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1. *Prudential Assurance Malaysia Bhd v Ombudsman Perkhidmatan Kewangan & Anor [2022] MLJU 2366*

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**Prudential Assurance Malaysia Bhd v Ombudsman Perkhidmatan  
Kewangan & Anor [2022] MLJU 2366**

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AHMAD KAMAL MD SHAHID J

PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO WA-25-278-09/2020

28 September 2022

*Wong Hok Mun (with Eng Kar Wei) (Azim Tunku Farik & Wong) for the applicant.  
Khoo Guan Huat (with Joshua Teoh) (Skrine) for the first respondent.*

**Ahmad Kamal Md Shahid J:**

JudgmentIntroduction

[1]The Applicant filed an application for judicial review proceedings (**Enclosure 13**) under Order 53 of the Rules of Court 2012 (**ROC**) to seek the following reliefs:-

- 1.1. a declaration that the 2<sup>nd</sup> Respondent's claim on the policy is not payable by the Applicant;
- 1.2. an Order of Certiorari to remove the proceedings before the 1<sup>st</sup> Respondent to this Honourable Court to quash the Adjudication by the 1<sup>st</sup> Respondent dated 29.06.2020, that allowed the 2<sup>nd</sup> Respondent's claim on the policy;
- 1.1. 1.3. all necessary and consequential orders or directions, as deemed fit by this Honourable Court; and
- 1.4. the costs of this Application and costs occasioned thereby be costs in the cause.

[2]In gist, the Applicant's judicial review application among others is on the adjudication and Award rendered by the Ombudsman, one S. Kalyana Kumar (**the Ombudsman**) or a dispute between the Applicant and the Second Respondent on the rejection of a claim made under the life insurance policy No. 35294124 (**the policy**) taken up by one Ms Kok Sok Fui (**the Deceased**) with the Applicant.

[3]The Ombudsman's adjudication was made according to the Financial Ombudsman Scheme operated by the 1<sup>st</sup> Respondent under section 126 of the Financial Services Act 2013 (FSA), the Financial Services (Financial Ombudsman Scheme) Regulations 2015, and the Terms of Reference for the Ombudsman for Financial Services (**the Terms of Reference**).

[4]After the hearing, I dismissed the Applicant's application for judicial review (Enclosure 13). The grounds for my decision appear below.

Background Facts

[5]The narration of the background facts herein is adopted with and/or without modification from the Written Submission of the 1<sup>st</sup> Respondent.

The policy

[6]On or about 20.04.2017, the Deceased applied to the Applicant for a life insurance policy vide a Life Insurance Regular Premium Proposal Form (**Proposal Form**) which contained a general declaration.

[7]On 15.05.2017, the Deceased attended a medical examination by one Dr Kheng Kien Soo for purposes of the Proposal Form. There was no detection of any symptom or condition of Myasthenia.

[8]On 17.05.2017, the Deceased consulted Dr Christopher Chong. However, she was not afforded any investigation and treatment / medication for Myasthenia.

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[9] On 07.06.2017, the Applicant accepted the Deceased's Proposal Form and issued the Deceased a letter bearing the Offer of Conditional Acceptance dated 07.06.2017. The Applicant has offered the Deceased, inter alia:

- a. Death benefits of RM 12,000.00;
- b. Add-on benefits, including medical benefits up to RM 1,000,000.00.

[10] The Offer of Conditional Acceptance dated 07.06.2017 was accepted by the Deceased on 09.06.2017.

[11] Upon the Deceased's acceptance of the Offer of Conditional Acceptance, the Policy with a commencement date of 01.06.2017 was issued on 13.06.2017 which provides for, inter alia, a monthly premium of RM 848.00. Also, the 2<sup>nd</sup> Respondent was named as the nominee under the Policy.

[12] On 30.08.2017, the Deceased was, upon being investigated, diagnosed by one Dr Christopher Chong to have Myasthenia Gravis. Thereafter, the Deceased has also undergone several consultations and treatments with Dr Christopher Chong until 20.06.2018.

[13] On 25.09.2018, the Deceased passed away due to Myasthenia Gravis with respiratory failure.

[14] Upon the Deceased's passing, the 2<sup>nd</sup> Respondent submitted a claim (**Death Claim**) on the Policy to the Applicant together with a copy of the Medical Questionnaire completed by Dr Christopher Chong dated 09.01.2019.

[15] However, on 16.10.2019, the Applicant rejected/repudiated the Death Claim and opted to void the Policy through a letter dated 16.10.2019 to the 2<sup>nd</sup> Respondent.

[16] In rejecting the Death Claim, the Applicant has purportedly claimed that the Deceased has, prior to the issuance of the Policy, committed non-disclosure of material fact in the Proposal Form, especially about her answers to the questions in Q3.5a, Q3.5b, Q3.6a and Q3.6c and therefore, the Applicant is voiding the Policy with the Deceased and denying the Death Claim.

[17] On or about 08.11.2019, the 2<sup>nd</sup> Respondent, being dissatisfied with the Applicant's rejection of 16.10.2019, made a reference on the Death Claim to the 1<sup>st</sup> Respondent.

[18] On 01.05.2020, the case manager of the 1<sup>st</sup> Respondent, Masni Sulaiman, provided a recommendation in favor of the Applicant (**the Recommendation**).

[19] Being dissatisfied with the Recommendation, the 2<sup>nd</sup> Respondent further referred the rejection of the Death Claim by the Applicant (**the Dispute**) to the 1<sup>st</sup> Respondent for adjudication under the financial ombudsman scheme (**the Adjudication**).

[20] Subsequently, the 1<sup>st</sup> Respondent has assigned the Ombudsman, one S. Kalyana Kumar, to adjudicate the Dispute.

[21] On 20.05.2020, the Ombudsman issued a letter to the Applicant informing that the 2<sup>nd</sup> Respondent has referred the Dispute for Adjudication and inviting the Applicant to provide information and/or documents for the Adjudication.

[22] On 22.05.2020, the Ombudsman further issued a letter to the Applicant stating his preliminary view that the Applicant has no basis to repudiate the Death Claim on grounds of non-disclosure of the Deceased's medical condition after signing the Proposal Form and prior to the Policy's commencement date on 01.06.2017 due to Schedule 9 of the FSA including paragraph 10.

[23] On 03.06.2020, the Applicant through a letter responded to the Ombudsman, and provided the Ombudsman eight (8) documents for evaluation in the Adjudication.

[24] With Schedule 9 of the FSA in mind, the issue for determination by the Ombudsman in the Adjudication was whether there was misrepresentation by the Deceased prior to the commencement of the Policy.

[25] On 29.06.2020, the Ombudsman concluded the Adjudication and found in favor of the 2<sup>nd</sup> Respondent (**the Award**). The Ombudsman also directed the Applicant to honour the Death Claim.

[26] Thereafter, in a letter dated 28.07.2020 addressed to the 2<sup>nd</sup> Respondent, the Applicant has admitted liability to the Death Claim of the Policy. The Applicant has also provided a payment of RM 15,482.04 to the 2<sup>nd</sup> Respondent.

[27] However, it was brought to the 1<sup>st</sup> Respondent's attention that the Applicant has failed to provide the hospitalisation claim under the Policy in the amount of RM 121,695.93 to the 2<sup>nd</sup> Respondent.

[28] On 06.08.2020, the case manager of the 1<sup>st</sup> Respondent, Masni Sulaiman, issued a letter to the Applicant enquiring and seeking for an explanation for the Applicant's failure to provide the hospitalisation claim to the 2<sup>nd</sup> Respondent.

[29] On 28.09.2020, the Applicant has, without naming the Ombudsman, applied to this Honourable Court leave to commence a judicial review application against the Adjudication.

[30] Thereafter, leave to proceed with the judicial review application was granted by this Honourable Court on 23.11.2020.

The Applicant's ground for the judicial review

[31] In gist, the Applicant's application herein is based on the following grounds:-

31.1. the 1<sup>st</sup> Respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that the Applicant's reliance on the "General Declaration" in the proposal form to avoid the policy has been unequivocally abolished by paragraph 10 of Schedule 9 of the FSA;

31.2. the 1<sup>st</sup> Respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that the practice of requiring a consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure under paragraph 10 of Schedule 9 of the FSA;

31.3. the 1<sup>st</sup> Respondent's Adjudication is an error of law and is irrational and/or unreasonable in the *Wednesbury* sense in that he held that paragraph 10 Schedule 9 of the FSA has the effect of nullifying the nature of insurance contract from being *uberrimae fidei*;

31.4. the 1<sup>st</sup> Respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense when it failed to appreciate and/or adequately appreciate that paragraph 10 of Schedule 9 of the FSA merely provides that any representation made at the pre-contractual stage will remain as a representation and be treated so. It does not "abolish" a party's reliance on the General Declaration made by the other whatsoever;

31.5. the 1<sup>st</sup> Respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that there is no misrepresentation on the part of the deceased prior to the Applicant's issuance of the policy. In so concluding, the 1<sup>st</sup> Respondent failed to take into account the following:-

- a. the deceased's complaint of "droopy eyelids" as well as the diagnosis of "Suspected Myasthenia" on 17.05.2017 amounts to a change in the state of her health required to be disclosed prior to the Applicant before the issuance of the policy;
- b. the deceased's condition ought to be disclosed to the Applicant prior to the issuance of the policy in light of questions 3.5, 3.6(a) and 3.6(b) of the proposal form; and
- c. the deceased's failure to disclose the condition amounts to a deliberate and/or reckless misrepresentation.

31.6. the 1<sup>st</sup> Respondent committed an error of law, acted in excess of jurisdiction under paragraph 30 of the TOR and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that he had the power to decide each case according to what is "fair and reasonable" without regard the relevant applicable law; and

31.7. the Adjudication by the 1<sup>st</sup> Respondent is unreasonable in law in that no other person or tribunal similarity circumstanced would have arrived at it.

## The Law

[32]Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

[33]However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the Courts to scrutinize the decision not only for the process, but also for substance.

[34]It is settled law that the High Court will not interfere with a decision of the inferior tribunal unless it can be established that the decision is infected with errors of law.

[35]The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 1 MLR A 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601; [1995] 2 MLJ 317 in the following words:

**"It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law."**

(emphasis added)

[36]Similarly, in the case of *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 1 MLRA 664; [2000] 4 CLJ 77, the Court of Appeal held that an erroneous inference of facts is also an error of law which would warrant an order of certiorari:-

**"On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. An erroneous inference from proved or admitted facts is an error of law; not an error of fact."**

(emphasis added)

[37]Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the Applicant must show that the 1<sup>st</sup> Respondent had, among others:-

- a. Asked itself the wrong questions;
- b. Considered irrelevant matters;
- c. Failed to consider relevant matters;
- d. Failed to apply the proper principle(s) of law; and/or
- e. Reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

## Preliminary Objection (PO)

[38]At the outset of the hearing, the learned Counsel for the 1<sup>st</sup> Respondent raised a PO. The PO was premised on the following grounds:-

- a. The Adjudication and the Award were rendered by one S. Kalyana Kumar as the Ombudsman, and not the 1<sup>st</sup> Respondent. Accordingly, this judicial review application is defective as the proper party is not cited;
- b. The Applicant has fully admitted to the liability of the Death Claim and unconditionally complied with the Adjudication and the Award, and consequently, the current proceedings are academic and of no utility to the Applicant.

The decision of the Court Preliminary ObjectionThe judicial review application is defective as the proper party i.e. the Ombudsman, was not named.

[39]The 1<sup>st</sup> Respondent submits that the current judicial review proceedings are defective as the party responsible for the Adjudication i.e. the Ombudsman, is not cited as a party.

[40]Having perused the Award, I find that the subject matter concerned an Adjudication that was rendered by the Ombudsman, one S. Kalyana Kumar who is not named as a party.

[41]It is my view that this judicial review application is defective as the person who is responsible for the Adjudication i.e. the Ombudsman is not cited as a party.

[42]I find that the 1<sup>st</sup> Respondent is only the operator of the Financial Ombudsman scheme, whereas the Ombudsman was appointed by the Board of the 1<sup>st</sup> Respondent to adjudicate disputes.

[43]This is because paragraph 2 of the Terms of Reference which regulates the Adjudication states that:-

“**Adjudication**” means the process where the Ombudsman adjudicates a Dispute and makes a final decision, including an Award in accordance with these terms of reference.

“**Ombudsman for Financial Services**” or “**OFS**” means the scheme operator approved by the Bank Negara Malaysia to operate the financial ombudsman scheme.

“**Ombudsman**” means an officer of the OFS appointed by the Board to adjudicate Disputes.

[44]Further, paragraph 6 of the Terms of Reference provides that:

An Ombudsman shall exercise all powers, duties and responsibilities in accordance with the Articles of Association, the FOS Regulations and these Terms of Reference, **including adjudicating and making a final decision on a Dispute.**

(emphasis added)

[45]Based on the above, I am of the considered opinion that the application was brought against the wrong party as the 1<sup>st</sup> Respondent named in this application was not the party who adjudicate the disputes as the party responsible for the adjudication is the Ombudsman, one S. Kalyana Kumar.

[46]It is my view that the Applicant must correctly identify the party responsible for Adjudication because the Applicant cannot seek for a declaratory order and a certiorari order to quash the Adjudication of the Ombudsman, who is not named as a party.

[47]in the case of *Council of Civil Service Unions & Ors (CCSU) v. Minister for the Civil Service* [1985] AC 374 at 408, Lord Diplock held that:-

“The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the decision maker or else a refusal by him to make a decision”.

[48]In the case of *Ambiga a/p Sreenevasan v. Ketua Pengarah Imigresen Malaysia & Ors* [2011] 9 MLRH 572; [2012] 7 CLJ 170; [2012] 1 MLJ 92 at 100, Rohana Yusuf J (now PCA) held as follows:-

[12] Thus, since the First Respondent and Third Respondent are not decision makers of the impugned decision, judicial review cannot lie against them. To put it differently, **there is no decision by the First and Second Respondent that is before this court to review. On this ground, alone, the application ought to be struck out**”.

(emphasis added)

[49]Further, the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 MLJ 1; [1999] 3 AMR 3529 held that:-

“It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading

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up to a decision and, of course, of the decision itself. **It is therefore a matter of the first importance to correctly identify the decision sought to be impugned.** Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision. **Failure to observe these basic requirements could have fatal consequences** as the following authorities will serve to illustrate."

(emphasis added)

[50]Coming back to the facts in the present case, based on the Award of the adjudication, it is clear that it was the Ombudsman, one S. Kalyana Kumar who is conducting the Adjudication and not the 1<sup>st</sup> Respondent.

[51]Therefore, based on the above, I am of the view that the Applicant's application for judicial review is incompetent and based on this ground alone, the application ought to be struck out. The judicial review application is academic as the Applicant has admitted liability to the Death Claim

[52]Upon perusal of the Applicant's letter to the 2<sup>nd</sup> Respondent dated 28.07.2020 as exhibited in exhibit 'MB-1' of the 1<sup>st</sup> Respondent's Affidavit, it is clear that the Applicant has admitted liability to the Death Claim made by the 2<sup>nd</sup> Respondent under the Policy. The said letter dated 28.07.2020 is reproduced for ease of reference:-

THIEN SHING YI

LOT NO 1, LUYANG PHASE 7

JALAN KOLAM

88300 KOTA KINABALU SABAH

OurRef : Claims/18326444/2007008903

Date : 28/07/2020

Dear Sir/Madam,

Policy Number : 35294124

Claim Number : 18326444

Assured : KOK SOK FUI (Deceased)

Life Assured : KOK SOK FUI

NRIC Number 510124125244

Death Claim

We would like to thank you for submitting the necessary documents in respect of the above claim.

**We are pleased to inform that we have admitted liability on this claim.** The

amount of benefit payable is as follows:-

(emphasis added)

[53]Based on the above, it is clear that the Applicant has unequivocally admitted liability to the 2<sup>nd</sup> Respondent's Death Claim or claim on the Policy, which is the subject matter of the Adjudication by the Ombudsman. Therefore, it is my view that this judicial review application is academic.

[54]In the Applicant's Submissions, the Applicant has purported claim in paragraph 10.7 that:-

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54.1. The letter dated 28.07.2020 was inadvertently sent out in its templated / auto-generated for the Claims System;

54.2. There was never any intention to admit the death claim; and

54.3. The latter dated 28.07.2020 was sent before legal advice was taken.

[55] It is my view that the Applicant's claim in paragraph 10.7 is nothing but an afterthought effort to resile on its clear admission of liability. This is because at all material times, the Applicant has failed to mention or address its admission in the letter dated 28.07.2020 to the 2<sup>nd</sup> Respondent.

[56] I find that the Applicant has only shifted its position on the letter dated 28.07.2020 after it received the 1<sup>st</sup> Respondent's Affidavit with, among others, a preliminary objection to the judicial review proceedings to the Applicant's admission on liability to the Death Claim.

[57] Consequent to the letter dated 28.07.2020, the 2<sup>nd</sup> Respondent relied on the Applicant's admission when she wrote to the 1<sup>st</sup> Respondent on 13.08.2020 to inform that among others, the Applicant has failed to provide all the benefits due under the Policy.

[58] Therefore, I am of the considered view that the Applicant's last minute shift from its clear admission in the letter dated 28.07.2020 to the 2<sup>nd</sup> Respondent has no merits. The Applicant is estopped by its clear admission to liability on the Death Claim.

(See *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* [1970] 2 MLJ 111; [1970] 1 MLRA 475)

[59] Premised on the aforesaid reasons, I find that the PO raised by the 1<sup>st</sup> Respondent has merits and accordingly, I uphold the 1<sup>st</sup> Respondent's objection. However, for completeness, I will now deal with the merits of the application.

Merits

[60] It is to be noted that since Ground 1, 2, 3 and 4 of the judicial review concerned the pre-contractual representation in the 'General Declaration' of the Proposal Form, reference must be made to relevant provisions of law as follows:-

a. Section 129 of the FSA provides that:-

**Pre-contractual disclosure and representations, and remedies for misrepresentations**

129. (1) Schedule 9 sets out the pre-contractual duty of disclosure and representations for contracts of insurance in Part 2, and the remedies for misrepresentations relating to contracts of insurance in Part 3.

(2) Any person who contravenes the duty of disclosure under paragraph 11 of Schedule 9 commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[61] Further, paragraph 3 of Schedule 9 of the FSA prohibits any attempt to contract out of Schedule 9 as follows:-

**Contracting out**

3. (1) A term of a consumer insurance contract, or of any other contract, is rendered void to the extent that it would put the consumer in a worse position in respect of the matters mentioned in subparagraph (2) than he would be in by virtue of the provisions of this Schedule.

(2) The matters referred to in subparagraph (1) are -

- (a) **disclosure and representations by the consumer to the licensed insurer before the contract is entered into, varied or renewed;** and
- (b) the non-contestability of contracts of life insurance and any of the remedies for consumer insurance contracts provided in Part 3 of this Schedule.



(3) This paragraph does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

(emphasis added)

[62] Paragraph 5 of Schedule 9 of the FSA provides for the pre-contractual duty of disclosure for consumer insurance contracts as follows:-

**Pre-contractual duty of disclosure for consumer insurance contracts**

5. (1) Before a consumer insurance contract is entered into or varied, **a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.**

(2) It is the duty of the **consumer to take reasonable care not to make a misrepresentation** to the licensed insurer when answering any questions under subparagraph (1).

(5) If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under subparagraph (1) or subparagraph (3)(a), or fails to confirm or amend any matter under subparagraph (3)(b), or does so incompletely or provides irrelevant information, as the case may be, **and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.**

(7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

(8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

(9) Nothing in this Schedule **shall affect the duty of utmost good faith** to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, **after a contract of insurance has been entered into, varied or renewed.**

(emphasis added)

[63] As to the consumer's duty to take reasonable care, paragraph 6 of Schedule 9 of the FSA provides as follows:-

**Duty to take reasonable care**

6. (1) In determining whether a consumer has taken reasonable care not to make a misrepresentation under subparagraph 5(2) or (4), the relevant circumstances may be taken into account including -

- (a) the consumer insurance contract in question and the manner in which the contract was sold to the consumer;
- (b) any relevant explanatory material or publicity produced or authorized by the licensed insurer; and
- (c) how clear and specific, the licensed insurer's questions were.

(2) Subject to subparagraph (3), the standard of care required of the consumer under subparagraph 5(2) and (4) shall be what a reasonable consumer in the circumstances would have known.

(3) If the licensed insurer was, or ought to have been, aware of any particular characteristics or circumstances of the consumer, the insurer shall take into account such characteristics or circumstances.

[64]As to any representation made prior to an insurance contract, paragraph 10 of Schedule 9 of the FSA states that:-

**Warranties and representations**

10. **Any representation made before a consumer insurance contract was entered into, varied or renewed shall not be converted into a warranty** by means of any provision of the consumer insurance contract or of any terms of the variation or of any other contract, **whether by declaring the representation to form the basis of the contract** or otherwise.

(emphasis added)

[65]Based on the above provisions of the law, I will now deal with the Applicant's grounds of the judicial review. Grounds of judicial review Ground 1 - The Ombudsman has erred in law in concluding that the Applicant's reliance on the "General Declaration" in the Proposal Form to avoid the Policy has been unequivocally abolished by paragraph 10 of Schedule 9 of the FSA.

[66]It is to be noted that before the coming into force of Schedule 9 of the FSA, i.e. 01.01.2015, it is permitted for an insurer to rely based on contract clauses to avoid a policy when any of the pre-contractual representations provided by the insured was found to be inaccurate.

[67]Under a basis of contract clause, a person who applies for an insurance contract warrants the accuracy of their answers on the proposal form and agrees that such answers will form the basis of the contract.

[68]However, due to the repeal of the Insurance Act 1996 and the introduction of paragraph 10 of Schedule 9 of the FSA. The use of the basis of contract clauses to avoid insurance policy for inaccurate representations has effectively been abolished.

[69]Having perused Schedule 9 of the FSA, I find that it provides that even if there is misrepresentation by the insured towards the specific questions by an insurer at the pre-contractual stage, it is not automatic for the insurer to avoid the entire policy as there are remedies provided, depending on the type of misrepresentation, in Schedule 9.

[70]Therefore, applying Schedule 9 of the FSA to the Policy, I am of the view that the Ombudsman has correctly observed that the Applicant cannot use the representations made by the Deceased in the Proposal Form to avoid the Policy as though these representations are warranties forming the basis clauses of the contract for the Policy. This is because such practice conflicts with Schedule 9.

[71]I view that the Ombudsman's observation concerning the Applicant's attempt to avoid the Policy by using the Deceased's representations in the "General Declaration" of the Proposal Form through its letter dated 29.10.2019 to the 2<sup>nd</sup> Respondent is rational 66. and/or reasonable. There is no error of law committed by the Ombudsman. Ground 2 - The Ombudsman has erred in law in concluding that the practice of requiring a consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure under paragraph 10 of Schedule 9 of FSA.

[72]On this issue, I find that the observation made by the Ombudsman is consistent with Schedule 9.

[73]This can be gleaned in paragraph 4(iii) of the grounds of Adjudication where the Ombudsman observed as follows:-

iii) We also note that the Insurer is relying on the "General Declaration" in the proposal form to void the policy. In this respect it is important to note that pursuant to paragraph 10 of Schedule 9, any misrepresentation made at the pre-contractual stage cannot be converted into a warranty in that the misrepresentation becomes the basis of the contract which would allow the Insurer to then avoid the contract. The use of basis clauses has been abolished by paragraph 10. As such, the practice of requiring the consumer to confirm his health condition through a declaration in the proposal form would

be in direct conflict with pre-contractual duty of disclosure and remedies under Schedule 9. Such declarations are invalid and of no effect any longer with the coming into force of Schedule 9.

[74]Based on the above, it clearly shows that the Ombudsman's sentence that the "practice or requiring a consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure under paragraph 10 of Schedule 9" was made about the context of the abolishment of the use of basis clauses. The Applicant cannot discount the use of the words "As such" at the start of the sentence, as these words would provide the correct context as to the abolishment of the use of pre-contractual representations as basis clauses.

**Ground 3 - The Ombudsman has erred in law in concluding that paragraph 10 Schedule 9 of FSA has the effect of nullifying the nature of insurance of contract from being *uberrimae fide*,**

[75]Upon perusal of the grounds of the Adjudication, I find that nowhere in his grounds did the Ombudsman conclude that paragraph 10 of the Schedule 9 has the effect of nullifying the nature of the insurance contract from being *uberrimae fidei*.

[76]Therefore, I view the Applicant's contention on Ground 3 as untenable and devoid of merits.

Ground 4 - The Ombudsman has erred in law in failing to appreciate and/or adequately appreciate that paragraph 10 of Schedule 9 of the FSA concerning representation made at the pre-contractual stage.

[77]Paragraph 10 of Schedule 9 states that:

**Warranties and representations**

10. **Any representation made before a consumer insurance contract was entered into, varied or renewed shall not be converted into a warranty** by means of any provision of the consumer insurance contract or of any terms of the variation or of any other contract, **whether by declaring the representation to form the basis of the contract or otherwise.**

(emphasis added)

[78]Based on the above, I see no reason why the Applicant claim that paragraph 10 merely provides that any representation made at the pre-contractual stage will remain as a representation when in fact, it is also obvious that paragraph 10 excludes any such representation from being converted into a warranty which would form the basis of the insurance contract.

[79]Therefore, based on paragraph 10 of Schedule 9 above, I am of the view that the Ombudsman has correctly observed that it has abolished the use of pre-contractual representations as basis clauses by insurers to avoid a policy. This would necessarily mean that in this case, the Applicant's attempt to use the Deceased's representations in the "General Declaration" of the Proposal Form to avoid the Policy would be in conflict with Schedule 9 and is no longer permissible.

Ground 5 - The Ombudsman has erred in law in concluding that there is no misrepresentation on the part of the Deceased prior to the issuance of the Policy.

[80]On this issue, I find that the Applicant has conflated the pre-contractual duty to take reasonable care not to make misrepresentation under paragraph 5 of Schedule 9 with the previous duty of disclosure under section 150 of the *Insurance Act 1996* (repealed).

[81]Having read paragraph 5(1) of Schedule 9, I find that the Deceased is not obliged to volunteer any information. Instead, the Deceased is only required to take reasonable care not to make misrepresentation when answering the specific question posted by the Applicant. In other words, the Deceased is only required to answer the specific question when posted by the Applicant to comply with the pre-contractual duty of disclosure.

[82]In the Proposal Form or at any time up till the commencement date of the Policy, there was no request from the Applicant to the Deceased to provide an answer to any specific question on the diagnosis for Myasthenia. By failing to do so, the Applicant could be deemed to have waived the Deceased's compliance with the pre-contractual duty of disclosure under Schedule 9 for the diagnosis of Myasthenia.

[83]It is also not in dispute that when the Deceased provided her answer to the questions in the Proposal Form up

until the commencement of the Policy, there is nothing to show that she was investigated and diagnosed with Myasthenia.

[84]Therefore, the Deceased would not have reasonably known of any Myasthenia diagnosis and therefore, I view that there is no misrepresentation by the Deceased when filing up Proposal Form on 20.04.2017.

[85]Further, I also noticed that the medical examination by one Dr Kheng Kien Soo on 15.05.2017 also did not detect or diagnose any symptom or condition of Myasthenia in the Deceased.

[86]Even though, I find that the consultation with Dr Christopher Chong (Chris Chong or Chong Kang Tzrd) on 17.05.2017 has recorded that the Deceased is "suspected" to have Myasthenia. However, his report also unequivocally showed that there was no investigation done, and no treatment / medication provided to the Deceased about that suspicion.

[87]Therefore, based on the above, I am of the considered view that a "Suspected Myasthenia" purported diagnosis is not a conclusive diagnosis. Furthermore, the suspicion by the doctor is, at most, limited to only the Deceased's eyelids. There is nothing to show that the Deceased has any issue or complaint with her respiratory system or breathing discomfort from 17.05.2017 up until the commencement of the Policy (01.06.2017). The cause of the Deceased's death was later found to be "septic shock" due to "Myasthenia gravis with respiratory failure".

[88]Based on the evidence produced before the Ombudsman, I find that the Ombudsman has correctly found, among others, that:

- (a) There was no misrepresentation on the part of the Deceased as to her state of health in the Proposal Form of 20.04.2017;
- (b) The Deceased was only diagnosed with Myasthenia on 30.08.2017, which was after the commencement date of the Policy on 01.06.2017. The Deceased had no knowledge of Myasthenia until the doctor diagnosed it on 30.08.2017. As such, the Deceased has no duty to inform of any change in her health prior to commencement of the Policy.
- (c) The Applicant cannot rely on the "General Declaration" in the Proposal Form to avoid the Deceased's Policy due to paragraph 10 of Schedule 9 of the FSA which has unequivocally abolished the practice or use of basis clauses; and
- (d) The Applicant's practice of requiring a consumer to confirm his or her health condition through a general declaration in the Proposal Form would be in direct conflict with the pre
- (e) contractual duty of disclosure and remedies under Schedule 9 of the FSA.

[89]All in all, I find that the Ombudsman's adjudication is reasonable, and based on applicable legal principles. The Ombudsman has complied with, among others, paragraph 30 of the Terms of Reference in delivering the Award.

[90]It is to be noted that the Ombudsman had made a finding of fact in the Adjudication that there was no misrepresentation by the Deceased in answering questions raised by the Applicant in the Proposal Form prior to the commencement of the Policy.

[91]The Ombudsman has all the relevant and contemporaneous documents to draw a reasonable inference from them.

[92]The finding of facts of the Ombudsman will only be disturbed by this court when the Ombudsman was wrong in the evaluation of the evidence. It is for the Applicant to establish that there was a misdirection by the Ombudsman to warrant interference by this court. Unfortunately, the Applicant has not demonstrated any such errors in the facts of this case to warrant appellate interference

[93]I view the Ombudsman's findings as rational and cogent and there are no flaws in its reasoning or the conclusions therein. Based on the evidence before the Ombudsman, it cannot be said that the findings of the Ombudsman are irrational or perverse.

[94]I am of the view that the finding of the Ombudsman is based on the totality of the evidence adduced before him. To me, the Ombudsman had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinize every piece of evidence adduced before the

Ombudsman and to make another finding of fact. The tasks of fact-finding fall within the jurisdiction of the Ombudsman.

Conclusion

**[95]** Premised on the aforesaid reasons, I am of the view that the decision of the Ombudsman is not tainted with any errors of law, irrationality and/or unreasonableness that warrants the intervention of this court.

**[96]** As such, the Applicant's application for judicial review (Enclosure 13) is dismissed with costs of RM 5,000.00 subject to the allocator fee.

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