Aro Road and Land Vehicle Limited v. Insurance Corporation of Ireland [1986] IESC 1; [1986] IR 403 (22nd July, 1986)

Supreme Court

Aro Road and Land Vehicles Limited
(Plaintiff)

v.

The Insurance Corporation of Ireland Limited
(Defendant)

No. 279 of 1983
[22nd July, 1986]

Status: Reported at [1986] IR 403

Walsh J.
I have read the judgment about to be delivered by McCarthy J., and I agree with it.

Henchy J.

1. Aro Road and Land Vehicles Ltd. ("the insured company") carried on business in Rathcoole, Co. Dublin. In July, 1981, it agreed to sell and deliver a quantity of vehicle cabs and engine parts to a firm called L.R. Plant, whose premises were at Maize, Co. Antrim. The insured company's secretary, Miss Broe, telephoned the road freight section of Córas Iompair Eireann ("C.I.E.") to arrange with them to transport the goods by road to the purchaser's premises. She made the arrangement over the telephone with a Mr. Spelman. She told him what the goods were, she gave him the names and addresses of the consignor and consignee, and she estimated the value of the goods at £200,000. Mr. Spelman quoted transport charges at £2.00 per £1 ,000 worth of goods.

2. On 13th July, 1981, the insured company placed a firm order by telephone for the transport of the goods and it was made clear by Mr. Spelman that they would be carried at owner's risk. Accordingly he suggested that they be insured, and offered to arrange the insurance. He had to hand blank insurance certificates from the Insurance Corporation of Ireland ("the insurers"), and (apparently without disclosing the identity of the insurers),

read out over the telephone the extent of the insurance cover that would be provided, namely, “against the risks of fire and theft only, but including physical loss or damage directly resulting from collision or overturning of the carrying conveyance.”

3. Mr. Mansfield, the managing director of and principal shareholder in the insured company, reluctantly agreed to take out the proferred insurance. His reluctance was understandable because C.I.E. had previously carried goods for him by road to Northern Ireland and there had been no trouble.

4. Mr. Spelman, having arranged with the insured company for the payment of the transport charges and having agreed that the goods would be transported in one 40 ft. container and three 40 ft. tilts or flats, arranged with Miss Broe that a trailer would be sent by C.I.E. next day to start collecting the goods. Meanwhile the arrangement of the insurance was passed by Mr. Spelman to a Mr. McAdam, who was a road freight superintendent in C.I.E. He in turn passed the particulars to a firm of insurance brokers, who arranged the insurance with the insurers. The insurance was recorded by the issue of two insurance certificates by C.I.E., one dated 15th July, 1981, for £200,000 and another dated 16th July, 1981, for £50,000. Those certificates were issued and authenticated by the signature of an official in the road freight department of C.I.E. C.I.E. apparently had a master policy with the insurers covering such transport insurance, and the certificates state that the cover was to be subject to “the conditions and terms of the original policy.”

5. C.I.E. seem to have treated the insurance as having been effected on 15th July 1981. Apart from issuing the main certificate of insurance on that date, they also on that date issued an invoice and statement for £1,180 (including £400 in respect of insurance), and on the same date one of their representatives called to the premises of the insured company and collected a cheque for £1,180 to cover the insurance premium of £400 and £780 freight charges. While a further £100 was paid by the insured company on 31st August, 1981, in respect of additional cover, C.I.E. began to collect the goods on or about 15th July, 1981, for the purpose of transporting them to their destination in County Antrim.

6. From the foregoing account of the transactions that took place before C.I.E. began to transport the goods, the following facts appear to emerge:-

1. The insured company reluctantly took out insurance on the goods and only at the invitation of C.I.E.
2. Before the goods were transported the only information as to the terms of the insurance that was given to the insured company was as to the extent of the cover.
3. Before the goods were transported the relevant certificates were completed by C.I.E. as agents for the insurers.
4. Before the goods were transported the relevant certificates were not issued by C.I.E. to the insured company, nor was even the identity of the insurers made known to the insured company.
5. C.I.E. had been furnished with blank certificates of insurance by the insurers and apparently were empowered to effect them by countersignature.

6. C.I.E., with that power to act as agents for the insurers, did not deem it necessary to require any proposal form from the insured company or to make any inquiries save as to the names and addresses of the consignor and consignee and the nature and value of the goods.
7. C.I.E., as agents for the insurers, made it virtually impossible for the insured company to give the insurers the type of information they now say they were deprived of, for on the 15th July, 1981, as soon as they got the premium agreed by the insurers, they not only completed the main insurance certificate but demanded and were paid the premium payable in respect of that certificate.

7. The contract of insurance in this case must be held to have been concluded (subject to a later addendum) on the 15th July, 1981. It is well established that the duty of disclosure (where such duty applies) ceases to exist as soon as the contract is concluded: see *Whitwell* v. *Autocar Fire and Accident Assurance Co. Ltd.* (1927) 27 LI.L.Rep. 418 and *Looker* v. *Law Union lnsurance* [1928] 1 KB. 554.

8. The essential question, then, is whether the non-disclosure now relied on could have been made, or was expected to be made, before 15th July,1981.

9. C.I.E. proceeded to deliver by road the four loads of goods as arranged. Three of those loads safely reached their destination, but on 20th July 1981 the container was hijacked by a man with a pistol. It was set on fire and its contents destroyed. The insured company brought proceedings in the High Court claiming indemnity under the policy for the loss. The claim was contested on a variety of grounds, but at the end of the hearing the sole issue was whether the insurers were entitled to repudiate liability on the ground that, before the policy was effected, Mr. Mansfield, the managing director of and main shareholder in the insured company. had not disclosed that in 1962 he had been convicted of ten counts of receiving stolen motor parts and sentenced to twenty-one months imprisonment. It was established that the convictions and sentence took place and that they were not disclosed to the insurers, but it was not shown that Mr. Mansfield had anything to do with the malicious destruction near Newry of the container of goods. This defence was entirely a technical one under the law of insurance. It succeeded in the High Court. The judge, having heard expert evidence and having applied the test for the duty of disclosure laid down by this Court in *Chariot Inns* v. *Assicurazioni Generali* [1981] I. R. 199, held that the insurers were entitled to repudiate the policy on the ground of Mr. Mansfield's failure to disclose the convictions and imprisonment that had befallen him nineteen years earlier.

10. I accept without question that it is a general principle of the law of insurance that a person seeking insurance, whether acting personally or through a limited company, is bound to disclose every circumstance within his knowledge which would have influenced the judgment of a reasonable and prudent insurer in fixing the premium or in deciding whether to take on the risk. Carroll J., while personally of opinion that Mr. Mansfield's non-disclosure of his convictions and imprisonment was not material, deferred to the expert opinion given in the High Court (which she accepted and considered to transcend her personal opinion) that a reasonable and prudent underwriter would regard that matter

as material and would have regarded its non-disclosure as a good reason for refusing to underwrite the risk. Accordingly, she held that the insurers were entitled to avoid the policies in question and to repudiate liability. On the assumption that full disclosure of all known material facts was obligatory, I consider that the judge's conclusion could not be interfered with by this Court: see *Northern Bank Finance* v. *Charlton* [1979] IR. 149.

11. It emerged, however, in the course of the hearing of this appeal, that a particular aspect of the case was not adverted to, either in the pleadings or in the argument in the High Court. This was whether the circumstances of the case showed it to be an exception to the usual requirement of full disclosure. Normally, a departure in an appeal from the case as pleaded, or as argued in the court of trial, or as circumscribed by the notice of appeal, is not countenanced. However, in view of the trial judge's expression of her personal opinion as to the effect of the evidence, and having regard to the technical nature of the defence and the general importance of this point in the law of insurance, I consider that this point should be entertained.

12. Generally speaking, contracts of insurance are contracts *uberrime fidei,* which means that utmost good faith must be shown by the person seeking the insurance. Not alone must that person answer to the best of his knowledge any question put to him in a proposal form, but, even when there is no proposal form, he is bound to divulge all matters within his knowledge which a reasonable and prudent insurer would consider material in deciding whether to underwrite the risk or to underwrite it on special terms.

13. That is the general rule. Like most general legal rules, however, it is subject to exceptions. For instance, the contract itself may expressly or by necessary implication exclude the requirement of full disclosure. It is for the parties to make their own bargain – subject to any relevant statutory requirements – and if the insurer shows himself to be prepared to underwrite the risk without requiring full disclosure, he cannot later avoid the contract and repudiate liability on the ground of non-disclosure.

14. An example of a contract of insurance which excludes full disclosure is where the circumstances are such as to preclude the possibility of full disclosure; or where the requirement of full disclosure would be so difficult, or so impractical, or so unreasonable, that the insurer must be held by his conduct to have ruled it out as a requirement. This is exemplified by many forms of what I may call "over-the-counter insurance". Because this case is concerned only with fire and theft cover, I am addressing myself only to property insurance. Many concerns, such as airlines, shipping companies and travel agents – acting as agents for an insurance company and usually under the umbrella of a master policy – are prepared to insure travellers or consignors of goods in respect of luggage or of goods consigned, in circumstances in which full disclosure is neither asked for nor could reasonably be given effect to. The time factor, if nothing else, would rule out the requirement of full disclosure in many instances: an air traveller who buys insurance of his luggage in an airport just before boarding an aeroplane could not be expected to have time to make disclosure of all material circumstances. Insurance sold in that way obviously implies a willingness on the part of the insurer to provide the cover asked for without requiring disclosure of *all* material circumstances. The question in this

case is whether this insurance, which the judge has held was entered into by Mr. Mansfield's company in good faith and without any intention to defraud, was attended by circumstances which show that the insurers are precluded from claiming that full disclosure was a prerequisite of a valid contract of insurance.

15. Consider the relevant circumstances. Mr. Mansfield, through his company, was sold this insurance. He did not look for it. It was suggested by C.I.E. He was reluctant to take it out; he considered it a waste of money. C.I.E. as agents for the insurers arranged the rates and filled in the relevant certificates of insurance. Once that was done, C.I.E. were ready to transport the goods. They sought no further information from Mr. Mansfield and apparently deemed none necessary. Before collecting and transporting the goods, they did not furnish the certificates of insurance to Mr. Mansfield or his company. They did not even inform Mr. Mansfield or his company of the identity of the insurers. It is conceded by counsel for the insurers that if Mr. Mansfield was to make full disclosure he would have to make such inquiries as would bring the identity of the insurers to his knowledge – or alternatively to pass the relevant information to C.I.E. as their agents. C.I.E. as well as being the insurers' agents, were to be the carriers of the goods insured. Everything points to the conclusion that when, as carriers of the goods, they got the information necessary for their purposes as carriers, and then arranged insurance of the goods during transit, the insurance was for all practical purposes concluded, so that no further information could have thereafter been asked for.

16. The circumstances of this case seem to me to show that C.I.E., acting as agents for the insurers, accepted this insurance without expecting or requiring disclosure of *all* relevant circumstances. The informal, almost perfunctory, way in which C.I.E. effected this insurance, their readiness to collect the premium and proceed to carry the goods to their destination as soon as they had ascertained the premium, showed a failure or unwillingness to give the insured company an opportunity to make full disclosure before the contract of insurance was concluded. The relevant circumstances indicate an indifference on the part of C.I.E. as agents for the insurers as to matters such as the personal circumstances of the managing director of the insured company.

17. It may well be the law that even in a case such as this certain types of information may not be knowingly withheld by the insured, but this case calls only for an answer to the question whether in the circumstances of the case an innocent non-disclosure of an incident in the past life of the managing director of the insured company entitled the insurers to avoid the policy. In my opinion it did not. Insurers who allow agents such as shippers, carriers, airlines, travel agents and the like to insure on their behalf goods being carried, and to sell that insurance to virtually all and sundry who ask for it, with minimal formality or inquiry, and with no indication that full disclosure is to be made of any matter which the insurers may *ex post facto* deem to be material, cannot he held to contract subject to a condition that the insured must furnish *all* material information.

18. I would allow the plaintiff's appeal and remit the case to the High Court for the assessment of damages.

Griffin J.

19. I agree with the judgment of Henchy J.

Hederman J.

20. I agree with the judgment about to be delivered by McCarthy J.

McCarthy J.

21. The documentary evidence of the insurance effected is contained in two certificates which. save for date, insured value and an irrelevant detail, all in manuscript, are identical in form. They certify that the defendant "has insured the goods specified hereunder, under open policy, on behalf of Coras lompair Eireann and/or as agents" against risks, including the event which happened, "subject otherwise to the conditions and terms of the original policy." The most obvious comment is that the certificate makes no reference to the plaintiff in this action. "The certificate represents and takes the place of the original policy and will, for the purpose of collecting any claims, be accepted as showing that the holder is entitled to the benefit of such policy to the extent set forth herein." Unlike what I understand to be the ordinary course of the insurance business, there was no proposal form; such forms ordinarily provide that the proposal form shall be the basis of the contract. Here the insurance was arranged by Frank Spelman of C.I.E. who signed the quotation of the 15th July and provided the certificates duly completed from forms pre-signed on behalf of the Insurance Corporation of Ireland Ltd. Frank McAdam, road freight superintendent, arranged the insurance through the brokers, Coyle Hamilton Hamilton Phillips Ltd.; exactly how this was done is not clear. What is clear beyond doubt is that no proposal form was completed, no questions relevant to the risk, save as to value, were ever asked. James Mansfield, managing director and principal shareholder of the plaintiff company, the insured, had, in 1962, been convicted on ten counts of receiving stolen motor parts and sentenced to twenty-one months imprisonment. Not merely was the fact of these convictions not disclosed to the insurers; not merely did it not occur to Mr. Mansfield, a reluctant insured, to disclose them; they never occurred to him at all; they were a part of his past which he understandably preferred to forget. Although a great number of different matters were canvassed in the course of the trial, at the conclusion the sole issue was the right claimed by the insurers to repudiate liability on the ground of non-disclosure of these convictions, which, it is said, was a non-disclosure that a reasonable and prudent underwriter would regard as material and, therefore, on ground of moral hazard, a valid reason for refusing the risk. I think not.

22. Consideration of this appeal is not helped by the fact that the master policy, the open policy, was not produced in evidence. There was no evidence to suggest that between the l5th/l6th July and the 20th July (the day of the hijack) there was any communication passing to the insurers concerning this particular risk. Carroll J. considered that the

convictions could not be material, particularly to the type of insurance where the risk only attached while the goods were in the custody of C.I.E. Nonetheless, accepting that Mr. Smart was expressing the view of a reasonable and prudent underwriter, she felt that the defendants had discharged the onus on them to prove a material non-disclosure; she felt obliged, so to speak, to suppress her own view of materiality in favour of that of Mr. Smart, once she assessed him to be a reasonable and prudent underwriter. Notwithstanding that she still held to her view that the convictions were not material, Carroll J. deferred to the view of Mr. Smart; in my judgment, she was incorrect in so doing, being herself the sole and final arbiter.

23. In my view, if the judgment of an insurer is such as to require disclosure of what he thinks is relevant but which a reasonable insured, if he thought of it at all, would not think relevant, then. in the absence of a question directed towards the disclosure of such a fact, the insurer, albeit prudent, cannot properly he held to be acting reasonably. A contract of insurance is a contract of the utmost good faith on both sides; the insured is bound ,to disclose every matter which might reasonably he thought to be material to the risk against which he is seeking indemnity; that test of reasonableness is an objective one not to be determined by the opinion of underwriter, broker or insurance agent, but by, and only by, the tribunal determining the issue. Whilst accepted standards of conduct and practice are of significance in determining issues of alleged professional negligence, they are not to be elevated into being an absolute shield against allegations of malpractice — see *O'Donovan* v. *Cork County Council* [1967] I.R. 173 and *Roche* v. *Peilow* [1985] I.R. 232. In disputes concerning professional competence, a profession is not to be permitted to be the final arbiter of standards of competence. In the instant case, the insurance profession is not to be permitted to dictate a binding definition of what is reasonable. The learned trial judge depended part of her judgment upon the decision of this Court in *Chariot Inns* v. *Assicurazioni Generali* [1981] I.R. 199. In his judgment, with which Henchy and Griffin JJ. agreed, Kenny J. stated at p. 225:-

"A contract of insurance requires the highest standard of accuracy, good faith, candour and disclosure by the insured when making a proposal for insurance to an insurance company. It has become usual for an insurance company to whom a proposal for insurance is made to ask the proposed insured to answer a number of questions. Any misstatement in the answers given, when they relate to a material matter affecting the insurance, entitles the insurance company to avoid the policy and to repudiate liability if the event insured against happens. But the correct answering of any questions asked is not the entire obligation of the person seeking insurance: he is bound, in addition, to disclose to the insurance company every matter which is material to the risk against which he is seeking indemnity.
What is to be regarded as material to the risk against which the insurance is sought? It is not what the person seeking insurance regards as material, nor is it what the insurance company regards as material. It is a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk, and, if so, in determining the premium which he would demand. The standard by which materiality is to be determined is objective and not subjective. In the last resort the matter has to be determined by the court: the parties to the litigation may call experts in

insurance matters as witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determined by such witnesses."

24. These observations were made in a case in which there was a proposal form, there were questions asked by the insurer and, as this Court held, there was a non-disclosure of a matter material to the risk. In the High Court (in *Chariot Inns)* Keane J., at p. 209, said:-

"The most widely accepted test of materiality in all forms of insurance on property and goods appears to be that set out in s. 18, sub-s. 2, of the Marine Insurance Act, 1906, which is in the following terms:-
'Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.'

25. That test has been frequently stated to be applicable to non-marine insurance as well: see *Joel* v. *Law Union & Crown Insurance Co.* and *March Cabaret* v. *London Assurance.* Another test has sometimes been proposed, *i.e.,* the test of whether a reasonable man in the position of the assured and with knowledge of the facts in dispute ought to have realised that they were material to the risk. But this test has been confined normally in its application to cases of life, see MacGillivray & Parkington on Insurance Law (6th ed. – paras. 749, 750). It was not suggested by any of the parties as the appropriate test in the present case and, accordingly, I propose to apply the test set out in s. 18, sub—s. 2 of the Act of 1906."

26. Kenny J. did not expressly advert to this proposition but it reflects the argument advanced by the plaintiff here touching on what the insured might consider relevant or material. Keane J., at p. 207, referred to the judgment of Fletcher Moulton L.J. in *Joel* v. *Law Union & Crown Insurance Co.* [1908] 2 K.B. 863 at p. 892. There it was said:-

"Over and above the two documents signed by the applicant, and in my opinion unaffected by them, there remained the common law obligation of disclosure of all knowledge possessed by the applicant material to the risk about to be undertaken by the company, such materiality being a matter to be judged of by the jury and not by the Court."

27. The same Lord Justice, at p. 885, had some critical comments to make on the practices on the part of insurance offices of requiring that the accuracy of the answers to the proposal form should he the basis of the contract. I point to this so as to emphasise that *Joel* v. *Law Union & Crown Insurance Co.* [1908]2 KB. 863 was a case concerned with a proposal form and insurance effected on foot of it as was *Chariot Inns* [1981] I.R.199. This is not such a case, but the test remains one of the utmost good faith. Yet, how does one depart from such a standard if reasonably and genuinely one does not consider some fact material; how much the less does one depart from such a standard when the failure to disclose is entirely due to a failure of recollection? Where there is no spur to the memory, where there is no proposal form with its presumably relevant questions, how can a failure of recollection lessen the quality of good faith? Good faith is

not raised in its standard by being described as the utmost good faith; good faith requires candour and disclosure, not, I think, accuracy in itself, but a genuine effort to achieve the same using all reasonably available sources, a factor well illustrated by Fletcher Moulton L.J.. at p. 885 of *Joel.* If the duty is one that requires disclosure by the insured of all material facts which are known to him, then it may well require an impossible level of performance. Is it reasonable of an underwriter to say:- "I expect disclosure of what I think is relevant or what I may think is relevant but which a reasonable proposer may not think of at all or, if he does, may not think is relevant?". The classic authority is the judgment of Lord Mansfield in *Carter* v. *Boehm* (1766) 3 Burr. 1905 where, in terms free from exaggeration, he stated at p. 1911:-

"The *Reason* of the Rule which obliges Parties to disclose, is to prevent Fraud and to encourage good Faith. It is adapted to *such* Facts as vary the Nature of the Contract; which One privately knows, and The other is ignorant of. and has no Reason to suspect. The Question therefore must always be "Whether there was, under all the Circumstances at the time the Policy was underwritten, a *fair Representation;* or a *Concealment;* fraudulent, if *designed;* Or, though not designed, *varying materially the Object* of the Policy, and *changing the Risque* understood to be run."

28. If the determination of what is material were to lie with the insurer alone I do not know how the average citizen is to know what goes on in the insurer's mind, unless the insurer asks him by way of the questions in a proposal form or otherwise. I do not accept that he must seek out the proposed insurer and question him as to his reasonableness, his prudence, and what he considers material. The proposal form will ordinarily contain a wide ranging series of questions followed by an omnibus question as to any other matters that are material. In the instant case, if Mr. Mansfield had ever had the opportunity of completing a proposal form, which, due to the convenient arrangement made between the insurers and C.I.E., he did not, there is no reason to think that he would have recounted petty convictions of about 20 years before the time. For the reasons I have sought to illustrate, in my view, the learned trial judge failed correctly to apply the very stringent test; in my judgment, the insurers failed to discharge the onus of proof that lay on them.

29. There is a second ground upon which, also, in my view the plaintiff is entitled to succeed. Without detracting from what I have said in respect of the general law of insurance, in my judgment, that law is materially affected by over-the-counter insurance such as found in cases of the present kind, in other forms of transit and in personal travel, including holiday insurance. If no questions are asked of the insured, then, in the absence of fraud, the insurer is not entitled to repudiate on grounds of non-disclosure. Fraud might arise in such an instance as where an intending traveller has been told of imminent risk of death and then takes out life insurance in a slot machine at an airport. Otherwise, the insured need but answer correctly the questions asked; these questions must he limited in kind and number; if the insurer were to have the opportunity of denying or loading the insurance one purpose of the transaction would he defeated. Expedition is the hallmark of this form of insurance. Mr. Whelehan suggested that the whole basis of insurance could be seriously damaged if there was any weakening in the rigidity and, I must add, the

severity, of the principle he sought to support. The force of such an argument as a proposition of law is matched by the improbability of the event.

30. Mr. Gleeson sought leave of the Court to argue as an alternative proposition that *Chariot Inns* [1981] I.R. 199 was wrongly decided in being an elaboration in a particular direction; that the reasonably prudent test is inherently unreasonable, biased and productive of unfairness, producing unjust results and, consequently, is not part of the common law. The issue of arguing this point was postponed until the main grounds of the appeal were determined; having regard to the outcome of the appeal, it is not necessary to elaborate further on the matter.