In The Supreme Court of Bermuda

CIVIL JURISDICTION

(COMMERCIAL COURT)

2007: No. 247

BETWEEN:

ARGUS INSURANCE COMPANY LIMITED

Plaintiff

-and-

PAUL Y M DUCLOS

Defendant

JUDGMENT

Date of Hearing: 7 & 8 May 2008

Date of Judgment: 16 May 2008

Mr. Jai Pachai, Wakefield Quin, for the Plaintiff

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates, for the Defendant

Introduction

1. These proceedings arise from a road traffic accident which occurred on 5 November 2004, when the motorcycle ridden by the defendant ("Mr. Duclos") was in collision with a motorcycle ridden by Justin Carreiro at the junction of Lane Hill, Cavendish Road and Middle Road in Pembroke Parish. Mr. Carreiro suffered serious injuries in consequence of the accident.

2. Mr. Duclos' witness statement refers to his having bought the motorcycle which he was riding at the time of the accident in or about February 2003, that he had insured the motorcycle with the plaintiff ("Argus") at that time, and had registered it with the Transport Control Department ("TCD") in his own name. As appeared from Mr. Duclos' cross-examination at the hearing, none of these statements was correct. Neither was it correct that he had effected a renewal of his insurance policy with Argus approximately one year later. I will deal with the true position when I come to review the evidence as a whole, but suffice it to say for the purpose of this part of the background narrative that Mr. Duclos was not renewing insurance with Argus. The motorcycle in question had been "purchased" by Mr. Duclos from his brother-in-law, Simon Watkinson, and the arrangement for the "purchase" had involved Mr. Duclos' use of the motorcycle from about February 2003 onwards, instalment payments being made by Mr. Duclos to his brother-in-law for the ensuing period of approximately one year, and the actual transfer of ownership of the motorcycle being effected on or about 30 January 2004. And although Mrs. Duclos in her witness statement similarly referred to having attended the Argus offices, and having signed "renewal forms" on her husband's behalf, in fact this was the issue of a new policy by Argus. Mrs. Duclos had attended the Argus offices on 2 February 2004, and had then completed and signed a proposal form for a new policy of insurance on the motorcycle on her husband's behalf. It is the completion of that proposal form which gives rise to this action, because in response to the standard form of question as to whether the proposed insured had been convicted of any traffic offences in the previous five years, Mrs. Duclos had ticked the box marked "no". Her evidence was that she was unaware that Mr. Duclos had been convicted of speeding at 60 kph and for driving without a valid driver's licence, both on 1 July 2003.

3. Mr. Duclos' witness statement dealt at some length with the accident itself, which has limited relevance to the issues before me, and dealt sparingly with the detail of his July 2003 traffic offences. He simply said that he had never made any

secret of his "one and only speeding conviction", giving an incorrect date for the conviction, and saying that he was not aware that he had also been charged (and presumably had pleaded guilty to) driving without a valid driver's licence. In his report to Argus of the accident, Mr. Duclos indicated in response to the question whether he had any motoring convictions that he had one of speeding, which he referred to as being a first conviction, and in respect of which he gave the speed as being 52 kph, not 60 kph.

4. Because of the (admitted) inaccuracy of the proposal form in relation to Mr. Duclos, Argus now seeks a declaration that it is entitled to avoid the policy of insurance (numbered 0039208M/04) from its date of inception (given in the pleadings as 1 February 2004), pursuant to section 6(3) of the Motor Car Insurance (Third-Party Risks) Act 1943 ("the Act"). In the alternative, Argus seek a declaration that its liability to indemnify Mr. Duclos under the provisions of the Act should be limited to the figure of $125,000 contained in section 4(1)(b)(ii) of the Act.

5. For Mr. Duclos, the argument is made that the mistake by Mrs. Duclos as her husband's agent in completing the proposal form was an honest mistake, and that in any event Argus would have issued its certificate of insurance on the same terms and at the same premium as the certificate was in fact issued. It is accepted by Mr. Harshaw for Mr. Duclos that such an honest mistake would not prevent avoidance by an insurer under general principles of insurance law. However, Mr. Harshaw submitted that the terms of the declaration in the proposal form, and specifically the use of the word "knowingly" therein, make the position different. There are further claims on both sides, which I will deal with by reference to the pleadings themselves, to which I now turn.

The Pleadings

6. The points of claim endorsed on the writ detailed the terms of the proposal and policy issued by Argus to Mr. Duclos, and the failure to disclose Mr. Duclos' July 2003 convictions. Argus made complaint of the manner in which Mr. Duclos completed the report of his accident, when he disclosed a conviction for speeding for 52 kph, but not the lack of a valid driver's licence. Argus also made complaint that Mr. Duclos had failed to give prompt notice of the accident; the accident report form was dated 5 January 2005, some two months after the accident.

7. The pleading then referred to the accident and continued that in view of the pleaded non-disclosures, admissions and false statements, Argus had elected to rescind the policy of insurance between it and Mr. Duclos. However, that decision on the part of Argus was either not made or not put into effect until 4 September 2007, almost three years after the accident. Argus then sought the declaration that it was entitled to avoid the policy from inception, or alternatively that its liability to indemnify Mr. Duclos should be limited to the minimum limit required under the Act.

8. The defence admitted that Mr. Duclos had the convictions for speeding and driving without a valid driver's licence, as pleaded in the points of claim, but maintained that the inaccurate declaration was an honest mistake by Mrs. Duclos and that Argus would have issued its certificate of insurance in any event, presumably a plea that the non-disclosure was not material.

9. The defence carried on to plead that no policy had ever been provided by Argus to Mr. Duclos, in reply to the various policy terms which had been set out by Argus in its points of claim.

10. The accident was then admitted, but in relation to the accident report, the defence did not admit the contents of the report, pleading that Mr. Duclos had not retained a copy and had no recollection of what had been recorded in the report. There

was an admission that Mr. Duclos had not held a valid driver's licence at the time of the accident, but a plea that this did not constitute a change of risk. In relation to the failure to give notice of the accident, the pleading maintained that this had been given "as soon as practicable". In relation to the purported avoidance of the policy, the pleading indicated that Mr. Duclos had no knowledge of such investigation as may have been carried out by Argus, and no admission was made in that regard.

11. Although the skeleton arguments submitted on behalf of Mr. Duclos made arguments in relation to the issues of waiver and estoppel, these arguments were not at that time supported by anything in the pleading. No doubt appreciating this, Mr. Harshaw for Mr. Duclos made application at the commencement of the hearing to amend the defence so as to plead waiver and estoppel, essentially basing those claims on the fact that Argus did not purport to avoid the policy of insurance until September 2007, even though Argus had been aware of the true position in relation to Mr. Duclos' traffic convictions and his lack of a valid driver's licence at the time of the accident from about 12 August 2005. Further, the pleading made complaint of the fact that Argus had notice of a potential claim as early as January 2005, and had engaged in correspondence and discussion with the attorneys for the third party claimant without reference to Mr. Duclos.

The Evidence

12. For Argus, evidence was given by John Doherty, the Argus employee with responsibility for its motor insurance business. Mr. Doherty indicated that on joining Argus in May 2002 he had been given a mandate to get its hitherto highly unprofitable motor insurance business to a break even point in the shortest time possible. Mr. Doherty indicated that the only way to achieve his mandate was to institute very strict underwriting guidelines, and said that he had created a document described as "the Motor Matrix" to assist in determining the acceptability of an applicant for motor insurance. The Motor Matrix operated on the basis of a points system, directed towards the applicant's history of traffic

offences, and Mr. Doherty indicated the range at which applicants would be referred to him as chief underwriter, and the range over which applicants were not to be offered insurance. The combined effect of Mr. Duclos' convictions for speeding at 60 kph and for driving without a valid driver's licence gave a point count of 11 on Mr. Doherty's Motor Matrix, which provided that for 10 points or more, insurance would not be offered and that the applicant should be referred to himself as chief underwriter. Mr. Doherty indicated that the terms of the Motor Matrix were applied in a rigorous manner, and said that if Mr. Duclos had disclosed his convictions, Argus would have declined to offer him insurance coverage. There was no suggestion, either in Mr. Doherty's witness statement or in his oral evidence, that coverage would have been offered but at an increased premium. Mr. Doherty maintained that Argus was very strict in relation to the implementation of the Motor Matrix, and said that if Mr. Duclos had come in and explained his convictions, and particularly that he had not been aware of the conviction for having no driver's licence, insurance would still not have been offered to him.

13. Mr. Doherty's witness statement also referred to the investigation undertaken by Argus following the accident, but did not explain the substantial delay between the accident, Argus' knowledge of Mr. Duclos' traffic offence history from August 2005, and the delay of more than two years before Argus took steps to rescind the policy of insurance it had issued to Mr. Duclos. Unsurprisingly, therefore, this aspect of matters was pursued in cross-examination. Mr. Doherty conceded that Argus' investigations into Mr. Duclos' driving record had been completed by December 2005. He agreed that Mr. Duclos had not been involved in any way with the communications which had taken place between the attorneys for Argus and attorneys for the third party claimant, Mr. Carreiro. While accepting that memories obviously fade with the lapse of time, Mr. Doherty did not accept that Mr. Duclos had been prejudiced in any way by the delay.

14. In relation to Mr. Duclos' evidence, I have already indicated that Mr. Duclos' witness statement was inaccurate in relation to the date of his purchase of the motorcycle, and the position when he first insured it, which was in February 2004, so that the terms of the proposal form which lies at the heart of these proceedings was for a new policy of insurance, rather than a renewal. In this regard, Mr. Duclos said in his witness statement that approximately one year after he had purchased the motorcycle, he had received a renewal notice from Argus telling him that it was time to renew his insurance. This was clearly not true; not having any insurance with Argus at that time (Mr. Duclos' brother-in-law Mr. Watkinson was the owner of the motorcycle and no doubt the insured under whatever insurance policy he had in place), there could be no question of Mr. Duclos receiving any notice from Argus. There are other statements made in the witness statement which are either not true or tell only part of the story. In paragraph 17 of the statement, Mr. Duclos stated that he was told by someone from Argus, whom he believed to be Mr. Crumley, that Mr. Carreiro had sustained serious injuries as a result of the accident. This may or may not have been the case, but for some reason Mr. Duclos sought to suggest in cross-examination that this was the first time that he had appreciated that Mr. Carreiro had indeed sustained serious injuries. That conversation with an Argus employee could not have occurred before 5 January 2005, when Mr. Duclos attended the Argus offices for the first time, to complete his accident report form. As appears from paragraph 14 of the witness statement, Mr. Duclos had had a conversation with Mr. Carreiro's father about one week after the accident, and from that conversation had learned that Mr. Carreiro had been paralysed in consequence of the accident, and had been taken out of Bermuda for medical treatment. He carried on to say that he had spoken with Mr. Carreiro's sister many times (which in his evidence he equated to three), because she was anxious to see her brother over the Christmas holiday and this involved the purchase of a ticket. So the suggestion that Mr. Duclos had learned of the seriousness of Mr. Carreiro's injuries from Mr. Crumley cannot be sensibly maintained.

15. Then in paragraph 18 of his witness statement, Mr. Duclos said "I have never made any secret of my one and only speeding conviction, in April 2003." However, Mr. Duclos made no reference to the fact that in the accident report form he had referred to his "one and only speeding conviction" as being for speeding at 52 kph. In cross-examination, Mr. Duclos said that it was not until he had met with Mr. Pachai that he appreciated that this was wrong, and that at the time that he had filled out the accident report form, he had believed that his conviction was for speeding at 52 kph. I do not accept that Mr. Duclos had any such belief. At best, I think that he was cavalier in relation to the speed of his conviction, but for the avoidance of doubt I reject Mr. Duclos' evidence that he believed in January 2005 that he had been convicted of speeding at 52 kph.

16. Finally, Mr. Duclos said in his witness statement that he did not understand that at the time of his speeding conviction (1 July 2003, not April 2003 as put in the witness statement), he had also been convicted of driving without a valid driver's licence.

17. So I find Mr. Duclos' witness statement to be unsatisfactory in quite a few material respects, and the position was the same in relation to his cross-examination. In response to what one would expect to be an uncontentious question as the to renewal of his own driver's licence, following his securing that for the first time in Bermuda in 1985, Mr. Duclos said that he had never renewed his licence. When he was shown a letter from TCD showing that his licence had expired on 15 April 2004, Mr. Duclos said that he may have renewed his licence in April 1994, but that he had no recollection of having done so. Then there was the important question as to why Mr. Duclos did not tell his wife of his conviction for speeding at 60 kph when he had asked her to effect a policy of insurance on his behalf. His response was "I don't believe it came up". Mr. Duclos had also omitted to explain in his witness statement that he had failed to inform his wife of his speeding conviction when he asked her "to renew" the insurance on his behalf, and why there had been such a failure on his part.

18. In relation to the policy documentation, which the defence said had not been provided to Mr. Duclos at any time prior to 2007, Mr. Duclos' evidence was that he did not remember ever having received the policy document, but that he could have received it. When he was asked why he had not reported the accident to Argus, his response was that he did not know why, but he then said that he did not feel that he had to, that the police had not told him to go to his insurance company and that he did not think to do that himself. He accepted that a delay of two months in making the report of his accident was not in compliance with the policy requirement that the accident be reported as soon as possible.

19. In relation to Mr. Duclos' alleged lack of knowledge of his conviction for not having a driver's licence, Mr. Duclos said that he now understood that there were two separate cases (one for speeding, one for no driver's licence), but that that had not been his understanding at the time. However, he did recall paying the fines immediately upon coming out of court, and in the circumstances it is difficult to accept that Mr. Duclos did not appreciate that he had been fined for more than one offence, given that he would have paid a total fine of $330, when he had been fined only $230 for the speeding offence.

20. Finally, in relation to the fact that Mr. Duclos' driver's licence had expired in April 2004 and had not been renewed at the time of the accident on 5 November 2004, Mr. Duclos' evidence was that he was expecting TCD to send him a note. I will deal with the issue of credibility in relation to Mr. Duclos' evidence in due course.

21. Next, in terms of the evidence, evidence was given by Mrs. Duclos. She indicated that she had understood that the insurance was a renewal, as had been said in her witness statement, although she did say in cross-examination that it could have been new insurance. In relation to the critical question as to why she had filled in the answer on the proposal form in the negative in relation to her husband's traffic

offence history, Mrs. Duclos' response was that she could have called her husband, but assumed that the correct answer to the question on the proposal form was no. Her evidence was that the reason that she had not known at the time of her husband's court appearance was because she had been incarcerated at the time, and she maintained that she had no knowledge of the true position in relation to Mr. Duclos' traffic convictions when completing the proposal form with Argus.

Credibility

22. In this case there is no conflict between the evidence of one witness with that of another, but nevertheless a finding on credibility is necessary. This is the case in relation to Mr. Doherty, even though his evidence was not seriously challenged. For the avoidance of doubt I should indicate that I accept that Mr. Doherty was a witness of truth, and particularly I accept his evidence in relation to the rigorous operation of the Motor Matrix. I bear in mind in this regard that the test in relation to whether an insurer is induced by an insured's presentation to enter into the contract of insurance is a subjective one, and that it is in Argus' interests for Mr. Doherty to give evidence as he did. I do not think that that reality affected the truthfulness of Mr. Doherty's evidence.

23. In relation to Mr. Duclos the issue of credibility is particularly important in relation to the issue of his knowledge of his conviction on 1 July 2003 of driving without a valid driver's licence, taking into account Mr. Harshaw's argument as to the effect of the declaration in the proposal form and the need for Mr. Duclos to have been aware of his conviction.

24. I have already made adverse comments and findings in relation to Mr. Duclos' evidence. The view that I take is that his evidence was thoroughly unsatisfactory. This is the case even in relation to his witness statement, no doubt prepared by his attorney on his instructions, when one would expect the maker of the statement to take care that his statement was accurate. Mr. Duclos clearly did not do so. And

in cross-examination, he was always ready to respond that he could not recall the answer to a particular question, even when such response made no sense. And in relation to the important question of Mr. Duclos' knowledge of his conviction for driving without a driver's licence, I have already referred to my rejection of his evidence. Mr. Duclos must have been aware of this conviction in the circumstances, and I so find.

Summary of Findings of Fact

25. Accordingly, my findings of fact are as follows:

(i) Mrs. Duclos, acting as agent for her husband in seeking insurance for his motorcycle from Argus failed to disclose Mr. Duclos' traffic convictions on 1 July 2003 for speeding at 60 kph and driving without a valid driver's licence.

(ii) Mr. Duclos did not have an honest belief, when Mrs. Duclos completed the proposal form on 2 February 2004 on his behalf, that he had not been convicted of driving without a valid driver's licence, or that the speed of his speeding conviction was other than 60 kph.

(iii) the non-disclosure on the proposal form was material to Argus' appraisal of risk in relation to the issue of a policy of insurance to Mr. Duclos.

(iv) the non-disclosure induced Argus to effect a contract of insurance with Mr. Duclos. Put another way, if Mr. Duclos had advised Argus of the true position in relation to his traffic conviction history, I am satisfied that Argus would not have entered into a contract of insurance with him.

Argus' Right to Avoid for Non-disclosure

26. The above findings of fact would in the normal course entitle Argus to avoid the policy of insurance from inception, and in this regard it would make no difference that Mrs. Duclos, acting as Mr. Duclos' agent in seeking the insurance, was herself unaware of the true position in relation to Mr. Duclos' traffic conviction

27. However, in this case, Mr. Harshaw argues that the position is changed by reason of the wording of the declaration appearing on the second page of the insurance proposal form. In view of its importance, I set out the terms of the declaration in full, as follows:

> **DECLARATION**
>
> Where (a) the Proposer for a contract (i) gives false particulars for the described motorcycle to be insured to the prejudice of Argus or (ii) knowingly misrepresents or fails to disclose in the proposal any material fact which is likely to influence Argus' acceptance and assessment of the Proposal; or (b) the Insured contravenes a term of the contract or commits a fraud; or (c) the Insured willfully makes a false statement in respect of a claim under the contract, a claim by the Insured is invalid and the right of the Insured to recover indemnity is forfeited.
>
> The Proposer acknowledges that to the best of his knowledge and belief all of the information given is true and hereby applies for a contract of Motor Insurance to be based on the truth of the said information.

In relation to the contract of insurance in this case, Mrs. Duclos signed the declaration as proposer, an Argus representative as agent/underwriter, and the document was dated 2 February 2004.

28. The critical part of the declaration, according to Mr. Harshaw, is part (a)(ii). The effect is that if a proposer knowingly misrepresents or fails to disclose a material fact in the proposal, any subsequent claim is invalid and the right to indemnity forfeited.

29. The issue, according to Mr. Harshaw, is whether Mr. Duclos knowingly misrepresented the position in relation to his traffic offences, and he submitted that the word "knowingly" applied both to misrepresentation and non-disclosure. Mr. Pachai relied upon non-disclosure rather than misrepresentation, and submitted that the word "knowingly" referred to misrepresentation only, and not to non-disclosure.

30. Mr. Harshaw did not, as I understood his closing submissions, seek to place reliance upon the fact that it could be maintained that Mrs. Duclos was unaware of her husband's traffic convictions. He submitted that the failure to disclose the convictions was an honest mistake on the part of Mr. Duclos. One can see the potential force of that argument if Mr. Duclos only had a conviction for driving without a valid driver's licence, and if I had accepted Mr. Duclos' evidence that he was unaware of that conviction. In the event, of course, I rejected that evidence, but even on Mr. Harshaw's case, there remains the conviction for speeding at 60 kph. While obviously it is the case that Argus renewed insurance in February 2005, following the accident, in the belief that Mr. Duclos had only a single conviction for speeding at 52 kph (which would have resulted in only one point under the Motor Matrix system, as opposed to four points for speeding at 60 kph), for the argument to succeed I would have to be satisfied that Mr. Duclos believed in February 2004, when the proposal form was completed, that his speeding conviction was for a speed of 52 kph, as opposed to such a belief on 5 January 2005, when the accident report form was completed. Mr. Duclos was never asked about his state of mind in February 2004, but I have rejected his evidence that he believed at the time that he completed the accident report form that he had been speeding at 52 kph rather than 60 kph, so the point is academic.

I do not accept that Mr. Duclos believed that he had been speeding at 52 kph in February 2004, that much closer to the date of his speeding conviction.

31. So on the basis of my findings of fact, it makes no difference whether the word "knowingly" applies to the non-disclosure as well as to the misrepresentation. Since I have found that Mr. Duclos was aware of the true position in relation to his convictions at the time that the proposal form was completed, his non-disclosure was knowingly made in any event.

32. There is a further point to be made in relation to this argument. Mr. Pachai submitted that the word "knowingly" in the declaration could only be applicable to the misrepresentation, and of course he relied not upon misrepresentation, but on non-disclosure. In support of that position, Mr. Pachai referred me to the description of *expressio unius* contained in the third edition of Statutory Interpretation by Bennion. Mr. Harshaw submitted that Bennion had no application, since it was concerned with statutory as opposed to other interpretation. In my view, Bennion describes a general canon of construction, and if the drafter of the declaration in the Argus proposal form had intended that the word "knowingly" should apply to non-disclosure as well as to misrepresentation, I would have expected to see the word included. On that basis, it matters not whether Mr. Duclos made an honest mistake in regard to the disclosure of his traffic convictions, so that if I were to be wrong in regard to my finding of fact as to whether Mr. Duclos had indeed made an honest mistake, the terms of the declaration would be of no assistance to him.

33. During the course of argument, I indicated that it seems to me anomalous that Mr. Duclos should be able to be in a better position by reason of his agent's lack of knowledge as compared with his own. As I now understand it, Mr. Harshaw does not rely on an argument in relation to the declaration based on the lack of knowledge of the agent. His submissions were based on the state of mind of Mr. Duclos as principal. However, his pleading refers to the declaration contained in

Breaches of Duty

34. Although the points of claim made complaints in regard to Mr. Duclos' failure to give prompt notice to Argus of the accident, and that he did not hold a valid driver's licence at that time, those were matters which had arisen subsequent to the making of the contract of insurance, and as such had no relevance for the purpose of avoidance of that contract. Mr. Pachai also made it clear that those complaints were not relied upon in relation to the alternative claim for a declaration which Argus sought, so that in practical terms they have no relevance for the purpose of these proceedings, and I would not therefore propose to make findings in relation to them. It also means that nothing turns on whether Mr. Duclos actually received the policy, though had it been necessary for me to make a decision in this regard, I would have found that he did.

Waiver and Estoppel

35. In relation to this aspect of matters, Mr. Harshaw relied upon the statements of the relevant law appearing in the ninth edition of MacGillivray at paragraph 10-96 et seq, and Mr. Pachai agreed that the law was as Mr Harshaw had set it out in his

submissions. By way of update, Mr. Harshaw relied upon the case of *Kosmar Holidays plc-v-Trustees of Syndicate 1243* [2008] EWCA Civ 147 at paragraph 55. In *Kosmar*, Rix LJ analysed the position in relation to waiver by election and waiver by estoppel, and concluded that the doctrine of estoppel was both sufficient and appropriate for the factual scenario of the case before the Court of Appeal, as it is for the case before me, without reference to waiver by election.

36. *Kosmar* was a case where there had been a delay of approximately one year in the reporting by the insured of an occurrence. Notwithstanding the delay, the insurer had corresponded with the claimant's solicitors. The trial judge concluded that the insurer had waived compliance with the condition precedent required by the policy of immediate communication of an occurrence, that there was room for the doctrine of election to pertain and that there had been an unequivocal communication of that election. Considering the insured's argument that the insurer's communications with the claimant had constituted an estoppel and/or affirmation, the trial judge was inclined to reject both, on the basis that the argument required the same as election and therefore added nothing. The trial judge therefore found in favour of the insured on the basis of waiver by election, coupled with an unequivocal communication of a decision to deal with a claim and thus accept liability for it.

37. Rix LJ reviewed the relevant authorities, and concluded (paragraph 70) as follows:

> "In sum, I do not think that we have been shown any case where the doctrine of election has been applied, in the context of a merely procedural condition precedent, to the conduct of a claim on behalf on an insured by an insurer, nor do I think it would be consistent with the paradigm examples of election, or with the nature of the doctrine, which requires unequivocal conduct which has irrevocable effect, to treat that doctrine as being by its rationale applicable to this situation. The doctrine is ill-

> fitting in these circumstances, and unneeded. For there remains the doctrine of estoppel: in circumstances where it can be said that the handling of a claim by an insurer is an unequivocal representation that the insurer accepts liability and/or will not rely of breach of some condition precedent as affording a defence, and there has been such detrimental reliance by the insured as would make it inequitable for the insurer to go back on his representation, the insured will have all the protection that he needs."

38. Rix LJ then reviewed the relevant communications and held them to be "far from unequivocal". He referred to the fact that the insurer had not said in terms either that it was waiving the need for immediate notification, or that it was accepting liability under the policy. He described the communication in which the insurer had written directly to the claimant's solicitors asking them to note insurer's interest, to ensure that all future correspondence was sent to it, and also asking questions about the claimant. Rix LJ carried on refer to that as being "perhaps the high point of the effect of the communications" from the point of view of the insured. He carried on to refer to those communications in which the insurer had made it clear to the insured that pending responses to requests for information, it was going to postpone any decision on liability to the claimant. Rix LJ concluded that there was no specific acceptance of liability on the part of the insurers to make the claim, and that there was no basis for the insured to be justified in thinking that its late notification of a serious claim would be accepted, even though it was in breach of a condition precedent, when it had not answered the many questions which the insurer had raised in regard to the incident. Rix LJ concluded that the correspondence was equivocal. However, he did add a word of caution (paragraph 83) in the following terms:

> "That said, I would certainly not like to give the impression that insurers can equivocate for long while giving the plain impression that they are treating a claim as covered by their policy, especially at a time when a

> decision might be required, without running at least the risk that they will be treated as having waived some requirement of their contract or their right to avoid it. Moreover, there may well be express options given to insurers under their policy the unguarded exercise of which is simply inconsistent with the right to decline cover. In my judgment, however, this is not such a case."

According, the appeal was allowed on the basis that the insurer did not waive, either by election or by estoppel, its right to rely on the insured's admitted and unexplained breach of condition precedent.

39. Against that background, it is obviously necessary to consider with care the nature and effect of the correspondence which took place between attorneys for Argus and attorneys for the third party claimant.

40. The first point to note in regard to the correspondence in question is that it is correspondence only between attorneys for Argus and attorneys for the claimant. The correspondence was not copied to Mr. Duclos, and indeed one of the complaints made by Mr. Harshaw is the Mr. Duclos was entirely unaware of the position taken by Argus and concerned that Argus might in some way have compromised his position. In the event, there was nothing in the correspondence to suggest that that had been the case.

41. The correspondence starts with a letter dated 5 December 2005 from Argus' attorneys, Wakefield Quin, to the claimant's attorneys, Juris Law Chambers. The letter indicates that the firm of Wakefield Quin is acting for Argus as insurers of Mr. Duclos, and asks for medical records and reports in relation to the injuries sustained by Mr. Carreiro. The next letter is dated 6 March 2006, and refers to a discussion concerning details of Mr. Carreiro's claim, and indicates an understanding that Juris Law Chambers were waiting for updated medical reports before providing Wakefield Quin with proposals for settlement on a without

prejudice basis. The letter also deals with the outstanding request for copies of medical reports and records, and asks for the standard form of release to enable them to secure the records from the hospital. This letter led to a prompt response sending copies of the records. There was then a letter from Juris Law Chambers to Wakefield Quin dated 22 June 2006, which referred to the difficulty in putting together the claim, but indicated that it would be in the region of $3,000,000, and indicated an intention to request an interim payment. This was followed by a detailed claim made on 26 July 2006, with a draft schedule. Wakefield Quin responded on 9 August 2006 that they were taking instructions and would revert in due course. That letter closed with the comment:

> "In the meantime, we reiterate our client's position on the issue of liability, namely that your client caused or contributed to the accident in question by reason of his own negligence."

There was no further correspondence until about the time that these proceedings were issued.

42. So it does appear that from December 2005 until August 2006, Wakefield Quin on behalf of Argus were corresponding with Juris Law Chambers on behalf of the third party claimant in a manner which was consistent with an obligation to indemnify Mr. Duclos, and in this regard it has to be borne in mind that by December 2005, Argus' inquiries into Mr. Duclos' traffic conviction history were complete, although Mr. Doherty had indicated that Argus' investigation into the circumstances surrounding the claimant were continuing. Realistically, Argus would have known well before the correspondence from Juris Law Chambers that this was likely to be a major claim; in his accident report form Mr. Duclos had described Mr. Carreiro's injuries as "extensive" and in the undated statement which Mr. Duclos gave to Argus, there was reference to Mr. Carreiro having been paralysed, and having gone abroad for medical attention.

43. But it does seem to me the difficulty which Mr. Duclos faces in regard to the plea of waiver and estoppel is the absence of any communication between Argus and Mr. Duclos. Whether or not the correspondence between Wakefield Quin and Juris Law Chambers was equivocal, in terms of Argus relying on its right to avoid the contract of insurance for non-disclosure, there was no representation of any sort on the part of Argus towards Mr. Duclos, indicating its intention to waive such rights as it had. It follows from the lack of representation that there was no suggestion of reliance on Mr. Duclos' part. Rather, matters were put by Mr. Harshaw that Mr. Duclos had been prejudiced by the delay. Even if this were the case, Mr. Duclos would need to establish that the prejudice followed from some reliance on a representation by Argus. But I do not see what prejudice it can be said that Mr. Duclos suffered. Mr. Harshaw stressed the delay which there had been, but delay alone does not constitute prejudice, particularly in circumstances where the third party claimant has not yet issued proceedings arising from this accident. Mr. Duclos is in the same position today as he would have been whether or not there had been the correspondence between Wakefield Quin and Juris Law Chambers to which I have referred. For the avoidance of doubt, I find that Mr. Duclos has not suffered any prejudice in consequence of that correspondence. I also find that there was no representation by Argus to Mr. Duclos to the effect that Argus would not rely on its right to avoid the policy, and consequently no reliance. It follows, and I therefore find, that Argus is not precluded by waiver or estoppel from avoiding its policy of insurance with Mr. Duclos by reason of the correspondence between Wakefield Quin and Juris Law Chambers. It further follows that Argus is entitled to the declaration it seeks in relation to the avoidance of its policy of insurance with Mr. Duclos, and I so find.

Alternative Declaration

44. I have already referred to the fact that for the purpose of the alternative declaration it seeks, Argus' position is that it does not need to rely upon breaches of duty by Mr. Duclos. The application is sought on the basis that this is the effect of the Act, and particularly sections 4 and 6 thereof. The combined effect

of sections 4(1)(b) and 6 (1) of the Act was considered by the Privy Council in the case of *Suttle-v-Simmons* [1989] Lloyd's Law Reports Vol 2 p227. This was a case on appeal to the Privy Council from the Court of Appeal for Bermuda, so dealt with the provisions of the Act. The case was concerned with the limit of liability of underwriters to a third party claimant who had secured judgment against their insured. The limit of liability contained in section 4 (1)(b)(ii) of the Act was then $24,000, and the judgment obtained by the third party claimant was for $100,000. The third party claimant sought to recover the full amount of the judgment from the underwriters, and the Board, following the authority of *Harker-v-Caledonian Insurance Co.* [1980] 1 Lloyd's Rep. 556, held that the underwriters' liability to the third party claimant was restricted to the amount contained in section 4(1)(b)(ii) of the Act. *Suttle-v-Simmons* has since been followed in other decisions of the Privy Council concerning similar wording to that contained in the Act, and is of course binding on this Court. As Mr. Pachai recognised, there is no need for Argus to establish any breach of duty on the part of Mr. Duclos to be entitled to the alternative declaration it seeks; it is entitled to the declaration because that is effect of the Act. I therefore grant Argus the declaration in the alternative, which is of course academic in view of the declaration which I have granted in relation to the avoidance of the policy. Mr. Pachai had indicated in his written submissions that the alternative declaration was sought in the expectation that Mr. Carreiro would exercise his right to be made a party to the action. The declaration is of course sought and made against Mr. Duclos, and not against Mr. Carreiro.

Summary

45. I therefore grant Argus the declarations sought in its points of claim that

    (i) pursuant to section 6(3) of the Act, it is entitled to avoid of policy of insurance number 0039208M/04 from the date of its inception on 1 February 2004, and

(ii) alternatively that its liability to indemnify Mr. Duclos by virtue of the Act be and is hereby limited to the amount required of an insurance policy by section 4(1)(b)(ii) of the Act, namely $125,000.

Costs

46. I see no reason why costs should not follow the event, but will hear counsel in regard to costs should they so wish.

Dated the 16th of May 2008.

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Hon. Geoffrey R. Bell