

IN THE SUPREME COURT OF SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO . SLUHCV2013/0784

BETWEEN :

[1] CLAIRE EMMANUEL

[2] VINCENT EMMANUEL

[3] GILES JN . LOUIS

[4] MICHAEL JN . BAPTISTE

Claimants

and

SAINT LUCIA MOTOR & GENERAL INSURANCE CO . LTD

Defendant

Appearances:

Mrs. Petra Nelson for the Claimants

Mr. Dexter Theodore QC for the Defendant

2017: July 12.

On written submissions

[1] **ACTIE , M .:** This Court is asked to rule on a preliminary issue to determine the limitation of use under a policy of insurance issued by the defendant Saint Lucia Motor & General Insurance Co. Ltd pursuant to the **Motor Vehicles Insurance (Third- Party Risks) Act (MVIA) Chap. 12.02 Laws of Saint Lucia.**

Background Facts

[2] The parties presented a statement of agreed facts stating as follows:

1. On 3rd July 1998, Fergus Edwin signed a proposal form for motor vehicle insurance with St Lucia Motor & General Insurance Company Ltd covering the use of T8713. The proposal form indicated that the vehicle would be used for social, domestic and pleasure purposes and for the carriage of Mr. Edwin's goods. It was also a term that the vehicle would not be used for hire.
2. It was a term of the policy that the insurer would indemnify Fergus Edwin against all sums that he may become legally liable to pay in respect of death of or bodily injury to any person caused by or arising from the use of the vehicle on a public road.
3. Additionally under the rubric "General Exceptions" the policy stipulated that "The company shall not be liable in respect of (1) any accident loss damage or liability caused sustained or incurred... (b) whilst any motor vehicle in respect of which indemnity is provided by this Policy is; - (i) being used otherwise than in accordance with the Limitations as to use". Under the caption "LIMITATION AS TO USE" "use only for the carriage of the insured own goods and personal effects" and Under the caption THIS POLICY DOES NOT COVER "use for the carriage of passengers".
4. On 22nd June 2009, an accident occurred while Fergus Edwin was driving the vehicle along a public road. At the time of the accident Mr Edwin was carrying 74 boxes of bananas belonging to Fitzroy Emmanuel and was also carrying the claimants as passengers.
5. The claimants all suffered injuries as a result of the accident. The defendant, St Lucia Motor and General Insurance Co. Ltd repudiated liability to indemnify Fergus Edwin on the ground that such use was contrary to the express terms of the policy.
6. On 26th July, 2012, the claimants commenced a claim against Fergus Edwin and notified St Lucia Motor and General Insurance Co. Ltd prior to the institution of the claim and upon filing of the claim.
7. On 18th July, 2012, judgment with damages to be assessed was entered in favor of the claimants. The claimants and Fergus Edwin entered into a consent order on quantum of damages. St Lucia Motor and General Insurance Co Ltd. refused to honor the judgment resulting in the filing of the present claim on the 16th September 2013.
8. St Lucia Motor and General Insurance Co. Ltd never sought a declaration pursuant to Section 9 (3) of Motor Vehicles Insurance (Third Party Risks) Act Cap 8.02.

Claimant's submission

[3] Counsel submits that the claimants are covered by the policy of insurance and are entitled to bring the action against Fergus Edwin's insurer St Lucia Motor and General Insurance Co. Ltd. Counsel contends that the insurer is required to satisfy the judgment debt. Counsel avers that the

alleged breaches cannot be relied on to avoid liability as the insurer never exercised its' right under Section 9(3) or (4) of the **MVIA**. Counsel further contends that Section 9 (3) (4) of the **MVIA** requires an insurer to seek a declaration that it was entitled to avoid the policy on the grounds of non-disclosure of a material fact or by representation of a fact which was false in some material particular on or before or within 7 days after being served with the notice or the claim. Counsel avers that the alleged breaches are covered by sections 7 and 11 of the Act and the insurer is obliged to indemnify the insured, Fergus Edwin and compensate the claimants.

Defendant's submissions

[4] Counsel for insurer, St Lucia Motor and General Insurance Company Ltd, contends that the policy of insurance did not purport to cover liability for anything otherwise than in accordance with the limitation as to the use provision in the policy. Counsel avers that the **MVIA** only requires an insurer to satisfy a judgment when the liability is covered by the terms of the policy.

Law and Analysis

[5] The issues to be determined are (1) whether the liability is covered under the claim and (2) whether or not the insurance company was under an obligation to obtain a declaration in order to avoid liability under the policy of insurance.

[6] Section 9 of the **MVIA** imposes a duty on insurers to satisfy judgments against persons insured against third party risks and reads:

(1) If, after a certificate of insurance has been duly delivered under this Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy of insurance under section (4) (1) (b) **(being a liability covered) (emphasis added)** by the terms of the policy to which the certificate relates is obtained against any person who is insured by the policy then, although the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, he or she shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under subsections (1) --...

(a) in respect of any judgment, unless before or within 7 days after the commencement of the proceedings in which the judgment was given (or within such other period as the court may in its absolute discretion consider equitable) the insurer had notice of the bringing of the proceedings;

(b)

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein and either -

(i) before the happening of that event, the certificate was surrendered to the insurer or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or;

(ii) after the happening of that event but before the expiration of a period of 14 days from the taking effect of the cancellation of the policy the certificate was surrendered to the insurer or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) before or after the happening of that event but within the period of 14 days the insurer commenced proceedings under this Act in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under Subsection (1), if, in an action commenced before, or within 3 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, or, if the insurer has avoided the policy on that ground, that the insurer was entitled to do so apart from any provision contained in the policy.

[7] Counsel for the claimants is of the view that the insurance company cannot at this point refuse to indemnify the insured, Fergus Edwin, as the company was under an obligation to seek a declaration to avoid the policy. Counsel contends that the failure to seek the declaration within the timeline is fatal and the insurer is accordingly bound to satisfy the judgment obtained against its insured. Counsel placed exclusive reliance on the authority of **Maisie Harris and other V Guyana and Trinidad Mutual Life Insurance Co . Ltd (1972) 19 WIR 203**

[8] The facts in **Maisie Harris and other V Guyana and Trinidad Mutual Life Insurance Co. Ltd** are as follows; S was the registered owner of a motor car which he hired to M. S left the country putting C in charge of the vehicle with instructions to M to pay the rental to C. Upon the expiration of the existing policy of insurance, C applied to the defendants for insurance coverage and secured a policy. In completing the proposal form, in answer to the question, "is the proposer the owner of the vehicle and is it registered in his name? C said "Yes". S returned to the country, whereupon C handed over all relevant papers to S. The vehicle whilst being driven by M was involved in an accident in which the plaintiffs, together with another person who died as a result of the accident were passengers. The plaintiffs obtained judgment against M. The insurance company refused to satisfy the judgment. The plaintiffs filed a claim against the insurance company. The Court of Appeal ruled that "*the insurers, not having elected to take proceedings under Section 8 of the Motor Vehicles Insurance (Third Party)*

Ordinance to obtain a declaration that the contract of insurance be avoided so as to operate against the appellants (third parties) , the contract must be taken to have subsisted on the date of the accident and the policy must be regarded as being in force ". The Court citing in approval the case of **Zurich Insurance Co Ltd v Morrison (1942) 1 All ER 529** held that the insurers failure to elect to seek a declaration under the **MVIA** means that contract of insurance continues to subsist and the policy of insurance remains in force and is effective. The insurance company not having elected to take proceedings under S 8 of the MVIA to obtain a declaration that the

contract of insurance be avoided so as to operate against the appellants (third parties) means that the contract must be taken to have subsisted on the date of the accident. The Court made it quite clear that the policy of insurance was voidable and not void as no steps were taken by the respondent company to avoid the policy under the Motor Vehicles (Third Party Risks) ordinance to determine what was the effect of this false statement on the proposal form vis a vis third parties. The court held that M was a person covered by the policy and the policy of insurance was valid.

[9] I am of the view that the case of **Maisie Harris** does not assist the claimants in the case at bar. The policy of insurance in **Maisie Harris** was obtained through misrepresentation or non-disclosure of material facts made at the time of the completion of the proposal forms. The issue was whether the insurer was under an obligation to seek a declaration to avoid the policy based on the misrepresentation/non-disclosure made in the proposal form in order to be absolved from liability. The court held that failure to seek a declaration to avoid the policy was fatal to the insurer since the liability was covered under the policy.

[10] The issue in the case at bar is far different to the issue in the **Massie** Case. It is agreed fact between the parties that the policy of insurance covered Fergus Edwin for social, domestic and pleasure purposes and for carriage of his goods. The policy did not cover passengers neither did it cover use in third parties business. It is the evidence that Fergus Edwin was at the time of the accident carrying 74 boxes of bananas belonging to a third party along with the claimants as passengers in clear breach of the terms of the policy.

[11] Counsel for the claimants is of the view that St Lucia Motor and General Insurance company was under an obligation to seek a declaration in order to avoid liability. I disagree. I am of the view that that interpretation runs afoul the provision Section 9 of the **MVIA** states that subsection 9(3) only applies to a "*liability covered by the terms of the policy*". If a policy does not cover a certain mode of use, then any liability incurred during that mode of use would not be covered by the terms of the policy. The policy explicitly stated that it did not cover passengers and was for use of Fergus Edwin business.

[12] An insurance company's option to avoid or cancel a policy of insurance arises in situations such as where the policy is voidable for misrepresentation or non disclosure of material facts. The option to avoid or cancel does not apply to situations where the liability is not covered under the policy. The statutory language of Section 9 (1) of the **MVIA** indicates that the insurer is under an obligation to satisfy judgments obtained against its insured. The obligation to pay is only for a "**liability covered by the terms of the policy**".

[13] An insurance company shall remain liable to satisfy a judgment notwithstanding that it "maybe entitled to avoid or cancel or may have avoided or cancelled the policy".

[14] I am of the humble view that the reference to " **avoid or cancel**" refers to situations where the policy is voidable at the option of the insurers for example, misrepresentation or non-disclosure of material facts at the time of the proposal form which induced the insurer to provide coverage under the policy. If a policy does not cover a certain mode of use, then any liability incurred during that mode of use would not be covered by the terms of the policy. The insurer is

not under an obligation to incur cost to seek a declaration to avoid a liability that the policy did not purport to cover in respect of the person insured as there is nothing to avoid or cancel in the first place.

[15] Counsel for the claimant states that the policy is subject to section 11. of the **MVIA** . Section 11 provides for the avoidance of restrictions on scope of policies covering third-party risks and reads:

(1) Despite any provision to the contrary in this Act, where a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured by the policy by reference to any policy of the following matters, that is to say - :

- (a) the age or physical or mental condition of persons driving the vehicle;
- (b) the condition of the vehicle;
- (c) the number of persons that the vehicle carries;
- (d) the weight or physical characteristics of the goods that the vehicle carries;
- (e) the times at which or the areas within which the vehicle is used;
- (f) the horse-power or value of the vehicle;
- (g) the carrying on the vehicle of any particular apparatus; or
- (h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under this Act or
- (i) the persons named in the policy who may or may not drive the vehicle

Shall, as respects such liabilities as are required to be covered by a policy under section 4(1)(b) be of no effect.

[16] Section 11 provides a list of instances where the insurance company cannot avoid liability where (1) liability required to be covered by **MVIA** and (2) is covered under the policy but contains stipulations of the matters listed in the section for exoneration from liability. The categories listed in section 11 are exhaustive and relate generally to vehicular characteristic. The section does not include limitation of use or prohibition of passengers. The section list the number of passengers if restricted in the policy of insurance. The motor insurance policy with Edwin Fergus contained a clause that excluded the insurer's liability against passengers and was not restricted to a number of passengers to bring it under Section 11.

[17] The policy only permitted the carriage of goods in the use of Edwin Fergus business and for social, domestic and pleasure purpose. Its is irrefutable evidence that the vehicle was being used

for a purpose outside of the scope of the existing policy of insurance at the time of accident. Consequently section 11 does not apply to the circumstances before the court.

Conclusion

[17] For the forgoing reasons it is concluded that:-

(1) The St Lucia Motor and General Insurance Company Ltd. is not liable to indemnify Fergus Edwin and by extension the claimants, as the limitation of use did cover the purported liability at the time of the accident.

(2) The insurance company was not under an obligation to avoid or cancel the policy of insurance for a liability which was not covered under the policy of insurance.

[18] The claimants having entered into a consent order is to proceed by way of enforcement of the judgment debt against the judgment debtor, if necessary.

Agnes Actie

High Court Master

By the Court

Registrar