



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

2005HCV05420

BETWEEN ROAMI OBADIAH HENRY CLAIMANT
AND UNITED GENERAL INSURANCE
COMPANY LTD DEFENDANT

Mr. Ronald M. Paris Attorney-at-Law instructed by Messrs. Paris & Company for
the Claimant

Miss Suzette Campbell Attorney-at-Law instructed by Campbell & Campbell for
the Defendant

Insurance – Theft/Loss of Motor Vehicle – Condition of Policy –

Requirement to give notice in writing within 30 days of loss – Whether

Insurers Liable

Heard: May 11, 2008; June 4, & 5, 2008 & May 29, 2009

Thompson-James (Ag.)

Mr. Henry sued on a Policy of Insurance, entered into sometime in 2004 by the
defendant United General Insurance Company Ltd (UGI) with him which provided
inter alia.

“that in the event of any occurrence which may give rise to a
claim under the policy, the insured shall within 30 days thereof
or such further time as the company may in writing allow in
that behalf give notice thereof to the company with full
particulars.”

Mr. Henry expresses that he was robbed of his vehicle at gun point in 2004. One of the risks insured against was loss due to theft. He sought to be indemnified for his loss, however UGI is seeking to avoid indemnifying him under the policy, contending that his claim was submitted after the expiration of the stipulated 30 days condition in the policy.

Further, that in the policy there exists a provision for arbitration and Mr. Henry having failed to take steps to arbitrate cannot now seek to have the court determine the claim.

UGI neither accepted nor denied that the loss occurred.

The Claim

The claimant claims against the defendant the sum of \$2,500,000.00 and interest thereon as damages for breach of contract of insurance made between the parties by Motor Vehicle Insurance on or around the 23rd March 2004 whereunder the defendant agreed to insure the claimant's Toyota Tundra pick-up against theft/loss in the said sum of \$2,500,000.00.

The claimant said that on Sunday the 27th June 2004 the said pick-up truck was stolen from him by armed men with guns.

On Monday the 28th June 2004 the claimant telephoned the defendant's servant and/or agent at the Montego Bay's office and reported the loss but was told he had to come in and make a written report.

The claimant went to the defendant's said office at its Montego Bay branch but the defendant's servants and/or agents there refused to take a written report of

the theft from the claimant until he filed a police report as well as the title for the said vehicle.

The claimant was not able to produce same to the defendant within 30 days of the theft/loss, whereupon the defendant's servant and/or agent informed the claimant that he had reported the loss outside of the notification period of 30 days stipulated in the said policy, then defendant could not settle his claim.

The claimant therefore claims against the defendant damages for breach of the contract of insurance, the sum insured with interest as well as other fees and costs.

The Claimant's Account

In brief, Mr. Henry testifies that on the 27th June 2004 at about 12:15p.m. he was robbed of his Toyota Tundra pick-up in St. Elizabeth by men armed with guns.

On the same day he made a report to the Nain Police Station. The following week he reported to the station and gave a statement, which he signed, to Det. Sgt. Mitchell.

He first visited UGI on the 2nd July 2004 however on the 28th June 2004 he had telephoned, and spoken to someone.

He took no record of the person with whom he spoke. When he attended the office on the 2nd July 2004 he spoke with an employee in the general office who informed him ~~that she~~ could not take a statement from him as he had no proof that the vehicle was stolen and until he obtained a police report and the title to the vehicle she could not take a statement. He said that he obtained the title but he does not remember how long it took him to get the police report.

The employee at UGI refused to take his name and particulars. He further testifies that there is a procedure at the office involving the recording of the name and particulars in a book which he sometimes signs. The only written record of his visit to UGI on the 2nd July 2004 would be in that book as the employee refused to record any particulars of the theft.

On the 7th July 2004 he visited the office in relation to business involving other vehicles that he owned.

In 2005 after he had supplied UGI with the title and the police report, he was informed that they were not honouring the claim.

He was given a motor vehicle accident form at UGI and was told to take it home, fill it out and return it to the office, which he did. He was later informed that he had not dated the form. When he enquired of an employee as to what date to place on the form, her response was that she did not know. He therefore inserted the date on which he visited the office, the 13th October 2004 and on that form he had incorrectly stated the date of the loss of the vehicle as the 4th July 2004. His Particulars of Claim has one date of theft as the 23rd April 2004 which also is incorrect.

The motor vehicle policy was tendered and admitted into evidence as exhibit "1".

When he attended the office the receptionist wrote his name in a hard cover book. The last time he wrote in that book was ~~on~~ the 30th July 2004.

In Cross-Examination

He testifies that he did not get the police report at the same time he applied for it and he does not remember how he got the report.

He went on to say that he took in a claim form to the Insurance Company so when he testified that the police report was taken in by him is an error put into the statement by the lawyer. He does not remember seeing a police report relating to this matter.

On the motor claim form the date of the theft is the 4th July 2004. He did not write up the form, he signed it. Over the years he owned about five (5) vehicles and he had previously signed a claim form. At that time an employee of the company had registered his claim and filled out the claim form for him.

When he telephoned the Montego Bay's office of UGI he did not ask the name of the person to whom he spoke. When he attended the office the person did not wear a badge. He did not ask her name. She was in the claims office. He corrected this to say the main office. He is aware of the underwriting department. He did not ask for a claim form because he had made a loss report.

He did not ask for the name of a supervisor. He made no complaint to a supervisor.

He made no enquires, he just took what she said and left.

It was the Insurance Company that made the mistake as to the 7th. He does not remember the date that he got the documents from UGI. He does not remember when he filled out the claim. He does not remember when the motor claim form was filled out. He does not remember the date that he reported the loss to the company. He did not date the claim. He had no particular reason not to do so. When he received the call from the Insurance Company he went and fill in the date but, he did not fill in the date of the 4th July.

He agreed that the police told him that he had to make a report before 30 days.

He denies that prior to the 13th of October, 2004 he had no contact with UGI in relation to this accident.

He is aware of the computer system at UGI and that when one goes on business to UGI, the information is placed on the computer however he maintains that there is a hard cover book at the company for this purpose as well.

He cannot remember when he submitted the police report. He gave nothing but the signature on the 13th October 2004.

When the policy schedule was shown to him in court he couldn't recall seeing it.

He expects his Insurance Company to take care of him. He denies the signature on the proposal form and does not remember it. He is a self taught person for whom people usually fill out forms.

He denies receiving the following documents from UGI;

- (1) Insurance Certificate,
- (2) Policy Schedule and
- (3) Booklet, when he first insured the vehicle in 2001.

He cannot recall if he visited UGI in the months of August and September in relation to the claim.

He was not aware that in the event that a dispute arose in relation to the claim ~~the matter had to go to arbitration.~~

In Re-Examination

He acknowledges that a police report in fact exists. He expresses that it was the person who assisted him in filling out the claim form that had made the mistake in relation to the date.

At the time he went to UGI there was no computer at the receptionist's desk. The second time he visited he spoke to someone else. He did not fill out the claim form and did not read it as best as he could. When he called the office to report the claim he was not informed that the claim should be in writing.

The Defendant's Account

Miss Ruthann Morrison a legal officer employed to UGI testifies that on the 17th of September 2001 Mr. Henry submitted to UGI a motor proposal form exhibit '3' in which he applied for insurance coverage of his 2001 Toyota Tundra pickup.

On the basis of the representations made in the proposal form and the payment of premiums he was issued with a comprehensive Motor Vehicle Policy of Insurance – exhibit '4a', a Policy Schedule – exhibit '4b' and a copy of Policy Booklets – exhibit '4c'.

Mr. Henry was also notified and given copies of four (4) endorsements affecting the policy. One of them related to the time and manner in which claims for compensation or indemnity under Policy Schedule are to be made. Effective September 2001 Mr. Henry has a period of ~~30~~ days in which to notify UGI of any occurrence which would give rise to a claim under the policy.

The policy of Insurance in relation to this vehicle was renewed several times with the last certificate of insurance being issued on the 26th March 2004. At the time

of the policy renewal Mr. Henry furnished UGI with a report from Priority Loss Adjusters Ltd indicating that the renewal value of the vehicle was \$2.5 million. On the 13th October 2004 a report was made by Mr. Henry to UGI that his vehicle was stolen.

She testifies that at no time prior to the 13th October 2004 did he make a report of the theft of the vehicle and UGI is not in possession of any document to support the claim that a report was made to UGI prior to the 13th October 2004.

After reviewing the file a decision was made not to honour the claim as, Mr. Henry had allowed three months to elapse before the claim was reported to UGI. By letter dated the 27th October 2004 Mr. Henry was advised of this position and that he was in breach of the Policy of Insurance issued to him by failing to report the loss to UGI within the time to do so.

This letter of refusal to indemnify is exhibit '10'.

Condition 9 of the Policy issued provides, that all disputes between Mr. Henry and UGI as a result of UGI's refusal to indemnify are to be referred to arbitration within 12 months of the disclaimer and if not so referred then the claim is deemed to have been abandoned and cannot be maintained.

The time limit for arbitration of the claim expired on the 27th October 2005. The matter was never referred to arbitration.

It is not a requirement that a police report should be obtained before a claim can be reported. UGI had made no request for this report. An examination of the file revealed that, this report was brought in by Mr. Henry on the 13th October 2004, the date stamped on the document as received in the office.

In Cross-Examination

The witness testifies that she is not saying that the claim is a fraudulent one, neither can she conclude that UGI has accepted that the vehicle was stolen. Exhibit '10', the letter refusing to indemnify is not evidence of acceptance that the vehicle was stolen but evidence that Mr. Henry reported an alleged loss. UGI is not admitting nor denying the loss.

The issue in this case is not whether the loss occurred but that a loss was reported on the date indicated on the motor claim form as the loss occurring. This date was far more than 30 days prior to the date that Mr. Henry made the report on the motor claim form. She is aware that Mr. Henry is expressing that the vehicle was stolen on the 27th June 2004.

On a perusal of the files that she was given she observed that the claim form exhibit '9' was filled out at the office but she is unable to say by whom. She agrees that two different dates of loss were recorded and neither has complied with the 30 days requirement.

The file would not indicate who the receptionist was at the time of the report at the office. Since she commenced working at UGI computer hardware exists on receptionists' desks to record visits of persons to the company. She doesn't know how long this recording by computer existed.

In dealing with the matter she considered two files

- 1) Policy file folder – controlled by the underwriting department which contains all records and endorsements issued to the insured in respect of this specific motor vehicle and to his particular policy.

2) Claim file – which was created in respect of this particular accident, that is, loss or reported loss and is controlled by the claims department.

The files did not disclose that there was a book in which entries were made by the receptionist. She describes Mr. Henry's evidence in this respect as a total fabrication.

She maintained that he did not make a report within 30 days of the loss of the motor vehicle.

It is not the receptionist's duty to see to claims made by the insured. Claims are usually reported to the customer services' representative. Having looked at the claim filed there is nothing to suggest that the insured was given the claim form to take away.

The Claimant's Submission

Learned Counsel on behalf of the claimant Mr. Ronald Paris submits that the date of the loss is the critical point that the court has to determine in this proceeding. The court is to find and believe the claimant when he said that his vehicle was stolen on the 27th June 2004 and that Exhibit '9' incorrectly states the date of the loss as the 4th July 2004 instead of the 27th June 2004.

The court has to resolve the date of loss with reference to (1) the claim form and (2) the police report.

The only evidence on which ~~the~~ police report could be issued is based on that of the claimant.

Miss Morrison's evidence is that the police report was taken in to them by the claimant on the 13th October 2004. Following this Mr. Paris posed the question "why was the proper procedure not followed re the police report?"

The claimant has been insured with the company since 2001. Why then would he wait for 60 days to make his report? There is no allegation of fraud.

He asked the court to accept Mr. Henry as a witness of truth.

With reference to exhibit '5', the claim notification excess clause, he said Mr. Henry did not sign this form, the conclusion must be drawn that there is nothing in the file to indicate that he signed, having read it.

With reference to exhibit '9', the claim form, Mr. Paris queried whether the Insurance Company acted with the level of efficiency that one expects to accept from an Insurance Company.

He points out that Mr. Henry said he got the claim form to fill out. Miss Morrison is saying that the claim form was filled out in the office.

The court in coming to a decision must look on both sides, must assess both sides.

He invited the court to find that the claimant did suffer loss and that he did make a report. The burden is on the defendant to establish that Mr. Henry did not comply with notice procedure.

He referred to the cases of **Baker V Providence Accident and White Cross Insurance Company Ltd 1939 AER 690**, **Barnett vs. Jeremy 1849 3 EXCH 535** and **McGillivray on Insurance 10th Edition**.

He urged the court to discredit the Insurance Company as UGI had brought a witness who had commenced working with the company in 2007 whose knowledge is based on her perusal of two files.

In dealing with the arbitration proceedings, Mr. Paris referred the case of the **Insurance Company of the West Indies vs. Dalvester Wray, C.L. 2000/I 051.**

The arbitration agreement, he said is contained in the policy. The defendants at this point are estopped. He referred to the White Book – application must be made before taking any steps on the action. Whilst the notice was not in writing the defendant is not obliged to do so..

The defence is saying that the loss to the insurer must be in writing. The defence is not saying that notice was not given but that it had to be in writing.

The Defendant's Submission

On behalf of the defendant Learned Counsel Miss Suzette Campbell submits that a policy of insurance is a contract like any other contract, there are duties and obligations imposed hence you cannot take the risk without the obligation.

With reference to exhibit '9' the motor claim form, she points out that this was attached to a notice to tender hearsay evidence served on the claimant on the 7th April 2008. They would have had advanced warning and sight of the notice. If there was an objection then a counter notice could have been filed to disallow the document.

When the claimant went into the witness box he was shown exhibit '9', he said he did not fill it out himself. He did not deny the document and on this basis the document was put in and formed part of the evidence in this matter. A

document contained in a bundle is not evidence to contradict that which is in evidence.

With reference to the date of the alleged theft, the Learned Counsel proposes that the defendant has never acknowledged nor denied that the theft took place. The denial of indemnity is not on the basis that the vehicle was not stolen. This issue has to be dealt with and goes to the credit of the claimant. He has to prove to the court that a liability has arisen for which the defendant has to pay. The claimant has not satisfied the court as to this issue.

His evidence is inconsistent. Referring to the motor claim form Mrs. Campbell proposes that the vehicle was stolen on the 4th July 2004, he signed to this document which was filled out by his representative. In signing to it Mr. Henry has acknowledged the loss to be on the 4th July 2004. He came to court and gave evidence that it was on the 27th June 2004 that the vehicle was stolen, the Particulars of Claim bears a different date which the claimant attributes to Counsel's mistake.

Paragraph 12 of Particulars of Claim has the date of theft as the 23rd April 2004. There are three different dates on which the incident was supposed to have occurred. This is a significant event that ought to be embedded in the claimant's mind; Robbery at gun point. At the time of the preparation of the claim form, Mr. Henry would ~~not~~ have been under any pressure to recall the date. He cannot convince the court as to the date of the incident, having given three different dates.

Miss Campbell then posed the question; Did the claimant report the theft within the time laid down by the policy, that is the 30 days notice?

She referred to the following authorities; **Insurance Law: Doctrines and Principles by John Lowry and Phillips Rawlings page 139**

General Principles of Insurance Contracts at page 171

MacGillivray on Insurance Law – 9th Edition at page 851.

With reference to page 8 paragraph 4 of exhibits '1' (the policy) which states

"In the event of any occurrence which may give rise to a claim under this policy the insured shall within 30 days thereof or such further time as the company may in writing allow in that behalf give notice thereof to the company with full particulars."

Mrs. Campbell proposes that, Mr. Henry said he knew of this 30 days as on his evidence it is not the first time that he is making a claim. He knows of the requirement to report in writing within 30 days and he knows how this should be done. His evidence is that he telephoned the company. The procedure is not to make report over the telephone – you have to come in.

Further he is bound by the arbitration clause in the Policy as well.

Inconsistencies on Mr. Henry's Evidence

Mr. Henry testifies that he applied for a police report. He also testifies that he does not remember how he obtained the police report, so when it is stated that he took in the police report; this is an error on the part of ~~the~~ lawyer. He also testifies that he cannot remember when he handed in the police report.

The date on exhibit '9', the motor claim form, as the date that the loss occurred is the 4th July 2004. Mr. Henry's evidence is that the loss occurred on the 27th June 2004. Paragraph 12 of Mr. Henry's Particulars of Claim states:

"The date in exhibit '9', the motor claim form is stated as the 4th July 2004 instead of the 23rd April 2004."

The Areas in Issue

Although UGI is not admitting nor denying that the loss occurred, the main issues in this matter seem to me to be,

- (i) Whether Mr. Henry did report in writing within the 30 days stipulated in the policy.
- (ii) Whether the 30 days requirement is a condition precedent to the payment of the claim
- (iii) Whether UGI is obligated to indemnify Mr. Henry under the terms of the policy.

Finding of Facts

I find as fact that Mr. Henry has proposed three (3) dates on which the loss occurred. The motor claim form, exhibit '9', bears the date the 4th of July 2004, he testifies that the loss occurred on the 27th June 2004 and in his Particulars of Claim, he states that the loss did not occur on the 4th July 2004 but on the 23rd April 2004.

I find as a fact that he did not report the loss in writing to UGI prior to the 13th October 2004. His testimony is that he reported the loss to UGI but not in writing.

I find as a fact that he is aware that the report must be made within 30 days of the loss as his testimony states that the police told him that he had to report the loss within 30 days. Further he is aware of the terms in the policy which requires that this must be done in writing. Mr. Henry's testimony is that he had made a claim before in which an employee at UGI registered the claim and assisted him to fill out the claim form, clearly he is not unmindful of the procedures involved in reporting a loss and the time within which it must be made.

Mr. Henry's testimony is that he does not remember when he filed the claim. He does not remember when the motor claim form was filled out. He does not remember the date that he returned it to the company, he did not date it and he has no particular reason for not doing so. He said he got the policy booklet exhibit '1' after he got a call from the Insurance Company yet he can not say how long after he got the call that he went to the Insurance Company

Overall I find that I cannot rely on Mr. Henry's testimony based on the inconsistencies as well as the fact that he does not remember quite a number of events relating to this matter.

I find that exhibit '9', the motor claim form, is crucial to the issues joined. On this document dated the 13th October 2004 the date of the loss is stated as occurring on the 4th of July 2004.

~~I accept~~ exhibit '9' and find that the document is Mr. Henry's as it bears his signature and find that in the event that a loss occurred, it would have occurred on the 4th July 2004 and that the loss was reported on the 13th October 2004, the date that Mr. Henry signed to document.

I find that this date of the 13th October 2004 extends way beyond the 30 days stipulated as the period within which notice in writing shall be given.

I take into consideration that Mr. Henry is a self taught man who relies on persons to assist him in dealing with certain documents.

I also take into consideration that the evidence from the defendant to a large extent came from a legal officer of the company Miss Ruthann Morrison, whose evidence is as a result of her perusal of two (2) files but these do not in any way affect my findings.

The Applicable Law

MacGillvray on Insurance Law 10th Edition page 277 states:

“Insurance Policies are to be construed according to the principles of contract applicable to commercial contracts generally, and there are no peculiar rules of constructions applicable to the terms and conditions in a policy which are not equally applicable to terms of other mercantile contract. The task of a tribunal endeavouring to interpret the contract of insurance is to ascertain the intention of the parties in relation to the facts in dispute. Such intention is however, to be gathered from the wording of the policy itself and from the wording of any documents which maybe incorporated within it.”

And at page 226:

There are also other terms which are termed conditions precedent. These maybe condition precedent to the contract itself or they maybe condition precedent to liability.

The Application of the Law to the Finding of Facts

The general principle as stated earlier on by **MacGillvray** is that Insurance Policies are to be construed according to the principle of construction applicable to commercial contracts generally.

Mr. Henry is seeking to enforce the terms of the insurance policy that he entered into with UGI under which he comprehensively insured his Toyota Tundra motor vehicle against the risk of loss due to theft.

Paragraph 4 of page 8 of exhibit '1', the policy states:

"in the event of any occurrence which may give rise to a claim under this policy the insured shall within 30 days thereof or such time as the company may in writing allow in that behalf give notice thereof to the company with full particulars.

Page 226 of **MacGillvray** states:

There maybe conditions precedent to the contract itself and there may be conditions precedent to liability.

I hold that the 30 days notice in writing stipulated in the policy is a condition precedent to liability.

Learned Counsel Mr. Paris sought to persuade the court that the notice was not a condition precedent to the right to recover and that the insurers were liable; relying on the principle in **Stoneham v The Ocean Railway and General Accident Insurance Company** 1887 QB 237

The head note in this case reads:

A Policy of Insurance covered death caused by an accident happening within the United Kingdom and was made subject to a condition that in case of fatal accident, notice thereof must be given to the insurers within seven (7) days.

The assured was accidentally drowned in Jersey. It was impossible to give notice within seven (7) days.

In an action on the policy:-

Held, that the accident happened within the United Kingdom, and that notice was not a condition precedent to the right to recover and the insurers were liable.

In Mr. Henry's case paragraph 10 of exhibit '1', the policy states that:

The due observance and fulfillment of the terms of the Policy shall be condition precedent to any liability of the company to make payment under the policy.

I find that this position stands and the present case can be distinguished from the **Stoneham's** case. In the **Stoneham's** case this notice was not stated to be a condition of liability however in the present case this notice is stated to be a condition of liability.

At page 240 of **Stoneham**, Matthew L.J. points out that;

The notice is not stated to be a condition of liability nor is there any stipulation that if no notice is given the policy shall be void.

In the present case I find that it is clearly expressed that failing to comply with the 30 days notice that is stipulated in the policy will serve to exonerate UGI from liability in Mr. Henry's claim.

The police report could have served to inform UGI of the loss, however it is Mr. Henry's evidence that he did not get the police report at the time he applied for it and he does not remember when he got the report and where it is stated that he took in the police report it is an error put in the statement by the lawyer. He does not remember seeing a police report.

Miss Ruth Ann Morrison's testimony is that this report was stamped as being received on the 13th October 2004. This date would still be outside the 30 days stipulated. The police report in this case could not serve to inform UGI of the loss.

Paragraph 9 of exhibit '1' the policy states;

All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar 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 abandoned and shall not thereafter be recoverable hereunder.

Mr. Henry did not seek to enforce this condition.

On the 27th October 2004 UGI wrote to Mr. Henry indicating that they were not liable to settle the claim for this vehicle as he had breached the notice condition in the policy. This letter is exhibit '10'.

Mr. Henry after receiving this correspondence did not seek to refer the matter to arbitration pursuant to paragraph 9 of exhibit '1', the policy

I find that Mr. Henry has been insuring his vehicles with UGI since the year 2001 he must therefore have had adequate notice of the terms of the policy.

In **ICWI vs Dalvester Wray # C.L. 2000 I 051** Anderson J at page 9 of the judgment points out, in relation to a similar provision as contained in paragraph 9 of exhibit "1" the policy, that, ———

the condition herein on its ordinary meaning and effect requires the insured who seeks to challenge a disclaimer of liability to do so within 12 months of the disclaimer.

Exhibit 10, the letter of disclaimer is dated the 27th October 2004. To date Mr. Henry has not sought to invoke this condition. It seems to me that as of 27th October 2005 the time for Mr. Henry to apply for arbitration of the disclaimer would have passed.

Conclusion

I find that reporting the loss in writing within 30 days is a condition precedent to recovery for the loss and as such entitles UGI to avoid liability for this **particular** claim as Mr. Henry did not report in writing within the stipulated period.

Moreover he did not seek to refer the decision not to indemnify to arbitration and as such it may well be said that his claim is deemed to have been abandoned and not recoverable.

On a consideration of all the terms of the documents, and the evidence in this matter, I am satisfied on a balance of probabilities that the giving of the notice in writing within 30 days of the loss is a condition precedent to recovery for the loss, coupled with the fact that Mr. Henry did not utilize the arbitration provision, then the defendant is entitled to judgment.

Order

Judgment is hereby entered on the claim to the defendant with costs to be agreed or taxed.