

IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. DOMHCV2022/0071

BETWEEN:

CHARLESBERT LARONDE

Claimant

and

TDC INSURANCE COMPANY LTD.

Defendant

Appearances:

Mrs. Dawn Yearwood-Stewart, Counsel for the Claimant
Ms. Lisa de Freitas, Counsel for the Defendant

2025: February 12; 13
March 7th, 12th
November 17

JUDGEMENT

Background

[1] **JAWARA-ALAMI. J.:** By a fixed date claim form dated and filed on 6th April 2022, the insured/Claimant herein alleges that the Defendant failed to honour its insurance policy and indemnify him for the loss and damage of his vehicle which he suffered

due to an accident which occurred on the 16th July 2021, and claims the following reliefs:

- a. An order that the Defendant indemnify the Claimant in respect of all loss, damages, expenses or claims arising from an accident involving the Claimant's vehicle on the 16th July 2021 in the vicinity of the Chinese Settlement in Coulibistrie.
- b. A declaration that the Policy of Insurance No. TDC105/2021 issued to the Claimant by the Defendant is valid and subsisting.
- c. A declaration that the Claimant is not in breach of warranty of contract under the Policy of Insurance.
- d. A declaration that in failing to pay the Claimant the loss, damages, and expenses arising from the accident on the 16th July 2021 as aforesaid the Defendant is in breach of the warranty under the policy of insurance.
- e. A declaration that the Defendant is obliged to honour the terms of the agreement between the Claimant and the Defendant and to provide compensation for the damage and loss suffered by the Claimant and to provide indemnity for him with respect to the loss, damage, expenses or claims arising out of the accident on the 16th July 2021.
- f. Such further and other relief as may be just.
- g. Costs.

[2] By a defence and counterclaim filed on the 25th May 2022, the Defendant made no admissions but alleges that the Contract of Insurance was and is voidable, and that the Defendant was entitled to avoid same, and counterclaims as follows:

- a. A declaration that the Defendant was and is entitled to avoid the Contract of Insurance and has validly avoided same.
- b. Costs.
- c. Such further and other relief as the Honourable Court deems it fit.

[3] The Claimant filed a reply to defence and counterclaim on 16th June 2022 joining issues with the Defendant.

Claimant's Facts

- [4] The Claimant contends that he purchased comprehensive insurance coverage for a Honda CRV motor vehicle with serial registration number PY726 from the Defendant company for the period 28th May, 2021 to 27th May, 2022 with an insured value of \$36,000.00.
- [5] The Claimant states that on 27th May 2021, prior to acquiring the insurance policy, he spoke with Ms. Melvina Newton at H.H.V Whitchurch, who advised him that he should bring an Assessor's Report in relation to the vehicle for consideration. He informed her that he could not pay the amount stated for comprehensive insurance because of how he earned money and Ms. Newton advised him of the option for instalment payment, to which he agreed. The following day, on the 28th May 2021, he gave Ms. Newton the Assessor's Report prepared by Mr. Randy Peters of Peters Engineering Services, and Ms. Newton subsequently took the relevant information from the said report.
- [6] The Claimant also contends that he was not asked how much he paid for the vehicle, nor was he asked whether the vehicle was in an accident, and denied any knowledge of the vehicle being in a prior accident before he purchased it. He claims that the terms of the policy stated that upon payment of the required premiums, the Defendant would indemnify the Claimant against all liability, loss or damage occurring during the subsistence of the insurance, subject to certain exceptions, and the policy was for social, domestic and pleasure purposes and for the Claimant's business.
- [7] The Claimant recalls that on or about 16th July 2021, at about 8:30 p.m., whilst driving the said vehicle in the Coulibistrie area in the vicinity of the Chinese Settlement, the car skidded across the road and collided with another vehicle which was parked on the road.

- [8] As a result of the accident, the Claimant states that his vehicle sustained damage to the front bumper, head lamps, condenser, radiator, radiator support, driver's airbag, passenger's air bag, windshield, and grille.
- [9] Additionally, on 17th June 2021, the Claimant states that he went to Ms. Newton and informed her that he had been in an accident. She asked him to fill out a Motor Accident report/claim form, and thereafter told him that the Defendant Company would get in touch with him.

Defendant's Facts

- [10] The Defendant agrees that the Claimant entered into a contract of insurance for the aforementioned Honda CR-V for the period 28th May 2021 to 27th May 2022, and that on 27th May 2021, the Claimant visited the Insurance Department at H.H.V. Whitchurch and was assisted by Ms. Melvina Newton.
- [11] The Defendant asserts that the Claimant inquired about fully comprehensive insurance for a motor vehicle with an engine capacity of 2400cc and with a value of \$35,000 and \$36,000 respectively. Ms. Newton informed the Defendant that the insurance coverage would be based on the appraised value of the vehicle, and he would therefore need to obtain an appraisal for the vehicle. She also informed him that vehicles manufactured before 2005 could not have fully comprehensive insurance coverage.
- [12] The Defendant also asserts that the following day, the Claimant returned with an appraisal form from Peters Engineering dated the same day, 28th May 2021, and informed Ms. Newton that he wanted to proceed with the insurance application in respect of the Honda CR-V registration number PY726.

- [13] The Defendant maintains that the Claimant provided his driver's license and social security card, and Ms. Newton read each question on the proposal form to him, and recorded his responses in the electronic form on her computer. The Claimant reviewed then signed the completed proposal form. The Claimant was told that the premium was \$2,253.66 annually, and was given the option to pay in instalments as he said he could not pay the full amount.
- [14] The Defendant also maintains that the Claimant was informed that he would have to pay 40% of the premium, and pay the balance with a 2% interest rate in three monthly instalments from the following month, and the Claimant paid \$901.47. The policy of insurance was underwritten by Ms. Lena Alfred, and the Claimant was subsequently called to collect the policy on 3rd June 2021.
- [15] The Defendant further maintains that the Claimant came to collect his policy of insurance, and asked Ms. Newton for confirmation on the limit in the event of a claim. He was informed that the limit was \$200,000 and asked if he would receive the full amount in the event of a claim. Ms. Newton communicated to him that the payment would be based on the extent of damage to the vehicle, the number of persons involved, and the assessment report on the damage.
- [16] According to the Defendant, on or about the 17th June 2021, the Claimant arrived at the Defendant's office and informed Ms. Newton that the vehicle had been involved in an accident the previous day. Ms. Newton gave him a Notification of Accident form to complete, which the Claimant duly completed, indicating on the form that he had collided with a Mercedes Benz, motor vehicle registration number TP532, owned by Chad Jules and driven by Goldwin Ernest Philips.
- [17] Further, the Defendant states that Ms Newton explained the process of settling a claim to the Claimant. She contacted Mr. Kevin Bruney, a vehicle assessor and sent him details of the insured, the insured's vehicle, the details of the other vehicle involved, and the names of its owner and driver.

- [18] The Defendant asserts that the vehicle was assessed by Mr Kevin Bruney, who submitted his report on 21st June 2021 in respect of the Claimant's vehicle, and on the 23rd June 2021 in respect of the other vehicle TP532. Mr. Ezekiel Bazil was then contacted to investigate and adjust the claim.
- [19] Stating also that on 28th July 2021, a letter was received from Norde and Lambert Chambers in respect of Mr Chad Jules, requesting that damages be paid in respect of the vehicle with registration number TP532. The Defendant turned down the request on 16th September 2021.
- [20] Following this, the Defendant paid the sum of \$901.47, as a refund of the premium payment of \$2,253.66 made on the 25th May 2022 because of the breach of the Claimant's duty to disclose the accurate history of the Vehicle, the fact that the Vehicle had been involved in an accident prior to 28th May 2021; that the Claimant paid \$15,000 to Pulse Car Rental for the purchase of the vehicle, and not \$26,000 as represented by the Claimant in his proposal for insurance to the Defendant; and that the vehicle was manufactured in 2004, and not 2005 as represented by the Claimant to the Defendant.
- [21] Based on the foregoing facts, the Defendant states that the Claimant was given a letter dated 20th September 2021, advising that the claim was forwarded to the Financial Service Unit (FSU) for further investigations and that they were unable to settle the claim pending the relevant report of the FSU.

Claimant's Submissions

- [22] The Claimant submits that he sought information from the Defendant for comprehensive insurance coverage, and upon receipt of its advice, he provided all that was required. Further, that he did not ask any questions about him being paid on an accident claim, nor was he asked any questions about the vehicle by Ms.

Newton. That Miss Newton took all of the information in relation to the said vehicle from the Assessor's Report prepared by Mr. Randy Peters. The Claimant claims that there were no material non-disclosures and as stated by the Defendant's Witnesses, the alleged purchase price for the vehicle is not a material non-disclosure and in any event the Claimant says that he never told her what he paid for the vehicle.

[23] The Claimant also submits that he entered into the contract with the Defendant with utmost good faith, provided the underwriter with a valuation from a reputable assessor, and was not asked any questions in relation to the vehicle. That while he accepts that the year of the vehicle was given as 2005 instead of 2004 and this is material to the Defendant as they would not have taken the risk since it was their policy not to insure vehicles beyond 15 years, this information was not known to the Claimant as he relied on the Assessor's Report to satisfy the requirements of obtaining Comprehensive Insurance Coverage.

[24] Additionally, the Claimant submits that he is a 32-year-old Contractor who was a first-time owner of a vehicle, who was not expected to check the vehicle to look for the year of the same, nor was he expected to disclose to Ms. Newton that the vehicle was involved in an accident prior to him purchasing the same.

Defendant's Submissions

[25] The Defendant submits that it has defended the claim and instituted a counterclaim against the Claimant on the basis that the Claimant failed to disclose material facts which, had they been known at the time of underwriting, would have resulted in the policy either not being issued or being issued on different terms. The Defendant also submits that these non-disclosures render the insurance contract voidable and that the Claimant is not entitled to indemnification.

The Issues

[26] The issues which fall for consideration and determination in this suit are formulated as follows:

- (1) Whether a Contract of indemnity exists between the Parties.
- (2) Whether the facts as alleged by the Defendant are sufficient to have the Policy of Insurance avoided for misrepresentation and/or non-disclosure of material facts.
- (3) Whether the insurance contract is voidable due to the Claimant's non-disclosures.

The Law and Discussions

[27] It is settled law that many of the principles applicable to contract law generally, apply with equal force to contracts of insurance. However, insurance contracts typically possess a number of characteristics not widely found in other types of contractual agreements. One such characteristics is the requirement of utmost good faith.

[28] Although all contracts ideally should be executed in good faith, insurance contracts are held to an even higher standard, demanding the utmost good faith between the parties. By the very nature of an insurance agreement, each party needs and is legally entitled to rely upon the representations and declarations of the other. Each party must have a reasonable expectation that the other party is not attempting to defraud, mislead, or conceal information and is indeed conducting himself in good faith. In a contract of utmost good faith, each party has a duty to reveal all material information (that is, information that would likely influence a party's decision to either enter into or decline the contract), and if any such data is not disclosed, the other party will usually have the right to void the agreement.

[29] In addition, a contract of insurance is one of adhesion, meaning that there is really no negotiation of the terms. The assured is presented with the terms upon which

the contract will be entered into and he agrees by signing the proposal form.

- [30] Consistent with this, the law is such that **section 208 of The Insurance Act**¹ provides that where a person has entered into a policy with a registered insurance company, the insurer must forward to that person the relevant insurance policy documents within thirty days of entering into the policy, or at some other time as the Registrar may consider reasonable.
- [31] Having outlined the principles governing the formation and execution of insurance contracts particularly the duties arising from utmost good faith and the adhesive nature of such agreements it is also necessary to consider the legal character of the insurance contract itself. In this regard, the concept of indemnity lies at the heart of most insurance relationships, and an understanding of this principle is essential before turning to the specific issue that arises in the present case.
- [32] Most contracts of insurance according to Chitty on Contracts, are contracts of indemnity whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of the event, upon which the insurer's liability may arise, but this is not necessarily so. If the object of the contract is indemnification (that is, the insurer's obligation does not arise unless and until the assured has sustained a loss), there are at least three practical consequences in classifying an insurance contract as a contract of indemnity as opposed to a contingency insurance. First, the assured is entitled only to compensation for his loss. He is not entitled to receive or retain any benefits which result in the assured being over-compensated. Secondly, the assured's cause of action against the insurer arises upon the assured suffering the loss in question.
- [33] Accordingly, once the "loss" has been sustained, subject to the terms of the contract, time then starts running for the purposes of the Limitation Act 1980. Thirdly, if the insurer refuses or fails to pay an indemnity as required by the contract, the insurer

¹ Chapter 78.49 Revised Laws of the Commonwealth of Dominica

will not be liable to the assured for any damages above and beyond the amount of the indemnity. This is because the indemnity is itself regarded by the law as damages and the court cannot award damages for the late payment of damages.²

Resolution of Issue No 1- Whether a Contract of Indemnity Exists Between the Parties

[34] Having set out the relevant principles of law, I now turn to the determination of the first issue arising in this matter, whether a contract of indemnity exists between the parties.

[35] At the trial into this matter, the court heard from the Claimant himself and from Beyanka Blanchard, the Claimant's witness. The documents put in evidence included the policy of insurance³, from 28th May 2021 to 27th May 2022.

[36] The Claimant's evidence is such that he entered into a Contract of Insurance with the Defendant for the period 28th May 2021 to 27th May 2022 inclusive, for private vehicle comprehensive insurance with an insured value at \$36,000.

[37] The Claimant states that on the 28th May 2021, he gave Ms. Newton the Assessor's Report prepared by Mr. Randy Peters of Peters Engineering Services, and Ms. Newton subsequently took the relevant information from the said report.

[38] The terms of the policy were such that upon payment of the required premiums, the Defendant would indemnify the Claimant against all liability, loss or damage occurring during the subsistence of the insurance, subject to certain exceptions.

[39] An insurance contract, like any other valid contract, must contain the essential elements of offer, acceptance, consideration, and an intention to create legal

² Chitty on Contracts, Volume 2. Edition

³ Exhibit 1, page 31,.Trial Bundle No. 2

relations. The determination of whether these elements are present is critical, as the existence of a valid contract of insurance will ultimately decide whether the insurer is liable for the loss alleged to be insured against.

- [40] In the context of insurance, the offer is ordinarily made by the proposed insured through the completion and submission of the proposal form, and it lies within the discretion of the insurer either to accept or reject that offer. Upon acceptance, whether by the issuance of a cover note, policy, or other clear act signifying assent, a binding contract of insurance is formed.
- [41] The Proposal Form⁴ therefore is an important document in the overall equation. It is exhibited by the Defendant and contains essential particulars, including a full description of the proposed assured, the Claimant herein, together with his full name and address. It further sets out a description of the risk proposed to be insured, namely a Honda CRV, right-hand drive, manufactured in 2005, purchased in 2021 at a price of \$26,000, and with a present value of \$36,000. The form also records the circumstances affecting the risk and concludes with a declaration at its foot, duly signed by the proposed assured.
- [42] The legal effect of a proposal form, when duly completed and signed by the proposer and forwarded to the insurer, is to operate as a formal offer by the proposer to enter into a contract of insurance. The form sets out the terms upon which the proposer is willing to contract, and if the offer is accepted, the proposer cannot insist on a policy differing from those terms. Since proposal forms are generally prepared by the insurer, the form also reflects the terms upon which the insurer is willing to contract, and upon acceptance, the insurer becomes bound to issue a policy consistent with the proposal. The proposal form thus remains integral to the interpretation of the contract, defining both the scope of coverage and the representations made by the assured at the time of contracting.

⁴ Exhibit DE11, page 100, Trial Bundle No. 2

- [43] This position is consistent with the reasoning in **General Accident Insurance Corporation v Cronk**⁵, where the Court held that once the insurer issues a policy in response to a proposal form, it must be taken to have accepted the proposer's offer on the terms contained therein. Similarly, in **Rust v Abbey Life Assurance Co Ltd**⁶, it was held that the proposer's application form, together with the policy subsequently issued, constituted a concluded contract on the insurer's standard terms.
- [44] Furthermore, the declaration at the foot of the proposal form, makes the answers provided the basis of the contract, and by signing it, the proposer warrants the correctness of those answers. This has the effect of relieving the insurer from the burden of proving that any such statement was material or that it induced the insurer to enter into the contract. See **Andrene Brown v ICWI**.⁷
- [45] Applying these principles to the present case, the Court accepts that the Proposal Form exhibited by the Defendant was duly completed and signed by the Claimant, thereby constituting an offer to the Defendant to enter into a contract of insurance on the terms contained therein. The Defendant, subsequently issuing a policy of insurance, must be taken to have accepted that offer and upon issuance of the policy, a binding contract of indemnity came into existence between the parties. The effect, therefore, is that the proposal form and the policy together form the entire contract of insurance.
- [46] Accordingly, the Court finds that the policy issued by the Defendant represents a valid and enforceable contract of indemnity⁸.

⁵ [1901] 17 TLR 233

⁶ [1979] 2 Lloyd's Rep 334

⁷ *Andrene Brown v Insurance Company of the West Indies (ICWI)* Unreported decision of the Supreme Court of Jamaica. (R. Anderson J.) Claim No: HCV 04439 of 2007

⁸ Exhibit 1-Claimant's Exhibit

Issue No.2-Whether the Facts as Alleged by the Defendant are Sufficient to have the Policy of Insurance Avoided for Misrepresentation and/or Non-disclosure of Material Facts

Has there been Misrepresentation and/or Non-Disclosure?

[47] Having determined that a valid contract of insurance was concluded between the parties, the next issue for consideration is whether the Defendant is entitled to avoid the policy on the grounds of misrepresentation or non-disclosure of material facts by the Claimant.

[48] The Defendant's defence and counterclaim against the Claimant is on the basis that the Claimant failed to disclose material facts which, had they been known at the time of underwriting, would have resulted in the policy either not being issued or issued on different terms. It is the Defendant's position that these non-disclosures render the insurance contract voidable.

[49] The Defendant submits that the Claimant had knowledge of the vehicle's accident history and the year of purchase of the vehicle. Now, "The onus of proving nondisclosure is on the insurer" and;

"To succeed in a defence of non-disclosure, the insurer must prove not only that the assured failed to disclose a material fact but also that the non-disclosure induced the making of the contract in the sense that he would not have made the same contract if he had known the matters in question. Where the materiality of the undisclosed is obvious it may justify the court in presuming that the underwriter was induced but this is an evidential presumption which may be rebutted by contradictory evidence addressed by the assured."⁹

⁹ Ibid 7

Duty of Disclosure and Material Misrepresentation

[50] It is important to recall at this point that the Claimant is who asserts and must therefore prove his claim, and must, on the balance of probabilities, prove that he is entitled to the reliefs sought. In saying this, a close look at the Claimant's evidence is required. Under cross-examination, he admits to purchasing the vehicle at \$15,000, less than the appraised value of \$36,000. He was directed to the proposal form and the fact that the form recorded the purchase price at \$26,000. His attention was also directed to the form where the manufactured date was 2005.

[51] The Claimant was also directed to the warranty on the proposal form which is as follows;

" The declaration on the proposal form states that ; "I, we, hereby warrant that all the above statements and particulars, including those details set out overly, are true and complete in every respect, and that no material facts have been withheld or suppressed. And I, we, declare that the vehicle or vehicles described is in good condition, and I, we, agree that this declaration shall be held to be promissory and shall, for the basis of the contract between me, us, and the underwriters, and I am, or we, are willing to accept a policy subject to the terms, exceptions, and conditions prescribed by the underwriters therein. I, we, undertake that the vehicle or vehicles to be insured shall not be driven by any person who, to my or our knowledge, has been refused any motor vehicle insurance or continuous sale" "I, we, further agree that if the statements made in this proposal are in writing of any person other than myself or ourselves, such person shall be deemed to be my or our agent for the purpose of filling in the same, and we undertake to advise the underwriters in writing of any subsequent material change in the particulars given herein that occurred during the currency of the policy. When you sign, this is the declaration that you made."

[52] Still under cross-examination, he confirms his signature on the document but states that he did not read, but he signed it.

[53] The Claimant maintained throughout cross-examination that he was not asked nor did he volunteer any information about the year the vehicle was manufactured, that the year of the vehicle was taken from the vehicle appraisal which was done by another party, which he submitted to the insurance company. He maintained that

he was not asked questions by Ms. Newton so that she could complete the proposal form for him. He stated that she asked him to bring in some documents, which he did. He agreed to signing the proposal form after it was completed by Ms. Newton without reading.

[54] The Claimant's second witness was Beyanka Blanchard-Forde. In her testimony she said that the Claimant was not informed that the Honda CR-V had been in an accident and that following the accident, the Honda CR-V was on the grounds of Pulse Rental, but she was not aware of whether the Claimant had seen it. She maintained that when the vehicle was sold to the Claimant, the previous accident was not disclosed to him. She admitted that the vehicle was sold for \$15,000 and the Claimant was to pay by instalments, and told them that he would pay the balance owed when he was paid by the Insurance Company.

[55] Under cross-examination, she admitted that the Claimant asked her whether the vehicle was previously involved in an accident, following his own accident. This contradicts the evidence of the Claimant who says he had no knowledge of any prior accident, and it was only the insurance company that told him about it.

[56] Still under cross-examination, Mrs. Blanchard-Forde initially stated that after the first accident, the Honda CR-V was taken by a wrecker into a garage, she denied that it was brought back to the Pulse Car Rental compound. After directing her attention to the Motor Vehicle Accident Report dated 16th April 2021¹⁰ with the location of the survey as Goodwill Road, she said she remembered that the vehicle had been brought back to the Pulse Car Rental Compound, and not to a wrecker first as previously stated.

[57] The evidence establishes that in April 2021, prior to the purchase, the vehicle was involved in an accident which rendered it a total loss, and that between December 2020 and early May 2021, the Claimant worked at the premises of Leon Forde on

¹⁰ page 77 of the Bundle

Goodwill Road, helping Mr. Forde to build a bar which was on the compound of Pulse Car Rental. It was the evidence of both Mrs. Forde and the Claimant that the Claimant was frequently at their premises at Goodwill Road during this period as he was constructing the bar.

[58] In revisiting the duty of disclosure discussed earlier, the proposal form also sought to elicit information on the condition of the vehicle and contained a number of questions to be answered and one of the questions under Section 4 of the form was;

“have any motor accidents or losses occurred during the past 3 years in which any of the drivers have been involved or involving vehicles owned by them”.

To this question, the Claimant answered “No”. Also under Clause 8 a. of the Conditions section of the form which states that the insured must “disclose to us all material facts, that is all the information which could influence our decision to either agree to issue this policy or set the price and / or conditions”¹¹

[59] As stated earlier, the proposal form forms the basis of the insurance contract (The Policy) between the parties and in it the Claimant warranted that the statements made therein were true and that the Claimant had a duty of disclosure to the Defendant. Although he said that he had no knowledge that the Honda CR-V was in an accident before he purchased it, and that when he filled out the proposal form he was not asked about how much he paid for the vehicle or whether it was in an accident by the Defendant’s agent, Ms. Newton, the question arising at this point is whether ignorance of the Claimant on the condition of the vehicle or the other facts stated is a valid defence.

[60] The case of **Newsholme Bros v Road Transport and General Insurance Co., Ltd.**¹² settling the question posed states that;

“The proposer will generally be bound by their signature even if they have not read the form”

¹¹ Trial Bundle 2. Exhibit 1, page 8

¹² *Newsholme Bros v Road Transport and General Insurance Co., Ltd.* [1929] All ER Rep 442

[61] However, this may not be the case where the proposer suffers from some form of incapacity. This was the view of the Lord Justice Clerk in **Yule's Case**¹³ where **Biggar v Rock Life Assurance Co**¹⁴ was followed, who says:

"I hold that in filling up the paper for the defender at his request he was acting for him. Further, I hold that if the defender did not choose to see that there were no mis-statements in the proposal before he signed it he must be held responsible for it as being his."

[62] In **Newsholme Bros v Road Transport and General Insurance Co., Ltd.**¹⁵ Scrutton LJ refers to the decision of Wright J, holding in Biggar's Case, that;

"the agent in filling up the form was the agent of the proposer, and the proposer, having signed the agreement that the truth of the statements in the form was the basis of the contract, could not recover against the company if they were untrue".

[63] The evidence establishes that the information on the proposal form was derived from Exhibit DE8 provided on the instructions of Ms Newton, the Defendant's fourth witness. Exhibit DE8 states that the year of Manufacture of the vehicle was 2004, that the vehicle was in good condition, showed no sign of previous collision, repairs or refurbishment and that it was valued at \$36,000. I find that that these statements in the Exhibit constitute material misstatements and I accept that there was non-disclosure.

Was the Misrepresentation or Non-disclosure "Material"?

[64] Having found that there was non-disclosure, the question which the Court has to decide at this point is whether the proposer, the Claimant herein, had provided all the material information which was within his knowledge to the Defendant.

¹³ Life and Health Assurance Association, Limited, v Yule. [1904] F 437

¹⁴ Biggar v Rock Life Assurance Co., Ltd. [1902] 1 KB 516;

¹⁵ Newsholme Bros v Road Transport and General Insurance Co., Ltd. [1929] All ER Rep 442

[65] In **Pan Atlantic Insurance Co. Ltd. v Pine Top Insurance Co., Ltd**¹⁶, the *locus classicus* case on materiality, it was established that the test of material information for both marine and non-marine insurance is the common law, as:

“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.”

[66] Thus, it is established that by the act of completing, signing and submitting the proposal form, the proposer is providing the information on which the insurers act in deciding whether to accept the proposal at all, and if so, at what premium¹⁷. In saying this I turn to the appraisal report¹⁸ submitted by the Claimant. I have found as fact that the Claimant signed the form and that the information contained in the proposal form was from the appraisal report that he provided on the instructions of Ms Newton, the Defendant’s 4th witness. The appraisal report, Exhibit DE8, confirmed that the year of Manufacture of the vehicle was 2004, **“that it was in good condition, showed no sign of previous collision, repairs or refurbishment and was valued at \$36,000”**.

[67] To rebut this information, the Defendant called Mr. Kevin Bruney the independent expert, who provided the “Vehicle Assessment Report”¹⁹ in relation to the Honda CR-V following the Claimant’s accident, and gave evidence in court. His report concluded that the vehicle was manufactured in 2004, showed signs of previous damage, and had a pre-market value of \$25,000 with a salvage value of \$7,000.

[68] The Defendant’s 2nd witness was Ezekiel Bazil, a loss adjustor, hired by the Defendant company to investigate and adjust the insurance claim made by the Claimant. His evidence was such that he was treated as an ordinary witness having filed a witness statement, and exhibited to the statement a report marked as Exhibit DE13. The report detailed that the valuation report presented at the time of

¹⁶ [1994] 3 All ER 581

¹⁷ Halsbury’s Laws of England Insurance, Volume 60 (2023)

¹⁸ See Exhibit DE8, Trial Bundle 2 at page 82

¹⁹ Trial Bundle No 2 at pages 229-231

application was “grossly exaggerated” because the Claimant purchased the vehicle at \$15,000 but declared in the proposal form that the purchase price was \$26,000 and proceeded to insure the vehicle at \$36,000.

[69] Mr Bazil also found considerable nexus between the third party whose vehicle was involved in the accident, with the assessor Peter’s Engineering, as operating from the same business facility, and confirmed that the vehicle was involved in an accident on 8th March 2021.

[70] Mr Ezekiel’s evidence raises serious allegations of collusion and fraud, and it is too much of a coincidence that the Claimant worked at Goodwill in close proximity with the assessor who valued the vehicle, who also shared a place of business with the third party who was involved in the accident.

[71] This witness also found that both the insured and the driver of the third party vehicle deliberately avoided giving the names of the individuals they visited in Portsmouth on the day of the accident and found that both vehicles were previously rendered total losses and subsequently repaired in a very short time.

[72] Significantly, absent at the trial is the assessor, who was not called as a witness by the Claimant to explain the exaggerated value of the vehicle and the misstatement of the manufactured year. The resultant effect of the appraiser’s absence is that an inference can be drawn by his absence, as it leaves the Court with no credible explanation as to why the appraisal report contained a materially false statement. Therefore, the only reasonable inference to be drawn from these circumstances is that the Claimant intentionally withheld the accident history to ensure that his vehicle would qualify for comprehensive insurance.

[73] The assertion that in these circumstances the Claimant was unaware of the prior accident is wholly implausible and having had the benefit of seeing the demeanour of the witness and his contradictory answers, I am of the view that the Claimant is

unreliable. It is also noteworthy that the Claimant sold the vehicle to another person on the 21st June 2021, five days after the accident occurred, and without finalizing the insurance claim on 16th June 2021²⁰. Clearly, this further makes the behaviour of the Claimant suspicious to say the least.

Issue No.3 -Whether the Insurance Contract is Voidable Due to the Claimant's Non-disclosures.

- [74] The defendant's witness Ms. Renee Whitchurch-Aird a Director of H.H.V Whitchurch and Co. Ltd, who holds the position of Director of Services, and manages the Insurance Department, confirmed that the purchase price represented by the Claimant was a material fact which was not disclosed.
- [75] Ms. Melvina Newton, also a witness of the Defendant, testified that the Claimant asked her about insurance for a vehicle valued at \$35,000 and \$36,000. She told the Claimant that to get comprehensive insurance coverage, and the vehicle had to be manufactured from 2005 and after. She maintained that he asked her about the limit in event of a claim, and whether he would receive the full amount.
- [76] The contract of insurance, as articulated earlier in paragraphs 29 and 30 above, requires the utmost good faith and according to the **Newsholme** case where it was held that;
- “...the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk.”**
- [77] While all contracts are expected to be performed in good faith, insurance contracts are subject to an even higher obligation, the duty of utmost good faith.²¹ Because of the nature of insurance, both parties must rely on the accuracy and honesty of each other's statements and disclosures. Each has a legitimate expectation that the other

²⁰ Trial Bundle 2. Exhibit DE8-Peter's Engineering Service Valuation Report

²¹ *Carter v Boehm* (1766) 3 Burr 1905 at 1909

is not seeking to deceive, misrepresent, or withhold relevant information, but is acting with complete honesty and fairness. Having said this, the Claimant therefore, was required to disclose to the Defendant the proper facts surrounding the vehicle. The Claimant ought to also have declared the true date of manufacture, the purchase price, and the fact that the vehicle was involved in a previous accident.

[78] These are material facts that would have been known to the Claimant but unknown to the Defendant, who relied on the appraisal report to issue the policy. **Newim Life & General Assurance Co. Ltd v Selwyn Redhead**²² made it a requirement that it was necessary for the defendant to demonstrate that the alleged material non-disclosure induced it into accepting the risk on the terms that it did. From the evidence therefore, it is clear to me that the Defendant has established that it was induced by the misrepresentation or non-disclosure, to enter into the contract of insurance with the Claimant and

[79] Failure to disclose such information generally entitles the other party to rescind or void the contract. Furthermore, the signing of the declaration at the foot of the proposal form amounted to a warranty to the Defendant, the breach of which allows the Defendant to avoid the policy. In **Condogianis v Guardian Assurance Co**²³ the court held that;

“where the truth of the statements is made the basis of the contract, it is unnecessary to consider whether the fact inaccurately stated is material or not, or whether the applicant knew or did not know the truth”.

Concluding that the warranty has been breached, and the Defendant is therefore entitled to avoid the policy.

[80] In making the foregoing finding, the Defendant has the option to exercise its rights under the policy and repudiate all losses associated with this accident. The Policy stated under section 1 A provides;

²² GDAHCV2016/0012

²³ [\[1921\] 2 AC 125](#)

"If the insured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise this certificate shall become void and all claims there under shall be forfeited".

[81] In **Marks v First Federation Life Insurance Co, Ltd**²⁴ the non-disclosure of a material fact by the insured rendered the policy of insurance null and void. This is to say, that the effect of non-disclosure or misrepresentation by one party, entitles the other party to avoid the contract and the avoidance takes effect ab initio. It follows that, an insurer confronted with a fraudulent claim is entitled to avoid the insurance contract²⁵.

[82] In a similar vein, in the event of a breach of duty of utmost good faith, the innocent party has an unfettered right to avoid the insurance contract and there is no equitable discretion exercisable by the court which could restrain or set aside an otherwise effective avoidance of the contract²⁶

Conclusion

[83] In light of the foregoing reasonings, I find on the balance of probabilities that the Claimant engaged in fraudulent misrepresentation and collusion, coupled with a wilful failure to disclose material facts. The Defendant insurer was therefore justified in repudiating liability under the policy. The claim is accordingly dismissed with costs to the Defendant, and the counterclaim succeeds.

Orders:

[84] In conclusion therefore, I make the following orders:
(1) Judgement is entered for the Defendant.

²⁴ (1963) 6 WIR 185

²⁵ Cornhill insurance Co v Assenheim (1937) 58 Ll. L Report

²⁶ Drake Insurance Plc v Provident Insurance Plc(2003)EWHC 109

- (2) The Defendant's counterclaim succeeds and it is declared that the Defendant is entitled to avoid the Contract of Insurance.
- (3) The Claimant is in breach of warranty of contract under the Policy of Insurance.
- (4) The Policy of Insurance No. TDC105/2021 issued to the Claimant by the Defendant is void ab initio.
- (5) I award costs to the Defendant, to be taxed if not agreed

Zainab Jawara-Alami
High Court Judge



By the Court,
Registrar