

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2017/0628

BETWEEN:

[1] KAHILI NICHOLAS

Claimant

-AND-

**[1] GEO. W. BENNET BRYSONS AND CO LIMITED DOING
BUSINESS AS BRYSONS SHIPPING AND INSURANCE**

Defendant

Appearances:

Ms. Kathleen Bennett for the Claimant

Mr. Kwame L. Simon for the Defendant

2023: October 11th
November 30th

JUDGMENT

[1] **DRYSDALE, J.:** On the 12th day of December 2017, The Claimant initiated proceedings against the Defendant by way of a Claim Form and Statement of Claim seeking the following relief:

- 1) Repair of car at cost of \$31,974.84 for vehicle as per insurance policy.
- 2) Coverage of cost for repair of damaged third-party vehicle in the amount of \$42,769.98.
- 3) Such further or other relief as this Honourable Court deems fit;
- 4) Interest pursuant to statute
- 5) An order that the Defendants do pay the Claimant's costs.

The Pleadings

The Claim

- [2] The Claimant was involved in a motor vehicle accident on around 24th February 2017, with motor vehicle A41595 driven by Mr. Glenly Active (third party). Said accident had been reported by the Claimant to the Police Department along with all relevant receipts and documentation forwarded to the Defendant which is an insurance company within the jurisdiction of Antigua and Barbuda.
- [3] The Claimant contends that the Defendant has failed to honour their obligations as per the terms of the insurance policy which is inclusive of third-party damages and to cover the cost of repair to the Claimant's motor vehicle. The Claimant further asserts that numerous letters were sent to the Defendant requesting payment but to date, no payment has been made. It is the Claimant's position that the statements regarding the collision are not misleading, but all factually made.

The Defence and Counterclaim

- [4] The Defendant states that at all material times, the Claimant's motor vehicle with registration number A39591 was insured by the Defendant under insurance policy number MPC445. However, it is the Defendant's cardinal contention that the Claimant submitted a false insurance claim and thus the Defendant is seeking from this court, a declaration to avoid the Claimant's auto insurance policy on the ground of misrepresentation.
- [5] The Defendant asserts its belief that the damages sustained from the alleged collision bear no relevance, relation, or connection. Furthermore, it submits that the Claimant and third party provided contradicting statements regarding the time, place, and date of the collision in issue.
- [6] The Defendant accepts that it denied the Claimant's claim for repairs to both the third-party Mr. Active's vehicle and the Claimant's motor vehicle via a letter dated 12th July 2017. The Defendant states that the Claimant's action was in breach of its motor vehicle policy. Moreover, the Defendant adamantly denies receiving demand letters from either the Claimant or its attorney.

- [7] The Defendant wholly denies liability for the insurance claim and allegations put forth by the Claimant.

The Evidence

- [8] The Claimant's case was supported by the Claimant, Mr. Kahili Nicholas, and Superintendent Elson Quammie along with Corporal Gregory Henry. The Defendant relied on evidence from Marjorie Parchment its manager and who had been intimately involved in this matter. An expert namely Patrick Zoé whose speciality was in forensic road collision was presented for examination and gave evidence in these proceedings. The parties were each cross-examined on their respective witness statements as filed. For the purposes of this judgment, the most pertinent evidence will be adduced.

The Claimant's Evidence

Mr. Kahili Nicholas

- [9] It is the Claimant's evidence that he is a member of the Royal Police Force of Antigua and Barbuda having served ten years. He agreed that based on experience, attention to detail is important within law enforcement. The Claimant stated that he is the owner of a black Honda Accord which he was driving on the night of the collision in question. Said vehicle, he stated is comprehensively insured with the Defendant.
- [10] The Claimant deposed that the collision was with Mr. Glenny Active who was driving a white Toyota Celica whom he had not known prior to the incident. The Claimant was adamant that Mr. Active's vehicle on the night of the collision was at a standstill on the left side of the road which would have been in the Claimant's lane. He described that Mr. Active's vehicle was in the same direction in which he was traveling which was from south to north and that there was no light coming from Mr. Active's vehicle. The Claimant stated that the road in which the collision took place had a bend in the shape of an 's', commonly described as an 'S bend'. He further confirmed that the collision took place going into the second bend. The Claimant stated that this collision caused damage to the left front of his motor vehicle while Mr. Active's vehicle had damages at its right rear.

- [11] The Claimant stated that he attempted to swerve Mr. Active's vehicle but was unable to apply brakes due to the road being bad. Mr. Active was pulling out at the same time which caused the collision. The Claimant stated that Mr. Active had suddenly moved off from a parked position with no lights without using his indicator. The Claimant stated that immediately after the collision, the vehicles had not been far apart but rather somewhat in physical contact.
- [12] The Claimant testified that police came to the scene of the accident to take measurements and to investigate the circumstances surrounding the incident. He identified those investigating officers to be Corporal Shillingford as the lead investigator and Corporal Alves whose statements had been taken by them. After the incident occurred, the Claimant stated that he reported the collision to the Defendant, providing a signed statement as to how the accident transpired.
- [13] Furthermore, the Claimant stated that expert witness Mr. Patrick Zoé conducted an interview with him at the Claimant's home in which a signed statement had been provided. The Claimant deposed that Mr. Zoé asked in-depth questions and more questions compared to Mr. Garner (the insurance representative) who wanted straight-to-the-point answers. Thus, the Claimant accepts that the information given to Mr. Zoé would be true and correct.
- [14] The Claimant was unable to recall the exact time as to when the accident happened. Opposing counsel reiterated the evidence of the Claimant agreeing that in law enforcement, attention to detail is vital as seen through his experience of being in the force for ten years. The Claimant admitted that he had not paid attention to detail regarding the timing of the collision.
- [15] The Claimant stated that Mr. Active was negligent in driving off in the manner he did but nonetheless stated that he was responsible for the accident because he hit Mr. Active from behind. He explained that it was for this reason he accepted liability for the accident.
- [16] Finally, the claimant contested the accuracy of the police reports, particularly regarding the 4 foot distance between the vehicles post collision. Additionally, he asserted that the impact of the collision caused Mr. Active's vehicle to spin around.

Mr. Elson Quammie

[17] It is this witness evidence that he is a Superintendent of Police who oversees the Traffic Department of the Royal Police Force of Antigua and Barbuda. He clarified that the copy of the relevant Traffic Accident Register could be identified by "SEQ2". He confirmed that the details of said register would include the driver's name and address, type of vehicle, place of the accident and the name of the investigator. Mr. Quammie further accepted that as recorded in the original Traffic accident register the investigator was No.464 Corporal Alves and that he was the main investigator.

[18] Mr. Quammie deposed that the role of an investigator is to visit the scene and to do a thorough investigation of the traffic collision inclusive of measurements, insurance particulars, taking explanations from the drivers, and any other required information. Thus, essentially having full conduct of the investigation. He confirmed that the Traffic Accident Register is prepared first and then the report.

[19] This witness accepted that as recorded in the Traffic Accident Register, there is no mention of an uneven road surface but that there was mention of it in the police report. This he stated could be deemed a fundamental error.

Corporal Gregory Henry

[20] It is this witness evidence that on the day of the collision in question, the Claimant had initially been by his home but was coming back. He explained that he had called the Claimant for assistance with his car battery. Later, he also gave evidence that the issue he had on the night of the collision was a punctured tire. He stated that he was in the vicinity of Cassada Gardens specifically close to the New Winthropes area.

[21] The witness acknowledged solving the issue with his vehicle that night but admitted to not checking on the Claimant involved in the earlier accident despite being aware of it. Instead, he stated that he visited the scene of the accident about a week after the accident occurred. He stated that he had seen the third party around but only knew of him after the collision in issue.

The Defendant's Evidence

Ms. Majorie Parchment

- [22] It is this witness evidence that she is the Insurance Manager of the Defendant's Insurance Agency. She amplified her statement to address the material differences she would have noticed between the third party, Mr. Active's statement to that of the Claimant insured. Based on her experience in her field, she explained that she observed several fundamental differences surrounding the circumstances of the incident. Particularly, she identified that the insured stated that the third party was parked on the left side of the road with no lights on, whereas the third party in his statement adamantly denied having been parked, neither having his lights off. Ms. Parchment stated that the cause of the accident should not be that significantly different. Furthermore, another red flag noticed by Ms. Parchment was that the general area was said to be dark yet Mr. Active had not observed an approaching vehicle when it would have been the only form of light in the area which she described to be fairly deserted with only a few homes and open businesses within the location. Ms. Parchment also found that the time of the collision raised a red flag, as the Claimant stated to the insurance that the accident took place at 11:10 pm on Friday 24th February 2017 whereas the third party indicated that the accident took place on the 25th day of February in the early hours of Saturday morning sometime around 12:30 pm. This witness further found of significance the fact that the renewal date of the Claimant's insurance policy was a matter of a few days from the date of the accident in question.
- [23] Under cross-examination, this witness disagreed that the accident would have occurred in the vicinity of the horse racetrack in Cassada Gardens despite the Claimant stating such in both his submitted insurance claim and police report.
- [24] Ms. Parchment deposed that before seeking the expert services of Mr. Zoé, the Defendant engaged the services of Shaw Brothers Enterprises who produced a 'Damage Report' on March 1st, 2017, relating to the Claimant's vehicle. Defensively and reluctantly, this witness admitted that it was possible for both the Claimant and the third party's vehicle to have received damages. However, in the same breath while under cross-examination, it had been put to this witness that the statement made in the Defence that "*the damages reportedly sustained to the motor cars bear no relevance, relation or connection whatsoever to the alleged collision*" was a false statement. This witness disagreed with the statement being false. Furthermore, it had been put to this witness that the damage was consistent with the assessment and descriptions submitted by the Claimant which the

witness also denied. Moreover, when suggested by opposing counsel that the varying times of the collision was immaterial this witness disagreed.

Mr. Patrick Zoé

- [25] It is this witness evidence that he is the Managing Director of Claims Adjusting Bureau Ltd., a company incorporated within Trinidad specializing in the investigation of insurance claims to determine the degree of liability owed by an insurer. He acts in the capacity of the expert witness on behalf of the Defendant and has investigated the circumstances surrounding the alleged traffic collision in question.
- [26] The Claimant would have filed written questions relating to the investigation report prepared by this witness in which Mr. Zoé would have given responses to each question.
- [27] Mr. Zoé conducted an interview with the Claimant but stated that he had not received photos of the alleged collision from the Claimant. However, this witness did get a chance to assess said photos but deemed those photos to lack clarity and stated that he was unable to recognize what they represented. Under examination, this expert witness admitted that both the Claimant and third party gave statements on the rough surface of the road.
- [28] Mr. Zoé addressed under examination the issue of paint transfers on the vehicles in question. He explained that it would be close to impossible for neither vehicle to have no paint transfers considering the impact of the collision. He further stated that the visible streaks of white paint found would not satisfy or constitute enough evidence of physical contact. Fundamentally, there had been absolutely no paint transfer at either the frontal area of the black car or the rear area of the third party's white vehicle. He stated that it would have been expected for those areas of the vehicle to have a tremendous amount of paint transfer when in fact the evidence showed none. The frontal area of the black vehicle and the right rear of the white vehicle was where the alleged impact and force occurred and thus the areas of the expected abundance of paint transfers.
- [29] Mr. Zoé adamantly disagreed that the insurance claim submitted by the Claimant was not a false insurance claim. He stated that there were several inconsistencies that would have persuaded his

disbelief in the Claimant's statements. He underscored the fundamental fact of the claimant being a police officer who would have been exposed to special training to make him a "creature of time".

[30] This witness maintained his position that the damages submitted by the Claimant are wholly inconsistent with the evidence.

The Issues

The issues identified for consideration are as follows:

- (i) Whether the Defendant is entitled to avoid the Claimant's motor insurance policy on the ground of fraudulent misrepresentation.
- (ii) Is the Claimant entitled to be compensated by the Defendant for damages claimed pursuant to the Claim Form.

Analysis

Whether the Defendant is entitled to avoid the Claimant's motor insurance policy on the ground of fraudulent misrepresentation

The Claimant's Submissions

[31] The claimant argues that in order for the defendant to nullify the motor insurance policy on the ground of misrepresentation, the misrepresentation must have played a critical role in influencing the innocent party to enter into the contract. The claimant relies on the authority of **Dennis Brown v Nagico Insurance Company Limited**¹ and a passage from the learned authors of MacGillivray on Insurance law which stated as follows:

'a misrepresentation by one party to a contract of insurance does not entitle the other to avoid the policy unless it induced the making of the contract in the sense that induced has in the general law of contract. The plaintiff must show that the misrepresentation

¹ SKB HCV 2012/0053

was a substantial cause of his entering into the contract on terms that he would not have accepted if he had been apprised of the truth.’

- [32] The claimant argues that the crucial element of inducing the defendant to enter into the insurance contract was neither pleaded nor did the defendant lead evidence in relation to the same in its witness statements or at trial. Accordingly any alleged misrepresentation would not be actionable. That further the ground of misrepresentation is the sole basis upon which the defendant has sought to defend the claim and made its counterclaim and that in light of its previous arguments the defense and counterclaim was unsustainable.
- [33] The Claimant also denied that he had submitted a false claim to the Defendant and invited the Court to conclude that the statement two police reports referenced an accident between the claimant and Glenn Active on 24th February 2017 was true. The Claimant also maintained that his car suffered damage to the front left side while the damage to the vehicle belonging to Glenn Active was on the rear right side. He claims that the alignment of the damages corresponds to the way the collision occurred. The Claimant relied on the examination of the Defendant’s mechanic conducted by Shaw Brothers which entity examined both vehicles and gave estimates similar to that obtained by the Claimant. The Claimant also submitted that the Defendant’s witness agreed that the Claimant and Mr. Active’s vehicle showed points of impact as described by the Claimant.
- [34] The Claimant further argues that the expert did not challenge the report produced by the Shaw Brothers. More importantly that the expert’s suggestion that the accident did not occur as there was no paint transfer was unsustainable as the Claimant’s vehicle demonstrated that there was white streak marks against the right side of it².
- [35] The claimant asserts that the defendant has not alleged any false representations by him regarding the condition of the road at the collision site. Further that Superintendent Quammie attributed contradictory police reports to an administrative error stating that they do not accurately reflect the official records in the traffic accident register and invite suggest that the claimant should not be held responsible for the same and should not found a basis for avoiding the contract of insurance. The

² The vehicle driven by Glenn Active was a white Toyota

Claimant relied on the authors of MacGillivray on Insurance Law who stated that 'it is the general rule in the law of contract that fraud, misrepresentation or nondisclosure by persons who are not parties to a contract or agents of those parties does not affect the validity of the contract.'

- [36] Finally, the Claimant concludes that he not having pleaded that the condition of the road caused the accident and that the Defendant also failing to plead that cause of the accident was the basis for voiding the contract that these factors are immaterial to the case.

The Defendant's Submissions

- [37] The Defendant disputes the Claimant's claim for damages on the basis of fraudulent misrepresentation. The defendant asserts that the reported vehicular accident was untruthful in that it did not result from an actual collision between the respective vehicles.
- [38] The Defendant argues that the core foundation of an insurance contract relies on the principle of utmost good faith emphasizing fair dealings based on honesty and transparency between the parties. The Defendant referenced the authority of **Prasad v Demerara Mutual Life Assurance Society Ltd.**³ wherein it was stated that 'the assured therefore must disclose everything that was known to him that is material in fact even though he does not appreciate its materiality and even though a reasonably prudent man would not do so.' Furthermore, the Defendant contends that this duty subsists throughout the entirety of the contract until its expiry. Thus, where there has been an occasion of loss during the currency of the policy period, the insured has a duty to exercise utmost good faith in disclosing material facts resulting in the loss.
- [39] The Defendant acknowledges that in cases where an allegation of fraud or misrepresentation is made that the burden of proof shifts to it. That the Defendant must demonstrate on a balance of probabilities that the Claimant deliberately caused the loss or that his claim was dishonest or fraudulent. The Defendant submits that the required proof in this case does not reach the standard of proof beyond a reasonable doubt but instead involves establishing a case on a balance of probabilities. In meeting the burden of proof, the Defendant can fulfil this requirement through the presentation of direct evidence. However, if direct evidence is lacking, the court may consider

³ GY 1978 HC 6

substantial circumstantial evidence taking into account factors such as motive, opportunity and all other circumstances of the case. The Defendant submits that per the authority of **Derry v Peek**⁴, that once fraud has been proved that it automatically vitiates the insurance contract and thus the insurer is entitled to avoid the policy of insurance with effect from the date of the false insurance claim.

[40] The Defendant in support of the claim that the Claimant made a fraudulent statement concerning the alleged collision relied on certain inconsistencies in the claimants' case. Particularly the Defendant references the difference in the dates and times given by the claimant of the accident. The Defendant points out that the approximate time difference was over one and a half hours which it suggests is significant. The Defendant also points out that although the Claimant testified that the third party drove off from a stationary position with no lights on and thereby caused the vehicles to collide that the Claimant nonetheless took full responsibility for the collision.

[41] The Defendant also highlighted the fact that the claimant although relying on five photographs that he indicated he had taken at the scene, did not share those photographs with it for the expert. In fact that the Claimant only disclosed these for the first time during the course of these proceedings.

[42] The Defendant highlights the absence of the third party who had initially given a witness statement but who was absent at trial as well as the lack of evidence from any of the investigating officers both of whom were still gainfully employed with the Government of Antigua Police Force attached to the traffic department.

Court's Reasoning

[43] The crucial question for determination is whether the facts give rise to a misrepresentation or fraudulent claim by the Claimant sufficient to vitiate the contract of insurance.

[44] Insurance contracts operate under the principle of utmost good faith. This is a dual obligation and requires that both parties act with the highest level of honesty and transparency. Parties are therefore required that parties disclose all relevant information during the formation and performance of the

⁴ [1889] UKHL 1

contract. In the case of **Michael Beruello vs Victor Cordino proprio et nomine**⁵the Court endorsed this and held that:

‘the application of *uberrima fides* is extended beyond the moment of conclusion of the contract of insurance, that is, when the proposal form is presented, and in fact it continues to apply throughout the course of the performance of the said contract. This principle obliges both parties.’

- [45] Therefore, where there has been an occurrence of loss during the policy period, the insured has an obligation to promptly and honestly disclose material facts related to the loss during the policy period. In this case the timing of the disclosure is considered timely in the context of these proceedings. However, the truthfulness of the collision itself is in question.
- [46] The Defendant pleads that the Claimant ‘submitted a false insurance claim to the Defendant in which he represented untruthfully that on 24th February 2017, whilst driving motor car A39591 on the Cassada Gardens Main Road in the vicinity of the Race Track his motor car collided with motor car A41595 owned and driven by third party driver, Glenny Active.’
- [47] The Defendant further pleads that ‘the damages reportedly sustained to the motor cars bears no relevance, relation or connection whatsoever to the alleged collision.’ The Defendant further asserts that the Claimant provided contradictory statements to that of the third party and claim that the Claimant’s false claim has resulted in a breach of the insurance contract which entitles the Defendant to avoid the same.
- [48] In circumstances where an insurer denies a claim based on fraud or dishonesty, the burden of proof lies with the insurer. The Defendant therefore need to demonstrate, on a balance of probabilities that the Claimant wilfully caused the loss of that the claim was dishonest or fraudulent. The standard of proof is less stringent than the criminal standard of proof that is beyond a reasonable doubt. In the case of **Bater v Bater**⁶ Lord Denning in considering the standard of proof stated as follows:

⁵ Malta Court of Appeal decided on the 11th July, 1994

⁶ [1950] 2 All E.R. 458

‘The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. **So also in civil cases the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.**’ (Emphasis mine)

[49] The burden of proving fraud or dishonesty by Defendant can be discharged through direct evidence. However, where direct evidence is lacking, the authority of **Derrick St. Vile v Netherland Antilles General Insurance Corporation**⁷ guides that the court may consider circumstance evidence evaluating factors such as motive, opportunity and all other circumstances of the case. Therefore, as a starting point a careful consideration of the evidence is required.

[50] The Claimant at the material time was the holder of a comprehensive motor vehicle insurance policy with the Defendant with an expiry date of 26th February 2017. Pursuant to the policy the Defendant is obligated to indemnify the Claimant for loss or damage to the motor vehicle caused by:

- (a) Accidental collision or overturning or collision or consequent upon mechanical breakdown or consequent upon wear and tear.

⁷ [2001] ECSCJ No 115 para 26

- (b) Fire, external explosion, self-ignition or lightning or burglary, housebreaking or theft.
- (c) Malicious act
- (d) Hurricane

[51] The policy also provides that:

'The due observance and fulfilment of the Terms of the Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal I shall be conditions precedent to any liability of the Company to make any payment under this policy.'

[52] In pursuance of the policy the Claimant on 27th February 2017 reported the accident to the Defendant. The Claimant provided a statement to the Defendant attributed the cause of the accident to Glenn Active. He asserted that Mr. Active was parked without lights on the left side, caused the accident by suddenly moving without warning leading to the collision. In another statement to the Defendant the Claimant also described the condition of the road as good.

[53] Thereafter two police reports were provided dated 10th March 2017 and 22nd March 2017. The first police report stated that the Claimant advised that he drove into a pothole and lost control of his vehicle which caused the collision. The second police report differed slightly in that it was stated that Claimant claimed that he drove over an uneven wave in the road surface which cause him to lose control of the vehicle and caused him to collide with the rear right portion of the other vehicle.

[54] Subsequently on 25th May 2017 the Claimant issued a more detailed statement to Patrick Zoé and stated the following:

'As I got to the area of the Race Track I was travelling at about 60 to 70km per hour. I began going round the first of an "S" curve in the area of the roadway there which was very rough. I was driving with my headlights on at the time, the right side head light was a bit dim, but the left side was bright. There was no street lights in the area at that time, and the corner was dark. I began pulling over to my right to pass the parked vehicle, which was a car, at that very moment the car drove off, travelling in a northerly direction. At that

very moment the driver drove forward, I collide with the right side rear of the car. Both vehicles ended up in the middle of Utility Drive after the accident.'

[55] The third party Mr. Active also on the same date above issued Mr. Zoé with the following statement: 'I left my home that night around 11.40p.m. And was on my way to Cedar Grove. I was driving with the lights of my car on. The weather condition in the area was dry and dark. There was no traffic in the area at the time. As I drive past the Race Track was doing about 35 miles per hour. There is a curve just as you past the Race Track. I had no problem negotiating that curve. There is a side road on the left side only after you pass that first curve. Right after passing that side road there is a second curve which goes to the left. Right before this curve there are some waves of rough road surface there which caused me to slow down a bit. Just as I approached that curve going further north I suddenly felt an impact to the back of my car. I was listening to some music on my CD at this time and did not see any lights or vehicle to my rear. The impact was heavy, and it jolted my car towards the right, coming to a stop on the roadway facing a dirt road over on the right side there. The car which hit me came to a full stop on the road facing north with its right side front in physical contact with the right side rear of my car. My car was never in a stopped position at any time in that area.'

[56] From the above there are obvious glaring inconsistencies in the reports provided about the collision. Whilst the Claimant indicated to his insurers that the accident was because of the actions of a third party in negligently pulling from a stationary position in front of him, two subsequent police reports indicates that the statement of the Claimant was such that the condition of the road caused him to lose control of the vehicle and collide with the third party.

[57] It is significant that the Claimant obtained the second police report citing inaccuracies in the first one⁸. Remarkably the only modification involved the substituting of the words "uneven waves in the

⁸ Paragraphs 6 and 9 of the claimant's witness statement refers. Paragraph 6 reads 'Mr. Active got his statement before I made my second report and certain things in his report wasn't accurate because they didn't get my statement and notified me the insured after.'

Paragraph 9 reads 'I then called police headquarters and a second police report was done. A police report was obtained from the commissioner.'

road” for “potholes”. The lack of evidence from the Claimant to address and correct inaccuracies in the second police report especially regarding the road conditions is notable.

[58] Further it is worth noting that the author of these reports, who is no longer with the police force was not called to testify despite having no apparent impediment to providing evidence in court. The author’s explanations on the disparities between the police reports and the accident register would have carried more persuasiveness and credibility in the circumstances.

[59] I observe nonetheless that the evidence of Superintendent Quammie, which evidence was admitted on the cusp of trial sought to clarify that the issue of the condition of the road was not mentioned in the accident register which details would have informed the police report and that this was a fundamental error. This suggestion comes more than 4 years post-accident. Superintendent Quammie’s observation that the accident report and accident register are inconsistent regarding the reference of the condition of the road doesn’t necessarily mean that the facts in the report are inaccurate. Inconsistencies may exist without disputing the accuracy of the reported facts. Given that Superintendent Quammie was not the author of the reports he cannot assert with confidence whether the condition of the road causing the accident was communicated or not communicated and the reasons behind its inclusion in the reports. As a result, his evidence may have little value in assessing the situation.

[60] In contrast the Claimant’s inaction or delayed challenge to the reports, specifically acknowledging the road condition as a factor in the collision holds significant weight in interpreting his acceptance of the report’s accuracy. I pause here to state that the inconsistencies regarding the date and time of the collision in the various reports to be immaterial given the circumstances surrounding the time of night and the potential for errors in providing such details. However, the delayed challenge to these reports is noteworthy especially considering the awareness of these reports were being considered by the Defendant in deciding his claim. Further given the Claimant’s role as a police officer his awareness of the importance of an accurate report is implied. It follows logically that the Claimant accepted that the road condition as a direct factor in causing the collision and the accuracy of the police reports.

[61] The court's acceptance of the Claimant's view of the police report was accurate despite substantial differences from the statement given to the Defendant suggests the possibility that the Claimant provided a false or misleading account of how the collision occurred. However, having also considered the totality of the evidence including the Claimant's demeanour and conduct at the trial and the nature of the inconsistencies, the lack of credible evidence that the Claimant's statement in the police report attributing the collision to the condition of the road, the inescapable conclusion which I make as a factual finding is that the Claimant indeed provided a false statement to the Defendant about the collision of the accident.

[62] It is essential to address the Claimant's concern about whether the defendant explicitly pleaded that the road condition was a factor in its pleaded case. The Claimant suggests that this assertion did not form part of the pleaded case of the Defendant. I disagree. Whilst the defence does specifically identify the date and time of the collision as being contradictory the heart of the defence is that the Claimant made a false claim concerning the collision and was thereby dishonest. The defendant also specifically pleads that reliance would be placed on the expert report to substantiate its findings which report identified the inconsistency in the reasons for the collision as being a factor considered in the truthfulness of the claim submitted by the Claimant. Further the findings of the Defendant were captured in the rejection letter dated 12th July 2017 which forms part of the evidence in this case. In that letter the Defendant specifically mentions that a comprehensive review was undertaken regarding the documentary evidence, the damage to the vehicles and interviews regarding the circumstances surrounding the alleged accident. This clearly suggests that a plethora of factors beyond the date and time were considered of the collision. Thus, the issue of the condition of the road and whether there was a false statement regarding this as a cause of the collision is a relevant factor in the determination of this case. Therefore, the finding of fact related to this aspect will play a relevant role in the consideration of the case.

[63] The Defendant's contention that the damage to the subject vehicles bears no resemblance to the alleged collision introduces another layer of complexity in this matter which also must be explored according to the standard of proof articulated above.

[64] Although the Claimant argued that there were paint streaks on the front left side of his car and the rear right side of the third party's vehicle there is no other damage to that area. Given the extensive and costly damages sustained and the explanation suggestion by the Claimant that he hit the third party from the rear this raises doubts about these paint transfers being connected to the collision. That further I note that no explanation was given by either the Claimant or the third party as to how the Claimant's vehicle would have come into contact with the third party's vehicle to produce these paint transfers. The police report also does not identify a point of impact and the Claimant asserts that he 'collided with the right side rear of the car.' Moreover, there is no paint transfers on the Claimant and third party's vehicles of the areas directly impacted and to which there was extensive damage. The vehicles involved are a black Honda and a white Toyota which I agree with the expert provides the best opportunity for paint transfer. Therefore, I agree with the experts' analysis that limited paint transfer on the front left side of the Claimant's vehicle do not align with the severity of the damages in this case and are not indicative of the collision.

[65] Although the Claimant and third party's vehicles were assessed as having sustained damages, the expert's analysis of whether those damages related to the collision is notable. For instance, the examination of the left side front damages to the bonnet, left front fender, head lamp assembly and other areas on the left side of the Claimant's vehicle it was stated that the same bore no connection whatsoever with the existing damages of the right rear side of the third party vehicle. This same opinion was expressed in relation to damage to the bonnet, left front fender, front grill, front suspension metal cross bar of the Claimant's vehicle in relation to damages which existed onto the right side rear areas of the third party vehicle and several other areas of examination which for brevity will not be repeated in this decision. Also interesting is the opinion that the uniformed depressed areas of the left side frontal areas of the Claimant's bonnet and the left front fender to be consistent with the Claimant's vehicle being driven straight forward and the vehicle making contact with a solid horizontal object which object stood at a height higher than the bonnet and front fender. Although the expert provided various detailed explanations and examinations supporting the view that the damages did not correspond with the Claimant's allegation, the Claimant did not present evidence to counter or undermine these explanations. Therefore, I find that upon a preponderance of evidence that it is unlikely that the damage sustained by the Claimant's Honda Accord was as a result of the collision reported by the Claimant. I find also that the Claimant untruthfully made a false statement

to the Defendant about the collision and the manner in which damages were sustained to his vehicle and that of the third party.

[66] Finally, the Claimant's evidence in cross examination appears to be inconsistent especially regarding the admission of liability and the prior acknowledgment of the third party's negligence. It must be remembered that the Claimant's statement to the Defendant was that the third party moved off suddenly with no lights or indications causing a rear ended collision. The Claimant is a seasoned police officer of over ten years' experience. Notwithstanding that the Claimant never worked in the Traffic Department it is illogical that he would believe that rear ending a third party would automatically render him as liable in these circumstances. The Claimant's account of the accident, the rational for accepting liability, the inconsistent reports and the evidence in totality suggests that Claimant's account to be inconsistent and unreliable.

[67] The Claimant's testimony has been marked by inconsistencies, illogical statements and indications of untruthfulness. This raises questions about the veracity of the Claimant's account especially concerning the details of the collision. Upon reviewing the entire case and considering the preponderance of evidence, the balance favours the Defendant.

[68] Making a false statement without belief in the truth or with recklessness and with an intention to deceive constitutes fraudulent misrepresentation. The leading authority of **Derry v Peek**⁹ underscores this principle and further provides that fraud when proven results in the automatic nullification of an insurance contract.

[69] The Defendant's defence and counterclaim are identical. Having successfully met the burden of proof and proven fraudulent misrepresentation it follows that the counterclaim which in essence was a repeat of the defence and therefore reliant on the same evidence already examined would automatically be successful.

⁹ [1889] UKHL 1

[70] Before I conclude the Claimant has suggested that the Defendant by misquoting the policy number is unable to avoid the same. This suggestion can easily be addressed as such an error is not fatal. At all material times the correct policy and related information were in evidence throughout these proceedings. Thus, any error can be remedied by an amendment which can be made at any time.

Whether the Claimant is entitled to damages

[71] This issue can easily be disposed of given the prior findings of the Court. The failure of the Claimant to establish that the Defendant without lawful and proper cause failed to indemnify him for the collision and the resultant effects, renders him unable to recover the damages claimed.

Order

[72] In light of the foregoing, it is hereby ordered as follows:

- (i) The Claimant's claim is dismissed.
- (ii) The Defendant is entitled to avoid the motor vehicle insurance policy of the Claimant.
- (iii) The Claimant shall pay the Defendant prescribed costs in accordance with CPR 65.

Jan Drysdale
High Court Judge

By The Court

Registrar