,* a case cited in the case of **The Insurance Company of the West Indies v Dalvester Wray,** the plaintiff had also signed a declaration in similar terms to that in the

instant case, agreeing that the indemnity to be provided by the insurance was subject to the provisions of the insurance policy. The court was required to consider the effect of a provision which was in the following terms:

> *"If the Association shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve months from the date of such disclaimer have been referred to arbitration under the provision herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable here under".*

[46] In his judgment, Gordon J stated that based on the agreement signed by the plaintiff he agreed to be bound by the condition and therefore the insurance company was not obligated to indemnify him.

[47] Applying the principle distilled from the cases referred to, I am of the view that, notwithstanding it was an 'exclusion clause' in the case of **L'Estrange**, the fact that the claimants signed the proposal form which set out where the policy document could be examined, they are deemed to have read it and to have agreed to the terms set out in the policy document and are bound by the terms they have contracted to and cannot properly make this claim.

[48] The claimants had an opportunity to ascertain the terms of the policy. The claimants not only renewed a previously held policy with the same terms but they signed the proposal form subject to the conditions of the policy. The contents of the proposal form and the certificate of insurance cannot therefore be ignored. I find that they provided ample information and direction as to where the policy could be found, which sufficiently brought the terms and conditions of the policy of insurance to their knowledge.

[49] The 1st claimant himself in his witness statement admitted that he had not complied with Clause 9 which suggests he did in fact have prior knowledge of the provision in the policy. I also find it hard to accept that the claimants could have based

their claim on specific terms of the policy yet claim to not have been made aware of another condition within the same policy.

[50] The court has also taken into consideration the question of whether the defendant did what was reasonably sufficient to give notice of the clause 9 to the claimants. To the extent that the clause is one which would regularly be found in contracts of the nature entered into by the claimants and the defendant, and the claimants indicate that this was a renewal of a contract of insurance, I find further, that the claimants cannot succeed in their contention that they had no knowledge of the clause, and in Counsel's submission that it was not incorporated into the contract. Since this was a renewal of a policy, the claimants had a fair opportunity of knowing what the terms and conditions of the policy were.

[51] Additionally, there is nothing particularly onerous or unusual about the clause in question which would lead me to a finding that this is a term which should have been specifically pointed out to the claimants at the time of entering into the contract of insurance. Indeed I accept that they had sufficient information which would point them to having a detailed examination of the policy if they so wished. They chose not to. The claimants cannot therefore, under the circumstances, successfully maintain that they had no knowledge of the limitation clause in the policy.

[52] In any event, irrespective of whether the policy was brought to the claimant's knowledge, the fact that the claimants signed the proposal form accepting the terms of the policy, I find that they are bound by it.

[53] The claimants assertion that by taking steps to defend the claim instead of applying for a stay of the proceedings, the defendants acquiesced to the proceedings and waived their right to enforce Clause 9 of the policy is unfounded.

[54] In **Wray, (Supra)** Anderson J stated that a condition may be waived by the insurer either by explicit words or by its conduct which might lead the other party to act to its detriment. He said, *inter alia,* that "...*In such circumstances, an estoppel may arise to prevent the insurer from insisting upon the contract condition...*".

[55] I cannot agree with the claimants' submission as there is no evidence before me which suggests that based on reliance on the defendant's actions or words, the claimants acted to their detriment. In correspondence from the defendant dated March 1, 2007 and January 30, 2008 the defendant has maintained its position that due to the breach of the policy by the manner in which the vehicle was used and the fact that the claimants have failed to bring an action within twelve months, contrary to Clause 9, they would not indemnify them. As there is no evidence presented by the claimant adverse to the position stated, it is within the defendant's right to enforce the conditions of the policy against the claimant.

[56] I find it is clear from the correspondence (Exhibits 3 and 4) that it is the claimants' failure and or refusal to appreciate the position that the defendant had taken concerning their claim from as far back as March 1, 2007 that prevented them from acting in accordance with clause 9 as in light of the correspondence, the claimants, who were always represented by Counsel, would have been aware of the defendant's position.

[57] Additionally, even where the claimant had proved that the vehicle was not rented, on the authority of **Hopeton Wilson v National Employers Mutual General Insurance Association Ltd, supra**, the claimant would still be under an obligation to honour Clause 9 of the policy and bring proceedings within the twelve months.

[58] In view of the evidence and the authorities and the clear terms of general condition 9 of the policy of insurance, I find that the claimants have failed to show that the defendant breached the contract thereby causing them loss. My findings and conclusions therefore dictate that I deny the Claimants the claims and reliefs sought against the Insurer.

[59] There shall therefore be judgment for the defendant with costs (inclusive of costs for the adjourned trial date) to be agreed or taxed.