



[2019] JMSC Civ 144

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 04052

**BETWEEN JN GENERAL INSURANCE COMPANY LIMITED CLAIMANT
AND DEXTER SALMON DEFENDANT**

IN CHAMBERS

Mr. Matthew Ricketts instructed by Samuda and Johnson for Applicant

Heard: May 17, 2019 and July 5, 2019

T. HUTCHINSON, J (Ag.)

APPLICATION FOR DECLARATION TO VOID POLICY OF INSURANCE

BACKGROUND

[1] On the 8th of June 2015, Motor Truck registered 1478 FX and insured by the Claimant under Motor Vehicle Policy CMC0014546 was involved in a motor vehicle accident along the Stony Hill main road in St Andrew. The vehicle had first been insured by NEM Insurance in 2010 the Defendant having completed a Motor Vehicle Proposal Form in furtherance of same on the 16th of February 2010. In that form it was stated that the Defendant was the owner of the said motor truck.

[2] The assessment of the risk having been done by the Insurers a Policy was issued providing Third Part coverage in respect of damage to property and death or bodily injury to Third Parties arising out of the use of the said motor truck.

- [3] In May 2012 the name of the Claimant company was changed to JNGI and the policy assigned to the Defendant became a part of the Claimant's portfolio. There were a number of renewals based on the information on the proposal form. On the 8th of June 2015 the vehicle was involved in an accident and this was reported in an accident report form completed the 9th June 2015, which the Claimant received on the 18th of March 2016.
- [4] An investigation was commenced into the said accident during which statements were taken from Mr. Salmon as well as a Mr. Leon Bailey. On receipt of these statements checks were made by the Insurers to determine if any updated information had been provided to the Company by Mr. Salmon as to the vehicle, ie, who was in actual possession of same at the relevant time but no such update was found.

THE LAW

- [5] It is accepted that insurance is a contract upon speculation and the special facts, upon which the contingent chance is to be computed, are 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. This doctrine of concealment was first formulated in the case of ***Carter v. Boehm*** [1558-1774 All ER 183, where Lord Mansfield emphasized that a contract of insurance is based on the utmost good faith and that:

'The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risqué understood and intended to be run at the time of the agreement.'

- [6] This English rule as developed in their jurisprudence, contains three variables:
- a. The Insured knew the fact;
 - b. The Insured did not disclose the fact to the Insurer, and the Insurer was not chargeable with its knowledge;
 - c. The fact was material.

- [7] This principle has also been accepted and applied in this jurisdiction as is evident in several Court of Appeal decisions. Of note is the dictum of K. Harrison, JA in the case of ***Insurance Co. Of the West Indies v. Elkhail SCCA No. 90 of 2006, delivered on the 19th December 2008*** where he said:

'In practice, the requirement of uberrimae fides means simply that an applicant for insurance has a duty to disclose to the insurer all material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts'.

The Marine Insurance Act [1906] also confirms that insurance contracts are contracts uberrima fides and defines in section 23, what matters is material for the purposes of said contracts, in the following terms:

"Every circumstance is material which would influence the judgment of a prudent underwriter in fixing the premium or determining whether he will take the risk".

- [8] The House of Lords in ***Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd [1995] 1 A.C. 501*** has held that for an Insurer to be entitled to avoid a policy on the basis of misrepresentation or non-disclosure, the alleged misrepresentation or nondisclosure must be material and must have induced the making of the policy. The UK Court of Appeal decision of ***Drake Insurance v Provident Insurance [2003] EWCA Civ 1834*** has decided that inducement must be proved by the Insurer.
- [9] The Claimant asserts that there has been material non-disclosure and misrepresentation on the part of the Defendant in securing the contract and that

the contract is thereby voidable. The Claimant relies upon the terms of the contract, and in particular, the declaration signed by the Defendant which, by its very expression, is made a term of the contract and JNGI is also averring that there has been a breach of the terms of the contract by the motor truck no longer being in the possession or under the control of Dexter Salmon who had identified himself in the Proposal Form as the owner of the said motor truck and this was the basis on which subsequent renewals had been made.

[10] It is settled law that an Insurer has the right to avoid the contract of insurance if the Insured was guilty of fraud, non-disclosure or misrepresentation before the contract was entered into. This is so because an insurance contract is one which is said to be *uberrimae fidei* or of the utmost good faith. There is therefore a duty on the insured to answer the questions on the insurance proposal form and any subsequent renewals correctly and truthfully. Any failure to disclose even if it is innocent, gives the Insurer the right to avoid the contract *ab initio*.

[11] The general principle is that the duty of disclosure ends when the contract is concluded. It must also be borne in mind that the burden of proving misrepresentation/non-disclosure is on the Insurer per Caulfield, J in ***Woolcott v. Sun Alliance [1995] 1 AC 5014 [2003] EWCA Civ. 1834***

[12] In that case, the Claimant's property was destroyed by fire. There was no dispute that fire was one of the perils covered by the policy of insurance. The Defendants, who were the Insurers sought to avoid liability on the basis of non- disclosure. Caulfield, J. said:

"prima facie the defendants are liable to indemnify the plaintiff for the damage resulting ... The onus is upon the defendants to show that they are entitled to avoid the policy".

[13] JNGI therefore has the obligation of proving that:

- a. There was a material misrepresentation or non-disclosure by the Insured at the time the parties entered into contract for the renewal of the policy.

- b. The Claimant/Insured has breached warranty/condition of the policy which entitles the Defendant/Insurer to avoid the policy.

ANALYSIS OF EVIDENCE

[14] I will address the issues identified above individually and then determine if any of the allegations made by JNGI are proved and whether this entitles them to the declarations sought.

Misrepresentation/non-disclosure

[15] In order for the defence of misrepresentation/non-disclosure to succeed the Insurer must prove that the Insured failed to disclose a material fact and that the non-disclosure induced the making of the contract. In other words, it must be proved that the Insurer would not have entered into the same contract if he was aware of the facts in question.

[16] The Claimant, JNGI is claiming from the Court a declaration that they are entitled to avoid the policy of insurance between them and Mr Dexter Salmon and to refuse to indemnify him against any claims which may be brought on the grounds of misrepresentation and/or non-disclosure of material facts. They assert that his failure to notify them on the subsequent renewal of the Policy that he no longer had custody and/or control of the vehicle and possession had passed to Unitrade Plus since 2012, amounted to the non-disclosure of a material fact or a misrepresentation of fact which materially altered the risk contemplated by them on the renewal of said policy. In this regard, JNGI is relying on the statements of Dexter Salmon as well as Leon Bailey which were given to the investigator employed by them after the accident involving the relevant motor truck.

[17] The Statement of Mr. Salmon indicates that he had formed the company Unitrade Plus and a number of motor trucks were owned by him and used as company vehicles one of which was the relevant vehicle which was registered in his name. He subsequently sold the business but asserts he did not sell the trucks to the new

owners even though they continued to use them as company property. On the 24th of July 2012 he was terminated from the Company where he had been working as an employee and all the vehicles as well as the keys were handed over. As a result of this he no longer had access to the vehicles or the papers for them as they were kept at the Company office.

- [18]** In June 2015 he was informed by Leon Bailey that the vehicle had been involved in a motor vehicle accident and asked to complete the forms for insurance purposes which he declined to do. In 2015 or 2016 he was informed by Mr. Bailey that the said truck had been sold and asked to sign off on the transfer which he did. He concluded his statement by saying that even though he was the registered owner, Unitrade Plus was the actual owner.
- [19]** The Claimant also relies on the statement of Leon Bailey. In his statement Mr Bailey indicated that the Company was bought from Mr. Salmon and some of his vehicles to include the relevant motor truck were purchased as well but the transfer was never done. He said the vehicle was classified as a company vehicle and owned by the new owners. He said Mr. Salmon remained the registered owner until 2015/16 when he Bailey disposed of it as it had been involved in a motor vehicle accident. He said the sale proceeds weren't handed over to Mr. Salmon as the company was the owner of the vehicle.
- [20]** An examination of Mr. Salmon's statement reveals that he raises no dispute that the vehicles in question had been insured and the insurance had been effected in his name. This is clear from his indication that he had been asked to sign the insurance form and had declined to do so, not because he believed that a new policy had been effected in the name of another but because there had been a dispute with the new owners where he had wanted them to sign accepting liability and they didn't.
- [21]** This statement makes it clear that he had addressed his mind to the fact that the vehicles no longer being under his custody and control issues of liability could

arise. In spite of this recognition however, he did not seek to make contact with the Applicant to provide an updated position even after he lost physical custody of the vehicles in 2012.

- [22]** What the Defendant opted to do instead was to take no action in respect of this policy, perhaps because he had settled in his mind that the liability was that of the company and not his. This omission to act or to provide information to the Applicant was a material non-disclosure as it deprived the Claimant of the opportunity to have a new proposal form completed and to conduct a fresh assessment in respect of the new owners to determine if this was a risk that they wanted to assume.
- [23]** This is the very type of conduct which the authorities referred to above have found to be a sufficient basis on which a contract of insurance can be avoided. The situation is made worse when the statement of Mr. Leon Bailey is considered as he makes it clear that ownership had in fact passed from Mr. Salmon to Unitrade Plus, as the relevant vehicle had been sold to the new owners by Mr. Salmon as part of the Company assets. He also noted that the fact that the registration remained in the name of Mr. Salmon was a mere formality and Mr. Salmon made no issue when the vehicle was sold having already been paid for same.
- [24]** In the circumstances, it is clear that there had been a material change in circumstances since 2012 and the Claimants had not been informed of same in spite of Mr. Salmon having 3 years to do so before the accident in June 2015. I find on a balance of probabilities that a material non-disclosure had occurred, accordingly the orders sought by the Claimant herein at paragraphs 1 and 3 of the Fixed Date Claim Form filed on the 17th of October 2018 are granted.