IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
COMMERCIAL JURISDICTION
2018-HC-DEM-CIV-FDA-949
BETWEEN:-

NAVITA SHIRMALA SAHADEO represented herein by her duly constituted Attorney in Guyana **GAVINDRA JAISINGH,** agreeably with Power of Attorney executed on 30th January, 2018 and registered in the Deeds Registry on 31st January, 2018 as No. 799 of 2018.

Claimant

-and-

DIAMOND FIRE & GENERAL INSURANCE INC. a company incorporated under the Laws of Guyana whose office is at 11 Lamaha Street, Queenstown, Georgetown.

Defendant

1. DEOLOK JAISINGH
2. GAVINDRA JAISINGH
3. SHIVINDRA SAHADEO
4. MARK DOMAN

Third Parties
Jointly and Severally

BEFORE THE HON. MR. JUSTICE NARESHWAR HARNANAN

MR. MOHAMED ALI – ATTORNEY-AT-LAW FOR THE CLAIMANT

MR. TIMOTHY JONAS – ATTORNEY-AT-LAW FOR THE DEFENDANT

RULING:

Brief facts:

1. The claimant seeks an order against the defendant for the sum of $7.5M on grounds that the defendant has breached an insurance policy it issued to her on the 11th December, 2017.

2. The claimant contends that the vehicle insured was involved in an accident and the defendant company has denied the claimant's claim without any valid reasons.
3. The defendant has denied the claimant's insurance claim, thereby avoiding thecontends that when the claimant negotiated and contracted with them, she falsely and fraudulently represented that the car was in a good state of repair, it was never modified or involved in any accident and that she paid the sum of $7.5M as the value of the vehicle.
4. The defendant also contends that the claimant failed to disclose her close familial and personal relationships with the principal of Zoom Auto Sales which was the importer of the vehicle, being her brother in law, and her husband's connection with Zoom Auto Sales, whom they believed is a co-owner/proprietor.
5. The defendant also contends that the vehicle was imported as used and damaged with a declared value of $1,000.00USD and remained unsold for 2 years until it was registered in the claimant's name for $7.5M, crashed and written off a mere 3 weeks of acquiring the insurance contract.

The Issue:

6. The main question for this Court therefore is whether the defendant is entitled to avoid the policy of insurance.

The Law:

7. *Clive Turner*[1] in the text, ***Australian Commercial Law***, defines an insurance contract as:

> A contract by which one party, called the insurer, in consideration of a sum of money called the premium undertakes to pay to another person called the insured, a sum of money, or its equivalent, on the happening of a specified event. The person undertaking the risk is

[1] 25th edition [2005] at page 580 of the text.

called the insurer and the party who is indemnified is called the insured.

8. Therefore, an insurance contract must fulfil the elements of a general contract, and specifically, the elements of a special contract relating to insurance.

9. There is no dispute in the evidence before the Court about the existence of a valid contract of insurance. The defendant however, takes issue with the obligation of the claimant, at law, to act in utmost good faith, in disclosing all material information to the defendant, before the insurance policy was concluded.

Utmost good faith:

10. The duty to act with utmost good faith is one of the principal features of an insurance contract, as they are based on mutual trust and confidence. This principle essentially means that there is an obligation to reveal all information which may possibly influence a party's decision to enter into an insurance contract.

11. The legal basis of this disclosure was considered by *Lord Atkin* in **Bell vs. Lever Bros. Ltd.**[2] where he said:

> Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of *caveat* emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is *voidable*. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of the contract; the duty of a person proposing the insurance arises before a contract is made, so of an intending partner.

[2] [1932] A.C. 161, at page 227 of the report

12. Whilst the law relating to insurance contracts has evolved since *Lord Mansfield's* pronouncement in the early case of ***Carter v. Boehm***[3] on the reasons behind the duty to act in utmost good faith, it still rings true to date. Explaining the reason for this stringent rule, he said:

> Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. ***The keeping back of such a circumstance is a fraud, and therefore the policy is void***. ***Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood*** and intended to be run at the time of the agreement…Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain into his ignorance of that fact and his believing the contrary. (emphasis supplied)

13. *Romer LJ,* in ***Seaton v Heath***[4] described a contract of *uberrimae fidei (utmost good faith)* as:

> There are some contracts in which our courts of law and equity require what is called '*uberrimae fidei*' to be shown by the person obtaining them … Of these, ordinary contracts of marine, fire and life insurance are examples, and in each of them the person desiring to be insured must, in setting forth the risk to be insured against, ***not conceal any material fact affecting the risk known to him***.

[3] (1558 - 1774) All ER Rep 183
[4] [1899] 1 QB 782 at page 792 of the report

> On the other hand, ordinary contracts of guarantee are not amongst those requiring '*uberrimae fidei*'… …Whether the contract be one requiring *'uberrimae fidei*' or not must depend on its substantial character and how it came to be effected. (emphasis supplied)

14. *Professor Kenneth Sutton,* in ***Insurance Law in Australia***, commenting on the utmost good faith principle, said that[5]:

> …it encompasses notions of fairness, reasonableness and community standards of decency and fair dealings.

15. The authors, *Desmond Derrington* and *Ronald Ashton*, of ***The Law of Liability Insurance***, said that:[6]

> …good faith has proved difficult to define, but it has generally come to mean ***fair dealing*** in which one party puts the interests of the other at least at the same level of protection as his or her own…(emphasis supplied)

16. It is noted also that the principle of utmost good faith extends and applies to both parties of the insurance contract. *Lord Jauncey*, in ***Banque Financiere v Skandia (U.K.) Insurance Co. Ltd***[7] concluded that the duty applies equally to both an insured and his insurer. He stated:

> The duty of disclosure arises because the facts relevant to the estimation of the risk are most likely to be within the knowledge of the insured and the insurer therefore has to rely upon him to disclose matters material to that risk. The duty extends to the insurer as well as to the insured: ***Carter v Boehm***. *The duty is, however, limited to facts which are material to the risk insured, that is to say facts which would influence a prudent insurer in deciding whether to accept the risk and, if so, upon what terms and a prudent insured in entering into the contract on the terms proposed by the insurer*. Thus, any facts which would increase the risk should be

[5] LBC Information Services 1999, at pages 157-158
[6] 2nd Edition, LexisNexis Australia 2005 at page 236
[7] [1990] 2 Lloyd's Rep. 377 at page 389 of the report.

> disclosed by the insured and any facts known to the insurer but not to the insured, which would reduce the risk, should be disclosed by the insurer. There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract. … Although there have been no reported cases involving the failure of an insurer to disclose material facts to an insured the example given by Lord Mansfield in ***Carter* v *Boehm*** is of an insurer who insured a ship for a voyage knowing that she had already arrived. Another example would be the insurance against fire of a house which the insurer knew had been demolished. In these cases, the undisclosed information would have had a material and direct effect upon the risk against which the insured was seeking to protect himself. Indeed, the insured would have said that the risk no longer existed. (emphasis supplied)

17. The absence of utmost good faith, or an established breach of the principle therefore, would entitle an insurer to avoid the insurance policy, *ab initio*, at the stage where a claim is made.

18. In the 6th edition of **General Principles of Insurance Law**, *Ivamy* states at page 139 of the text that:

> The assured is under a duty to disclose all material facts relating to the insurance which he proposes to effect. In addition, he must make no misrepresentation regarding such facts…. The assured must disclose all material facts which are within his actual or presumed knowledge. The absence of a proposal form does not modify the assured's duty of disclosure…. 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, solely within the knowledge of the proposed assured.

19. ***Ivamy***, cites **London General Omnibus Ltd v. Holloway [1912] 2 KB 72**, where *Kennedy, LJ* observed:

> No class of case occurs to my mind in which our law regards mere non-disclosure as invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in deference 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 the only person who has the knowledge; the underwriter… cannot as a rule know and but rarely has either the time or the opportunity to learn by inquiry, circumstances which are… most ***material*** to the formation of his judgment as to his acceptance or rejection of the risk, and as to the premium which he ought to require.

20. In ***Joel v. Law Union Insurance Co*** **[1908] 2 KB 863**, *Fletcher Moulton LJ* stated at page 885 of the report:

> 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.

21. This duty of disclosure is not confined only to facts actually known to the assured, but as ***Ivamy*** puts it pages 140-141 of the text:

> …it also 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…. Where the fact could have been discovered by the assured if he had made reasonable inquiries, he is guilty of a 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 inquiries 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.* [emphasis supplied]

22. One specific area which has been held to be ***material*** is the value of the subject matter of the insurance. **Ivamy** points out at page 150 of the text that:

> All facts are ***material*** which suggest that the proposed assured, in effecting the insurance, is actuated by some special motive, and not merely by ordinary prudence. Thus, in an insurance on property, it is ***material*** that the subject-matter is so greatly overvalued as to make the risk speculative. [emphasis supplied]

23. In **Gervais v. Liverpool Insurance [1920] QR 57 SC 407** as relied on by **Ivamy** at page 437 of the text, a carriage bought for $7 was insured for $300 being valued by the assured at $600. The underlying insurance coverage was held to be vitiated by the necessary inference of fraud.

Analysis:

24. The defendant seeks to avoid the insurance contract because they have concluded that the claimant was guilty of material non-disclosure and misrepresentation when she negotiated the contract of insurance.

25. With regard to the latter, the defendant asserts that the claimant lied in her application for insurance about the condition, value and of her payments for the vehicle.

26. Regarding non-disclosure, they assert that she did not disclose her close familial relationship with the vendor, the circumstances surrounding the transfer to her, that Zoom Auto Sales declared it at a value of $1000USD whilst GRA valued it at $607,000.00 GYD and that it was in Zoom's parking lot for 2 years.

27. The claimant denies the assertions and simply declares that she saw a fancy car and bought it on an instalment basis from Zoom Auto Sales which was owned by her brother in law.

28. The claimant testified that she saw the car in October 2015 and liked it. She then negotiated with her brother in law for its purchase and made a

downpayment of $3M. She said it was then agreed that she would have 2 years to pay off for the car on an instalment basis. She told the Court she asked no questions about the car before deciding to buy it.

29. She said she never received any receipts evidencing that arrangement, but she kept records of the payments made by her and her husband. Further she said that she would have withdrawn cash from her bank accounts on a regular basis to make the payments and agreed those withdrawals would be noticeable in her bank statements. No such records were produced to the Court at the trial, even though it was the defendant's contention in their defence that the claimant was guilty of misrepresentation and non-disclosure in the terms highlighted above.

30. She further testified that the first record of their transaction was the receipt for $7.5M dated the 3rd December 2017 which she agreed would not be correct to say that she paid that amount on that day for the vehicle.

31. She said she was surprised to learn that the vehicle was brought in after payment of taxes and duties at a value of $1.7M, but testified that she did not consider it relevant. She said that she left the vehicle with her brother in law for the 2 year period until she completed payments before taking possession of it.

32. Both the claimant and her husband testified that they were aware that they could have purchased the car via a bill of sale and a low interest loan but opted to pay over a period of 2 years instead leaving the car parked in Zoom Auto Sales parking lot.

33. Being faced with the proposal form, she testified that she gave answers to the questions asked in the form. She said she told the defendant that the vehicle was in a good state of repair. She admitted that she had no discussion with her brother in law about it. She also admitted having no discussion with the vendor about whether the engine or body of the vehicle was modified or altered, before she told the defendant that it was not.

34. She also admitted that she declared the vehicle to be accident free without having a conversation with the vendor. With respect to the value of the

vehicle, she admitted not having a valuation from the vendor and assumed the value of the vehicle from the price she paid for it.

35. These admissions alone are quite telling. The answers given by the claimant in the proposal form were declaratory. They were not incomplete. It goes without saying that an insurer will assess all risks and make business decisions based on the disclosures made at the proposal stage, whether to enter into an insurance contract. If an assessment is conducted from the information provided and it reflects a significant risk, the insurer will then decide whether to enter into an insurance policy with the proposer, or enter into such a policy charging the appropriate premium to cater for such risk.

36. Gavindra Jaisingh, the claimant's brother in law and vendor of the car testified that he declared the vehicle as used and damaged because it was involved in an accident. He testified that he took it straight to the body work shop to do repairs and he had to buy parts for it. He even admitted that he was the one who placed the Subaru logo on the front bumper – the car being a Toyota motorcar.

37. The claimant's case leaves much to be desired. It is unbelievable that a reasonable and prudent person would not make usual and relevant inquiries about a used motor car before purchasing it. More so since the value of the motor car being claimed amounts to $7.5M. The claimant is not a casual observer or a person who is not unlearned. She admitted being qualified as a professional accountant, once holding high office as a Chief Internal Auditor, which she declared as her occupation in the proposal form. She must have appreciated the importance about being truthful in the proposal form and even if the answers were not within her knowledge at the time, she was under a duty to make such reasonable inquiries to apprise herself of the facts before she signed the proposal form.

38. She was an unimpressive witness who did not engender in the Court a belief that she was being truthful about her story of acquiring the car. Relying on a self-proclaimed ignorance of the state and value of the vehicle, whilst

declaring to the defendant definitive answers on the very state and value of the vehicle, is clearly disingenuous.

Conclusion:

39. Therefore, this Court finds that the defendant is entitled to avoid the contract of insurance on grounds of material non-disclosure and misrepresentation and the claimant's action is dismissed in its entirety.

40. The defendant's counter-claim for damages for fraud is also dismissed. This Court could not find sufficient evidence of a conspiracy amongst the third parties named to warrant the declaration and consequential order sought.

41. There will be costs to the defendant in the sum of $250,000.00 to be paid on or before the 31st October, 2019.

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Nareshwar Harnanan
Puisne Judge
03 September 2019