EASTERN CARIBBEAN SUPREME COURT

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS

SKBHCV2012/0053

BETWEEN:

DENNIS BROWNE

Claimant

And

NAGICO INSURANCE COMPANY LIMITED

Defendant

Appearances:

Ms. Teshari John of Seaton and Foreman for the Claimant
Mr. Denzil Hinds, Ms. Angelina Gracie Sookoo and Mr. Sylvester Anthony of the Law office of Sylvester Anthony for the Defendant

…….....

2013: April 8; 17; May 1;

November 27;

…….....

JUDGMENT

[1] THOMAS, J [A.G]: In this action the claimant, Dennis Browne, claims against the defendant, NAGICO Insurance Company Limited the sum of $170,000.00 with respect to a comprehensively insured motor vehicle owned by the claimant.

[2] In the statement of claim the claimant contends that the defendant, as an insurance company registered in the State of St. Kitts and Nevis, and was the insurer of the claimant.

[3] The matter of the insurance premium is also pleaded which the claimant avers was $2,501.04 for the period January 12th, 2010 to April 12th, 2010. Under the said policy it was agreed that the claimant would be indemnified against, inter alia, loss or damage to the motor vehicle as well as its accessories and spare parts caused by accidental loss or overturning or collision or overturning consequent upon breakdown or consequent upon wear and tear.

[4] The claimant avers that on 27th March 2010 during the subsistence of the policy the insured vehicle was destroyed when it overturned due to brake failure at which time it was driven by an authorized driver.

[5] It is the pleading by the claimant that the defendant was informed of the accident and the resulting loss and damage, and in or about March 2010, was informed that the claim could not be honoured on the basis of the claimant's neglect.

[6] In its defence the defendant while admitting the existence of the policy disputes the claim on the basis that the proposal for motor insurance by the claimant was not true in every respect and contained false statements and or misrepresentations.

[7] The particulars of false statements include the following:

a. "The claimant stated that the make of the vehicle was a Ford Dump truck. The same was not true. The make of the vehicle is a Ford Tractor Truck which was modified to operate as a dump truck."

[8] It is the further contention of the defendant that the claimant did not disclose all material facts and did not give notice of any of the modification to the said vehicle. In the premises the defendant denies that it is liable under the contract.

[9] The claimant in his reply denies that the proposal contained false statements or misrepresentations. The claimant also says that the defendant's Loss Adjusters, Surveyors and Insurance Consultants inspected the insured vehicle and stated, among other things that in terms and conditions there are no modifications.

Evidence

Dennis Browne

[10] In his witness statement the claimant, Dennis Browne, outlines the circumstance under which he purchased a 1997 Ford Mode Dump Truck in about October 2008 which was financed by the foundation for National Development with a loan of $139,200.00 and insured with the defendant.

[11] The coverage initially was from the period 10th October 2008 to 1st January 2009 and continued every month after January 2009 with the payment of monthly premiums. The witness says further that in November 2009 he did not have the funds to continue the premium payments and payments ceased until 12th January 2010 when they were resumed at which time he was not asked to complete a new proposal form and the policy was renewed for the period 12th January 2010 to April 2010.

[12] The circumstances surrounding the accident involving the insured vehicle are outlined by the witness and the submission of the claim for compensation which was not satisfied by the defendant. According to the claimant, the refusal is not based on a determination by the defendant that the accident occurred due to brake failure.

[13] Finally, the claimant reveals his knowledge of the vehicle as a dump truck and also denies that he misled or misrepresented information to the defendant.

[14] I cross-examination the claimant gave further evidence of the valuation done on the subject vehicle and the steps he took before purchasing the said vehicle.

[15] The witness was also cross examined on the valuation carried before the purchase and for the purposes of the valuation. In the end the claimant conceded that the valuation of $140,000.00 which is the valuation given to the defendant was wrong but he was not aware of this.

[16] In further cross-examination the claimant revealed that when he made the claim to the defendant the response was that it was refused because of lack of maintenance.

Alston Williams

[17] In his witness statement Alston Williams says he is a heavy equipment owner and operator and the owner of A. W. Heavy Equipment. And with respect to Dennis Browne, he says that he know him from a very long time.

[18] Concerning the vehicle which he says he sold to Dennis Browne, it is Williams' evidence that it is a 1997 Ford CBO Model Dump Truck which he ordered on line; and he gave a host of technical details in this regard.

[19] In cross-examination Williams testified that the vehicle he sold to the claimant was not a tractor. It is also his evidence that he sold the vehicle to the claimant for $140,000.00

[20] In a direct discrepancy between his evidence in chief and his cross-examination, the witness said first that when the vehicle ordered it only had a 9 yard dump and he did certain modifications to get the 12 yard dump he needed. However, in cross-examination the witness said that when the vehicle arrowed it had a 12 yard dump. And in cross-examination on the point the witness insisted that both statements are correct.

[21] In re-examination on the same point the witness evidence is that the vehicle was a 9 yard because it came with the preparation for 12 yards.

Kazembe Harris

[22] Kazembe Harris in his witness statement gave his occupation as a heavy equipment operator/driver with a class C licence, being a truck driver licence. It is Harris' evidence that he was the driver of the 1997 Ford CBO model dump truck on 27th March 2010 at the time of the accident, at which time he was employed by the claimant.

[23] With respect to the accident the witness gave full details and he also said on descending a hill he selected his low gear and when he applied the brake it went straight into the floor of the truck with the truck crashing over the hill and was completely destroyed.

[24] The witness, Kazembe Harris, gave further evidence of the brake failure in a conversation with an officer of the defendant. According to him, he told the officer that: "there was no explanation from why the brakes did not work other than they suddenly failed and that the only thing I could do when I realized the brakes had failed was to abandon the truck".

[25] In cross – examination Harris gave the court some indication as to what he did under the hood of the vehicle as being to check the water in the radiator.

Eudid Osborne

[26] According to Eudid Osborne, he has been a motor mechanic for approximately 32 years and owns and operates an Automotive Evaluation Limited.

[27] It is Osborne's evidence that he examined the wrecked vehicle, as requested to form opinions as to why the brakes failed. According to him: "I was able to conclude from my examination as well as from the explanation of the accident that the air brakes had failed at some stage, most likely during that trip, which failed to ultimately stop the truck. Having been familiar with heavy duty trucks I am aware that brake failure in this type of vehicle is not an unusual occurrence."

[28] Eudid Osborne was cross-examined initially on the plate on a vehicle. In this regard the witness testified that such a plate cannot be removed and explained that the words “dump truck” would not be found on the plate. However, in relation to the claimant’s vehicle the witness said he could not recall what description appeared on the plate.

Mashanda Nisbett

[29] In her witness statement Mashanda Nisbett says that she is an underwriter supervisor employed by the defendant and that her duties included the approval of all policy documents and supervisor of the underwriting and customer service departments.

[30] In her witness statement the witness gives the history of the insurance of the subject vehicle with the defendant including the renewals on January 15th, 2009 for nine months and on January 12th, 2010 for 3 months at which time the insured value was increased from ,$140,000.00 to $170,000.00 under a comprehensive policy.

[31] At paragraph 17 of her witness statement Ms. Nisbett states the policy of the company on receipt of a proposal for motor vehicle in order to determine whether to insure the risk and if so at what premium. And at paragraph 18 the witness says as follows:

> 18 “If Dennis Browne had informed NAGICO that the make of PA1219 was a Ford Truck Tractor and it was converted to a Dump Truck, NAGICO would have requested that the vehicle be presented for inspection by NAGICO prior to acceptance of the risk.
>
> 19 Additionally, if Dennis Browne had stated on the proposal or on the change form that PA1219 had an engine capacity of about 1800cc as oppose[d] to 2400cc the premium charged by NAGICO would have been higher because a higher engine capacity creates a higher risk”.

[32] In cross-examination Ms. Nisbett testified that on the proposal form there is no question relating to modification, and she could not say if the question was asked.

[33] It was then put to the witness that the fact that a question as to modification does not appear and there is no modification it is not a material or important aspect of the proposal for the motor insurance. The witness disagreed and added that the proposal does not contain all the questions but NAGICO would expect the customer to provide all the relevant information.

[34] As regard the actual policy Ms. Nisbett said that a customer would get the document with the terms but added that she could not say that the policy should contain all the terms and conditions. There was no re-examination of this witness.

Jason Hodge

[35] Jason Hodge gave evidence that he is a Senior Claims Clerk with NAGICO and identified his duties.

[36] This witness also gave the history of the motor vehicle insurance policy No. SKV5653/08 with NAGICO for PA1219 with VIN No. 1PYY92P6VVA42838 manufactured in 1997 by Ford as a dump truck with an engine capacity 2400cc.

[37] Jason Hodge in giving evidence as to the manner in which he dealt with the claimant's claim details the various report he requested and received. These were requested from Tim Price of Time Price and Associates and Tim Price and Craig David of AKUCHI Trucking Limited.

[38] In cross-examination Hodge testified both reports came to the conclusion that the accident was due to brake failure. He went on to say that the claimant's claim was denied, based on his assessment of both reports.

Wilmot Alleyne

[39] Wilmot Alleyne says that he began working in the Claim Department of NAGICO Insurance Company in May 2011 and is now the Claims Supervisor with the said company.

[40] This witness also details what he did in relation to the claimant's claim; this includes the obtaining of a statement from the previous owner of the subject vehicle in which he stated that he had modified a tractor into a truck. The witness also said that the proposal for the motor vehicle was examined by him and noted that it stated that vehicle was a Ford Dump Truck and not a Ford Tractor which was converted into a dump truck.

[41] Evidence was also given of a pre-accident valuation and post accident valuation of $100,000.00 and $4,000.00, respectively and a replacement cost of $95,000.00 given in a report by Tim Price.

[42] In cross-examination the witness, alleyne said that the reports from Craig Davis and Tim Price concluded that the accident was due to brake failure; and that based on his assessment of both reports he determined that NAGICO would not honour the claim.

[43] The issues for determination are:

(1) Were the statements of the claimants complained of by the defendant as being in breach of a duty to disclose material facts or misrepresentations made, in relation to the contract of insurance between them are such as would entitle the defendant to avoid the contract on the ground of on-disclosure of material facts or misrepresentation.

(2) What measure of damage, if any, is available to the claimant?

(3) Which party is entitled to costs in the circumstances?

ISSUE NO. 1

Were the statements of the claimants complained of by the defendant as being in breach of a duty to disclose material facts or misrepresentations made, in relation to the contract of insurance between them are such as would entitle the defendant to avoid the contract on the ground of on-disclosure of material facts or misrepresentation

[44] The journey in relation to this issue must necessarily begin with a detailed consideration of the non-disclosure and misrepresentation by the claimant; as alleged by the defendant.

[45] As noted above, the claimant's case is that the claimant's vehicle was insured under a policy of insurance with the defendant which vehicle was destroyed attributed to brake failure while transporting a heavy load and that the defendant has failed to indemnify the claimant in accordance with the term of the said policy.

[46] On the other hand, the defendant while admitting to the existence of the policy of insurance with the claimant contends that the refusal to indemnify rests on non-disclosure of material facts and or misrepresentation by the claimant which render the policy voidable at the instance of the defendant.

[47] The journey for the truth and justice must necessarily begin with identification by both sides of the statements by the claimant that go to the root of the issue. These are the description of the subject vehicle as being "dump truck" and the failure to disclose to the defendant that the said vehicle had been modified. But it must be made clear that as far as the claimant is concerned, there is no breach of the claimant's duty to disclose material facts nor has it been established that the words of which the defendant complains were material to the contract.

[48] The words complained of must now be analysed in their proper context. At paragraph 2 of the proposal for motor vehicle insurance the following is shown:

> "Particulars of the vehicle to be insured: chasis #IP449286VV442838
> Color: White/black

Registered No.	PA1219
Make of Vehicle:	Ford Dump Truck
Engine Capacity:	2400 cc
Type of Body:	Dump Truck
Year of Manufacture:	1997
Seating capacity including driver:	2
Price and date of purchase	$140,000.00
Proposers estimate of present including accessories and spare parts	$140,000.00

Submissions

[49] The submissions in this regard on behalf the claimant begin with references to the claimant's evidence as well as that of Eudid Osborne, Craig Davis, Tim Price and Jason Hodge to make the point that "they all have described the vehicle as a dump truck". The submissions continue, in part, as follows:

> "40 It is not until the filing of the defence herein on 12th March 2012 that the issue was raised concerning whether the vehicle was a dump truck, whether there had been a misstatement or whether material facts had not been disclosed
>
> 41 The claimant, on cross-examination stated that he did indeed see the plate on the vehicle before he insured it but went on to say that he did not know that the inscription 'truck tractor'.
>
> 42 No evidence was led by the defendant as to what Ford classification 'truck-tractor' referred. The claimant stated that he had known the truck, having seen it around and he knew it to be a dump truck and that his primary concern when purchasing the truck was to ensure that it was a properly functioning truck. He was indeed assured of this when he had it examined by Eudid Osborne in 2008 who reported that, in all respects, the condition of the said truck was 'good'. See pg 47 trial bundle volume 2."
>
> 43 The defendant has concluded that because the plate stated 'truck tractor' the claimant misrepresented to it what the truck was. We say that what the claimant represented to the defendant was a matter of fact. The fact that it was a truck, a dump truck."

[50] After a reference to certain dicta of Bollers CJ in the case of Pillay & Anne v Guyana & Trinidad Mutual Life Insurance Co. Ltd [1] to the effect that the insured is only required to disclose what he believes to be material to the question of insurance went to distinguish the said case by arguing that: "the defendant has pleaded breach of duty to disclose all material facts in that the claimant did not give notice to the defendant of any modification. We say that there was no failure to disclose any material fact."

[51] The submissions ended in this way:

> "47 We say also that if it can be argued by the defendant successfully that the claimant failed to disclose anything at all, that can only be that he failed to disclose that he saw the plate inside the vehicle with the inscription "truck tractor". However, the entitlement of the Insurer described by the cases above which were referred to in *Pillay* require that such disclosure be material to the risk and that they influence the rate on premiums recquired.
>
> 48 The burden of establishing materiality and the influence of the material fact on the insurer rests solely on the insurer, in this case NAGICO. This burden had not been discharged. Therefore, we submit that the entitlement of the insurer to vitiate the policy referred to in the above cases does not apply to the instant defendant."

[52] In the of the defendant the submissions begin with a re-statement of the law relating to the duty to make disclosure and says that it is based of good faith and it is a constituent in the function of the contract and at every renewal or variation of the contract. The authorities relied on for the proposition are Vol. 25 Harlsbury's Law of England[2] and at paragraph 45 Macgillivray on Insurance Law.

[53] The submissions continue and the matter of disclosure expressly required by the proposal. And based on the learning MacGillivray[3] makes the submissions that "breach of the duty by the assured entitles the insured to avoid the contract so long

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[1] (1972) 118 WIR 220

[2] (12th ed.) at para 473. (p bb19)

[3] Opit, at pages 17-009 and 17-010

as he can show that the non-disclosure induced the making of the contract on the relevant terms."

[54] A further submission is phrased in this way :

> "At para 17-010 the authors[4] opined that the obligation to disclose is based on knowledge possessed by the assured, which is a question of fact. The learned authors continued at para 17-20 that as a general rule the fact that particular questions relating to the risk are put to the proposer does not per se relieve him of his independent obligations to disclose all material facts. We therefore submit that the claimant's assertion that since there is no column in the proposal to describe modifications does not abdicate without more, the duty of the claimant to disclose this material fact, especially since the said modification touched and concerned the make of the vehicle."

[55] With respect to the materiality of the make and modification to the subject vehicle, the submissions are that the onus is on the defendant to prove that the vehicle was a truck tractor which was modified to dump truck was material and further that this onus was discharged by the uncontested evidence of the defendant's underwriting supervisor. Added to this is the claimant's own evidence as to his knowledge of the vehicle.

[56] Also placed in the equation is the matter of the involvement of Dish Limited with the claimant regarding the completion of the proposal eventually submitted to the defendant. In this regard the submission is that the claimant and Dish Limited are governed by the law governing agency.

Reasoning and Conclusion

[57] This issue turns on the narrow but critical question of the insured's duty to disclose to the insurer. And it must be common ground that an insurance contract is one of a small number of contracts based on the principle of *good faith- uberrimae fidei* [5]

[4] Being a reference to: MacGillivray on Insurance Law
[5] See E.R. Hardy Ivamy, General Principles of Insurance Law (3rd ed), pp -105-107

[58] In MacGillivary on Insurance Law the law [6] is stated as follows:

> "[T]he assured must disclose to the insurer all facts material to the insurer's appraisal of the risk which are known or deemed to be known by the insurer. Breach on this duty by the assured entitles the insurer to avoid the contract- of insurance so as long as he can show that the name disclosure induced the making of the contract on the relevant terms.

[59] The learning on the law extends into an even narrower focus. This is what is stated:

> "The duty to disclose extends only to facts which are known (or deemed in law to be known) to one party and not to the other. 'The duty is a duty to disclose,' said Hetcher Moulton L.J in Joel v Law Union and Crown Insurance, 'and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends upon the knowledge you possess."

[60] Regardless of the source, the foregoing represent the full statement of the law on the matter of the duty to disclose without a doubt, this duty is a serious obligation on the part of the assured. And in Pillay and Anor v. Guyana and Trinidad Mutual Life Insurance Company[7] Bollers CJ made the pertinent observation that:

> "Insurers are thus in the highly favourable position that they are entitled not only to bona fides on the part of the applicant, but also to full disclosure of all knowledge possessed by the applicant that is material to the risk."

[61] Sixty years prior Kennedy, L.J in London General Omnibus Company Ltd v Holloway[8] came to a similar but more comprehensive conclusion:

> "No class of case occurs to my mind in which our law records make non-disclosure as invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in defence to that plain exigencies of this particular and most important class of transaction".

[62] A return must now be made to the basic pleadings pertained to the issue. And they are, on the part of the claimant, that the defendant did not meet its obligation under

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[6] See MacGillivary on Insurance Law (12th ed.), para 17-002. At para 17-009

[7] [1972] 18 WIR. SEE also: Joel v Law Union and Crown Insurance Co. [1908] 2K3683 PER Fletcher Moulton, L.J

[8] [1912] K.B 72,85

the policy of insurance with the defendant. And the other hand, the defendant averred that the claimant did not disclose material facts and the claimant did not give notice to the defendant of any modification to the insured vehicle.

But what did the claimant know of the insured vehicle?

[63] The submissions on behalf of the claimant do not deviate much from the claimant's evidence in his witness statement at paragraph 16 where he says this:

> "This truck has always been operated as a Dump Truck since it has been in the federation of St Kitts and Nevis. I always knew the truck to be a Dump truck and when I asked Ashton to purchase it I was of the knowledge and understanding that I was purchasing a Dump Truck. I was never aware of any modification of the truck from something else into a Dump Truck. It is only after the defendant raised this issue that I became aware of how Ashton ordered the truck from the company overseas."

[64] Under cross-examination the relevant portions of the claimant's evidence are as follows:

> "I knew what type of truck it was. I know how long he had it for. I did not ask for proof of ownership. I knew he owned it and we went to the Traffic Department to change the ownership. I bought a Dump Truck. It was the same vehicle I bought from Mr Williams. It had a description of truck tractor. I saw it before I went to see the insurance. I see Ford Dump truck. I bought a dump truck. I bought a dump truck from Ashton. He told me he was selling a dump truck before October 2008.
> I agree that the particulars are on the plate. I did not know it was a truck tractor. I did not ask Mr Williams anything when I saw the difference. I went to Mr Williams after the accident. I went because I wanted to know what you were talking about. I did not know that a dump truck and a truck tractor are different.
> I said it was always operated as a dump truck. I admit that I know that I know it was a dump truck as it same to St Kitts. I know it as a dump truck. Before I bought the truck I was driving bus. I did not ask Mr Williams any other question. I had to get Mr Osborne to check it out. "

[65] In submissions on behalf of the claimant it is argued that the claimant made it clear as to when he found out anything about the composition of the truck until after the issue of modification and misrepresentation had been raised in the Defendant's defence. According to the submission: "He went on to state that he had always

known the truck to be a dump truck and when he saw the plate that included the inscription 'Truck Tractor', having bought a Dump Truck, he thought that the truck he bought came with the inscription 'Truck Tractor'. Further, according to the submission: [T]his was not/an unreasonable position to have answer at given that up to the filing of the Defence everyone, including the persons who had examined the vehicle on behalf of the Defendant, all described the said Truck as a Dump Truck."

[66] In furtherance of their contention the claimant faced to disclose certain matters in the proposal. The submission, in essence, is as follows:

> "At paragraph 17-010 the authors opened that the obligation to discuss is based on knowledge possessed by the assured, which is a question of fact. The learned authors continued at paragraph 17-026 that as a general rule the fact that particular questions relating to the risk are put to the proposer does not per se relieve him of his independent obligation to disclose all material facts. We therefore submit that the claimant's assertion that since there is no column in the proposal to describe modifications does not-abdicate without more, the duty of the claimant to disclose this material fact, especially since the said modifications touched and concerned the 'make of the vehicle.'

The Law of non-disclosure

[67] E.R Hardy Ivamy in his book General Principles of Insurance Law addresses this issue and divides it into actual knowledge and presumed knowledge.

[68] As far as actual knowledge is concerned the learned author says this:

> "It is the duty of the proposed assured to disclose to the insurers all material facts within his actual knowledge. The special facts distinguishing the proposed insurance are, as a general rule, unknown to the insurers who are not in a position to ascertain them. They lie, for the most part within the knowledge of the propose assured."

[69] The learned author illustrates his thesis by referring to a dictum of Kennedy L.J. in London General Ammbus Co Ltd v. Holloway [9] which is as follows:

> "No class of case occurs to my mind in which one law regards non-disclosure as invalidating the contract- except in the case of insurance. That is an exception which that law has wisely made in defence to the plain exigencies of this particular and most important class of transactions. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and, generally, is, as to save of them, the only person who has the knowledge; the underwriter which he asks to take the risk, cannot, as a rule, know and but rarely has either the time or the opportunity to learn by enquiry, circumstances which are, or may be, most material to the formation of his fragment as to his acceptance or rejection of the risk, and as to the premium which he ought to require."

[70] The learned author further elaborates as follows:

> "Good faith therefore requires that he should not; by his silence mislead the insurers into believing that the risk, as proposed, differs to their detriment from the risk which they will actually run. On the contrary, he should help them by every means in his power to estimate the risk at its proper value.
>
> A failure on the part of the assured to disclose a material fact is sometimes called "concealment". Strictly speaking, however, the word implies the keeping back or suppression of something which it is the duty of the assured to bring specifically to the notice of the insurers, and not merely an inadvertent omission to disclose it. Hence, where the failure to disclose is not due to design and the assured has no intention to deal otherwise than frankly and fairly with the insurers, the term "non-disclosure" may perhaps be more appropriate.
>
> Every contract of insurance proceeds on the basis that the duty of disclosure has been discharged by the proposed assured and the failure to discharge it renders the contract voidable at the instance of the insurer."

[71] In so far as presumed knowledge is concerned this is the learned author's statement of the law[10]:

> "The duty of making disclosure is not confined to such facts as are within the actual knowledge of the assured. It extends to all material facts which he ought in the ordinary course of business to have known, and he cannot escape the consequences of not disclosing them on the ground that he did not know them.

[9] [1912] 2 KB 72, 85
[10] Op cit, pp109-110

> There is, however, no duty to disclose facts which the assured did not know, and which he could not be reasonably expected to know at any material time.
>
> Where the facts have been by the assured if he had made reasonable enquiries, he is guilty of breach of duty towards the insurers. This is clearly the case where, although the fact in question was never within his actual knowledge, his ignorance was due to his intentional failure to make such enquiries as he might reasonably have been expected to make in the circumstances; and the policy is therefore voidable at the instance of the insurers since his failure to make them is evidence of fraud and lack of *uberrima fides.*
>
> Where the assured's failure to make enquiries is unintentional, the policy is equal liable to be avoided on the ground that it is inconsistent with his duty towards the insurers to have neglected to make them. Whether he has failed in his duty will in each case depend on the circumstances.
>
> Thus, in Australia and New Zealand Bank, Ltd. V. Colonial and Eagle Wharves, Ltd., (*Boag, Third Party*), which concerned an "all risks" insurance policy in respect of some goods stored at a warehouse, it was alleged that the assured company ought to have known the materials facts because it would have known them if it had made such inquiries as to its system of supervision as a reasonable prudent board of directors of such a company would have made in the ordinary course of business. McNair, J., said that he had been referred to no authority to suggest that the board of a company proposing to insure owed any duty to carry out a detailed investigation as to the manner in which the company's operations were performed, and he knew of no principle in law which led to that result."

Reasoning

[72] The law shows clearly that the claimant cannot say he did not know of the modifications and feel assured as the law goes further to speak of presumed knowledge on the part of the insured.

[73] It is made clear that the question on failure to make reasonable inquiries is a constituent of presumed knowledge. And in the case of the claimant the relevant aspects of the evidence accepted by the court in this regard are as follows:

(a) The claimant knew the vehicle from the time it came to St Kitts.

(b) The claimant did not ask any questions of the vendor of the vehicle, Ashton Williams who told him it was a dump truck.

(c) The vehicle arrived in St Kitts prepared to take a 9 cubic yard dump and new springs had to be added as a consequence to accommodate a 12 cubic yard dump.

(d) The claimant testified that he did not see dump truck on the plate but he did see the said palate which said 'Truck Tractor'.

(e) The claimant testified that he opened the hood of the vehicle on numerous occasions in order to do maintenance checks.

(f) The vehicle was in the possession of the claimant for approximately 17 months, of which 14 months escaped before the renewal of the policy in January 2010.

(g) The vehicle year of maintenance is stated as 1997 on the proposal and as such or at the time of purchase by the claimant in 2008 it was over 10 years.

(h) Eudid Williams, the seller of the vehicle testified that although the claimant was not his good friend they were on friendly terms.

(i) The claimant in his evidence said he drove a passenger bus prior to the purchase of the truck, but on the proposal he stated that he was "Driver/Heavy Duty Operator."

[74] To argue, as the claimant does, that the defendant is seeking to make modification a term of the contract is not quite the point. It is simply a matter of disclosure of material facts as derived from actual or presumed knowledge.

[75] It has been shown that an assured has no duty to disclose facts which the assured did not know and which he could not be reasonably to know at the material time. This was illustrated by Hetcher Moulton, LJ in Joel v. Law Union and Crown Insurance[11] in this way:

> "But the question always is: Was the knowledge you possess such that you ought to have disclosed it? Let me take an example I will suppose that a man, as is the case with most of us occasionally had a headache. It may be that a particular one of these headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache indistinguishable from the rest. No no reasonable man would deem it material to tell an insurance company of all the casual headaches he had

[11] [1908] 2KB863

> in his life, and, if he knew no more as to this particular headache that that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable world deem material, or of the insurer in their action. It was what he did not know which have seen of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know. "

[76] In computing the elements of presumed knowledge, Ivamy [12] points to materials known from the ordinary course of business, reasonable enquiries, whether intentional or unintentional.

[77] In circumstances of the claimant, it cannot be regarded as unreasonable for him to make enquiries given all the facts outlined above, especially after the plate showing "Truck Tractor" was noticed. Further, the commercial vehicle field is not new to the claimant as his evidence is that he was driving a passenger bus prior to his venture into the trucking business.

[78] It is therefore the conclusion of the court that there was non-disclosure by the claimant in view of the fact that he admitted that he saw the ID plate attached to engine of the subject vehicle plus other facts and based on his personal knowledge of the circumstances bearing on the issue and failed to make reasonable enquiries as to exact make and body type of the vehicle. This would lay to waste the submissions on behalf of claimant that the defendant is seeking to make modification a term of the contract. Rather, the foregoing serves to illustrate the permeating or intrusive nature of the doctrine of non-disclosure.

Misrepresentation

[79] It will be recalled that the defendant in its defence pleaded that the proposal for Motor Vehicle Insurance submitted by the claimant was not-true in every respect and contained false statements and/in misrepresentations. And in the particulars the following is pleaded: "The claimant stated that the make of the vehicle was a

[12] Op. cit, at pages 110-111.

true Dump Truck. The same was not true. The make of the vehicle is a Ford Tractor Truck which was modified to operate as a dump truck."

[80] The claimant in his Reply denied that the proposal contained false statements and/or misrepresentations.

[81] It is recorded [13] in the context of misrepresentations that:

> "Statements of facts made during the negotiations are usually called 'representations'. They have fulfilled their object when the find acceptance is achieved and formed no part of the subsequent contact of insurance. They must, therefore, be distinguished from statements which are contractual in nature, and which are made parts of the contract between the parties."

[82] It is generally accepted that a misrepresentation must be: "A statement of fact, it must be untrue, it must be material to the risk and made to the insurer, it must be in relation to a present fact and must have induced the innocent party" [14]. The conditions are conjunctive.

[83] As noted before, the defendant's contention as to misrepresentation relates to the proposal provided by the claimant in relation to "Make of vehicle" and "Type of body." The information provided by the Claimant is "Ford Dump Truck" and Dump Truck respectively.

[84] In his submissions on the question the claimant contends that:

> "The Defendant seeks to rely heavily on the plate inside the Truck. There was no evidence led by the Defendant that the inscription 'Truck Tractor' was [in] substance anything other than a Dump Truck. The claimants, the previous owned Ashton Williams and the mechanic were all asked whether they had seen the plate. They all agreed that they had. The mechanic of 32 years experience, Eudid Osborne, stated that that he had not normally seen a specific description that stated 'Dump Truck' on such a plate. We submit that the Claimant did not mistake what the Claimant the Claimant did not mistake what the vehicle was. He bought a Dump Truck, he operated a Dump Truck and he knew it only to be a Dump truck. The truck was in form and substance a Dump Truck. It is unlikely that the Defendant would have worked the Truck described some other way to yell

[13] Ivamy, op cit, at page 141
[14] Macillivary & Parkinson, op cit, at page 87

'foul' again when called upon to honour the claim and argue 'hey that looks like a Dump Truck to me."

[85] In further submissions, on behalf of the claimant, and, specifically in relation to the proposal for Motor Vehicle Insurance, the following is stated:

> "In close examination of the information there is particular information requested by this form. We refer specifically to two pieces of information: Make of vehicle and Type of Body of the Vehicle.
> Jason Hodge agreed under cross-examination that the Make of the Vehicle refers to the company who makes the vehicle. William-Alleyne, too, a agreed that the make of the vehicle refers to the company who 'manufacture' it. Euclid Osborne, the mechanic also on cross-examination stated the same. Jason Hodge was able to assist- in describing what was meant by the Body Type by agreeing on cross-examination that the Body Type referred to the shape and style of the vehicle.
> The relevant answers by the Claimant, we say, could in no way considered misrepresentations in light of these statements. When the claimant was asked to provide the Make of the Vehicle the answer recorded was "Ford". When the Claimant was asked to provide the Type of Body the answer recorded was "Dump Truck."

[86] In the circumstances the defendant submits as follows:

> [T]he actions and conduct of the claimant, which he admitted on cross-examination, of intentionally misrepresenting the vehicle of the value in order to manipulate the premium to be charged by the defendant for the risk to be covered under the policy of insurance should weigh heavily on the court's mind in assessing the overall credibility of the claimant; as well as in determining whether or not the claimant withheld other material information and in particular the 'make of the vehicle from the defendant in order to obtain insurance coverage from the defendant. It is the respectful submission of the defendant that the claimant demonstrated a propensity to not disclose and/or make false statements with the clear intention and effect of inducing the defendant to provide a policy on terms favourable to the claimant."

[87] The submissions in this context continue thus[15]:

> "At paragraph 16 of his witness statement, the Claimant protested that he only became aware that the insured vehicle was a truck tractor and not a dump truck as he described it on the insurance proposal he submitted, when he saw it mentioned in the Defence filed by the Defendant. However, under cross-examination the Claimant admitted that that during the time when he owned the vehicle he was personally responsible for the

[15] At paragraphs 16-18 of Closing Submissions

maintenance of the vehicle. That in order to maintain the vehicle he had reason, on numerous occasions to look and work under the hood of the vehicle where the engine was. He also admitted that he was also present during every inspection of the vehicle, including the inspection carried out in 2008 before he purchased the vehicle, for the purpose of licensing of the vehicle. He also admitted under cross examination that he had no need when he purchased the vehicle from its previous owner, and one of his witnesses in the case, Ashton Williams, since he knew the Claimant, had been familiar with the vehicle knew from the time it arrived in St Kitts. Having made these admissions, the Claimant then had to admit that further cross-examination that the description of the vehicle as a truck tractor was in fact contained on the plate identification inside the vehicle and that he had in fact seen the vehicle plate with that description on a number of occasions, including the prior date in October 2008 when he submitted the proposal for insurance as well as on the occasions when he renewed the insurance contract in 2009 then again, in 2010."

[88] In a word, the submissions on behalf of the claimant overlook the import of the ID plate on the insured vehicle which the court accepts as a fact. The court had already accepted the claimant evidence that he saw said plate on several occasions and the fact remains, is that however the claimant describes the vehicle cannot alter what the manufacturer said it is endorsed on the ID plate.

[89] Based on the conjunctive conditions outlined by the MacGillivray & Parkington [16] that statement as to 'Make of Vehicle' and 'Type of Body' constitute a misrepresentation because the statements:

(a) were answers relating to facts;
(b) were untrue given, inter alia, what is inscribed on the ID plate which is affixed to the engine of the vehicle;
(c) were made to the defendant insurer on the proposal and were material to the risk;
(d) relation to the present and to the future;
(e) induced the defendant to enter into the contract with respect to the claimant vehicle, given the fact that the proposal tendered by the claimant was accepted.

[16] Log cit at para 581

Materiality

[90] The burden of proof with respect to materiality falls on the insurer. The ambit of such onus has been explained thus[17]:

> " ….. The onus of proving that the assured has failed to perform the duty to disclose or has made a misrepresentation or has broken or condition relating to disclosure lies upon the insurers."

[91] Bernard, CJ in the Somati Ali case goes further by saying that:

> "The burden of proving that a fact is material rests on the insurer who must satisfy the court on a balance of probabilities. In doing so reference is usually made to 'the prudent or reasonable underwriter.' The count may rely on its own sense of the attitude of a prudent, insurer which may be proved by the insurer calling expert evidence in addition to the insurers our testimony that the fact is material. Of these courses it is always the to rely on expert evidence as the court hearing the action may not be adequately seized of all aspects of insurance can and an insurer is never the best person to determine a matter involving his own interests. His evidence will not prove materially from the point of the view of the prudent insurer, only that he considered the particular fact to be material. Therefore, proof of materiality rests on expert evidence.

Submissions

[92] On behalf of the claimant it is said that the burden of materiality was not discharged. The submissions continue thus:

> "Additionally, we submit that in addition to the expert evidence necessary in the proceedings where material non-disclosure is alleged. That while not conclusive, another guide at to what could be considered material can be suggested by what is included in the proposal for Motor Insurance and the policy's Term and Condition."

[93] In the case of the defendant the main submissions are as follows:

> "The onus is in the Defendant to prove that the fact that the vehicle was a truck tractor modified to a dump truck was material. We submit that the uncontested evidence of the Underwriting Supervisor of the defendant; Mrs Nisbett is that if the claimant had disclosed that the insured vehicle

[17] See Ivamy, op cit, pages 160 seq. See also Somali Ali v Hand-in-Hand Mutual Fine on Life Insurance Co. Ltd [2001] 65 WIR 186, see Bernard CJ Contained Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd (1984), Lloyd's Rep 476 as quoted by Bernard CJ, supra.

was a truck tractor modified into a dump truck that this information would have affected the policy and that before the entering into the contract they would have had the vehicle inspected. Her further evidence is that if the true engine capacity of the vehicle was given the premium would have been higher."

[94] Chief Justice Bernard in the Somati Ali case made reference to the prudent or reasonable underwriter in the context of materiality. But the learning and the law both go further as testified by Ivamy[18]. According to the learned another:

> "Various tests have been adopted by the Courts in order to ascertain what facts are to be regarded as material.
> The test which is usually adopted is whether the non-disclosure of the facts would influence a "prudent" insurer, (though in some cases the term "reasonable" had been submitted for "prudent"). Another test is whether a "reasonable" assured would consider them material.
> In no case is it relevant to consider whether the non-disclosure would influence the particular insurer concerned or whether the assured himself thought that the facts were material."

[95] Continuing on the prudent or reasonable test the learned author notes that:

> "This test was adopted in a motor insurance case by the Supreme Court of Victoria, Court of Appeal, in *Babatsikos* v. *Car Owners' Mutual Insurance Co.*
> The meaning of the term "prudent insurer" was considered by Atkin, J., (as he was then) in *Associated Oil Carriers, Ltd* v. *Union Insurance Society of Canton, Ltd.,* where the question was whether it was material on July 31, 1914 to disclose that the characters of a vessel were of German nationality. His Lordship pointed out that this fact had been held material in *British and Foreign Marine Insurance Co., Ltd.* V. *Samuel Sanday & Co.,* which has been decided by the House of Lords in 1916, and then went on to say:
> "[Counsel] said that a prudent insurer within the meaning of the section must be taken to know the law as laid down in *Sanday's* case. Knowing so much, he would clearly have been influenced. I think that this standard of prudence indicates an insurer much too bright and good for human nature's daily food. There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurers carrying on business in that market at that time. The evidence satisfies me that if the standard of prudence is the ideal one contended for by [Counsel], there were in July, 1914, no prudent insurers in London, or if there were, they were not to be found in the usual places where one would seek for them.

[18] Op cit, at page 112 et seq.

> In some cases, however, the test adopted has been that of a "reasonable" insurer. But it is submitted that the words "reasonable" and "prudent" are interchangeable."

[96] The unique feature of this case is that the issue of modification, as noted above, fits into the mould of non-disclosure and misrepresentation. And the learning is that the prudent or reasonable insurer being the test to be applied to materiality is objective in nature. In other words, would a prudent or reasonable insurer insured the subject vehicle in light of the fact of modification. The position is, in a terse manner expressed by Ivamy as follows:

> "In no case is it relevant to consider whether the non-disclosure would influence the particular insurer concerned on whether the assurer himself thought the facts were material."

[97] In this context modification is an unknown quality in the sense that the vehicle came equipped or modified to carry a 9 cubic yard dump but this was changed to a 12 cubic yard dump. There is also evidence that the springs had to be changed which by necessary implication is related to the heavier load to be carried. Beyond the foregoing would lead into the realm of speculation in this context is an unknown quality. This in turn gives additional light to the issues of non-disclosure and misrepresentation.

[98] It has been said [19] that the following facts will usually be held to be material:

1. "All facts suggesting that the subject-matter of insurance is exposed to more than ordinary danger from the peril insured against.
2. All facts suggesting that the proposed assured is actuated by some special motive.
3. All facts showing that the liability of the insurers might be greater that would normally be expected.
4. All facts relating to the "moral hazard".
5. All facts which to the knowledge of the proposed assured are regarded by the insurers as material."

[99] In this context it is the determination by the court is that exposure to more than ordinary danger and greater liability to the insurer are relevant.

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[19] Ivamy, op. cit, at page 117

[100] In so far as exposure to more than ordinary danger is concerned, the learning[20] is that: "The facts are material which suggests that the subject-matter of insurance by reason of its nature, condition, user, surrounding on other circumstance is exposed to more than ordinary danger from the peril against."

[101] Given the foregoing the court is compelled to return to the notion of modification in order to weigh the facts for the purpose of making determination as to materiality.

[102] The undisclosed modification terms out to mean that the vehicle was being used other than as a truck tractor for which it was designed and built by Ford. The modification involved, by implication, rather than pulling a certain weight, carry a certain weight in a 12 cubic yard dump instead of in 9 cubic yard dump as originally modified. This was accommodated by larger springs placed on the vehicle.

[103] Before stating the conclusion of the court, the question of expert evidence in this context must be addressed given the emphasis placed on it by in submissions on behalf of the claimant. But the short point is that while there was no expert evidence in the case, this is not fatal. This is stated in one of the authorities cited on behalf of the claimant. The statement of the law in Macgillivray at para. 002 is in part as follows:

> "The question whether a fact misrepresented is or is not material is one of fact to be determined, if necessary, with the assistance of expert evidence. Materiality can, however, be determined without evidence being called and the ultimate decision depends upon on critical assessment of the evidence by the trier of the fact. If the same or similar questions of fact are asked by practically every insurer, that is strong evidence of that fact's materiality."

[104] The court must also comment on the reliance placed on the reports of Tim Price and Craig Davis who both inspected the wrecked vehicle and came to the conclusion that it as a dump truck. Herein lies the basis for discrediting their findings since they know the subject area generally and since the evidence is that

[20] Ivamy, op. cit at pages 119-118

ID plate cannot be removed, that should have been the starting point of their inspection, if any, and the report being subject to what is indicated on the said plate as seen by them.

[105] In all the circumstances it is the determination of the court that non-disclosure and misrepresentation turning on the modification of the insured vehicle are material to a prudent or reasonable insurer and which in turn would entitle the insurer to avoid the contract. Accordingly, it is the further determination of the court that the defendant has discharged its burden of proof and as such is entitled to avoid the contract entered into with the claimant.

ISSUE NO. 2

What measures of damages, if any, is available to the claimant.

[106] This issue is purely academic given the determination of the court regarding the non-disclosure and misrepresentation. Accordingly, since the defendant was entitled to avoid the contract the question of damages does not arise.

ISSUE NO. 3

Who is entitled to costs?

[107] The principle laid down in Part 65.5 of CPR 2000 is that the unsuccessful party must pay the cost of the successful party. Accordingly, on accordance with Part 65.5 of CPR 2000 the claimant is hereby ordered to pay prescribed costs to the defendant.

ORDER

[108] IT IS HEREBY ORDERED AND DECLARED as follows:

1. The defendant was entitled to avoid the contract for motor vehicle insurance because

(a) the failure of the claimant to disclose the facts relating to the modification of the vehicle constituted non-disclosure of material facts based on his presumed knowledge plus he failed to make reasonable inquiries as to the exact make and body type of the vehicle;

(b) the statements made by claimant as to make of the of the vehicle and type of body were misrepresentations having to the modifications made to the said vehicle to operate as a dump truck rather than a Tractor Truck as it was originally manufactured;

(c) having regard to the insured vehicle the non-disclosure and misrepresentation were material to a prudent or reasonable insurer.

2. The question of the measure of damages to which the claimant is entitled does not arise.

3. The defendant is entitled to prescribed costs in accordance with Part 65.5 of CPR 2000.

Errol L. Thomas
High Court Judge (Ag)