

**IN THE SUPREME COURT OF BELIZE, A.D. 2014**

**CLAIM NO: 164 OF 2017**

**BETWEEN**

**HERITAGE BANK LIMITED**

**CLAIMANT**

**AND**

**HOME PROTECTOR INSURANCE CO. LTD**

**DEFENDANT**

**ROMMEL BERGES**

**INTERESTED PARTY**

**Keywords:** Insurance; Liability in respect of residential loan; True meaning of the Home Protector Group Policy of Insurance; Effect of insurance agreement with bank; Insurance company's liability to pay

**Before the Honourable:** Mr. Justice Courtney A. Abel

**Hearing Date:** 26th July 2017.

**Appearances:**

Mr. E. Andrew Marshalleck, SC, for the Claimant.

Mr. Estevan Perera for the 1<sup>st</sup> Defendant

Mr. Vanessa Retreage for the Interested Party

**WRITTEN JUDGMENT**

**(Of an Oral Judgement Delivered on the 26<sup>th</sup> day of July, 2017)**

**Introduction**

[1] This is a claim principally between the Claimant, a bank, and the Defendant, an insurance company, about the insurance company's liability to pay out under a policy of insurance.

- [2] The insurance was in respect of a residential loan from the Claimant for the principal sum of BZE\$550,000.00 and intended to cover the lives of the borrowers.
- [3] It is undisputed that one of the borrowers and parties to the insurance policy, Josefina Berges, is the wife of the Interested Party, the other party to the policy and borrower. The wife subsequently died with the borrowers having duly paid the requisite premiums under the policy.
- [4] The Interested Party now stands to benefit from the policy as a result of the death of his deceased wife.
- [5] The question arises about the terms, as well as true meaning and effect of the policy, and also about whether there is liability to pay the insured upon the death of the deceased.

## **Background**

### Parties

- [6] The Claimant is a company duly formed and existing under the Laws of Belize and was at all material times engaged in banking business in Belize pursuant to a license duly issued under the provisions of the domestic Banks and Financial Institutions Act of Belize.
- [7] The Defendant is a company duly formed and existing under the laws of Belize and was at all material times engaged in insurance business in Belize pursuant to a license duly issued under the provisions of the Insurance Act of Belize.
- [8] On the 24<sup>th</sup> April, 2013, Rommel<sup>1</sup> and Josephina Berges of 15 St. Thomas Street, Belize City, Belize, took out a residential loan (“the Loan”) from the Claimant for the principal sum of BZ\$550,000.00 and agreed to repay the same together with interest thereon at the rate of 7.5% per annum in equal monthly installments over a term of 240 months starting on 30th May, 2013.

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<sup>1</sup> The Interested Party herein.

### The Sagicor Group Policy

- [9] Rommel and Josefina Berges at the time of the Loan, having duly completed the Claimant's 'Group Creditor Life Insurance Enrolment Form', were enrolled with Sagicor Insurance Company Limited (hereinafter called 'Sagicor') in a group creditor life policy then held by the Claimant ("the Sagicor Group Policy").
- [10] On the 3<sup>rd</sup> November, 2015 the Claimant unilaterally decided to terminate the Sagicor Group Policy.

### The Home Protector Group Policy

- [11] Following the termination of the Sagicor Group Policy, after negotiations between both parties, the Claimant in or about February 2016, proceeded to, and did enter into a new written group Creditor Life Insurance Policy bearing number CRL-50002 issued by the Defendant in favour of the Claimant ("the Home Protector Group Policy").
- [12] Under Clause 1 of the Home Protector Group Policy it is provided as follows:

***"1. The Contract***

*Each Borrower who applies for Creditor Insurance policy for loans will be insured as long as he/she meets the terms and conditions on the Application for Creditor Insurance and in this Policy.*

*Any changes in any of the conditions and provisions of this Policy must be agreed by at least two of our officers. The only qualified officers are our Chairman, Chief Financial Officer and managing Director. No sales representative has authority to change the policy or waive any of its provisions."*

- [13] Clause 2 of the Home Protector Group Policy states as follows:

***"2. Amounts***

*Loan amounts maximum range up to \$500,000.00 BZE dollars"*

[14] Thus by the terms of clauses 1 and 2 of the Home Protector Group Policy the Defendant undertook to insure the lives of borrowers of residential loans from the Claimant so long as the borrower met the terms and conditions on the Application for Creditor Insurance and in the Home Protector Group Policy for up to BZ\$500,000.00.

[15] Clause 7 of the Home Protector Group Policy then went on to provide as follows:

***“7. Death Benefit***

*The base coverage life insurance benefit is the outstanding balance of the Loan on the date of death. Your estate is responsible for the Loan payments until the claim is approved. Any payments made after the date of the death that are covered by the insurance will be reimbursed once the claim is approved. In no event will more than one benefit being payable on account of joint coverage.”*

[16] Clause 8 of the Home Protector Group Policy, dealing with pre-existing conditions, provides as follows:

***“8. Pre-existing Condition***

*The death benefit will not be payable for a death occurring within 12 month period after the Date of Loan if the primary or secondary cause of death is cancer, leukemia, HIV, AIDS, diabetes mellitus, lung diseases, heard diseases, liver diseases for which the Insured visited or consulted a physician or took tests during the 12 months immediately prior to the Date of loan. This condition also applies if the Borrower either took medication or received treatment for the above-mentioned impairments, but did not consult a physician 12 months immediately prior to the Date of Loan.”*

[17] Clause 10 of the Home Protector Group Policy goes on to deal with beneficiaries as follows:

**“9. Beneficiary**

All coverage benefits accruing under this policy shall be paid to the Creditor as irrevocable Beneficiary as the Creditor’s interest may appear. Such amounts shall be applied to reduce or extinguish the unpaid debt of the Debtor. When the amount of insurance exceeds the unpaid debt, any excess shall be paid by us by a separate cheque to the estate of the Insured Debtor.”

[18] Under Clause 10 of the Home Protector Group Policy, under so-called limitation on the pay out under the policy, it is provided as follows:

*“10. Limitations: Whether the Borrower is insured under the Policy with respect to one Loan or more than one Loan, the total maximum Benefit that will be paid under each Residential Loan Account on the Borrower’s death is BZ500,000.00*

*No Benefit will be payable for a death occurring within the first twelve months after the insurance commences that was excluded under the Pre-Existing Condition Qualification contained in the Enrollment Form.*

*.....”*

[19] The Claimant made payments, accepted by the Defendant, in regards to the Home Protector Group Policy and in respect of Rommel Berges and Josefina Berges in March of 2016 at which time the coverage offered by the Defendant in regards to these borrowers commenced, and such payments continued until August 2016.

[20] In August 2016 Josefina Berges died.

[21] At the date of the death of Josefina Berges the outstanding balance on the Loan, from the Claimant (which had not been renegotiated or rescheduled), was in excess of BZ\$500,000.00.

[22] The Claimant thereafter submitted a claim for payment of the maximum amount payable under the Home Protector Group Policy on the death of

Josefina Berges by supplying proof of death as required by the Defendant in or about September 2016.

- [23] The proceeds of the claim are to be applied to the outstanding balance owing from Josefina and Rommel Berges to the Claimant under the Loan.

### The Dispute

- [24] As a result of the above an issue has arisen as to whether in or about February 2016 the Defendant under the Home Protector Group Policy took up the cover which had been provided by Sagicor to the Claimant, specifically the cover over the lives of Rommel and Josefina Berges, to the extent of their obligations to the Claimant under the Loan, up to the sum of BZ\$500,000.00, or whether such coverage ended?
- [25] The determination of this issue will also resolve the question which has arisen whether the coverage provided by Sagicor to Rommel and Josefina Berges prior to the date of the commencement of the Home Protector Group Policy with the Defendant was to take effect, with or without condition, after this insurance commenced (and was not a continuation of any coverage previously provided by Sagicor).

### The Court Proceedings

- [26] On March 7<sup>th</sup>, 2017, the Claimant, Heritage Bank Limited, filed a Claim Form and Statement of Claim against the Defendant, Home Protector Insurance Company Limited to resolve the dispute which had arisen between them.
- [27] The Claimant in the Claim Form claims under the Home Protector Group Policy:-
- (1) Payment of BZ\$500,000.00 being the maximum amount of insurance payable in respect of the death of Josefina Berges under the terms of the Home Protector Group Policy.
  - (2) Interest thereon at the rate of 7.5 percent per annum pursuant to section 166 of the Supreme Court of Judicature Act from the 31<sup>st</sup> August, 2016, (the date of death of Josefina Berges when payment became due), until judgment herein.

- (3) Such further or other relief as the Court considers just; and
- (4) Costs.

- [28] The basis of the claim is the wrongful denial of liability by the Defendant to pay out to the borrowers the sum of \$500,000.00 which is now alleged to be due under the Home Protector Group Policy.
- [29] On April 24<sup>th</sup>, 2017 the Defendant thereafter filed their Defence.
- [30] In its Defence the Defendant alleges that the Sagicor Group Policy had come to an end and that the Home Protector Group Policy was 'a new policy' with the Defendant. The Defendant alleges that any coverage under the Home Protector Group Policy was provided "on a customer to customer basis".
- [31] The Defendant, in the Defence, otherwise admits that payments were made by the Claimants to it but that the same were made under the new Home Protector Group Policy. The Defendant went on to deny any liability to the Claimant to pay out any sums to Rommel and Josefina Berges. Such denial was on the basis that any such payment was excluded by Clause 10 of the Home Protector Group Policy.
- [32] The Defendant also denies any liability to pay out to the Claimant by reason of a material non-disclosure on the part of the Claimant of a preexisting medical condition – a diagnosis in 2010 of cancer of the deceased – of which the Claimant was aware, and under a duty to disclose.
- [33] The Claimants, on May 8<sup>th</sup>, 2017, made an application to strike out the Defendant's defence or, in the alternative, receive Summary Judgment. Written submissions were filed by both parties. The strike-out Application was heard on the 12<sup>th</sup> day of June, 2017 and refused; but an early trial was ordered. Both parties were also instructed to disclose documents and exchange and file witness statements.
- [34] The trial was fixed for the 25<sup>th</sup> day of July, 2017 at 9:00 a.m.
- [35] At the trial the Court heard the evidence for the Claimant from the witnesses Mr. Stephen Duncan (the General Manager of the Claimant), Ms. Mara Mai (the Junior Supervisor of the Claimant), Ms. Lilian Gomez (the Customer

Service Supervisor of the Claimant), and Mr. Rommel Berges (for the Claimant). The Court heard the evidence for the Defendant given by Ms. Louise Moore (the Chief Executor of the Defendant).

### **Issues**

- [36] Was the enrollment form issued by the Defendant required in order for the insurance policy to be valid?
- [37] Was the coverage taken up by the Defendant provided on a customer by customer basis?
- [38] Was the Defendant protected by Clause 10 of the Policy, the Pre-Existing Condition provision/qualification, which provides that no benefit is payable for a death occurring within the first 12 months after the insurance commenced and is thereby excluded? Is this provision material in the circumstances of this case and/or does the legal principle of estoppel arise?
- [39] Was there a material non-disclosure on the part of the Claimants in failing to disclose to the Defendant that the said Josefina Berges had been diagnosed with cancer since 2010-2011 and as such would be considered a pre-existing medical condition, the details of which the Claimant was obliged to disclose to the Defendant?
- [40] Whether the Claimant or Defendant are liable to pay the Berges under their policy of insurance?

### **Whether or not the enrolment form issued by the Defendant was required in order for the insurance policy to be valid?**

- [41] The evidence is not entirely clear upon what basis the agreement for the Home Protector Group Policy rested.
- [42] Specifically it is generally unclear from the evidence whether an enrolment form was required to be filled in by each person who had previously been insured by Sagicor.
- [43] Having heard all the evidence, I must say that I am far from satisfied that the Defendants have put forward a credible case that such a form was required and indeed, I am bound to say that, on balance, I have found, and

determined, that it was more likely than not, that no such form was actually required.

- [44] I am also bound to say that clearly there seem to have been some interest on the part of the Defendant to get the Home Protector Group insurance business, which the Claimant was offering, and it seems to me that some corners may have been cut, I am afraid, by the Defendant, which has somewhat undermined their position in their case before this Court.
- [45] On the basis of the testimony of the witness for the Defendant it appears to this Court as if the form of agreement that ultimately was entered into between the parties may not have been wholly appropriate for the kind of transaction with which it dealt; and might have left some holes in it.
- [46] I have already made reference to the question about the need for the enrolment form. I have also made reference to whether indeed it was a new policy requiring each person (borrower) to fill in a specific form or whether it was not, and that this is far from clear to me, and has resulted in a lot of the confusion which has since arisen in this case.
- [47] There is no evidence before this Court that each of such person (borrower) was required to nor, did they (or any of them) fill in such a new form; but instead there is clear evidence that a list was subsequently provided in March 2016 containing the information as set out in February 2016 and that within such list was the need to provide most of the information, if not all, which would have been included in an enrollment form.
- [48] This Court has therefore found and determined that because of the details or information which was required to be provided on this list, or subsequent lists, and which was provided on a regular monthly basis thereafter, took the place of, and therefore constituted an enrolment form.
- [49] After considering all the facts and circumstances of the case I have therefore come to the conclusion that the Home Protector Group Policy was not a new kind of policy, requiring each person to fill in a specific form; and nor have I found that it was the understanding between the parties that such a form was required.

- [50] This Court has therefore concluded that it was never understood between the Claimant and the Defendant that each of the persons insured under the Sagicor Group Policy, was required to fill in a new enrolment form.
- [51] It was suggested by Counsel for the Defendant that one of the things that should have been included in the enrolment form was the state of health of the persons who had previously been insured by Sagicor.
- [52] In relation to this latter point I don't see that the evidence supports the suggestion that the state of health of the persons who had previously been insured by Sagicor had to be included in the enrolment form, not least because when one looks at the agreement establishing the Home Protector Group Policy, that the matters relating to the health of the Insured is not in respect of any date of insurance, but rather the date of the Loan.

**Was the coverage taken up by the Defendant provided on a customer by customer basis?**

- [53] In the context of the present case, on a clear reading of the Home Protector Group Policy, the date of the Loan had to have predated the date of the agreement between the Claimant and the Defendant and had to be related back to the agreement with Sagicor for persons who had been insured by Sagicor.
- [54] So, the question is whether in February 2016 the Claimant switched insurers from Sagicor to the Defendant.
- [55] It is difficult to know what term to use, or is appropriate to be used, in the context of the agreement between the Claimant and the Defendant: whether 'switched' or 'assigned' or whether there was a 'transfer' or what. But, clearly what happened was that by and under the Home Protector Group Policy, there was a new agreement and that the parties are bound by that agreement. Also that the effect of that agreement was that the Defendant took on as insurers, *en block*, as a group, the previous persons (borrowers) who had been insured by Sagicor, and for whom premiums were paid and accepted by Home Protector Insurance Company Limited.

- [56] It follows therefore that in about February 2016 the Defendant took up the cover then provided by Sagicor to the Claimant, including the cover provided over the lives of Romel and Josefina Berges. This included the cover to the extent of their obligations to the Claimant under the Loan from the Claimant up to \$500,000.
- [57] Therefore by the Defendant accepting the premiums with the list(s), including their names on it and their details, such coverage never ended and were assumed by Home Protector Insurance.
- [58] It therefore also follows that, and this Court is not able to find, that the coverage taken by the Defendant was provided on a customer-by-customer basis.
- [59] I have considered all the evidence and listened to all of the witnesses and the only credible conclusion which this Court can come to is that it was a group transfer or arrangement; or assumption of a group coverage, *en block*, on mass, as it were, based on the list provided - and in which list Josefina and Romel Berges were included.

**Was the Defendant protected by Clause 10 of the Home Protector Group Policy, the Pre-Existing Condition provision/qualification?**

- [60] The question arises whether this provision, (Clause 10) is material in the facts and circumstances of this case and/or whether an estoppel arise?
- [61] By the terms of clauses 7, 9 and 10 of the Home Protector Group Policy, it will be observed, the Defendant agreed to pay to the Claimant the outstanding balance of the Loan up to a total maximum of BZ\$500,000.00 on the death of an insured borrower – in this case Josefina Berges.
- [62] The Home Protector Group Policy of insurance, by its terms, was also clearly intended to cover the lives of new borrowers, and also to provide new coverage in regards to existing borrowers of the Claimant.
- [63] Paragraph 8 the Home Protector Group Policy, in the view of this court, also applies if the borrower either took medication or received treatment for the above mentioned impairments, but did not consult a physician 12 months immediately prior to the date of Loan.

- [64] Paragraph 9 of the Home Protector Group Policy provides to beneficiaries of coverage, but in the view of this court, which is not pertinent to the present case.
- [65] Paragraph 10, dealing with "*Limitations*" is relevant as it refers to the borrower being insured under the policy with respect to one loan or more than one loan, but limiting the total maximum benefit to be paid on the residential loan account to \$500,000., and also stipulating that no benefit will be payable for a death occurring within the first 12 months after the insurance commences that was excluded under the pre-existing condition qualification contained in the enrolment form.
- [66] Thus clearly paragraph 8 and paragraph 10 have got to be read together. And the question then arises whether the Defendant is protected by Clause 10 of the Home Protector Group Policy, the pre-existing condition provision qualification, which provides that no benefit is payable for a death occurring within the first 12 months after the insurance commence, and is therefore excluded.
- [67] It seems to me that the critical provision here is contained under the pre-existing condition and concerns the date of the Loan.
- [68] The witness for the Defendant laboured extensively about the date of the agreement as if that was somehow relevant, by her emphasizing and paying particular attention to the fact that the 12 month period is in respect of the date of the agreement.
- [69] But, in the view of this court, the agreement is very clear, and the Loan had taken place on 29 April, 2013.
- [70] The death occurred on 31 August 2016.
- [71] Clearly the death did not occur within a 12 month period from the date of the Loan.
- [72] So the question about whether the person died from cancer or anything else is, in the view of this court, wholly irrelevant, in so far as this is concerned.

**Was there a material non-disclosure on the part of the Claim in failing to disclose to the Defendant that the said Josefina Berges had been diagnosed with cancer since 2010-2011?**

- [73] It has been suggested by Counsel for the Defendant, and the question arises, as to whether there was a material non-disclosure on the part of the Claimant in failing to disclose to the Defendant that the said Josefina Berges had been diagnosed with cancer since 2010-2011. That as such it would have been considered a pre-existing medical condition the details of which the Claimant was obliged to disclose to the Defendant.
- [74] The difficulty that this Court faces in relation to this issue is that though there is evidence that Josefina Berges was diagnosed with cancer since 2010 and 2011, and that it is also clear that she died on 31 August, 2016, in the relevant period, which is at or about February 2016, the date of the Home Protector Group Policy, there was no material or other evidence to disclose about the state of the deceased health – thus the same is unclear to this Court.
- [75] Counsel for the Defendant is asking this Court to assume or to infer that because of the diagnosis in 2010/2011, and the death on 31 August 2016, that there must have been something to disclose.
- [76] There has, however, been no medical evidence before this Court.
- [77] I consider that the burden for establishing any such material non-disclosure will lie on the Defendant in this case. That is because they are asserting it, and in any event it seems to me, that they would otherwise be asking this Court to make a huge leap over a void, which this Court is not prepared to make, and to arrive at a conclusion that there was something to disclose at the time, and there was therefore an obligation to disclose it.
- [78] I was referred to a specific provision in the Insurance Act, I think it is section 108 “State of health of Insured”.
- [79] I don't understand what it is that Counsel for the Defendant was urging upon me about some duty to disclose.

- [80] It seems to me that this provision is to protect a potential insured and I can't see how the Defendant can take advantage of this provision.
- [81] In any event, I have already stated my reason for thinking that there is no evidence to suggest that there is anything that had to be disclosed and that this Court is not willing to jump to that conclusion.

### **Determination**

- [82] In conclusion, based on all that I have said so far, this Court is of the view that the Defendant is liable to pay the Berges' under the Home Protector Group Policy.
- [83] I must say that in arriving at this conclusion this Court feels obliged to say that at the end of the day it finds, based on the way in which this whole case has been presented by and on behalf of the Defendant, and I am not blaming Counsel for this, that there really isn't much of a credible defence to this claim, or even a reasonable defence to this claim.
- [84] Having seen and heard the witnesses and understood the case a little more clearly, which I didn't when the matter was brought before me on a summary judgment application, this Court has concluded that there really isn't any reasonable defence to this claim and that it would not have been unsuitable, or inappropriate, to have granted summary judgment, now that I understand the issues as I do.
- [85] On the merits it is a little surprising that a reputable insurance company can be collecting premiums from Claimants, from parties insured all this period of time, that they did, as disclosed by the evidence, and that when the time come to pay out under the Home Protector Group Policy, they would go to all the trouble that they have to resist paying.
- [86] The judgment which this Court will enter really doesn't do justice to the grief and trouble that is being caused to the insured in having to defend this claim and to be a party Interested in the present claim, in the way that he has had to do.
- [87] So I will give judgment for the Claimant who is Heritage Bank, but no doubt the real beneficiary is the insured, Romel Berges, who has had, not only to

suffer the loss of his wife, but had to fight to protect a policy that they diligently paid on for some considerable time.

**Costs**

[88] Because the Claimant has wholly succeeded; it is entitled to its Costs which I will award to the Claimant against the Defendant, be agreed or assessed, such assessment to be conducted by the trial judge.

**Disposition**

[89] Judgment is to be entered in favour of the Claimant in the amount of BZE\$500,000.00 being the maximum amount of insurance payable in respect of the death of Josefina Berges under the terms of a written Group Creditor Life Insurance Policy bearing Number CRL-50002 issued by the Defendant to the Claimant and covering the life of Josefina Berges as Co-Borrower of a residential loan from the Claimant

[90] The Defendant to pay to the Claimant interest on the said sum of BZE\$500,000.00 at the rate of 7.5 percent per annum (the rate due to the Claimant under the residential loan), pursuant to section 166 of the Supreme Court of Judicature Act from 31<sup>st</sup> August, 2016, (the date of death of Josefina Berges when payment became due) until the 26<sup>th</sup> July, 2017, being the date of judgment herein; and thereafter a rate of 6 percent per annum until the date of payment.

[91] The Defendant is to pay the Claimant costs to be agreed or assessed, such assessment to be conducted by the trial judge.

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**The Hon. Mr. Justice Courtney A. Abel**

**15th January 2018**