EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2014/0001

BETWEEN:

DENNIS BROWNE

Appellant

and

NAGICO INSURANCE COMPANY LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mrs. Teshari John-Sargeant for the Appellant
Mr. Sylvester Anthony holding papers for Ms. Angelina Gracy Sookoo and instructed by Ms. Renal Edwards for the Respondent

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2017: March 14;
December 8.

Civil appeal — Whether facts stated by appellant in proposal for insurance misrepresented – Whether failure by appellant to disclose modification of truck material non-disclosure – Whether expert evidence of materiality necessary to enable the Court to find that non-disclosure was material – Whether insurance company entitled to avoid insurance policy on ground of material non-disclosure

In 2008, the appellant purchased a 1997 Ford dump truck. He insured it under a comprehensive policy of insurance with the respondent. In March 2010, during the subsistence of the policy, the truck was destroyed when it overturned due to a failure of the brakes while coming down a hill. The appellant filed a claim with the respondent seeking to be indemnified in respect of loss of the truck. The respondent denied the claim. The letter denying the claim stated that the independent engineer contracted to inspect the truck had identified a problem with the brakes which probably should have been rectified during regular maintenance of the truck. The appellant filed a claim in the High Court

alleging that the respondent wrongfully denied his claim. The respondent filed a defence denying liability on the ground of non-disclosure and/or misrepresentation by the appellant rendering the contract voidable.

It emerged that the truck purchased by the appellant and described in the proposal form as a "Ford dump truck" was not a Ford dump truck but a Ford "truck tractor". This information was stated on the manufacturer's metallic plate containing the vehicle identification number, popularly known as the "VIN". The plate with the VIN was located in the engine of the truck. The appellant admitted in cross-examination that he personally serviced the truck which included going under the bonnet to inspect the engine. Further, that he had seen the metallic plate with the VIN describing the truck as a truck tractor on different occasions, both before and after completing the proposal form. Notwithstanding this clear admission that he had seen the description of the truck as a truck tractor, the appellant maintained that it was a dump truck. He did so on the basis that from the time when he first saw the truck it was a dump truck, and he bought it and used it as a dump truck.

The truck was manufactured as a truck tractor and was modified by installing a 12 yard dump which necessitated a change to the springs of the truck to accommodate the size and weight of having a 12 yard dump.

The learned judge found that the appellant had committed a material misrepresentation by describing the truck as a dump truck in the proposal form and had not disclosed that it was a converted truck tractor. He therefore upheld the respondent's defence that it was entitled to avoid the contract, dismissed the claim and ordered the appellant to pay the respondent's prescribed costs.

The appellant, being dissatisfied with the findings of the learned trial judge, appealed. The appellant argued, inter alia, that (1) the learned judge erred in finding that the appellant failed to make reasonable enquiries as to the exact make and body type of the truck and was therefore presumed to have known that the truck was a truck tractor and not a dump truck; (2) the learned judge erred in finding that the truck was what the manufacturer said it was on the VIN plate, namely, a truck tractor, when that description does not include the truck; (3) the learned judge erred in accepting the evidence of the respondent so as to find that there was material non-disclosure; and (4) the judge erred in finding that the lack of expert evidence on materiality was not fatal to the respondent's defence.

Held: dismissing the appeal and awarding costs to the respondent, if not agreed within 14 days, to be assessed at two-thirds of the costs awarded to the respondent in the lower court, that:

1. The law relating to misrepresentation and non-disclosure in the context of insurance contracts is well settled. It is that the contract of insurance is a contract of the utmost good faith and because the facts relating to the assessment of the risk involved are generally known by the insured, he or she is under an obligation to disclose all material facts to the insurer. The learned judge found that the appellant saw the identification plate on several occasions and that the import of the plate is that the truck is a "truck tractor". Further, the appellant's attempt to

describe it otherwise cannot alter the fact of what the manufacturer endorsed on the plate. If a vehicle is manufactured as a truck tractor to pull loads and is converted and used as a dump truck, the conversion does not alter the fact that it is a truck tractor. It follows that the appellant was incorrect in describing the truck in two places on the proposal for as a "dump truck".

MacGillivray on Insurance Law 12th Edition considered; **Halsbury's Laws of England, Volume 60 (2011) paras. 43 and 46** considered.

2. The findings of fact by the learned judge that the appellant either knew that the truck was a truck tractor or failed to make reasonable enquiries to determine the body type of the truck are based on the judge's assessment of the oral and written evidence of the witnesses and there is no basis on which this Court should interfere with these findings.

3. The finding of materiality is ultimately a question of mixed fact and law for the trial judge based on his findings of fact in the case. The authorities do not support the appellant's position that the allegation of materiality has to be proved by expert evidence. The burden of proving materiality rests squarely on the insurer to prove on a balance of probabilities that the undisclosed information influenced the decision to accept the risk and to do so on the terms in the policy. The learned judge in this case carried out a full assessment of the evidence relating to materiality and concluded that there was misrepresentation and non-disclosure that was material to a prudent or reasonable insurer that entitled the Insurer to avoid the contract.

Somati Ali v Hand-in-Hand Mutual Fire and Life Insurance Ltd (2001) 65 WIR 186 considered; **Glicksman v Lancashire and General Assurance Co. Ltd [1925] 2 KB 593** considered; **AC Ward & Son Ltd v Catlin (Fire) Ltd and Others [2008] EWHC 3122 (Comm)** considered; **MacGillivray on Insurance Law 12th Edition** considered. **Somati Ali v Hand-in-Hand Mutual Fire and Life Insurance Ltd (2001) 71 WIR 227** considered.

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an appeal against the judgment of the learned judge dismissing the appellant's claim against the respondent for damages for breach of an insurance contract by the respondent by failing to indemnify the appellant for the loss of his motor vehicle.

Background

[2] In 2008, the appellant purchased a 1997 Ford dump truck from Mr. Alston Williams. He insured it under a comprehensive policy of insurance with the respondent, Nagico Insurance Company Ltd. ("the Insurer"). In March 2010, during the subsistence of the policy, the truck was destroyed when it overturned due to a failure of the brakes while coming down a hill. The appellant filed a claim with the Insurer seeking to be indemnified in respect of loss of the truck. The Insurer denied the claim. The letter denying the claim stated that the independent engineer contracted to inspect the truck had identified that there was indeed a problem with the brakes which probably should have been rectified during regular maintenance of the truck. The letter also referred to condition 3 of the policy which states that 'The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition.' As a result of the appellant's failure to maintain the truck, in breach of condition 3 of the policy, the Insurer denied the claim on the ground of neglect in not properly maintaining the truck.

[3] The appellant filed a claim in the High Court alleging that the Insurer wrongfully denied the claim. The Insurer filed a defence denying liability on the basis of non-disclosure and/or misrepresentation on the part of the appellant rendering the contract voidable at the instance of the Insurer. Paragraphs 4 and 5 of the defence read:

> "4. The proposal for Motor Vehicle Insurance submitted by the Claimant was not true in every respect and contained false statements and/or misrepresentations.
>
> Particulars
>
> 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 Truck Tractor which was modified to operate as a dump truck."
>
> 5. Further, in breach of the duty to disclose all material facts, the claimant did not give notice to the defendant of any modification to the said vehicle."

[4] There is no mention in the defence of the allegation that the appellant did not maintain the truck properly. The Insurer's defence was presented on the sole ground of material misrepresentation and non-disclosure inducing the insurance contract.

[5] In the events that followed, it emerged that the truck purchased by the appellant and described in the proposal form as a "Ford dump truck" was not a Ford dump truck but a Ford "truck tractor". This information was stated on the manufacturer's metallic plate containing the vehicle identification number, popularly known as the VIN. The plate with the VIN was located in the engine of the truck. The appellant admitted in cross-examination that he personally serviced the truck which included going under the bonnet to inspect the engine. Further, that he had seen the metallic plate with the VIN describing the truck as a truck tractor on different occasions both before and after completing the proposal form. Notwithstanding this clear admission that he had seen the description of the truck as truck tractor, he maintained throughout that it was a dump truck. He did so on the basis that from the time when he first saw the truck it was a dump truck, and he bought it and used it as a dump truck.

[6] The original owner of the truck, Alston Williams, had purchased it online from dealers in the United States. It was manufactured as a truck tractor and Mr. Williams instructed the dealers to convert it to a dump truck. This involved installing a 9 yard dump on the truck. However, a 12 yard dump was installed and it is not clear whether this happened before or after the truck arrived in St Kitts. What is important is that it was modified by installing a 12 yard dump which necessitated a change to the springs of the truck to accommodate the size and weight of having a 12 yard dump.

[7] The difference between a truck tractor and a dump truck was explained in very simple terms by Mr. Euclid Osborne, a mechanic who gave evidence on behalf the appellant. At page 109 of the transcript of the trial, he said in answer to a question

from counsel for the Insurer, Mr. Sylvester Anthony -

> "Well, the Truck Tractor is, (sic) just carries what we call the cab and something that you connect whatever you will be hauling on to it. Now, the truck, Dump Truck, is a complete truck with a dump on the back of it that you will use to dump whatever you are carrying sand, stone or whatever."[1]

Mr. Osborne agreed with counsel's description of a dump truck as a complete truck that carries loads of sand or stone and a truck tractor as one that holds a container that is latched onto the back of the truck. One does not need to be an expert in trucks to appreciate that the two types of trucks are very different in appearance, size and function.

[8] Notwithstanding the obvious differences between a truck tractor and a dump truck, the appellant signed the proposal for insurance describing the truck as a "Ford dump truck" with an engine capacity of 2400 cc and a value of $140,000.00. Clause 14 of the proposal stated –

> "I/we desire to insure with the Company in respect of the vehicle described in the above proposal. I/we warrant that the above statements are true and complete and that nothing materially affecting the risk has been concealed by me/us and I/we agree that this proposal shall be incorporated in and form (sic) the basis of the insurance contract between me/us and the Company, and I/we agree to accept a Policy in the Company's usual form for this class of insurance. I/we undertake that the vehicle or vehicles to be insured shall not be driven by any person who to my/our knowledge has been refused any Motor Vehicle insurance or continuance thereof.
>
> If the Proposal is written by another, it shall be deemed, he shall be my agent not the agent of the Company."[2]

The proposal was signed by the appellant thereby making the statements in the document a part of the insurance contract that was later issued by the Insurer.

The learned judge's decision

[9] The action was tried over three days in April 2013. All the witnesses filed witness statements, except the Insurers' witnesses, Tim Price and Craig Davis, were cross-

[1] Page 143 of Appeal Bundle Volume 3.
[2] Page 127 of Appeal Bundle Volume 1.

examined on their statements. The learned judge delivered a detailed and carefully reasoned written judgment in which he found that the appellant had committed a material misrepresentation by describing the truck as a dump truck in the proposal form and had not disclosed that it was a converted truck tractor. He therefore upheld the Insurer's defence that it was entitled to avoid the contract, dismissed the claim and ordered the appellant to pay the Insurer's prescribed costs.

The appeal

[10] The appellant was dissatisfied with the learned judge's dismissal of his claim and appealed to this Court. The notice of appeal lists 13 grounds of appeal which are set out below in summary form:

(i) Grounds 1 and 4 - The learned judge erred in finding that the appellant failed to make reasonable enquiries as to the exact make and body type of the truck and/or is presumed to have known that the truck was a truck tractor and not a dump truck.

(ii) Ground 2 and 3 - The learned judge erred in finding that the truck was what the manufacturer said it was on the VIN plate, namely, a truck tractor. The learned judge should have found that the description truck tractor does not include the truck.

(iii) Grounds 5 and 6 - The learned judge failed to distinguish between the make of the truck and the body type.

(iv) Grounds 7, 8 and 9 - On the issue of materiality, the learned judge erred in accepting the evidence of Mashanda Nisbett and in finding that there was material non-disclosure.

(v) Ground 10 - The judge failed to consider the actual cause of the accident.

(vi) Ground 11 - The judge failed to consider that the Insurer did not have

clean hands.

(vii) The judge erred in finding that the lack of expert evidence on materiality was not fatal to the Insurer's defence.

(viii) The judge erred in assisting the Insurer to discredit the reports by Tim Price and Craig Davis by suggesting that they were careless in preparing their reports.

The issues

[11] The following issues arise from the grounds of appeal:

(1) Did the learned trial judge err in finding that the truck was a truck tractor as stated on the VIN plate?

(2) Did the judge err in finding that the statement by the appellant in the proposal form that the make of the truck was "Ford Dump Truck" a misrepresentation?[3]

(3) Did the judge err in finding that the failure of the appellant to disclose the modification of the truck a non-disclosure of a material fact?[4]

(4) Did the judge err in finding that the misrepresentation and non-disclosure were material to a prudent or reasonable insurer thereby entitling the Insurer to avoid the contract?[5]

(5) Did the judge err in finding that the Insurer's failure to lead expert evidence on the materiality of the misrepresentation and non-disclosure was not fatal?

The resolution of these issues involves challenges to the findings of fact and of mixed fact and law by the trial judge which brings the Court to consider the test that should be applied in dealing with the issues.

[3] Paragraphs 88 and 89 of the judgment; page 27 of Appeal Bundle Volume 3.
[4] Paragraphs 77 and 78 of the judgment; page 24 of Appeal Bundle Volume 3.
[5] Paragraph 105 of the judgment; page 32 of Appeal Bundle Volume 3.

Tests on appeal

[12] The skeleton argument of counsel for the Insurer sets out a very helpful summary of the cases and principles that illustrate the approach of an appellate court in dealing with findings of fact made by the trial judge. The three levels of findings of fact are:

(i) Findings of primary fact based on the trial judge's assessment of the witnesses giving evidence at the trial.

(ii) Inferences drawn by the trial judge based on his or her evaluation of the primary facts.

(iii) Findings of mixed fact and law where the trial judge draws legal conclusions based on the facts.

[13] The approach regarding findings of primary facts is well known and the passage that is most often cited that sums up the courts' approach is that of Lord Thankerton in **Watt (or Thomas) v Thomas**:

> 'I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'[6]

Lord Greene MR made a similar pronouncement in **Yuill v Yuill**:

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[6] [1947] 1 All ER 582 at 587.

> 'It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion.'[7]

[14] The courts of the Eastern Caribbean have adopted a similar approach and it is only in the rarest of cases that the Court of Appeal will upset a finding of primary fact by trial judge.

[15] Appellate courts have a more flexible approach when dealing with challenges to findings of fact that are inferences drawn by the trial judge from his evaluation of the findings of primary fact. Even at this level, the appellant still faces the steep uphill climb to persuade the appellate court to disturb the trial judge's findings. The climb may be a little easier when the inferences are drawn from written evidence that is not disputed. In this situation, the appellate court is more likely to conclude that it is in as good a position as a trial judge to evaluate the undisputed written evidence and, if it is satisfied that the wrong inference was drawn, may be inclined to substitute its own finding. This is illustrated by the speech of Lord Hodge in **Beacon Insurance v Maharaj Bookstores Ltd**,[8] a recent decision of the Privy Council from Court of Appeal of Trinidad and Tobago. Lord Hodge summed up the evaluation process as follows –

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In *Re B (a child)* (above) Lord Neuberger (at [60]) acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 All ER 267 at 286, [1981] 1 WLR 246 at 269–270:

[7] [1945] 1 All ER 183 at 188.
[8] [2014] UKPC 21.

'[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."[9]

[16] The third class of findings by a trial judge are findings of mixed fact and law where the trial judge comes to a conclusion of law based on his evaluation of the facts that he has found. This is a situation where the appellate court is most likely to interfere if it has come to a different conclusion, but even then, the appellate court will proceed with caution because as Baptiste JA pointed out in **Margaret Blackburn v James A. L Bristol**[10] in dealing with a finding of negligence –

> "Appellate courts must be cautious however, in finding that a trial judge erred in his or her determination of negligence as it is often difficult to extricate the legal questions from the factual."

[17] For completeness, we should mention the obvious point that an appellate court is in as good a position as the trial judge to make pure findings of law and, in this respect, an appellate court is generally free to make its own findings when it disagrees with the findings made by the trial judge.

[18] We will now deal with the issues listed arising from the grounds of appeal.

Type of truck (Grounds 2, 3, 5 and 6)

[19] The appellant complained in grounds 2, 3, 5 and 6 that the judge erred in finding that the VIN identification plate placed on the truck by the manufacturer was determinative of the type of truck (grounds 2 and 3) and that he failed to distinguish between the make of the truck and the body type (grounds 5 and 6).

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[9] Ibid at paragraph 17.

[10] GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) at paragraph 24.

[20] The learned judge noted at paragraph 88 of his judgment that he had already found that the appellant saw the identification plate on several occasions and that the import of the plate is that the truck is "truck tractor" and the claimant's attempt to describe it otherwise cannot alter the fact of what the manufacturer endorsed on the plate. This makes complete sense. If a vehicle is manufactured as a truck tractor to pull loads and is converted and used as a dump truck the conversion does not alter the fact that it is a truck tractor.

[21] The appellant also relied on evidence of his mechanic, Mr. Euclid Osborne, that the words "dump truck" do not normally appear on the identification plate. It is not clear what Mr. Osborne's reason was for saying this and, in any event, his evidence is not helpful to the appellant. What is important in this case is that the plate identified the vehicle as a truck tractor and Mr. Osborne's description of it as a dump truck does not change the fact that it was manufactured as a truck tractor.

[22] The appellant also contended that the judge did not make a distinction between the make of the truck and the body type. He submitted that the correct answer to the question on the proposal for the make of the truck was "Ford" and for the body type the correct answer was "Dump truck". This is a distinction without a difference. The judge found correctly that the truck was a truck tractor, and by extension not a dump truck. It follows that the appellant was incorrect in describing the truck in two places on the proposal for as a "dump truck". There was no need for the judge to make a distinction between the make and the body type of the truck.

[23] I would dismiss grounds 2, 3, 5 and 6 of the notice of appeal.

Misrepresentation or nondisclosure (Grounds 1 and 4)

[24] The misrepresentation relied on in this case is the statement of fact by the appellant in the proposal form that the truck is a dump truck. The learned judge

found at paragraph 89 of the judgment that this statement by the appellant constituted a misrepresentation.

[25] The non-disclosure is his failure to inform the Insurer that the truck was originally a truck tractor which had been converted to a 12 yard dump truck.

[26] The law relating to misrepresentation and non-disclosure in the context of insurance contracts is well settled and was clearly set out by the trial judge in his judgment. Briefly, it is that the contract of insurance is a contract of the utmost good faith and because the facts relating to the assessment of the risk involved are generally known by the insured he or she is under an obligation to disclose all material facts to the insurer. The learned editors of **MacGillivray on Insurance Law** set out the duty in this way –

> "Subject to certain qualifications considered below, the 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 assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms."[11]

[27] The misrepresentation and non-disclosure are clearly established in this case. But the duty to disclose only arises in respect of facts that are known or deemed to be known by the assured and are material to the risk insured. This is a settled principle of insurance law. Under the heading "Facts unknown to proposer" the learned editors of **Halsbury's Laws of England** state –

> "The proposer is under a duty to disclose to the insurer all material facts as they are within his knowledge. The proposer is presumed to know all the facts and circumstances concerning the proposed insurance. Whilst the proposer can only disclose what is known to him the proposer's duty of disclosure is not confined to his actual knowledge, it also extended to those material facts which, in order course of business, he ought to know."[12]

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[11] **MacGillivray on Insurance Law** 12th Edition 17 – 009.
[12] Halsbury's Laws of England, Volume 60 (2011) para. 43.

The appellant's position is that he did not know that the truck was anything other than a dump truck. Put another way, he did not know that the truck was a truck tractor. The judge did not accept his evidence and disposed of the issue of his actual and the presumed knowledge at paragraphs 77 and 78 of the judgment by finding that-

> "77. In the 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 the venture into the trucking business.
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> 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 the engine of the subject vehicle plus other factors and based on his personal knowledge of the circumstances bearing on the issue and failed to make reasonable enquiries as to the exact make and body type of vehicle." [13]

These findings of fact by the learned judge that the appellant either knew that the truck was a truck tractor or failed to make reasonable enquiries to determine the body type of the truck are based on the judge's assessment of the oral and written evidence of the witnesses and there is no basis on which this Court should interfere with the findings.

Materiality and expert evidence (Grounds 7 and 8)

[28] As stated above, the general rule of insurance law is that the assured must disclose to the insurer all material facts that will influence the insurer in determining whether to accept the risk and on what terms. This is stated in very simple terms by the learned editors of **Halsbury's Laws of England** under the heading "Material facts" as follows -

> "A fact or circumstance is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk… Whether a fact is material will depend on the circumstances, as proved by evidence, of the particular case. It is for the court to rule as a matter of law whether a particular fact is capable of being material. Of

[13] Page 24 of Appeal Bundle Volume 3.

> particular relevance will be the nature of the risk, insurance practice in relation to that risk and the circumstances at the time when the disclosure ought to have been made."[14]

The burden of proving materiality rests squarely on the insurer to prove on a balance of probabilities that the undisclosed information influenced the decision to accept the risk and to do so on the terms in the policy.

[29] The Insurer's evidence on materiality came from its underwriting supervisor, Ms. Mashanda Nisbett, in paragraphs 17 to 20 of her witness statement. The paragraphs read –

> "17. When THE INSURER receive a proposal for motor vehicle insurance, the underwriting department examines the information presented in order to determine whether to insure the risk and if so at what premium.
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> 18. If Dennis Browne had informed THE INSURER that the make of PA 1219 was a Ford Truck-Tractor and that it was converted to a Dump Truck, THE INSURER would have requested that the vehicle be presented for inspection by THE INSURER prior to acceptance of the risk.
>
> 19. Additionally, if Dennis Browne had stated in the proposal or on the change form that PA 1219 had an engine capacity of about 10,800 cc as opposed to 2400 cc the premium charged by THE INSURER would have been higher because a high engine capacity creates a higher risk.
>
> 20. The decision by THE INSURER to accept the Proposal for Motor Vehicle Insurance presented by Dennis Browne was base on the information stated on the proposal and the fact that Dennis Brown warranted that information was true and complete and that nothing material affecting the risk was concealed."[15]

Ms. Nisbett was not cross-examined on this evidence. Her evidence on the misrepresentation regarding the engine size is that this would have attracted a higher premium. The evidence regarding the non-disclosure of the type of the truck was less clear. She did not say that the Insurer would not have accepted the risk if the modification was disclosed or that the terms of the coverage would have been different. What she said is that the vehicle would have been inspected.

[14] Halsbury's Laws of England, Volume 60 (2011) para. 46.
[15] Appeal Bundle Volume 1 at pages 124 and 125.

Presumably, this would have led to other consequences. Ms. Nisbett's evidence on materiality was somewhat lacking in detail but it was evidence, when considered in the context of all the evidence in the case, on which the judge could rely to find materiality.

[30] The judge considered Ms. Nisbett's evidence at 93 of his judgment and went on in paragraph 97 to note that –

> "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."[16]

The judge continued at paragraphs 101 to 102 –

> "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 a determination as to materiality.
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> 102. The undisclosed modification terms (sic) 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."

[31] The judge was obviously satisfied on the totality of the evidence that the non-disclosure relating to the modification of the truck was material to the Insurer, a matter that was entirely within his purview as the trier of the facts.

[32] The judge went on to consider that the fact that the Insurer had not led expert evidence on materiality and concluded that –

> "In all the circumstances it is the determination of the court that nondisclosure and misrepresentation turning on the modification of the insured vehicle are material to a prudent reasonably insurer and which in turn would entitle the insured to avoid the contract."[17]

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[16] Appeal Bundle Volume 3 at page 30.
[17] Appeal Bundle Volume 3 at page 32.

[33] The appellant challenged the judge's findings on materiality by submitting that the evidence of Ms. Nisbett did not support the conclusion that the misrepresentation did not affect minds of the Insurer and induce it to enter into the contract of insurance with the appellant, and that the judge erred in finding that the absence of expert evidence on materiality was not fatal to the defence.

[34] Dealing first with the issue of expert evidence, the authorities do not support the appellant's position that the allegation of materiality has to be proved by expert evidence. The learned judge referred to the following passage from **MacGillivray on Insurance** at paragraph 103 of his judgment –

> "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 the critical assessment by the trier of fact. If the same or similar questions of fact are asked by practically every insurer, that is strong evidence of that fact materiality."

That the court can find materiality without expert evidence was confirmed by the Court of Appeal in England in **Glicksman v Lancashire and General Assurance Co Ltd.** [18] when Scrutton LJ stated –

> "There remain two other points which were argued before him [the judge in the court below]: (1.) that before a Court can find that a fact is material, somebody must give evidence of the materiality. That is entirely contrary to the whole course of insurance litigation; it is so far contrary that it is frequently objected that a party is not entitled to call other people to say what they think is material; that is a matter for the Court on the nature of the facts. I entirely agree with Roche J., that the nature of the facts may be such that you do not need anybody to come and say, this is material. If a shipowner desiring to insure his ship for the month of January knew that in that month she was heavily damaged in a storm, it would, with deference to counsel who has suggested the opposite, be ridiculous to call evidence of the materiality of that fact; the fact speaks for itself."

The decision of the Court of Appeal was upheld by the House of Lords where Viscount Dunedin described the reasoning of the judges of the Court of Appeal as "impeccable".[19] Notwithstanding the vintage of the decision in the **Glicksman case**, the learning of

[18] [1925] 2 KB 593 at 609.
[19] [1927] AC 139 at 144.

Scrutton LJ was approved and followed as recently as 2009 in **AC Ward & Son Ltd v Catlin (Five) Ltd. and others**[20] where Flaux J was considering the issue of materiality in case where there was expert evidence. The learned judge, in referring to Scrutton LJ's judgment, said -

> "217. That evidence (particularly points (8) and (9)) amounted to acceptance by Mr Guest [the expert witness] that the question whether and to what extent the insured had complied with the matters set out in both the risk improvement requirements was material, in the sense that what the true position was about compliance with the risk improvement requirements would have influenced the mind of a reasonably prudent underwriter in determining whether to vary the contract by lifting the exclusion in Endorsement 6.
>
> 218. However, even without the assistance of such expert evidence, I would still have concluded that the matters misrepresented were material. This is one of those cases where the court can and should adopt the robust approach of Scrutton LJ in the well-known case of *Glicksman v Lancashire and General Assurance Co Ltd*…" (Dictum of Scrutton LJ set out above intentionally omitted)

[35] The learned trial judge in the case at bar also referred to the judgment of Bernard CJ in **Somati Ali v Hand-in Hand Mutual Fire & Life Insurance Ltd**.,[21] where the Chief Justice noted:

> "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 court 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 insurer's own testimony that the fact is material. Of these courses it is always best to rely on expert evidence as a court hearing the action may not be adequately seized of all aspects of insurance law, and an insurer is never the best person to determine a matter involving his own interests. His evidence will not prove materiality from the point of view of a prudent underwriter, only that he considered the particular fact to be material. Therefore, proof of materiality rests on expert evidence."

Notwithstanding the final sentence of the passage from the learned Chief Justice's judgment, it is apparent that she, as well as the learned editors of **MacGillivray**, acknowledge that the rule requiring expert evidence to prove materiality is not absolute, although highly desirable. The judges in the **Glicksman** and the **AC Ward cases** seem to

[20] [2009] EWHC 3122 (Comm) at paras. 217 and 218.
[21] (2001) 65 WIR 186 at 193-194.

go further to suggest a robust approach by considering all the evidence in the case – materiality does not depend on what a witness, expert or lay, says is material.

[36] In the Court's opinion, the true test is that the trier of fact must assess all evidence to determine whether the insurer has discharged the burden of proving that the non-disclosure influenced it in accepting the risk on the terms that it did. Therefore, it was not fatal for the judge to assess materiality without the assistance of expert evidence.

[37] The finding of materiality is ultimately a question of law for the trial judge based on his or her findings of fact in the case. In other words, it is a finding of mixed fact and law. The learned judge in this case carried out a full assessment of the evidence relating to materiality and concluded that there was misrepresentation and non-disclosure that was material to a prudent or reasonable insurer that entitled the Insurer to avoid the contract.

[38] I do not think that this is a case where this Court should interfere with the judge's finding of materiality for at least the following reasons:

(a) the appellant signed a proposal form in which he warranted the truth of the statements in the form;

(b) he knew that the truck was a converted truck tractor and did not disclose this fact to the Insurer;

(c) there was evidence before the judge that the appellant deliberately misrepresented the value of the truck at $140,000.00 in the proposal form when he knew that the value was $170,000.00, and he admitted both in examination-in-chief in amplifying his witness statement, and in cross-examination, that he did this in order to pay a lower premium; and

(d) the appellant admitted in cross-examination that the truck's engine capacity of 2400 cc was incorrect and that the truck, to his knowledge at the time of filling out the proposal, had a much larger engine.

[39] Having found that there was a proper evidential basis for the judge to find materiality, I do not think that this Court should interfere with his conclusion. It is ultimately a finding of fact based on his assessment of the evidence that this Court should respect. To illustrate this point, I refer to the judgment of Singh CJ in **Somati Ali** when the case went on appeal to the Court of Appeal in Guyana.[22] At page 241 of the judgment of the Court of Appeal, Singh CJ referred to the decision of the House of Lords in the **Glicksman case** and cited with approval the following passage from the speech of Viscount Dunedin (commenting on an arbitrator's findings of materiality) -

> "My Lords, under the circumstances I have considerable doubts, but then I am not entitled to take any view of my own on that, because that is a fact and the arbitrator has found it as a fact and I cannot get beyond the arbitrator's finding."[23]

[40] I am of the same view as Singh CJ and Viscount Dunedin. In this case, the appellant either deliberately or without due regard to the obvious facts regarding the truck chose to represent it to the Insurers as a dump truck without drawing their attention to the fact that it had been converted from a truck for pulling loads to one of carrying loads in a dump that was of such a size that the springs of the truck had to be changed. It does not help his case that he also deliberately misled the insurance company as to the value of the truck in order to secure a lower premium and also as to the capacity of the truck's engine.

[41] I would therefore dismiss grounds 7 and 8 dealing with materiality.

Miscellaneous points arising from the grounds of appeal

[42] In ground 10, the appellant complained that the judge failed to consider the actual cause of the accident. This ground has no bearing on the disposal of this appeal. The appeal is concerned with misrepresentation and non-disclosure leading to the avoidance of the insurance policy. There is no evidence that the cause of the accident had anything to do with the issue of misrepresentation and non-disclosure.

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[22] (2001) 71 WIR 227.
[23] [1927] A.C. 139 at 144.

[43] The submission in ground 11 is that the judge erred in not acknowledging the doctrine of clean hands because the Insurer relied initially on their own expert reports, by Tim Price and Craig Davis, to deny the claim on the ground of neglect and then disregarded those reports at trial and relied on the new ground of non-disclosure. However, this submission did not take account of the fact that a party is entitled to conduct its case as it sees fit and there is no rule that a party is obliged to rely on reports produced during the course of pre-trial negotiations. This has nothing to do the equitable defence of clean hands.

[44] Ground 12 alleges that the judge erred by "discrediting" the reports produced by the Insurer's witnesses, Tim Price and Craig Davis, who did not describe the truck as a truck tractor. This ground is without merit. The learned judge, as the trier of the facts, is entitled to and must assess the evidence and accept or reject so much of it as he sees fit. The learned judge did not accept the evidence of the two witnesses on the ground that he found that they should have had more regard to the VIN metal plate describing the truck as a truck tractor. This is a matter that was entirely within the trial judge's discretion and no proper complaint can be made against his decision.

Order

[45] I would dismiss the appeal with costs to the Insurer which, if not agreed within 14 days, shall be assessed at two-thirds of the costs awarded to the respondent in the lower court.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar