SUIT NO: C.L. 2000 I-051

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

IN THE MATTER OF CONDITION
8 OF PRIVATE CAR INSURANCE
POLICY ISSUED BY THE APPLICANT

AND

IN THE MATTER OF AN APPLICATION
FOR A DECLARATION AS TO THE
LEGAL EFFECT OF CONDITION 8

BETWEEN	**THE INSURANCE COMPANY OF THE WEST INDIES**	**PLAINTIFF**
AND	**DALVESTER WRAY**	**DEFENDANT**

Ms. C. Wignall instructed by Mrs. Suzette Campbell for the Applicant;
Ms. Marsha Smith instructed by Ernest A. Smith & Co., for the Respondent

Heard on December 4 and 7, 2001 and January 18 2002

ANDERSON: J

This is an application by the Insurance Company of the West Indies ("I.C.W.I.") by way of an Originating Summons, for a declaration as to the meaning and legal effect of a clause, "Condition 8 of a Private Car Insurance Policy" issued by I.C.W.I. The Summons seeks the following relief:

1. A Declaration that Condition 8 of the Private Car Insurance Policy issued by the Plaintiff is legally binding on and enforceable by or against the insured.
2. A Declaration that upon a true construction of Condition 8, the expiration of the time limited therein for the referral of disputes arising from a disclaimer to arbitration without any such referral, effectively bans an insured under the policy from bringing any proceedings whatsoever in relation to that claim.
3. An Order that the suit brought by the Respondent against the Applicant in the Resident Magistrate's Court of Saint Ann by virtue of Plaint No 120 of 2000 be stayed.

The facts giving rise to this application are not in dispute, but the parties are at variance over the legal effects of those facts. The facts as gleaned from the various affidavits are as follows:

On the 18th day of February 1998 the respondent/insured Dalvester Wray ("Wray") attended the Brown's Town branch office of I.C.W.I. in the parish of St. Ann, in order to secure insurance coverage for his motor vehicle, 1991 Nissan Sunny License 4051 BU. On the occasion of his visit, he was assisted in the completion of a proposal which, as is common knowledge, forms the basis upon which the insurance policy would be issued. It seems to be common ground that the form was completed by a representative of I.C.W.I. who inserted the answers given by the insured to the questions asked on the proposal. These were then read over to the proposed insured who then signed the proposal form. That proposal form contained a declaration which is set out below in the course of this judgment. With effect from the 18th February, an insurance policy was issued to cover the motor vehicle although at first only a cover note was given to the insured as evidence of this. . The policy number was 2903482001. The actual policy document containing condition 8, the main subject of this litigation, was delivered to Wray, according to his own affidavit, sometime after the 12th March 1998, apparently within the period directed by the Insurance Act of 1972 for the delivery of such policies.

On the 12th September 1998, Wray's vehicle was involved in an accident and he made a claim on the insurance company on the 14th September. By a letter dated November 16, which is set out below, I.C.W.I. purported to disclaim liability on the basis that the vehicle was being used in a manner in contravention of the policy and the terms of the proposal which had been signed by the insured. The letter to Wray stated:

"We acknowledge receipt of completed Claim Form in respect of the above accident.
We however regret to advise that we had the use of the vehicle investigated and the findings are that the vehicle was used contrary to the Terms and Conditions of the Policy.
In light of the above, we will therefore not be granting you

indemnity under your Policy."

In December 1998 the respondent insured retained the law firm Ernest A. Smith and Company, attorneys-at-law of Brown's Town to act on his behalf in relation to the claim which he had made on September 14. Three letters were sent by the attorneys to I.C.W.I.

On the 10th day of May 2000 Wray filed a suit in the Resident's Magistrate Court for the parish of St. Ann seeking to have the insurance company indemnify him for the loss he had suffered in the accident on the 12th September 1998. As a consequence of the institution of that action, ICWI has come to this court seeking a declaration in the terms set out above. That application is being resisted by the respondent who continues to insist upon his right to be indemnified.

Both sides made written submissions on order to reduce the time for and extent of oral submissions. Affidavits were also produced by representatives of the Applicant as well as by the Respondent himself and these are referred to below where relevant.

Condition 8, which is the subject this litigation is in the following terms –

Condition 8

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 difference 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 parities within one calendar month after having been required in writing so to do by either parties or in case the arbitrators do not agree by 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. <u>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 provisions herein contained then the claim shall for all purposes be deemed to</u>

have been abandoned and shall not thereafter be recoverable hereunder. (Emphasis mine)

It is the contention of the Applicant that its letter of November 16, 1998, was a "disclaimer of liability" on the part of the Applicant, the effect of which was to trigger the commencement of the contractual twelve (12) month period which the insured purportedly had under condition 8, to refer this matter to arbitration, or be forever deemed to have accepted the decision of the insurer to disclaim liability. The respondent for his part claims, as set out in his affidavit, sworn to on March 24, 2001, that he received the policy on or around March 12, 1998 and that condition 8 was not brought to his attention. In any event, he argues that after receiving the purported disclaimer of liability, he had retained the services of attorneys-at-law, who had written letters to the Applicant on February 3, 1999, July 20, 1999 and January 5, 2000. Further that his attorneys had been in discussion with the Applicant's attorney. It is implied in the affidavit and the copies of the letters referred to above confirm, that the respondent was disputing the conclusion arrived at by applicant in its investigations, and which formed the basis upon which it purported to disclaim liability under the policy.

When on May 10, 2000, the respondent filed action in the St. Ann Resident Magistrate's Court seeking to recover his losses occasioned by the accident of September 12, 1998 and Summons No. 120 of 2000 issued out of that court, the issue was well and truly joined.. The Applicant, insisting on its view that condition 8 referred to above is applicable and effective to bar the action by the respondent, in the absence of a reference to arbitration within twelve (12) months of "disclaimer of liability", now seeks this declaration.
The questions which fall to be considered for the purposes of deciding this application, may be stated thus.

1) What is the legal effect of a true construction of condition 8; and
2) How is that affected, if at all, by the letters and /or discussions between the parties after the Applicant's letter of November 16, 1998?

Let me commence that exercise by looking at the respective submissions of the parties.

For the applicant it was submitted that by virtue of the declaration on the proposal form signed by the insured, not only is the proposal form incorporated by reference into the contract of insurance which is evidenced by the policy, but the insured is put on notice of the actual terms of the policy.

The declaration signed by the Ward is in the following terms.

> "I/WE HEREBY DECLARE that all the above Statements and Particulars are true and I/we further declare that if any of such particulars and answers are not in my/our writing the person or persons filling in such particulars and answers shall be deemed to be my/our agent for that purpose. I/we further understand that the Vehicle(s) above referred to is/are in good condition and undertake that the Vehicle(s) to be insured shall not be driven any person who to my/our knowledge has been refused any motor vehicle insurance or continuance thereof. I/we hereby agree that this Proposal and declaration shall be the basis of and be considered as incorporated in the policy to be issued hereunder which is in the ordinary form used by THE INSURANCE COMPANY OF THE WEST INDIES LIMITED for this class of Insurance and which I/we agree to accept."

The first thing to be noted here is that the insured agrees that even if someone else fills out his proposal form, that person is deemed to be his agent. The suggestion in his affidavit that the form was filled out by an employee of ICWI avails him little in these circumstances. It may be taken as trite law, that where an insured is issued a policy of insurance, he is bound by the terms of that policy. It was submitted by the counsel for the Applicant that, "the insured is bound by standard terms which are part of his policy if he has knowledge of them." It was further stated that "Actual knowledge of the term is not necessary, but it must be shown that the insurer took reasonable steps to give the insured notice and the insured had an opportunity to ascertain the terms." The Applicant, for the purposes of this submission, relies upon the unreported 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 C.L. S.330 of 1998* a decision of my learned brother, Cooke, J.

In that case, the court was required to consider the effect of a similar provision to that of condition 8 herein. Condition 19 of the insurance in that case was in the following terms:-

> "In no case whatsoever shall the company be liable for any loss or damage after the expiration of twelve (12) months from the happening of the loss or damage, unless the claim is subject of pending action or arbitration."

The loss in that case had occurred on the 3rd day of March 1986, and the plaintiff's action was commenced on the11th August 1987. The policy of insurance in that case was not delivered until August 1989, and it was submitted for the plaintiffs therein that the defendants had waived the application of condition 19, by this late delivering of the policy.

In considering this submission, Cooke J. said he found assistance in the case of Re *Coleman's Depositaries Ltd. and Life and Health Assurance Association* [1904-1907] A.E.R. 383. In particular, he referred to the judgment of *Vaughan Williams L.J* where he stated:

> "I hold that, on the face of the award, there is no evidence that the employer knew, or had the opportunity of knowing, the conditions of the policy."

Cooke J, having cited that dictum of Vaughan Williams L.J states:

> "Knowledge can be imputed, especially where there was the opportunity of knowing".

In the S & S Entertainment case, the judge found that since this was a renewal of a previously held policy which had the identical provision, it could not be said that the plaintiff had no "opportunity of knowing" In the instant case counsel for Ward has urged upon the court, that S&S should not be treated as an authority upon which reliance could be placed. She submitted that it was distinguishable in light of the fact that, in that case, one was dealing with a renewal of a policy. In this case, it was a new policy. While it is accepted that there is this factual difference, I do not believe the legal consequences change, because here Mr. Ward had the actual policy of insurance with the condition in question in his possession sometime after March 12, 1998, well before the occurrence of

the accident giving rise to this claim. In any event, the respondent had signed a proposal form which contained a declaration and which he must be presumed to have read to the effect that: "I further agree to accept indemnity *subject to the conditions in and endorsed on the Association's policy".* (Emphasis mine) If Cooke J. was correct in S & S Entertainment v Caribbean Home Insurance Co. Ltd & Ors., referred to above, and I believe that he was, then the respondent cannot rely upon his professed lack of knowledge of the condition when he had an "opportunity of knowing".

But counsel for the respondent further argues that "in order to be binding, the arbitration provisions must be brought to the notice of both parties before or at the time of the contract". In support of this proposition, she cites the case of *McConnell & Reid v Smith [1911] 48 Sc. L.R. 564.* I have to say that I do not find much assistance from this authority. In fact, the digested version which has been submitted in the skeleton submissions, clearly distinguishes that case from the instant one.

> "A contract was embodied in a sale note which bore the following side-note: 'Any dispute under this contract to be settled according to the rules of the Glasgow Flour Trade Association.' The rules of the association provided, *inter alia,* that all disputes etc., be referred to arbiters. Defender was not a member of the Association. No copy of the rules was sent to him and he knew nothing about them. Held: defender did not receive reasonable notice that he was giving up his common law rights and was agreeing to submit to arbitration with regard to the matter in dispute".

Similarly, in the other case cited as further authority for the respondent's proposition, *Crooks v Allen [1879-1880] 5 QBD 38,* the issue was an exemption clause and not a condition of the policy. The same may be said with respect to another case cited as a purported authority to support the respondent's proposition, *Olley v Marlborough Court [1949] 1 A.E.R. 127.* That case is correctly regarded as one of the classic expositions of the doctrine of the applicability of exemption clauses by Denning L.J. as he then was. But I regret that I do not find it of help in construing condition 8 of this ICWI insurance

policy. I also should say that I find a little disingenuous respondent's submission based upon the foregoing cases, which is phrased in the following terms:

> The contract was made when the premium was paid. The insurer accepted a proposal subject to the payment of a premium. It is submitted that in the present case, the Applicant's policy containing terms relating to settlement of disputes was not brought to the attention of the Respondent until after the contract was made. Though reference is made in the proposal to the policy, it is not clearly indicated how the policy terms can be ascertained. The proposal form contains no details of the standard cover offered, neither does it contain an outline of the cover, nor does it provide that a copy is available on request.

However, as noted above, the terms of the proposal clearly contained a declaration by the insured acknowledging that the policy to be issued would be in the "ordinary form". It should be noted, ***en passant,*** that paragraph 39(1) of the Insurance Regulations issued under section 104 of the Insurance Act, provides that policies of insurance should be issued not later than twenty-one (21) days after the receipt of the payment of the first premium. It seems clear that the Act contemplates that there will be a time lag between the conclusion of the contract and the issue of the policy. Nothing therefore should turn upon the time of issue of the actual policy document. The question to be determined is whether the insured had adequate of notice the terms of his policy which he would in time receive, and in light of his declaration, the answer is decidedly, "Yes". It surely is not the submission of the respondent that he should receive a detailed summary of his policy along with the policy when it is received. Further, one may well ask whether the Respondent would be prepared to accept that, with respect to any term of the policy which may operate to his benefit and to the disadvantage of the company, but of which he had not been previously made aware, such would not be enforceable against the insurer, if the shoe were on the other foot. I think not.

In *Hopeton Wilson v National Employers Mutual General Insurance Association Ltd., [1981] 18 JLR page 334*, the court was required to consider the effect of a similar provision 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, hen the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder".

In that case, the plaintiff had also signed a declaration in similar terms to that in the instant case.

> "I agree that this declaration and the answers given above as well as any further proposal or declaration or statement made in writing by me or anyone acting on my behalf shall form the basis of the contract between me and the Association and I further agree to accept indemnity subject to the conditions in and endorsed on the Association's policy".

The late Gordon J., (as he then was) stated at page 337 of *Wilson*, that:- "In so declaring plaintiff agreed to be bound by condition 8 of the policy. This condition is a submission as defined in Section 2 of the Arbitration Act." He then set out the definition of "submission" as contained in the Arbitration Act.

> "Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not".

I adopt the impeccable reasoning of Gordon J., and hold that condition 8 herein, on its ordinary meaning and effect, requires the insured party who seeks to challenge a disclaimer of liability, to do so within twelve months of the disclaimer.

This is not, however, by any means, the end of the matter. It must still be considered whether the Applicant has waived the rights given under condition 8 by its conduct. It is clear that a condition such as that set out in condition 8 may be waived by the insurer either by its explicit words or by its conduct which might lead the other party to the contract to act to its detriment. In such circumstances, an estoppel may arise to prevent the insurer from insisting upon the contract condition. It seems clear that the letter which was sent by I.C.W.I. to Mr. Wray on November 16, was a disclaimer of liability. Indeed Mr. Wray in his affidavit dated the 24th day of March 2001 at paragraph 12 accepted that the plaintiff had informed him that he would not be indemnified for the loss. He then goes on to state that having retained attorneys-at-law there was correspondence between his attorneys and the attorneys for the insurance company, the effect of which, in his view, was to have obliged I.C.W.I. to institute a new investigation into the alleged facts upon which they had based their disclaimer of liability i.e. that he had been using the car contrary to the terms of the policy.

Regrettably nothing in the skeleton arguments put forward by counsel for the respondent has given any indication where under the terms of the policy an objection by the insured would have mandated the insurer to carry out new investigation and in effect to suspend its decision to disclaim liability until such re-examination had been carried out. The affidavit of Mr. Wray of the 24th March 2001 makes reference to three (3) letters sent by his attorneys, Ernest Smith and Company to I.C.W.I., those letters are dated the 3rd February 1999, the 20th July 1999 and the 5th January 2000. None of these letters suggests that there was any contractual basis for a new investigation under the terms of the policy. Indeed the final letter of the 5th of January 2000 to the claims department of the insurer, was to advise them of the threat of a suit by another insurance company, United General Insurance, who apparently were the insurer of the other vehicle which was involved in the accident of September 12, 1998. More importantly, none of those letters make any reference to condition 8 and it apparently had escaped the attorneys that time could have been running under the terms of the policy, for the application of condition 8.

Notwithstanding the fact that there is no obligation under the terms of the policy to institute a new investigation, it appears from the affidavit of Suzette Campbell sworn on the 22nd of May 2001 in response to Mr. Wray's affidavit of March 24, 2001 that the Applicant did in fact revisit its investigation and confirmed that there was no basis for them to indemnify the insured. That information was communicated to the insured through his attorneys by a letter dated February 22, 2000, which indicated that the I.C.W.I. position remained unchanged. In this regard, I refer again to the case of *Hopeton Nelson v N.E.M.*, which is discussed above. In that case the court came to the conclusion that the refusal of the insurance company to honour the claim for loss due to fire, was based on an error, in that the house was "occupied" within the meaning of the contract of insurance. There therefore would have been no basis to disclaim liability on that basis. Notwithstanding that however, the failure of the insured to pursue his rights to seek arbitration under the terms of that contract in circumstances where the clause mandated action under the arbitration condition, quite similar to that set out in condition 8 in this case, was held to prevent the insured from recovering and pursuing his action against the insurer. It seems to me that Hopeton Nelson is determinative of this case. Counsel for the applicant in her skeleton arguments has referred to an American authority *Perzy vs. Intercargo Corp 827 F. Supp. 1365*. Unfortunately the court was not provided with a full copy of this case which was cited as authority for the proposition that courts have gone so far as to place the responsibility on an insured to seek a copy of the policy rather than the insurer to supply him with one. In light of the absence of the full authority I would decline to make any ruling which would in any case be obiter on this submission.

Counsel for the respondent in her supplemental submissions suggested that the date of the disclaimer, if it is to be accepted that there was one, was in fact the 22nd February 2000 and this would be the date from which the 12 month period in the policy would have run. She submits that the original disclaimer became inoperative as the applicant had instituted a new investigation and that its final position was stated in the letter of February 2000. I do not accept this proposition. If one were to accept this, one would have conclude that where the insurer, out of an abundance of caution, at the invitation of the insured looks again at the facts upon which his original decision was made, he would

automatically extend the period which would be open for the insured to take advantage of the 12 month period under condition 8. In other words, the insurer would have by its own action, prejudiced in its own position. This seems to me to be illogical.

Finally the counsel for the respondent has referred us to the Arbitration Act and in particular sections 5 and 10. It is claimed for the respondent, that the applicant is only entitled to a stay of the action in the Resident Magistrate's Court in St. Ann if it can show that it has satisfied the provisions of section 5 of the Arbitration Act.

Section 5 of the Arbitration Act is in the following terms:

> "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings"

It is clear that in order for section 5 to be evoked, the judge to whom the application to stay has been made, as in this case, would have to be satisfied that there is "no sufficient reason why the matter should not be referred in accordance with the submissions." In the instant case there is every "sufficient reason" why the matter should not be referred to arbitration because under the terms of the agreement and the terms of condition 8, the parties agreed to limit the time within which such referral should be made. Respondent's counsel also submitted that under this same section, there is a requirement that it be shown that "at the time when proceedings were commenced", the Applicant for the stay was "ready and willing to do all things necessary to the proper conduct of the arbitration". In the unreported case of *Errol Munroe v N.E.M. Insurance Company Jamaica Ltd Suit No E.3397/1989*, Pitter J had to consider a similar submission under section 5 of the

Arbitration Act. Having concluded that there was a statutory need to fulfill the requirement of being ready and able, Pitter J delivered himself thus:-

> "I have given full consideration to the cases cited in this regard, and nowhere in any of them is to be found any rule of law as to any particular acts or steps to be taken by the Applicant before the Court could find that he was ready and willing to arbitrate. The authorities do not establish that there is any need for the Applicant to particularize or give details of steps taken by him to indicate his readiness and willingness to arbitrate. The requirement is therefore satisfied once it is shown by affidavit that the Applicant is ready and willing to arbitrate".

In the instant case, the averment contained in paragraph 8 of the supplemental affidavit of Suzette Campbell dated May 22, 2001, is sufficient to meet the test accepted by pitter J in Errol Munroe.

In light of the foregoing, it goes without saying and I so find, that the effect of condition 8 is as claimed by the applicant and on a true construction of that condition the time for the respondent to apply for arbitration of the disclaimer has passed. Accordingly, I find for the applicant and grant an order in the following terms:

1. Condition 8 of the private car insurance policy issued by the plaintiff applicant to the respondent in this case is legally binding on and enforceable by or against the respondent.
2. Upon a true construction of condition 8 expiration of the time limited therein for the referral of disputes arising from a disclaimer to arbitration without such referral effectively has barred the insured under the policy from bringing proceedings whatever in relation to that claim.

3. It is ordered that the suit brought by the respondent against the applicant in the Resident Magistrate's Court of St. Ann by virtue of Plaint No. 120 of 2000 is hereby stayed.
4. Costs in this matter to be the Applicant's, to be agreed or taxed.