Neutral Citation Number: [2019] EWCA Civ 261

Case No: A2/2017/2910

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
Mr Justice Turner
HQ15X03146

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LORD JUSTICE HADDON-CAVE

- -

Between:

FRIENDS LIFE LIMITED	**Appellant**
- and -	
CHARLES THOMAS MILEY	**Respondent**

- -
- -

Caroline Harrison QC, Sonia Nolten and Luka Krsljanin (instructed by Aviva Legal Services) for the Appellant
David Callow (instructed by EMW Law LLP) for the Respondent

Hearing date: 5 February 2019

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is the appeal by Friends Life Limited ("FL") from the judgment and order of 4 October 2017 of Turner J after the trial of this action. By his order the judge gave judgment in favour of Mr Charles Miley ("Mr Miley") for payment to him of benefits arising between September 2013 and 26 July 2017 under a group income protection insurance policy effected by his former employer, Piper Jaffray Limited ("PJL"). The judge also dismissed a counterclaim by FL seeking the recovery of sums previously paid to Mr Miley under the policy. The neutral citation reference to the judge's judgment, from which a fuller statement of the facts can be found, is [2017] EWHC 2415 (QB).

2. Mr Miley's claim was based upon his asserted inability to do his job with PJL owing to the debilitating effects of chronic fatigue syndrome ("CFS"). His initial claim was admitted by FL on 20 November 2009. From September 2013, however, FL declined to make payments on the basis that Mr Miley was either faking, or significantly over-stating, the seriousness of his illness.

3. The essence of FL's case before the judge was that Mr Miley's assertions of incapacity based upon the state of his health were "false and fraudulent" (paragraph 19 d. of the Defence and Counterclaim) and that "he [had] sought to mislead [FL] and those examining him on [FL's] behalf as to the nature and extent of his incapacity" (Loc. Cit. paragraph 21). In the counterclaim, FL made a claim in deceit and a claim of unjust enrichment on the basis that Mr Miley had never been entitled to benefits under the policy and, further or alternatively, under the unjust enrichment claim alone, FL had not been obliged to make payments "in consequence of untrue statements and/or non-disclosure of facts material to the claim".

4. The judge rejected FL's case. He found that Mr Miley did suffer from CFS to a sufficient degree to entitle him to benefits under the policy and that his own assessment of his condition, as reported from time to time to FL, was not materially worse than the objective truth. At paragraph 101 of the judgment, the judge said:

> "101. … I am satisfied that the claimant has discharged the burden of demonstrating that he suffers from CFS at a level sufficiently debilitating to entitle him to the requisite benefits under the policy. I find that he has not deliberately fabricated or exaggerated the extent of his disability and that his subjective assessment of the severity of his condition is not materially worse than the objective truth."

(B) The Grounds of Appeal

5. In extensive grounds of appeal, FL sought to challenge the judge's conclusions on the alleged fabrication/exaggeration of symptoms. The application for permission to appeal on that basis was rejected by Henderson LJ. However, the learned Lord Justice gave

permission to appeal on the last two (out of seven) of the proposed grounds. These were grounds 6 and 7. In doing so, he stated expressly that:

> "For the avoidance of doubt, the permission does not permit any challenge to the judge's finding that Mr Miley did not act dishonestly in making the allegedly untruthful statements and/or misrepresentations of material fact relied upon as falling within clause 5.1(b) of the Policy."

6. First, in ground 6, FL contends:

> "6. As a matter of mixed fact and law, the learned Judge failed to address the Appellant's case that irrespective of dishonest intent, the Respondent made objectively untruthful statements and/or misrepresentations of material fact as to his health and functional capacity, which fell within clause 5.1(b) of the policy, and which would have entitled the Appellant to cease payment of Benefit. …"

7. Two matters are relied upon under this head.

8. First, there are statements made to a Mr Newman, a functional capacity assessor, in a telephone conversation on 2 September 2013, as noted in a short "bullet point" summary of the conversation made by Mr Newman in a letter to FL of 3 September 2013. The grounds of appeal raise one such statement, namely that he [Mr Miley] "…hadn't undertaken any activities since [an assessment conducted on 21 and 23 August] and could only rest on the sofa during the day…". (These statements are called in FL's appeal papers "the Newman lies", a description which, to my mind, tends to go behind Henderson LJ's express prohibition of challenge to the judge's rejection of deliberate falsehood on Mr Miley's part.)

9. FL says that this statement was inconsistent with Mr Miley having spent some hours on 24 August 2013 at a beer festival (see below as to the judge's finding as to the real nature of this festival) and his going on holiday to Southampton on the following day for several days.

10. Secondly, reliance is placed upon statements made by Mr Miley in "claims continuation forms" ("CCFs") which he was required by FL to complete. As an example, two extracts from such a form in January 2013 are picked out in which Mr Miley wrote: "[I] couldn't even get to work" and that symptoms included: "continuous fatigue and limited mobility". These are contrasted with Mr Miley having gone on a family skiing holiday four days later.

11. FL expands on this ground (whether permissibly or not), in the skeleton argument for the appeal, by relying upon a further CCF of January 2011. In this respect, a statement by Mr Miley is picked out in which he said that he complained of "Fatigue, flu like symptoms reducing mobility to a minimum often, no concentration, mental fog… I am rarely able to stay up all day and avoid driving unaccompanied if at all possible due to lack of concentration". A contrast is drawn between that, on the one hand, and occasions when Mr Miley had been observed driving "on occasions" alone, and an answer by Mr

Miley in evidence in which he said that he and the family went on a skiing holiday every year on the other hand.

12. Further criticism is made of a statement made in a letter of 10 June 2013 in which Mr Miley said he found telephone calls and face-to-face conversations tiring, and said he had difficulty with interacting with groups of people. FL points out that some six weeks later Mr Miley went for a week's holiday in Norfolk and then for a further week to France which, it is submitted, would inevitably have involved interacting with others and dealing with strangers.

13. I would add that FL produced in the appeal papers a "Schedule of Factual Inconsistencies", running to 25 pages in length in tabular form, picking out further alleged inaccuracies in Mr Miley's presentation of his condition. However, we were not invited to consider any of these items individually, either in the written or oral arguments presented on behalf of FL, and I have not done so.

14. Ground 7 contends that the judge erred in holding that a sum of about £79,000 received by Mr Miley between 2011 and 2013 was "income from investment" which did not have to be declared by Mr Miley in "Financial Review Forms" ("FRFs") required from him by FL. I will return below to the factual background to this ground of appeal and the circumstances in which the point arose at the trial before the judge.

(C) The Policy, the CCFs and the FRFs

15. Turning to the policy itself, while its wording is not of the clearest, it is evident that it is designed to provide benefit when an employee is "unable because of illness or injury to perform the Material and Substantial Duties of their employment and is not engaged in a remunerative occupation". "Material and Substantial Duties" are defined as "the essential activities for which an employee is employed that take up a significant proportion of their time and which cannot be reasonably omitted or modified by them or by the Employer". It is provided that a claim for benefit will be subject to conditions including, in clause 5.1 b):

> "If in connection with the happening or purported happening of any event insured by this Policy, the Member makes an untrue statement of a Material Fact or omits to disclose a Material Fact, the cover provided by the Policy in respect of that Member will immediately become void and no benefit whatsoever will be payable in respect of him."

Material Facts are defined as:

> "Material Facts are facts which are likely to influence Friends Provident in the assessment of an application for insurance or in the assessment of a claim. …
>
> The questions we ask in connection with a claim cover the Material Facts commonly relevant to making a decision on the validity of that claim. They include:
>
> - details of the Member

- confirmation of membership and entitlement to Benefit
- the Member's state of health, the nature and implications of his incapacity
- his duties and the steps which have been taken to adjust the work to with incapacity
- Continuing Income and Pre-incapacity earnings."

16. Each of the CCFs contained the following declaration:

> "I hereby declare that I am the person referred to above, that I have read over the replies to all the questions in this form, that to the best of my knowledge and belief all the information given is true and that I have not withheld any material fact. I shall inform Friends Life immediately of any change…" (emphasis added)

The FRFs contained a broadly similar declaration in these terms:

> "I hereby declare that I am the claimant/member referred to in this financial review form and that I have read over the replies to all the questions in this form, that to the best of my knowledge and belief all the information given is true and that I have not withheld any material fact. I shall inform Friends Life immediately of any changes in my work, or financial situation described in the replies given. This includes performing any work whether paid or unpaid. I understand and accept that if I fail to disclose a material fact that is known to me or give false information, Friends Life is entitled to decline this claim and cancel the policy." (emphasis added)

17. In essence, whilst the grounds of appeal still allude to "untruthful statements and/or misrepresentations", notwithstanding the judge's finding that there had been no deliberate fabrication by Mr Miley, it became clear from Ms Harrison QC's helpful argument that what FL was now focussing upon was, not active misrepresentation, as principally alleged at trial, but material non-disclosure of facts relating to Mr Miley's condition and the alleged non-disclosure of the additional income.

18. In the face of the terms of the declarations (that answers were given to the best of Mr Miley's information and belief) and the judge's findings, it seems to me to be impossible for FL to contend that, in the forms, Mr Miley had made any positive misstatement of material fact, either fraudulently or innocently. He was only to be taken to be stating that the facts stated were true to the best of his information and belief. He made no other statement. Clearly, in this context, the failure to disclose a material fact, as mentioned in the FRF declaration, can only be to a material fact known to Mr Miley, picking up the reference to "material fact" earlier in the declaration. It is not to be read as a warranty that every fact that might be material to FL has been disclosed; it is merely a statement of the understanding of the maker of the declaration as to the consequences of failing to disclose a material fact of which he is aware.

19. I consider that this view of the declaration is consistent with the construction of a rather similar declaration made by an insured party to his insurer in *Economides v Commercial Assurance Co. Plc* [1998] QB 587. In that case, the declaration was that the statements made were, to the best of the insured's knowledge and belief, true and complete. This court held that such a declaration imported only a requirement of honesty and there was no implied representation that there were objectively reasonable grounds for the belief expressed.

20. That case can be contrasted with *Holmes v Scottish Legal Life Assurance Society* (1932) 48 TLR 306 in which a proposer for insurance stated expressly that the policy would be avoided if any statement contained in the proposal was untrue. Swift J held that this was a warranty of the facts stated and, therefore, the innocently false statement made by the proposer that the health of the life assured was good rendered the policy void. The declarations in the present case are, in my view, not of that character.

21. With regard to non-disclosure, FL also wish to rely upon the second part of clause 5.1 b) of the policy rendering cover void if the member "omits to disclose a Material Fact". It is to be noted, however, that the definition of "Material Fact" also states that the questions asked by FL commonly cover the Material Facts that are relevant to the claim. Thus, while not exclusively determinative of the relevance of a background fact, the materiality of a fact must be conditioned by the questions on any particular topic asked by FL.

22. With these points in mind, I turn to the individual grounds of appeal.

(D) Ground 6

23. This ground is directed to non-disclosure of facts relating to Mr Miley's medical condition and presentation.

24. It will be recalled that the judge found that Mr Miley's subjective assessment of his disability was not materially worse than the objective truth. In my judgment, that finding not only defeats FL's claim that Mr Miley was fabricating his presentation to FL, it also defeats FL's claim that that presentation omitted to deal with material facts. FL's case in fraud was based upon precisely the same alleged inconsistencies between Mr Miley's statements and the surveillance evidence as its case on non-disclosure. FL was saying that Mr Miley had failed dishonestly to disclose material facts pertaining to his medical condition.

25. The judge's conclusion was not only that Mr Miley was not dishonest but also that his medical condition was not *in fact* materially different from what he told FL. The judge found that the surveillance evidence did not negative Mr Miley's entitlement under the policy. He found expressly that Mr Miley "suffers from CFS at a level sufficiently debilitating to entitle him to the requisite benefits under the policy". The judge knew precisely what the surveillance disclosed. He also had the lay evidence and the evidence of a number of experts. With all that evidence available to him, he found that Mr Miley had made out his claim. Thus, even if Mr Miley had expressly told FL all the things relating to his condition, which they say he failed to tell them, he would still have been entitled to the benefits under the policy and FL would not have been justified in withholding it.

26. There are two important passages in the judge's findings which bear on this point. They are in paragraphs 57 and 85 of the judgment. It is necessary to quote them.

27. In paragraph 57, the judge said:

> "… i) In June 2013, the claimant kept an activity diary in which he recorded, for example: going on cycle rides, working on emails, socialising and painting the garage door. Save for one venial occasion upon which he records going for a coffee with a friend when, in fact, he went out for an alcoholic drink, there is no direct contrast between what he says he was doing and what he is seen to be doing. Moreover, the fact that he recorded significant activity at a time when he was not being filmed enhances rather than undermines his credibility.
>
> ii) I do not consider, upon a fair and objective assessment of the evidence as a whole, as the defendant contends, that the evidence reveals that the claimant has only good days as opposed to a pattern of good and bad days. In this context, I note, in particular, that any bad days are likely to have been those upon which he did not venture out of the house and were thus not captured on video.
>
> iii) The evidence reveals that the claimant has the cognitive ability, on occasion, to deal with emails, to initiate transactions on the internet, to engage with strangers and to socialise with friends. He has been able to ski, drive and travel alone on the train. Yet again, however, he has never denied being able to perform both mental and physical activities at some level. Although he reported being blocked by a mental fug, he was also stating in 2013, before the payments under the policy were stopped, that he still tried to do at least one mental task a day and was able to read, look at his emails and use the internet for short periods. I do not find that there is a sufficient level of contrast, between (i) what the claimant has been shown to be able to do in the surveillance and other objective evidence and (ii) his own account freely given, to support the suggestion that he is lying. It is to be noted when it falls to be determined whether the level of his symptoms satisfy the threshold test for his entitlement to benefits that his work with PJL had involved long hours, frequent evening meetings and very significant and sustained levels of concentration. I must take into account, as I do, the nature of the claimant's employment when applying the contractual test of entitlement under the policy.

iv) The defendant rightly points out that the claimant has taken frequent holidays both at home and abroad. Doubtless, this required a certain level of stamina but not one which I find to be inconsistent with the claimant's honesty or accuracy. The claimant was simply never asked about holidays at any relevant time before the payments were stopped under the policy and I am not satisfied that he could reasonably be expected to volunteer this information unprompted.

v) The point is fairly made on behalf of the claimant that the defendant, armed as it was with hours and hours of DVD footage, could have asked him direct and specific questions the answers to which may well have put beyond doubt whether or not he was being honest and straightforward. This they chose not to do.

vi) The evidence of the extent to which the claimant is able to shop and socialise does not significantly contradict his accounts of the extent of his limitations and carries the allegation of misrepresentation no further.

vii) The defendant suggests that the video evidence does not reveal that the claimant's friends and family behave any differently towards him than if he were fully fit. In the circumstances of this case, however, it is not apparent to me quite what overt demonstrations of assistance or concern could reasonably have been expected to have been portrayed."

28. Then in paragraph 85, the judge stated his conclusion about Mr Miley's condition as follows:

"85. I have reached the conclusion that the surveillance evidence, whether taken on its own or in combination with all the other evidence in the case, falls very far short of undermining the claimant's case that he is telling the truth about his levels of disability or that his medical condition is sufficiently serious to entitle him to claim under the policy. I make the following observations:

i) Once more, there is a lack of flat and unequivocal contradiction between what the surveillance evidence reveals and what the claimant says he has done. Had the claimant, for example, denied ever going to the pub or going cycling then the defendant's case would have been immeasurably strengthened. As it is, the value of the surveillance evidence is undermined by the far weaker contrast between the general and the specific.

> ii) Consistently with the claimant's evidence and that of his wife, the video evidence reveals no occasion upon which the claimant goes out in the evening whether with friends or otherwise.
>
> iii) There are a number of days on which he is not seen to leave the house at all.
>
> iv) Despite the fact that Mrs Miley is in work, there are a number of occasions when she undertakes other duties, such as mowing the lawn and doing the school run when the claimant does not appear to be otherwise occupied.
>
> v) The footage of the second visit to the CPAD assessment clearly shows the claimant struggling to walk the distance to the car. The defendant is constrained to explain this by speculating that the claimant was putting on a show because he may have suspected that he was under surveillance. However, this suggestion does not explain why, if the claimant were alerted to the possibility that he was being watched, that he did not curtail his activities for a longer period. The claimant said under cross examination that he was unaware that he was being filmed at any stage and I believe him."

29. Importantly, it is to be noted that in this latter paragraph the judge found that, even with the surveillance evidence and taking that into account, there was nothing to show that Mr Miley did not truly suffer from the level of CFS of which he complained. Not only was he not deliberately lying about it, he actually had the condition at the level that he claimed. That is a finding reached by the judge on all the evidence which it is impossible for FL to contest on appeal. There was, by definition therefore, nothing material for Mr Miley further to disclose which he had not disclosed.

30. I said above that I would record the judge's finding about the "beer festival" about which FL expressly complained that it had not been informed. For completeness, the judge found (at paragraph 27):

> "27. … In so far as the notion of a beer festival might, to the uninitiated, conjure up images of the participants cavorting in lederhosen whilst brandishing overflowing beer steins in scenes of infectious Bavarian gaiety, they must be dispelled. In reality, this was a rather understated affair in which patrons of the local public house were given the leisurely opportunity to sample a range of craft beers."

It is somewhat ironic that FL should have been complaining about exaggeration.

31. I should address two further submissions advanced by Ms Harrison on this aspect of the case.

32. First, she submitted that the judge's assessment of Mr Miley's honesty or otherwise in providing information had been informed by the wrong test of what constitutes dishonesty in law. She argued that the judge did not and could not apply the statement of the test for "dishonesty" given by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd.* [2017] UKSC 67. The decision in that case was delivered on 25 October 2017, some three weeks after the judge delivered his judgment in this case.

33. Apart from anything else, it seems to me that this argument is expressly excluded from this appeal by Henderson LJ's order which prohibits the reopening of the debate as to the dishonesty that had been alleged against Mr Miley in FL's primary line of defence. Further, I consider that the terms of the judge's decision make it clear that he acquitted Mr Miley of deliberate falsehood (or dishonesty) by whatever test one sought to apply to his conduct. There is nothing to suggest that any different conclusion would have been reached, even if it had been possible to refer the judge to the detail of Lord Hughes's judgment in *Ivey's* case.

34. Secondly, Ms Harrison argued that if Mr Miley's claim were allowed to succeed, our decision on this appeal would amount to a "cheaters' charter" for the making of improper claims under this type of insurance policy. I disagree. The decision would only amount to a "cheaters' charter" if Mr Miley had been found to be "a cheat". By definition he was not so found and, if his claim succeeds before this court, it does not entail that a claim made by "a cheat" has been upheld.

35. In my judgment, this ground of appeal should fail.

(E) Ground 7

36. This ground raises a quite different point. Here FL claims that Mr Miley wrongfully failed to disclose a source of income, relevant to the amount of benefit to which he was properly entitled. It will be necessary to look more closely at the precise ground of appeal for which permission was given a little later.

37. I am grateful to the parties for preparing an agreed note as to the factual background to this income and as to its fiscal treatment, as directed by Henderson LJ in his order granting permission to appeal. The factual background (with the fiscal consequences for Mr Miley) as set out below relies upon that agreed note.

38. The point arose out of shares awarded to Mr Miley in 2007 and 2008 as part of his bonus package. The shares were to vest in him in February 2010 and February 2011, subject to conditions (principally that he remained employed by PJL, or if no longer employed, it was because of redundancy, death or disability or had left voluntarily but had entered into certain restrictive covenants). Mr Miley was precluded from dealing with the shares prior to vesting, save for by testamentary bequest. The shares would be forfeited in the event of a purported dealing or if he was dismissed by PJL for cause. The shares duly vested in Mr Miley, free of restrictions, in 2010 and 2011.

39. When the shares vested free of restrictions in Mr Miley, and whether he then realised the shares or not, the market value of them became taxable as "employment income of

the employee for the relevant tax year": Income Tax (Earnings and Pensions) Act 2003 ("IPETA") s.426(1). Thus, a tax charge arose upon the value of shares as income, whether or not any income from them had been realised. The tax charge arose not by reason of any disposal, but by virtue of the shares being *treated* as income at market value for tax purposes, whether or not any such income had been generated in cash terms.

40. On this basis, it became apparent from Mr Miley's tax returns, supplied in the process of disclosure, that his total declared income for the years 2011 and 2012 was respectively £170,713 and £103,511, as against benefits from the policy of £92,457 in each year. The difference represented the market value of the relevant shares on the dates when the restrictions fell away. That value had to be treated as income for tax purposes, whether income in cash was realised at that stage or not. In fact, as I understand it, Mr Miley did realise the shares very shortly after the restrictions fell away.

41. The information sought by FL in relation to ongoing income of a claimant under the policy was set out in the FRFs. The material question appeared in paragraph 4 of the form in these terms:

> "Other Income (income from investments may be ignored)
>
> (a) Are you receiving or have you received any other income during the course of this claim? (You should include any continuing salary, bonus, pensions, commissions, etc.)
>
> (b) Are you expecting to receive any other income in the future?"

42. The negative declaration made by Mr Miley in the forms was as set out above.

43. The judge decided two matters under this head. First, he decided that the restricted shares were an "investment" and that when they were realised the money generated represented income from that investment. Thus, they fell expressly within the category of income that fell to be ignored in the FRFs.

44. FL had argued that the income generated was in effect part of Mr Miley's bonus and, therefore, fell within sub-paragraph (a) of paragraph 4 of the form. The judge held, however, that even if that interpretation of the form were correct, he was not satisfied that Mr Miley provided fraudulent information when filling out the FRF.

45. Secondly, whatever the meaning of the form, the judge found that Mr Miley had not been deliberately fraudulent in completing it.

46. On the first point, the judge said this:

> "47. In the context of this case, I am satisfied, on the application of a straightforward interpretation of the word within the context in which it appears on the Financial Review Form, that the restricted shares which were owned by the claimant were an "investment". The shares comprised the property into which money had been invested. When the value of the shares was realised, the money generated represented income from that

> investment and thus fell within that category of income which expressly fell to be ignored under the wording of the Financial Review Form.
>
> …
>
> 49. … whoever is filling out the pro forma is informed that they are entitled, expressly and without qualification, to "ignore income from investments". Thus it matters not that the investment, when originally made, represented a bonus which formed part of the remuneration from his employment. When it was vested in the claimant it gave rise to income from an investment and was thus excluded from further consideration whether it could be characterised as amounting to a bonus or not. If the defendant had wished to provide for a more draconian consequence it would have been a simple matter to draft the form so as to make it clear that the investment income exemption was subject to the wording of what followed and not, by implication, the other way round…"

47. On the second point, the judge's conclusion was this:

> "54. I am satisfied that it is entirely credible that, despite the relatively large sums involved, the claimant formed the view, when filling out the forms, that the additional income, relating as it did to shares issued to him before his period of incapacity, would not be material to the information which the defendant was seeking. It follows that, despite the fact that the claimant is likely to have been fully aware of the share income at the time of filling in the Financial Review Forms, I am satisfied that he genuinely did not consider it either necessary or appropriate to disclose it."

48. In view of his conclusions on these points the judge declined to decide whether the claim would be invalidated on the hypothesis that Mr Miley intended to deceive (see paragraph 55 of the judgment).

49. The precise challenge made to the judge's findings is formulated in Ground 7 as follows:

> "7. The learned Judge erred in fact and law in his approach to the issue of contractual construction. The learned Judge wrongly held [paras.40 to 47] that the surplus income of approximately £79,000 over and above Benefit under the Policy, which was received by the Respondent in the tax years 2011-12 and 2012-13, was "*income from investment*" which did not need to be declared on the Financial Review Forms completed by the Respondent during the course of the claim for Benefit. The learned Judge should have held that this additional income should have been declared (and would have been declared had the Respondent been acting honestly), because:

> 7.1 The learned Judge (correctly) held that the surplus income derived from shares allocated in 2007 and 2008, expressly as part of the Respondent's total remuneration from his employment. When the value of those shares was realised immediately upon vesting in the Respondent, it constituted income from employment and was declared and taxed as such, and not as a capital gain. It therefore constitute income, which constituted a "Material Fact" which the Respondent was required to disclose under the terms of the Policy. The learned Judge wrongly mischaracterised that income as "*income from investment*" in reliance on a judgment (Re *Lilly's Will Trusts* [1948] 2 All E.R. 906) which neither parties' counsel were invited to address, and against the natural meaning of the words of the Policy. In his approach to this issue of pure contractual construction, the learned Judge failed properly to adopt the ratio of *Arnold v Brittain* [2015] UKSC 36 that the Court's role when construing a contract is to give effect to the parties'objective intentions, by reference (inter alia) to the natural meaning of the words used, and that "*a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party*." (S20)
>
> 7.2 The Respondent himself did not assert that his failure to declare this income was because he considered it was "*income from investment*". He gave several inherently improbable explanations in his oral evidence, but expressly said that if he had been in any doubt about whether it should be declared or not, he would have sought advice.
>
> 7.3 The learned Judge should have concluded that the Respondent had provided untrue information on the Financial Review Form, and that consequently clause 5.1 (b) of the Policy was triggered, with the effect that the claim should be dismissed, and the Counterclaim allowed."

(Clearly, the challenge to Mr Miley's honesty at the beginning of ground 7 cannot survive the terms of Henderson LJ's order.)

50. It can be seen, therefore, that the focus is upon what FL contends to be false declarations in the FRFs, although later in argument on this ground and in response to a Respondent's Notice the submissions ranged rather more widely as to the ambit of clause 5.1(b), independently of the statements in the FRFs. In view of the unsatisfactory manner in which this point emerged at the trial (see below), I do not consider it appropriate to allow argument outside the strict bounds of FL's grounds of appeal and the curtilage of Henderson LJ's order.

51. For my part, the judge's finding that Mr Miley did not deliberately mislead FL in his FRF statements, prevents any argument that his answers in those forms were either untrue or otherwise defective. I have set out in paragraph 17 above my view of the proper construction of the declaration sought and given in the FRFs. Mr Miley can only be taken as stating that to the best of his knowledge and belief he had not said anything untrue or omitted anything material. He is not to be taken as warranting that (whatever his own state of knowledge and belief) that the forms would contain every fact which FL might think to be material.

52. It seems to me that Mr Miley's disclosure obligations under cl. 5.1(b) must be conditioned by the information that he was asked by FL to provide, i.e. by the questions posed in the periodic FRFs (see the definition of "Material Facts" – paragraph 15 above). Indeed, as I have pointed out, ground 7 is confined to criticism of the judge's findings about Mr Miley's FRFs. It is not suggested that there were any other occasions on which the shares or their proceeds should have been declared.

53. The relevant clause in the FRF began with the clear opening statement that "income from investments may be ignored". In other words, such income could be ignored in responding to the questions posed in the remainder of the clause. It is not sufficient for FL to say that the shares were part of Mr Miley's bonus and bonuses are mentioned later in the clause. If the shares and income from them were "income from investments", the document stated they could be ignored when dealing with the subsequent questions. This was the obvious sense in which the clause was to be read.

54. The judge found (in paragraphs 51 and 54) that, whatever the true meaning of "investments" in this context, Mr Miley genuinely believed that he did not have to disclose the income deriving from shares.

55. In the circumstances, therefore, I do not consider that Mr Miley can be said to have made any material misstatement or omission on the occasions when he was asked to provide information, as identified in this ground of appeal. I would, therefore, reject ground 7 on this basis.

56. Moreover, in my judgment, in any event the judge was not wrong to find that the shares were "investments" and that the proceeds of sale were, therefore, "income from investments". Shares are quite commonly described as an investment, even if the money for their purchase has been provided by another. If a kindly aunt or uncle gives a child some shares, it would not be wrong to describe the shares as an investment, even though the child has paid nothing for them. The tax treatment of the shares in this case does not matter; the taxing statute is framed as it is to catch the value of the shares in the hands of the recipient as income in the relevant year, whether or not income in terms of cash has actually been received or not.

57. I have mentioned what I see as the unsatisfactory manner in which this issue arose at trial. There was no specific indication made anywhere in the pleadings or written arguments before trial that FL were relying upon a misstatement of income by Mr Miley, whether in the FRFs or otherwise. The matter only arose when the subject was sprung upon Mr Miley in cross-examination. The judge's reaction to this is to be found in paragraphs 38 and 39 of the judgment in these terms:

> "38. When challenged with these discrepancies in cross examination, the claimant struggled to account for them, speculating that they may be explained by an oversight or by a matter which had been dealt with on his behalf by his wife. His unpreparedness for this particular line of questioning, however, is not entirely surprising since the point had not featured, other than in the broadest generic form, either in the pleadings or in the skeleton arguments. No objection to this line of cross examination was taken on the claimant's behalf on the basis that it was conceded that the defendant's decision to keep its powder dry on this issue fell within the legitimate tactical boundaries of the adversarial process.
>
> 39. One consequence of this unheralded turn of events was that the "financial fraud" argument rather took on a life of its own and generated further written submissions, disclosure and, eventually, an unsuccessful application on the part of the defendant that I should recuse myself from the case on the grounds of apparent bias. My determination of this issue is to be found at Miley v Friends Life Limited [2017] EWHC 1583 (QB) and there is no need for me further to map out that particular procedural cul-de-sac in this judgment."

58. I note that no objection was taken to the unexpected line of questioning. However, I question whether the failure to make any mention of this subject in the pre-trial materials was consistent with the "cards on the table" approach encouraged by the Civil Procedure Rules. More particularly, the material deployed was being used to found a case based on alleged fraud. Such allegations are customarily required to be "distinctly alleged and as distinctly proved" (see *Davey v Garrett* (1878) 7 Ch.D. 473 at 489 per Thesiger LJ). That principle was not applied in relation to this matter in FL's pleading in the present case.

59. Further, as shown by a helpful agreed note on the pleadings, supplied by counsel after the hearing of this appeal, the only reference to non-disclosure of any sort (medical or financial) was in one paragraph at the end of FL's counterclaim in the section based on unjust enrichment (at paragraph 30). As is clear from the relevant extract from the Defence to Counterclaim pointed out in the note, Mr Miley's case on this non-specific allegation was to deny fraudulent exaggeration of his claim. The issue gave rise to substantial additional written submissions, but only after completion of the evidence.

60. In the circumstances, I consider that the judge was well entitled to leave alone the question of the potential invalidity of the claim if there had been no intention to deceive. Nonetheless, for the reasons given, I do not consider that, in the light of the judge's other findings, there was any material misstatement or omission in the financial information sought and given.

(F) Conclusion

61. I would dismiss this appeal.

Lord Justice Moylan:

62. I agree.

Lord Justice Haddon-Cave:

63. I also agree.