GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.16 OF 2003

BETWEEN:

NEW WEST INDIAN MUTUAL AND GENERAL ASSURANCE CO. LTD

Appellant

and

[1] COLIN McDONALD
[2] DAVID ALLAN McDONALD

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon Mr. Hugh Rawlins — Justice of Appeal [Ag]

Appearances:

Mr. Alban John for the Appellant
Ms. Celia Edwards for the Respondent

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2005: March 4;
May 23.

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JUDGMENT

[1] GORDON, J.A.: I shall quote from the judgment of the trial Judge for the background to this appeal:

> "The Defendant (Appellant) is an insurance company carrying on business in Grenada. On October 7, 1998 the Claimants (Respondents), as the owners of Toyota mini-bus registration number HF 913, proposed for and entered into a policy of insurance with the [Appellant] Company for basic comprehensive insurance coverage in respect of the said bus for the period of October 7, 1998 to October 6, 1999. On October 1, 1999, the said policy was renewed for a further period of one year ending October 6, 2000.
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> "By a Writ of Summons filed on July 14, 2000, the [Respondents] brought proceedings against the [Appellant] for damages for breach of the contract of insurance effected in October 1999. The Statement of Claim averred that the said bus was stolen and subsequently involved in an accident on or about May 1, 2000 in the Birchgrove area in the parish of St. Andrew.

> The claim is for special damages for the value of the bus and related expenses, general damages, interest thereon and costs. The [Respondents] alleged that the [Appellant] has acted in breach of the contract of insurance by refusing to reimburse them for the damage caused to the vehicle as provided for under the insurance contract.
>
> "The Defence pleaded that the policy of insurance had been automatically cancelled pursuant to a collateral contract made between the first-named [Respondent] and the [Appellant] on October 1, 1999 on account of the failure of the [Respondents] to pay the full premium upon which the agreement to insure the vehicle was conditional. The [Appellant] denied that it is liable to indemnify the [Respondents] for the loss and damage as claimed."

[2] There were conditions of the policy of insurance issued by the Appellants, Conditions 5 and 7 of which were headed respectively "Cancellation" and "Due Observance Clause" and read:

> "We may cancel this policy by sending you seven days notice by registered letter to your address last known to us. We will then refund premium paid for any period of insurance beyond the effective date of cancellation"
>
> "Our liability will be conditional upon:
> (a) the observance of the terms of the policy insofar as they relate to anything to be done or complied with by you or any person claiming indemnity..."

[3] The history of the relationship between the parties, to the extent that it is relevant in this appeal, is that the Respondents first entered into the contract of insurance with the Appellant on October 1998 and paid the annual premium satisfactorily. In October 1999, when the policy came up for renewal the parties entered into what was termed a "Credit Agreement" pursuant to which the Respondents agreed to pay to the Appellant the outstanding balance payable on the premium of $1790.88 on December 1, 1999, having already paid $2,000.00 on account of the amount due.

[4] The Credit Agreement contained the following provision:

> "I understand that if the above payment(s) is not made on the date(s) agreed, my policy will be automatically cancelled and I will not be entitled to claim on NEWIM in the event of a loss"

[5] The Respondent failed to pay the balance due on the due date, or indeed at all. On 17th February, 2000, the Appellant's evidence is that it sent a letter to the Respondents demanding payment of the outstanding balance of $1,790.88 which letter was in part in the following terms:

> "In order to enable us to continue to provide credit to valued customers like yourself, it is important that overdue balances be settled promptly. We therefore request that the outstanding amount be remitted to us within fourteen (14) days of this letter."

The Respondents claimed that they never received this letter, nor did they pay the outstanding balance on the premium due.

[6] A Notice of Cancellation dated March 8, 2000, (which the Appellant conceded was a typographical mistake and that the Notice should have been dated April 8, 2000) was sent to the Respondents by Registered post. The evidence is uncontroverted that the Notice of Cancellation was posted on April 10, 2000.

[7] The learned trial Judge found that there was no inhibition created by the policy of insurance on the parties varying the terms of payment of the premium and this is what they did by the Credit Agreement. I agree with the learned trial Judge. He further found that by virtue of the letter of 17th February 2000, after the policy ought to have been automatically cancelled by virtue of the terms of the Credit Agreement, the Appellants implicitly waived its right to rely on the cancellation provision in the Credit Agreement. He found that this had the effect of resuscitating Condition 5 of the policy.

[8] Having found that Condition 5 of the policy had been reactivated, he then found that the Notice of Cancellation, having been posted on April 10, 2000 and expressed to expire on April 15, 2000, was invalid in that it failed to give the required seven days notice after its posting and hence the Appellant had "failed to comply with the strict terms of Condition 5 of the policy". His conclusion therefore was that the Notice of Cancellation failed to cancel the policy of insurance which

remained valid and enforceable. Judgment in terms prayed for was entered for the Respondents.

[9] The Appellant is dissatisfied with the judgment of the learned trial Judge and has appealed to this Court on a number of grounds.

[10] The Appellants 8 grounds of appeal raise 3 substantive issues for the decision of this Court. They are, firstly, the issue of waiver and estoppel; secondly, the efficacy of the Notice of Cancellation; and, thirdly, that the learned trial Judge wrongly barred the Appellant from cross-examining the first Respondent on the circumstances of the loss of the vehicle. If the Appellant succeeds on the issue of waiver and estoppel, then it will be unnecessary to proceed further.

Waiver and estoppel

[11] The evidence of the first Respondent was that he understood that under the terms of the Credit Agreement if he failed to pay the balance of the premium on the due date, then the policy would lapse. He having failed to pay the balance on December 1, 1999, the due date, it is my view that the policy then lapsed. This raises the issue of whether by the letter of February 17, and/or by the Notice of Cancellation of April 2000 the Appellant can be said to have waived the lapse. In Halsbury's Laws of England, 4th Edition Reissue at Vol. 25 Paragraph 423 the following is written:

> "Consideration for a waiver. Where the obligation alleged to be waived has not been broken, no consideration is required beyond the mutual agreement of the parties that performance will not be required: the promise and the reliance on the promise are sufficient to satisfy the technical requirements of the law. However, where there has already been a breach by the assured, then there must be some consideration to offset the insurers' accrued rights."

In other words, the ordinary principles of the requirement of consideration for the existence of a contract apply. In this case, there was no evidence of any such consideration. In my view, therefore the issue of waiver does not arise.

[12] This leaves only the issue of estoppel to be determined. A classic definition of estoppel is to be found by Lord Birkenhead in Maclaine v Gatty[1] where he said:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time."

In short, in our case there must be a representation of a fact or facts by the insurer (Appellant), and evidence of the insured (Respondent) having acted on the basis of that representation to his detriment. I am of the view that the Appellant did represent, both by the letter of February 17, 2000 and by the Notice of Cancellation dated March 8, 2000 that the policy of insurance subsisted. However, by the evidence of the first Respondent himself, neither the letter nor the Notice of Cancellation came to his attention prior to the accident. In logic, therefore, he could not be said to have acted in any way to his prejudice based on knowledge that he admits he did not have. That is, very shortly, the answer to the Respondent's argument on the issue of estoppel.

[13] In the circumstances I would allow this appeal and dismiss the claim of the Respondents against the Appellant. I further award prescribed costs to the Appellant both here and in the Court below.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh Rawlins
Justice of Appeal [Ag.]

[1] [1921]1 A.C. 376