In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 281

BETWEEN:-

BENTLEY FRIENDLY SOCIETY

Plaintiff

-and-

DIRECTOR OF TRANSPORT CONTROL DEPARTMENT

Defendant

JUDGMENT

(In Court)

Application for declaratory relief – whether policies issued by friendly society are motor car insurance with respect to third party risks regulated by the Motor Car Insurance (Third-Party Risks) Act 1943 – whether friendly society may lawfully provide motor car insurance with respect to third party risks even if it has not complied with the requirements of the 1943 Act – whether the objects enumerated in section 1(b) of the Friendly Society Act 1868 include the provision of motor vehicle insurance with respect to third party risks

Date of hearing: 30th May 2016
Date of judgment: 15th June 2016

Mr Kevin Bean-Walls and Mr Craig Walls for the Plaintiffs in person
Mr Gregory J Howard, Attorney General's Chambers, for the Defendant

Introduction

1. This is the trial as a preliminary issue of the Plaintiff's claim for declaratory relief:

   (1) That the policies issued by the Plaintiff are motor car insurance with respect to third party risks within the meaning of the Motor Car Insurance (Third-Party Risks) Act 1943 ("the 1943 Act") and comply with its requirements.

   (2) Further or alternatively, that by reason of section 1 of the Friendly Society Act 1868 ("the 1868 Act") the Plaintiff may lawfully provide motor car insurance with respect to third party risks even if it has not complied with the requirements of the 1943 Act.

2. The terms of the declarations sought were initially framed at a directions hearing on 14th December 2014. I have tweaked them slightly so as better to express the true questions in controversy.

Background

3. The Plaintiff is a friendly society. The Registrar General issued a certificate of registration certifying that on 30th October 2013 the Plaintiff was entered on the Register of Friendly Societies kept and maintained pursuant to the 1868 Act. Under section 5(3) of the 1868 Act the certificate is conclusive evidence that the provisions of the 1868 Act relating to registration have

been complied with, including that the Registrar-General ("the Registrar") is satisfied that all the objects of the society are lawful.

4. The objects for which friendly societies may be established are set out in section 1 of the 1868 Act. This provides in material part:

> "*Societies may be established and registered, and societies already in existence may be enrolled, having for their objects –*
>
> . . . . .
>
> *(b) the making good any loss sustained by the members by fire, lightning, tempest, or by any contingency whereby they sustain any loss or damage of their live or dead stock, boats, goods, or stock-in-trade, or of the tools or implements of their trade or calling;*
>
> . . . . .
>
> *Provided that –*
>
> . . . . .
>
> *(ii) the investment of each member shall accumulate or be employed for the sole benefit of the member investing, or the husband, wife, children or kindred of such member; and*
>
> *(iii) no part thereof shall be appropriated to the relief, maintenance or endowment of any other member or person whomsoever; …*
>
> . . . . .
>
> *(d) for any other purpose which is certified to be legal by the Attorney-General, and which is allowed by the Registrar-General … as a purpose to which the powers and protection of this Act ought to be extended.*"

5. From the layout of the printed statute, it appears at first sight that the provisos at subsections (i) – (iv), of which subsections (ii) and (iii) are set out above, refer only to the objects enumerated in section 1(c) (which is not set out above). However, on reading the provisos in context it is strongly arguable that they apply to any permissible object of a friendly society, including those at sections 1(b) and (d). But as I did not in fact hear argument on the point I shall not rule on it.

6. The Plaintiff's objects include:

> "*... making good any loss sustained by the members by fire, collision, tempest or shipwreck, or by any contingency whereby they sustain any loss or damage to their motor bikes, autos, real estate or boats.*"

7. It is common ground that on the principle of statutory interpretation that a statute is said to be "*always speaking*"[1], and in light of modern circumstances, the language of section 1(b) of the 1868 Act is sufficiently broad to encompass these objects.

8. The Plaintiff was formed, in part at least, for the purpose of providing motor vehicle insurance in respect of third party risks for its members. It has issued some 50 certificates of motor insurance to its members certifying that a policy of insurance covered by the 1943 Act is in force.

9. For purposes of this judgment, the relevant provisions of the 1943 Act are as follows:

> "***Interpretation***
>
> *1 In this Act—*
>
> . . . . .
>
> *'insurer' means any assurance company or underwriter authorized by the Minister under section 2, to undertake insurance business for the purposes of this Act;*
>
> *'insurance business' means insurance business for the purposes of this Act.*
>
> . . . . .
>
> ***Governor may authorize insurers***
>
> *2 (1) Subject to the Bermuda Immigration and Protection Act 1956, any person may apply to the Governor for authority to undertake insurance business, and in considering any such application the Governor shall have regard to the financial standing of the*

[1] See Sir Rupert Cross, Statutory Interpretation, 3rd ed (1955), approved by Lord Steyn in McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277 HL(NI) at 296 B – E.

applicant, and for this purpose may require the production of such documents of financial statements as he may consider relevant.

(2) Where the Governor is satisfied that the applicant is a fit and proper person, he may authorize the applicant to undertake insurance business upon such terms and conditions as he may consider appropriate.

(3) The Governor shall have the power at any time to require an insurer to produce any documents and answer any questions which may be relevant, and if at any time the Governor is satisfied that the insurer is no longer a fit and proper person to undertake insurance business or is in violation of any term or condition specified in the authorization to undertake insurance business he may revoke the authority granted to him:

Provided that such revocation shall not affect the liability of the insurer in respect of any policy of insurance in force at the time of such revocation.

. . . . .

(4) Any person who undertakes insurance business, except under the authority of the Governor, commits an offence against this Act:

Punishment on conviction on indictment: imprisonment for 2 years or a fine of $16,800 or both such imprisonment and fine.

Owner of motor car must hold insurance

3 (1) Subject to this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor car on a highway or on an estate road unless there is in force in relation to the use of the motor car by that person or that other person, as the case may be, such a policy of insurance in respect of third-party risks as complies with the requirements of this Act."

10. The Insurance Act 1978 ("the 1978 Act") provides at section 2 that persons carrying on insurance business shall be subject to the supervision of the Bermuda Monetary Authority ("BMA") "*for the purpose of protecting the interests of clients and potential clients of such persons*". However section 57(1) of the 1978 Act provides that insurance business carried on by a friendly society registered under the 1868 Act shall be deemed not to be

insurance business within the meaning of the 1978 Act. That is no doubt partly because: (i) section 1(b) of the 1868 Act provides that friendly societies may have for their object the insurance of their members' losses and not that their insured may be non-members; (ii) the provisos at section 1(ii) and (iii) of the 1868 Act; and (iii) historically, friendly societies in Bermuda have been quite small.

11. On 4th April 2014 the Defendant advised holders of insurance coverage issued by the Plaintiff that they were not insured under the 1943 Act. On 7th April 2014 the Transport Control Department ("TCD"), for which the Defendant is responsible, wrote to the Plaintiff to advise it that on the "*instruction*" ("*advice*" would have been a better word) of the Attorney General's Chambers, and with immediate effect, the TCD was no longer able to accept certificates of motor insurance issued by the Plaintiff. The consequence being that it would no longer issue licences for such vehicles.

12. On 21st April 2014 the Permanent Secretary of the Ministry of Development and Transport wrote to the Plaintiff stating that the TCD would contact members of the Plaintiff who had already submitted a certificate of motor insurance issued by the Plaintiff to advise them that they must provide a certificate of motor insurance issued by a company authorised to do so, and that if they did not, their motor car licence would be revoked until they had done so.

13. Also on 21st April 2016, the Plaintiff's representatives Kevin Bean-Walls and Craig Walls, together with Kenneth Bascome MP, met the Governor to discuss the Plaintiff's situation. The Governor asked the Plaintiff to obtain a legal opinion as to its authority to issue third party motor vehicle insurance. The Plaintiff did so, and I have read the opinion. At a follow up meeting the Governor requested that the Plaintiff produce a set of audited financial statements. The Plaintiff has not yet done so.

14. The Plaintiff commenced the present action by a writ dated 28th July 2014, in which it sought damages of $500,000 for the Defendant's refusal to

process documents presented by its members. A statement of claim followed dated 10th September 2014.

15. By a summons dated 26th September 2014 the Defendant applied to strike out the writ and statement of claim pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 ("RSC") on the grounds that it disclosed no reasonable cause of action; was scandalous, frivolous or vexatious; or an abuse of process.

16. At a directions hearing on 11th December 2014 I gave the Plaintiff leave to amend its writ and statement of claim to request declaratory relief in substantially the terms set out at the start of this judgment. I directed the trial of the claim for declaratory relief as a preliminary issue pursuant to RSC Order 33, rule 3.

Discussion

17. The provision by the Plaintiff of motor vehicle insurance with respect to third party risks is insurance business within the meaning of the 1943 Act. By that, I do not mean that it has been authorised under the 1943 Act but that it is required to be authorised under the 1943 Act. Indeed the Plaintiff did not dispute this, stating in its written submissions: "*[The Plaintiff] has never disputed our need for compliance with the [1943 Act]*."

18. The policies issued by the Plaintiff were therefore insurance business within the meaning of the 1943 Act. However they did not comply with its requirements as the Governor had not authorised the Plaintiff to undertake such insurance business. The Plaintiff will no doubt be mindful that any person who undertakes insurance business within the meaning of the 1943 Act except under the authority of the Governor commits an offence.

19. Provided that it obtains the approval of the Governor, it may be that there is in principle no reason why the Plaintiff or any other friendly society should not carry on insurance business within the meaning of the 1943 Act. Before

granting such approval, the Governor would be likely to consider whether the Plaintiff was able to satisfy any third party claims which it is reasonably foreseeable that it might be called upon to meet. Eg whether it could satisfy a claim for in excess of, say, $1 million. In considering this question, the Governor would no doubt form a view as to whether, by reason of the provisos at section 1(ii) and (iii), the funds available to satisfy a claim against a member would be limited to the value of that member's investment.

20. The Governor would also be likely to consider whether the interests of third parties would be adequately protected if approval were granted, given that the Plaintiff is not subject to any regulatory oversight, eg under the 1978 Act. However these are policy matters for the Governor and not the courts. Moreover, it may be arguable, although as I did not hear argument on the point I need not decide it, that the terms of section 1(iii) preclude the Plaintiff from providing third party risks insurance altogether.

21. I shall assume for the sake of argument that section 1(iii) does not so preclude the Plaintiff. However the 1868 Act does not exempt the Plaintiff from complying with the requirements of the 1943 Act before providing insurance business within the meaning of the latter Act. The question of whether the objects enumerated in section 1(b) of the 1868 Act include the provision of motor vehicle insurance with respect to third party risks is therefore academic. If they do include such provision, it is nonetheless necessary for the Plaintiff to obtain the Governor's approval under the 1943 Act. If they do not include such provision, the Plaintiff can nonetheless apply to the Governor for approval: if such approval is forthcoming, obtaining certification from the Attorney General and the allowance of the Registrar pursuant to section 1(d) of the 1868 Act will likely prove a formality.

22. I shall answer the question anyway. In my judgment, the objects enumerated in section 1(b) of the 1868 Act do not include the provision of motor vehicle insurance with respect to third party risks. In so finding, I

give the words their natural and ordinary meaning. The Plaintiff invites me to focus on the words "*any contingency*", and suggests that they are broad enough to cover the provision of such insurance. However I accept the Defendant's submission that, considered in context, "*any contingency*" means any event whereby the members sustain loss or damage to their assets. It does not refer to an event causing loss or damage to a third party.

23. This construction is supported by policy considerations. As Lord Steyn stated in McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277 HL(NI) at 296F:

> "*... it is generally permissible and indeed necessary to take into account the place of the statutory provision in controversy in the broad context of the basic principles of the legal system as it has evolved*".

24. In Bermuda, as in other financially sophisticated jurisdictions, the provision of financial services is regulated by statute. One of the reasons for this is to protect consumers. This suggests that section 1(b) of the 1868 Act, which, read in conjunction with section 57(1) of the 1978 Act, permits the unregulated provision of insurance by a friendly society to its members, is to be narrowly construed. The members have the opportunity to inform themselves as to the regulatory position and take an informed decision whether to take out insurance with an unregulated provider. Third party beneficiaries of cover provided by a friendly society would have no such opportunity.

Summary

25. The Plaintiff's claim for declaratory relief is resolved thus:

    (1) The policies issued by the Plaintiff are motor car insurance with respect to third party risks within the meaning of the 1943 Act in that they are required to be authorised under that Act. As they have not

been duly authorised they do not comply with the requirements of the 1943 Act.

(2) Section 1 of the 1868 Act does not exempt the Plaintiff from its obligation to comply with the requirements of the 1943 Act.

26. The Plaintiff's application for declaratory relief is therefore dismissed.

27. I shall hear the parties as to costs.

DATED this 15th day of June 2016

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Hellman J