

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST VINCENT & THE GRENADINES
CLAIM NUMBER:SVGHCV2020/0122

BETWEEN:

KHALIQUE BROWNE

Claimant

and

WEST INDIAN INSURANCES LTD

Trading as Sentry

Defendant

Before: The Hon. Mde. Justice M E Birnie Stephenson

Appearances:

Mr Ronald Marks of Marks & Marks for the Claimant

Mr R Akin John and Ms. Nakita D Charles of Elizabeth Law Chambers for the Defendant

2023: February 16th
September 22nd

[1] **STEPHENSON J.:**Before the court is a dispute between and insurance company “the defendant” and an insured “the claimant” who was the holder of a comprehensive policy of insurance numbered WVP-07228/17 taken out on his Toyota Duet Motor Car Registration number PU539.

[2] The claimant claimed he was involved in an incident which resulted in his vehicle being totally written off. He submitted a claim to the defendant West Indian Insurance Limited trading as Sentry pursuant to his comprehensive policy of insurance. In his statement of claim the claimant claimed that the defendant’s company initially informed him that the vehicle was a total right off and that there would be an investigation into the matter with a view to settling the claim.

- [3] It is the claimant's pleaded case that based on his discussions with the defendant's agent when he made the report and claim for the loss of his vehicle, he understood that the insurance company would have facilitated the removal of the vehicle from on the sea rocks where it came to rest after it rolled down the embankment and over the cliff in the vicinity of Rawacou Recreational Park. Further, the claimant expected to be reimbursed the value of his vehicle which at the time of the claim was XCD\$16,000.00
- [4] The claimant further pleaded that on July 24th 2018 sometime after the incident he returned to the scene of where his car was located and noted that car was still where it fell onto the rocks and the car was stripped of some of its parts and accessories. It is noted that he claimed he made a report of this to the nearby police Station.
- [5] On the 2nd of October 2018 the claimant was informed by the defendant company that his claim for reimbursement of the cost of his vehicle pursuant to his comprehensive policy of insurance would not be honoured. This he pleaded, caused him loss of his vehicle, loss of use of his vehicle and costs. The claimant also made a claim for interest pursuant to the Interest Act¹.
- [6] In his pleaded case the claimant claimed:
- i. Damages for breach of contract;
 - ii. A declaration that his policy was in good standing at the date of the accident;
 - iii. Indemnification for loss and damages;
 - iv. Loss of use at the daily rate of XCD\$150.00 in the sum of \$123,600.00 and continuing;
 - v. Special Damages of \$100.00; and
 - vi. Interests and costs.
- [7] The claimant's case was disputed in its entirety by the defendant.
- [8] In their defence the defendant did not deny that the claimant had a comprehensive policy of insurance with their company for his Motor Car registration number PU539 and Insurance Policy NO. WVP-07228 which was current at the time claim was received from the claimant. However, in the defendant's defence it was contended that the claimant's entitlement

¹ Chapter 27 of the Laws of St Vincent and The Grenadines Revised Edition 2009..

to indemnity as contained in his policy was subject *inter alia* to limits of liability, exception clauses and the general rules of insurance law.

[9] In the statement of defence, the defendant pleaded that the conditions of the claimant's policy of insurance included the following *inter alia*:

- i. That the claimant takes all reasonable steps to safeguard his motor vehicle from loss and damage and to maintain the vehicle in an efficient condition.
- ii. That the claimant owed the defendant a duty of good faith in making any claim for loss under his insurance property. and
- iii. That the claimant would not be able to recover any claim for loss based on a claim that was contrary to public policy and/or when the loss was brought about by an event upon which the policy specifies the monies to be payable.

[10] The defendant claims that the claimant made material misrepresentations describing the circumstances surrounding the incident on the 13th July 2018. The defendant relies on an accident reconstruction report which was commissioned from an expert which stated that the incident possessed "... *the hallmark of a staged collision which was tantamount to insurance fraud*". The particulars of the defendant's claim were stated in their defence.

[11] The defendant pleaded that further or in the alternative the claimant failed to take all reasonable steps to safeguard his car from loss or damage or to maintain the said car in a condition in breach of his policy of insurance.

[12] The defendant in their defence pleaded that the claimant was informed that the cost of removing the wreckage was in excess of that which the policy provided for. The defendant also denied that a promise for payment and removal was made as alleged by claimant.

[13] The defendant reiterated their contention in their defence that the claimant was at all material times informed that his claim was being rejected. Further, that the defendant was at all material times relying on the report of their expert, that based on the investigation carried out on the incident it was proved to their satisfaction that incident could not have occurred unless the vehicle was aided either by a push or a pull by the claimant who, in their pleaded case acted at all material times in breach of his insurance policy.

[14] The defendant in its defence denied the losses claimed by the claimant and pleaded that any loss suffered by the claimant, which was not admitted, was brought about by the claimant's own actions because he intentionally permitted and or caused his vehicle to fall over the cliff and therefore he cannot recover under his policy of insurance, since his claim was:

- i. Contrary to public policy and/or the general laws of insurance;
- ii. That the damages arose out of the willful and or malicious act on the part of the claimant;
- iii. That the claim was excluded by the exception clause of the policy of insurance; and
- iv. That there was no basis upon which the defendant was responsible for the payments claimed.

[15] In his reply the claimant denied the assertions made by the defendant and stated that he did not accept the report of the defendant's expert witness and that he put the defendant to specific proof of the allegations of fraud made against him by the defendant.

[16] The claimant was adamant in his denial that the incident was staged and repeated his statement that on the evening in question, he pulled up, off the road to answer a call of nature and whilst doing so he noticed the car moving and he attempted to prevent it from going over the embankment but was unable to do so. In his pleaded case the defendant contended that he pulled up his hand brake and put the car in neutral before exiting the car.

[17] The claimant contended in his reply that he did not willfully or maliciously damage his motor vehicle registered PU539 and maintained his case that the claimant's agent promised him that the defendant company would take the wreck of his car into custody and pay him \$16,000 being the value of the car at the time of the incident.

[18] Both parties specifically denied each other's claim as set out and traversed in their respective statements of case.

[19] The court heard evidence from the claimant, the defendant's agent Terron Davis and accident reconstructionist Eric Kipps who furnished the court with an expert report. The court also visited the Locus in Quo where there was a re-enactment of sorts using two vehicles as no one had a Toyota Duet however the two cars used were similar to the claimant's car. And of course, none of the cars used were allowed to traverse the path of the claimant's car and roll

over the embankment and over the cliff. The claimant was questioned under oath by his counsel and counsel for the defendant and also by the court.

[20] The issues for the court's determination as to liability were as follows:

- a. Was the incident an accident as claimed by the claimant?
- b. Is the defendant entitled to refuse payment on the insurance benefits because the applicant willfully misrepresented material facts as to how the incident occurred and fraudulently made a claim on his insurance policy?

[21] For the court to find that the incident was an accident the claimant must prove on a balance of probabilities that the incident was an accident and in order to make that determination I must decide whether or not the incident was staged.

[22] The claimant presented his case first. In order to successfully make a claim on his comprehensive insurance and the claims made in his statement of claim, the claimant will have to prove on a balance of probabilities that the incident was an accident, which means that his car rolled down the embankment and over cliff on its own and not as a result of him pulling or pushing it as contended by the defendant's expert.

[23] Did the accident result from the ordinary use of the claimant's vehicle? Did the incident happen in the way and manner as described by the claimant?

[24] The claimant filed a witness statement which stood as his evidence in chief, thereafter he was cross examined by Counsel Mr Akin John on behalf of the defendant. There was also a visit to the locus in quo where the claimant gave a demonstration of what happened and was further cross examined under oath by Counsel for the defendant.

[25] The claimant's evidence in so far as is relevant to the claim at bar, is that on Friday the 13th July 2018 he was driving his motor car travelling towards Kingstown. He diverted off of the Stubbs/ Main Road in the vicinity of the Rawacou Recreational Park and pulled off the road to answer an urgent call of nature. It is the claimant's evidence that on the evening in question he hurriedly exited his car, leaving the engine running, but before doing so he pushed the car's gear lever forward towards the park position and pulled up his hand brake.

[26] He told the court that whilst he was relieving himself, standing on the other side of his car he heard a sound from his car and when he looked, he realised that the car was moving. He ran around to the driver's side of the car, attempted to open the driver's door in an effort to prevent it from rolling forward but he was unsuccessful in his effort and his testimony is that the car rolled over the embankment over to the cliff and crashed on to the sea rocks below.

[27] The car was extensively damaged. It is the claimant's evidence that he made a report at the nearby police station and the officers came and took measurements. He also duly made a report to his insurance company. He later visited the scene of the incident where the car was at rest and noted that one of the rims was missing from the car. When he first visited the scene with one Mr Davis a representative from the Insurance Company, pictures were taken of the car and the area and he said Mr Davis undertook to remove the car from the scene and take it to a mechanic.

[28] The claimant visited the scene a second time shortly after and noted that the vehicle had not been moved and subsequently contacted his insurers and the claimant said that he was subsequently informed by Mr Davis that where the vehicle was located made it very difficult to remove it and to do so would cost in excess of \$500.00 and that a meeting of the claims board had to be convened to discuss the matter as the cost of removal was in excess of \$500.00.

[29] The claimant stated in his evidence that he was subsequently informed by the defendant's agent that it was decided that it was not economically feasible to remove the vehicle as it was a total write off. The claimant said he was also informed and understood that there would be an investigation into the matter with a view to settling the claim. He said that based on the assurances of the agent he relied on the promise that the defendant would take the wreck of his motor vehicle into their custody and he would be reimbursed the value of the vehicle in the sum of \$16,000.00.

[30] The claimant's evidence is that he subsequently visited the scene on the 24th July 2018 and noted that the vehicle was still there and that a number of its accessories were missing and he subsequently made a report to the police station, to Mr Davis and to the defendant's office.

[31] The claimant said that on the 2nd October 2018 he received a letter from the defendant informing him that his claim was denied and that as a result of the defendant's refusal, he

suffered the loss of use of his vehicle and he was also inconvenienced and suffered loss and damages and is seeking compensation for same.

[32] The claimant said that the defendant denied his claim on the grounds of insurance fraud and at no point in time was he involved in any fraudulent activity.

[33] In his witness statement the claimant reiterated what happened on the evening in question that he exited his car urgently and made a hurried effort to put the car in the parked position. In his viva voce evidence Mr Brown said he could not say for certain that the transmission went into the parked position as his actions were hurried and that he hurriedly exited the car given the urgency of his biological urge which necessitated his speed. He also said he was not certain the hand brake which he pulled up hurriedly was fully engaged.

[34] The claimant went on to state in his witness statement that the car was valued more than the insured amount as he had installed alloyed rims and other accessories and therefore, he cannot see how he would want to defraud the insurance company and he would have lost much more than the insured value.

[35] The claimant made mention of his profession² and the fact that the defendant's accusation of fraud are serious accusations and that his impeccable record as a police officer in the special branch is more valuable to him than the costs of the insured value of the car.

[36] The gravamen of the defendant's case is that the claimant was the author or architect so to speak of the incident and due destruction of his vehicle in an effort to make a fraudulent claim to the insurance company. Staged auto accidents involve a situation where the insured so intentionally maneuvers his vehicle so as to cause its damage or destruction in an attempt to obtain compensation and payment pursuant to the coverage available in his insurance policy.

[37] The defendant in the alternative and also contends that in the event that no fraud is found on the part of the claimant, then the defendant submits that the incident was caused by the claimant's negligence in that he failed to take the adequate care of his vehicle when he parked it to avoid the incident from occurring and the subsequent destruction of his vehicle and therefore he cannot benefit from his failure to take care and his negligent actions.

² The Claimant is a police officer assigned at the time of trial to the special branch unit of the Dominica Police Force

[38] A claim is fraudulent if the loss which is being claimed by the insured for is brought about by the claimant.³ Very clear evidence of fraud is required. Where an insurance claim is premised on fraud that claim will be invalidated.⁴

[39] When an insurance company claims that a claim which has been presented to them is fraudulent, the question is whether there is evidence presented by the insurer sufficient to establish that the accident was staged and if so, is it sufficient to defeat the claimant's claim for compensation pursuant to his policy of insurance.

[40] An insurance company is entitled to refuse to pay a claim that is found to be tainted by fraud. Re: **Agapitas -v- Agnew**⁵. In this matter it was held that where parties are engaged in litigation where there is breach of the duty of utmost good faith on the part of the insured the contract of insurance may be avoided. However, the fact that an insured claimant may have lied in support of his claim would not in itself be ground for judgment to be given against it.⁶

[41] The burden of proof lies on the insurance company to prove the alleged fraudulent conduct. The allegation of fraud is a serious one and in Re: H⁷ Lord Nichols had this to say regarding the balance of probability for proof of fraud where there is an allegation of fraud in civil cases:

- i. *" The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence...Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of*

³Halsbury's Laws of England Vol 60 (2018) Paragraph 181

⁴ Halsbury's Laws of England 5th Edition Volume 60 Para 203

⁵[2002] 1 All E R (Comm) 714

⁶ Ibid see in the held "Once parties were engaged in litigation, it was the procedural rules which governed the extent of the disclosure which should be given in the litigation, not s 17 of the Marine Insurance Act 1906, which provided that if the utmost good faith was not observed by either party, the contract might be avoided by the other party. The fact that an insured claimant might have lied in support of its case would not itself be a ground for judgment being given against it."

⁷[1996] 1 AC 563

an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established...”⁸

[42] It must be reiterated, that the claimant must establish his case on a balance of probabilities that there was a breach of contract by the defendant company such as to entitle him to the reliefs sought. It would be crucial in other words to examine the claimant's evidence that is not only relevant to his claim but relevant to the nature of the accusation and or allegations made by the defendant.

[43] Is there any evidence before the court sufficient to establish the alleged fraud on the part of the claimant? It is well established if not trite law that it is necessary for the particulars of fraud to be particularly, distinctly and carefully pleaded.

[44] Byron CJ in **Thomas -v- Stoute** and others⁹ said that *“the definite character must be given to the charges upon which they rest...”* This court could do no better than to adopt the learned Chief Justice's words and apply them to the case at bar.

[45] This principle was examined by the Court of Appeal in the **St Lucia Motor and General Insurance Co Ltd -v- Peter Modeste**¹⁰. The Learned Justice of Appeal George Creque who delivered the leading judgement of the court held that *“... where an allegation of fraud is made particulars must be given, this is a longstanding and well-established principle”*

[46] The question is then, has the defendant adduced any evidence to substantiate their allegations of fraud on the part of the claimant?

[47] Counsel on behalf of the defendant sought to make heavy weather of the fact that the claimant came off the main road and drove into an access road which was lonely and where there would be no witnesses to his fraudulent act. This was in this court's view mere conjecture on the part of the defendant and their counsel. There is no evidence of facts from which this court

⁸Ibid at page 586

⁹(1977) 55 WIR 112

¹⁰ HCVAP 2009/008 St Lucia

can reasonably draw any negative inference of intention to commit a fraudulent act because of the route taken by the claimant.

[48] The court is required to weigh the probabilities, and having weighed the probabilities based on the evidence adduced by both parties in this case, this court has decided it is more likely than not that the incident occurred as the claimant stated, this court having had the opportunity to observe the claimant as he gave his testimony in court and at the visit to the locus in quo accepts his evidence as to how the incident occurred.

[49] This court will hasten to say however, that even though the expert's evidence concluded that "for the vehicle to have travelled the path and fall below the cliff it was not in neutral but was in drive with the hand brake down" and that "the incident possesses the hallmark of a staged collision which is tantamount to insurance fraud". There is no evidence adduced by the defendant in proof of any fraudulent activity or intention on the part of the claimant.

[50] Having heard the evidence and reviewed same this court finds as a matter of fact that the claimant exited his car leaving the engine running and that in his hurry, he failed to put the car in park which would have prevented it from moving he also failed to fully engage the hand brake which would have again prevented and or retarded the vehicle from moving.

[51] This court finds as a fact that the vehicle was either in drive or in neutral. It was noted by MrKipps in his report that even though he was of the view that the vehicle was in drive and not in neutral he did acknowledge the fact that the gear lever could have been possibly dislodged in neutral due to the tumbling downhill. I do agree with MrKipps that the vehicle would not have moved even if it were in neutral, and the hand brake engaged however it is clear to this court that the hand brake was not engaged as the photographic evidence showed the hand brake coming up to the level of the seat and not above the seat which would have been an indication that it was fully engaged. (My emphasis).

[52] It is also interesting to note that Mr Kipps spoke of the need for an even data recorder analysis to fully understand what exactly took place and the need for additional analysis to ensure without a shadow of doubt the behavior of the vehicle 5 seconds prior to impact is thoroughly known.

[53] This court is also of the view based on the claimants viva voce evidence and his evidence at the visit to the locus in quo that after he heard the car and realised it was moving and he ran around the car and attempted to enter the car to prevent it from rolling forward it could have possibly given the car the momentum to move forward over the embankment and the cliff and this would have been quite unintentional on the part of the claimant.

[54] This court does not accept that the claimant pushed or pulled the car on purpose to propel it over the cliff intentionally. A review and an analysis of the evidence as adduced by the witnesses and the aspects of the evidence as accepted by this court and based on the fact that it is the defendant who had to prove its claim of alleged fraud, this court finds that the defendant has failed to establish on a balance of probabilities that claimant staged the accident in an attempt to defraud the defendant or to file a fraudulent claim as alleged. This court is of the view that the finding of MrKipps is not sufficient to substantiate the serious allegation of fraud made in the case at bar.

[55] Having heard the witness and observed him as he gave evidence in the matter and at the visit to the locus in quo where there was an attempted re enactment of what occurred and the evidence from the accident reconstructionist, it is this court's finding that the claimant exited the vehicle without ensuring that the gear leaver was pushed all the way up to park, neither did he ensure that his hand brake was fully engaged thereby ensuring that the car would not have moved forward.

[56] It is a finding of fact by this court that the claimant was careless/negligent in the way and manner he operated his vehicle that night.

[57] When considering liability in accident cases, it usually comes down to whether or not the claimant was careful. It is the court's job to find out who was responsible/liable for the incident before the court. The court will have to consider whether the person involved acted with reasonable care under the circumstances and did the claimant act carelessly in a way that contributed to or caused the incident subject to the case at bar resulting in the loss suffered.

[58] It is the submission of the defendant company that the claimant's actions were in breach of the binding condition of the policy to safeguard his motor vehicle from loss of damage.

[59] Counsel on behalf of the defendant drew the court's attention to the provisions in the insurance policy that provided for the *"observance of fulfilment of the Terms of the Policy in so far as they relate to anything to be done and not to be done by the claimant or any person claimant to be indemnified ... shall be a condition precedent to any liability of the company to make any payment under this policy."*

[60] The defendant's submission in this regard was that the claimant failed to observe what is considered a critical term of his policy and in doing so he failed to fulfill a condition precedent to any liability on the part of the defendant. It was submitted that in the circumstances the defendant is not liable to honour the claimant's claim on the ground that the claimant failed to take all reasonable steps to safeguard his vehicle from loss or damage thereby failing to comply with a condition precedent of his policy for liability on the part of the insurer.

[61] Condition precedent to liability - Generally speaking is the failure to comply with a condition precedent to liability which will prevent the insurer from honouring insured's claim

[62] There are conditions precedent, breach of which could entitle the insurer the right to refuse to honour its obligation under the contract depending on the wording of the policy document. If the insured was the author of his loss due to his negligence, this would entitle the insurer not to honour his claim. This court is very cognisant of the fact that negligence is a question of fact that must be determined in accordance with the peculiar facts associated with the claim.

Conclusion

[63] This court has given deliberate consideration to all of the evidence that was led in this matter, the agreed bundle of documents, together with the helpful submissions of both learned Counsel. In all civil cases, the burden of proof is on the claimant. He who asserts must prove. The standard of proof is on the balance of probability.

[64] This court is of the considered view that the claimant was a credible and reliable witness. He did not seek to mislead the Court about what happened on that fateful evening. There is, however, merit in the defendant's assertion that the claimant failed to take all the necessary precautions to avoid the accident. This court accepts that the claimant was to a great extent the author of the destruction of his vehicle as he failed to ensure that his car was in park and that his hand brake was fully engaged which would have without a doubt caused his vehicle to remain in a stationary position whilst he relieved himself.

[65] This court is cognisant of the fact that the claimant acted in the urgency of the moment which this court is of the view operates to reduce his culpability in negligence making him really contributorily negligent.

[66] It is the finding of the court that given the nature of the situation as accepted by the court from the claimant's evidence that his negligence would operate to reduce the quantum of his claim and this court finds that it would be fair in all the circumstances of this case that the claimant is able to solely recover the loss of his vehicle at the time of the accident in his stated amount of \$16,000 plus his costs based on the amount recovered.

[67] The court is of the view that the evidence led by the claimant was very consistent and cogent, in relation to the important aspects of the issues of his claim. This court has absolutely no doubt that the entire situation was aggravated by the urgency of the claimant's situation on the evening in question and his failure to take all the necessary precautions to ensure his car did not roll and this was not an intentional act on his part but would amount to a major part of the cause of the accident

[68] This court is far from persuaded, as the defendant would have me believe that the accident was due to fraudulent activity on the part of the claimant. However, I do believe that he is to bear the greater part of the responsibility of the incident. Judgment is therefore entered in favour of the claimant for the loss of his car at the time of the accident solely in his stated amount of \$16,000 EC Dollars with prescribed costs to the claimant based on the amount recovered in the sum of \$3,200.00.

[69] This court wishes to thank counsel for the manner in which the litigation was conducted and for their helpful submissions in conclusion of the trial.

M E BIRNIE STEPHENSON
High Court Judge

BY THE COURT

REGISTRAR