IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 01562

BETWEEEN	**OKAY DAMION BROWN**	**CLAIMANT**
AND	**BRITISH CARIBBEAN INSURANCE COMPANY LIMITED**	**1ST DEFENDANT ANCILLARY/CLAIMANT**
AND	**NATIONAL PROPERTY AND GENERAL INSURANCE BROKERS**	**2ND DEFENDANT ANCILLARY/DEFENDANT**

CONSOLIDATED WITH CLAIM NO. 2011 HCV 02951

BETWEEN	**BRITISH CARIBBEAN INSURANCE COMPANY**	**CLAIMANT**
AND	**OKAY DAMION BROWN**	**DEFENDANT**

Leonard Green, Tasha-Kay Perue instructed by Chen Green & Co for Claimant

Simone Tenant and Steward Stimpson instructed by Hart Muirhead & Fatta for 1st Defendant Ancillary/Claimant

Sasha Vaccianna Riley instructed by Vaccianna Whittingham for the 2nd Defendant/Ancillary Defendant

Insurance – Misstatement of occupation in Proposal Form – Whether Policy Term effective without notice to insured – Whether insurer entitled to repudiate policy – duty of Insurance Broker.

Heard: 22nd, 23rd October 2012 & 22nd November 2012 & 14th February 2013

CORAM: JUSTICE DAVID BATTS

[1] By claim form dated the 22nd March 2010, the claimant asserts that he claims against the 1st and 2nd defendants "(whether severally or jointly) to recover compensation for the claimant's loss of a 2007 Toyota Tundra pick truck licence no.

7880 FG, pursuant to a contract of insurance between the claimant and the 1st defendant for coverage and indemnity It is further alleged that at all material times the second defendant (an insurance broker) was the agent for and on behalf of the 1st defendant".

[2] The particulars of claim dated the 16th March 2010 but filed on the 29th March 2010 do not attempt to add to the cause of action. Nor does it expand in any meaningful way upon the allegations against the 2nd defendant. The claim as particularised is one for breach of a contract of insurance, as per paragraph 20 of the particulars of claim:

> *"Notwithstanding the settlement of the third party's claim and in breach of the said contract of insurance, the 1st defendant has refused and/or neglected to entertain a claim for and behalf of the claimant."*

[3] By way of Defence the 1st defendant, which is an insurance company, stated:

a) The claimant in the proposal for insurance held himself out as a mechanical engineer when he was not and this is a material non-disclosure or misrepresentation.

b) That the 2nd defendant acted as agent for the claimant underwriting the insurance.

c) That it had informed the 2nd defendant as agent of the claimant that the cover was granted subject to restricted driving conditions and that these conditions had been breached by the claimant because the vehicle was being used by an unauthorized driver.

d) The third party settlement was without any admission of liability and on a without prejudice basis.

[4] By way of ancillary claim, the 1st defendant claimed contribution or an indemnity from the 2nd defendant for failure to notify the claimant of the restrictions on the policy. They also alleged breach of contract and negligence against the 2nd defendant.

[5] The 2nd defendant, which is an insurance brokerage by way of defence:

a) denied it was the agent of the claimant or the 1st defendant

b) stated that as the name of the principals were disclosed to each other there was no contractual relationship between the 2nd defendant (the alleged agent) and either principal.

c) stated that the insurance proposal was completed and the premium paid, on the basis of an open drive and not a restricted drive policy.

[6] On this state of the pleadings most of the evidence adduced related to:

a) The employment status of the claimant and whether it had been misrepresented.

b) The duties of a broker and whether and what duty of care was owed to the insured and insurer respectively.

c) Whether and to what extent the policy terms had been communicated to the claimant.

[7] The claimant's evidence-in-chief is contained in a witness statement dated 2nd March 2012. At the commencement of his evidence-in-chief, counsel for the 1st defendant urged that paragraph 19 of the witness statement as well as certain paragraphs of the particulars of claim ought to be struck out as they contained privileged matter pertaining to a settlement with a third party. Having heard submissions from both parties and having considered the case of **Rush &Tompkins Ltd v Gter London Council (1989) 1 AC 1280 which at page 1300 approved Tomlin v Standard Telphones & Cables Ltd Asset Ltd** [1969] 1 WLR 1378, that court decided that evidence of the fact of a settlement [as distinct from without prejudice negotiations leading to a settlement] is admissible. The paragraphs were not struck out. However at the end of the day this evidence I found to be irrelevant as there are many reasons an insurer may choose to settle a third party claim even whilst having issues with the insured not the least of which is the application of the Motor Vehicle (third party insurance risks) Act or the fear of it. There was no suggestion of an estoppel or other prejudice to the insured because of the settlement with the third party.

[8] The claimant's evidence-in-chief was by way of witness statement dated 2nd March 2012. He stated that he was now a taxi driver. In 2008 his uncle purchased a motor vehicle and sent it for him so that whenever he (the uncle) came to Jamaica the claimant would be able to transport him.

[9] The claimant therefore went to the 2nd defendant as he had no expertise in placing insurance. He received a cover note after the 2nd Defendant placed the insurance with the 1st defendant. All communication he said was with the 2nd defendant. He stated further:

> *"Among the papers that I completed was a paper that I now understand to be a proposal form on which it is stated that I am a mechanical engineer and it is not my understanding that I gave that information to the clerk who completed the form but I do recall signing the document since at the time I most certainly was a mechanic doing some engineering in that capacity."*

[10] He stated that he spoke to the supervisor in charge of the 2nd defendant's office at Savanna-la-mar and specifically requested insurance coverage with an open policy as this would allow his uncle to drive whenever he was in Jamaica.

[11] He stated that the 2nd defendant advised him that his driver's licence was too young and therefore his premium would be "loaded". He therefore paid a higher than normal premium. He made a payment and received a cover note and on the 8th September 2008, he paid the balance of the premium and received a further cover note as the insurance certificate and the policy were not ready.

[12] On the 2nd November 2008, while one Garfield Lewis his duly authorized driver and/or agent was driving, the vehicle was involved in a motor vehicle accident. The claimant reported the accident to the 2nd defendant but was told some 3 or 4 weeks later that the 1st defendant was alleging that a breach of the policy had occurred because

Garfield Lewis was not a named driver. By letter in April 2009 this allegation was reduced to writing.

[13] The claimant retained attorneys to act on his behalf and they advised him that notwithstanding the allegation of a breach of policy the 1st defendant had settled the 3rd party's claim. He explained that he sued the 2nd defendant because it was his understanding that the 1st defendant was saying it was the 2nd defendant who had failed to tell him of the restricted driving term of the policy.

[14] Among the several documents put in evidence was Exhibit 5 a cover note issued on the 21st July 2008. That document in the section entitled "persons or class entitled to drive" had the word "open" written in.

[15] The claimant was cross-examined by Mr. Stewart Stimpson on behalf of the 1st defendant. He was shown the proposal form and initially denied seeing his signature on it. He was then shown the particulars of claim and acknowledged his signature thereon. He was asked whether he was able to read what was on it and admitted that he was unable to read. He was shown several parts of other documents in the bundle and admitted again that he was unable to read. He identified his signature on one of the documents and it was suggested to the claimant that it was the proposal for insurance. He denied it. The following exchange occurred:

> "Q. Suggest it has your signature. It is document you say you signed.
> A. No I can show you my signature. This is not my signature
> Q. Look at page 125 bundle
> J. Use the witness statement
> Q. Look at paragraph 7 of witness statement, you wish to read it out loud
> A. O.K. I am unable to make out some of the words
> Q. [Reads paragraph 7 of the witness statement] "Among the papers that I completed was a paper that I now understand to be a proposal form on which it is stated that I am a mechanical engineer and it is not my

understanding that I gave that information to the clerk who completed the form but I do recall signing the document since at the time I most certainly was a mechanic doing some engineering in that capacity." Is that true?

A. At time I was working

Q. When you say you sign the proposal form, is that true or not

A. I don't see where I sign a proposal form

Q. Suggest you sign the proposal form

A. No I did not sign it."

[16] The claimant maintained that he was a mechanical engineer. He stated that he knew that a mechanical engineer was different from a mechanic.

[17] The parties at this juncture agreed that the following documents go into evidence by consent:

Exhibit 1	:	Motor Insurance proposal for British Caribbean Insurance Company Limited (BCIC) dated 20th June 2008
Exhibit 2	:	National Property and General Insurance receipt $200,000.00
Exhibit 3	:	Cover note for BCIC number 391671
Exhibit 4	:	National Property and General Insurance receipt dated 8th September 2008
Exhibit 5	:	Cover note 391884 dated 21st July 2008
Exhibit 6	:	Letter dated 17th April 2009 BCIC to claimant
Exhibit 7	:	Policy schedule 22nd July 2008
Exhibit 8	:	Letter dated 28th August 2009 BCIC to whom it may concern
Exhibit 9	:	Letter dated 23rd October 2009 from Chen Green & Co to BCIC
Exhibit 10	:	Letter dated 10th November 2009 from Chen Green to BCIC

Exhibit 11 : Cheque to N. McDonald - $583,700.00 dated 15th December 2009

[18] When further cross-examined the claimant stated that in July he never received any other documents neither did he receive a policy nor a policy schedule. He admitted that he had gone behind his uncles back and borrowed a loan using the car as security.

[20] When cross-examined by the 2nd defendant's attorney, the following exchange occurred:

> "Q. You say that your uncle bought the vehicle and is the owner
>
> A. I would not say that. He bought it
>
> Q. Did he have an interest
>
> A. Yes he need back his money. I lend it to a friend of mind and friend
>
> Mash it up. He need back his money. Me and him not in good peace."

[21] It was suggested to the witness that he had not told the 2nd defendant about his uncle and he agreed. He admitted that between September and November 2008, he had not gone back to the offices of the 2nd defendant and had no contact with them in the period. He only went back in November when the vehicle crashed and he went to report it. He had not found it strange he said that no certificate of insurance had been issued because he did not understand about insurance policy.

[22] In answer to the Court the witness said:

> "They ask what type of work I do and I tell them I told them I was a mechanical engineer
>
> J. What did you mean?
>
> A. A mechanical engineer that instruct people and do some mechanical. To fix a car when overhaul.

J. Who do you instruct?

A. Those people who work at Capleton Auto."

The witness was also asked by the Court what kind of training he had and answered:

> "I got to learn mechanic from somebody name Plukko. Did not go to any school."

He said he was 18-19 years old when he went to Plukko and spent 5-6 years there. At the time of the trial he was 31 years old.

[23] The claimant closed his case and the 1st defendant's only witness Claudia Roye was sworn. Her evidence-in-chief took the form of a witness statement dated 2nd March 2012. There being no objection she was allowed to amplify her statement.

[24] Ms. Roye gave evidence that she was a claims manager at the 1st defendant. She had previously been a manager motor underwriting and claims. She had held that position for 10 years. She stated that in her experience she would not consider a mechanical engineer to be the same thing as a mechanic. She said her consideration of a risk granting cover to a 26 year old mechanical engineer with a young drivers licence would be different than a risk associated with a 26 year old auto mechanic. It would, she said be different because:

> *"We would assess it differently. We would look at a mechanic driving an ex.....vehicle. We would think that a mechanical engineer would tend to use it for private, social and domestic purpose."*

She stated that had she received a proposal stating he was a mechanic she would not have undertaken the risk.

[25 She also said that had she been aware the proposer had difficulty reading she would consider long and hard before granting cover to such a person.

[26] Her witness statement stated that the claimant in these proceedings indicated he was a taxi operator, whereas on the proposal form he stated he was a mechanical engineer. She stated:

> *The nature of any policy holder's occupation is material in that the calculation of risk and premium takes into account possible correlation between a person's occupation and risk. People in stressful or highly contentious employment attract higher premiums and likewise people who it is believed will have the propensity to be more aggressive drivers by virtue of their profession. The materiality of the claimant's true occupation is under- scored by the fact that this information is specifically solicited by the proposal form, and was not entirely reliant on the Defendant proffering this information, although he had a duty to do so independently of the question being asked."*

[27] At paragraphs 14 and 15 of her witness statement, Ms. Claudia Roye deponed that based upon the proposal presented to it by the 2nd defendant, the 1st defendant had granted a policy with driving restricted to named drivers only. This was communicated to the 2nd defendant who in turn as the claimant's agent ought to have communicated it to the claimant. The driver at the time of the accident was not a named driver under the policy.

[28] When cross examined by the claimant's attorney Ms. Roye's indicated that she had almost 30 years experience as an insurance practitioner. She had always been at the head office in Kingston. About 70% of their business was conducted through brokers. She admitted that for certain purposes, such as issuing cover notes the brokers were the 1st defendant's agent, as also when collecting premiums. She admitted that there were no circumstances in which a certificate of insurance was issued to the broker immediately upon the payment of premium being made to the broker. She stated that cover notes were issued pending the issue of the certificate of insurance. She admitted that in rural Jamaica the level of literacy varied and that there was no question on the proposal form pertaining to the level of literacy of the proposer. The question was asked whether upon payment in full and issue of cover note, the

person was regarded as being under cover. The Court intervened to ask whether this was an issue and the attorney for the 1st defendant indicated that there was no denial that the cover notes and the certificate were validly issued that is there was no issue as to the period of cover.

[29] The witness agreed that the calculation of the premium paid by the claimant was done on the basis of an open drive policy. She admitted there were no restrictions as to named drivers on the 3rd cover note issued [Exhibit 3]. She admitted having no record that the claimant received notification about the issuing of the contract of insurance. She admitted that the 1st defendant had made no effort to satisfy itself that the refusal to accept a proposal for open (unrestricted) cover had been communicated to the claimant, and that the 1st defendant had endeavoured to avoid the policy without satisfying itself that the claimant was so informed.

[30] The following exchange occurred:

> "Q. In fact what you were doing is placing responsibility of notification to the client on the broker.
>
> A. Yes that is usual practice.
>
> Q. In your opinion if the usual practice is not complied with who is responsible
>
> A. The broker."

[31] The witness agreed that the claimant had been indemnified in relation to the same accident. She admitted that the 3rd party's settlement was substantially less than the claimant's claim against the 1st defendant ($583,000.00) as against $4 million). The witness denied that the size of the claim was the reason for refusal. The witness, however, admitted that neither in her affidavit or in her witness statement had she stated that risk would not have been accepted if full disclosure had been made. She admitted that she was saying so for the first time when giving evidence in Court.

[32] Upon being cross-examined by Ms. Sasha Vaccianna for the 2nd Defendant, Ms. Royes admitted that the brokers relied on a note guide issued by the 1st defendant. She admitted that the proposal received by the 1st defendant from the 2nd defendant stated specifically open cover and that the premium was calculated accordingly. The witness admitted that the issuing of a certificate of insurance was not necessarily tagged to the receipt of a premium by the 1st defendant. She stated:

> *"We issue a certificate to broker once we accept proposal."*

[33] In re-examination the witness stated that the 1st defendant advised the 2nd defendant about the restriction imposed on the policy in July of 2008. She asserted that this was done by telephone and by dispatch of the policy schedule [Exhibit 7]. The witness stated that the certificate of insurance was issued and sent to the 2nd defendant in about the 3rd September 2008. She explained why she was definite, now that she knew he was really an auto mechanic that policy coverage would not have been offered, in the following way:

> *"If we knew he was on auto mechanic, because he said private and domestic, because by our experience it was foreseeable he would use it to do auto mechanic work. It was not likely he would use the pick-up as a taxi."*

[34] Upon the case for the 1st defendant being closed Mrs. Barbara Brandon-Wong gave evidence for the 2nd defendant. Her witness statement dated 10th October 2012 was allowed to stand as her evidence-in-chief. In that statement the witness stated she was the manager, technical risk and claims management employed to the 2nd defendant. She stated that the claimant's proposal in which he had stated he was a mechanical engineer had been submitted to the 1st defendant along with premium for an open drive policy.

[35] She stated at paragraph 7 that the duty of a broker was to bring a prospective insured and an insurer into contractual relations and once that was done the resulting

contract was not with the 2nd defendant, but with the insurer. At paragraph 8 she admitted that in July 2008, the 1st defendant issued a schedule of policy:

> *"Outlining the terms of the insurance coverage offered to the claimant wherein it stated that the claimant would benefit from a private CMC comprehensive cover for named drivers only. No correspondence was given by the 1st defendant in the usual manner, under separate cover informing the 2nd defendant or claimant of the change in terms of the policy contract from an open comprehensive policy to that of a restricted comprehensive policy."*

[36] The witness stated further that the restriction on the policy was only formally stated by the 1st defendant on the issue of the certificate of insurance which did not take place until in or about the 8th September 2008. The certificate was not received by the 2nd defendant until sometime in the period 8th September to November 2008. She stated that the 2nd defendant was unaware of the change of cover introduced by the 1st defendant and was therefore unable to advise the claimant of it. She stated further that the claimant had been advised to come in to collect his certificate of insurance but failed to do so until he came to report the accident. Had he collected his certificate of insurance, said the witness, he would "easily have been able to ascertain the terms of his coverage."

[37] Mrs. Brandon-Wong was cross-examined by Mr. Leonard Green for the claimant. She agreed that the premium calculated and paid was for an open drive policy. She stated also:

> *"In my 42 years in cases like these we get written notification in form of a memorandum [about policy restrictions being imposed]."*

[38] When cross-examined by the 1st Defendant's counsel, the witness agreed that the 1st and 2nd defendants have an agreement governing their relationships. This insurance intermediary agreement dated 12th September 2006 was admitted as **Exhibit 12**. She admitted it was the 2nd defendant's responsibility to inform the claimant of information coming from the 1st Defendant. The 2nd defendant she said was the

claimant's agent for that purpose. The witness was shown the policy schedule **Exhibit 7** and admitted it was received in July 2008. She also agreed that it was clear, the following exchange occurred:

> "Q. It says restriction
>
> A. It said named drivers only. It means restricted to driver. Mr. Brown did not ask for it. Imposed by BCIC.
>
> Q. You did not communicate this to Mr. Brown
>
> A. I can't answer because I was not the person who would. I have no idea cannot refute Mr. Brown's assertion that he was not informed."

[39] She admitted that the policy schedule was a part of the policy of insurance. The witness also admitted that the 2nd defendant's records indicate that the certificate of insurance was received prior to the 2nd November 2008. However, she was unable to say when it was received.

[40] The claimant sought and was given permission to further cross-examine the witness. This exercise extracted confirmation that a private CMC policy had been issued and the policy was therefore a commercial motor policy.

[41] The witness was then re- examined, the witness opined that communication of a policy change of the nature in this case was not reasonably done by policy schedule and that there ought to have been a letter.

[42] The witness was then cross-examined by the 1st defendant. At this time the witness stated that the policy schedule was not clear as to the restriction. When asked why it was unclear she said because it did not say Damion Brown only. She, however, admitted that Damion Brown was the only named driver on the form.

[43] In answer to the court as to what is the broker's duty if someone described themselves as a Nuclear Physicist and was obviously not one she said:

> *"We would decline to give a quote to someone who says they are Nuclear Physicist. I would not accept Mr. Brown as a mechanical engineer if I had seen and heard him, having seen and heard him give evidence [in Court]."*

[44] After the evidence was completed the parties prepared and filed written submissions. On the 22nd November 2012 the parties attended before me and made oral submissions limited to a response to the written submissions of each other. The court expresses deep appreciation for the submissions prepared and filed. The fact that I will not quote extensively from them is no reflection on the quality or relevance of the submissions. Suffice it to say that they have been of inestimable value in my identification of the issues and my discerning of the applicable law.

[45] The issues for my decision are:

(a) Was there a binding policy of insurance to which restricted driving applied?

(b) If so what is the liability if any of the respective defendants given the claims raised on the pleading.

(c) Was there a material misrepresentation by the claimant of his occupation?

(d) If so, what if any is the liability to the claimant of the respective defendants.

[46] All parties to this action accept that there was a valid policy of insurance in place at the time of the accident. The question is what were its material terms and was the claimant in breach of any of them.

[47] I accept the evidence of the claimant that he was never made aware of any term of the policy which restricted the named drivers of the policy. Further, I accept the evidence of the 2nd defendant's witness that any such amendment to the proposed insurance would normally be communicated to the broker in writing. I find that the adjustment to the schedule was not sufficient notification. This is particularly so as the last cover note issued was for "open drive" and the premium calculated and paid was at

open drive rates. There was therefore in my view no variation, and it was not a term of the policy of insurance that driving was restricted. In my view, the 1st defendant even if it was entitled to unilaterally impose such a term could only do so after notice to the insured. The broker acted as the insurers agent for the purpose of issuing cover notes (and policies) hence the failure to notify the insured would be a failure of the insurance company. In any event as I have found there was not adequate communication to the 2nd defendant by the 1st defendant of the restricted driving term, that term never became a term of the policy.

[48] The claimant was therefore not in breach of any restricted driving term of the policy when he allowed Mr. Garfield Lewis to drive the motor vehicle on the day in question.

[49] On the other hand, the 1st defendant contends that the claimant described himself as a mechanical engineer. The claimant tried to deny his signatures on the proposal form and hence put some distance between himself and the description of his employment. I reject his assertion that he did not sign the proposal for insurance. I find as a fact that he did sign the document and he knew the nature of the document he was signing.

[50] I agree that he cannot read or write. This became painfully obvious while he was giving evidence. It therefore means, as he stated, that he relied very heavily on the servants or agents of the 2nd defendant when completing the proposal form. The claimant was aware that he had been described as a mechanical engineer. His lame excuse that he described himself as a mechanical engineer because he instructs people in auto mechanics and does mechanical repairs is to my mind a pretence. I reject the attempt by the claimant to say that he was unaware of what a mechanical engineer was. I find that the claimant, perhaps with the assistance, of the servant and/or agent of the 2nd defendant deliberately misstated his profession in order to make himself a more attractive prospect for insurance.

[51] This is because as the 1st defendant's witness stated, the nature of the profession or vocation can determine whether a risk is granted and the amount of premium charged. It may also determine the type of policy offered. In this case a motor mechanic is more likely to have used that type of vehicle for work purposes than a mechanical engineer. No doubt it is because a mechanical engineer being a recognized professional is more likely to be able to afford the vehicle and to get by without using the vehicle to ply for reward.

[52] It is clear from the findings, that this Court is of the view that a misstatement of one's occupation is a material misstatement as defined by Brooks J, in **Smith – Thomas v ICWI** 2006 HCV 01883. Further, this misstatement was concurred in or aided and abetted by the servant or agent of the 2nd defendant who must have known that the claimant was not a mechanical engineer. The 2nd defendant's witness admitted as much when she stated to the Court that having seen the claimant in the witness box it was obvious he was not such a professional. Indeed the Court shares that view not because of the way he dressed or carried himself, which would also raise questions, but his level of comprehension and inability to express himself. It would have been obvious to the 2nd defendant's servant or agent that he was unable to read.

[53] The claimant therefore made a material misrepresentation and falsely stated his occupation in order to induce the 1 defendant to grant the policy of insurance. The 1st defendant did grant the policy and I find that had they been aware of his true occupation they might reasonably have refused the risk or further increased premium. The 1st defendant is therefore entitled to refuse the claimant an indemnity, and was entitled to avoid the policy.

[54] This Court therefore gives judgment for the 1st defendant against the claimant on the claim. The 1st defendant should, however, account to the claimant for the premiums paid. Costs of the action are awarded to the 1st defendant against the claimant.

[55] As regards the claim against the 2nd defendant that also is dismissed. The claim against the 2nd defendant is for breach of a policy of insurance. However, the 2nd defendant had no policy of insurance with the claimant. Given the role, as I have found, played by the 2nd defendant in placing misleading information in the proposal I am minded to make no Order for costs in the 2nd defendant's favour. I will hear submissions from counsel before making this aspect final.

[56] The claim against the 1st defendant having been dismissed there does not arise any need to consider the claim for indemnity against the 2nd defendant save to say that the 1st defendant is entitled to recover costs against the 2nd defendant in the event it is unable to recover costs against the claimant.

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David Batts
Puisne Judge