[2012] JMSC Civ. No. 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 00574

BETWEEN	**ADVANTAGE GENERAL INSURANCE CO. LIMITED**	**CLAIMANT**
AND	**SHAWN MYRIE**	**DEFENDANT**

Mrs. Suzette Campbell instructed by Campbell & Campbell for Claimant
Ms Martina Edwards instructed by SHELARDS for Defendant

Heard: September 20, 21; December 21, 2011 and 17th February, 2012

Insurance company seems to avoid liability as a result of Defendant's allege breaches of insurance policy – Court to decide if the Defendant have an insurable interest in motor vehicle

Coram: D.O. McIntosh, J

The Facts

[1] The Claimant, Advantage General Insurance Company Limited, is seeking a declaration from the court that the Defendant has breached a policy of insurance numbered 251781/001 issued by the company to the Defendant and which provided coverage for the Defendant's Toyota Sequioa motor vehicle.

The Claimant alleges that the policy of insurance has been breached by the Defendant for the following reasons:

(1) The Defendant sold the vehicle to his brother Jody Myrie and therefore had no insurable interest in it prior to it being stolen.

(2) He failed to inform the Claimant that he had sold the vehicle and is therefore in breach of the policy of insurance which requires him to give full disclosure of all matters relating to the vehicle during the period of the policy.

(3) The vehicle was covered under a private motor policy of insurance but it was being used for and in the business of a duly incorporated company, Joshan Blocks, which has a different legal personalty from the Defendant.

(4) The Defendant is in breach of the warranty given as to the truth of all statements made by him on the proposed form at the time he applied for insurance.

The Claim was begun by Fixed Date Claim Form:

(a) Mr. Justice Brooks at the pre-trial review on the 4th October 2010 ordered that the claim was to be treated as if started by claim form; and

(b) The Affidavits filed and deposition taken shall stand in the place of pleadings and witness statements.

Claimants Submissions

Insurable Interest

[2] The basis on which the motor vehicle policy of insurance was issued was that the Defendant Shawn Myrie was the owner and had an insurable interest in the Toyota motor vehicle licenced 4355 ER.

Is it/are they registered in your name

It is an accepted principle of insurance law that if the insurer has undertaken to indemnify the assured against a pecuniary loss caused by or arising from particular risks, an interest in the thing insured is required.

MacGillivray on Insurance Law has defined an insurable interest as '***the insured's pecuniary interest in the subject-matter of the insurance.'*** The text went on to say that to establish an insurable interest ' the insured must be so situated that he will suffer economic loss as the proximate result of damage to or destruction of the property.'

[3] In **Routh v Thompson** (1890) 11 East 428, 433 the court described an insurable interest as possession of a legal or equitable right in property.

The English courts have gone on to hold that a bare legal title either to land or goods does not necessarily give the holder an insurable interest. **Kenneth v. Boolara Butter Factory Pty. Ltd.** (1953) VLR 548, 554. However mere possession could, since possession in English law is a root of title which is only defeated by a claim from the true owner.

[4] In the instant case, the Defendant, Shawn Myrie, claims that he was the owner of the Toyota motor vehicle prior to his application for insurance coverage

and up to the time of the loss of the vehicle in October 2006. He however, has not been able to prove this.

[5] In cross examination it was admitted by Ms Ruthann Morrison for the Claimant that it was likely the company would have seen the certificate of title at the time the Defendant applied for insurance. However the company does not and did not keep the original certificate of title. It is therefore possible that the Defendant could have sold or parted with ownership of the vehicle without the knowledge of the insured.

[6] The certificate of title presented to the court and on which the Defendant seeks to rely to prove his ownership and insurable interest, is a mere photocopy. It is submitted that the court cannot rely or act on this photocopy document to prove ownership of the vehicle, as only the original certificate duly endorsed with the Defendant's name would indicate he was the registered owner up to October 2006 when the vehicle was stolen.

[7] No effort has been made by the Defendant to account for the absence of the original certificate, except to say that he does not have it and the court is left to speculate as to what has become of the original certificate. The court must therefore find that as a matter of fact the Defendant has not proved himself the legal owner of the Toyota motor vehicle.

[8] Additionally the photocopy certificate of title presented to the court bears an endorsement indicating the Defendant's intention to transfer the vehicle in July 2006. When challenged on this the Defendant claims that he had been

negotiating the sale of the vehicle to a Heron Thompson but the sale was never completed.

The court is urged to reject this explanation for the following reasons:

(1) The bill of sale containing the terms of the proposed sale of the vehicle to Heron Thompson was never delivered to Mr. Thompson. The Defendant admits in his own evidence that he destroyed the bill of sale.

(2) Mr. Heron Thompson was never called to give evidence regarding the alleged purchase of the vehicle and therefore the Defendant's position is unsupported by any evidence.

(3) If the Defendant is to be believed, the sale was not concluded as Mr. Heron Thompson could not get financing, yet the Defendant did the final act, of endorsing the certificate of title for transfer of the vehicle.

[9] It is submitted, the court should find that the more provable explanation is that the Defendant sold the vehicle to his brother Jody Myrie, who by the Defendant's own admission had assisted in the preparation of the bill of sale. As stated by the Defendant to the insurance investigator, the transfer was not registered up to the time of the theft of the vehicle. It would have been unnecessary to rush to do so since Jody already had possession and custody of the vehicle and likely would have been satisfied to keep the certificate of title with the transfer endorsed on it, without doing the actual transfer given the relationship between himself and the Defendant.

[10] The clearest evidence that the Defendant had no insurable interest in the vehicle is contained in his statement to the insurance investigator and the viva voce evidence of the investigator given by deposition. The investigator Anthony Clarke states in his deposition that the Defendant informed him that prior to the theft of the vehicle it was sold to the Defendant's brother Jody Myrie. Mr. Clarke prepared a statement containing the information given by the Defendant to which the Defendant has signed. Albeit, the Defendant is contending he did not give the information or sign the statement (since his signature only appears at the end of the statement and not on each page) the court is asked to find that he did for the following reason:

(1) The court has consistently held that where a person signs a statement he is deemed to have adopted the contents of the document. Once the signature is affixed to the document there is a presumption not only that the signatory intended to sign but also that he adopts the contents of the statement. In both instances the burden of displacing the presumption is on the signature. **Saunders v Anglia Building Society** (1971) AC 1004.

[11] In the instant case the Defendant does not contend that he did not sign the statement but that he was unaware of its contents at the time he signed. It is submitted that this is not sufficient to rebut the presumption that he had an intention to sign and that he adopted the contents by signing.

[12] The English Court in **Foster v Mackinnon** (1971) AC 1029 held that there is a duty on every signatory of documents to act as a reasonable man in finding

out the contents before signing. Where he has failed to do so he has acted negligently and cannot rely on a plea of 'non est factum' and is bound by what he has signed. The dicta of Lord Wilberforce in the case is instructive:

> *In my opinion, the correct rule is that … **leaving aside negotiable** instruments to which special rules may apply, a person who signs a document, and parts with it so that it comes into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs.*

His sentiments were echoed by Lord Reid, who stated:

> *The plea [of non est factum] cannot be available to anyone who was content to sign without taking the trouble to find out at least the general effect of the document … It is for the person who seeks the remedy to show that he should have it.*

[13] It seems it was only after signing and then speaking to his brother Jody on the telephone that an issue arose as to the contents of the statement. It is submitted that having been given an opportunity to find out the contents of the document, having signed it and returned it to the insurance investigator the Defendant cannot now claim that its contents are untrue and that he is not bound by it. It is important to note that at two sections in the statement the Defendant says the vehicle was sold to his brother.

[14] The court is also asked to consider the following and arrive at a conclusion that the vehicle was sold prior to its theft.

The precise information contained in the Defendant's statement regarding the sale price of the vehicle, the approximate date of sale, the person to whom it was sold could only have come from a person with intimate knowledge regarding the vehicle. It can hardly be coincidental that the Defendant states he paid three million dollars for the vehicle at the time it was bought in 2005 and the price at which it was sold, two million nine hundred thousand dollars ($2,900.00) barring accident or destruction, would be its approximate value a year later. It is unlikely the investigator would have been in possession of such precise information if he had not be so informed by the Defendant.

There was no suggestion that the purchase price had not been paid in full, which would have given the Defendant an insurable interest in the vehicle until the sale price was fully paid.

The Defendant refers to himself in his statement to the investigator as the 'registered owner' the obvious and reasonable inference being that while the legal title maybe in his name that actual owner is not himself. It should be remembered that the certificate of title for the vehicle was endorsed by the Defendant for transfer.

When asked how many vehicles he owns, the Defendant does not refer to the Toyota Sequioa as being owned by him.

[15] Even if the court was to disregard all the matters set out above, which it's submitted the court cannot do, there is additional and ample evidence before the

court which can only lead to one conclusion, that is the Defendant had no insurable interest in the vehicle at the time of its loss.

[16] It must be recalled that the legal definition given of 'insurable interest' is that the owner or person with the insurable interest must be at risk of suffering or has suffered some pecuniary or financial loss as a direct result of the loss of the item insured.

[17] It is submitted that the actions of the Defendant do not suggest that he had suffered or was at risk of suffering any financial loss due to the theft of the vehicle.

[18] Quite apart from the admission by the Defendant that he had sold the vehicle, there is other evidence from which it can be reasonably inferred that the Defendant had parted with an insurable interest in the vehicle.

> He was without custody and possession of the vehicle from the time it was insured to the date of its loss. Note Jody Myrie in cross examination states he was the first person to drive the vehicle following its purchase, Jody says in his Affidavit to the court:
>
> ***Paragraph 17: 'I told the investigator that I had custody of the vehicle at the time it was stolen. By this I meant I was the one driving the vehicle <u>most of the time</u>.'***
>
> ***Paragraph 19: … I said that I had control of the Defendant's vehicle at the time it was stolen because <u>I was driving the vehicle a lot through quarries and gullies etc.</u>***

The Defendant had no access to the vehicle given that the sole key was in the possession of Jody Myrie.

The Defendant did not find out about the theft of the vehicle until the day after its theft, whereas the Defendant's brother was immediately informed by the driver, of the theft of the vehicle.

The driver of the vehicle at the time of its loss Rohan Dillon, attended the home of the Defendant's brother Jody Myrie to inform him of the loss of the vehicle rather than to the Defendant.

At no time did the Defendant attend on the Claimant to notify them of the loss of the vehicle. In fact the motor claim form reporting the theft was only signed by him in March 2007 some six months after the theft of the vehicle and only after the Defendant had to be notified by his brother to report the loss.

In the statement to the investigator the Defendant says" '*Jody who manages the business handled everything.'* This must be deemed questionable conduct by a person with a pecuniary interest in the vehicle who makes no effort to secure his own financial position but relied on someone else without an interest to do so. Further the words used by the Defendant would suggest that the vehicle was deemed an asset of the business rather than his personal possession.

No action was taken by the Defendant to enforce the policy of insurance or to recover an indemnity under the policy, until the claim herein was filed by the Claimant in 2009, three years after the theft of the vehicle.

Consequence of Lack of Insurable Interest

[19] In **Macuaura v Northern Ass. Co**. (1925) AC 619 the English Court of Appeal held that an insurer is entitled to raise a defence that the insured person either has no interest at all or an interest insufficient to constitute an insurable interest in law. If the insured person has no interest at the time when the event insured against occurred, he cannot recover anything under an indemnity policy. The policy of insurance is not void but merely unenforceable by the insured.

[20] The inescapable conclusion from the actions of the Defendant, his statement to the investigator and the evidence before the court is that the Defendant had no insurable interest in the toyota motor vehicle at the date of its loss and therefore is not entitled to an indemnity under the police of insurance.

Liability covered/Limitations on use

[21] An insurance company cannot be made liable for losses which occur while the vehicle insured was used for a purpose outside the policy terms. In the instant case the limitations as to use of the vehicle was as follows:

Use in connection with the insured's business

Use for social, domestic and pleasure purposes

The policy specifically excludes use for commercial traveling.

[22] In **Pailor v Co-operative Insurance Society** (1930) 38 LI. L. R. 92 it was held that where the permitted user extends to cover not only social, domestic and pleasure purposes but to business or professional use by the insured, as in the instant case, such clauses must be construed strictly and does not extend to business use by the permitted driver.

[23] Thus in **Browning v Phoenix Ass. Co.** [1960] 2 Lloyd's Rep. 360 it was held that where the assured and another person were on the business of a firm by which they were both employed they were not covered by the policy.

[24] In the instant case the Defendant's Attorney sought to prove that the Defendant was not made aware of the fact that his vehicle was not covered for use in his business and that he did not understand the term '**use in connection with the insured's business'** which she submits was never explained to the Defendant by the Claimant or contained in any of the policy document given to him.

[25] The case of **The Insurance Company of the West Indies v Dalvester Wray** Suit No. C.L. 2000 1-051 is instructive. In that case Mr. Justice Anderson citing previous authorities held that there was no duty on an insurance company to bring to the attention of the insured or to explain to him the terms of his policy of insurance. <u>The only duty the insurer has to give the insured notice of the existence of the terms and give him the opportunity of finding out about them.</u>

In that case the judge found that the insured had been given the opportunity of finding out about the terms of his policy by virtue of the following clause which was endorsed on the proposal form signed by the insured.

> ***'I further agree to accept indemnity subject to the conditions in and endorsed on the Association's policy*.'**
>
> **<u>See pages 5-7 of the judgment</u>**

[26] In the instant case the proposal form contains an endorsement similar in terms to the one noted above. It reads:

'I/We desire to effect an insurance with the insurer in the terms, conditions and exceptions of the policy to be issued by the insurer.'

There is no dispute that the proposal form was signed by the Defendant. By virtue of this clause he was given the opportunity of finding out the terms of his insurance coverage and obtaining an explanation of the terms from the Claimant if he so required. He cannot therefore claim not to be aware of the meaning of the terms of the policy and that he was barred from using the vehicle for commercial travelling and in his business.

[27] The proposal form also contained the following clause which was accepted and signed by the Defendant.

'I agree that this proposal forrm … shall form the basis of the contract between me and the insurer and shall be deemed as incorporated in the policy to be issued.'

In cross examination the Defendant admitted that at no time, whether on the proposal form or otherwise, did he apply to the Claimant for coverage which would allow him to use the vehicle for commercial traveling or for business purposes. In fact he stated he knew the vehicle was not covered for use in his business.

[28] Contrary to his previous position, the Defendant was adamant he knew the terms of the policy which were explained to him by his broker and he knew the Toyota motor vehicle was not covered for use in his business.

The evidence given by both the Defendant and his witness is that the Toyota Sequioa was routinely used for the business of Joshan Blacks. It was used for traveling to and from quarries and gullies. In his Affidavit Jody Myrie states:

> ***'I was driving the vehicle a lot through quarries and gullies etc. depending on where the business would require me to go. As a result of how <u>frequently</u> I would have to drive the Defendant's vehicle to visit these hilly and rocky terrain during the course of our business, the Defendant and I discussed and agreed that the costs associated with servicing the vehicle should be borne by the business.***

Of importance is that on the very day of the theft, the vehicle was being used for business purposes.

Shawn Myrie says in his statement to the investigator:

> '***At the time of the [theft] the vehicle was in the possession of Rohan Dillon, a driver employed to Joshan Blocks Limited.***
>
> ***At the time of the theft Rohan Dillon was on company (Joshan Block) business.'***

Jody Myrie in his statement to the investigator says in relation to the theft of the vehicle:

> ***The driver Rohan Dillon had gone to the Manor Park Plaza to conduct business on behalf of Joshan Blocks at the First Global Bank.***

[29] The English court in **Farr v Motor Trader's Mutual Insurance Society** [1920] 3 KB 669 has said that if the vehicle is being used for a dual purpose

neither being predominant and one is permitted while the other is excluded then the policy ceases to cover the car.

The Claimant in the instant case is entitled to avoid the policy for breach of contract since the Defendant had in fact warranted that he would only use the vehicle only for the purpose covered by the policy and has not done so but was routinely using it for dual purposes.

[30] The decision in **Provincial Ins. Co. v. Morgan** (1933) 61 LI. L.R 240 is also instructive. The policy of insurance was breached as the vehicle insured for private purposes was routinely being used for business.

In such a case the insurance company is allowed to avoid the policy for breach of contract and will be discharged from all liability thereunder if the insured had warranted that the vehicle would be used only for the specified purposes.

[31] It is clear that the policy of insurance was breached as the vehicle was routinely being used for a purpose not covered by the policy and it is submitted the Claimant ought to be discharged from all liability under the policy.

The matter maybe taken a step further as the evidence shows that the vehicle was not being used for the business of the Defendant, but that of Joshan Blocks a company duly incorporated under the laws of Jamaica.

[32] In **Levinger v Licences & General Insurance Company Ltd.** (1936) 54 LI. L.R. 68 it was held that there was no coverage when the vehicle was being used for the business of a company although the insured owned the business.

The rationale behind this decision is that although the insured maybe the owner of the business he is a separate and distinct legal person under the law from a company and the business of the company.

Salomon v Salomon Company Limited (1087) A.C. 22

Applying the principle set out in **Levinger** it is clear that since the vehicle was being used for the business of Joshan Block there is a breach of the policy and therefore no coverage.

Effect of Warranty On Contract of Insurance

[33] The proposal form which is the basis of a contract of insurance usually contained a declaration that the statements given the insured person in application for insurance are true and that this declaration shall be considered as part of the policy of insurance. The effect of the declaration is to make the truth of the statements given a condition precedent to the liability of the insurer. A proposer, by signing it, signifies his agreement to it.

[34] In **Condogianis v Guardian Assurance Co. [1921]** 2 AC 125 the English Court of Appeal held that where the truth of the statements is made the basis of the contract, it is unnecessary to consider whether the fact inaccurately stated is material or not, or whether the applicant knew the truth or not.

This decision was accepted and applied in the Jamaican decision **Insurance Co. of the West Indies v Abdulhadi Elkhalili** SCCA No. 90 of 2006. At page 9 of the judgment the court said *a breach of warranty entitles the insurer to terminate the contract of insurance and avoid the policy.*

In the instant case the declaration signed by the Defendant on the proposal form is in the following terms:

> *I/We the undersigned, do hereby **declare** and **warrant** that the above answers which I/We have read over are **true** … I/We desire to effect an insurance with the Insurer in the terms, conditions and exceptions of the policy to be issued by the insurer. I/We agree that this proposal and any declaration form … shall form the basis of the contract between me/us and the Insurer and shall be deemed as incorporated in the policy to be issued.*

[35] By virtue of this the truth of the statements made by the Defendant on the proposal form is a condition precedent to the Claimant being liable to honour the contract of insurance.

Several of the statements given by the Defendant are untrue. They are as follows:

Proposal Question 12: *In addition to private and pleasure purposes, will the vehicle be used for*

> *(a) Professional and business purposes such as sales and the like – Response no*
>
> *(b) Any other purpose - Response no*

Truth: *The evidence is that from the beginning of the policy of insurance the Defendant's vehicle was being used for business purposes and commercial traveling.*

Proposal Question 1*: Do you own the vehicle?*

Response *Yes*

Truth: *The vehicle was sold by the Defendant during the policy term.*

Proposal Question 6: *Is the vehicle fitted with a radio, cassette, CD or other special accessories/fittings (not being part of the original factory make)?*

Response: *No*

Truth: *By the Defendant's response to the investigator the vehicle was fitted with a 400 watt bass amplifier (2 channel) and a 10 inch subwoofer bass speaker.*

The evidence shows that the Defendant's responses to the questions are untrue and he is therefore in breach of the warranty given as to the truth of all statements on the proposal form and cannot claim an indemnity under the policy of insurance.

Ancillary Claim

[36] An attempt has been made by and on behalf of the Defendant to counterclaim certain orders arising from the claim herein. It is submitted that this Ancillary Claim cannot be considered by the court.

Rule 18.5 of the Civil Procedure Rules 2002 provides that a Defendant may make an ancillary claim without the court's permission if it is filed before or at the same time as the defence.

In the absence of the above Ancillary Claim can only be made with the permission of the court.

[37] The Ancillary Claim herein was not filed with the Defence or any of the Affidavits filed on behalf of the Defendant. In fact it was filed on the 20th July

2011 after the case management conference pre-trial review and the first trial date of the claim.

The Defendant neither sought nor obtained permission to file the ancillary claim and it therefore cannot stand for consideration by the court.

In addition the Defendant did not serve the Ancillary Claim on the Ancillary Defendant and therefore cannot seek to obtain any order from the court in relation to it.

Defendants Submissions

[38] <u>The Issues</u>

7. It is important to note that the reliefs sought by the Claimant were not in the alternative and cannot be construed as such. Therefore they must not be read disjunctively but must be read conjunctively.

8. At Paragraph 9 of the Affidavit in support of the Fixed Date Claim Form filed on February 16, 2009, Mrs. Ruthann Anderson said that:

   <u>Paragraph 9</u>

   "… I verily believe that the Defendant is in breach of the policy of insurance issued to him as he failed to act with utmost good faith and to disclose to the Claimant that he had sold the said motor vehicle and no longer had an insurable interest in it."

9. The purpose of the Affidavits filed in support of the Fixed Date Claim Form is to define the issues in contention between the parties. See **Esso Petroleum v Southport** [1956] AC 218.

10. Each party must plead the material facts on which he means to rely at the trial. No averment must be omitted which is essential to success. See **West Rand Co. v Rex** [1905] 2 KB 399.
11. From the material facts alleged in both Affidavits filed in support of the Fixed Date Claim form, it is my submission that the case which the Defendant must meet and the only issue to be determined by the court at trial is:-
    (1) Whether at the time of the theft, the Defendant was the owner of the vehicle or did the Defendant sell the vehicle to his brother prior to it being stolen? Or in other words
    (2) Did the Defendant at the time of the theft have an insurable interest in the vehicle?
12. There is no issue before the court as to whether or not, at the time of the theft; the Defendant was using his vehicle in violation of his insurance policy.
13. Likewise, there is no issue before the court as to whether or not the Claimant is entitled to avoid the insurance policy on the ground that the Defendant was using his vehicle for commercial purposes at the time of the theft.
14. The only issue before the court, as disclosed by the Affidavits filed in support of the Fixed Date Claim Form is whether the Defendant's vehicle was sold at the time it was stolen.

At the time of the theft, was the Defendant the owner of the vehicle or did the Defendant sell the vehicle prior to it being stolen

The Insurance Policy and the motor vehicle certificate of title

15. The Defendant's case is that he is and was the owner and the registered owner of the vehicle at all material times. The Defendant has never transferred ownership of the vehicle to anyone.

16. The vehicle was purchased by the Defendant in 2004 and the Defendant obtained a Certificate Title for the vehicle issued in his name: **see Exhibit 10.**

17. A motor policy insurance certificate was issued by the Claimant to the Defendant providing insurance coverage for the vehicle for the period November 30, 2005 to November 29, 2006: **see Exhibit 5.**

18. On the motor insurance proposal form marked as **Exhibit 3,** in response to question 1 on the proposal form ("do you own the vehicle?") and ("is it registered in your name?"), the Defendant answered affirmatively to both questions.

19. The Defendant contends that at the time of completion of Exhibit 3 and at all material times, his affirmative answers to question 1 are and were true representations of fact and he is and was the registered owner of the vehicle.

The statement given by the Defendant to the Claimant's investigator

20. In the Affidavit of Ruthann Anderson filed on the 16th February 2009

in support of the Fixed Date Claim Form, Mrs. Anderson said that after it was reported to the Claimant that the vehicle was stolen, the Claimant appointed an investigator, Mr. Anthony Clarke who interviewed the Defendant regarding the circumstances surrounding the theft of the vehicle. During that interview, Mr. Clarke took a statement from the Defendant: **see Exhibit 8**.

21. Page 1 of that statement contains a sentence that the vehicle was sold to the Defendant's brother Jody Myrie. However, it is important to note that nowhere in that statement is it expressly stated that '*at the time of the loss or at the time the vehicle was stolen. It was already sold to the Defendant's brother.'*

22. In fact the statement does not state exactly when the vehicle was allegedly sold to the Defendant's brother Jody Myrie. In his evidence in chief the Defendant says that he was never given the first page of the statement to read before he was told to sign the second page of the statement at the places marked by Mr. Clarke with the letter "X". As such, the Defendant's signature or initial does not appear anywhere on the first page of the statement in line with standard and correct practice.

23. The evidence given under cross examination by the Claimant's Investigator, Mr. Anthony Clarke is far reaching.

24. Subsequent to signing the second page of the statement as instructed

by Mr. Clarke, the Defendant says that he discovered that the first page of the statement did not reflect the true and full facts of what he actually told Mr. Clarke.

25. The Defendant maintains that his vehicle was not sold to his brother at the time that it was stolen.

26. The Defendant says that on his insistence, Mr. Clarke included a paragraph on the second page of the statement which states that there was no actual sale of the vehicle to the Defendant's brother. However, it must be noted that this paragraph does not appear anywhere in the typed written statement which is referred to at Paragraph 8 of the Affidavit of Ruthann Anderson which was filed and served in support of the Fixed Date Claim Form on February 16, 2009.

27. The Defendant submits that it was never his intention to sign a statement to the effect that at the time he sustained the loss the vehicle was sold to his brother as this was clearly not the case. Therefore, so far as that statement is concerned, the Defendant pleads non est factum.

28. In the case of **Foster v Mackinnon** (1868 – 69) L.R. 4 C.P. 704, Byles J said that if the mind of the signor did not accompany the signature: in other words, that he never intended to sign, and therefore in contemplation of law never did sign the document to which his name is appended then that document is invalid and

completely void in whosoever hands it may come. The decision in **Foster v McKinnon** was confirmed by the Court of Appeal in the case of **Carlisle and Cumberland Banking Company v Bragg** [1911] 1 K.B. 489.

29. In **Foster v McKinnon** the Defendant was only shown the back of a Bill of Exchange which he signed. Similarly in this case, it is contended that the Defendant was only given the last page of the statement to sign which explains why his signature does not appear on the first page of the statement which contains the false allegation that the vehicle was sold at the time that it was stolen. On this basis, it is submitted that it was never the Defendant's intention to sign a statement which was essentially different from that which he intended to sign.

30. Placing great reliance on the dictum of Byles J in **Foster v Mackinnon,** in the circumstances, the Defendant will submit that the statement taken by Mr. Clarke is invalid and void and cannot be relied upon. The Defendant therefore asks the Court to find as a matter of fact that the vehicle was not sold at the time of the theft and that he was not in breach of the policy.

31. It is an undisputed material fact that the Defendant holds the certificate of title for the vehicle. Therefore it is submitted that since the Defendant is the registered owner of the vehicle this is clear and convincing evidence that he has effective legal control of the vehicle.

32. It is further submitted that when a vehicle is sold invariably it will change registration. The new purchaser who has not acquired a financial interest in the vehicle will complete section II of the Motor Vehicle Certificate of Title – application for transfer of motor vehicle and register a transfer of owner ship of the vehicle with the Collectorate of Taxes. This is exactly what took place in the case of **Motor and General Insurance Co. Ltd. v Narine et al** (2003) HC 149 (TT) where a motor vehicle changed registration four times. However, this was clearly not the case here. In this case, the vehicle has never changed registration; there was never any transfer of ownership as proof that the vehicle was sold at the time that it was stolen. It is inconsistent that the vehicle was sold but yet the actual title was never transferred from the Defendant to the new purchaser.

33. Accordingly, I would invite the court to find that the vehicle was not sold at the time the Defendant sustained the loss and therefore it cannot not be said that the Defendant was in breach of the policy on the basis that he no longer had an insurable interest in the vehicle at the time of the loss. In doing so, it is submitted that the Court would be acting in accordance with the overriding objective.

Did the Defendant at the time of the theft have an insurable interest in the vehicle?

34. The Defendant's case is that he had an insurable interest in the vehicle at the time the vehicle was stolen.

35. In the case of **Beatty v USAA Cas. Ins. Co.** 330 Ark. 354, 954 S.W. 2d. 250 (Ark. 1997 it was held that ownership of property is not required to recover on an insurance policy covering the property, the insured must have an insurable interest.

36. It is indeed a cardinal principle of insurance law that a person could not recover for a loss in respect of a subject matter in which he no longer had an insurable interest: **Castellain v Preston** [1883] 11 QB 380 (CA).

37. An insurable interest exists where the insured has some lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage: **Lucena v Craufurd** (1806) 2 Bos & Pul. (N.R.) 269.

38. In **Brightside Enterprises (Pvt) Ltd. v Zimnat Insurance Co. Ltd.** [2003] (1) SA 318 (ZHC) it was held that insurable interest of a thing does not arise only from ownership of a thing in while or in part. In order to have an insurable interest, a party does not have to have legal title to the property insured, but some legal basis for the assertion of interest. This legal interest can be based upon (A) factual expectation of damages, (b) property interests, (c) legal liability, (d) and contract right: see **Beatty v USAA Cas. Ins. Co.** 330 Ark. 354, 954 S.W. 2d. 250 (Ark. 1997). Where an insured derives a benefit or advantage from the existence of a thing, that too constitutes insurable

interest: see **Brightside Enterprises (Pvt.) Ltd. v Zimnat Insurance Co.** Ltd. [2003] (1) SA 318 (ZHC).

39. The Defendant submits that he did not depart from the cardinal principle of insurance law that only those who have an insurable interest in the object of the insurance can recover because he did not hand over any of the documents in relation to the vehicle to his brother or anyone else. Therefore it could not be said that the Defendant had no interest in the vehicle whatever and/or that he had irrevocably parted with the possession of the vehicle and severed his connection with it.

40. It is the Defendant's case that since he is the registered owner of the vehicle and he holds the certificate of title for the vehicle, he has a property interest in the vehicle by right of a legal property interest. Additionally, the Defendant also has an insurable interest through the expectation of economic disadvantage if there is damage or loss to the insured property. The Defendant insured the vehicle with the Claimant comprehensively against all risks including theft. In addition to using the vehicle for his personal use, The Defendant also used the vehicle in connection with his business. The Defendant is a director and shareholder in a block factory business, called "Joshan Blocks Ltd." which was started by the Defendant and his brother, Jody Myrie: See **Exhibit 12.**

41. In accordance with the insurance policy, the Defendant gave his vehicle to his brother to drive for business purposes in connection with his business. Therefore, the Defendant contends that he also had an economic interest in the vehicle as it was being used by his brother in connection with his business which in turn directly benefitted him. Due to the theft, the Defendant suffered direct, indirect and immediate loss by no longer having access to the vehicle for his business purposes. Accordingly, the Defendant was placed in economic disadvantage when the vehicle was stolen; the Defendant had no vehicle and no proceeds from an insurance policy to procure another one. In **Beatty v USAA Cas. Ins. Co.** 330 Ark. 354, 954 S.W. 2d. 250 (Ark 1997), it was held that "... if the insured would sustain a loss by the destruction of the insured property, it is immaterial whether he or she has any title in, lien upon, or possession of, the property itself..." Based on the reasoning of the Court in the case of **Beatty v USAA,** the Defendant submits that he did have an insurable interest in the vehicle at the time that it was stolen.

42. In a statement given to the Claimant's investigator, Mr. Anthony Clarke, the Defendant's brother stated that he had custody of the vehicle at the time that it was stolen: see Exhibit 8. However, in light of the decisions in **Beatty v USAA and Brightside Enterprises (Pvt.) Ltd. v Zimnat Insurance Co. Ltd.** referred to above, even if

the Defendant did not have title or possession of the vehicle itself at the time of the theft, for all the reasons given above, it is submitted that that the Defendant had an insurable interest in the vehicle. According to **Beatty v USAA** any interest in property, legal or equitable, conditional, contingent, or absolute is insurable. Even the mere right to use property is insurable ...".

43. The Defendant effected a comprehensive policy of insurance with the Claimant which allowed him to use or to give the vehicle to any licensed driver to use in connection with the Defendant's business and for social, domestic and pleasure purposes. By allowing his brother and business partner to use the vehicle in connection with his business, The Defendant submits that he has not in any way acted in breach of the policy.

44. In the circumstances, it is submitted that it could not be said that the Defendant ceased to have an insurable interest in the vehicle thereby entitling the Claimant to avoid the policy.

Defendant asks Court to conclude

45. The Defendant's name is still on the certificate of title for the vehicle. Therefore the Defendant remains the legal owner of the vehicle. It is submitted that if the Defendant had sold or parted with the property in the insured vehicle then there would have been a transfer of ownership from the Defendant to the new purchaser. However, since this is clearly

not the case here, it is further submitted that the vehicle was not sold at the time of the loss.

46. Further, at the time of the theft, the vehicle was being used in connection with the Defendant's own business. Therefore in addition to having a legal property interest in the vehicle by virtue of having the legal title to other vehicle, the Defendant also had an economic interest in the vehicle. Accordingly, insurable interest had not been parted with so far as the Defendant is concerned.

47. For all the reasons given above, the Defendant humbly asks this Honourable Court to dismiss the Claimant's Claim and to make a declaration that the Claimant is liable to indemnify the Defendant for the loss of the vehicle. The Defendant submits that in doing so the Court would be acting in accordance with the Overriding Objective by dealing with this case justly, fairly and proportionately.

Court

[39] The evidence indicates that the motor vehicle the subject of this action was a Toyota Sequoia licensed 4355 ER. This vehicle was a four (4) wheel drive SUV better for use in the family's quarry than the BMW motor vehicle owned by Jody Myrie, brother of the Defendant.

[40] In fact it was Jody who first drove the vehicle and he was the virtual custodian of the vehicle using it in the family business. The use in the family

business entailed visiting the site of the quarry, running errands but no evidence has been adduced to validate a commercial usage. This court does not find that Defendant's use of the vehicle in the business of Joshan Blocks would have been in breach of the policy of insurance.

[41] This court however finds on a balance of probabilites that at the time of the theft of the motor vehicle the Defendant had already sold the vehicle to his brother Jody Myrie.

[42] This finding is based on the following facts:

(a) the non-production of the necessary original certificate of title;

(b) the evidence of the Defendant and his brother relative to the vehicle usage and the need of Jody to be owner of the vehicle;

© the fact that the driver at the time the vehicle was stolen [Rohan Dillon] treated the vehicle as owned by Jody Myrie;

(d) it was over six (6) months after the vehicle was stolen that Shawn Myrie, the Defendant made any report of the theft;

(e) the evidence of Anthony Clarke that the Defendant admitted having sold the vehicle to his brother.

[43] Accordingly, on a balance of probabilities, this court finds that at the time of the theft of the motor vehicle, the Defendant did not have an insurable interest and the insurance company is not obliged to offer an indemnity under the policy of insurance or to compensate him for the loss of the vehicle.

[44] The court enters judgments for Claimant with costs to the Claimant to be taxed if not agreed.