C.J. 6-3-97

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 80/96

BETWEEN :	BRITISH CAYMANIAN INSURANCE COMPANY LIMITED	PLAINTIFF
AND:	ANNE BRENDA DAWSON	1ST DEFENDANT
AND :	CAROLYN VIOLET CARTER (Administratrix of the Estate of the late Delmar Vendryse Carter)	2ND DEFENDANT

APPEARANCES:
D.M. Murray for plaintiff
C. Allen for first defendant
R. Alberga Q.C. and A. Taylor for second defendant

March 4, 1997

BEFORE MURPHY J. IN CHAMBERS

REASONS FOR DECISION

I have before me the plaintiff's summons dated 23 January 1997 seeking leave to amend the writ and statement of claim. The proposed amendments to which I will refer are those underlined in red upon what came to be known in argument as the "second draft". There was a "first draft" of an amended writ and statement of claim which was circulated but not filed. The second draft contained more extensive proposed amendments, and the submissions centered around these.

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The first defendant (hereinafter , "Dawson") purports to be insured under a motor vehicle policy issued by the plaintiff.

In Cause No. 29 of 1996 the second defendant (hereinafter, "Carter") sues Dawson and Dawson's sons on behalf of herself as the widow of the deceased and also on behalf of certain other dependants of her late husband. This action arises out of a motor vehicle accident in which Carter's husband was killed. Cause No. 29 of 1996 is only in the interlocutory stages.

In the present action the plaintiff seeks declarations that neither Dawson's son, the alleged driver, nor the vehicle involved in the accident, was insured by the plaintiff, and that there was no effective policy of insurance in force at the material time; that Dawson did not have an insurable interest in the vehicle involved in the accident; or, alternatively, that the plaintiff was entitled to avoid the policy of insurance; on the grounds that there was no valid certificate of insurance or cover note in force at the material time, that the policy was obtained by non-disclosure of material facts and by representation of facts which were false in some material particulars, and that Dawson was in breach of certain warranties made in the proposal form and declaration.

In the present action, the plaintiff is of course seeking to avoid liability under its policy in the event that Carter establishes liability against Dawson and her sons in Cause No. 29 of 1996.

As indicated, one of the bases upon which the plaintiff seeks its relief is that there were instances of material non-disclosure and misrepresentation in respect of the application for insurance coverage, and in particular with respect to the written form of proposal dated 13 July 1994. The allegations here are that Dawson failed to disclose the existence of one of her sons as a regular driver, and that that son was convicted of driving while intoxicated on 13 July 1993 and was fined and disqualified from driving for one year.

The nature and particulars of the alleged non-disclosure and misrepresentations were contained in the requisite notice under subsection 15 (3) of the Motor Vehicle Insurance (Third Party Risks) Law 1990. This provision reads as follows :

> "15(3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:
>
> PROVIDED that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment contained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to

> **whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto."**

This provision, based on English legislation, remains in force in this jurisdiction, though there have been statutory refinements in England.

There is no dispute that the subsection 15 (3) notice was delivered in a timely way to the attorneys for Carter. The notice was in fact dated 27 February 1996, a day after this action was commenced.

By the summons before me, the plaintiff now seeks to amend its statement of claim to allege further misrepresentations by Dawson to the effect that the vehicle was her vehicle and would be registered in her name, when such was allegedly not the case.

I should indicate that there are some minor amendments, merely reflecting the joinder of Carter after the commencement of the action, and also the correction of a typographical error in paragraph 7. No issue is taken in respect of these, and leave is granted to amend accordingly.

As to the more substantive proposed amendments with respect to misrepresentation as to ownership and registration, counsel for Carter objects on the basis that such amendments ought not to be allowed in view of the proviso in subsection 15 (3). Carter is of course a "third party", to adopt the terminology of the insurance case law in this context. Carter is in fact the alleged victim of the Dawson defendants in Cause No. 29 of 1996 and hopes to avail herself of the

proceeds of the insurance cover. She is the "plaintiff in the said proceedings" (that is, in Cause No. 29 of 1996) referred to in subsection 15 (3) . Her counsel argues that this new allegation of misrepresentation on the part of Dawson cannot be held against Carter insofar as it was not disclosed in a timely way in the subsection 15 (3) notice.

Counsel for Dawson, as I understand it, takes no position on this summons. He neither consents to, nor actively opposes, the amendments sought. Indeed, there can be no argument that the amendments sought cannot properly be made as against Dawson. The issue is as to whether they can be made against Carter, and Carter's counsel understandably takes the position that he does not want to be seen, at some later stage, as having waived Carter's rights.

I pause at this juncture to observe that the "first draft" of the amended statement of claim contained a paragraph 8 which reads as follows:

> **" 8. The proposal form and declaration and the questions therein referred to in paragraph 4 above upon completion by the First Defendant in the manner described in paragraph 4 above were effective as warranties given by the First Defendant to the Plaintiff regarding the matters referred to therein. By reason of the facts and matters referred to in paragraphs 4 and 5 hereof the warranties in relation to "OTHER DRIVERS" and question 1 under the Section headed "OTHER DRIVERS" and question 1 under the Section headed "OTHER DRIVERS" given by the First Defendant were breached. The First Defendant is therefore in breach of warranty."**

This allegation also gave rise to a proposed amendment to the prayer for relief to the effect that the plaintiff was entitled to avoid the policy of insurance on the

additional basis that Dawson "was in breach of certain warranties made in the proposal form and declaration." These proposed amendments are also found in the second draft of the amended statement of claim.

While framed as "warranties", this amendment , in my view, involves an allegation seemingly encompassed already by the subsection 15 (3) notice. On that basis, I would allow this amendment to be made as against both Dawson and Carter. However I make the following direction. If it should ultimately appear to the trial judge that what is alleged in the amended paragraph 8 is something conceptually different than what is contained in the notice, then it will be open to Carter to renew her objection that such allegation, if proven, ought not to be held against Carter for the reason which I propose to set out in the following paragraphs of these Reasons. Because of my disposition of the proposed amendment regarding paragraph 8, it is not necessary for me to consider the argument of plaintiff's counsel to the effect that Carter's attorney actually "consented" to that amendment to the "first draft", in correspondence.

As indicated, counsel for Carter's main concern is the proposed new allegation of misrepresentation in respect of the ownership and registration of the vehicle. In no way is this alleged misrepresentation encompassed by the notice. (I say, parenthetically, that it may, arguably, be encompassed in existing allegations elsewhere in the pleading, or it may form the subject matter of some future proposed amendments framed in such a way as to skirt the subsection 15 (3) notice requirement. However, those matters do not concern me now.)

As to the new substantive amendments proposed, Carter's counsel relies upon the leading case of Zurich General Accident and Liability Insurance Co. Ltd v Morrison [1942] 1 All ER 529 (C.A.). In that case the appellants sought to avoid a policy issued under the Road Traffic Act 1936, s. 36 on the ground of misrepresentation and non-disclosure of material facts. The respondent was a widow who had been awarded damages in respect of the death of her husband, caused by the negligent driving of the insured car. On February 26, 1940 the appellants served the respondent with a notice specifying the grounds on which they relied. On March 1, 1940 they issued their writ against the insured and on November 26 an order was made adding the respondent as a defendant. On February 3, 1941 the appellants filed their statement of claim in which they relied upon the matters of misrepresentation and non-disclosure specified in their notice of February 26, 1940. In October 1941 the appellants applied to amend the statement of claim by adding further allegations of misrepresentation and non-disclosure, and they were allowed to do so. The respondent contended successfully at trial that, since the further matters alleged were not included in the notice to her dated February 26 1940, they could not be relied upon by the appellants against her . The Court of Appeal held that on the true construction of the Road Traffic Act 1934 s. 10 (3) [which is not materially different from the relevant subsection in the Cayman Islands legislation] the insurers were prevented from relying either directly or indirectly on any matter not specified in the notice as a ground for avoiding the policy as against the third party, but not as against the insured.

A strong unanimous Court of Appeal took the view that the statutory provision was unequivocal and must be given its full effect in order to protect third parties in the position of the respondent.

The following passage is taken from the reasons of Lord Greene M.R. at 537:

> **"The statement of claim as delivered set out these matters and also other matters mentioned in the notice upon which the appellants do not now rely. At a later stage, a further allegation of non-disclosure was added to the statement of claim by amendment, namely, non-disclosure by Morrison of the fact that he had been convicted of contravening the Road Traffic Act, 1930, s. 15 (1) and was disqualified from holding or obtaining any driving licence for a period of 12 months. It is not open to doubt that, as against Morrison and the second defendant, Lauriston, the appellants were entitled to rely on this additional non-disclosure and that, as against them, it was sufficient to entitle the appellants to avoid the policy. The appellants maintain that they are also entitled to rely upon it as against the respondent, notwithstanding the fact that it was not mentioned in the notice. In my opinion, this contention is quite hopeless. True it is that the proviso to subsect. (3) does not in terms say that, as against the third party, the insurer is to be confined to the particulars set out in his notice. The reason for this is that it was quite unnecessary for it to do so. If the insurer could, as against the third party, bring forward matters not specified in the notice, the protection which the proviso gives could be rendered completely abortive."**

The main policy reason behind the proviso in the subsection was explained by the trial judge, Atkinson, J, at 532:

> **" It seems to me that there is a very good reason why the legislature should have laid down this condition. A plaintiff about to sue, or suing, a motor car owner is to be told early on that the insurance company is going to repudiate liability. The plaintiff has to make up his mind whether to go on or not. If the grounds indicated are perfectly clear and he knows the defendant he is suing is not worth powder and shot, he does not waste money on an action: but, if the grounds seem to him insufficient, he goes on and gets judgment. It seems to me extremely**

hard and going in the teeth of the intention of Parliament if, at, the last moment, some new ground can be introduced which may destroy the value of his judgment."

Similar views are expressed by Lord Greene M.R. at 536 and by

Goddard, L.J.at 540.

Goddard, L.J. continued at 540-41:

> **"The appellants in this case contend that, if they once serve a notice specifying grounds on which, at the time they serve it, they intend to rely, they are at liberty to set up any further grounds of repudiation which they may think will help them and which they subsequently discover, if they can get leave to amend their pleading, although the statutory period within which the notice must be served has expired. Now be it observed that, as against the insured, who must be a party to the action, there is no limitation as to the grounds on which the policy can be disputed, so, if something is discovered which was not known when the original pleading was delivered, there may be good reason why an amendment should be granted. There is, however, every reason why it should not prejudice the third party. If by amending his pleading the insurer can, in effect, add to the notice which he has given to the third party, the protection which, in my opinion, the proviso is designed to give to the latter is rendered nugatory. I have no hesitation in holding that, although the proviso does not contain words expressly precluding the insurers from setting up any grounds not mentioned in his notice, that is its effect."**

The legislative intent seems clear , and the Court of Appeal in <u>Zurich</u> clearly gave effect to it. I am not aware of any contrary authority on the point.

I am of opinion that, notwithstanding the able submissions of Mr. Murray, the present case cannot be distinguished from <u>Zurich</u>. In particular , as to the submission that the facts founding the alleged misrepresentation as to ownership and registration were unknown at the time of the notice, I observe that a similar submission was made in <u>Zurich</u> and expressly rejected . Any perceived

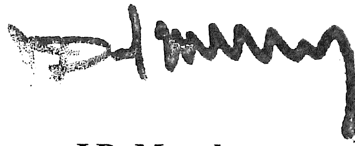
unfairness to insurers caused by subsection 15(3) is a matter for the legislature, not for this Court, when the drafting is unequivocal.

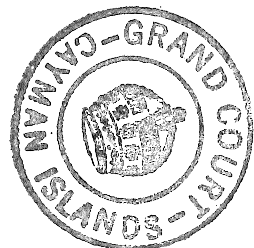
In the result, I grant leave to the plaintiff to make all proposed amendments as against Dawson. The minor "housekeeping" amendments referred to above may be made as against Carter as well. In addition, the amendment in respect of paragraph 8 may be made as against Carter for the reasons given above, and with the proviso I have attached. I do not regard the new paragraph 10 a. as being contrary to the <u>Zurich</u> principle, and that amendment may be made as against Carter as well. However, all other proposed amendments, insofar as they relate to the allegation of misrepresentation as to title and registration, may not be made as against Carter.

If difficulties arise in converting these Reasons into a formal order, I may be spoken to.

Costs to the defendants in any event of the cause.

Dated this 6th day of March, 1997.





J.D. Murphy
Judge of the Grand Court