Cayman Insurance Litigation Q4 2016 Review

Welcome to the Q4 2016 Stuarts Insurance Litigation review. In this edition, we review the recent Cayman Islands Court of Appeal Judgment in the case of Banks ("B") v The Insurance Company of the West Indies (Cayman) Limited ("ICWI") and Yee.

Introduction

On 4 November 2016 the Cayman Islands Court of Appeal handed down Judgment in the case of Banks (**"B"**) v The Insurance Company of the West Indies (Cayman) Limited (**"ICWI"**) and Yee. This Judgment will be of significant interest to Motor Insurance companies, but its application is much more far-reaching, as it affects all road users in the Cayman Islands.

The Facts

The proceedings at first instance were brought by ICWI, an Insurer, against its former policyholder, B, pursuant to section 15(3) of the Vehicle Insurance (Third Party Risks) Law (2012 Revision) (**"the Third Party Risks Law"**) which restricts an injured third party's right to recover damages from a motorist's insurer if that insurer obtains a declaration that-

"... apart from any provision in the policy, he is entitled to avoid it 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 he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it".

Within the proposal form, completed in May 2009, B correctly negatively answered one of the questions posed which was had any person who would drive the vehicle "*been prosecuted for a motoring offence*". During 2010, B was charged with a number of motoring offences, including careless driving, driving under the influence of alcohol and using a vehicle with an expired licence.

Notwithstanding that the above question was not asked of B again upon renewal of the policy in both 2010 and 2011, those charges were not disclosed upon either of the above renewals or at any point to ICWI. As a result, ICWI wrote to B on 30 July 2012 to advise that the above charges had come to their attention, that as the contract of insurance was one of utmost good faith it had been incumbent on B to disclose those "*prosecutions*" and her failure to disclose those material facts rendered the policy void. ICWI then issued proceedings on 22 November 2012 for a declaration that it was entitled to avoid the policy.

As a result of an accident when B's vehicle was being driven by B's husband, a Mr Richard Douglas Martin (**"the deceased"**) suffered fatal injuries and died on 30 November 2011. Proceedings were commenced against B and her husband, on behalf of the Estate and on behalf of Mrs Yee (widow and executrix of the deceased's estate) and other dependants of the deceased. In addition, Mrs Yee was added as a second defendant to the avoidance proceedings pursued by ICWI.

The Decision at first instance

The trial in the avoidance proceedings pursued by ICWI was heard by McMillan J (Ag, as he then was) and Judgment was delivered on 17 August 2015. The Judge found that ICWI was entitled to avoid the policy for non-disclosure of a material fact and as such he granted the declaration sought.

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The Issues on Appeal

The two separate issues for the Court of Appeal to determine were:-

1. Whether the Learned Judge erred in fact or law in deciding that ICWI was entitled to conclude that renewal of the Policy had been obtained by non-disclosure of a material fact; and
2. If the Judge was correct on the first issue, whether he erred in fact or law when concluding that ICWI did not breach their duty of good faith to the Appellant and that they were not prevented from avoiding the Policy.

The Court of Appeal Judgment[1]

The decision to uphold the decision at first instance was unanimous.

The First Issue

It was held that McMillan J (Ag) was correct to find that ICWI were entitled to avoid the policy on the basis that the renewal of the policy had been obtained by material non-disclosure. B's argument that the words *"been prosecuted"* referred to convictions and not *pending* charges (i.e. B had not *"been prosecuted"*, as she had *only* been charged and the proceedings had therefore not concluded, the position at the time of both renewals) was found to be *"untenable"*.

Morrison JA held that with reference to the meanings given to the verb *"to prosecute"* in the Oxford English Dictionary and the Chambers Dictionary, *"both meanings plainly indicate that a prosecution is a process, not a conclusion"*. Accordingly, he also agreed with McMillan J's finding at first instance that *"no ambiguity* [in the question on the proposal form] *arises which should be considered contra proferentem in favour of the Appellant[2]"*.

As a result of those preceding conclusions, it was held that B's argument that ICWI had waived the requirement to disclose pending charges due to the questions posed by them being in relation to convictions only, would also automatically fall away.

Morrison JA, at paragraph 87 of the Judgment went on to say that even if he was wrong about this and the questions in the proposal form did limit the scope of the information requested, then firstly, *"this is a case in which, quite apart from the information sought by the questions, a reasonable person would have recognised that it was material to disclose the fact that she had been charged with motoring offences, given its clear relevance to the subject matter of the insurance"*. Secondly, in distinguishing this case from the Cayman Islands case of Zeller[3], relied upon by B, it was held that *"the information which the appellant was required to disclose was, by her own admission, known to her"*. Importantly, B was under a duty to disclose what she knew.

Finally, in relation to the first issue, the lack of independent expert evidence of materiality at the trial was not a reason to disrupt McMillan J's finding of materiality, which was based on the evidence of Ms Lanigan, a senior underwriter at ICWI. Morrison JA held that *"the fact of a prosecution for driving under the influence of alcohol must plainly have been such as to influence the judgment of a prudent insurer in determining whether to take the risk[4]"*.

The Second Issue

It was recognised both at first instance and by the Cayman Islands Court of Appeal that there was a disparity between the regulatory framework, such as the CIMA Rules which were commensurate with widely recognised standards for good insurance practice, and the common law governing non-disclosure in the Cayman Islands. However, notwithstanding those observations, reference was made to the English decision in *Drake Insurance v Provident Insurance plc* where Rix LJ observed that *"no authority ... so far as is known, has ever decided the insurer's mutual obligation of good faith limits its rights of avoidance[5]"*.

Morrison JA held that firstly *"the position remains that the common law has yet to recognise any limitation on an insurer's right of avoidance for material non-disclosure by the insured, arising out of a want of good faith on the part of the insurer[6]"*, and secondly, "as Mance LJ stated in

1 Banks v Insurance Company of the West Indies (Cayman) Limited, Yee; CICA 18 of 2015
2 Insurance Company of the West Indies (Cayman) Limited v Banks, Yee G; G464 of 2012; Judgment of McMillan J (Ag) 17 August 2015, para 54
3 Zeller v British Caymanian Insurance Company Ltd [2008] CILR 11 wherein the answer given by the proposed insured to a question in a proposal form for medical insurance being "whether to the best of his knowledge or belief, he had had any departure from ill health". In that case the honest answer of the policy holder, based on his belief held on reasonable grounds, was held to be appropriate".
4 Ibid at 1, Para 88
5 [2004] QB 620 p57C
6 Ibid at 1, Para 94

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Brotherton & Others v Aseguradora Colsegura SA and Another, "*rescission in the general law of contract is by act of the innocent party operating independently of the Court*[7]". Morrison JA therefore concluded that it was not, as a matter of principle, open to the Court to limit the insurer's right to avoid even *if* an insurer had breached its duty of good faith (which in any event was not established in this instance).

Following on from this, it was held that the Judge was correct to hold that the CIMA Rules and other material said to be *"good insurance practice"* were only regulatory in scope and did not place any additional duty on an insurer nor did they modify in any way the duty of disclosure at common law. Any failure by an insurer to comply with such guidance or rules did not curtail or qualify the implications of non-disclosure so as to prevent the insurer's ability to avoid a policy under section 15(3) of the Third Party Risks Law.

Lastly, the decision that there had not been any "*unconscionable conduct or want of good faith by ICWI*" was upheld on the basis that it had not been shown that there was any reason *"to interfere with the Judge's clear finding, after a trial contested in part on this very point*[8]".

The Appeal was therefore dismissed.

Discussion

What is made abundantly clear is that non-conformity alone with any rules, policies or guidance that are regulatory in nature will not amount to a want of or breach of the duty to act in good faith on the part of the insurer and moreover, even if there is a want of good faith, no decisions to date have been prepared, as a consequence, to limit an insurer's right to avoid a policy for material non-disclosure.

The Cayman Islands Court of Appeal rejected the invitation to introduce into the common law such a restriction on the right of an insurer to avoid a policy on the grounds of material non-disclosure. The facts of this case, which involved consumer motor insurance (not commercial insurance) and the non-disclosure of a prosecution for driving under the influence of alcohol were facts which perhaps presented the decision **not** to impose any limitation on the right to avoid in these circumstances, more appealing.

Given the reference to the disparity between the regulatory framework and the common law governing non-disclosure in the Cayman Islands, it was noted by McMillan J that "*It may be that the time has come for the appropriate authorities to consider whether it is in the public interest that this disparity should be allowed to continue*[9]", this observation being endorsed by Morrison LJ[10], it remains to be seen whether the regulatory framework will, by way of a change in the law, be given an elevated status or indeed whether its existing content will drive a change in law.

Unless and until such a change in Cayman Islands Law ensues, Insurers can reasonably rely on section 15(3) of the Third Party Risks Law as being unfettered by their own duty of good faith when seeking to avoid a policy for material non-disclosure.

Policyholders should also heed the warning given of the established principle that if a reasonable person would consider a disclosure to be material to the fair presentation of the risk, then, such a disclosure should be made whenever it is known to the insured, whether that be prior to inception or at the renewal stage and regardless of the fact that upon renewal no further questions are raised. There is no duty to disclose, by way of an update, what would be regarded as a material fact during the policy period[11].

This, however, is not to say that careful consideration should not be given by all Insurers as to the renewal process so as to ensure that they transparently communicate to policyholders upon renewal what is expected of them by the common law. A careful review of the renewal process is in everyone's interest.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information please contact Richard Annette at Stuarts Humphries.

7 Ibid at 1, para 95
8 Ibid at 1, para 98
9 Ibid at 2, para 35
10 Ibid at 1, para 91
11 Although note MacGillivray on Insurance Law at 17-025 (11th Edition) states "if the assured negotiates a variation to the terms of cover for his benefit, a limited duty of disclosure applies".

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