SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. SLUHCV2003/0046

BETWEEN:

N.E.M. (WEST INDIES) INSURANCE LIMITED

Claimant

and

EUGENIA VERNETTE BROOKS

Defendant

Appearances:
Mr. Rhory McNamara for the Claimant
Mr. Gerard Russell Williams for the Defendant.

2004: July 06
July 22

LAW OF INSURANCE…MOTOR VEHICLE…FALSE ANSWER AS TO OWNERSHIP AND REGISTRATION OF VEHICLE…NON-DISCLOSURE…MISREPRESENTATION ON MATERIAL FACTS…LAW OF MATERIALITY…UBERRIMAE FIDEI…LIABILITY OF INSURER ON POLICY IN CASE OF AN ACCIDENT INVOLVING VEHICLE…MOTOR VEHICLES INSURANCE (THIRD-PARTY RISKS) ACT 1988, S. 3

JUDGMENT

1. HARIPRASHAD-CHARLES J: N.E.M. (West Indies) Insurance Limited ("NEMWIL") claims the sum of $57,086.43 which it alleges that it mistakenly paid out to Ms. Eugenia Vernette Brooks on 7th May 2002 after she made a claim for indemnity under a Policy of Motor Vehicular Insurance.

The Facts

2. By proposal form dated 19th April 2002, Ms. Brooks purported to insure with NEMWIL as owner a Toyota Hilux Surf 1997 model car ("the vehicle"). She subscribed for and obtained a comprehensive Policy of Motor Vehicular Insurance (Policy No. MCPMV52731).

3. By the said proposal form, Ms. Brooks declared as follows:
   (1) That she was the registered/legal owner of the vehicle.
   (2) That the vehicle was a convertible.
   (3) That it was a 1997 model vehicle.
   (4) That it had never been in any previous accidents prior to the proposal for insurance.

4. Ms. Brooks signed the proposal form and agreed that it shall form the basis of the contract of insurance between herself and NEMWIL and shall be incorporated into and form part of the Policy of Insurance. Further, she expressly warranted that the statements contained in the form were true and correct.

5. In reliance upon Ms. Brooks' representations contained in the proposal form, NEMWIL issued the said Policy of Insurance and Certificate of Insurance No. STLX1 3251 in favour of Ms. Brooks and agreed to comprehensively indemnify her during the period 19th April 2002 to 6th April 2003. It was an express term of the Policy as stated in paragraph 7 thereof under the rubric "conditions" that among other things, liability of NEMWIL under the said Policy will be conditional upon 'the truth of the statements and answers in the Proposal and Declaration for this insurance.'

6. On 25th April 2002, an accident was alleged to have occurred and Ms. Brooks' vehicle was damaged beyond repair. By Motor Vehicle Accident Report dated 29th April 2002, Ms. Brooks issued a formal claim for indemnity. On 7th May 2002, NEMWIL paid the sum of $57,086.43 in full settlement of her claim under the Policy.

7. Subsequently, a Private Loss Adjuster and Surveyor, Mr. Peter Clarke investigated the circumstances surrounding the accident and the Policy of Insurance. His investigations revealed a number of inconsistencies but more importantly, that Ms. Brooks did not appear on any of the Transport Board registers as the registered or legal owner of the vehicle despite the allegation that she purchased it from her boyfriend, Dale Elliott sometime in April 2002.

8. Ms. Brooks was contacted and asked to refute the allegations contained in the report of Mr. Clarke. She failed to do so. As a result, NEMWIL refunded to her all premiums paid under the policy in the amount of EC$1,913.57 and commenced these proceedings to recoup the sum of EC $57,086.43.

The issues:

9. The issues which arose for determination are as follows:
   (i) Whether Ms. Brooks was the registered or legal owner of the vehicle or alternatively, did she have an insurable interest in the vehicle?
   (ii) Whether Ms. Brooks failed to disclose and /or misrepresented material facts then known to her but unknown to NEMWIL?
   (iii) Whether on the basis of the above, NEMWIL mistakenly paid out the sum of $57,086.43?

Was Ms. Brooks the registered or legal owner of the vehicle?

10. Ms. Brooks contended that in or about April 2000, she and Dale purchased the vehicle and insured it comprehensively in their names with West Indies General Insurance. (Exhibit VB1). In or about 2002, she bought the vehicle from Dale for $65,000.00. She never requested a receipt from him because they were living together in a common law relationship. Dale undertook to register the vehicle in her name. As it turned out, he never did so. She never checked with the Transport Board to find out whether or not the vehicle was registered in her name. Indeed, she was unaware that the law of Saint Lucia requires registration of all motor vehicles within 7 days of ownership transferring.

11. It is accepted that the vehicle was not registered in Ms. Brooks' name with the Transport Board and as a consequence, she was not the registered or legal owner of the vehicle when the accident occurred or at all.

Insurable Interest

12. Mr. Williams appearing as Counsel for Ms. Brooks submitted that even though she was not the registered or legal owner of the vehicle, she was in fact the owner and therefore, she had an insurable interest in it. He next submitted that registration is not the sole criterion to satisfy the requirements of insurable interest and that the court must look at all of the facts and surrounding circumstances. He urged the court to believe Ms. Brooks' account that she bought the vehicle from Dale with cash from the sale of a parcel of land and that she is the factual owner even though the vehicle is not registered in her name. He submitted that there is an absence of documentary evidence to prove that she is in fact the owner of the vehicle because the parties were (and still are) in a common law relationship. He next submitted that she used the vehicle extensively as owner and further, she was under the belief that Dale had registered the vehicle in her name.

13. Mr. McNamara appearing as Counsel for NEMWIL submitted that in order to have an insurable interest a person must show both a factual and a legal interest in the property.[1] This, in my view, is the correct interpretation of the law.

14. Further, it is a cardinal principle of insurance law that an assured person could not recover unless he had an insurable interest in the subject matter of the insurance other than that created by the contract itself, for otherwise he will incur no loss through the happening of the event insured against, and so if the assured is without a legally recognized interest, the insurer will have a good defence to any claim under such a contract if he chooses to raise it.[2]

[1] See page 106 of the Law of Insurance Contracts by M. Clark –3rd edition
[2] Rogerson v Scottish Automobile and General Insurance Co. Ltd (1931) All ER 606

15. Although there is no authoritative definition of insurable interest, the most famous definition is that given by Lawrence J. in Lucena v Craufurd[3].

> "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstance which may attend it;…And whom it importeth, that its condition as to safety or other quality should continue:…To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."

16. It is generally true that a person who would foreseeably suffer financial loss from the occurrence of an event has an insurable interest in the subject matter which it is sought to insure against that event, but this rule of thumb requires qualification. For example, a person does not have an insurable interest in another's property in respect of which he merely hopes that he will have an interest in the future.[4] Further, an assured has no interest entitling him to insure against an event if he does not seek directly to protect the very right to which he is legally entitled. If, for example, the assured is the sole owner of shares in a company, his interest lies in the shares and their value. He has no interest recognized by the law in the profits or assets of the company except in so far as they form the basis of the value of the shares.[5]

17. On a balance of probabilities, I find it difficult to believe that Ms. Brooks, a school teacher would sell her land to purchase a vehicle and would not be interested in ensuring that the vehicle is registered in her name as the owner especially as she alleged, her relationship with Dale was strained at the time. I also find it difficult to believe that she did not read the question when she represented on the proposal form that she is the registered owner of the vehicle. I therefore reject her evidence that she was in fact the owner of the vehicle.

18. Based on my findings that Ms. Brooks was not the factual owner of the vehicle and her own admission, that she was not the registered or legal owner of the vehicle, she therefore lacked the insurable interest required by law. As a result, the Policy of Insurance was void *ab initio*.

[3] (1806) 2 B & P 269, 302, but this was criticized in Macaura v Northern Assurance [1925] A.C. 619, 627. See also Mark Rowlands Ltd v Berni Inns Ltd (1986) 1 QB 211 at 228 where it was quoted with approval.
[4] Buchanan v Faber (1899) 4 Com. Cas. 223
[5] Macaura v Northern Assurance [1925] A.C. 619

19. In the premises, NEMWIL is entitled to recover the sum of $57,086.43 which was erroneously paid out to Ms. Brooks.

20. Even if I were wrong to come to this conclusion, I am of the considered opinion that Ms. Brooks made a material misrepresentation about the vehicle which is sufficient to void the Policy *ab initio*.

Uberrimae Fidei

21. I begin by restating the golden rule that an insurance contract is a contract *uberrimae fidei:* it is a contract based on the utmost good faith and if the utmost good faith is not observed by either party the contract may be avoided by the other party.[6] The reason for this principle of insurance law is that contracts of insurance are founded on facts which are nearly always in the exclusive knowledge of one party (usually the assured) and, unless this knowledge is shared, the risk insured against may be different from that intended to be covered by the party in ignorance.[7] The duty which arises is three-fold: a duty to disclose material facts; a duty not to misrepresent material facts and a duty not to make fraudulent claims.

Material Misrepresentations

(a) *Registered Owner of vehicle*

22. NEMWIL contended that Ms. Brooks made several material misrepresentations about the vehicle which are sufficient to void the policy.

23. The Private Motor Car Insurance Proposal Form, (Exhibit PC2) duly signed by Ms. Brooks on 19th April 2002, formed the basis of the contract between her and NEMWIL. In it, she warranted that the statements and particulars contained therein were true. At section 13(b) of the said proposal form, she declared that she is the registered owner of the vehicle when in law and in fact, she was not. In her witness statement and under cross-examination, she admitted that the statement was untrue.

[6] Carter v Boehm (1766) 3 Burr.1905, 1909
[7] Carter v Boehm, ante; London General Omnibus v Holloway [1912] 2 K.B. 72, 86

24. Mr. McNamara submitted that NEMWIL was entitled to avoid the policy of insurance on two grounds. Firstly, the Motor Vehicles Insurance (Third –Party Risks) Act 1988 provided for the avoidance of a policy by the insurer on the ground of a representation of fact which was false in some material particular. Section 3 states as follows:

> "No sum shall be payable by an insurer under subsection (1), if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, the insurer has obtained a declaration that, apart from any provision contained in the policy, the insurer is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular…."

25. Secondly, NEMWIL was entitled to avoid the policy based on the common law proposition that a misrepresentation "is a positive statement of fact which is made or adopted by a party to a contract and which is untrue. A misrepresentation made innocently is a misrepresentation nonetheless."[8]

26. Mr. McNamara next submitted that the representation by Ms. Brooks that she was the registered owner of the vehicle was a material statement of fact which was adopted by NEMWIL and instrumental in her being issued with the policy of insurance as under no circumstance would NEMWIL insure a vehicle for everyday use if it were unregistered and thus illegally on the roads of Saint Lucia.

The law of materiality

27. The law of materiality has 3 main features. (i) The yardstick of the 'materiality' of a circumstance that has not been disclosed, or has been misrepresented, prior to the conclusion of the contract of insurance is the notional influence on the judgment of a prudent underwriter. It is not the actual influence on the judgment of the actual underwriter. (ii) In order to be 'material', the non-disclosed or misrepresented circumstance must be one that, if disclosed or properly represented, the prudent insurer would want to take into account when reaching his decision whether or not to accept the risk and, if so, on what terms. (iii) The consequence of material non-disclosure or misrepresentation prior to the conclusion of a contract of insurance or reinsurance is that the insurer may avoid the

[8] The Law of Insurance Contracts by M. Clarke 3rd edition at page 563

contract. These principles were correctly upheld in the C.T.I. case [9] and are supported by relevant legislation and an overwhelming body of consistent and eminent judicial authority. Fulfilment of the duty of disclosure does not depend on nice judgments by the broker as to the minimum disclosure he can get away with. Otherwise, the "utmost good faith" principle would be eroded, and such erosion the courts have consistently set to face: see Bates v Hewitt[10] and Greenhill v Federal Insurance Co. Ltd.[11]

28. It has never been the law of insurance that the insurer's right of avoidance for non-disclosure or misrepresentation is dependent on proof that the insurer's mind was affected or that the insurer's final decision would have been different. The rationale of the insurer's statutory right of avoidance is (a) the *uberrimae fidei* nature of the contract of insurance and, perhaps, (b) an implied condition of the contract that unless the facts substantially correspond with those represented the insurer will not be liable on the policy.

29. The duty is to disclose all facts that might influence a reasonable insurer in making his judgment. It is a strict liability: it does not matter that it is an accidental omission that does not affect the result. There is nothing in the authorities to show that there is an extra requirement that the actual underwriter must have been induced.

30. In Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd[12], it was held that before an underwriter could avoid a contract for non-disclosure of a material circumstance he had to show that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms.

31. In the instant case, the fact that the vehicle was unregistered and contravenes the law of Saint Lucia was a material fact which Ms. Brooks should have disclosed. It would have influenced the judgment of NEMWIL in determining whether it would take the risk to

[9] [1984] 1 Lloyd's Rep. 476
[10] (1867) L.R. 2 Q.B. 595, 604-611
[11] [1927] 1 K.B. 65, 72, 76, 85-86
[12] [1995] 1 A.C. 501

condone an illegality in insuring an unregistered vehicle so that it could be driven on the roads.

(b) Was the vehicle a Convertible?

32. In my view, Ms. Brooks made a genuine mistake when she recorded on the proposal form that the vehicle was a Convertible (CONV) when in fact it was a Sport Utility Vehicle (SUV). It was evident at the trial that Sport Utility Vehicles are not Convertibles. Perhaps, rightly so, Mr. McNamara did not actively canvass this issue.

(c) Year of vehicle

33. It was argued on behalf of NEMWIL that Ms. Brooks misrepresented that the vehicle was a 1997 model when in fact it was a 1995 model. Again, I consider this statement to be a genuine mistake. In any event, I do not think that NEMWIL would not have insured the vehicle had it been aware that it was a 1995 model. It may have affected the premium, a lower one, perhaps. Furthermore, even if it were not a genuine mistake on her part, I do not think that NEMWIL would have been entitled to avoid the policy on this ground standing by itself.

(d) Whether the vehicle was involved in previous accident?

34. Ms. Brooks stated in the Proposal Form that the vehicle had never been in any previous accidents, a fact which was disputed by Mr. Clarke and which Ms. Brooks alluded to at paragraph 8 of her witness statement. She maintained that as far as she was aware, the vehicle was not involved in any other accident except a minor accident which did not even necessitate the involvement of the police.

35. As previously indicated, I did not find Ms. Brooks to be a candid and honest witness. I did not believe that she was unaware that the vehicle was involved in any previous accident. I believe the allegations made by NEMWIL that the vehicle was involved in at least 2 accidents prior to the Proposal of Insurance.

36. Mr. McNamara argued that in not declaring the 2 previous accidents, Ms. Brooks misrepresented a material fact and as a consequence, the policy of insurance is void *ab initio*.

37. The law, as it has developed since 1766 (Carter v Boehm) is clear to the effect that the "materiality" of a circumstance does not require the risk itself to be changed or affected provided that the non-disclosed, or misrepresented circumstance "induced a confidence, without which the [underwriter] would not have acted:"[13]. If therefore, NEMWIL could show that it had actually been induced by the non-disclosure to enter into the policy on the relevant terms, then it could avoid the policy of insurance.

38. In the instant case, there is not an iota of evidence to show that NEMWIL was induced by the non-disclosure to enter into the policy of insurance. For the sake of argument, suppose Ms. Brooks had disclosed that the vehicle was involved in 2 previous accidents, would NEMWIL have accepted the risk on the same terms and conditions? I think so. In my opinion, NEMWIL was interested in the presentation of 2 documents to accept the risk: the valuation report and the no claim discount. NEMWIL was not even interested in the production of the registration certificate from the Transport Board. Had it been, it would not have found itself in this legal quandary today. Based on this finding, I do not think that NEMWIL could avoid the policy.

Conclusion

39. In my judgment, the Policy of Insurance was void *ab initio* for 2 reasons:
    (i) That Ms. Brooks lacked the insurable interest required by law in establishing that she is the factual as well as registered or legal owner of the vehicle and,
    (ii) That she made a material misrepresentation of fact when she declared that the vehicle was registered in her name when in fact, the vehicle was unregistered and thus illegally on the roads of Saint Lucia.

[13] Sibbald v Hill (1814) 2 Dow 263, 267

40. Accordingly, Ms. Brooks must refund to NEMWIL the sum of $57,086.43. I will make no order as to costs because I feel that NEMWIL should have been ‘put on inquiry’ before indemnifying Ms. Brooks.

Indra Hariprashad-Charles

High Court Judge