



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 00769

BETWEEN	ANDRAE BELL	CLAIMANT
AND	JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED	DEFENDANT

**Sean Kinghorn, Danielle Archer
instructed by Messrs. Kinghorn & Kinghorn for the Claimant.**

**Kwame Gordon instructed by
Samuda & Johnson for the Defendant.**

Contract – Insurance – Indemnity denied – Whether Misrepresentation

Heard: 13th & 14 November, November 2012 & 7th December, 2012

CORAM: JUSTICE DAVID BATTS

1. The Claimant is Mr. Andrae Bell. He alleges in his Particulars of Claim that on or about the 29th April, 2008 he entered into a Contract of Insurance with the Defendant. The essential term being that his 1997 International 4700/DT 466E motor truck registration number 7771 FG would be insured for one year from 29th April, 2008 to 28th April 2009. He alleges that notwithstanding the payment of his premium the Defendant failed and/or refused to honour the agreement to indemnify him after the truck was stolen in the course of a robbery on the 16th July, 2008.

2. The Defendant in its pleaded Defence admits that it did enter into such a Contract of Insurance with the Claimant and that it did refuse to indemnify the Claimant after a claim was made on the policy. The Defendant says it was entitled to refuse to indemnify the Claimant because:
 - a. The Claimant who proposed the policy of Insurance had misrepresented the fact that the vehicle was roadworthy when in fact it was damaged and unroadworthy.
 - b. The Claimant had failed to disclose the fact that the vehicle had been damaged in a motor vehicle accident and had not been repaired.
 - c). The Claimant fraudulently staged a theft of the motor vehicle when in fact no theft took place.
 - d) The Claimant conspired with the previous owner Michael Powell and/or Paul McIntosh
 - e) The Claimant falsely stated the value of the motor vehicle
 - f) The Claimant falsely made a claim when he suffered no loss whatsoever.
3. That being the state of the pleadings this was a case in which the Defendant might well have been asked to go first because the resolution of the issues will depend on whether the Defendant can prove that the Claimant breached the policy and/or his duty to the Defendant in the manner they alleged. In the result the Defendant was not asked to go first and the trial proceeded in the normal order.
4. On the first day the Claimant's attorney applied for relief from sanctions. A Notice of Application was filed on 4th May, 2012 but no date for the hearing had been assigned. The relief was required because the Claimant had been ordered on the 19th December, 2011 to pay security for costs of \$500,000 into court within 120 days failing which the claim would stand dismissed. The sum was paid on or about the 17th April, 2012. The Claimants counsel submitted that if vacation dates and public holidays were deleted from the calculation the Claimant was

within time. If they were not they were a few days out of time. His affidavit supporting the application details the effort made to make the payment and explains that the Claimant had remitted the money in time but there were bureaucratic related reasons for the delay in making the payment into court. He pursued this application for relief *ex abundante*. The Defendants attorney made no submissions in opposition to the application but did not consent.

5. Having considered the application I agree with the Claimant's Counsel and find that it is an appropriate case to extend time and grant relief. I bear in mind the efforts made to make the payment in and the fact that the Defendant will suffer no prejudice whatsoever. I therefore made an order in terms of the Claimants notice of application filed 4th May, 2012.
6. The trial thereupon commenced. Mr. Kinghorn advised the Court that certain documents were to be admitted by consent and 12 exhibits were therefore noted and marked as Exhibits 1 to 12 by consent. These were:

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| Exhibit 1 | Insurance Premium Finance Agreement dated 29 th April, 2008 |
| Exhibit 2 | Receipts evidencing purchase of motor vehicle 26 th April, 2008, 29 th April 2008 |
| Exhibit 3 | Motor vehicle Registration Certificate |
| Exhibit 4 | Certificate of fitness |
| Exhibit 5 | Motor Vehicle Certificate |
| Exhibit 6 | Letter dated 13 th October 2008 from JIIC To Andrae Bell |
| Exhibit 7 | Letter dated 13 th October 2008 from JIIC to the Fraud Squad |
| Exhibit 8 | Statement of Michael Powell with questions and answers taken 3 rd September, 2008 |
| Exhibit 9 | Resume of Paul McIntosh |

Exhibit 10 Motor damage Assessment Report prepared by Advanced Insurance Adjusters Ltd. dated 5th February, 2008

Exhibit 11 Assessment Worksheet prepared by Advanced Insurance Adjusters Limited

Exhibit 12 Motor Valuation Report dated 28th April 2008 prepared by Advanced Insurance Adjusters Ltd. together with valuation worksheet.

7. The Claimant Andrae Bell gave evidence. His witness statement dated 3rd November, 2011 was allowed to stand as his evidence in chief. An application to amplify was granted. He identified Exhibit 12 being a Motor valuation Report dated 28th April, 2008 prepared by Advanced Insurance Adjusters Ltd. He stated that it was the valuation he submitted to the Defendant insurance Company to obtain insurance on his vehicle. He also identified Exhibit 5 Motor Vehicle Certificate of Title and Insurance as the "Policy" of Insurance he received from the Defendant.
8. The Claimant was then cross examined. He stated that he knew Michael Powell as they had both grown up in the same community. He did not know Michael Powell when he was driving the truck but before. He learnt the truck was for sale while having a drink with friends in Linstead and one of them suggested he check with Mr. Michael Powell who had a truck for sale. He first saw the truck in mid April 2008 in Commodore, Linstead. He inspected it and observed nothing unusual. He did not have a mechanic inspect it because he grew up around vehicles and therefore had 'some knowledge'.
9. He said when the truck was stolen in 2008 he made a report to the police. The police took a statement from him. He said he kept a copy. He was asked where it is and responded-

"Not sure but if I go home and search I should be able to find it."

He promised to do so and return on the following day with it.

10. Cross Examination continued and he indicated that he could not say where the officers who came to the scene of the robbery were located as they came after he called 911.
11. The Claimant was then asked whether he was present when the assessor assessed the vehicle (Exhibit 12). He said no. Nor did he retain Advance Insurance Adjusters Ltd. to value the vehicle. Mr. Michael Powell took his information and got the vehicle valued. He made the initial payment of \$400,000 on the 26 April, 2008. He took possession of the vehicle after the valuation. He has not yet made the final payment on the vehicle. That final payment was to be \$80,000. The last payment was made on a date he could not recall but it was after the date when he received the valuation.
12. The Claimant says he received the valuation Exhibit 12 from Mr. Powell. He looked at the valuation. He did not find it strange that he was noted as owner on the valuation because he had given Mr. Powell his information and he came back with his information on the valuation. He was only legally registered as owner after the valuation was done. The final payment of \$80,000 was agreed to be made in September 2008. He did go to the tax office to register after insurance was obtained. The cross examiner then asked to adjourn as he had no further question save to ask the witness about the document he had promised to produce on the following day. It was approximately 11:15 a.m. The court adjourned but ordered ½ days costs in favour of the Claimants.
13. The matter resumed on the 14th November, 2012 and counsel for the Defendant indicated that he had some other questions he wished to ask. He asked the witness if he was once employed to the tax office in Linstead and this was denied. The witness stated that he did work at the tax office in Linstead and stopped working there in December 2007. He was asked whether he recalled on the previous day confirming that he knew Mr. Powell and that he was a childhood friend. The witness responded,

“Not friend but I knew him.”

14. He was then asked whether on a previous occasion he had stated that he did not know Mr. Powell when he purchased the truck from him. He responded in the affirmative. He was asked whether that statement was correct and he said it was. He was asked why does he say that having regard to his testimony now. The witness responded as follows:

“All in context. The way I understand the question is as if I knew him, he is my friend.”

15. There then followed this exchange:

Q: “I did not ask if you knew him as a friend. I ask if you knew him since childhood.”

A: That is correct.

Q: On the previous occasion when you were asked do you know Mr. Powell and you said no, which context did you understand.”

A: I understand it to mean as a personal friend and I said no.

Q: You do agree that the question was simply do you know Mr. Powell

A: Yes”

16. He was then cross examined about his work at the tax office and it emerged he was actually a HEART trainee at the time.

17. The witness was then asked about the copy of the statement he had promised to look for and produce. He answered as follows:

“I misunderstood the question. What I have and what I thought you meant is a copy I wrote while I was at the station. A police report was not issued to me. I went by the station yesterday. I spoke to the officer that took the statement and he explained to me that such a document would not be issued.”

The cross examiner then asked,

“What did you misunderstand?”

The answer,

“You ask if I have a copy of the statement. The copy I have is my notes I have which I made while at the station.....

“The copy I had in my mind is what I wrote.”

It was suggested to the witness that it was not true that the vehicle which was robbed is the same vehicle purchased from Mr. Powell. It was also suggested that the vehicle he claimed to purchase was not roadworthy, and that when he indicated to the Insurance Company that it was roadworthy it was not, also that he was not telling the truth when he indicated to the Insurance Company he had purchased it. It was suggested that the vehicle he claimed to purchase was in no condition to drive. All suggestions were denied.

18. There was no reexamination. An application to amend the Particulars of Claim was made and granted in terms of Notice of Application dated 12th November, 2012. An exhibit 14 [actually incorrectly labeled as this was the 13th exhibit] was put in by consent. It is the Endorsement to Policy #167390 dated 29th April, 2008.
19. The Claimant applied to amend his particulars of claim in terms of Notice of Intention to Amend Particulars of Claim filed on the 12th November, 2012. This was granted without objection from the Defendant. The case for the Claimant was then closed.
20. The Defendant's first witness was Mr. Carl Michael Webster. The Claimant's counsel indicated he had some objections to aspects of Mr. Webster's witness statement and he wished them taken in his absence. The witness was asked to wait outside. After hearing submissions from both sides and that the objections had been made before a judge in chambers who ruled that they were best taken before the trial judge I ruled that, the offending paragraphs be struck from the witness statement on the ground that
 - a) This witness was not called as an expert witness

- b) He was not entitled to give evidence of a document (photograph) which was not in evidence.
- c) He was not entitled to give that type of opinion evidence as there was no suggestion that he had any expertise in photography.

The section of the statement commencing "In combing" all the way to the section ending with the words "28th August 2008 at Lindsay Crescent" was therefore ordered struck out.

- 21. Mr. Carl Michael Webster was then called to give evidence. I disclosed to the parties that having seen the witness I recall using him as an expert witness many years ago whilst I was in private practice. Neither party had any objection to the matter proceeding.
- 22. Mr. Webster was then sworn and stated that he is an Insurance Loss Adjuster, Accident Reconstructionist and Forensic Damage Appraiser. He is the Managing Director of Advanced Insurance Adjusters Ltd and owner of the Company.
- 23. He identified his witness statement and was asked to use his pen to put a line through those parts of it which the court had ruled were inadmissible evidence. The Amended Statement was thereafter allowed to stand as his evidence in chief. The statement is to the effect that in 2008 Paul McIntosh was contracted to Advanced Insurance Adjusters Ltd. as an Inspector of Motor Vehicles. His duties included inspecting motor vehicles and preparing a valuation Report as well as Assessment Reports on damaged vehicles detailing loss, replacement cost and feasibility reports. The witness detailed the company's guidelines for the preparation of such reports. In January 2008 Mr. McIntosh was assigned to inspect and assess the damage to an International Box body motor truck engine #468 GMV65542 registration number CF7761 registered to Michael Powell. That upon completing the report Mr. McIntosh uploaded digital photographs of the truck and prepared a motor damage assessment report. The truck was treated as a constructive total loss due to the high cost of repairs and the possibility of supplemental charges in comparison to the value of the truck. Mr. Webster

further stated that on the 28th April 2008 Mr. McIntosh was instructed to attend premises at Lindsay Crescent Kingston 10 to value a fleet of vehicles. He received no instructions in relation to an International Box truck. In August 2008 Mr. Webster stated that he became aware that Mr. McIntosh had conducted an unauthorized "valuation exercise" of a motor truck when he received certain information concerning a claim made against the Defendant by the Claimant. He had never seen the report prior to his conversations with the Defendant Company. He 'discovered' a receipt created in the name of Andrae Bell. He noted a peculiarity on reviewing the motor valuation report as the odometer reading was the same on 5th February, 2008 as it was on April 2008 that is \$541,234. He stated that Mr. McIntosh was no longer employed to the company as his services were terminated on the 25th August 2008 as a direct result of "my confirmed knowledge of his involvement in the material unauthorized inspection and production of an unconventional motor valuation report."

24. The Defendant's Counsel was granted permission to amplify the evidence. He was shown exhibits 10 and 12 being 2 Loss Adjuster reports. He stated that these were the 2 reports he referred to in his witness statement but,

"The report dated 28th April 2008 does not contain the photograph that I had seen attached to it when I gave my witness statement."

The witness was asked to say what was meant by "constructive total loss" and stated that,

"Normally means that there is sufficient equipment left behind on the vehicle that the vehicle could be capable of restoration."

The witness was then asked when he used the words "constructive total loss" in his witness statement what did he mean. The witness said,

"it means there is possibility that vehicle could be restored but time element is a different matter."

25. The witness was then asked "what you mean by time?" However I ruled that the witness was to give no opinion evidence as he had not been called as an expert

witness and in any event had not examined the truck in question so his opinion in that regard would be speculative.

26. Mr. Webster was then cross examined by the Claimant's Counsel. He could not say whether he had personally assigned Mr. McIntosh to do the assessments. He was asked no further questions.
27. The Defendant then called Marcia Sellers. She was sworn. An objection was taken to Para. 7 of her statement and the Defendant's Counsel agreed it was hearsay. The witness identified her witness statement dated 8th November 2011 and it became her evidence in chief as amended. She was shown Exhibit 14 and identified it as an endorsement to the Policy of Insurance. Her witness statement details the importance of the proposal form to the policy of insurance and that the proposer signs to the truth of its contents. It acknowledges that on 29th April 2008 the Claimant submitted a proposal for Insurance which represented that the motor truck in question was valued at \$2,100,000.00 and was roadworthy and in good condition. It was supported by a Motor Valuation report dated 29th April, 2008 from Advanced Insurance Adjusters Ltd. On 25th July 2008 the Claimant submitted an incident report indicating that the motor vehicle had been stolen on the 16th July 2008. Investigators were appointed and the Defendant subsequently received the report of Binoc Visions Investigators Limited. Having read the report and statements that were taken a decision was made to deny indemnity to the Claimant. The matter was also referred to the Police Fraud Squad.
28. The witness was then cross-examined by Claimants Counsel. She admitted that on the 29th April 2008 the Claimant and the Defendant entered a policy of insurance. It was a term of the policy that upon the insurance premium of \$273,775 being paid the Defendant would effect motor vehicle Insurance Coverage on motor vehicle registration number 7771 FG. It was further agreed that in the event of the vehicle being stolen 5% of the insured value of \$2.1 million would be borne by the Claimant. The witness was asked what was the

usual time for claim settlement where a vehicle was stolen. The answer was up to 3 – 4 months although they try to settle within 2 months. She confirmed that the Insurance Company had a list of approved loss adjusters and that in 2008 Advanced Insurance Adjusters was on that list. Advanced was still on that list.

29. The witness was shown Exhibits 6 and 7, and was asked whether she still stood by the contents of the letters. She said yes. She was also asked whether she would be surprised to learn that the Claimant had not been arrested or charged by the Fraud Squad, she responded.

“Not surprised based on level of investigation our police do sometimes.”

30. The witness was asked why have they not presented the results of Binoc Investigations to the Court and responded,

“For us, we presented all the information to our attorneys.”

There was no reexamination of the witness. The case for the Defendant was then closed.

31. The Defendants Counsel submitted in his closing address that the court should have regard to the assessor’s reports of 5th February 2008 (exhibit 10) and 28th April 2008 (Exhibit 12) and infer that it was impossible to do those repairs in 3 months. Further that the Claimants evidence was discredited because he gave inconsistent evidence about “knowing”: Mr. Powell and he had lied when he said he had a copy of his statement to the Police. On the question of damages he submitted that no evidence was put before the court to support the alleged loss of income and that in the absence of documentary proof this should be disallowed in its entirety. An interest rate of 21.839% was agreed.

32. I indicated to Counsel for the Claimant that I only needed to hear submissions on the question of lost earnings. In this regard counsel submitted that the claim to lost earnings was not unreasonable. Counsel candidly indicated that the Claimant was not entitled to interest as well as loss of earnings for the same

period. Lost earnings were only applicable for the 3 – 4 months period it would normally take to settle the claim. Interest applies on the value after 3 months.

33. The parties were asked and agreed to submit the interest calculation. This did not indicate consent to the award only to the accuracy of the calculation.
34. I did not need to hear from the Claimant on the issue of liability because at the end of the day there was no evidence before me to challenge the case for the Claimant. He stated that he purchased this motor truck from a Mr. Powell. Mr. Powell commissioned someone to do the valuation. The witness was not asked why Mr. Powell commissioned the valuation but it is not so unusual as to lead to any adverse inference. He may have required it to support the agreed price for the truck. This is not unusual when parties are contracting to purchase secondhand motor vehicles. Certainly that fact is not sufficient to lead to a finding of fraud. Further there is no evidence the Claimant ever saw the report of the 5th February, 2008 Exhibits (10 and 11). Nor is there evidence that repairs were impossible. Indeed the term “constructive total loss” which appears in the report of the 5th February 2008 suggests that repair is possible as per Mr. Webster’s evidence. The time to do those repairs are a function of the money spent, the number of parts replaced and the intensity of work put in.
35. Having seen and heard the Claimant Andrae Bell give evidence I accept him as a witness of truth. I accept that he purchased the vehicle for the price agreed and that he insured it and was held up and robbed in the manner described in his witness statement. It appears to the undersigned in any event that the fact, as it seems is the case, that Mr. Paul McIntosh did a valuation without the approval or knowledge of his employers is hardly sufficient cause to impute fraud on the Claimant. That Mr. McIntosh may have been in some unlawful relationship with Mr. Powell is speculative but in any event does not without more taint the Claimant.

When regard is had to the serious allegations made against the Claimant in this matter this court is rather surprised at the paucity of evidence adduced by the Defendants.

36. I therefore find for the Claimant on the claim and that the Defendant is in breach of its Contract of Insurance.

37. As regards damages I considered the evidence of the value of the vehicle and the terms of the Contract of Insurance, as put in evidence and as stated by Marcia Sellers. I accept that the truck will have earned something for the Claimant and that any earnings will have been reduced for taxes as well as the necessary expense i.e. cost of fuel and servicing that goes with the operation of a truck for haulage. I therefore reduce the amount of \$150,000 to \$90,000 to take this into account.

38. I therefore assessed damages as follows:

a).	Value of motor vehicle (\$2,100,000.00) Reduced by 5% for Insurance Excess	\$1,995,000.00
b).	Lost earnings for 3 months \$90,000.00 x 3	\$270,000.00
c).	Interest on \$1,995,000.00 for the period 28 th October, 2008 to 14 th November, 2012 @ 21.83 % to being	\$1,767,084.77.00

39. Judgment will therefore be entered for the Claimant in the amount of \$3,032,084.77. An amount of \$500,000 was paid into Court by the Claimant as security for the Defendants costs and I order that that sum be released to the Claimant along with any interest thereon.

40. Costs to the Claimant to be taxed if not agreed.