# IN THE COMMONWEALTH OF THE BAHAMAS

# IN THE SUPREME COURT

# **Common Law & Equity Division**

## 2014/CLE/gen/00891

BETWEEN:

- (1) CAROL M. WILLIAMS (nee Dean)
  - (2) OLIVER A. HUTCHINSON
    - (3) BRENDA DAVIS
    - (4) PAMELA ADDERLEY

(Wife of the Late Patrick Adderley)

- (5) BERNESE CULMER
- (6) MARCIAN J. LEVARITY
  - (7) MELODIE LEVARITY
- (8) STEPHEN J. CANCINO

**Plaintiffs** 

#### AND

## COLINA INSURANCE LTD.

**Defendant** 

Before:

The Honourable Mr. Justice Neil Brathwaite

Appearances:

Attorney Kahlil Parker KC with Attorney Roberta Quant for the Plaintiffs

Attorney Terry North for the Defendant

### **DECISION**

### BRATHWAITE, J

#### **INTRODUCTION**

- [1.] This is a ruling on an application by the Plaintiffs, filed 30<sup>th</sup> March 2015, for an order pursuant to Order 24 Rule 12 of the Rules of the Supreme Court 1978 and under the inherent jurisdiction of the Court for discovery of:
  - "1. All documents, records, and other information in the possession, custody, and/or control of the Defendant with respect to its Universal Life Insurance Policy product and the Universal Life Insurance Policies issued to and/or relating to the Plaintiffs, including but not limited to the following documents, records, and information:
    - i. All promotional, marketing, and instructional material produced and distributed by the Defendant with respect to its Universal Life Insurance Policies;
    - ii. All correspondence of the Defendant, including correspondence between the Defendant and The Insurance Commission of The Bahamas, concerning its Universal Life Insurance Policies issued by the Defendant and the Plaintiffs' Universal Life Insurance Policies in particular;
    - iii. All documents, records, and other information in the possession, custody, and/or control of the Defendant concerning its operation and management of the following Funds (the 'Funds'):
      - a. The Bahamas Investment Fund;
      - b. The Cayman Investment Fund; and
      - c. The International Equity Fund; and
    - iv. All documents, records, and other information in the possession, custody, and/or control of the Defendant concerning the funds and fund balances associated with each of the Plaintiffs' insurance policies.

#### AND FOR:

An Order that the Plaintiffs' application for discovery precede the Defendant's application for Further and Better Particulars, upon its Summons filed on 4 November 2014, or otherwise, which application for Further and Better Particulars shall be stayed pending completion of the discovery exercise; AND

That the Plaintiffs be at liberty to amend their Writ of Summons within twenty-one (21) days of receipt of the documents produced by the Defendant pursuant to the Plaintiffs' discovery request; AND

Such further or other relief as to the Court seems just."

- [2.] The Defendant opposes the application on the grounds that the request is wholly disproportionate, lacks relevance, and in any event, should not precede the determination of its Summons for Further and Better Particulars filed 4<sup>th</sup> November 2014.
- [3.] The determination of the Plaintiffs' application is therefore the primary issue to be decided by this Honorable Court.

## **FACTUAL SUMMARY**

- [4.] The Plaintiffs are and were at all material times the holders of Non-Participating Universal Life Insurance policies Nos. 402080, 003006413, 000379742, 000379443, 000411070, 405825, 405826 and 409300 respectively, pursuant to their insurance contracts entered into with the Defendant between March 1993 and June 1998.
- [5.] The Defendant is and was at all material times a limited company duly incorporated and registered under the laws of the Commonwealth of The Bahamas and carrying on the business of an insurance company within the jurisdiction.
- [6.] Through its agents, viz., Phyllis Johnson, Sandy Knowles, Nathaniel K. Dorsett, Eddison Brice, Elaine Simms, Daniel F. McKinney and Corinna Neely, the Defendant produced and distributed certain promotional material in relation to its Universal Life Insurance product to the Plaintiffs. The promotional material described the product as being flexible and customizable and highlighted that the policy premiums could be increased or decreased, temporarily suspended, or drawn upon '...just like a savings account'.
- [7.] However, according to the Plaintiffs, they were never advised of the 'significant risks' of holding the policies, those risks being the ongoing 'mortality charges' that were to be applied, the 'financial speculation' on which the success or failure of the policies depended, and the fact that the purported 'savings element' of the policies was in fact 'riskier than a savings account'.
- [8.] In reliance on the Defendant's representations that: (i) the policies were 'traditional life insurance policies' (ii) the required 'premium payments would be level, and were likely to decrease in amount over time' and (iii) payment of the fixed premiums was 'all that was required' to keep the policies in force, the Plaintiffs entered into contracts with the Defendant, and paid the required premiums for the purchase of their respective Universal Life insurance policies which they subsequently maintained for the past 20 years.
- [9.] The Plaintiffs further allege that in or around late 2009 the Defendant sent 'standard form letters' to the Plaintiffs which advised that their insurance policies 'had achieved, or were close to achieving, a negative fund balance' and were therefore 'purportedly liable to cancellation'.

- [10.] Then, on or about 2<sup>nd</sup> October 2012, the Defendant notified the 5<sup>th</sup> Plaintiff by written correspondence that her monthly premiums had increased due to her policy's negative fund balance. The other Plaintiffs received 'the same or similar information' from the Defendant sometime thereafter.
- [11.] The Plaintiffs contend that the said premium increases contradict the express terms of their policies, unjustly shift the financial burden of the Defendant's own conduct onto them and deprive them of what they 'bargained for' and 'legitimately expected' as Universal Life Insurance policyholders.
- [12.] They aver that unless restrained by this Honorable Court, it is their honest belief that the Defendant will 'continue to act to their detriment'. On that basis, they commenced this action by specially endorsed Writ of Summons filed 27<sup>th</sup> June 2014, and seek the following relief:
  - "1. A declaration that the Plaintiffs' insurance policies remain in force in accordance with the terms actually agreed and understood between the parties as they are set out on the face of their policies or otherwise;
  - 2. A declaration that the Defendant is estopped from relying on clauses 2 and 4 (6) of the insurance contracts between the parties, and any other terms thereof alleging the Plaintiffs' participation in its funds or that their policies are subject to 'mortality charges' or other like charges;
  - 3. A declaration that the Plaintiffs neither agreed to nor were they at any time participating in any of the Defendant's funds;
  - 4. An order that upon payment of their monthly premiums as contracted the Plaintiffs' insurance policies are to remain in force and that the death benefit payable thereunder be paid by the Defendant upon the triggering event under the Plaintiffs' policies;
  - 5. An injunction prohibiting the Defendant from cancelling or threatening to cancel the Plaintiffs' insurance policies based upon their purported fund balances;
  - 6. An order that the Plaintiffs' insurance contracts be rectified in order to reflect the terms actually agreed and understood between the parties;
  - 7. Damages for Breach of Contract;
  - 8. Damages for Negligent Misrepresentation;
  - 9. An order that the Defendant produce and provide to the Plaintiffs a proper accounting of the current state of the Funds and of its administration and management thereof from their inception to the date of such order. The said

accounting to be audited by an auditor approved by the Court at the Defendant's expense.

### AND ALTERNATIVELY THE PLAINTIFFS SEEK:

- 10. A declaration that the Plaintiffs' insurance contracts are invalid;
- 11. Rescission of the Plaintiffs' insurance contracts with the Defendant for negligent misrepresentation;
- 12. An order that the Defendant do return all sums it has received from the Plaintiffs under or in accordance with their said insurance contracts with interest at the statutory rate;
- 13. Further or in the alternative damages for negligent misrepresentation whereby the Plaintiffs were negligently induced by the Defendant to enter into the said contracts and make payments in accordance therewith

#### AND THE PLAINTIFFS ALSO SEEK:

- 14. Damages for breach of fiduciary duty;
- 15. Damages;
- 16. Costs; and
- 17. Such further or other relief as to the Court may seem just."
- [13.] In addition to the Plaintiffs' Writ of Summons, the Defendant's Summons for Further and Better Particulars and the Plaintiffs' application for Discovery, the following documents were filed in this action:
  - 1. Defendant's Request for Further and Better Particulars of the Statement of Claim dated the 27<sup>th</sup> June 2014 filed 8<sup>th</sup> October 2014;
  - 2. Plaintiffs' Further and Better Particulars filed 21st October 2014;
  - 3. Defendant's Analysis of the Plaintiffs' Further and Better Particulars and Response filed  $10^{\rm th}$  March 2015; and
  - 4. Plaintiffs List of Documents filed 1st June 2021.

## THE PLAINTIFFS' CASE

[14.] The Plaintiffs' Statement of Claim provides that they were solicited by the Defendant, through its agents and promotional materials, to purchase the Universal Life insurance policies. They claim that they were 'induced' to enter into their respective insurance contracts because of the Defendant's alleged negligent conduct, negligent misrepresentations, and omissions regarding the policies' risks, structure and performance.

## Alleged Misrepresentations and Negligence

- [15.] In their Further and Better Particulars, the Plaintiffs assert that they were 'each advised' by the Defendant and 'led to believe' that the policies they purchased were 'traditional life insurance policies', only requiring payment of the agreed premiums to guarantee continued coverage and payment of the death benefit.
- [16.] However, the Plaintiffs allege that the Defendant negligently misrepresented the policies' benefits by (i) failing to provide them with an adequate or any explanation of the impact of the involved 'units', 'funds', 'mortality charges', 'cash value' and 'financial speculation'; (ii) employing unreasonable and unsubstantiated performance projections and assumptions; and (iii) misrepresenting and/or failing to explain the consequences of less favorable performance, adequately, or at all.
- [17.] On that basis, the Plaintiffs posit that the Defendant's representations made to them at the time they purchased their policies were simply untrue and if they had been properly advised as to the policies' 'risk-laden' nature ab initio, they would have never agreed to purchase the policies in the first place.

#### Breach of Fiduciary Duty and Breach of Contract

- [18.] By way of the Plaintiffs' Statement of Claim filed 27 June 2014, the Plaintiffs contend that, as their insurer and investment fund manager, the Defendant owed them fiduciary and contractual duties to keep them informed of the performance of their policies and the management of any associated funds.
- [19.] They allege that in breach of those duties, the Defendant failed to provide 'critical financial information' concerning the fund balances associated with their policies before those balances turned negative, making the policies 'liable to cancellation'.
- [20.] As a result of the Defendant's failures, the Plaintiffs claim that they were 'negligently denied' 'regular, fair, and objective' policy statements which in turn deprived them of (i) the opportunity to make informed decisions as to the future of their policies, (ii) the opportunity

to have sight of the performance of the associated Funds and (iii) the opportunity to have

- [28.] It is their position that even if the matter of confidentiality arises, confidentiality alone does not bar discovery (Science Research Council v Nasse [1980] AC 1028 at 1064E), and in any event, the disclosure requested must be ordered by the Court as it would (i) yield them a litigious advantage, (ii) is neither oppressive in volume nor speculative (Wallace Smith Trust Co v Deloitte Haskins & Sells [1997] 1 WLR 257), and (iii) is necessary to ensure the fair and accurate outcome (R (Al-Sweady and Others) v Secretary of State for Defence [2008] EWHC 2387) of this instant action.
- [29.] In further support of their position, the Plaintiffs referred the Court to **Dorsey McPhee v** Colina Insurance Ltd [2023] UKPC 8, where the Board considered the rights of the Plaintiff, another Universal Life Insurance policyholder, who challenged the validity of increased charges imposed by the Defendant under his policy. The policy was subsequently deemed lapsed following the issuance by the Defendant of a 'Notice of Pending Cancellation'.
- [30.] The Plaintiffs invite the Court, in determining its application, to consider the dissenting opinions of Lords Leggatt and Stephens in that case, who at [45] emphasized that the burden rested on Colina, as the insurer, to prove the legitimacy of the increased charges by providing as they referenced at [48] the relevant cost-of-insurance table. However, in that case, no disclosure of such documents was ever done.
- [31.] Therefore, their Lordships opined at [55], that Colina's failure to produce the relevant documentation to justify the increased charges or to explain how those charges were calculated 'raised real uncertainty' regarding how the increases were determined during the term of the policy. This failure then according to their Lordships still at [55] further suggested that 'Colina was not in fact applying the contractual rates of the policy but rather using some other rating table' and also indicated a degree of incompetence in Colina's 'conduct of the case'.

#### THE DEFENDANT'S CASE

- [32.] On the other hand, by way of its written submissions, it is the Defendant's position that the Plaintiffs' application should not be granted. Firstly, it submits that discovery at this juncture is simply 'premature' as the pleadings in this matter have not closed and the Plaintiffs have failed to sufficiently particularize what the Defendant 'is up against with respect to each Plaintiff' or satisfy its subsequent requests for Further and Better Particulars.
- [33.] The Defendant contends that the categories of documents sought are overly broad, wholly disproportionate, and not tethered to the actual 'matter in question' (Phillips v. Phillips

- (1879) 40 LT.815 at 821). The Defendant therefore posits that the Plaintiffs' request violates the long standing principal that discovery should not be used to 'fish out a case'.
- [34.] As regards the Plaintiffs' discovery request at paragraph 1 of their Summons, the Defendant submits that the request amounts to a demand for 'blanket disclosure' of years' worth of marketing and instructional material, with no true regard for relevance or proportionality.
- [35.] The Defendant argues that if any material requested relates to its alleged misrepresentations or negligence, it will be disclosed appropriately, once identified. However, it is the Defendant's position that 'there is no good or adequate reason' for the Plaintiffs' otherwise blanket disclosure order to have been applied for in the first place, or for the same to be granted 'without discrimination or limitation by reference to proportionality, reasonableness, relevance, necessity and confidentiality'.
- [36.] Regarding paragraph 2 of the Plaintiffs' Summons, the Defendant objects to the discovery sought on the ground of 'relevance'. The Defendant submits that the Plaintiffs' request for 'all correspondence', including that between itself and the Insurance Commission of The Bahamas (ICB), is too broad, vague, and speculative. In any event, the Defendant asserts that it is unaware that any correspondence between itself and the ICB concerning the Plaintiffs and their Universal Life insurance policies exists at all.
- [37.] As regards paragraph 3 of the Plaintiffs' Summons which concerns discovery of 'all documents, records and other information' concerning the Defendant's operation and management of the Bahamas Investment Fund, the Cayman Investment Fund, and the International Equity Fund, the Defendant argues that the request is irrelevant to the resolution of the matters in question and nothing more than a mere 'fishing expedition' to support the Plaintiffs' vague allegations that they have in fact not actually pleaded. Further, the Defendant submits that as the Plaintiffs' policies were never invested in the Cayman Investment Fund or the International Equity Fund, there is simply no reason for them to accede to such a discovery request.
- [38.] In the determination of the Plaintiffs' application, the Defendant refers the Court to the case of The Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55 at 63 where Brett J underscores the challenges in drawing the line between relevant and irrelevant discovery, and urges the Court to avoid allowing discovery that is disproportionate and speculative.

#### **ISSUES**

[39.] The issues that arise for determination by this Court in this instant action are:

- 1. Whether the Plaintiffs' request for discovery should be granted; and if granted
- 2. Whether the Plaintiffs' application for discovery should precede the Defendant's Summons for Further and Better Particulars filed 4<sup>th</sup> November 2014;
- 3. Whether the Defendant's Summons for Further and Better Particulars shall be stayed pending completion of the discovery exercise; and
- 4. Whether the Plaintiffs should be allowed to amend their Writ of Summons within twenty-one (21) days of receipt of the documents produced by the Defendant pursuant to the Plaintiffs' discovery request.

#### LAW

- [40.] As regards Discovery, Order 24 Rule 12 of the Rules of the Supreme Court 1978 provides that:
  - '12. At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the documents when produced in such manner as it thinks fit.'
- [41.] Rule 13 (1) provides that:
  - '13. (1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.'
- [42.] In **Downing v. Falmouth United Sewerage Board (1888) 37 C.L.D. 234**, the Court determined that <u>in all cases where discovery is not automatic</u>, it is a matter of discretion and is <u>only granted where it is necessary for disposing fairly of the matter or for saving costs</u>. The Court further provided that whether <u>disclosure</u> should be ordered <u>is dependent upon the facts of the particular case and if there is no reasonable prospect of its being of use, it will be refused; and</u>
- [43.] In **The Consul Corfitzon** [1917] AC 550 the Court determined that where discovery is pursuant to an order, it is both permissible and convenient that the Judge who makes the order should indicate the kind of document that should be discovered.

### **ANALYSIS & DISPOSITION**

- [44.] The Plaintiffs seek discovery pursuant to Order 24 Rule 12 of the Rules of the Supreme Court 1978, and under the inherent jurisdiction of the Court. Their request spans several categories of documents relating to the Defendant's (i) promotional, marketing and instructional material; (ii) correspondence, including correspondence with the ICB concerning the Plaintiffs' policies; (iii) documents concerning the management of certain investment funds; and (iv) documents detailing the fund balances associated with their policies.
- [45.] The threshold test pursuant to Order 24 Rule 12 is whether the discovery sought relates to 'any matter in question in the cause or matter', and under Rule 13(1), whether the discovery is 'necessary either for disposing fairly of the cause or matter or for saving costs'. In addition to these particular requirements, the Court retains a broad discretion to determine what documents are relevant depending on the facts of the particular case (Downing v Falmouth United Sewerage Board (1888) 37 C.L.D. 234).
- [46.] In the instant action, the Plaintiffs allege negligent misrepresentation, breach of contract, and breach of fiduciary duty against the Defendant. These allegations are based, *inter alia*, on the Defendant's purported failure to fully and accurately (i) disclose the structure and risk associated with its Universal Life Insurance product; (ii) disclose the policies' reliance on the performance of the associated Funds and (iii) disclose the impact of the imposed mortality charges on the policies. It follows then, that in my view, documents evidencing what was actually represented to the Plaintiffs at the time of solicitation, such as promotional and marketing material, are plainly relevant to the issues in dispute and therefore should be disclosed.
- [47.] As regards the Plaintiffs request for discovery of all of the Defendant's correspondence, including its correspondence concerning the Plaintiffs' Universal Life Insurance policies with the ICB, the Defendant has submitted that it is unaware that any such correspondence exists. While I accept that discovery cannot compel production of correspondence that does not exist, I do not find that the request is irrelevant.
- [48.] The Plaintiffs contend that the Defendant has previously been the subject of regulatory scrutiny by the ICB for similar conduct affecting other policyholders. They therefore argue that all correspondence between the Defendant and the ICB on the subject of the Universal Life Insurance policies could be relevant in establishing a pattern of conduct and similar breaches on the part of the Defendant.

- [49.] Accordingly, the Court finds that while the Defendant cannot be ordered to produce correspondence it avers does not exist, it is nonetheless appropriate that it conduct a reasonable search for any correspondence between itself and the ICB relating to its Universal Life Insurance product generally, in relation to the Plaintiffs' policies and in relation to any regulatory guidance, investigation or concerns it received about its marketing or structure of that particular product. Thereafter, any such correspondence found to exist should be disclosed as it may prove relevant. However, its disclosure shall be subject to the appropriate safeguards such as any necessary redactions being applied (Science Research Council v Nasse [1980] AC 1028).
- [50.] As regards the third category of discovery requested for all documents, records and information relating to the Bahamas Investment Fund, the Cayman Investment Fund, and the International Equity Fund, I agree with the Defendant that disclosure in this regard should be proportionate and tethered to the pleaded case. As such, to the extent that the Plaintiffs' policies were not invested in the Cayman Investment Fund or the International Equity Funds, the documents related to those funds would in my view be of little relevance. However, given the Plaintiffs' position that the Defendant failed to provide sufficient accounting for how the Funds were managed, and considering the Plaintiffs' allegation that the Defendant mismanaged the Funds, it is my finding that at least a limited discovery as it relates to the Bahamas Investment Fund is justified.
- [51.] Turning now to the Defendant's assertion that the Plaintiff's application is premature, the Court accepts that discovery is not typically granted until pleadings are closed. However, the Court is mindful that this rule is not absolute. In Cyril Leonard & Co. v Simon Securities Trsut Ltd (supra), early discovery was permitted where the existing pleadings were sufficiently particularized. Further, in Leitch v Abbott (supra), the Court recognized that early discovery may be warranted where it is necessary for a party to properly plead fraud.
- [52.] In the instant case, I find that the particulars produced to this Court are pleaded with sufficient clarity and specificity to justify the discovery sought. Further, I find that early discovery in light of the serious allegation of potential fraud would aid in the fair disposal of the matter and mitigate against any further delays. I am therefore persuaded that discovery is appropriate at this stage in the proceedings as I do not find on the facts that the request constitutes a 'fishing expedition' as asserted by the Defendants. Rather, while the categories sought are broad they are in the context of the Plaintiffs' claims grounded in the matters in dispute. In this regard, the Court finds the Plaintiffs' position to be persuasive.
- [53.] In reaching this conclusion, the Court is also guided by the reasoning of Lord Leggatt and Lord Stephens in the case of **Dorsey McPhee v Colina Insurance Ltd (supra)**. In that case, Colina's failure to disclose its cost-of-insurance table was considered detrimental to its justification for the policy deductions made. While the supportive reasoning is to be found

in the dissenting decision, it is instructive in my view as it speaks to the issue of a failure to disclose material which might elucidate the matters in issue. Therefore, I find it to be appropriate that the Plaintiffs in this instant action be entitled to disclosure of all documents and or correspondence that reveal how their policies were administered, how their policies were marketed, how their funds were performing and the basis for all charges levied against their policy fund accounts.

[54.] It then follows that the Plaintiffs' request for leave of this Court to amend their Writ of Summons within twenty-one (21) days of receipt of the documents to be disclosed is granted considering that the documents obtained from discovery may reveal further particulars relevant to the Plaintiffs' claims.

#### **CONCLUSION**

- [55.] Accordingly, for the reasons set out above, it is the order of this Court that:
  - 1. The Plaintiffs' application for discovery is partially granted. The Defendant shall therefore produce the following documents within thirty (30) days of this Order:
    - All marketing, promotional and instructional material created and or disseminated by the Defendant concerning its Universal Life Insurance policies, during the period of March 1993 to October 2012;
    - ii. The Defendant shall conduct a reasonable and good faith search for any correspondence between itself and the ICB concerning its Universal Life Insurance product, including but not limited to communications relating to regulatory oversight, product structure or consumer complaints, and shall disclose any such correspondence found. To the extent that no such correspondence exists, the Defendant shall confirm this by Affidavit;
    - iii. All documents in the Defendant's possession concerning the operation and management of the Bahamas Investment Fund, insofar as such documents reflect the valuation, performance, or administration of said Fund during the period which the Plaintiff's policies were active;
    - iv. All documents detailing the account balances, fund contributions, fund allocations, charges (including mortality charges), and transactions associated with each of the Plaintiffs' Universal Life Insurance policies.

- 2. The Plaintiffs' application for discovery shall take precedence over the Defendant's Summons for Further and Better Particulars filed 4<sup>th</sup> November 2014 which is hereby stayed pending completion of the ordered discovery;
- **3.** The Plaintiffs shall have liberty to amend their Writ of Summons within twenty-one (21) days of receipt of the documents disclosed by the Defendant pursuant to this Order; and
- 4. Costs of this application shall be costs in the cause.

Dated this 23rd day of July, A.D. 2025

Neil Brathwaite

Justice