SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No:SLUHCV2002/1206

BETWEEN:

LYDIA HILTON

Claimant

AND

BARBADOS FIRE AND COMMERCIAL INSURANCE LTD

Defendant

Appearances:
George Charlemagne for Claimant
Evans Calderon for Defendant

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2005: July 25, 29

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JUDGMENT

Introduction

[1] SHANKS J: The Claimant insured her house and contents under a Homeowner's Comprehensive Policy with the Defendant insurance company. The cover note shows the amount insured for the building as $450,000 and for the contents as $131,950. On 4 January 2002 the house and contents suffered substantial damage in a fire. She claims an indemnity in relation to the damaged contents. The Defendant denies liability to indemnify her on the grounds that they are entitled to avoid the policy for non-disclosure and/or misrepresentation.

[2] The insurance was based on a proposal form signed by the Claimant and dated 15 November 2001 the relevant parts of which stated as follows:

> GENERAL DETAILS
>
> ...
>
> 10 Have you been insured before for any of the risks proposed?
>
> Yes No
>
> a If yes, who was your insurer?
>
> Hunte
>
> b Is there an existing Policy in force? Yes No [tick]
>
> 11 Have you or any member of your household ever:
>
> a had any insurance refused, been subjected to special terms or been asked to take extra precautions? Yes No [tick]
>
> ...
>
> c sustained loss or damage by any of the risks or liabilities you now wish to insure?
>
> Yes No [tick]
>
> DISCLOSURE
>
> All important facts which may affect the acceptance or assessment of the coverage requested by this proposal form must be disclosed...Failure to disclose these facts may invalidate the Policy
>
> DECLARATION AND SIGNATURE

I declare that to the best of my knowledge and belief the information on this form is true in every respect...

15.11.01 [Claimant's name]

Date Signature of Proposer

[3] It is alleged in the Defence:

(1) that answer 10(b) was not true because the building was already insured under a blanket cover held by the mortgagee;

(2) that answer 11(a) was not true because the Claimant had been refused insurance by NEM (West Indies) Insurance Ltd; and

(3) that answer 11(c) was not true because the Claimant had suffered losses in 1999.

I must decide whether any of these matters entitle the Defendants to avoid the insurance.

Legal framework

[4] In his helpful written submissions Mr Calderon for the Defendants reminds the court that an insurance contract is subject to an obligation of utmost good faith. The effect of this is that the assured must disclose to the insurer any material fact of which he has knowledge. A material fact is any fact which would influence the judgment of a prudent insurer in fixing the premium or in determining whether to take the risk. If the assured has failed to disclose any such material fact or made any representation which is inaccurate in any material way and the insurer has thereby been induced to underwrite

the risk on the terms he did, he may be entitled to avoid the insurance even if the assured acted entirely innocently.

[5] It is important to note the limits of this doctrine however. In a business context the assured's duty of disclosure is not confined to his actual knowledge; it also extends to those material facts which, in the ordinary course of business, he ought to know. But a person effecting insurance cover as a private individual must disclose only material facts known to him and he is not to have ascribed to him any form of deemed or constructive knowledge (see Halsbury's Laws *Insurance* para 44 and *Economides v Commercial Union* [1997] 3 All ER 636). It is also sufficient if facts which are disclosed put insurers on inquiry and their inquiry would in the normal course elicit such further facts as may be material (see Halsbury's Laws *Insurance* para 37 and *Anglo-African Merchants v Bayley* [1969] 2 All ER). An entirely innocent misrepresentation may entitle the insurer to avoid the insurance but, where the representation is qualified and stated to be to the best of an assured's knowledge and belief, then provided the assured is honest in making the representation the insurer is not entitled to avoid the insurance even if it is in fact inaccurate (see Halsbury's Laws *Insurance* para 47).

[6] In the light of this legal framework I turn to consider the matters raised by insurers.

Answer 10(b)

[7] The Claimant accepted in evidence that she had borrowed money on mortgage from the St Lucia Development Bank to help with the cost of acquiring and extending her house and that the Bank had insured the building under a blanket cover with the Alliance Assurance Co Ltd. Indeed she has already received $42,115 in respect of

damage to the building caused by the fire from Alliance Assurance. The Defendants therefore say that there has been a material non-disclosure and that answer 10(b) is a misrepresentation and that they are accordingly entitled to avoid the insurance. I think it is clear that the existence of the blanket cover was a material fact and that if it had been disclosed the terms of the insurance issued by the Defendants are likely to have been different. The issue is whether the Claimant had knowledge of the cover or whether the inaccurate answer to question 10(b) amounted to a misrepresentation.

[8] The Claimant's evidence was that she was not aware when she signed the form (which was filled in by the broker Lionel Forde) that the Bank had insurance cover in respect of her house. She also said that she gave full values for the building and contents ($450,000 and $131,950) in the proposal form and that she does not know even now how much the Bank had insured the building for. Although it is very likely that she had the means of knowing that the Bank had some insurance cover (no doubt her mortgage payments in some way included a contribution to the premiums and the terms and conditions of her mortgage would have revealed the fact) I accept her evidence that in fact she did not know this was the case. And since she was effecting the insurance as a private individual she is not to have ascribed to her any kind of deemed or constructive knowledge of facts actually unknown to her. She cannot therefore be guilty of material non-disclosure.

[9] Further, although answer 10(b) was wrong I find that it was true to the best of her knowledge and belief; in the light of the terms of the declaration before her signature there was therefore no misrepresentation and this answer did not provide any ground for avoiding the policy.

[10] The Claimant also relied on a second point. Under section 1 of the proposal form which is headed "Buildings" the Claimant gave an affirmative answer to the question "Is the legal interest of a mortgagee to be recorded on the policy?" and identified the St Lucia Development Bank as the mortgagee. It was her case at trial that this information put insurers on inquiry and that such inquiry would normally have elicited the fact that the Bank had already effected insurance cover in respect of the building.

[11] Joseph Maxwell, the St Lucia agent for the Defendant insurers, accepted in evidence that insurers can come under a duty of inquiry and that in this case it would have taken him about five minutes to find out that there was an existing insurance covering the Claimant's house. He denied, however, that the information that the house was mortgaged to the Bank gave rise to a duty to inquire into the matter further. He accepted that any mortgagee will want to be sure that a building it is relying on as security is insured and that they often have blanket cover arrangements as the St Lucia Development Bank did. But, he said, the borrower is often given the option of arranging his own insurance and indeed he himself had purchased a property through the St Lucia Development Bank which he, for obvious reasons, insured in full through the Defendants. Having considered this point I think Mr Maxwell is probably right in his contention: given that mortgagees do allow borrowers to arrange their own insurance it would have been reasonable in my view for him to conclude without further inquiry that the answer to question 10(b) was true.

[12] I therefore reject this second point. However, as stated above, I find that there was no non-disclosure or misrepresentation entitling the Defendants to avoid the insurance in

relation to the existing cover effected by the Bank and I therefore reject the defence based on answer 10(b).

Answer 11(a)

[13] Notwithstanding the reliance on this answer in the Defence there was no admissible evidence presented to the court that the Claimant or any member of her household had ever had insurance refused or been subjected to special terms or asked to take special precautions. I therefore reject this defence.

Answer 11(c)

[14] Mr Maxwell's case as put in his witness statement was simply that the Claimant's answer to question 11(c) involved a non-disclosure but he gave no further details of what she had failed to disclose. The Claimant accepted in cross-examination that she had had an insurance policy in respect of a now discontinued boutique business with a different insurance company and that there had been losses from a flood and a theft which had resulted in small claims some years before (she did not remember precisely when). She said that when she signed the proposal form she was not thinking of her boutique business and that she did not understand question 11(c) to refer to losses relating to properties other than the one she was proposing to insure. Mr Maxwell's position was that the word "risk" in question 11(c) meant risk in the generic sense of flood, fire or theft rather than the specific risk of loss or damage to her house or its contents and that her answer was therefore untrue.

[15] In the absence of an express question, there is no general duty to disclose any and every sort of insurance claim which the assured may have made during his or her

lifetime, although it may be material to know that, in relation to insurance comparable with that sought, there have been previous losses or claims (see Halsbury's Laws *Insurance* para 40). Since I have no evidence as to the circumstances of the previous losses and claims save for what I was told by the Claimant I cannot find that the failure to disclose them amounts to a material non-disclosure. Further, in the light of my interpretation of question 11(c) (see para 16 below) I think the Defendant must be taken to have waived any requirement to disclose losses or claims arising out of damage to properties other than the house she was proposing to insure.

[16] As to whether question 11(c) required Claimant to disclose the earlier losses I much prefer her interpretation of the question to that of Mr Maxwell. The general rule is that a fair and reasonable construction is to be given to such questions (see Halsbury's Laws *Insurance* para 61). The word "risk" is commonly used to refer to the particular risk taken by the insurer in relation to a particular building or other item of property (as in the phrase "A fact is material if it would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk") as well as to types of risk (as in "fire" or "theft"). If Mr Maxwell was right in his interpretation of the question it would be almost completely open ended, unlimited by time or by the specific items of property or even the type of property to be insured. This would be very onerous for those seeking insurance and would impose an obligation of disclosure going way beyond the general duty I have described above for no apparent good reason. In the circumstances I find that the answer to question 11(c) was correct and that there was no misrepresentation which would have entitled the Defendants to avoid the insurance.

[17] But even if I had found that there was a material non-disclosure or misrepresentation, there was no direct evidence that it induced the Defendant to enter into the insurance on the terms it did. Sometimes the court will infer that an insurer has been induced to enter into an insurance contact on the basis of a non - disclosure or misrepresentation if it obviously relates to an important matter. But in this case all I know about the previous losses is what I was told by the Claimant. I cannot say on the basis of this limited information that the insurance would not have been granted on the same terms if the Defendants had known about the losses, bearing in mind that the onus clearly lies on the Defendants to satisfy me on the point.

[18] I therefore reject the defence based on answer 11(c) and find that the Defendant is liable to indemnify the Claimant in respect of the damage to her contents caused by the fire on 4 January 2002.

Quantum

[19] The Claimant gave no evidence in relation to quantum save that the contents of the house were largely destroyed in the fire and that a claim for $131,950 (the sum insured) was submitted. However, para 3 of her Statement of Claim sets out particulars of loss totalling $131,950 and the Defence does not address para 3 of the Statement of Claim at all. In those circumstances, my reading of CPRs 10.5 and 10.7 is that the Defendants are debarred from contesting the quantum of the claim put forward in the Statement of Claim.

[20] The Statement of Claim also gives credit for the payment made to the Claimant by Alliance Assurance, which was $42,115, leaving a net claim of $89,835. Since the

payment by Alliance Assurance related to the building and not the contents this was clearly an error. However, Mr Charlemagne for the Claimant did not seek permission to amend and, given that it is possible that the Defendants elected not to contest quantum on the basis that the claim was only $89,835, it may not have been possible to amend the claim without injustice even assuming the rules permitted such an amendment.

Result

[21] I will give judgment for the Claimant for $89,835 with interest at 6% from January 2002 to July 2005 (3 ½ years), which gives a total award of $108,700. Subject to any submissions I shall also award the Claimant her costs on the prescribed basis which I calculate as $25,305.

Murray Shanks

High Court Judge (Ag)