

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 571 OF 2001

BETWEEN:

EDMUND FRANCIS

Claimant

v

CLICO INTERNATIONAL INSURANCES LTD

Defendant

Appearances:

Mr. Richard Williams for the Claimant

Mr. Samuel Commissiong for the Defendant

2003: March 10
2003: March 11
2003: September 23

JUDGMENT

[1] **BRUCE-LYLE, J:** The Claimant Edmund Francis is claiming from the defendant, CLICO International Insurances Ltd the sum of \$24,000 being the insurance value of his truck T 1073 and interest on the said sum of \$24,000 at the rate of 12% from the 22nd day of November 2001 until payment, damages for breach of contract, such further or other reliefs and costs.

[2] This was as a result of Edmund Francis' truck T1073, which was insured with the defendant company, sustaining serious damage having rolled from the top of a hill at Kamacabu Mountain at Diamonds, and into a ravine through which a small river runs, during a heavy downpour, where it had earlier been parked by the claimant, on or about the 9th day of June 2001.

- [3] At the time of the accident, the said truck was still insured with the defendant company. The claimant had gone to the said mountains to collect a load for a trafficker with Kirk Jack of Lowmans Windward, who had accompanied him to the said mountains.
- [4] The defendant company, having been duly notified of the accident by the claimant who had also filed the necessary forms, caused the said truck to be removed from the accident scene by one Cliffy Gunsam who operated a tow truck business. The vehicle was a total write off.
- [5] The defendant has refused to pay the claimant the insured value of the truck as claimed, because in their view the claimant in contravention of the dictates of the insurance policy had kept the said truck in an un-road-worthy condition and also contended that it was no accident when the truck rolled down hill over the precipice into the ravine, but rather a deliberate act on the part of the claimant, and to support that contention the defendants referred the claimant to some missing nuts and bolts that were supposed to be holding some of the wheels together. The claimant contended that these missing nuts could have been removed from the truck as it lay on the river bed for about two days after the accident before it was towed to Cliffy Gunsam's garage. The claimant further contended that his truck was in good roadworthy condition at the time he parked it on the hill at Kamacabu mountains.
- [6] The issues to be determined are clear and revolve also on the facts and also on credibility.
- [7] The claimant called two witnesses including himself. In his witness statement, signed to and filed on the 31st January 2003, the claimant said he lived at Lauders, and described himself as a farmer and an occasional mechanic. He said on the 9th day of June 2001 he drove his 3 ton truck, registration number T1073 to the Kamacabu mountain at Diamond to collect a load for a trafficker. He was accompanied by Kirk Jack of Lowmans Windward.

- [8] He said when he got to the mountains between 9 a.m. and 10 a.m., the load he was supposed to collect from the roadside was not there. He said it was raining heavily that morning. He drove his vehicle to the top of the hill and parked it by turning it around and stopping the truck, facing downhill. He said owing to the rain there was a lot of loose gravel on the road. He further said this was the farthest he could have driven the truck, and if he had parked it on the brow of the hill he would have blocked a track leading further up into the mountain. He said he then secured the truck by pulling up the handbrakes of the vehicle, turning off the ignition, taking out the keys and ensuring that the vehicle was locked and secure. He also left the truck in reverse gear.
- [9] The claimant further stated that he did not place any large stones in front of the wheels to prevent it from skidding or rolling down the hill. He further said Kirk and himself then left in search of the farmers to collect their load. After traveling a distance from the truck while looking for the farmers, there was another heavy downpour and they decided to return to the truck. He said to their surprise when they returned to where they had left the truck, it was not there, but he could see signs on the road where the truck had dragged. He said himself and Kirk followed the drag marks down the hill. At the bottom of the hill, they saw the truck had gone over a bank with a 200 foot to 300 foot drop, and was lying in a river bed badly damaged. He said Kirk and himself immediately went to a shop where he telephoned his insurers and notified them of the mishap.
- [10] The claimant further stated that as at the 9th June 2001 his truck was comprehensively insured with the defendant company for the past three years; and that the initial insured value was \$37,000. But he went further to say that on 9th June 2001 the truck was still insured with the defendant company for \$24,000.
- [11] Edmund Francis further stated that on calling the defendant company to inform them of the mishap, he spoke to a Mrs. Williams who instructed him to get the closest wrecker to take out the vehicle. They agreed on Dennis "Cliffy" Gunsam, Mrs. Williams supplied him with Gunsam's telephone number and he called Gunsam. He then said he completed the necessary claim forms a couple of days later.

[12] The claimant further stated that as a mechanic he serviced his truck quite often; as often as every week and had last serviced his vehicle the Sunday before the mishap. Some days later he said, Mrs. Williams informed him that Gunsam had estimated the vehicle as a complete write off. He then contacted his lawyer Mr. Arthur Williams who wrote on his behalf to the defendant company requesting payment for the truck. But despite various correspondence between his lawyer and the defendant company, he has not been paid as yet, as the defendant had refused to honour his claim.

[13] Under cross-examination, heavy weather was made about the age of the truck and whether the claimant had at anytime read his insurance policy. The claimant stated in answer to these questions that he knew he owed the defendants a sacred duty to follow the terms of the policy as he knew what he had been insured for, and understood that he was to take care of the vehicle and to maintain it in good condition. Various photographs were shown to Mr. Francis and he identified these as photographs depicting the areas where he parked the truck, where he turned the truck and also photographs of the truck itself without being able to say where the photographs of the truck were taken. The claimant generally insisted that there was no flat area at the brow of the hill where he could have parked more safely. When shown photographs of the wheels of the truck with some nuts missing from the wheels he denied vehemently that he drove his vehicle with missing wheel nuts that day. He insisted that he did not know where those photographs of his truck were taken, and that someone might have tried to tamper with the truck. What he was sure of, and which I am in agreement with, is that no-one in his right senses would drive a 3 ton truck up a mountain, on a rainy day, to pick up a load of agricultural produce, with only one nut holding one of the two front wheels to the hub. For the defendant company to try to suggest this, to my mind was stretching the issue a bit too far.

[14] Besides, there is a strong probability that the nuts may have come off during or after the accident. Again what could the claimant have done to secure his vehicle in the river bed in that damaged state? Lock the nuts onto the tyres? Leave someone with the truck for two days and two nights in a river bed in a lonely area of the mountains? To my mind asking

the claimant to undertake these responsibilities in this particular situation is asking for too much.

- [15] The claimant's witness Kirk Jack also gave evidence via his witness statement signed on 28th January 2003 and filed on 31st January 2003. In it Mr. Jack states more or less exactly what the claimant Mr. Francis stated in his evidence. In his view where Francis parked his vehicle at the top of the hill, was the furthest point that the vehicle could have gone, and that this was the most convenient place he could have left the vehicle, as the road goes to the top of the hill and no further. He said the claimant secured the vehicle before they left it to look for the farmers. Otherwise his evidence was on all fours with that of the claimant, even to where he states that Francis and himself walked to a shop and called and notified the insurers of what had taken place.
- [16] Under cross-examination this witness had this to say, "He turned right on the brow of the hill. He turned right on top of the hill and reversed. That area was not flatter than where Mr. Francis left his vehicle. By the time he had finished turning, the vehicle was already inclined down hill. It would have been safer there." The fact that this witness did not look at the tyres of the truck is neither here nor there. I have already opined on that issue. I need say no more on that. All told the cross-examination of this witness did not elicit anything of importance to the defendant's case. That signified the case for the claimant.
- [17] The defendant called two witnesses. Mrs. Yvonne Williams who testified by way of her witness statement and oral evidence and who tendered various letters and documents in to evidence including the motor vehicle insurance policy from the defendant company pertaining to truck T 1073 and stated the year of manufacture of the said truck as 1994 on the policy, and not 1985. The essence of her evidence was that as Branch Administrative Manager of the defendant company she was of the view that the claimant was supposed to safeguard his vehicle at the accident scene, but that she did not know if he did so, and further the claimant was not paid his claim because they at the defendant company were not satisfied that there was evidence that there was an accident. She further stated that after reading the investigative report that they had commissioned there was some doubt as

to the proper condition of the vehicle at the time of the accident, and that the claimant had violated the conditions of his insurance policy. The report on the condition of the vehicle, prepared by Mr. Patrick Ferrari was admitted into evidence.

[18] This witness further stated that they visited the accident scene together with the claimant where they tried to ascertain from him the cause of the accident. Specifically they asked the claimant why he did not park at the top of the hill which had a flatter area, but she cannot remember the answer the claimant gave to that query.

[19] The defence also called Mr. Ferrari to give evidence. He tendered his report in evidence, together with photographs of the parts of the vehicle mentioned in the said report. He stated specifically that the threads and studs of the wheels of the truck were damaged. He said because of the damage to the threads and studs, the nuts would be of no use if the vehicle was driven, as the nuts would not be able to secure the wheel to the hub of the vehicle.

[20] Under cross-examination this witness stated that he examined the vehicle a few days before he wrote his report on 22nd June 2001. But he does not know on what date the vehicle got into the accident, nor where the vehicle got into the accident, nor did he enquire of the place of rest of the vehicle after the accident, nor how long it remained at the place of rest, until retrieved by Mr. Cliffy Gunsam. He stated that he did not know that the vehicle had spent several days in a river or stream, but that if the vehicle spent several days in a river that would enhance the oxidization process. Generally this witness' evidence under cross-examination was to the effect that the vehicle's coming to rest in the river was not the cause of the damage to the thread and studs. Of significance is when he stated that if there is one nut on the wheel, the wheel would wobble after a while, but that the wobbling would not necessarily damage the studs.

[21] On being re-examined the witness stated that there was no evidence of any oxidizing process on the wheels of the truck, but there was some rust, which could not have developed between the period of the accident and when he examined the vehicle. In his

view the threads were damaged due to incessant bad removal and putting on of the wheels, and that there were attempts to repair the studs with pipe thread. This signified the case for the defendant.

ANALYSIS

[22] On looking carefully at the defence and counterclaim filed by the defendant it is interesting to note that numerous items are listed as being defects on the said vehicle which invariably has led to the defendant concluding that the claimant did not keep his vehicle in a good and roadworthy condition, thereby violating the conditions of his insurance policy. These are:

- (a) faulty steering and/or knuckles
- (b) poorly adjusted steering box
- (c) bent steering box
- (d) missing right stop light
- (e) improperly secured left front wheel with four of the five nuts securing the same missing
- (f) four badly damaged studs on the said wheel
- (g) the studs had obviously been rusting long before the alleged accident
- (h) the threads of the studs of the wheel hub were worn so that the nuts had to be secured with plumber's tape and/or Teflon pipe tape
- (i) the right front wheel was held secured by two out of five nuts. A third nut was in place but was useless because both the nut and the stud were damaged.
- (j) Given the condition of the wheels to allow the truck to be driven with any load (weight) would cause one or both of the front wheels to break off thereby creating a risk to life and property carried on it
- (k) driving the truck with improperly secured front wheels thereby making the vehicle a danger on the public roads.

- (l) driving the same truck with smooth tyres thereby rendering its traction capability minimal or non-existent and causing difficulty to bring the said vehicle to a standstill in any case;
- (m) rusting hand brake cable
- (n) defective steering mechanism

[23] Having regard to the defendant's defence and counterclaim as juxtaposed with the report of witness Patrick Ferrari, the case against the claimant is compelling. Mr. Ferrari's report, including the photographs attached, tell a complete story. A story which I am inclined to believe except for the missing nuts on the wheels which I find were not the cause of the accident. I have already held that no-one in his right senses would drive a vehicle with these missing nuts as described, up a steep hill as described, to carry a load, and put his passenger to that kind of risk.

[24] I am more inclined to accept the view, that as a result of the other very serious defects on the vehicle T 1037, the claimant who obviously was aware of these defects, should have either parked his vehicle in the flat area of the hill, which I believe existed, or if he had parked his vehicle as he did, he should have gone to greater lengths to make sure that his vehicle was secure, and would not roll down the hill, especially in view of the very heavy rainy conditions that day of the accident, and the presence of gravel on the road. What prevented the claimant for instance from putting stones or blocks in front of his wheels as added security, so as to prevent the truck from rolling down hill; an action that a lot of prudent drivers take when parked on steep inclines even though their hand brakes are engaged and the gear in reverse position? I find the claimant was highly reckless in this regard.

[25] Having said thus, I am of the view, and do hold that the claimant flouted clearly, condition four (4) of the said policy, where the claimant as the insured agreed to take all reasonable steps to safeguard the motor vehicle T 1073 from loss or damage and to maintain same in efficient conditions, a breach of which resulted in the said vehicle becoming un-roadworthy.

- [26] In Patrick Ferrari's report he mentions how the threads of the hub studs were stripped, and states that this was not as a result of the accident, but that this condition must have existed in that state for sometime because the studs were rusty, and there was a residue of pipe tape on the base of the studs which indicates that an effort was made to secure the nuts to the stud by using Teflon pipe thread tape. He stated in his evidence that in this condition this truck could not be driven safely with a load. This, I would agree, amounts to recklessness on the part of the claimant. Frankly, I do not accept, in the face of this report from Ferrari that the claimant regularly serviced this vehicle as he claimed.
- [27] There clearly was indifference on the part of the claimant towards his obligations by virtue of the said policy. I agree with learned counsel for the defendant that he cannot willfully and recklessly drive a motor vehicle on the public roads in a dangerous condition without endangering the interest of the defendant. I agree that the insurers can accept the consequences of negligence caused by inadvertence, momentary lapse of even speeding, but it will not accept the consequences of a motor vehicle falling into a serious state of disrepair. A motor vehicle in motion on a public road is a dangerous weapon in itself and that is why there is compulsory insurance for third parties. But where the insured takes unnecessary risks and recklessly drives his vehicle in a serious state of repair he forfeits his right to be indemnified.
- [28] The cases cited by learned counsel for the defendant are on all fours with this case at hand – *New India Assurance Co. Ltd. V Yeo Beng Chow* (1972) 3 ALL E.R. 293 (Privy Council) – where the Privy Council stated that there is no such duty on insurance companies to explain the terms of insurance policies to persons insured when entering into contract with them, and that by entering into a contract of insurance the insured has an obligation to read and understand the policy, even ask questions and seek clarification on any part of it. Once he accepts the policy he becomes bound by its terms as effectively as if he had read and clearly understood everything contained in it. The insured therefore has a strong responsibility to ensure that he does everything possible to safeguard the insured

property, and that is why he will never be indemnified from loss and damage by willful or reckless conduct on his part.

[29] The case of Trickett vs Queensland Insurance Co. Ltd (1935) ALL E.R. 729 at 731 is also another case on point involving the issue of driving a vehicle in un-roadworthy condition. It is clear that those wheels of the claimant's truck had been in that condition for some time, and that by itself makes the claimant reckless for his own life and that of others. In that case a general exceptions clause in a private motor vehicle insurance policy provided that no liability shall attach to the company under this policy in respect of any personal accident to the insured occurring:

(1) While any motor vehicle in connection with which indemnity is granted under the policy is driven in a damaged or unsafe condition. Need I say more.

[30] It is clear from the above that the claimant's case must fail as against the defendant company. There really is nothing in this case going for the claimant as far as the evidence is concerned. As far as the missing nuts are concerned, even though there is no evidence of the truck being vandalized after the accident, there is a strong probability that this might have occurred having regard to the frequency with which such acts are committed in this State, and the fact that the claimant's vehicle remained on the river. This however does not vitiate the report of Patrick Ferrari as regards the other defects also of a serious nature.

ORDER

[31] I therefore order that the Claimant's claim against the defendant be dismissed. The claimant is to pay the defendant's costs in the sum of \$7,200.00.

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Frederick V. Bruce-Lyle
HIGH COURT JUDGE.

