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King's Bench Walk

Success for David Callow in the Court of Appeal

In Friends Life Limited-v-Miley [2019] EWCA Civ 261 the Court of Appeal considered the correct approach to alleged misrepresentations and material non-disclosure in a PHI policy.

The claimant was an equity trader and brought proceedings for an indemnity under an permanent health insurance policy provided by his employer as a result of Chronic Fatigue Syndrome that rendered him unable to perform the duties of his employment. At first instance the insurer alleged that the claimant had acted fraudulently in faking or seriously exaggerating his condition and relied upon substantial quantities of surveillance and an alleged contrast between this and accounts provided by the Claimant in the course of the claim. It sought to rely both on the common law fraudulent claim principle, unjust enrichment and contractual terms contained within the policy to avoid payment and to seek repayment of all sums paid under the policy. At trial Turner J rejected the insurer's allegations and found that the Claimant did suffer from CFS as alleged and was entitled to benefit under the policy (see 2017 [EWHC] 2415, QB). Permission to appeal was sought on numerous grounds many of which sought to attack the Judge's findings on fraud and dishonesty. Limited permission to appeal was granted by Henderson LJ in relation to two arguments relating to an alleged failure by the Judge properly to consider its contractual arguments based on specific terms of the policy and subject to the proviso that the insurers were not allowed to challenge the judge's finding that the claimant had not acted dishonestly when making representations of material fact. The policy contained a clause providing that untrue statements or omissions during the presentation of a claim rendered the policy void. The Insurer sought to argue that the Claimant had made untrue statements in certain documents that, while not dishonest, were inaccurate. Moreover it sought to argue that he had failed to disclose both his true condition in certain respects and the fact of payments received by him in respect of restricted stock wards, which had vested during his period of incapacity albeit awarded in early years when he was fit to work.

During the course of argument the insurers' real case developed such that it sought to rely on principally on non-disclosure of material facts rather than active misrepresentation by the claimant. That argument was unanimously rejected by the Court of Appeal. McCombe LJ held that the Judge had found that the claimant had not misrepresented material facts and that the Claimant's presentation was truthful and not materially different to the objective reality this was fatal to the Insurer's case as *“there was, by definition, nothing material for [the claimant] further to disclose which he had not disclosed”.*

The Court of Appeal also cited, with approval, the decision by the Court of Appeal in ***Economides v Commercial Assurance*** that a statement which is made *“to the best of the insured's knowledge and belief”* must only be honest and there is no implied warranty that there are objectively reasonable grounds for the belief which is expressed (or that there is a warranty of the facts stated). Such declarations are commonly employed by insurers in forms seeking updating information from insureds across all species of insurance.

In common with virtually all PHI policies the Claimant was required to complete financial review forms whilst receiving payments under the policy in order to ensure that he did not receive more than 75% of his pre-incapacity earnings. The forms advised that *“income from investments may be ignored”*. The claimant had declared that to the best of his knowledge and belief he had not received any other income. During the relevant time, he had received the aforementioned “restricted stock awards” (shares which were subject to various restrictions on their disposal prior to a vesting date). At first instance, the judge had concluded that the shares had been *“income from investments”*.

The Court of Appeal upheld that finding on the basis that *“Shares are quite commonly described as an investment, even if the money for their purchase has been provided by another”*. Further and in any event the Court held that, the Claimant's disclosure obligations *“must be conditioned by the information that he was asked by [the insurers] to*

provide". The form contained no definitions or further clarification or qualifications. It had stated at the beginning of the relevant section that *"income from investments may be ignored"* and it was held that *"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 [the insurers] to say that the shares were part of [the claimant]'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".*

The Judgment provides welcome guidance as to the way in which such forms are to be construed in claims under policies of insurance where it is alleged that incomplete or inaccurate information has been provided but where such shortcomings are not alleged to be dishonest. The Court has provided clarity that such questions are to be construed in the context of the forms as they are presented to the member/ insured and that the declarations as to knowledge and belief cannot be construed as warranties of the truth of the contents of the forms. The Insurer's arguments that such a finding amounted a *"cheater's charter"* were unanimously rejected.

David appeared for Mr Miley both at trial and in the Court of Appeal instructed by Mark Rondel of EMW Law LLP.