IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 242 OF 2013

BETWEEN	**ROYAL STAR ASSURANCE LTD.**	**PLAINTIFF**
AND	**(1) ALLEN A. FOSTER**	**1ST DEFENDANT**
AND	**(2) WILLIAM CAUSLEY ARCHER**	**2ND DEFENDANT**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 4TH AND 13TH NOVEMBER 2014,

APPEARANCES: Mr. Colm Flanagan of Nelson & Co. for the Plaintiff

Mr. James Kennedy of Samson & McGrath for the First Defendant

The Second Defendant not appearing

Mr. Waide DaCosta for Mr. Gordon Michael Owens (on a watching brief)

Right of insurer to avoid policy on grounds of material non-disclosure or misrepresentation – test of materiality – burden of proof on insurer to show it was induced to enter into the contract.

RULING

1. This is the Plaintiff Royal Star Assurance Ltd.'s ("RSA") application for summary judgment against the Defendants for a declaration that the second Defendant Mr. Archer, was not an authorized driver under a policy of insurance obtained from RSA. RSA alleges that the policy of insurance was obtained by means of material non-disclosure and/or false representation of material facts and/or breach of warranty.

Background and Procedural History

2. The background to these proceedings is summarized as follows:

3. RSA provides motor insurance coverage in the Cayman Islands through its underwriting agent Fidelity Insurance Cayman Ltd. ("Fidelity"). Acting by Fidelity, RSA agreed to effect a policy of insurance, providing third party commercial motor vehicle insurance to the First Defendant (Mr. Foster), in respect of a Ford F350 motor vehicle registration number 131 835 ("the Vehicle"). This policy of insurance was effective from 14th December 2009 to 13 December 2010 ("the Policy").

4. The contract for the Policy was made on the basis of a proposal form and declaration made by Mr. Foster dated 8 October 2008 ("the Proposal").

5. At approximately 2:00 pm on 24th June 2010, Mr. Foster sought to effect a change to the Policy. He gave instructions to RSA to add the Second Defendant Mr. Archer, as a new named driver to the Policy.

6. RSA agreed to effect the change, and to provide third party insurance to Mr. Archer in respect of the Vehicle, on the basis of a form entitled "*Instructions to Effect a Change in a Policy*" ("the New Driver Proposal") which was signed by Mr. Foster.

7. In the New Driver Proposal, Mr. Foster answered the question, "*Has Driver been involved in ANY accident in the last 3 years?*" with the word "*No*".

8. This representation was untrue. Mr. Archer had been involved in a road traffic accident, whilst driving the Vehicle, earlier that very day, at around 12:34 pm ("the Accident")[1].

[1] As confirmed by a Motor Vehicle Accident Report Form and Royal Cayman Islands Police Service ("RCIPS") Traffic Report both of which are exhibited in evidence.

9. The other motor vehicle involved in the Accident was being driven by Mr. Gordon Michael Owens ("Mr. Owens"). He has alleged that he was injured and suffered loss and damage as a result of the Accident. He has issued proceedings against Mr. Foster and Mr. Archer in this Court (Cause 210 of 2013) seeking damages.

10. RSA were served through Fidelity, with a copy of Mr. Owens' Writ of Summons and Statement of Claim on 24th June 2014.

11. By letters dated 3 July 2013, RSA wrote to Mr. Owen, Mr. Foster and Mr. Archer for the purposes of providing notice that it intended to seek relief (which it now seeks) from this Court and to provide notice (to the extent it was required) under Section 15(3) of the Vehicle Insurance (Third Party Risks) Law (2012 Revision, that it was entitled to avoid the Policy.

12. On 17th July 2013, RSA issued these proceedings. The Writ and Statement of Claim were served on Messrs. Owens and Foster on 18th and 20th July, 2013, respectively.

13. As a result of difficulties with service of the proceedings upon Mr. Archer, RSA sought and obtained on Order for substituted service on 22 October 2013. Service of the proceedings in accordance with this Order is verified by affidavit.

14. Neither Mr. Foster nor Mr. Archer has filed an Acknowledgement of Service.

15. Although Mr. Owens is aware, and has been kept informed of the progress of these proceedings, he has chosen to take no part[2].

16. On 13 December 2013, RSA issued the present Summons in which it seeks summary judgment on its action, by way of declaratory relief today. Difficulties with service necessitated a further application for substituted service upon Mr. Foster which was

[2] Mr. DaCosta who acts for Owens has been served with all the pleadings and on occasion (including today) has appeared at Court in a watching capacity.

granted on 24 April 2014 by Mr. Justice Williams. Substituted service of the Summons has been verified by affidavit and Mr. Kennedy appears today for Mr. Foster.

Grand Court Rules ("GCR") Orders 13 and 14

17. As there has been a failure by Messrs. Archer and Foster to file a notice of intention to defend, ordinarily, RSA would be entitled to apply to enter final judgment in default, pursuant to GCR O.13.

18. However, RSA's action falls into the category of "other claims" contemplated by GCR O. 15 r6 as a result of the nature of the claims made, namely, for:-

(1) A declaration that, Mr. Archer was not an authorised driver entitled to drive the Vehicle under the Policy;

(2) A declaration that RSA are entitled to avoid the Policy on grounds of material non-disclosure of relevant fact(s) and/or false representation of material fact(s) and/or breach of warranty;

(3) A declaration that RSA are not required to indemnify either Mr. Foster or Mr. Archer in respect of the claim for damages brought by Mr. Owens in Cause No. 210 of 2013;

(4) An order for Rescission of the Policy; and/or

(5) An order for Costs;

19. O. 13, r6(1) provides:-

"*Where a writ is indorsed with* ***a claim of a description not mentioned in rules 1 to 4*** *then, if any defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time and,* ***if that***

defendant has not acknowledged service, upon filing an affidavit proving due service of the writ on him *and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him,* ***proceed with the action as if that defendant had given notice of intention to defend****".* [Emphasis Added]

20. As the defendants have not acknowledged service and RSA having filed an affidavit proving service of the Writ in these proceedings on them, RSA seeks to proceed with the action as if both Mr. Foster and Mr. Archer had given notice of intention to defend, not by seeking default judgment but by seeking summary Judgment pursuant to O.14, r1[3].

21. In accordance with the provisions of O. 14, RSA's application is brought on the ground that Mr. Foster and Mr. Archer have no defence to their claims. The application is supported by an affidavit verifying the facts on which the claims are based and stating the affiant's[4] belief that there is no defence to the claim.[5]

22. Accordingly, it is submitted by Mr. Flanagan that the pre-conditions of O.14 have been met. I accept this and so may proceed to deal with whether or not RSA's claim satisfies the test for summary judgment which is that the defendants (had they sought to defend) would have had no prospect of succeeding.

[3] O.14. r1 provides: "*Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.*"

[4] The affiant is Mr. Dale Edwards, the Vice President and Chief Operating Officer for Fidelity.

[5] See O.14, r2 [10/1] and Mr. Edwards' affidavit at paragraph 4.

Mr. Archer was not an authorised driver at the time of the Accident

23. The Motor Vehicle Accident Report form and the RCIPS Report disclose that the Accident took place on 24 June 2010, sometime between 12.30pm and1:00pm.

24. The Policy as it was in existence at the time of the Accident, named Messrs. Foster, Michael Wayne Johnson and Leon F. Grant as entitled to drive the Vehicle. This is evident from the face of the effective certificate of insurance delivered to Mr. Foster in accordance with the provisions of the Motor Vehicle Insurance (Third Party Risks) Law (2007 Revision).

25. The terms and conditions of the of the Policy[6] provides that it is condition precedent to the liability of RSA that if the Vehicle was driven by any person other than Mr. Foster it had to be driven (i) with his permission; and (ii) that the person driving be entitled to drive the Vehicle as defined by the effective certificate of insurance.

26. The effective certificate of insurance shows that Mr. Archer was not named and accordingly he was not entitled to drive the Vehicle.

No Indemnity

27. As can be seen from Section 2 of the Policy schedule, it was an explicit exception to the indemnity provided by RSA, under the terms of the Policy, that liability would not arise in respect of any claim arising while the Vehicle was being driven by a person who was not an authorised driver entitled to drive as defined in the effective certificate of insurance.

[6]See Section 2 of the Policy as exhibited to Mr. Edwards' affidavit.

28. At the time of the Accident, it is clear that Mr. Archer was not an authorised driver entitled to drive the Vehicle, under the terms of the Policy. He was an uninsured driver. As a result, it is contended that no liability arises on the part of RSA.

Material non-disclosure/false representation

29. At the time Mr. Foster sought to effect the change to the Policy, he knew that Mr. Archer had been involved in the Accident. This was contrary to the representation he made in the New Driver Proposal, that Archer had not been involved in any accidents in the last 3 years.

30. The fact that Mr. Foster knew of the Accident is evident from the summary of facts contained in the RCIPS Traffic Accident Report, which identifies Mr. Foster as a passenger in the Vehicle, at the time of the Accident.

31. Apart from the answer contained in the New Driver Proposal, as a contract of insurance imposes an obligation of utmost good faith upon the parties, Mr. Foster was under a general duty to disclose all material facts to RSA.

32. In *British Caymanian v Lindo and Brown [2011 (2) CILR 282]*, Justice Henderson set out the standard by which materiality for these purposes is judged in the Cayman Islands (at paragraphs 31-32):

> *"Materiality is judged by an objective standard: the insured's duty is to disclose everything which a reasonable man would recognize as material: Joel v. Law Union & Crown Ins. Co. (2).*
>
> *However, and this is crucial in the present case, the general duty to disclose extends only to matters within the knowledge of the applicant*

for insurance. The test on this aspect is subjective; it is not a question of what facts a reasonable man would have knowledge of when applying for insurance. The question turns on what the individual insured actually knew at the material time. The onus of proving that he knew of a fact which he failed to disclose rests upon the insurer. This principle emerges clearly from the judgment of Fletcher Moulton, L.J. in Joel (2) ([1908] 2 K.B. at 883–884)....."

33. It appears to be beyond doubt that the Accident was within Mr. Foster's knowledge at the time of seeking to effect the change to the Policy. The fact of the accident and that Mr. Archer was the driver were material facts to be disclosed to RSA. Furthermore, by reason of the fact that Mr. Foster had this knowledge, the representation that he made in the New Driver Proposal was patently false.

Avoidance of the Policy

34. As a contract of the utmost good faith, if utmost good faith is not observed by either party the contract may be avoided. The effect of the non-disclosure and/or false representation by Mr. Foster is that RSA have the right to treat the Policy as *void ab initio*[8].

35. For RSA to be entitled to avoid the Policy for the non-disclosure and/or false representation, these factors must not only be shown to be material but in addition, they had to have induced the making of the Policy on the relevant terms.

36. This was settled by the House of Lords in ***Pan Atlantic Ins.*** (above) in the following terms (as taken from the headnote):

[8] See Pan Atlantic Ins. Co. Ltd. v. Pine Top Ins. Co. Ltd [1995] 1 A.C. 501.

"...a material circumstances was one that would have an effect on the mind of a prudent insurer in estimating the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk or on the amount of premium demanded.

...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."

37. The traditional definition of materiality as an inducing factor as set out in ***Pan Atlantic*** (above) is also codified in s.15(5) of the Vehicle Insurance (Third Party Risks) Law (2012 Revision) ("the Law") which provides:-

"(5 In this section—

'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk, and if so, at what premium and on what conditions."

38. The facts to be established by the insurer seeking to avoid a policy on grounds of material non-disclosure must be established on the balance of probabilities[9] and the burden is upon the insurer seeking to avoid a policy on the basis of non-disclosure of a material fact at the time a policy was entered into, to prove that the non-disclosure induced the contract[10].

[9] See British Caymanian v Lindo and Brown 2011 (2) CILR 282.
[10] See Drake Insurance plc v Provident Insurance plc [2003] EWCA Civ 1834 (per Rix and Clarke LJJ).

39. It is argued on behalf of RSA that the non-disclosure and false representation were material and did induce the making of the Policy, by reference to the following facts and matters:-

(1) Any fact is material which leads to the inference that the particular proposer is a person, or one of a class of persons, whose proposal for insurance ought to be subjected to special consideration before it can be decided whether it should be accepted at all or accepted at the normal rate[11].

(2) It is therefore material to know that the proposer, or person for whom insurance is sought, has a relevant accident record[12].

(3) It is attested by Mr. Edwards that had RSA been aware that Mr. Archer had been involved in the Accident and so had a relevant accident record, there was no prospect that they would have agreed to effect and write the change to the Policy[13].

(4) Mr. Edwards also attests that RSA's Customer Service Officers have never knowingly effected and/or written changes to a policy in such circumstances. To do so would be contrary to their own Guidelines which provide for onward referral.[14]

40. Disclosure of the Accident would, at the very least, have lead to RSA applying loadings which would have increased the premium for Policy, attests Mr. Edwards[15].

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[11] See Halsbury's Law of England, Insurance, Volume 60, 5th Edition, para. 48

[12] Zurich General Ass and Liability Co. v Leven 1940 Sc 406 CT of Sess and Halsbury's op. cit. obid.

[13] "DE1" paragraph 39]

[14] "DE1" paragraph 42]

[15] "DE1paragraph 44-46]

42. In reliance upon Mr. Foster's representation, RSA agreed to affect the change for a mere additional premium of CI$ 25.00. (again, per Mr. Edwards)[16]

43. No evidence to the contrary has been submitted by Foster.

Conclusion

44. The claims made by RSA are not in dispute and there is no dispute as to the facts on which the claims are based.

45. For the reasons set out above, I find that the Defendants (who have chosen not to defend) have no real prospect of success in defending these claims and I find that there is no other compelling reason for trial.

46. In the circumstances, I grant RSA's application and enter summary Judgment in the terms sought by RSA in its Summons.

Hon. Anthony Smellie
Chief Justice

November 7 2014
(Written reasons provided on 13th November 2014).

[16] "DE1" paragraph 30]