AmGeneral Insurance Berhad
v
Shahrul Aziman bin Abd Aziz & Anor

High Court, Kuala Lumpur – Originating Summons No. WA-24NCC-118-03/2019
Wong Chee Lin J

May 3, 2019

Insurance *– Motor insurance – Liability – First defendant purchased coverage after accident happened – First defendant failed to disclose or concealed fact that motorcycle had already been involved in an accident – Whether plaintiff entitled to rescind insurance policy due to breach of pre-contractual duty of disclosure and misrepresentation by first defendant – Whether by having appointed solicitors to act for first defendant, plaintiff barred from subsequently denying liability – Whether plaintiff could deny representation made to second defendant that it was the insurer of first defendant's motorcycle at material time of accident – Whether second defendant was induced by plaintiff's representation in commencing suit against first defendant– Whether doctrine of estoppel applicable in circumstance of case*

The first defendant's motorcycle bearing registration No. WB 8810 T was involved in an accident with the second defendant's motorcycle. The plaintiff is the insurer of the first defendant's motorcycle. The second defendant gave the required notice under s 96 of the Road Transport Act 1987 ("the Act") to the first defendant and the plaintiff before filing a writ claiming damages in respect of the accident. The plaintiff confirmed cover by a "without prejudice" letter stating expressly "We are the insurer of vehicle number WB 8810 T at the material time of the accident". The second defendant then filed a writ action against the first defendant in the Sessions Court for damages arising from the said accident. The second defendant herein was the plaintiff and the first defendant herein was the defendant in the Sessions Court suit.

The plaintiff served the present originating summons ("the OS") on the second defendant together with the notice stating the grounds relied on by the plaintiff to seek the declaration herein pursuant to s 96(3) of the Act. The OS and the notice were only received by the plaintiff on March 19, 2019. Because the declaration sought under s 96(3) of the Act must be obtained prior to judgment being delivered in the Sessions Court, the plaintiff filed a certificate of urgency and obtained an ex parte order that all proceedings in the Sessions Court be stayed pending the disposal of the OS. The plaintiff sought the declaration under s 96(3) of the Act on the ground that the first defendant was not insured at the time of the accident and only purchased the insurance policy after the time of the

accident. The accident occurred at 7.30 a.m. on August 8, 2017 and the insurance policy only commenced at 12.43 p.m. on August 8, 2017. The second defendant contended that the plaintiff had issued other documents such as the policy enquiry detail and the tax invoice wherein the time of commencement of risk was not mentioned. The time was only mentioned in the motorcycle schedule and the certificate of insurance. The second defendant further submitted that the remedy of declaration is an equitable remedy and it should not be granted in this case because the plaintiff had been guilty of inordinate delay or laches and did not explain its delay. The second defendant also submitted that, by appointing solicitors to represent the first defendant in the Sessions Court and not instructing them to discharge themselves the moment they became aware that they were not the insurer, the plaintiff is estopped from denying liability.

Issue

Whether there is any principle which would preclude the plaintiff from denying the representation made by it to the second defendant that it was the insurer of the first defendant's motorcycle at the material time of the accident, bearing in mind that the insurance policy had purportedly not taken effect at the time of the accident.

Held, allowing the applicant's application

1. As long as the time of commencement of risk had been referred to in the certificate of insurance, it is evident that the insurance policy only commenced from 12.43 p.m. on August 8, 2017. Thus, the motorcycle was not insured at the time of the accident. [*see p 320 para 14 - p 321 para 14*]

2. There was a delay of one year four months from the date of notification to the filing of the OS by the plaintiff. The only conclusion why the present application has been filed at such a late stage can only be that it was only recently that the plaintiff realised that the policy had not taken effect at the time of the accident. The plaintiff had not been guilty of inordinate delay or such delay which has caused prejudice to the second defendant which cannot be compensated by costs. [*see p 321 paras 15-16*]

3. The appointment of solicitors by the plaintiff to act for the first defendant in the Sessions Court does not necessarily debar the plaintiff from subsequently denying liability on the insurance policy. It is not necessary for the second defendant to show that it had acted to its detriment as a consequence of the representation of the plaintiff. [*see p 325 paras 22-23*]

5. Having regard to the doctrine of estoppel, since the first defendant was not insured at the material time of the accident and since there is no evidence led that the first defendant cannot satisfy any judgment debt against him, which in turn gives rise to the inference that the second defendant would in

all likelihood still have sued the first defendant even if he knew that the first defendant was not insured at the material time of the accident and furthermore, the second defendant can be compensated for his commencement of the Sessions Court suit by an appropriate order as to costs, it would not be unconscionable for the plaintiff to now assert that the insurance policy had not come into effect at the time of the accident and that it was not in fact the insurer of the first defendant's motorcycle at the material time of the accident. The submission that the second defendant cannot even make a claim against the Motor Insurers Bureau, if that is the case, that is because the insurance policy had not purportedly taken effect at the time of the accident and not because of the representation made by the plaintiff that it was the insurer at that time. In the circumstances, the doctrine of estoppel does not help the second defendant. [*see p 326 para 26*]

6. The first defendant only applied for insurance after the accident on August 8, 2017 because he had been involved in the accident earlier in the day. He must have known that his involvement in the said accident would be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied. Accordingly, the first defendant had breached his duty of disclosure to the plaintiff when obtaining the insurance on August 8, 2017 and the plaintiff is entitled to avoid the policy on this ground. [*see p 327 para 34 - p 328 para 34*]

7. Even assuming that the first defendant did not breach his duty of disclosure, there is still the fact that the insurance policy had not taken effect at the material time of the accident. Since the plaintiff was not the insurer of the first defendant's motorcycle at the material time of the accident, the plaintiff is entitled to the orders sought. However, because the second defendant may well have been partially induced by the plaintiff's representation that it was the insurer of the first defendant's motorcycle at the material time of the accident in commencing the Sessions Court suit against the first defendant, it is entitled to costs of RM20,000.00 against the plaintiff subject to allocator. [*see p 328 para 35*]

Cases referred to by the court

AmGeneral Insurance Bhd v Iskandar b Mohd Nul [2015] MLJU 1255, CA *(ref)*
Badaruzamani b Azmi v Kurnia Insurance (M) Bhd [2001] 6 MLJ 481, HC *(ref)*
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 AMR 2871; [1995] 3 MLJ 331, FC *(ref)*
Datuk Wira SM Faisal SM Nasimuddin Kamal v Datin Wira Emila Hanafi & Ors [2018] AMEJ 0122 [2018] 7 CLJ 290, HC *(ref)*
Express Newspaper plc v News (UK) Ltd [1990] 3 All ER 376, Ch D *(ref)*
Pacific & Orient Insurance Co Bhd v Hameed Jagubar Syed Ahmad [2018] 7 AMR 142; [2018] 6 MLRA 85, FC *(ref)*

Soole v Royal Insurance Co Ltd [1971] 2 Lloyds Rep 332, QBD *(ref)*
Tradium Sdn Bhd v Zain Azahari b Zainal Abidin & Anor [1996] 2 CLJ 270, CA *(ref)*
United States in Dickerson v Colgrove [1880] 100 US 578, SC (USA) *(ref)*

Legislation referred to by the court

Malaysia
Financial Services Act 2013, s 129, Schedule 9, Part 1, paragraphs 1(3), 2, 5(1)
Road Transport Act 1987, s 96, (3)

Melvin Selvam Thambirajah (Sabarudin Othman & Ho) for plaintiff
SV Namasoo (SV Namasoo & Co) for second defendant

Judgment received: July 24, 2019

Wong Chee Lin J

[1] This is an application by the plaintiff for a declaration that the provisions of an insurance policy No. JDV4007517 issued in respect of a motorcycle No. WB 8810 T for the period commencing 12.43 p.m. on August 8, 2017 until August 7, 2018 is null and void and unenforceable against the plaintiff in respect of an accident which occurred on August 8, 2017 at approximately 7.30 a.m. and, further, that the plaintiff was not liable in respect of any claim or judgment as a result of the said accident. I have allowed the application. These are the full reasons for my decision.

Salient background facts

[2] The first defendant was at all material times the registered owner of a motorcycle bearing Registration No. WB 8810 T.

[3] The second defendant was at all material times the rider of motorcycle No. AHY 5080 and was involved in an accident with the first defendant's motorcycle on August 8, 2017 at 7.30 a.m.

[4] The plaintiff is the insurer of the first defendant's motorcycle vide insurance policy No. JVD4007517 which was issued on August 8, 2017 but at 12.43 p.m., that is, after the accident had already occurred.

[5] By letter dated November 16, 2017, the second defendant's solicitors Messrs SY Namasoo & Company gave the required notice under s 96 of the Road Transport Act 1987 ("the Act") to the first defendant and the plaintiff before filing a writ claiming damages in respect of the accident. In the said notice, the date and time of the accident was specifically mentioned as August 8, 2017 at 7.30 a.m.

[6] The plaintiff with reference to the statutory notice dated November 16, 2017 confirmed cover by a "without prejudice" letter dated December 7, 2017 stating

expressly "We are the insurer of vehicle number WB 8810 T at the material time of the accident".

[7] After confirmation of cover by the plaintiff the second defendant filed a writ action No. AA-A53KJ-334-09/2018 dated September 21, 2018 against the first defendant in Ipoh Sessions Court for damages arising from the said accident. The second defendant herein was the plaintiff and the first defendant herein was the defendant in the Ipoh Sessions Court suit.

[8] By letter dated October 5, 2018 the plaintiff informed the second defendant's solicitors of the appointment of M/S Kenneth William & Associates as solicitors to protect the interest of the first defendant as well as the plaintiff in the Ipoh Sessions Court and this was confirmed by letter dated October 5, 2018 from M/S Kenneth William & Associates.

[9] The second defendant closed his case in the Ipoh Sessions Court when the matter proceeded for hearing as fixed on February 1, 2019 with the investigating officer and the second defendant himself giving evidence on behalf of the plaintiff. The first defendant closed his case after giving evidence on his own behalf.

[10] The Ipoh Sessions Court then fixed the matter for decision on March 26, 2019.

[11] The plaintiff served the present originating summons on the second defendant personally by letter dated March 15, 2019 together with the notice stating the grounds relied on by the plaintiff to seek the declaration herein pursuant to s 96(3) of the Act. The originating summons and the notice were only received by the plaintiff on March 19, 2019.

[12] Because the declaration sought under s 96(3) of the Act must be obtained prior to judgment being delivered in the Ipoh Sessions Court, the plaintiff filed a certificate of urgency and on March 22, 2019 obtained an ex parte order from the court that all proceedings in the Ipoh Sessions Court be stayed pending the disposal of the originating summons.

[13] The plaintiff seeks the declaration under s 96(3) of the Act on the ground that the first defendant was not insured at the time of the accident and only purchased the insurance policy after the time of the accident. The accident occurred at 7.30 a.m. on August 8, 2017. The insurance policy only commenced at 12.43 p.m. on August 8, 2017.

Findings of the court

[14] The second defendant raised various issues in opposition to the originating summons. One is that the plaintiff had issued other documents such as the policy enquiry detail and the tax invoice wherein the time of commencement of risk was not mentioned. The time was only mentioned in the motorcycle schedule and the

certificate of insurance. I am of the view that as long as the time of commencement of risk had been referred to in the certificate of insurance, it is evident that the insurance policy only commenced from 12.43 p.m. on August 8, 2017. Accordingly, it must be accepted as a fact that the motorcycle was not insured at the time of the accident.

[15] Next the second defendant submitted that the remedy of declaration is an equitable remedy and it should not be granted in this case because the plaintiff had been guilty of inordinate delay or laches and did not explain its delay. The said accident happened on August 8, 2017 and the plaintiff became aware of the accident by statutory notice dated November 16, 2017 but the originating summons was only served on the second defendant on March 19, 2019 when the Ipoh Sessions Court suit was fixed for decision on March 26, 2019. There was a delay of one year four months from the date of notification to the filing of the originating summons by the plaintiff. The second defendant relied on the case of *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1996] 2 CLJ 270 and *Badaruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481 in support of the proposition that delay is fatal to the plaintiff's case.

[16] I do not agree with the submission that the plaintiff has been guilty of inordinate delay or such delay which has caused prejudice to the second defendant which cannot be compensated by costs. The only conclusion why the present application has been filed at such a late stage can only be that it was only recently that the plaintiff realised that the policy had not taken effect at the time of the accident. Learned counsel for the plaintiff also clarified that the grounds of judgment in the case of *Pacific & Orient Insurance Co Bhd v Hameed Jagubar Syed Ahmad* [2018] 7 AMR 142; [2018] 6 MLRA 85 were only published some time after the judgment was given by the Federal Court in favour of the insurers in September 2018. Prior to the Federal Court judgment and pursuant to the Court of Appeal judgment, the insurers would still be liable even though the policy took effect after the time of the accident. The decision of the Court of Appeal was reversed by the Federal Court.

[17] Pursuant to s 96(3) of the Act, the court can make a declaration that the policy is invalid or unenforceable as long as the order is made before judgment is obtained in the liability action by the second defendant against the first defendant. The present application is filed before judgment has been obtained by the second defendant although just a few days before the date for delivery of the judgment and the second defendant had not applied to set aside the order obtained by the plaintiff that the proceedings in the Ipoh Sessions Court be stayed pending the disposal of this originating summons. In the Federal Court case of *Pacific & Orient Insurance Co Bhd v Hameed Jagubar Syed Ahmad* [2018] 7 AMR 142; [2018] 6 MLRA 85 a similar fact, that the accident occurred prior to the commence of risk of the policy, was also discovered during the course of the trial of the action commenced by the victim. More important is the issue whether the delay had caused the second defendant any prejudice which cannot be

compensated by costs and I am of the view that the delay has not caused the second defendant any prejudice that cannot be compensated by an order for costs.

[18] The second defendant also submitted that, by appointing solicitors to represent the first defendant in the Ipoh Sessions Court and not instructing them to discharge themselves the moment they became aware that they were not the insurer, the plaintiff was estopped from denying liability. They cannot approbate and reprobate, that is blowing hot and cold in the attitude they adopt. The second defendant referred to the case of *Datuk Wira SM Faisal SM Nasimuddin Kamal v Datin Wira Emila Hanafi & Ors* [2018] AMEJ 0122 [2018] 7 CLJ 290 where Justice Nordin Hassan H had referred to the case of *Express Newspaper plc v News (UK) Ltd* [1990] 3 All ER 376 where Nicholas Browne-Wilkinson VC at pp 383 to 384 explained that the principle simply means:

> A man cannot adopt two inconsistent attitudes towards another; he must elect between them, and having elected to adopt one instance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

[19] I am aware of the line of authorities which say that simply because an insurer appoints solicitors to defend an insured does not necessarily mean that he is debarred from subsequently denying liability.

[20] For instance, in *Soole v Royal Insurance Company Ltd* [1971] 2 Lloyds Rep 332, the insurers had taken control and conduct of the defence of the insured and later denied liability under the policy. The English High Court held that the assumption of control of the proceedings by the insurers did not necessarily imply a representation by the insurers that they regard the claim as one which must give rise to a liability to indemnify the insured. Accordingly, the assumption of proceedings by the insurers did not necessarily debar them from subsequently denying liability.

[21] The same issue was also considered by the Court of Appeal in the case of *AmGeneral Insurance Berhad v Iskandar bin Mohd Nul* [2015] MLJU 1255 where the Court of Appeal (and affirmed by the Federal Court) said this:

> [39] At the outset, we shall deal with the preliminary question of whether by the plaintiff's conduct in appointing GLA to defend the second defendant in the Singapore suit, it has by such conduct waived the right to deny liability on the policy and is estopped from maintaining the action.
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> [40] It is not a disputed fact that Zuraini instituted the Singapore suit against her husband, the second defendant and the driver of the other motor vehicle on January 31, 2014 and that the plaintiff appointed GLA to represent the second defendant in the proceedings.
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> [41] The learned judge found that GLA had taken various steps in defending the second defendant in the Singapore suit including entering a memorandum of

appearance, taking instructions from the second defendant, filing the statement of defence, writing to other solicitors and liaising with the second defendant on the conduct of the proceedings. As such the learned judge held that the plaintiff is estopped from maintaining the action as it had waived its right to deny liability under the policy by reason of its conduct in having appointed GLA to act for the second defendant in the Singapore suit, even though it was aware that the policy does not cover passenger liability.

[42] In *Soole v Royal Insurance Company Ltd* (supra) the insurers had taken control and conduct of the defence of the insured and later denied liability under the policy. The English High Court held that the assumption of control of the proceedings by the insurers did not necessarily imply a representation by the insurers that they regard the claim as one which must give rise to a liability to indemnify the insured. Accordingly, the assumption of proceedings by the insurers did not necessarily debar them from subsequently denying liability.

[43] The aforesaid view found support in *MacGillvray on Insurance Law* (10th edn, Sweet and Maxwell 2003) where the learned authors had this to say: "It is submitted with respect that the decision in Soole correctly represents the English law. There is good authority for the proposition that an estoppel requires: (i) a clear representation by word or conduct of a present fact, (ii) made to someone who is expected to act on it, and (iii) who does so, to his 'detriment'. The insurers' conduct did not constitute a clear representation that they would meet the claim, and it could not be so construed as a matter of law. The assured was in no way prejudiced…"

[44] In the Hong Kong Court of Appeal case of *Oriental Fire & General Insurance Co Ltd v Cheuk Ma Yee* [1980] HKCA 291, the deceased was a passenger who was killed in a motor accident in a motor car owned and driven by one Lau Koon Ki. The administrator of the deceased's estate sued Lau Koon Koi ("the accident suit"). The insurer defended the accident suit against Lau Koon Ki, the insured in the name of the insured, as permitted by the motor policy. Judgment was entered against Lau Koon Ki. Lau Koon Ki was unable to satisfy the judgment and was adjudicated a bankrupt. Subsequently, the administrator brought an action against the insurer for an indemnity granted to Lau Koon Ki under the motor policy. The insurer repudiated liability on the basis that the insured had been in breach of certain terms in the policy. The High Court held that the insurer is not entitled to defend the accident suit in the insured's name without abandoning its right to repudiate liability under the policy. The Hong Kong Court of Appeal disagreed with the High Court. At para 36 of the judgment, McMullin VP said: "What is fundamental to the judge's findings in relation to both pleas is this contention that the insurance company is not entitled to defend the action in the plaintiff's name without thereby abandoning its right to repudiate liability in respect of its indemnity to the insured. This is in effect asserting that by taking over the defence the insurer must be held to have elected to waive the breach. However I cannot see that taking over the defence is inconsistent with asserting that the insurer is in any event not liable. The insurer is surely entitled to say 'We affirm the policy but repudiate liability for this particular claim. However in the

event that we may be held liable, we take over the defence and will conduct it with due regard to the insured's interest. The conclusion of the learned judge in this case is of the widest import and we must look carefully at the ground on which it is supported'".

[45] In *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 the insurer had taken over conduct of the proceedings in the action instituted by the injured third party against Chong Kok Hwa (the insured). The insurer defended the suit and paid RM3,250 as damages and costs to the third party under a consent judgment. Subsequently, the insurer brought an action against the insured to recover the said sum from the insured on the ground that they had repudiated liability on the policy because the insured had only given notice of the accident to the insurer one year after the accident. The sessions court gave judgment for the insurer; the insured appealed to the High Court against the sessions court decision. In dismissing the appeal, Ajaib Singh J (as he then was) said at p 247:

> "a. When they took over the conduct of the proceedings in the action instituted by the injured third party against the appellant and settled the action without contest the respondents were merely exercising their rights under the policy. In no sense could it be said that the respondents had thereby waived any express condition in the policy especially when they had warned the appellant that he would be held liable for any third party claim which might be made against them arising out of the accident involving his lorry."

[46] *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* was also cited in Poh Chu Chai, *Law of Insurance* (3rd edn) in support of the proposition that the conduct of the insurer in taking over the action from the insured cannot be construed as a waiver of the insured's breach of the terms of the policy.

[47] In this instance, GLA was acting in the interests of the second defendant when acting for the second defendant in the Singapore Suit. We agree with the submission of the plaintiff's learned counsel that there is a commonality in the interest of the plaintiff and the second defendant. The common interest in this instance was to avoid the possibility of judgment by default and to argue that the driver of the other vehicle was solely or mainly liable for the accident. There is no suggestion that GLA in any way acted contrary to the interest of the second defendant. As such, we hold the view that there is no conflict of interest in acting for both insured and insurers.

[48] The plaintiff's contention that from the outset they made it clear to the second defendant that they were doing without prejudice to their right to deny policy liability is denied by the second defendant. At any rate, GLA eventually discharged itself as the second defendant refused to accept GLA's position that their continued involvement was without prejudice to liability. We do not think that the contested fact as to whether the plaintiff did express a reservation of right prior to September 27, 2013 is a determining factor on this issue. We observe that

neither *Soole* (supra) nor *Oriental Fire* (supra) regard reservation of right as a critical element.

[49] We have scrutinised the appeal record and find no evidence to show or suggest that the second defendant had acted to his detriment by virtue of GLA being appointed by the plaintiff to act for the second defendant in the Singapore Suit. Accordingly, we do not agree with the learned judge that the plaintiff has by its conduct waived its right to deny liability on the policy and is estopped from maintaining the action.

[22] The above cases are authority for the proposition that the appointment of solicitors by the plaintiff to act for the first defendant in the Ipoh Sessions Court does not necessarily debar the plaintiff from subsequently denying liability on the insurance policy. The issue in this case is whether there is any principle which would preclude the plaintiff from denying the representation made by it to the second defendant that it was the insurer of the first defendant's motorcycle at the material time of the accident.

[23] *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 AMR 2871; [1995] 3 MLJ 331 had established that detriment is not an element in the principle of estoppel. In other words, it is not necessary for the second defendant to show that it had acted to its detriment as a consequence of the representation of the plaintiff. This is what Gopal Sri Ram (JCA) said on this issue:

All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that "his conduct was so influenced by the encouragement or representation…that it would be unconscionable for the representor thereafter to enforce his strict legal rights". (per Robert Goff in *Amalgamated Investment* [1982] 1 QB 84 at 105).

[24] In *Boustead*, Gopal Sri Ram (JCA) quoted what was said by Lord Denning as to the width of the doctrine in the case of *Amalgamated Investment* case [1982] 1 QB 84 at 122 as follows:

When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law- whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[25] His Lordship stated the doctrine is no different in American equity jurisprudence and quoted Swayne J of the Supreme Court of the *United States in Dickerson v Colgrove* [1880] 100 US 578 at 580 (25 L Ed 618) as follows:

> The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject that person to loss or injury by disappointing the expectation upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice.

[26] Having regard to the doctrine of estoppel, I am of the view that since the first defendant was not in fact insured at the material time of the accident and since there is no evidence led that the first defendant is a pauper and cannot satisfy any judgment debt against him, which in turn gives rise to the inference that the second defendant would in all likelihood still have sued the first defendant even if he knew that the first defendant was not insured at the material time of the accident and, furthermore, the second defendant can be compensated for his commencement of the Ipoh Sessions Court suit by an appropriate order as to costs, it would not be unconscionable for the plaintiff to now assert that the insurance policy had not come into effect at the time of the accident and that it was not in fact the insurer of the first defendant's motorcycle at the material time of the accident. It was further submitted for the second defendant that it cannot even make a claim against the Motor Insurers Bureau but, if that is the case, that is because the insurance policy had not purportedly taken effect at the time of the accident and not because of the representation made by the plaintiff that it was the insurer at that time. In the circumstances, the doctrine of estoppel does not help the second defendant.

[27] It was submitted for the plaintiff that it was entitled to rescind or cancel the insurance policy as the first defendant had not acted in good faith when purchasing the said policy by his failure to inform or by concealing the fact that the motorcycle had already been involved in an accident. In other words, the first defendant had breached his pre-contractual duty of disclosure and committed misrepresentation.

[28] In this respect, it should be noted that as of January 1, 2015, the pre-contractual duty of disclosure and representations is governed by s 129 of the Financial Services Act 2013 wherein it is stated that the said duty is set out in Schedule 9 of the said Act.

[29] In Part 1 paragraph 1(3) of Schedule 9, it is clearly stated that:

> For the purpose of obtaining a declaration under subsection 96(3) of the Road Transport Act 1987, this Schedule shall apply to determine if a consumer

insurance contract which provides cover for third party risks may be avoided by a licensed insurer for misrepresentation.

[30] In paragraph 2 of Schedule 9, "consumer insurance contract" is defined as a "contract of insurance entered into … by an individual wholly for the purpose unrelated to the individual's trade, business or profession".

[31] In paragraph 5(1) it is clearly stated that the "licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not …" if he is taking for the first time and if it is a renewal a similar duty is imposed under sub-paragraph (3). Therefore, the burden is imposed on the plaintiff as the licensed insurer to ask the first defendant as a consumer to discover any matters that may be relevant before providing coverage.

[32] What if the licensed insurer does not ask the proposer any question and the coverage is provided in silence? Then it is clearly spelt out in sub-paragraph (5) of the said schedule that if the "licensed insurer does not make a request in accordance with subparagraph (1) and (3)" of the said schedule then the need to disclose "has been waived by the insurer". However, it is provided in subparagraph 8 that "Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied." This provision seems to contradict the provision in subparagraph 5. Subparagraph 5 seems to indicate that a proposer's duty only extends to the answering of specific questions posed to him by the insurer whereas subparagraph 8 seems to indicate that his duty of disclosure extends beyond that of simply answering the specific questions posed to him. The way I would reconcile the two provisions is to construe the position to be such that when a specific question is not posed to the proposer by the insurer and the proposer keeps silent, then the matter shall be deemed to be waived by the insurer unless the proposer knew for a fact that the matter is relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

[33] It was submitted on behalf of the second defendant that the insurance policy issued to the first defendant was a consumer insurance policy and that there was no evidence before the court that any inquiry as required under Schedule 9 was made from the first defendant before the coverage was provided. Therefore, the first defendant did not breach his duty of disclosure which is deemed waived under sub-paragraph 5 of Schedule 9.

[34] Since the insurance policy issued to the first defendant in this case specifically referred to Schedule 9 paragraph 5 which relates to the "pre-contractual duty of disclosure for consumer insurance contracts" it can be deemed that the insurance policy issued to the first defendant was a consumer insurance policy. Since there was no evidence before the court that the first

defendant had been asked any question regarding whether he was involved in an accident prior to the application for insurance, I agree with the second defendant that the first defendant did not breach his duty of disclosure which is deemed waived under sub-paragraph 5 of Schedule 9 unless he knew that his involvement in an accident at 7.30 a.m. on the day he applied for the insurance was relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied. I am of the view that the first defendant only applied for insurance after the accident on August 8, 2017 because he had been involved in the accident earlier in the day. He must have known that his involvement in the said accident would be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied. Accordingly, I am of the view that the first defendant had breached his duty of disclosure to the plaintiff when obtaining the insurance on August 8, 2017 and the plaintiff can avoid the policy on this ground.

[35] However, even assuming that the first defendant did not breach his duty of disclosure, there is still the fact that the insurance policy had not taken effect at the material time of the accident. Since the plaintiff was not the insurer of the first defendant's motorcycle at the material time of the accident, the plaintiff is entitled to the orders sought and I accordingly make an order in terms of the prayers sought in the originating summons. However, because the second defendant may well have been partially (though not wholly) induced by the plaintiff's representation that it was the insurer of the first defendant's motorcycle at the material time of the accident in commencing the Ipoh Sessions Court suit against the first defendant, I award costs of RM20,000.00 against the plaintiff subject to allocator.