Increased risk: the importance of questions to policyholders

June 20, 2018

On 23 January 2018, in a case in which Marcelin Fortier (hereinafter the "**applicant**") sued his insurer, the Superior Court rendered a decision[1] whereby it reiterates the principles applicable to the notion of increased risk in insurance, and insisted on the importance of the questions asked by insurers at the time an insurance contract is purchased.

On 8 January 2015, the applicant's home was seriously damaged by fire. The applicant thereafter turned to his insurer, seeking compensation for the damages resulting from the fire. The insurer denied coverage and asked that the contract be declared void *ab initio,* arguing that the applicant had failed to disclose the fact that his ex-wife, who has a serious criminal record, had returned to live in his house since October 2011. The insurer argued that this constituted an increased risk, sufficient to invalidate the insurance contract.

For starters, we point out that an insured person has the obligation to disclose to his or her insurer any increased risk that may change the insurance contract that was signed initially, such obligation being limited to disclosing increased risks resulting from the insured party's actions[2]. Once that increased risk is disclosed, an insurer can choose to do nothing, to increase the premium, or to terminate the contract from the onset of such increased risk. Consequently, an insured's failure to disclose an increased risk may lead to a proportional reduction in compensation, or to the nullity of the contract in the event of a claim. In the latter case, the insurer needs to prove that a prudent insurer in the same circumstances would have terminated the contract if it had been warned in due course about such increased risk, or else that the insured has acted in bad faith.

In this case, the insurer claimed that, had it been informed about the spouses resuming their life together in the house, it would have terminated the contract, arguing that the criminal records of policyholders are of the utmost importance in damage insurance. Here, the insurer argued that this justified the termination of the contract.

For his part, the applicant argued that the insurer had never asked him about the criminal records of the members of his household, not even at the time of the initial declaration of risk. In this context, he did not deem it necessary to disclose to his insurer that he had resumed cohabiting with a person with a criminal record.

In its decision, the Court pointed out that, in order to establish whether an increased risk entails consequences for the indemnification, a two steps test needs to be performed. First, one has to establish whether the allegedly increased risk is such as to influence a prudent insurer in its decision to accept it. Then, the Court needs to assess whether the insured has acted as a normally provident insured.

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The Court mentioned that the criminal record of a third party to the insurance contract cannot have the same impact as that of the insured party, basing this on the fact that such a third party would not have any financial benefit to gain if he or she were to deliberately damage the insured property. In the case at hand, the Court noted that the insurer had never asked the applicant any specific questions about the criminal records of the members of his household. The Court therefore concluded that the insurer's behaviour did not demonstrate that it conferred the "utmost importance" to the arrival of a resident with a criminal record during the contract period, thus triggering a declaration obligation in mid-contract.

The Court emphasized that insurers need to take the necessary measures to make sure the persons they insure are able to understand the importance the insurer gives to a specific risk, in particular by asking them specific questions.

Ultimately, the Court rejected the insurer's defence, concluding that the applicant had acted as a normally prudent insured person by not disclosing the resumption of his cohabitation with his ex-wife, despite the fact that she has a serious criminal record. Moreover, the Court said it was convinced that many homeowners would not have the instinct to inform their insurers in mid-contract if a member of their household was found guilty of a crime connected with the insured risk, thereby limiting the residual obligation of policyholders to declare all the circumstances known to them that are such as to materially influence an insurer's risk assessment.

This decision was appealed on 26 February of this year. In the meantime, this decision urges insurers to ask more questions of those they insure, and to take a more proactive approach to clearly establish what could constitute an increased risk for them. However, we point out that insurers should take care not to ask excessively precise questions, so as to prevent limiting or even canceling out a policyholder's residual duty to inform with regard to the subject of the question.

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1. *Fortier* c. *SSQ, Société d'Assurances Générales Inc*., 2018 QCSC 1495.
2. Art. 2466 C.C.Q.

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