**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV2009-03023**

**Between**

**UZANN WOODS**

**Beneficiary under Policy Number 5000602781**

**Guardian Life of the Caribbean Limited**

**Of the Estate of Glenroy Kerwin Charles, deceased**

**CLAIMANT**

**AND**

**GUARDIAN LIFE OF THE CARIBBEAN LIMITED**

**DEFENDANT**

**Before the Honourable A. des Vignes**

**Mr. Farid Scoon for the Claimant**

**Ms. Annabelle Sooklal for the Defendant**

DECISION

1. Based on the evidence adduced in this matter and the submissions made on behalf of both parties, I find that there was a material misrepresentation and/or material non-disclosure by the deceased, Glenroy Charles, in his answers to the questions on the

Proposal and Declaration Form dated 14th August 2003. As a consequence whereof the Policy of Insurance issued by the Defendant was rendered void and all moneys payable thereunder were forfeited to the Defendant.

2. Further, I also find that the burden of proof lay upon the Claimant to prove that the Defendant waived its right to avoid the Policy and the Claimant failed to discharge that burden.

3. In the circumstances, for the reasons hereinafter set out, I hereby dismiss the Claimant's claim with costs to be paid by the Claimant to the Defendant.

**Reasons**

4. In the Submissions filed on the 18th June 2012, the Claimant's Attorneys conceded that there was a material non-disclosure by the deceased, Glenroy Charles and that the Defendant had proved same. Notwithstanding this concession, the Claimant's Attorney submitted that, based on the pleading and the evidence of the Claimant, the Defendant's agent knew of the facts and therefore the Defendant waived its right to avoid the policy.

5. At paragraph 10 of the Statement of Case, the Claimant made the following averment:

> "*Further and or alternatively the Claimant will maintain that if the Deceased was such a person as described in Question 28 (c) of the Proposal and Declaration Form of the said policy, then the servants and or agents of the Defendant well knew the Claimant to be such a person and waived their right to depend on and are stopped from relying on the said Question 28 (c) as a reason for not paying the Claimant the sums due to her under the said insurance policy."*

6. In reliance on this pleading, the Claimant's Attorney also submitted that "*in the circumstances of waiver such as in this case where the peculiar facts of the waiver are within the knowledge of one person, that is the Defendant, the Defendant bears the burden of proving or disproving such"* In support of this proposition, Counsel for the

Claimant relied on **Bond Air Services Ltd. V. Hill**[1] and **General Accident, Fire and Life Assurance Corporation v. Janet Robertson (or Hunter)**[2].

7. Having considered these authorities, I must respectfully disagree that these cases support the Claimant's submission on the issue of who bears the burden of proof on a plea of waiver.

8. In **Bond Air Services Ltd.**, a Special Case had been stated by an arbitrator for the determination of the Queen's Bench Division. Lord Goddard C.J. in expressing his opinion on the burden of proof in a claim under a policy of insurance stated as follows:

> "*I do not think it can be doubted that, ordinarily, it is for the underwriter to prove a breach of condition, at least where he is not contending that the policy is void on the ground that there has been a breach of a condition precedent to the formation of the policy. So, too, it is for him to prove an exception. The difference between a condition and an exception is that the former places some duty or responsibility on the assured, while the latter restricts the scope of the policy. That it is for the insurers who allege that the conditions were broken to prove it, has, I think, always been accepted, at least since Baron Parke's judgment in Barrett v. Jermy."*

9. Then after referring to the cases of **Geach v. Ingall**[3] and **Ashby v. Bates**[4] relied upon by Counsel for the Respondent, Lord Goddard went on to state:

> "*In both cases cited the insurers were repudiating the policies, and they were not concerned with conditions precedent to the liability to the insurers on a valid and existing policy. What I think they decided was that, where on the pleadings the issue was whether there was an existing policy, the plaintiff has to prove it, and prove the performance of conditions*

[1] [1955] 2 Q.B. 417
[2] [1909] A.C. 404 at 414
[3] (1845) 14 M. & W. 95
[4] (1846) 15 M. & W. 589

*necessary to establish it. But I cannot find that these cases have ever been regarded, either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition which would relieve him from liability in respect of a particular loss."*

10. With both these dicta, I can find no fault since they support the proposition that the burden of proving a breach of condition of a policy lies upon the insurer. For that reason, it has not been in doubt in this case that the burden lay upon the Defendant to prove that the deceased, in his answers to question 28 (c), was guilty of a material non-disclosure or misrepresentation which entitled the Defendant to avoid the policy. By the concession contained in the submissions filed on behalf of the Claimant, Counsel for the Claimant accepted that the Defendant had discharged that burden and had proved that there was a material non-disclosure by the deceased. However, in my view, the dicta of Lord Goddard does not support the submission of Counsel that if an insured alleges that an insurer has waived reliance on a condition in a policy of insurance, the burden of proving that the insurer has not waived the condition lies upon the insurer.

11. In **General Accident, Fire and Life Assurance Corporation v. Robertson**, the issue before the House of Lords was whether a claim had been made within twelve months of registration of the name of the respondent's husband at the head office of the insurers. The respondent's husband filled up the form of application for registration by inserting this name, address and the date, December 25, 1905 and forwarded it to the insurer's office. The respondent's husband received a letter from the insurers dated January 3, 1906, enclosing an official acknowledgement, dated December 29, 1905 of the registration of his name as being insured against accidents. He was injured in a railway accident on December 28, 1906 and died the next day. On January 2, 1907, the respondent, his executor, gave notice of the claim and the insurers denied liability on the ground that the date of registration was December 27, 2005 and therefore the insurance ended on December 27, 1906. The House of Lords held that the period of

twelve months had not expired when the claim was made on January 2, 1907 for the reason that there was no regular register and the date of registration must be taken to be the date when the bundle of application, containing that of the deceased, were arranged alphabetically and filed. In the absence of any definite proof of this date, it must be held against the insurers, to be January 3, 1906, the date of the letter containing the official acknowledgment of the registration. Lord Chancellor, Lord Loreburn, in his leading judgment at p. 413 stated as follows:

> "*It is a matter peculiarly and solely within their knowledge, and the burden is on them to prove this, if they can. So far as the evidence goes, the fact that they did not send their letter of acknowledgment to Hunter till January 3, 1906, seems to shew that the act which constituted registration was not prior to that date, for in the joint minute of admissions the process which I regard as the registration is treated as a thing subsequent to the sending of the acknowledgement."*

12. In my opinion, this case is distinguishable on its facts and does not at all support the Claimant's argument. On the facts of that case, the issue of waiver did not arise and it is a far stretch of logic and common sense to so interpret the dicta of Lord Loreburn to conclude that, in circumstances where an insured has alleged that an insurer has waived compliance with a condition of the policy, the burden lies upon the insurer "to prove or disprove" that the condition was waived.

13. In **Halsbury's Laws of England (Vol. 60)(2011) (5th Edition)** at para. 53, the law on waiver is summarised as follows:

> *"**53. Information waived by the insurer.** The assured is not bound to disclose any information which is waived by the insurer. In general, where from the facts communicated to him the insurer would naturally infer the existence of other facts not disclosed, his omission to make inquiry is an implied waiver of a more explicit disclosure. ... ...The omission to make inquiry is no waiver if the insurer is not put on inquiry; waiver is not to be easily presumed. The question of waiver ought to be approached by asking*

> *(1) whether there was a fair presentation of the risk; and (2) whether the insurer was, in the course of the presentation, put on inquiry by the disclosure of facts which would raise in the mind of the reasonable insurer at least the suspicion that there were other circumstances which would or might vitiate the presentation. Although the burden of proof is, in general, on an insurer who seeks to avoid a policy for material non-disclosure, once it has been established that the non-disclosure was material and that it induced the insurer to contract on the relevant terms, the burden of proof moves to the insured to establish that the right to disclosure has been waived." (emphasis mine)*

14. On the evidence adduced in this case and accepted by the Claimant, the deceased failed to disclose that he had been involved in criminal activities and that he had been arrested and charged with criminal offences relating to, inter alia, the possession of ammunition, possession of cocaine for the purpose of trafficking, and possession of marijuana for the purpose of trafficking. In fact, the deceased had expressly replied in the negative when asked specifically at Question 28 (c) whether he had ever been involved in, charged or convicted for any activities, or criminal offences relating to the use, possession, sale or trafficking in narcotics or any other substances, the use, sale or possession of which is controlled by law and that answer was a blatant untruth.

15. Therefore, in answer to the first question of whether there was a fair presentation of the risk to the Defendant, the answer must be that there was not.

16. The second question requires the Court to consider whether the Defendant was put on inquiry by the disclosure of facts which would raise in the mind of the reasonable insurer at least the suspicion that there were other circumstances which would or might vitiate the presentation.

17. The Claimant, at paragraph 10 of the Statement of Case, alleged that the servants and/or agents of the Defendant well knew the Claimant to be such a person and waived their right to depend and/or is estopped from relying on Question 28 (c)

18. However, in her witness statement and under cross-examination, the Claimant failed to give evidence that the insurance agent, Mr. Keith Cyrus, well knew or had any knowledge whatsoever of the deceased's criminal activities or the charges laid against him. Further, the Claimant failed to give any or any sufficient evidence to persuade this Court to impute such knowledge to Mr. Cyrus or to find that the Defendant, through Mr. Cyrus, was put on inquiry as to the Deceased's criminal activities or the charges laid against him. Having failed to do so, therefore, there is no basis on which I can accept the submission that the burden shifted onto the Defendant to disprove Mr. Cyrus's knowledge of the circumstances of the non-disclosure and the Defendant's waiver.

19. Accordingly, I find that the Claimant has failed to discharge the burden of proof that lay upon her to prove the allegation of waiver contained in her Statement of Case and for that reason, her claim against the Defendant is hereby dismissed with costs.

**Costs**

20. I will now invite the parties to address me on the quantum of costs to be paid by the Claimant to the Defendant.

**Dated the 28th day of March 2013.**

**……**

**André des Vignes**

**Judge.**