

THE HIGH COURT

[2018 No. 661 P]

BETWEEN

FINBAR TOLAN

PLAINTIFF

AND

MCLAUGHLIN & GREANEY INSURANCES LIMITED T/A FUTURE

AND

ZURICH INSURANCE PLC

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered the 3rd day of April, 2020

Introduction

1. The plaintiff received a "farm protection renewal notice" from the second named defendant ("Zurich") for twelve months commencing on the 27th April, 2016. On the 23rd February, 2017, Storm "Doris" damaged the two relevant sheds (the "cattle sheds") which the plaintiff had first insured with his previous insurer (Aviva) for the period from 12th April, 2013 to the 11th April, 2014. The description of the cattle sheds in the submission to Zurich, resulting in the quote of March, 2015 which lead to the inception of cover on the 27th April, 2015, and in the schedule to the renewal notice dated the 10th March, 2016, from Zurich is a central issue for the plaintiff's claim which arises from the storm damage to the cattle sheds. No witness demurred from the fact that the cattle sheds had been built before 1950 at least and that the original walls for the cattle sheds had been constructed in the 19th century.
2. Close to the cattle sheds is a large slatted type unit built in 2007 ("the 2007 unit") which can hold up to 200 cattle for fattening, according to the plaintiff. It was not damaged by storm Doris. The source of the information given to Aviva, and particularly Zurich, to quote for insurance cover for the cattle sheds is a primary issue of fact.

General submissions

3. Counsel for the plaintiff submitted that Zurich is seeking to:-

"... evade the possibility of a fusion between private and public law to ensure natural justice is denied to the plaintiff."

4. Zurich in its submissions cited the classic statement of Lord Mansfield in *Carter v Boehm* [1766] 3 BURR 1905 at 1909, p. 1164: -

"First. Insurance is a contract upon 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 proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement."

5. The claim against the first named defendant ("the broker") is premised on establishing that an employee of the broker ought to have notified Zurich that the buildings had been constructed in the 19th century and that the broker compounded the errors made from the completion of a proposal sent to Aviva in April 2013 which had referred to 2002 as being the year of build with a sum insured of €59,600 for the cattle sheds.
6. In addition to claiming for the damage to the cattle sheds (which was first notified on the 26th April, 2017 to Zurich by an insurance assessor engaged by plaintiff on the previous day) other reliefs claimed in the statement of claim dated 24th July, 2019 drafted by the plaintiff himself include.
 - (1) "A declaration ... that the plaintiff at no time ever made any misrepresentation with regard to the incepting of his policy";
 - (2) "An order that the plaintiff will be reinstated with insurance at market rate and will be insured by [Zurich]... as this error which has occurred is not of his making";
 - (3) "...damages ... for breach of contract and/or breach of duty, misrepresentation, including aggravated and/or exemplary damages."
7. It is worth noting at this stage that Zurich withdrew storm cover retrospectively from the policy inception and refunded that part of the premium which related to the €60,000 insured value of the cattle sheds. The fire and storm cover for the 2007 unit valued at €200,000 continued to apply. Suffice to say that the plaintiff's loss assessors and Zurich engaged in robust exchanges until the plaintiff then took matters into his own hands before commencing these proceedings himself.
8. The following chronology of those events not already described indicate relevant background and the resolution of the plaintiff to attribute all of his woes about farm insurance cover to alleged acts or omissions of the defendants: -
 - 9.2.2017 The plaintiff was advised by the broker about a default in his direct debit for Zurich.
 - 23.2.2017 Storm Doris caused damage throughout the west of Ireland including significant destruction of the cattle sheds.
 - 7.3.2017 The plaintiff acknowledged by email that the broker had been trying to contact him while he was unavailable due to a "big case in Dublin" and he assured the broker that arrears would be paid "in the coming days".

- 12.4.2017 Zurich issued to the broker a "farm protection policy schedule" for the period up to 27th April 2018 with the sum for the renewal premium. The plaintiff also emailed the brokers that he had positive news about "funds being released" and gave assurances about paying for renewal of the farm protection policy and the policy for his jeep.
- 18.4.2017 The plaintiff engaged his insurance assessor to inspect the storm damage to the cattle sheds.
- 21.4.2017 A direct debit in favour of Zurich was signed by the plaintiff. The plaintiff gave evidence that he had no reason to believe that the yet to be notified claim for storm damage would be an issue. The broker enclosed in a letter collected by the plaintiff the "Zurich farm renewal schedule, tractor certificate\disc and receipt of direct debit". The plaintiff reluctantly confirmed in evidence that he did not tell the broker about the storm damage to the cattle sheds at this time.
- 25.4.2017 The plaintiff's loss assessor carried out an inspection.
- 26.4.2017 Zurich, its loss adjuster, and the broker were made aware of the plaintiff's claim.
- 25.8.2017 Following the robust exchanges mentioned earlier, Zurich in a four-page letter explained the refusal to reinstate the policy liability for the cattle sheds.
- 2.11.2017 The plaintiff wrote a "Byrne Letter" threatening the issue of proceedings and the prospect of an order over if he is unsuccessful in his claim against one of the defendants.
- 25.1.2018 The plenary summons was issued and served on Zurich.
- 5.4.2018 The broker advised the plaintiff that Zurich and Aviva had declined to quote for the renewal of his farm insurance policy.
- 1.5.2018 The plaintiff emailed the broker to threaten that Zurich and the broker will be held liable if he suffers loss while his policy is not renewed.
- 21.5.2019 The plaintiff sent by registered post to the broker a request for all information about his dealings with the broker since the 1st January 2000 and enclosed €6.35. The plaintiff ultimately received all relevant information from the defendants.
- 24.7.2019 The plaintiff delivered his statement of claim.
- 26.7.2019 The plaintiff was granted by Reynolds J. on an ex parte basis an order giving him leave to issue a motion returnable to 31st July, 2019.

- 31.7.2019 Reynolds J. gave directions for the delivery of a defence and exchanges of requests during the long vacation; the plaintiff repeated then and later in open court that he urgently required a determination of his claim due to the unavailability of insurance cover.
- 14.11.2019 Solicitors for the plaintiff came on record and arranged for counsel to prepare outline legal submissions.
- 26.11.2019 Before the witnesses started to give evidence, this Court gave liberty to the broker to amend, or effectively focus its defence, by identifying that storm cover was first sought in 2013 and that the plaintiff had informed the broker in 2015 that the cattle sheds had been built in 2007.

Decision on the facts

9. Ms. Gilligan of the broker dealt with the plaintiff from 2010 onwards in relation to the renewal of his insurance, by attending him generally when he visited the broker's office. No matter how much the plaintiff protests that he did not mention to Ms. Gilligan a date of 2002 in respect of the construction of the shed in February 2013 for the Aviva proposal or a date of 2007 in respect of the construction of the shed in 2015 for the Zurich proposal, the plaintiff cannot escape the fact that the relevant information was included in the copy proposal forms enclosed with a cover letter addressed to him dated 2nd May 2013 and 19th May 2015. More significantly, the plaintiff admits his belief that he would not "have read every document" prior to signing the proposal form. The plaintiff expressed his belief that Ms. Gilligan "... had my best interests at heart with regard to getting the best policy she could for me. That is how I believed I had such a good relationship for so many years until such time as the [broker] decided that they weren't going to honour the claim".
10. The plaintiff under cross-examination was argumentative and sought to justify his conviction that Ms. Gilligan took it upon herself to insert years for the construction of the cattle sheds without reference to him. In his quest to foist liability on one or other of the defendants for the consequences of making a late claim for the storm damage to the cattle sheds, the plaintiff was prepared to tarnish the reputation of a broker's employee without regard to his acknowledged long-standing prior belief that she had his best interests at heart.
11. The plaintiff sought to coerce the broker by his various communications to organise a way of overlooking his shortcomings when insuring and then making a late claim for the cattle sheds.
12. This court is satisfied on the balance of probabilities that Ms. Gilligan did not unilaterally and without input from the plaintiff enter the incorrect years for the construction of the cattle sheds. I reject the plaintiff's argument that the inconsistency between the year 2002 and 2007 in the different proposals support his theory that a unilateral decision was likely made by the broker. In fact the inconsistency corroborates Ms. Gilligan's evidence of input from the plaintiff. Ms. Gilligan was calm and honest when giving her evidence

despite the undoubted stress which these proceedings have caused. The significance of the errors in the proposal forms for future insurance may not have dawned on the plaintiff until after Zurich rejected his storm damage claim. It was the plaintiff's late claim for storm damage which triggered the alleged effects and which the plaintiff then used to accelerate the prosecution of these proceedings. The submission that the defendants have some legal or regulatory requirement to save the plaintiff from his own misguidance is not supported by the evidence which this court has heard.

13. The height of the plaintiff's claim against the Broker is that Ms. Gilligan ought to have spent more time to ensure that the plaintiff understood that the material description of the cattle sheds was vital. Apart from the fact that the plaintiff by his own admission is an intelligent and accomplished trader in cattle, there was no evidence that another broker would have assisted the plaintiff other than how Ms. Gilligan helped the plaintiff. The plaintiff must take responsibility for confirming information before and after inception.
14. Mr. Jason Byrne, "Head of Agri-Business" in Zurich explained how Zurich handled the plaintiff's claim in a way which reflects what would have been done at inception if the correct material facts had been provided. He also outlined how and why Zurich and the relevant underwriter did not offer a renewal in 2018 because the plaintiff was not willing to work with Zurich on what was fair and reasonable given the material misrepresentation, late notification of the claim, the condition of the buildings which were evident from the reports of the loss adjusters and the fact that the plaintiff was prosecuting these proceedings. Despite a wide-ranging cross-examination Mr. Byrne conscientiously apprised the court of Zurich's awareness of the grave effect for the plaintiff which arises from declining cover or renewal based on misrepresentation.
15. Despite much being made on behalf of the plaintiff that he was unable to obtain insurance for the last 18 months, the plaintiff singularly failed to identify in evidence or in legal submissions an obligation for an insurer like Zurich to offer cover. Mr. Byrne denied vehemently that this was a test case to bolster Zurich's position in future cases. The plaintiff's reference to the necessity to have insurance for driving his tractor turned out to be an exaggeration because Zurich as the last insurer through Insurance Ireland is obliged to offer a third party motor only policy if the plaintiff cannot arrange insurance cover for such a vehicle. The plaintiff will therefore not be deprived of the opportunity to operate and drive his tractor. The plaintiff's focus throughout his complaining communications and prosecution of these proceedings was to erase his misrepresentation about the year of construction of the cattle sheds which became an issue following the late notification of his claim for the storm Doris damage.
16. Lest there be any doubt, the limited cross-examination of witnesses about whether the cattle sheds were built with new or old stone was a waste of time. The submission for a quotation sent in March 2015 described the cattle sheds as:-

"Block (construction type) galvanized (roofed) 2007 (year of build) and a value of €60,000"

while the 2007 unit was described correspondingly as “concrete”, “galvanized”, “2007” with a “value of €200,000”. The material misrepresentation attributable to the plaintiff related to the age of the cattle sheds which would not have been covered by Zurich if a proper description of the cattle sheds had been given.

Legal submissions

17. The authorities cited by counsel for the plaintiff do not in light of the finding of a material misrepresentation assist. Further *Carna Foods Limited & Anor v. Eagle Star Insurance Company (Ireland) Limited* [1997] 2 I.R. 193 does not open up the potential for this Court to review a refusal to renew by a private insurance company. The facts relating to the material misrepresentation of the cattle sheds and subsequent late notification of the claim do not permit a review by this court of the refusal to renew in 2018 in the circumstances.

The Broker

18. Having found on the balance of probabilities that the plaintiff informed the broker of the 2007 construction date and certainly omitted to alert the broker of the error following his receipt of the proposal form, there can be little more said about the futility of the plaintiff’s claim against the broker. Neither the broker nor Ms. Gilligan had anything to gain from misrepresenting the situation to Zurich.

19. Moreover, no loss arising from the alleged unilateral action of Ms. Gilligan has been established. Zurich did not repudiate the policy but rather returned the premium related to storm cover on the cattle sheds. Zurich has confirmed that it would not have taken on the storm damage risk for the cattle sheds if a proper description had been given. In effect no evidence of loss was given by the plaintiff.

20. “Unrealistic” is a mild word to describe the plaintiff’s claim that the broker is responsible for Zurich’s refusal to renew. Zurich makes its own decisions based on the information which it seeks and gathers.

21. Lastly, the plaintiff’s omission to address the availability to him of third party “cover for agri-vehicles such as tractors” in order to keep his business and, as mentioned by Mr. Byrne in cross-examination, supports the Court’s poor view about the reliability of the plaintiff when it comes to understanding and telling the whole truth.

22. The claims against the defendants are dismissed.