[2016] JMSC Civ. 179

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV06157 of 2012

BETWEEN	**BASIL SENIOR**	**CLAIMANT**
AND	**JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Glenroy Mellish for the Claimant.

Ms. Camille Wignall instructed by Nunes, Scholefield, DeLeon & Co for the Defendant

HEARD: 21st October 2016

CORAM: GEORGE, J.

INTRODUCTION

[1] [On September 3, 2009, Mr. Senior was a passenger in a motor truck insured by the Defendant when the vehicle was involved in an accident. Mr. Senior sustained serious personal injuries to his left hand and left leg. His leg was amputated below the knee shortly thereafter. Mr. Senior says that his life; personal and business, have been drastically affected by these injuries. He instituted proceedings against the insured and the driver of the motor truck he was traveling in, by way of a separate claim, and has obtained a final judgment against them. The Defendant has refused to indemnify Bertram Wright, the insured and owner of the motor truck in which Mr. Senior was traveling, despite being the insurer at the material time. Mr. Senior prays that this court will grant declaratory relief by finding that:

1. The policy of insurance issued by the Defendant was valid, in force at the material time and that it covered the liability of the insured in respect to the

injuries sustained by Mr. Senior who was, at the time a lawful passenger in the vehicle;

2. The Defendant, having provided the coverage asserted above, ought to indemnify the insured for the injuries sustained by Mr. Senior and for which a separate claim has been filed for damages for those personal injuries.

The issues for concern

[2] The parties have agreed on the issues to be determined by the court. The issues have been stated as follows

1. Whether the Defendant is entitled to rely on the strikes made at the response section to question 13 on the proposal form signed by Bertram Wright and dated March 4, 2009 as being his response to the question posed in respect of passenger liability coverage, and particularly an indication that no passenger liability coverage was required.

2. *Whether the terms of the Defendant's standard Public Commercial Policy of Insurance, including the term in relation to passenger liability were incorporated into the contract of insurance between Bertram Wright and the Defendant by virtue of the proposal form signed by Bertram Wright and dated March 4, 2009.*

3. *Whether the Defendant is entitled to deny the Claimant's claim on the basis that Bertram Wright's liability to him is not a liability covered by the terms of the Third Party Public Commercial Policy of motor vehicle registered CF 1574.*

[3] The court has assessed the issues stated and will proceed to resolve the issues as formulated:

It was counsel for the Claimant's submission that the Proposal Form was not completed in its entirety and importantly, question 13 on the form, which solicited an indication as to whether the insured required passenger liability coverage, was left unanswered. Counsel submitted further, that the

Court can and should find, as a matter of law and fact that the question was not answered; or at the very least that the answer given was ambiguous. It was therefore submitted that the court should resolve this issue in favor of the insured. That is to say, the policy of insurance included coverage for passenger liability.

[4] In what can be best described as unique submissions, Counsel further stated boldly that the three semi-vertical lines which were placed through the body of questions (13 & 14) of the proposal Form did not render the questions answered and more importantly do not indicate that the insured was not desirous of obtaining passenger liability coverage or any other coverage that the questions related to. To support this submission, Counsel stated, that for every other question on the form that required a "yes" or "no" answer, those words were actually used. Counsel also submitted that the form was poorly designed and that the questions asked therein were ambiguous.

[5] In support of these submissions, Counsel Mr. Mellish relied on a passage from the authors of **MacGillivray on Insurance Law, 10th edition at paragraph 16-31**. It is useful to recite the passage in its entirety:

> "**The unanswered question.** Where a question in the proposal form is left entirely unanswered, the issue of the policy without further inquiry has been held to be a waiver of information; the omission to answer a question cannot be regarded as a misstatement of fact unless the obvious inference is that the applicant intended the blank to represent a negative answer. The forgoing passage in the third edition of this work was approved by Barry J. in ***Roberts v Avon Insurance***. In ***London Assurance v Mansel***, Jessel M.R. said obiter that, if a proposer purposely avoids answering a question and does not state a fact which it is his duty to communicate, that is non-disclosure. That, with respect, is undoubtedly so, but the question, and it is submitted that Sir

> George Jessel's dicta do not affect the principle of law whereby an insurer who issues a policy despite a wholly unanswered question in the proposal form waives his rights to repudiate liability unless the blank answer must be read as "No"."

[6] I must say at this juncture, that I find the Claimant's reliance on this passage to be unhelpful. This is so, as the evidence does not support the assertion that the question was wholly unanswered. There is no doubt that the three lines which were drawn through the questions were done by the insured or his agent. The lines are not a work of art, nor are they there as part of the general layout of the document. They were placed through the questions for a particular reason. This court must therefore resolve the intention of the insured in so doing.

[7] The Claimant has also submitted that in any event, that type of answer would be unsatisfactory or inconsistent. In support of this submission, reliance was placed on a passage from the text **General Principles on Insurance Law, Fifth Edition** at page 176. This passage is also worth reciting in its entirety:

> "When the answers which the proposer gives are inconsistent or unsatisfactory, and no further enquiries are made by the insurance company, and a policy is issued, the company cannot repudiate liability on the ground that there has not been a full disclosure, for it will be held to have waived its rights. 'If his answer is hesitating or unsatisfactory, the insurers are put upon their guard, and have the option of declining the assurance, or seeking information from other sources, or charging a higher premium."

[8] Further, the Claimant prays in aid of the *'contra proferentem rule'* which in essence states that any ambiguity in the policy must be resolved against the person who wrote the policy; consequently in favour of the insured. This aspect of the submission is in essence that having regard to the ambiguity of the question and the uncertainty of the answer given for question 13 on the Proposal

Form, the Defendant should have clarified whether the insured was foregoing the additional coverage for passenger liability. Counsel further submitted that this failure to clarify was a breach of the principle of utmost good faith which is an important pillar in contracts of insurance.

[9] The gravamen of the Defendant's case is that the Policy which was in place was a Third Party Public Commercial Policy, which expressly excluded coverage of the insured's liability to any passenger travelling in the insured motor vehicle unless that passenger is an employee of the insured. In essence, the Defendant contends that though they were the insurers at the material time, the policy of insurance did not cover passengers being conveyed in the vehicle, other than those employed by the insured. Consequently, the policy did not extend to cover Mr. Senior. Further, the insured had, as a matter of choice, not availed himself of coverage which would have covered Mr. Senior in the circumstances.

[10] The Defendant urged this court at the outset to consider carefully the Proposal Form which was tendered into evidence. It was their submission that the Proposal Form was completed in its entirety and no indication was given that the insured required passenger liability coverage. Indeed, the Defendant contends that the insured struck out the question which allowed for an indication to be given by the insured of any additional coverage which would have been required. In addition to this, it was the Defendant's submission that the only intention to be derived from the response to question 13 in particular and on assessment of the Proposal Form as a whole was that the insured did not wish to avail himself of any additional coverage to which question 13 referred. Counsel submitted that no words were written on the line provided, and the entire section under "INCREASED BENEFITS" including the said question 13 was crossed out by way of 3 strikes. Counsel therefore urged the court to reject the Claimant's submission in respect to the purpose of the 3 lines which were placed through the relevant question

[11] The Defendant has also submitted that it has not refused to indemnify the insured on the basis of non-disclosure. Indeed, this court understands the Defendant's argument to be the opposite. That is, the insured, at the time of completing the Proposal Form, indicated definitively the type of coverage it required and in equal measure, indicated that which he was not desirous of obtaining. In indicating the latter, it is the Defendant's submission that the insured, by the three lines it struck through question 13, signaled that he did not wish to avail himself of passenger liability coverage. It follows therefore, that the Claimant cannot pray in aid of this court to find otherwise, where upon the ordinary or purposive interpretation of the completed Proposal Form, it is clear that he did not seek to avail himself of this type of coverage.

[12] The Defendant has also submitted that there was no ambiguity in the questions asked and that the *contra preferentum* rule is not applicable. I find the submissions of counsel in this respect instructive and for its merit I will reproduce without improvement;

> "The Claimant has ignored a critical point in respect of the *contra proferentem* rule, which is that it only becomes applicable when there is an ambiguity, and is not a licence for one to create ambiguities where none exist."

[13] In support of this submission, Counsel relied on a passage from **General Principles on Insurance Law, Fifth Edition** at page **366** where the learned authors went on to state the following:

> .'…this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.'"

Analysis

[14] What is clear upon a perusal of the Proposal Form, is that there was no indication made by the insured that he required passenger liability coverage. I find that the question is sufficiently simple and unambiguous to have alerted the insured to the information being solicited. More so, the insured in placing the three lines through the question must have been attempting to provide some answer. It is this courts view, that the only logical intention to be gleaned is that the insured did not need passenger liability coverage or any other additional coverage referred to in question 13. I am convinced that even a blind man on a galloping horse would come to the same conclusion. The facts just do not in my assessment lend themselves to an alternative conclusion.

[15] I find that there was no ambiguity with the question or with the answers supplied. Consequently the Claimant's prayer in aid of the 'contra proferentem rule' has not advanced his case.

The Privy Council decision in ***Melanesian Mission Trust Board v. Australian Mutual Provident Society*** (1996) NZPC 9 is also instructive on this issue. The Board had this to say in respect to interpreting formal documents:

> "…. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used, they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. **But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there**. …" **(Emphasis Added**

[16] The Jamaican Court of Appeal, in ***NCB Insurance Company Limited v Claudette Gordon-McFarlane*** [2014] JMCA Civ 51 had this to say as well about interpreting formal documents:

> "It is trite law that in interpreting any provision in a contract, one must give the words their plain and ordinary meaning, and this meaning can only be displaced if it produces a commercial absurdity (per Lord Dyson in John Thompson and Janet Thompson v Goblin Hill Hotels [2011] UKPC 8). In such a case one might get assistance from the context, the background and the other provisions in the document."

Indeed, it is this court's understanding of the law, that the use of the *contra proferentem* rule is a tool of last resort when all other rules of construction have failed to resolve an ambiguity. Where the language is clear, as it was in the instant case, there would have been little chance that the insured would be faced with any ambiguity. Equally, and considering the circumstances, there can be only one interpretation for the response given, when assessed purposively. This court is not of the view that there is need to apply the *contra proferentem* rule as there was no ambiguity. Additionally, the Proposal Form contained a declaration signed by the insured indicating that the answers supplied were not only true but complete and that no material information was withheld. Importantly though, question 13 did not seek to elicit material information.

In the circumstances, the Defendant must be allowed to rely on the three strikes through question 13 representing the insured's unequivocal indication that he did not require passenger liability insurance.

Second Issue

[17] It is trite that a contract of insurance usually consists of the following main documents:

1. The Proposal Form

2. The Cover Note/Certificate of Insurance

3. The Insurance Policy Booklet.

The Jamaican Court of Appeal in the case of ***Insurance Co. of the West Indies v Abdulhadi Elkhalili*** SCCA 90 of 2006 made important pronouncements on the first of these main documents. In that case, Karl Harrison J.A., in delivering the main judgment of the Court had this to say about the Proposal Form:

> "The proposal form which precedes the issuance of the policy of insurance is the document which helps the insurer to make an informed decision as to whether he will indeed insure the proposer's risk. In order therefore, to ensure the utmost good faith on the part of the insured, it is commonplace among insurers to require that the proposal form be filled up accurately and to have the proposer for insurance warrant the accuracy of the answers and statements made on the form. Thus, the proposer was required to sign and did sign the declaration. The critical element in the declaration is the phrase which states that "this proposal and declaration shall be the basis of and be considered as incorporated in the policy...." This declaration, in my view, forms the basis of the contract, so that, the declaration at the foot of the proposal form that the statements are true, and that the declaration shall be considered as part of the policy of insurance, makes the truth of the statements a condition precedent to the liability of the insurer. A proposer, by signing it, signifies his agreement to it."

[18] There was a similar declaration in the instant case which had the following words:

> "I declare that to my knowledge and belief the particulars given in this proposal, whether by me or on my behalf are true and complete, that I have not withheld any material information. I agree that this proposal and declaration shall be the basis of the contract between me and JIIC whose policy terms and conditions I accept.
>
> I hereby authorize the Commissioner of Police or his representatives or the Manager of the Inland Revenue Department or his representatives to release any and all information that may be required by JIIC pertaining to me, my authorized driver or the vehicle(s) declared in this Proposal Form or in the Policy document which together constitute the contract." [Emphasis Added]

The Policy Booklet, which was also tendered into evidence, bears a declaration in its first recital which is reproduced below:

"WHEREAS the Insured by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein has applied to the Company for the insurance hereinafter contained and has paid or agreed to pay the Premium as consideration for such insurance."

[19] There is no doubt that these declarations incorporate the Proposal Form as well as the Policy Booklet into the contract of insurance. This fact is incontrovertible. The Claimant has not produced evidence or relied on any law to displace this fact. I must also borrow from the reasoning of McDonald-Bishop J(as she then was), who in ***Donovan Bennett v Advantage General Insurance Co. Ltd*** Claim No. 2009 HCV 0078- Judgment delivered 28/7/2011, highlighted that the terms and conditions of a policy were incorporated into the contract of insurance, particularly where the insured is alerted to this fact in the Proposal Form. Indeed, he would have accepted these terms by virtue of the declaration which was signed in the Proposal Form. This was the case when Mr. Wright signed the Proposal Form.

[20] I therefore find that the Claimant's grouse in respect to this issue must also fail. The law clearly outlines the legal effects that the declaration in the Proposal Forms should have. As it has been shown, one important effect is to incorporate the terms of the Policy Booklet/Document into the contract of insurance\

Third Issue

[21] In determining whether liability arises under the contract of insurance, the paramount consideration must be whether on a proper construction of the terms of the insurance policy, the liability arose from a risk that was covered by the express terms of the policy, and in respect of persons entitled to indemnity at the time of the incident.

The Defendant has submitted that it is the following clause in the Policy Booklet which expressly precludes liability:

"The Company shall not be liable in respect of

(i)….

(ii)….

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment with a person insured by the Policy) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."

I find guidance in respect to the construction of this provision from McDonald-Bishop J (Ag) (as she then was) in **Conrad McKnight v NEM Insurance Company** Claim No. 2005 HCV 03040 at pg. 5, wherein she stated:

> "It is clear that it is open to the parties to set the terms and conditions of the policy and to agree the cover to be afforded by the

> policy. Like in any form of contract, the parties are free to negotiate the terms of their dealings subject of course to the requirements of the law and public policy. It is also patently clear that the extent of the indemnity is to the extent of the cover offered by the policy. So, before the Claimant can recover on the indemnity, the liability must be one that the policy purports to cover."

The insured in the instant case, having not taken out passenger liability coverage, is not entitled to be indemnified. What the law requires in order for liability to accrue, are clear terms within the policy or statute to that effect. In the circumstances, I find that the contract of insurance which was in effect, expressly excluded liability for passenger liability. Mr. Senior was a passenger in the insured's vehicle at the material time and one who was not covered under the policy of insurance which was in effect. It follows therefore that the Defendant is not liable to provide indemnity for Mr. Senior's injuries.

Disposition

[22] In the round, having considered the evidence before this court, I find that the Claimant has not satisfied this court, on a balance of probabilities, that its claim is meritorious. I therefore make the following orders:

1. The declarations sought by the Claimant are refused.

2. The Defendant is entitled to refuse to indemnify Bertram Wright, the insured and owner of the motor truck in which Mr. Senior was traveling, as at the material time, the contract of insurance did not extend to cover passenger liability.

3. Costs to the Defendant to be agreed or taxed.