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Article

*160 Financial Services Act 2013 and the requirement of the Duty of Utmost Good Faith for Third-Party Insurance Cover under the Road Transport Act 1987

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Abstract

The cornerstone of any valid insurance contract is the need for the insured to show utmost good faith or in Latin uberrimae fidei at the point of inception of such contract (hereinafter "the said duty"), failing which the insurer can repudiate liability under the policy and not indemnify the insured when the contingency covered occurs. The need to comply with the said duty is also applied with equal force in the cases of third-party risk insurance policies (hereinafter "the said policy"). The said policy must be taken by the insured as it is so mandated under the Road Transport Act 1987 (Act 333) (hereinafter "the RTA") before a motor vehicle can be used on a public road. This is to ensure payment of compensation to the innocent road users in the event of an accident by the insurer.

Failure on the part of the insured to comply with the said duty at the pre-contractual stage means that the insurer can repudiate liability with the innocent victim of a road accident who would then have to look towards the tortfeasor (the insured) for compensation, who might be a man of straw. Such a scenario, one not too uncommon in our country, defeats the objective intended to be achieved by the provisions under Part IV of the RTA, namely assured compensation.

With a view to mitigating the harshness of such a scenario and to level the playing field amongst all the stakeholders, namely the insurer, insured (tortfeasor) and the innocent victim of an accident, Parliament enacted new provisions in the form of the Financial Services Act 2013 (Act 758) (hereinafter "the FSA 2013") which came into effect as of January 1, 2015. Obviously, due to it being relatively new, there is a dearth of case law in the area.

Introduction

Although it is a legal requirement under subsection 90(1) of the RTA that every motor vehicle must be insured under the said policy, however for some time now, the insurers on various grounds have resorted to seeking declarations under subsection 96(3) of the RTA ("the said declaration") on the *161 basis that there is a breach of the said duty and thereby defeating the legitimate claim for compensation by road accident victims under the RTA. Based on principles of contract and insurance law per se , it is conceded that the breach of the said duty by the insured entitles the insurer to invalidate the said policy.

However, with the coming into effect of the provisions of the FSA 2013 the question is whether the insurer can rely on principles of contract and insurance law per se to repudiate liability under the said policy or has a higher duty been cast on them now before such repudiation can be sought. This article intends to explore to what extent the provisions of the FSA 2013 has redefined the said duty, if at all, to mitigate the harshness of its application in accident claims.

Uberrimae fidei or duty of utmost good faith

Before venturing into the provisions of the FSA 2013 an understanding of the rationale behind the said duty is imperative to see how a just balance can be achieved when it comes to its applicability in accident cases having in mind the social objective behind Part IV of the RTA, namely assured compensation.

The origin and the meaning of uberrimae fidei was explained by his Lordship Abang Iskandar J (as he then was) in the case of Tan Jing Jeong v Allianz Life Insurance Malaysia Bhd & Anor[1] as follows:

Uberrima fides is a Latin terminology which literally means most abundant faith. The duty of utmost

good faith had a uniquely distinguished pedigree. The essential role of good faith in law was embraced by the Athenians (as "epieikeia") and later by the Romans (as "aequitas") and those concepts were later developed into a concept what has become known as "equity" under the English general common law and subsequently they had given rise to the specific reciprocal obligation owed between insurers and insureds known as uberrima fides .

In the aforesaid case, his Lordship Abang Iskandar J stated a higher duty is expected from parties to an insurance contract than in other types of contracts to ensure the disclosure of all material facts so that the contract may accurately reflect the actual risk being undertaken.

The rationale behind the said duty was stated by Lord Mansfield in the oft-quoted case of Carter v Boehm[2] as follows:

Insurance is a contract of speculation … The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceed upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the *162 circumstances does not exist … Good faith forbids either party by concealing what he knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

The other unique feature of the said duty was stated by his Lordship Gopal Sri Ram JCA (as he then was) in the case of Leong Kum Whay v QBE Insurance (M) Sdn Bhd & 3 Ors :[3]

But the duty to make full disclosure of all material fact is not an implied term of a contract of insurance. There is in fact no contract at the point at which the duty arises: the parties being still at stage of negotiations. It is therefore a pre-contractual duty imposed by common law . (Emphasis added.)

The social objective encapsulated in Part IV of the RTA

It has been pronounced more than once by our courts that the provisions of Part IV of the RTA, is a piece of social legislation bearing in mind that the intended beneficiary is the victim involved in a road accident. In Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool ,[4] his Lordship Hamid Sultan Abu Backer JCA in construing the scope of third-party coverage stated:

It must also be noted that the RTA 1987 to some extent is a social legislation attempting to provide statutory protection to road victims. It does not prohibit greater coverage for road victims under the insurance policy terms.

In a similar vein, in the case of Aqmal bin Dakhirrudin v Azhar bin Ahmad & Anor[5] where the insurers sought to repudiate liability on the grounds that there had been a transfer of interest, her Ladyship Hanipah Farikullah JCA stated:

We are of the considered view that the second defendant is an innocent third party and the RTA to some extent is a social legislation, in particular, the provisions under Part IV namely s 89, 90, 91, 94 and 95 to 107 of the RTA is attempting to provide statutory protection to road victims (who are innocent parties) under the insurance policy terms.

Her Ladyship Mary Lim JCA (as she then was) in Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor v MMIP Services Sdn Bhd[6] ("Balamoney") stated that the Supreme Court in Malaysia National Insurance Sdn Bhd v Lim Tiok[7] regarded the RTA as a "piece of social legislation".

Intrinsic in what his Lordship Abdul Rahman Sebli FCJ (as he then was) had said in the recent Federal Court case of AmGeneral Insurance Bhd v Sa' Amran *163 Atan & 2 Ors (and 7 Other Appeals) ("AmGeneral v Sa' Amran")[8] can be seen the social element in Part IV of the RTA and I quote his Lordship:

Before we conclude, perhaps it needs to be said that insurers may complain about the circumstances that make them liable to pay; third party accident victims may complain about being uncompensated. There are two competing interests. Having regard to the object and purpose of the RTA, which is to protect innocent third parties against risks arising out of the use of motor vehicles, we are inclined to the view that the conflicting interests must be resolved in favour of the innocent third party accident victims . The following observations by Justice Sarkar of the Supreme Court of India delivering his judgment in British India General Insurance v. Captain Itbar Singh And Others 1960 (1) SLR 168 on 11 May 1959, albeit in the context of a claim against the insured himself who caused the injuries, are worth pondering over:

"It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss . On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an accident in the happening of which he had no hand at all." (Emphasis added.)

Balancing justice for the road accident victims against the rights of the insurer under the RTA?

However, to ensure justice to all concerned, a just balance needs to be struck between the aforesaid parties so that the insurer is not saddled with an unmerited claim. This requirement was well encapsulated by his Lordship Edgar Joseph Jr FCJ in the case of Malaysia National Insurance Sdn Bhd v Lim Tiok , where in holding that apportionment of liability does not mean apportionment of damages, and I quote:

It is important to fit these three elements — the Common Law principle, the contribution legislation [s 10(1) & (2) Civil Law Act 1956] and the compulsory third party insurance legislation — in such a manner as to ensure that they work in harmony without injustice

To ensure harmony and justice in managing the conflicting interests between the insured, insurer, and the claimant third party (plaintiff), a conditional statutory pathway has been enacted for the insurers to escape liability. This pathway is found by seeking the said declaration that they are not liable *164 under the said policy but with the important proviso that for the said declaration to be binding on the plaintiff, the plaintiff must be notified and be permitted to partake in such declaratory proceedings, if so desired. In the Court of Appeal case of Rasip b Hamsudi v P&O[9] it was held that the failure to notify the plaintiff meant that the declaration, if granted, although binding between the insured and the insurer, will not be binding on the plaintiff and the insurer must indemnify the plaintiff provided the plaintiff had obtained judgment against the insured/tortfeasor before the declaratory order was granted. This was aptly summed up by his Lordship Scott LJ in Merchants and Manufacturers, Insurance Co Ltd v Hunt & Ors[10] when interpreting s 10(3) of the UK Road Transport Act 1934 which is in pari materia with our s 96(3) of the RTA as follows:

The legislation was obviously intended to effect, inter alia, a fair compromise between the two desirables but conflicting objects — namely, on the one hand that of protecting the public from danger of impecunious tortfeasors on the roads, and, on the other hand, that of avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary burden of a policy which, neither in law nor in equity, is his policy.

To further bolster the protection for innocent victims of road accidents, our Parliament enacted ss 94 and 95 of the RTA which prohibit certain terms and conditions from being included in the said policy, and where, even if violated by the insured during and/or after the accident, it would not nullify the right of the third-party from succeeding in the claim. The rationale behind ss 94 and 95 of the RTA can be gleaned from the case of Zurich General Accident and Liability Insurance Co Ltd v Morrison[11] and I quote:

Part II of the Road Traffic Act 1934 was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act 1930. That Act and the Third Parties (Rights Against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyers nor connected with the business of insurance, to believe that if thereafter they were, through no fault of their own, injured or killed by a motor car, they or their dependents would be certain of recovering damages, even though the wrongdoer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company, who could fulfil the not very onerous financial requirement that were necessary for acceptance as an approved insurer, could hedge the policies with so many warranties and conditions that no one advising an injured person could say with any *165 certainty whether, if damages were recovered against the driver of the car, there was a prospect of recovering against the insurer …

In the case of motor car insurance it was the third parties who needed the warning , and unfortunately they had no voice as to the warranties or conditions that were inserted in policies , though it was only

because they held a policy that careless drivers were enabled to drive and put others in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and by s. 10 of the Act of that year ... they took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford.

Generally speaking, s. 10 was designed to prevent conditions in policies from defeating the rights of third parties. (Emphasis added.)

Were the existing statutory provisions sufficient to achieve the social objective in Part IV of the RTA?

Although ss 94 and 95 of the RTA curbed to a great extent the ability of the insurers to insert terms and conditions enabling repudiation of their liability under the said policy there was still the loophole at the insurers disposal of the insured needing to comply, inter alia, with the said duty at the pre-contractual stage, a duty which applied to all other types of insurance as well (henceforth known as "the general requirements of insurance law"). Not only the need to comply with the general requirements of insurance law but the burden of proving compliance rested with the insured . In the event, the aforesaid requirement was violated, it provided an avenue for the insurers to exploit and escape liability from indemnifying under the policy. Once again, we find that the third-parties (plaintiffs) have no control to ensure compliance with the general requirements of insurance law by the insured at the pre-contractual stage as the latter is only concerned with obtaining coverage so that the vehicle can be legally driven on the road.

Not infrequently insurers have resorted to and have succeeded in relying on the insured's failure to satisfy the general requirements of insurance law, in particular the said duty, to repudiate liability and to refrain from indemnifying third-parties. Our law reports are replete with such cases. The grounds of the violation of utmost good faith by the insured can be broadly classified into two classes, that is as misrepresentations and/or non-disclosures . For example, the non-disclosure could take the form of the failure of the next-of-kin to inform the insurer that the insured had passed away at the time of renewing the policy in the name of the deceased or purchasing a new policy in the deceased's name. Another classic and common example is where there has been a "transfer of interest" which is an informal sale of a vehicle without the insurer's knowledge.[12]

*166 It must be acknowledged that pre-contractual general requirements of insurance law such as compliance with the said duty by the insured is to ensure that the insurer is fully aware of the risk being covered for the premium being paid. Another such requirement is the need for the insured to have an insurable interest at the time of inception of the policy to prevent it from being deemed a wagering contract. In all policies, except the said policy, if a claim is repudiated by the insurer on the alleged ground that one such pre-contractual general requirements of insurance law has not been complied with by the insured it will be a battle between the insured and the insurer who will be in a position of knowledge to fight the repudiation and in any event, the outcome will only affect them as contracting parties.

However, when one turns to the said policy governed by the RTA, the repercussions of any violation of the pre-contractual general requirements of insurance law it will not only affect the insured but will more so directly and financially impact the third-party victims of road accidents as they will be looking towards the insurers as paymasters. Often, any such violations by the insured at the pre-contractual stage will be invoked by the insurer when the third-party files a tortious claim in court against the insured. At that stage, the third party not being privy to the said policy, is akin to a boxer with both hands tied to fight the battle, against the declaratory proceedings between the insurer and the insured to have the policy declared null and void. Often, the insured will not contest the declaratory proceedings and the insurer will obtain the declaratory relief by default thereby making the third-party's right to assured payment illusory. This situation was aptly stated by her Ladyship Mary Lim JCA in Balamoney as follows:

We would not be wrong to suggest that the law must have been amended to address the hardship that third parties, like the appellant before us, face in cases where the validity of the insurance policies are challenged and the court is asked to grant declarations under s. 96(3) of Act 333. The third parties are simply not in the position to address any of the issues that may arise like the appellant and have in fact arisen as we see in this appeal. This then whittles down to naught the very benefit and purpose that was intended under s. 90 of Act 333 and s. 129 of Act 758 . (Emphasis added.)

This begs the question as to whether general requirements of insurance law such as compliance with the said duty per se by the insured should be allowed to hold sway over tortious claims arising from road accidents to the prejudice of the third-party's right to compensation? Or, at the least, should

certain pro-active steps and their burden of compliance be laid at the doorsteps of the insurers at the pre-contractual stage of the said policy as they are in the best position to ensure compliance by the insured? That brings us to the FSA 2013.

Rationale for the FSA 2013

Before delving into s 129 and Schedule 9 to the FSA 2013 (hereinafter "the Schedule"), let us look at the rationale behind these provisions. The rationale can be gleaned from the Hansard as set out by his Lordship Abdul Rahman Sebli FCJ in the case of AmGeneral v Sa' Amran as follows:

Keenam, rang undang-undang ini akan menyediakan rangka kerja yang kukuh bagi perlindungan pengguna kewangan. Ini dicapai melalui:

…

Pada masa sekarang, kontrak insurans boleh dielak, avoidable secara langsung oleh penanggung insurans tidak kira sama ada salah nyata oleh seorang pengguna tersebut dibuat secara sengaja atau melulu, cuai atau pun tidak sengaja.

Ketujuh, rang undang-undang ini akan menyokong pendekatan penyeliaan yang lebih bersifat pencegahan awal, prevention , ya.

Jadual 9 menyatakan kewajipan baru untuk penzahiran dan representasi bagi pengguna yang perlu dipatuhi sebelum sesuatu kontrak insurans dibuat, diubah atau diperbaharui dengan penanggung insurans. Jadual ini juga menyatakan remedy berkadar proportionate remedy yang boleh digunakan oleh penanggung insurans dalam hal salah nyata yang dibuat oleh pengguna semasa peringkat pra kontrak bergantung kepada jenis salah nyata yang dibuat.

Sama dengan syarikat-syarikat insurans, apakah kawal seliaan terhadap syarikat-syarikat insurans mengikut Akta Insurans 1967? Pada masa ini, semua syarikat insurans apabila berlaku satu tuntutan oleh pelanggan mereka , pertama sekali dia tengok bagaimana nak tolak permohonan itu, dengan izin, how to repudiate liability . Padahal, orang ambil insurans adalah untuk perlindungan semasa kejadian kecurian atau rompakan.…

Sama macam Parlimen juga Tuan Yang di-Pertua, sebab kes-kes insurans yang boleh diselesaikan tengok kepada polisi, mesti ada niat untuk menyelesaikan kepada pencarum, kepada policy-holder dan proses claim itu, tuntutan itu. Saya rasa syarikat-syarikat insurans sebagai kartel, mereka menguasai industri insurans ini . Sama macam dahulu.

From the relevant minister's explanation, as above, the following are clear as to the way insurers generally operate their business and what the FSA 2013 intended to achieve:

(i)

firstly, the insurers operate with a mindset of repudiate first when a claim is made;

(ii)

insurers repudiate irrespective of whether the misrepresentation is intentional, negligent or innocent;

(iii)

because of the above, the purpose of the FSA 2013 is to impose a preventive supervisory role on the insurers;

(iv)

the Schedule creates a new duty on the insurers in respect of representations and disclosures at the pre-contractual stage with a proportionate remedy in the event the remedy is available to the insurers depending on the type of misrepresentation or non-disclosure.

His Lordship Abdul Rahman Sebli FCJ summed up Parliament's intentions as follows:

It is clear that Parliament's intention vide Schedule 9 of the FSA is to provide a check and balance as a way to supervise the insurance companies, to prevent them from easily repudiating liability without reasonable cause.

FSA 2013

Although the FSA 2013 came into operation on June 30, 2013 vide PU(B) 276/2013, the relevant provisions housed in s 129 and the Schedule only came into operation on January 1, 2015 vide PU(B) 552/2014. So as not to reinvent the wheel, in exploring the dynamics involved in s 129 and certain parts of the Schedule, parts of the judgment of her Ladyship Mary Lim JCA in the case of Balamoney will be set out verbatim, as her Ladyship has clearly captured and explained spot-on the intent behind

certain of the said provisions. Henceforth all reference to “paragraphs”, “subparagraphs” and “ the Schedule” refers to Schedule 9 unless stated otherwise.

Section 129 of the FSA 2013

It reads as follows:

129.

This section clearly sets out the scope of the Schedule, namely that it deals with matters as regards pre-contractual duty of disclosures and representations for all contracts of insurance in Part 2 and remedies for misrepresentations (and also non-disclosures) in Part 3.

The Schedule

For the sake of completeness and better understanding the relevant parts of the Schedule are set out below and, in that respect certain paragraphs not relevant to the scope of this article have been omitted:

PART 1

Preliminary

1. Application of Schedule and other laws

(1)

This Schedule shall not affect a contract of insurance entered into, varied or renewed before the date on which section 129 and this Schedule come into operation.

(2)

Where there is a conflict or inconsistency between a provision of this Schedule and the Contracts Act 1950, the provision of this Schedule shall prevail.

(3)

For the purposes 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.

2. Interpretation

In this Schedule —

“consumer” means the individual who enters into, varies or renews a consumer insurance contract, or proposes to do so with a licensed insurer;

“consumer insurance contract” means a contract of insurance entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business or profession.

3. Contracting out

(1)

A term of a consumer insurance contract, or of any other contract, is rendered void to the extent that it would put the consumer in a worse position in respect of the matters mentioned in subparagraph (2) than he would be in by virtue of the provisions of this Schedule.

(2)

The matters referred to in subparagraph (1) are —

(3)

This paragraph does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

PART 2

Pre-contractual disclosure and representations

4. Pre-contractual duty of disclosure for insurance contracts other than consumer insurance contracts

(1)

Before a contract of insurance other than a consumer insurance contract is entered into, varied or renewed, a proposer shall disclose to the licensed insurer a matter that —

(2)

The duty of disclosure shall not require the disclosure of a matter that:

(3)

Where a proposer fails to answer or gives an incomplete or irrelevant answer to a question contained in the proposal form or asked by the licensed insurer and the matter was not pursued further by the insurer, compliance with the proposer's duty of disclosure in respect of the matter shall be deemed to have been waived by the insurer.

(4)

A licensed insurer shall, before a contract of insurance is entered into, varied or renewed, clearly inform a proposer in writing of the proposer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

*171 5. Pre-contractual duty of disclosure for consumer insurance contracts

(1)

Before a consumer insurance contract is entered into or varied, a 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 and the rates and terms to be applied.

(2)

It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph (1).

(3)

Before a consumer insurance contract is renewed, a licensed insurer may either:

(4)

It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subsubparagraph (3)(a), or confirming or amending any matter under subsubparagraph (3)(b).

(5)

If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

(6)

Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under subparagraph (1) or subsubparagraph (3)(a), or fails to confirm or amend any matter under subsubparagraph (3)(b), or does so incompletely or provides irrelevant information, as the case may be, and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

(7)

A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

(8)

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 *172 relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

(9)

Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

6. Duty to take reasonable care

(1)

In determining whether a consumer has taken reasonable care not to make a misrepresentation under subparagraph 5(2) or (4), the relevant circumstances may be taken into account including —

(2)

Subject to subparagraph (3), the standard of care required of the consumer under subparagraphs 5(2) and (4) shall be what a reasonable consumer in the circumstances would have known.

(3)

If the licensed insurer was, or ought to have been, aware of any particular characteristics or circumstances of the consumer, the insurer shall take into account such characteristics or circumstances.

7. Misrepresentation in respect of insurance contracts

(1)

Part 3 of this Schedule —

(2)

The remedies set out in Division 2 shall be available to a licensed insurer for misrepresentation made by a consumer before a consumer insurance contract referred to in subsubpragraph (1)(b) was entered into, varied or renewed if —

(3)

For the purposes of this Schedule, a misrepresentation for which a licensed insurer has a remedy in Division 2 against a consumer may be classified as —

(4)

A misrepresentation is deliberate or reckless if the consumer knew that —

(5)

A misrepresentation made dishonestly is to be regarded as having being made deliberately or recklessly.

(6)

A misrepresentation is careless or innocent, as the case may be, if it is not deliberate or reckless.

(7)

It is for the licensed insurer to show that a misrepresentation was deliberate or reckless on a balance of probability.

(8)

Unless the contrary is shown, it is to be presumed that the consumer knew that a matter about which the licensed insurer asked a clear and specific question was relevant to the insurer.

*174 PART 3

Non-contestability and remedies for misrepresentations

Division 2

Remedies for misrepresentation

14. Application of Division

This Division sets out the remedies available to a licensed insurer for a misrepresentation by a consumer made in respect of:

(a)

a consumer insurance contract of life insurance which has been effected for a period of two years or less; and

(b)

a consumer insurance contract of general insurance.

15. Remedies for deliberate or reckless misrepresentation

If a misrepresentation was deliberate or reckless, a licensed insurer may avoid the consumer insurance contract and refuse all claims.

16. Remedies for careless or innocent misrepresentation

(1)

If a misrepresentation was careless or innocent, the licensed insurer's remedies shall be based on what it would have done if the consumer complied with the duty set out in paragraph 5 and subparagraphs (2) to (4) are to be read accordingly.

(2)

If the licensed insurer would not have entered into or renewed the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but shall return any premium paid by him.

(3)

If the licensed insurer would have entered into or renewed the consumer insurance contract, but on different terms excluding terms relating to the premium, the contract is to be treated as if it had been entered into or renewed on those different terms if the insurer so requires.

(4)

In addition, if the licensed insurer would have entered into or renewed the consumer insurance contract, whether the terms relating to matters other than the premium would have been the same or different, but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim as may be specified by the Bank.

Scope of the FSA 2013

Firstly, according to subparagraph 1(1) it only applies to contracts of insurance which were entered into, varied or renewed after January 1, 2015 which means that contracts of insurance before that will be dealt with under s 150(1) to (3) of the Insurance Act 1996 (Act 553).

*175 Also, the FSA 2013 has created two classes of insurance contract, namely "consumer insurance contract" and "non-consumer insurance contract". The FSA 2013 only applies to the former but not the latter.

"Consumer insurance contract" is defined in paragraph 2 as "a contract of insurance entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business or profession." Therefore, the protection afforded under the FSA 2013 does not apply if the contract of insurance is taken for commercial purposes and an obvious instance being a vehicle registered under a business entity such as those involved in the transportation sector. Although a moot point, it may even exclude instances where the contract of insurance is taken under an individual's name but the vehicle is being used for business purposes. This effectively removes many of the said policies being subject to the requirements of the FSA 2013 before repudiation can even take place. A possible rationale for excluding vehicles used for business purposes could be that in the event the contract of insurance is repudiated, the corporate entity that owns the vehicle would be able to pay the damages awarded to the third-party. However, it is worth questioning whether the small and medium enterprises, who eke out a day-to-day living, will be able to pay the damages in the event the insurer repudiates liability on the ground that the vehicle was used for business or business purposes and that there was a breach of the said duty?

In the case of "contracts other than consumer insurance contracts" the law has not changed and what is stated in subparagraphs 4(1) to (3) is the same as found in s 150(1) to (3) of the Insurance Act 1996 wherein the insured owed the said duty at the pre-contractual stage to make full and frank disclosures when purchasing the insurance whether any questions were asked by the insurer save and except that in subparagraph 4(4) it is stated that the licensed insurer must inform in writing of the proposer's pre-contractual duty of disclosure which continues until the time the contract is entered into, varied or renewed.

Where the protection accorded by the FSA 2013 applies there are certain provisions which fortify its application. In subparagraph 1(2) it is stated that in the event of conflict or inconsistency between the provisions in the FSA 2013 and the Contracts Act 1950 the provisions of the Schedule shall prevail. In paragraph 3 it is clearly stated that the insurers cannot contract out of the requirements accorded by the FSA 2013 to the insured by inserting terms and conditions in the contract of insurance in respect of matters relating to disclosures and representations.

Of great importance and relevant to tortious claims arising from road accidents is subparagraph 1(3) where it is stated in clear, unequivocal and mandatory terms that the requirements of the Schedule must be complied with before "a consumer insurance contract which provides cover for *176 third-party risk may be avoided by a licensed insurer for misrepresentation". In Balamony her Ladyship Mary Lim JCA stated and I quote:

In other words, in the determination of the respondent's application for a declaration under sub-s. 96(3) that the respondent is entitled to avoid liability to the appellant for third party risks under the renewed policy due to Selvamani or whoever's misrepresentation, the court is obliged to apply the specific regime in Schedule 9 . (Emphasis added.)

The “specific regime” in FSA 2013 for consumer insurance contracts

An elaborate specific regime is set out in paragraph 5 under the heading “Pre-contractual duty of disclosure for consumer insurance contracts” and it applies to the purchase of a new contract as well as to variations or renewals of contracts of insurance. Since the provisions under paragraph 5 relate directly to the duties and obligations on the part of the prospective insured (who will at times be referred to also as the proposer or customer) and the insurer at the pre-contractual stage, each provision will now be dealt with in detail along with the consequences of failing to abide with it.

Subparagraph 5(1)

This provision imposes a duty on the insurer to enquire from the proposer in cases of purchase of a new contract of insurance or variation of an existing one what the insurer deems relevant in deciding whether to accept the risk and if so, what terms as well as the premium to impose. This was explained by her Ladyship Mary Lim JCA in Balamoney as follows:

On the part of the insurer, the new statutory regime gives the insurer the right to request answers by posing questions, either specific or general. In the case of a new contract or one which is being varied, the insurer may request or pose to the customer questions to elicit answers or information which will assist the insurer on whether it will accept the risks, and what rates and terms it is to impose — see sub-para. 5(1).

Therefore, the days of the insurer remaining in abject silence when a new contract of insurance is bought or renewed is over. Now the Schedule imposes a positive duty on the insurer to enquire whatever the insurer wants to know at the pre-contractual stage, which shall be termed as the “Duty of Enquiry”. Since the word “may request” is used one may be inclined to think that this duty of enquiry is directory but when read with subparagraphs 1(3), 5(5) and (6) and subparagraphs 7(1) to (8) it will be apparent that it is a mandatory requirement (which will be dealt with later under a separate heading).

Subparagraph 5(2)

This subparagraph imposes a corresponding duty on the prospective insured to take reasonable care to ensure no misrepresentation is made in respect of *177 the questions asked by the insurer. This was explained by her Ladyship Mary Lim JCA in Balamoney as follows:

Where the insurer undertakes this exercise , the consumer owes a corresponding duty to take reasonable care not to make any misrepresentations to the insurer when answering any of the questions posed — see sub-para. 5(2). (Emphasis added.)

Basically, this subparagraph reaffirms the need on the part of the prospective insured to be completely truthful to ensure compliance with the said duty in answering questions posed by the insurer. Therefore, to say that the Schedule has completely taken away the said duty owed by the prospective insured at the pre-contractual stage is far from the truth. However, it is subject to the duty of enquiry where the insurer must undertake the obligation imposed under subparagraphs 5(1) or 5(3)(a) or (b) which triggers (hereinafter “the trigger mechanism”) the need for the prospective insured to comply with the said duty when answering them which will be deemed as representations. If the trigger mechanism is not activated by the insurer, the insurer will not be able to allege breach of the said duty on the part of the insured entitling them to the said declaration. This was stated by her Ladyship Mary Lim JCA in Balamoney as follows:

It is apparent from these provisions, that where the insurer is in itself in breach either by not pursuing or safeguarding its own interests and obligations, it will not be open to the insurer to approach the court for a declaration under s. 96(3) of Act 333 to void the insurance contract . This becomes clearer when Parts 2 and 3 are examined closely. (Emphasis added.)

Subparagraphs 5(3)(a) or (b)

These subparagraphs deal with renewals of the insurance policy which is akin to the purchase of new contracts or variations, a similar regime needs to be complied with by the insurer. This was explained by her Ladyship Mary Lim JCA in Balamoney as follows:

In such a situation, the insurer may pose one or specific questions , once again, for the purpose of ascertaining whether to assume the risks, and what rates or terms are to be imposed [as in para 5(1) Sch. 9]. Alternatively, the insurer may give to the consumer a copy of any matter previously disclosed by the consumer in relation to the contract and request the consumer to either confirm or amend any change to the matter . (Emphasis added.)

Subparagraph 5(4)

This subparagraph again affirms the need for the proposer to fulfil the said duty as required under subparagraph 5(2) if the insurer complies with the trigger mechanism set out in subparagraphs 5(3)(a) or (b) .

Subparagraph 5(5)

This subparagraph worded in mandatory fashion states clearly that in the event the insurer does not undertake its duty of enquiry as required under subparagraphs 5(1) and (3) then the need to comply with the said duty by the prospective insured is deemed to have been waived by the insurer (hereinafter the "doctrine of waiver"). The doctrine of waiver deems that there was no breach of the said duty by the prospective insured, even if factually there was one, for example, a failure to disclose a material fact and therefore the insurer will be devoid of the basis to seek the said declaration. This was explained by her Ladyship Mary Lim JCA in Balamoney as follows:

This duty of utmost good faith does not end with the imposition of duty on the consumer. In relation to the insurer, the doctrine of waiver operates. Where the insurer does not undertake the exercise of posing questions when considering whether or not to assume risks and enter the contract of insurance with the consumer, the insurer is deemed to have waived the right to complain that there has been a failure of disclosure — subpara. 5(5).

Subparagraph 5(6)

This subparagraph deals with the scenario where under subparagraph 5(1) or sub-subparagraph (3)(a) the prospective insured fails to answer the question asked or gives an incomplete or irrelevant answer or under sub-subparagraph (3)(b) the prospective insured fails to confirm or amend any matter or does so incompletely or provides irrelevant answers and the insurer fails to pursue the matter in order to obtain the complete or relevant answer, then the prospective insured's duty of disclosure is deemed to have been waived. This was explained by her Ladyship Mary Lim JCA in Balamoney as follows:

The insurer is also deemed to have waived its right to complain in the second situation where questions are posed but the consumer has come up short in their responses or have simply failed to respond to those questions. Now, if either of those situations arise, that is where the consumer fails to answer, or where the consumer gives an incomplete or irrelevant answer, it is implied in sub-para. 3(6) [should read as 5(6)] that the insurer is to follow up with the consumer on such failure. Where the insurer itself fails to do so, where it does not pursue the matter, the consumer's duty of disclosure " shall be deemed to have been waived by the insurer" under sub-para. 5(6).

In short, if the insurer does not take steps to elicit all relevant complete answers, once again the doctrine of waiver comes into play.

Subparagraph 5(7)

Under this subparagraph, it is mandatory on the part of the insurer to inform in writing to the prospective insured before a consumer insurance contract is entered into, varied or renewed the prospective insured's said duty under the Schedule. This is a new requirement and since it is couched in mandatory *179 terms, the implication is that failure to do so would prevent the insurer from seeking the said declaration to repudiate the contract. The Federal Court in the case of MMIP v Balamoney[13] upheld the Court of Appeal's decision on the basis that there was no evidence to show that the insurer had complied with the said subparagraph.

Note: If one were to peruse subparagraphs 5(1) to (6), they deal with the obligation on the part of the insurer to activate the trigger mechanism by asking or posing questions to the prospective insured at the pre-contractual stage (duty of enquiry) and the obligation on the part of the prospective insured to answer them honestly and truthfully in fulfilment of the said duty. If the insured fails to comply with the said duty in answering the questions, then the insurer will be entitled to apply for the said declaration when the contingency arises. The answers by the prospective insured are in fact representations to the insurer and it need only be confined to the questions posed.

Therefore, subparagraphs 5(1) to (6) per se do not deal with the failure to disclose any information that the prospective insured is aware of and knows may have a bearing on whether the insurer wants to provide coverage. It relates only to information given by the prospective insured in response to questions asked by the insurer. So far, the courts have been consistent in the interpretation of the provisions found in subparagraphs 5(1) to (6) with the leading case being that of Balamoney .

Subparagraphs 5(8) and (9)

Although an in-depth analysis will reveal that both the aforesaid paragraphs deal with entirely different issues, in a few cases the courts have interpreted them as complimenting or supporting one another in arriving at their decisions. Therefore, the provisions of both the aforesaid subparagraphs will be discussed together first based on the court cases and later separately.

The provisions of both the aforesaid paragraphs have been the subject of judicial scrutiny in the following cases, namely Liberty Insurance Berhad v Marrison Anak Sidai & Anor[14] (“Liberty Insurance”); AmGeneral Insurance Berhad v Shahrul Azmin bin Abd Aziz[15] (“AmGeneral v Shahrul Azmin") and Etiqa General Takaful Berhad v Personal Representative of Fatimah bte Adam, deceased & Ors[16] (“Etiqa General Takaful”) (hereinafter “the three cases”). Let us look at how the courts have interpreted the said paragraphs in each of these cases and whether they have captured Parliament’s intent in enacting them.

*180 Liberty Insurance was a case where the insurer had sought a declaration under s 96(3) of the RTA on the ground that the insurance policy in question was issued after the accident. His Lordship Mohd Nazlan Mohd Ghazali J’s (as he then was) reasoning based on the Schedule in allowing the said declaration sought by the insurer is as follows:

[39] Whilst subparagraphs (1) and (3) of para 5 of Schedule 9 to the FSA on pre-contractual duty of disclosure do provide for the insured's duty of disclosure to be waived if the insurer chooses not to request the insured answer specific questions relevant to the decision-making of the insurer whether or not to accept the risks and on the setting of the pertinent terms, subparagraph (8) nevertheless still imposes on the insured the duty to take reasonable care to disclose any matter that he knows to be relevant to the decision making of the insured .

[41] Perhaps most significantly, it is in any event made explicit by para 5(9) of Schedule 9 that the duty of the utmost good faith on the part of both the insured and the insurer in respect of the dealings with one another continues unaffected by the provisions of the Schedule . Thus, the First Defendant would continue to be under the duty to make the requisite disclosure in adherence to the duty of utmost good faith, even after the Policy had been issued.

[42] Accordingly, given the clear requirements of Schedule 9 to the FSA , it can no longer be the law that failure to ask the potential insured to answer pre-qualification questions necessarily waives the insured's disclosure obligations under the duty of the utmost good faith .

[43] This must be correct . For what is the point of giving effect to a contract of insurance which has been obtained irregularly? It is absolutely unacceptable for the Court to countenance a state of affairs which has a clear effect of condoning or worse, even encouraging road users to drive without being in possession of road tax and insurance coverage until the occurrence of an accident. This is certainly a blatant violation of public policy at the same time. (Emphasis added.)

His Lordship’s view is that, even if the trigger mechanism has not been activated by the insurer as required under subparagraphs 5(1) or (3), the prospective insured was still under a duty to disclose any information that he thinks might be relevant to the insurer’s decision to accept the risk or not. In other words, according to his Lordship, the obligations imposed on the insurer by subparagraphs 5(1) or (3) do not extend to the duty of disclosure of any other matter that the prospective insured thinks might be relevant to the insurer’s decision-making process by virtue of the provisions in subparagraphs 5(8) and (9). Therefore, his Lordship had interpreted subparagraphs 5(8) and (9) as being independent of subparagraphs 5(1) or (3). Is such an interpretation correct?

*181 In AmGeneral v Shahrul Azmin , her Ladyship Wong Chee Lin J in interpreting the provisions of the Schedule stated as follows and I quote:

[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 [subparagraph 8] 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 2 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.

Her Ladyship's initial view was that subparagraph 5(5) contradicts subparagraph 5(8) but in any event erred in stating in a blanket fashion that under subparagraph 5(8) the duty of disclosure by the prospective insured "extends beyond that of simply answering the specific question posed to him". However, a crucial matter her Ladyship had failed to address was when is a prospective insured under duty to disclose relevant matters beyond the questions asked? Is it, even if the policy is issued in silence by the insurer, without undertaking the duty of enquiry? As will be seen later it cannot be the case.

Etiqa General Takaful was with regard to the validity of a car insurance policy that was renewed in the name of the insured after her demise without the knowledge of the insurer. Upon discovery, the insurer contended that there was a breach of the duty of utmost good faith by the insured and sought a declaration under s 96(3) of the RTA. His Lordship Ong Chee Kwan J in arriving at his decision, inter alia, was referred to the provisions of the Schedule and the case of Balamoney by counsel for the third-party and the aforesaid two cases were referred to by counsel for the insurer. It was an accepted fact that the policy in question was a "consumer insurance contract" as defined under the FSA 2013 (paragraph 22 of the judgment) and that there was no evidence that the insurer had complied with subparagraph 5(3) by posing questions to the person renewing the insurance before entering the contract (paragraph 30 of the judgment). Despite the lack of compliance with subparagraph 5(3) by the insurer, his Lordship in *182 allowing the declaration, interpreted subparagraph 5(8) as follows, and I quote:

[40] Subparagraph (8) stipulates the scope of the consumer's duty of disclosure i.e the consumer is to take reasonable care to disclose to the licensed insurer any matter 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.

[41] The knowledge of the material fact which should have been disclosed must be capable of being imputed to the person providing information to the underwriter or must be a fact of which the person ought to have been aware in the ordinary course of business. (In this regard, whether this duty to " take reasonable care to disclose to the licensed insurer any matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and rates and terms to be applied" is equated to a duty of " a fair presentation of the risks" is a matter for another day).

[42] Subparagraph (8) however expressly carved out from the general duty of disclosure " matter other than in relation to subparagraph (1) and (3) ". (Emphasis added.)

Further, his Lordship having considered subparagraphs 5(1), (3), (4) and (6) proceeded to distinguish subparagraphs 5(1) to (6) and subparagraphs 5(7) to (9) as follows:

[38] It seems to me that in interpreting Paragraph 5, one must bear in mind subparagraph (9) which expressly refers to the existence of underlying duty of utmost good faith on both a consumer and licensed insurer in their dealings with each other in a contract of insurance notwithstanding the provisions in Schedule 9 .

[48] Whilst subparagraphs (1) to (6) deal with the consumer's duty of disclosure with regards to information required by the licensed insurer, subparagraphs (7) to (9) in turn deal with the duty of disclosure by the consumer without any prompting by the licensed insurer. (Emphasis added.)

From the above, his Lordship is of the view that under subparagraphs 5(7) to (9) the prospective insured was simpliciter under a general duty to disclose to the insurer any matter that he knows to be relevant to the decision whether to accept the risk or not, even if the insurer had not set into motion the trigger mechanism under subparagraphs 5(1) or (3) at the pre-contractual stage by asking questions first. His Lordship found fortification for his view in subparagraph 5(8) because it is referring to " matter other than in relation to subparagraphs (1) and (3) ". The said reasoning of his Lordship can also be found in paragraph [50] of the judgment and I quote:

[50] This is the reason why subparagraphs (4) and (6) refer only to the duty "not to make a misrepresentation" and make no mention of the duty to make full disclosure of material facts. The relevant disclosure in *183 subparagraphs (1) and (3)(a) are disclosure in response to a request by the insurer of matter not generally within the consumer's general duty of disclosure . (Emphasis added.)

Also, his Lordship was of the view that since subparagraphs 5(4) and (6) only refer to misrepresentation and do not talk in terms of disclosures therefore what is asked and answered under

subparagraphs 5(1) and (3) does not encompass the prospective insured's general duty of disclosure.

Basically, his Lordship is of the view that the doctrine of waiver only applies to answers (representations) in respect of questions that the insurer should have asked in its normal course of business under subparagraphs 5(1) or (3) but the doctrine of waiver has no application in respect of a failure to disclose any matter which the prospective insured knew would be relevant to the insurer's decision to accept or decline the risk. His Lordship stated it as follows:

[54] I agree with the observation my [by] Justice Mohd Nazlan in Liberty Insurance Berhad that the failure to ask the potential insured to answer pre-qualification questions will not necessarily result in the waiver of the insured's disclosure obligations under the duty of the utmost good faith .

His Lordship coming to the case in hand concluded as follows:

[56] Thus, in the case where an application for an insurance contract is made after the happening of the very event intended to be insured against, merely because the insurer may have failed to request any specific questions from the consumer will not result in the waiver of the consumer's duty to disclose the happening of the said event as this would be a duty coming under subparagraphs (8) and (9) .

[57] Similarly, in the case where the contract is entered into or renewed after the consumer has passed away, the failure or omission by the insurer to request specific questions from the consumer will also not be deemed as the insurer having waived the disclosure of the said fact. Such non-disclosure will result in the insurance contract being voidable at the instant of the insurer . (Emphasis added.)

Basically, his Lordship allowed the declaration sought under two grounds. Firstly, under subparagraph 5(8) that the prospective insured was still under a general duty of disclosure of the insured's demise irrespective of the fact that no questions were asked as regards it under subparagraph 5(3) by the insurer. In other words, the duty of disclosure by the prospective insured remains unaffected by the provisions found in the Schedule. Secondly, as the contract was renewed in the name of the deceased person, according to contract law the insurance policy was void ab initio and therefore s 129 of the FSA 2013 and provisions of the Schedule have no role to play in determining the outcome of the declaratory proceedings, which will be dealt with later in length.

*184 The question is whether the interpretation of subparagraphs 5(8) and (9) in the three cases captured Parliament's intent in enacting s 129 and the Schedule? That brings us to the realm of statutory interpretation and its canons and maxims, which with all due respect were never adverted to by the courts in the three cases. Although they are numerous authorities on the matter, a good starting point would be s 17A of the Interpretation Acts 1948 and 1967 where it is clearly stated as follows:

17A. Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Further in Krishnadas a/l Achutan Nair & 3 Ors v Maniyam a/l Samykano ,[17] the Federal Court said as follows:

The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment.

More importantly in Foo Loke & Anor v Television Broadcast Ltd & Ors ,[18] where his Lordship Abdoolcader SCJ said and I quote:

The court ⋯ is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ⋯

In Jayakumar a/l Rajoo Mohamad v CIMB Aviva Takaful Berhad ,[19] his Lordship Vernon Ong Lam Kiat JCA, stated as follows:

But where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way it considers reasonable .

Also, in Dato' Seri Anwar Ibrahim v PP ,[20] the court stated as follows:

Parliament must be taken to mean what it says. The courts in interpreting statutes must not be seen to be splitting hairs or producing any inconsistency or absurdity.

From the above, the primary aim when interpreting statutory provisions is that they must "promote the purpose or object underlying the Act" and that *185 it must be done "by reference to the words appearing in the particular enactment" and "every word" must be given its due recognition and " not be disregarded" as Parliament must have put it there for a purpose. The courts are not at liberty in the guise of judicial interpretation to dabble in judicial legislation.

Seen in the light of the above, with all due respect, in the three cases, important phrases and words were ignored when interpreting the provisions of subparagraphs 5(8) and (9) and only selected parts were considered in arriving at the decisions.

Now let us see how the provisions of subparagraphs 5(8) and (9) should have been interpreted taking into consideration all words and phrases used therein in such a manner that all the subparagraphs in paragraph 5 of the Schedule are consistent with one another and promote the legislative intent. First, we shall look at subparagraph 5(8) and thereafter subparagraph 5(9).

Subparagraph 5(8)

For ease of reference, the said paragraph is set out below again and underlined for emphasis.

5.

The most important phrase in the said subparagraph but not addressed or even alluded to in the three cases is the phrase " Subject to subparagraphs (1) and (3), " (hereinafter "the phrase"). What is the legal implication of the phrase?

For that, we turn to the case of DP Vijandran v Majlis Peguam ,[21] a case that dealt with whether the Bar Council was under a peremptory duty to issue to the plaintiff the Sijil Annual. The meaning of the phrase came-up for consideration and his Lordship Low Hop Bing interpreted it as follows and I quote:

In my judgment, one of the most important provisions which requires the determination of the Court in the instant case is s. 32(1)(a) which reads as follows :

" Subject to this section and ss. 33 and 34 , the Bar Council shall, at any time after the month of June in the preceding year, issue a Sijil Annual to an *186 Advocate and solicitor within twenty-one days of an application under subsection (2) if:

It is absolutely and abundantly clear to me that s. 32(1)(a) has been expressly made "subject to" ss. 33 and 34 . The inclusion of the expression "subject to" in s. 32(1)(a) means that this particular provision is not an independent provision and is therefore not intended to stand on its own. The scope, application, operation, effect or implication of s. 32(1)(a) is bound, restricted or limited by the provisions of ss. 33 and 34 so that when the provisions of ss. 33 and 34 are invoked in any particular instance, these provisions being the dominant provisions will prevail or take precedence while the subservient provisions in s. 32(1)(a) will then play a secondary role or take a back seat, so to speak .

In Government of the Federation of Malaya v. Surinder Singh Kanda [1961] MLJ 121 at 138, Neal J held that the expression "subject to" has the effect of the words following it negativing the statement preceding it. In other words, in its application to the instant case, s. 32(1)(a) is negatived by the provisions of ss. 33 and 34. The learned Judge referred to the judgment of Stout, CJ in the New Zealand case of Benge & Pratt v. Guardian Assurance Company [1915] 34 NZLR 81 at p. 86 to the effect that "subject to" must mean "swallowed up" or "negatived by". (Emphasis added.)

Also, refer to the case of Kunn Rekon Holdings Sdn Bhd v PP (and 2 Other Applications)[22] for a similar interpretation.

Based on the aforesaid two cases, subparagraph 5(8) cannot be construed as an independent provision, as decided in the three cases because it cannot stand on its own. In fact, the "scope, application, operation, effect or implication" of subparagraphs 5(8) "is bound, restricted or limited" by the provisions of subparagraphs 5(1) or (3).

In other words, subparagraphs 5(1) or (3) being "the dominant provision will prevail or take precedence while the subservient provision" in subparagraph 5(8) "will then play a secondary role or take a back seat, so as to speak". Therefore, the effect of the phrase is that, the prospective insured is only under a duty to take reasonable care to disclose to the insurer any matter other than

that asked under subparagraphs 5(1) or 5(3) which he thinks is relevant to the decision of the insurer to accept the risk, " if the insurer had activated the trigger mechanism first by asking the prospective insured any questions that would have been relevant to the decision process as required under subparagraphs (1) or (3) ". Simply put, if the trigger mechanism in subparagraphs 5(1) and (3) is not activated subparagraphs 5(8) does not come into play. Therefore, the right of the insurer to remain silent at the *187 pre-contractual stage and still seek the said declaration on the grounds of non-disclosure is over.

Since in the three cases, there is no proof that questions were asked by insurers to the insureds as required under subparagraphs 5(1) and (3) and also no evidence of compliance with subparagraph 7 before the said policy was issued, the insurers, in fact, cannot rely on subparagraph 5(8) to escape liability under the policy .

Subparagraph 5(9)

Once again for ease of reference, the said subparagraph is set out below and underlined for emphasis.

5.

Before embarking on how this paragraph should be interpreted, for the sake of completeness let us once again refer to how it was interpreted in the case of Liberty Insurance and Etiqa General Takaful .

In Liberty Insurance the court basically concluded by reference to subparagraph 5(9) that the duty of disclosure owed by the insured to the insurer continues " unaffected by the provisions of the Schedule " presumably on the basis that subparagraph 5(9) starts with the phrase " Nothing in this Schedule shall affect the duty of utmost good faith …". Of course, if parts of subparagraph 5(9) are read in isolation, it seems to convey that impression. However, with all due respect, his Lordship in the High Court fell into such an error by reading it so.

In Etiqa General Takaful , his Lordship was of the view that "in interpreting Paragraph 5, one must bear in mind subparagraph (9) which expressly refers to the existence of an underlying duty of utmost good faith on both a consumer and licensed insurer in their dealings with each other in a contract of insurance notwithstanding the provisions in Schedule 9 ". Again, we see a superficial reading of the words in subparagraph 5(9) and it seems to bring to nought the objective intended to be achieved by the legislature in enacting subparagraphs 5(1) to (8) .

In the above situation, where on a superficial reading there seems to be an apparent conflict between subparagraphs (when in fact none exists), the correct approach would be to read subparagraph 5(9) in the context of the entire Schedule bearing in mind Parliament's intent in enacting it. In the Federal Court case of Chor Phaik Har v Farlim Properties Sdn Bhd[23] where such *188 a situation arose when dealing with construing the proviso "provided" in s 322(1) of the National Land Code 1965 as to whether a caveat can be entered to protect a specific interest or a specific portion of the land. His Lordship Edgar Joseph Jr FCJ at p 2114 line 19 stated:

It is right to say at the risk of being trite, that in interpreting a statute, what the court is endeavouring to is to give effect to the object and intent of Parliament in enacting the statute.

Further and more importantly, his Lordship Edgar Joseph Jr FCJ after considering the arguments for and against accepting a particular interpretation for the proviso and before arriving at the decision stated that:

However the words of the proviso (which is equally applicable to subparagraph 9) must be read in their context. By this is meant, we must not only read the words of the proviso in the light of s. 322 as a whole but also in the light of the Code as a whole . Thus, it was said by the court in Arataki Honey Ltd v Minister of Agriculture and Fisheries (1979) NZLR 311 at 316:

"The Act must be read as a whole and that all sections must be read bearing in mind the provisions of other sections. It is not necessary for one section to refer specifically to another section before the first section can be construed as being subject to or overriding or in some other way qualifying the other section ." (Emphasis added.)

So, also, in Canada Sugar Refining Co v The Queen [1898] AC 735 Lord Devey said (at p 741):

" Every clause of a statute should be construed with reference to the context and other clauses in the Act, so far as, possible , to make a consistent enactment of the whole statute or series of statutes relating to the subject matter ." (Emphasis added.)

From the above case, subparagraph 5(9) cannot be construed in isolation or read at face value, as done by the courts, but it must be done in the context of the entire Schedule and in particular subparagraphs 5(1) to (8) "so as to make a consistent enactment of the whole" Schedule.

Also pertinent to note is that, although subparagraph 5(9) is housed under paragraph 5 with the heading "pre-contractual duty of disclosure for consumer insurance contracts" it has in fact nothing to do with duty of disclosure at the pre-contractual stage because it speaks of dealing between the insured and the insurer " after a contract of insurance has been entered into, varied or renewed ". Therefore, although placed under paragraph 5 and giving rise to a conundrum, Parliament in its eternal wisdom must have placed subparagraph 5(9) there to reiterate that the post-contractual duty of utmost good faith owed by the insured to the insurer remains unaltered by the Schedule. One fact that bears testimony to such an interpretation is the example given therein, namely it talks of "the making and paying of a claim." Making and paying of claims can only be done after the contract of insurance *189 had been entered into when the contingency occurs and in making the claim the insured must fulfil the duty of utmost good faith as it was understood pre-Schedule 9, namely the insured must make full and frank disclosure without any questions being asked by the insurer. The word "including" preceding the phrase "the making and paying of a claim" infers that such a duty is owed by the insured in all the processes and dealings between the insured and the insurer post-contractual. In fact, it would have been clearer if subparagraph 5(9) had been tweaked slightly and worded as follows:

Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed, including the making and paying of a claim .

If subparagraph 5(9) is interpreted as applicable only in the post-contractual scenario then the entire paragraph 5 becomes a consistent enactment.

Three other issues merit consideration, namely whether the provisions of the Contracts Act 1950 supersedes the provisions of the Schedule to render the contract of insurance void ab initio , whether compliance with the provisions of the Schedule is mandatory on the part of the insurer in respect of consumer insurance contract as defined therein and has the Schedule changed the mode of applying for the said declaration. These three issues will be discussed below.

Contracts Act 1950 and the Schedule

Although the facts in Balamoney ' s case and the case before his Lordship Nazlan J (as he then was) in Etiqa General Takaful were identical in that, the contracts of insurance were renewed in the name of the deceased owners, his Lordship distinguished them by stating that Balamoney only dealt with the provisions of s 129 and the Schedule and that these provisions do not regulate the legal requirements for the formation of the contract of insurance at all . I quote his Lordship:

[60] The section 129 and Schedule 9 are not provisions regulating the legal requirements needed for the formation of the contract of insurance at all. In fact, the section 129 and Schedule 9 work on the assumption that there is a valid contract in existence which is voidable where there is a breach of duty of disclosure unless deemed waived under the provisions.

[62] In other words, the Schedule shall apply only to determine the voidability or otherwise of an existing and valid consumer insurance contract covering for third party risks.

[63] Thus, it is my respectful opinion that section 129 and Schedule 9 will have no application in a case where the contract of insurance never in fact and in law come into existence or is void ab initio . (Emphasis added.)

*190 It must be noted that at paragraph [57] of the judgment, his Lordship stated that failure to disclose relevant information will result in the contract being voidable but at paragraph [63] states it will be void ab initio . In support of his Lordship' s contention that the contract will be void ab initio reference was made to the case of Malaysia Motor Insurance Pool v Eastern Moon Enterprise & Anor [24] wherein reliance was placed on s 11 of the Contracts Act 1950 which deals with capacity to enter a valid contract.

With all due respect, his Lordship' s view that consumer insurance contract must be valid under the provisions of the Contracts Act 1950 before they can be subjected to scrutiny under the provisions of the Schedule before the declaration can be granted, is with all due respect misplaced in the light of clear provision in subparagraph 1(2) wherein it is stated as follows:

(2) Where there is a conflict or inconsistency between a provision of this Schedule and the Contracts Act 1950, the provision of this Schedule shall prevail.

In short, according to subparagraph 1(2) even when a consumer insurance contract has come into being, in violation of the provisions of the Contracts Act 1950, its validity must be determined solely by reference to the Schedule.

Are the provisions under the Schedule mandatory or directory?

As I had alluded to earlier in this article, the issue of whether the provisions in the Schedule are mandatory or merely directory when dealing with an application for the said declaration is an important one.

The starting point is subparagraph 1(3) which reads as follows:

Firstly, in Balamoney the court by reference to subparagraph 1(3) made it clear that when the insurer is seeking the said declaration "the court is obliged to apply the specific regime in Schedule 9" because Parliament has used the phrase "shall apply" and I quote her Ladyship:

Further, and in any event, sub-para. 1(3) specifically provides that Schedule 9 "shall apply" to determine where the insurer, such as the respondent, is in court for a declaration under s. 96(3) of Act 333 so as to avoid providing cover for risks to third parties such as the appellant on the ground of misrepresentation. In other words, in the determination of the *191 respondent's application for a declaration under sub-s. 96(3) that the respondent is entitled to avoid liability to the appellant for third party risks under the renewed policy due to Selvamani or whoever's misrepresentation, the court is obliged to apply the specific regime in Schedule 9 . (Emphasis added.)

The case of Balamoney was affirmed by the Federal Court in MMIP v Balamoney on September 3, 2020 after the appeal was heard on its merits.

For the sake of completeness, although the word "may" appears in subparagraphs 5(1) and (3) and is open to argument that it gives the impression that the insurer has a discretion whether to ask the relevant questions or not at the pre-contractual stage, in fact, the insurer has none when Parliament's intent in enacting it is gleaned from the relevant minister's speech as set out in (AmGeneral v Sa' Amran) . The word "may" in legal parlance does not necessarily mean the action that needs to be undertaken is merely directory or optional but in certain circumstances, it has been interpreted to be mandatory in its compliance.

In Black's Law Dictionary (Seventh Edition), it is stated:

In dozens of cases, courts have held may to be synonymous with shall or must , usu. in an effort to effectuate legislative intent.

In the case of Kekatong Sdn Bhd v Bank Bumiputra Malaysia Bhd ,[25] the issue was whether the service of notice in Form 16D was mandatory or directory as the word "may" was used. His Lordship Gopal Sri Ram sitting in the Court of Appeal held that notwithstanding the use of word "may" it was interpreted to mean mandatory to ensure that the protection accorded to the charger was not rendered illusory. To quote his Lordship:

When a provision in a statute uses permissive language such as "may", it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory. It is therefore wrong to assume as a matter of course that whenever Parliament uses the word "may" in a statute it never means "must".

It will become more apparent that the word "may" that appears in subparagraphs 5(1) and (3) means "must" and therefore mandatory and not directory when read together with subparagraphs 7(1)(b)(ii) and (2).

In subparagraph 7(1)(b)(ii), it is stated that the remedies available to the licensed insurer for misrepresentation are set out in Division 2 Part 3 Schedule 9. However, in subparagraph 7(2) it is categorically stated that the *192 remedies set out in Division 2 Part 3 Schedule 9 is only available to a licensed insurer:

for misrepresentation made by a consumer before a consumer insurance contract referred to in subsubparagraph (1)(b) was entered into, varied or renewed if —

Therefore, even if there was a misrepresentation or non-disclosure but it was not in breach of subparagraphs 5(2) or (4) the insurer is not entitled to seek the said declaration. Only if the insured is in breach of his duty under subparagraphs 5(2) and (4) because the insurer had asked or posed

questions in writing as required under subparagraphs 5(1) or (3) (the trigger mechanism) and the prospective insured made a misrepresentation in answering them and/or did not disclose any matter that he knew would have been relevant to the insurer's decision whether to accept the risk is the insurer entitled to the said declaration.

That is why in Balamoney her Ladyship Mary Lim JCA correctly stated that subparagraphs 7(3) to (8) found in Part 2 "spell out when misrepresentation may be properly regarded as misrepresentation for the purpose of securing a declaration under s. 96(3) of Act 333" and I quote:

Subparagraphs 7(3) to (8) found in Part 2 of the Schedule, spell out when misrepresentation may be properly regarded as misrepresentation for the purpose of securing a declaration under s. 96(3) of Act 333 . It is only where the conditions laid down in these provisions are met that there is misrepresentation for which the insurer may avail itself to the particular remedies spelt out in Part 3 . Those remedies involve the insurer returning any premiums paid, especially where the insurer is asserting that it would not have entered into or renewed the insurance policy in the case of innocent or careless misrepresentation is alleged. (Emphasis added.)

Further, in subparagraph 5(7), a mandatory duty is imposed on the insurer to inform the prospective insured in writing of the duty not to misrepresent when answering questions posed by the insurer and/or the need to disclose any matter that he knew would have been relevant to the insurer's decision whether to accept the risk.

Finally, under subparagraph 7(7), the burden is now cast on the licensed insurer to show whether a misrepresentation (or non-disclosure) is deliberate or reckless on a balance of probability and not on the insured.

The mode of commencing the said declaration

Before coming into being of the FSA 2013 and the Schedule, the common mode of commencing an application for the said declaration was by means of an originating summons supported by an affidavit. All that needs to be alleged in the affidavit is the alleged breach of the said duty. There need not be any averments as to the circumstances surrounding the purchase of the said policy to succeed in obtaining the declaration. It was akin to strict liability offence in criminal law without the need for mens rea or guilty mind. The breach of the said duty sufficed ipso facto to invalidate the said policy.

However, the Schedule has now changed the said scenario, in that, a need to look into the state of mind of the insured as well as the insurer is a pre-requisite before the said declaration can be granted. This is evident when one looks at subparagraph 7(2)(b) where it is stated that the remedies for misrepresentation is only available to a licensed insurer if it proves that had it known of the true facts it would not have entered the contract or would have done so on different terms. Also, in subparagraph 7(4) whether a misrepresentation is deliberate or reckless depends on the knowledge on the part of the prospective insured at the time of purchase. In Balamoney , her Ladyship Mary Lim JCA said that under the new regime whether misrepresentation exists or not is "very much fact sensitive" and I quote:

[45] As can be seen from sub-para. 7(4), much will depend on knowledge on the part of Selvamani or whoever renewed the insurance policy at the material time. Whether misrepresentation exists is therefore very much fact sensitive, confirming our earlier opinion on the unsuitability of how the whole application was conducted by the High Court . The burden is on the respondent to prove the existence of misrepresentation; that it would not have entered into or renewed the insurance policy had it been aware of the true facts; and we have no information as to when the policy was actually submitted for renewal and the circumstances of the renewal.

Also, according to subparagraph 6(1) as to whether the prospective insured had taken reasonable care not to make a misrepresentation and/or non-disclosure this paragraph requires the courts to look into the circumstances prevailing at the time the said policy was sold, with particular attention to the manner in which it was sold, to what extent the explanatory or publicity material was available and how clear and specific the insurer's question were. Under subparagraph 6(3), it even requires the insurer to take into account the "particular characteristics or circumstances" of the prospective insureds such as whether illiterate or suffering some form of handicap.

Since whether misrepresentation exists or not is a fact-sensitive issue coupled with need to know the mindset of the insured and the insurer at the pre-contractual stage as well as the need to fulfil the requirements of paragraph 6 the correct mode of commencement to obtain the said *194 declaration should be by way of writ with viva voce evidence taken after the Schedule came into effect.

Conclusion

Section 129 of the FSA 2013 and the Schedule were enacted with a specific intention in mind, that is, to accord greater protection to innocent road users so that their right to compensation under subsection 96(3) of the RTA in the event of an accident is guaranteed. More often than not unscrupulous insurers have latched on to the slightest breach of the said duty, knowingly or unknowingly by their insured at the pre-contractual stage to seek a declaration to avoid payment to the third party and thereby rendering illusory the right to compensation accorded under the RTA. Further, under the pre-Schedule 9 law, there was no need to take into consideration the circumstances and the way in which the contract was entered into. However now, it is specifically stated in subparagraph 6(1) that certain relevant circumstances must be taken into consideration in determining whether a prospective insured had or had not taken reasonable care not to make a misrepresentation under subparagraph 5(2) or (4).

Section 129 of the FSA 2013 and the Schedule have now made it mandatory for insurers to be pro-active at the pre-contractual stage by, inter alia, performing their obligations set out under subparagraphs 5(1) and (3) (the trigger mechanism) and informing the prospective insured in writing the importance of complying with the said duty at that stage. Therefore, the days of the insurers issuing the said policy in abject silence in post offices are over and this paradigm shift would also necessitate the insurers to review the manner of conducting their business if they still intend to seek the said declaration.

However, unfortunately, the protection accorded by s 129 of the FSA 2013 and the Schedule is still limited in its applicability as it is confined to consumer insurance contracts which thereby excludes from its protection a large portion of third-party insurance coverage which are issued to vehicles used in a business context. Therefore, to further enhance the protection it would be wise to expand the scope of protection accorded by s 129 of the FSA 2013 and the Schedule to all third-party insurance coverage taken under Part IV of the RTA irrespective of whether it was taken out in a business context or otherwise.

*160 Financial Services Act 2013 and the requirement of the Duty of Utmost Good Faith for Third-Party Insurance Cover under the Road Transport Act 1987

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1. [[2017] 7 MLJ 179.]

2. [(1766) 97 ER 1162.]

3. [[2006] 1 AMR 668; [2006] 1 MLJ 710; [2006] 1 CLJ 1, CA.]

4. [[2017] 3 AMR 697, CA.]

5. [[2019] 3 AMR 417, CA.]

6. [[2020] 2 AMR 211; [2020] 1 CLJ 476, CA.]

7. [[1997] 2 AMR 1489; [1997] 1 MLRA 43, SC.]

8. [[2022] 6 AMR 1; [2022] 8 CLJ 175, FC.]

9. [[2015] 2 AMCR 438; [2015] 7 CLJ 984, HC.]

10. [[1941] 1 All ER 123.]

11. [[1942] 2 KB 52.]

12. [See SV Namasoo, "The Concept of Insurable Interest and the Road Transport Act 1987" [2018] LR 405.]

13. [Unreported, Rayuan Sivil No. 02(f)-24-03/202(b).]

14. [[2018] 6 AMR 893; [2019] 12 MLJ 763; [2018] MLRHU 1038, HC.]

15. [[2019] MLJU 671.]

16. [Unreported, WA-24NCC-346-08-2021.]

17. [[1997] 1 AMR 997; [1997] 1 CLJ 636, FC.]

18. [[1985] 2 MLJ 35.]

19. [[2015] 4 AMR 329, CA.]

20. [[2010] 4 AMR 292; [2010] 4 CLJ 265, FC.]

21. [[1995] 2 AMR 1084; [1995] 2 CLJ 815, HC.]

22. [[1996] 2 CLJ 689.]

23. [[1994] 3 AMR 2103, FC.]

24. [[2018] MLJU 779.]

25. [[1998] 2 AMR 1769; [1998] 2 CLJ 267, CA.]