IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 47 of 2016

LISA VERNON **CLAIMANT**

AND

INSURANCE CORPORATION OF BELIZE **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

2016
Hearings
6th June

Submissions
13th June– Claimant
14th June – Defendant
Decision
16th June

Mr. Jaraad Ysaguirre for the Claimant.
Mrs. Julie-Ann Ellis Bradley for the Defendant.

Keywords: Insurance –Theft of Vehicle – Rejected Claim – Contract Void Ab Initio - Unauthorized Driver – Unreasonable Delay in Reporting – Restored Salvage - Insured's Duty of Disclosure – Material Non-Disclosure – Misrepresentation – Waiver of Duty/Constructive Knowledge

JUDGMENT

1. On March, 17th 2015, the Insurance Corporation of Belize (ICB) – insured Mrs. Vernon's 2013 Honda Accord for $60,000 at a yearly premium of

$1,715. That premium was paid through arrangements with a finance company National Cash Express (NCE). The vehicle was insured inter alia against loss by theft and she was issued with a policy (The Policy).

2. On the 23rd March 2015, Mrs. Vernon says that, in all kindness, she lent the said vehicle to a close family friend, Curbert Estava, for two weeks. She says she has never seen the car or Mr. Estava since. She reported the matter to the police on the 21st April, 2015 and to ICB, on 2nd June, 2015. She sought to be indemnified for her alleged loss. ICB swiftly rejected her claim. She has therefore brought this claim for breach of contract where she seeks damages in the sum of $60,000 as the insured value of the Honda, costs and interests.

3. ICB says that Mrs. Vernon was contractually bound to inform them of the missing or stolen vehicle within a reasonable time. Two months later simply does not suffice. They add that this was not her only fundamental breach since the motor vehicle had not been used in accordance with the limitations of The Policy. Mrs. Vernon had agreed to allow only the named authorized drivers to use her vehicle. Mr. Estava was not so authorized and ought not to have been driving or left in charge of the vehicle.

4. Further, when she applied for coverage she ommitted to state that the vehicle had been salvaged and was in fact previously declared to be a total loss by the company for whom it was bought. This they say, is a material non-disclosure or a fraudulent misrepresentation which renders the agreement void ab initio. In any event, Mrs. Vernon did not pay her premium as agreed and The Policy had lapsed. They urge that for all these reasons they ought not be held liable to make payment under The Policy.

Counsel on both sides agreed and kindly proposed a lengthy list of issues for determination. The court has distilled them into (hopefully) a more palatable form.

The isues which the court must now determine are:

5. 1. Was there a breach of contract by the Defendant.

2. Is the Claimant entitled to be indemnified:- Were there breaches of The Policy by the Claimant and what effect, if any, do they have on the enforcability of same:

   a. Was the vehicle driven by an unauthorized driver
   b. Was there an unreasonable delay in reporting the theft to the Defendant.
   c. Was there a material non-discloure or fraudulent misrepresentation made by the Claimant.
   d. Was the premium paid up.

The Evidence:

6. The Claimant presented two witnesses – Mrs. Vernon and her daughter Paulesha Bradley. Mrs. Vernon through two witness statements testified to being the registered owner of the Honda. She said she had purchased it online from Copart Online auction using the account of one Kareem Garcia as she did not have her own account. It was subsequently transferrered to her on arrival in Belize.

7. Mrs. Vernon testified that on the 16th March she went to ICB's office where she spoke with Mr. Dishon Smith, the Branch Manager. She told him of the make, model, year and mileage of her vehicle. Then she enquired whether he needed the salvage title from the United States or if the vehicle needed to

go to a mechanic for inspection. He assured her that that would not be necessary, all he needed were photographs. He requested her driver's licence and registration for the Honda. She then asked him if he needed the US title. He likewise declined her offer to bring it. He completed the proposal form and gave it to her to sign. Thereafter he presented her with the certificate of insurance once he had inspected and photographed the vehicle. The vehicle was thereby insured comprehensively from 7th March, 2015 to 16th March, 2016. She was to be indemnified against loss, theft and damage.

8. She then told of how she allowed Mr. Estava to borrow her car for a two week period to run personal errands. She says she enquired after Mr. Estava by telephone on the expiration of that two week period when he had not returned the vehicle as promised. He replied, *"I got you."* Despite numerous attempts to reach Mr. Estava by phone that was the last she ever heard him. Two weeks later, on 21st April, 2015 she reported the matter to the police as she sought their assistance in recovering the car. By 2nd June, 2015 they too were unsuccessful in finding Mr. Estava or the vehicle so she reported the matter to ICB. She completed a motor theft claim form and submitted it to ICB days later.

9. On 16th September, by letter, ICB refused to honour The Policy and stated two breaches. The first being that she had allowed an unauthorized person to drive the vehicle and the other, that she had delayed in presenting her claim. By other means they also informed her later in September, that they would not be accepting any premium payments and her file had been closed.

10. Under cross-examination Ms. Vernon said that Mr. Smith proposed a value of $70,000 but agreed to insure it for $60,000 after checking the blue book value of $55,000. That makes no sense to me. Why would an insurer agree to insure for a sum higher than was proposed and why did Ms. Vernon sign the proposal of $60,000 if she did not accept that to be its value.

11. She said she never told Mr. Smith what she had originally paid for the vehicle or that it had been deemed a total loss on the salvage title. In fact, she proclaimed that she only knew it had been so declared here in court. Counsel asked her to look at the salvage title Exhibit M.W. 12 and amazingly she immediately found the small box checked beside total loss whereas the court had difficulty locating same without counsel's assistance. What was more astounding is that she prepared an entire affidavit in response to an application to amend the defene. The non-disclosure of trial was salvage title was a pertinent part of that application. I simply could not believe that she only know of this while in court.

12. For the first time she indicated that when Mr. Estava went missing in action taking her vehicle with him she visited his usual place of residence a *"couple times."* His neighbours told her he was not there. How this was not in evidence prior is beyond comprehension. She also expressed that she had just begun to import cars for resale. Yet, when asked what business she did with Mr. Estava, she claimed that he brought parts from the USA for her for cars she imported for the said same business.

13. She did not withstand cross-examination. I considered her and her testimony and I found her to be far less than honest. I could not rely on her testimony.

Pauleesha Bradley

14. Pauleesha Bradley, a 19 year old, spoke about 23rd March, 2015 when she witnessed her mother handing over her Honda to Mr. Estava (a family friend). She said her mother seemed hesitant but eventually agreed to assist Mr. Estava as he needed the vehicle to take his son to school. However, when the two week period had expired she accompanied her mother to the police station to report the vehicle missing. To this date the vehicle has not been returned to her mother.

15. Under cross-examination, Ms. Bradley explained that she knew Mr. Estava. He had had a child with her aunt but she was not aware of that child's whereabouts. She identified Mr. Estava from a photograph M.S. 18 exhibited in court. She continued that she had seen Mr. Estava in January of that same year at a house in an area called PIV. She could not inform where PIV was or what the house looked like. She then said "we" went to visit him. When questioned further she changed it to just she went to visit him. Eventually, she claimed to have gone there with her mother. I could not understand her need to lie or be evasive. It caused concern. She then went on to discuss the loan of the vehicle. She admitted that her mother was using the car and when she lent it to Mr. Estava it was the first time she had even lent it to anyone. She maintained the sequence of events previously stated and like her mother she sounded strangely rehearsed.

The defence presented three witnesses:

16. Melissa Watson Ellis, the Claims Manager of ICB; Dishon Smith, the Branch Manager of ICB and Marlon Skeen, the Managing Director of Security & Intelligent Solutions Ltd.

17. Ms. Ellis, an articulate, no nonsense individual explained that Mr. Dishon Smith first informed her of the report which had been made by Ms. Vernon.

18. Ms. Vernon then came to the claims department around 9th June, 2015 and submitted her completed claim form. She asked many question which were discussed personally with her by another claims officer. Ms. Ellis, however, asked her why she had taken so long to report to ICB and she explained that she was waiting on the police to locate Mr. Estava, but they had not. Ms. Ellis opined that from her experience this delay could severely affect ICB's ability to properly investigate the matter.

19. ICB then began their own investigations, as is routine in reports of theft. They appointed Mr. Marlon Skeen who had assisted them in investigating such claims in the past. She also requested and received a copy of Ms. Vernon's policy from the underwiritng department. Perusal of which revealed that Mr. Estava was not a named authorized driver and was therefore not covered by The Policy. When Ms. Vernon subsequently returned to the office with the police report, she informed her verbally that the delay in reporting and the fact that Mr. Estava was not an authorized driver resulted in her not being covered by The Policy. There was no further communication between the parties until this claim was served.

20. She continued that a Claim Manager employed by ICB received copies of records relating to the said vehicle from the Belize City Council Traffic Department. She exhibited those documents. It was then revealed that in seeking to register the vehicle Ms. Vernon had relied on a salvage ceritificate which indicated that it had been deemed a total loss and sold by State Farm Insurance to a Kareem Garcia. Ms. Vernon had also made a

statutory declaration in 2013 stating that she had purchased the car from Kareem Garcia but he had returned to the US without transferring ownership to her. It also stated that she had been in posssesiion of the vehicle since September 2013. That declaration had been made in December 2013. It was also discovered that the vehicle had changed ownership to one Raheem Flowers in November 2014 but reverted to Ms. Vernon in February of 2015. All before she applied for coverage from ICB.

21. She went on to say that from the premium receipts Ms. Vernon disclosed, it was obvious that she had failed to pay the full insurance pemium as contracted.

22. Ms. Ellis withstood rigorous cross-examiantion and was consistent in her evidence. She denied that it would be beneficial to ICB if claims were refuted. She explained that ICB was in the business to pay valid claims and by her determiantion Ms. Vernon's claim was not valid, hence its rejection. When questioned as to their procedure for valuing a vehicle for coverage she maintained that it is the client who would propose a value which the company does not simply accept. That proposal must be verified through the details which the client also provides. The $60,000 proposed by Ms. Vernon was accepted based on the information she had provided. Ms. Ellis accepted that her knowledge of what was provided by Ms. Vernon was limited to what was reflected on the signed proposal form and what she had been told otherwise.

23. Interestingly, she informed that NCE works much like a bank. They finance the entire premium through a loan to the insured who would then make

monthly payments towards that loan. Any arrangements by the insured as to monthly payments would necessarily have to be with NCE and not ICB.

24. Finally, she made it clear that the claim had not been refuted because the vehicle may or may not be missing or stolen.

Dishon Smith:

25. Mr. Smith testified that he dealt with Ms. Vernon's application to insure her 2013 Honda Accord. Ms. Vernon provided her driver's licence and registration for the vehicle as per his request. She also provided her social security card. He asked her a number of questions in order to complete the proposal form. He basically followed the questions on that form and filled answers as they were given. He explained that their comprehensive policy only covers named drivers so he asked her to provide the names of the person who would be authorized to drive the vehicle. She gave three names, none of which was Mr. Estava's. He then says that it was agreed that the driving of the car would be restricted to the three named persons. This was also reflected in the certificate of insurance.

26. Finally, he read to her the section of the proposal which states "*any other facts known to you which are likely to affect acceptance of assessment of the risks proposed for insurance must be disclosed. Should you have any doubt about what you should disclose do not hesitate to tell us or your insurance advisor. This is for your own protection, as failure to disclose may mean that your policy will not provide you with the cover you require, or may perhaps invalidate the policy altogether.*" Thereafter she confirmed that there was nothing else she wished to disclose, read the form over, accepted it was correct and signed. He exhibits that signed proposal.

27. He continues that he took photographs of the vehicle while there was a man seated in it. He produced a number of photographs. He maintains that Ms. Vernon had never disclosed that the vehicle was a salvage or was a total loss. He explained that the value of a salvage is usually significantly less than a vehicle with no accident history. In such circumstances he would have inquired as to the type of damage, then he would have physically inspected the vehicle or requested that an assessment be done. He may even have rejected the client's proposed value and indicate their own verified value.

28. He denied that she had asked him if she needed to take the vehicle to a mechanic or that he assured her that that was unnecessary. He likewise denied that she had offered to bring the US title document and he had declined the offer. He says that based on what Ms. Vernon had proposed he accepted the risk on behalf of ICB. He insured the vehicle comprehensively for one year, beginning March 17, 2015, against inter alia loss, theft or damage. This agreement was subject to the terms, conditions and exceptions of The Policy and based on the contents of the proposal submitted. Theafter, he issued her with a ceritificate of insurance and other insurance documents all of which he exhibited.

29. He explained that she had agreed to a yearly premium of $1715. and opted to finance payment through NCE. She made a down payment of $200 and had a balance of $1,651.94 including interest and expenses. She agreed to ten monthly payments of $165.19 and signed the finance agreement. He likewise exhibited that agreement.

30. He then proceeded to discuss the report. In the first week of June, 2015, Ms. Vernon made her report of the theft of her vehicle to him. He provided her with the claim form and told her that on its completion, she should submit same to the Claims Department. He then informed the claims manager. His records showed that Ms. Vernon, in addition to the initial $200, deposit had only made three monthly payments totalling $695.38 and had failed, refused or neglected to make any further payments.

31. Under cross-examiantion, he, like Ms. Ellis maintained that the value of vehicles for insurance is proposed by the customer. ICB would then verify that figure through another department. He confirmed that the value she gave had been accordingly verified and found to be accurate. He denied ever suggesting a figure to Ms. Vernon and having a discussion about it being too high before eventually settling on the lower and accepted $60,000.

32. He agreed that he calculated the premium and suggested NCE for financing. He admitted that Ms. Vernon had told him the vehicle had been brought from the US but not from whom it had been bought. He again denied that he had requested the US registration or that she had told him she had left it at home. It was then put to him that she had informed him that she she was just entering the car dealership business. He agreed.

33. He admitted that most vehicles brought from the US are usually bought through auction and a good number of them are usually damaged. However, all of them did not have major damage. He confirmed that he had previously comprehensively insured vehicles bought in auctions.

34. Under re-examiantion he explained that by taking photographs of the vehicle he could not determine whether or not it was a crash. He again stated that he never gave Ms. Vernon any assurance that he did not need a salvage title from her.

Marlon Skeen:

35. Mr. Skeen testified, among many other things, that he had been engaged by ICB to conduct investigations into a report of a stolen vehicle made by Ms. Lisa Vernon. Ms. Ellis of ICB provided certain information on which he began his inquiries. He interviewed Ms. Vernon who was not very helpful and seemed "cagey and reluctant". She volunteered that she knew Mr. Estava well. He was in the car dealership business, just as she was, but she could not provide a cell phone number for him. His investigations led him to Mr. Estava's son's school but he was unsuccessful at getting any information there either. He gatherered some information about Mr. Estava in the Vernon Street neighbourhood. He checked the police and other sources all without success. He felt too much time had passed for any investigation to bear significant fruit. He submitted his report to ICB.

36. In April, 2016 ,at Ms. Ellis' request, he resumed investigations. He attended the Traffic Department and thereafter tried to locate one Raheem Flowers. Mr. Flowers gave him certain information. He eventually received a photograph of Curbert Estava from Ms. Vernon. He also visited the address for Kareem Garcia which he had discovered at the Traffic Department. He got directions to Mr. Garcia's house from neighbours. He was not there. Mr. Skeen was not cross-examined.

Was there a breach of the contract by the Defendant:

37. For this court, much like for Ms. Evans who testified for the Defendant, whether or not there was in fact a theft of the vehicle is really not the issue. No where in the defence does it state categorically that the Honda had not been stolen. It simply neither denied or admitted the circumstances leading up to the report and put the Claimant to strict proof. This means that the Defendant had insufficient information but did not intend to offer any positive alternative to the Claimant's allegation. Moreover, there is no evidence whatsoever that her claim was rejected because there had been no theft. That would mean that the claim to ICB was fraudulent which was not pleaded at all. This case really turns on whether an insurance claim was properly rejected and the policy consequently treated as void by the insurer.

38. Yet, the defence bombarded the court, through the evidence of the private investigator Mr. Skeen, with bits of sensational, mostly irrelevant, barely circumstantial evidence relating to Mr. Estava, Mr. Garcia, ownership of the vehicle and sundry other fluff. When all strung together they amounted to nothing close to demonstrating to the civil standard that the vehicle had not been stolen, far less that the claim was fraudulent. Suspicion and proof are two completely different things.

39. Counsel for the Defendant also sought, during trial, to exhibit a colour copy of a black and white photograph. That black and white photograph had been disclosed and attached to a filed witness statement. She explained that the colour enhanced the appearance of the figure in the vehicle and was simply a better quality than the black and white print. She urged that it was the original of the copy provided throughout. The court allowed it conditionally and reserved its ruling.

40. Part 31.1 deals with relying on photographs at a trial. Sub rule (6) states: *"Where a party has disclosed the intention to put in the evidence, that party must give every other party an opportunity to inspect it and to agree to its admission without proof."*

41. Counsel for the Claimant explained that a black and white photograph had been disclosed to him even on inspection. Since there was no objection to the admission of that, there was no need for any further proof i.e. by way of an original. To my mind had the coloured photograph been disclosed there would have been no issue. I hold the coloured photograph to be inadmissible as there is now only counsel's evidence that the photograph, coloured in this way, is in fact the original. In any event, nothing turns on this piece of evidence.

42. Ms. Vernon on the other hand says she lent her vehicle to Mr. Estava who has never returned it. The police to whom she reported the matter, have been unable to find it or him and have since issued a warrant for his arrest. To date there has been no progress. ICB launched its own investigation, they too met without success. When one considers the evidence presented there might be doubt as to the statutory declaration Ms. Vernon made in December to register the car, she having had possession of it since September. It might be suspicious that she lent her car to Mr. Estava when she herself needed it. The reason she lent it – personal errands and the reason her daughter gave – carrying his child to school, conflict. That he has fallen off the face of the earth without a trace, taking that vehicle with him creates further doubt in one's mind. Even her behavior afterwards may be odd, but all of this is not proof that the situation is not as she has stated, nor was the court called upon to make such a determination. This court

therefore finds that on a balance of probability Ms. Vernon's Honda has been stolen. The terms of The Policy covers loss by theft and she made a claim in writing to ICB as was required under The Policy. That is all admitted. What is left therefore is for the defence to prove that they ought not to be held liable to indemnify Ms. Vernon.

Is the Claimant entitled to be indemnified: - Were there breaches of The Policy by the Claimant and what effect, if any, do they have on the enforceability of same:

a. Was the vehicle driven by an unauthorized driver:

43. Once there has been offer and acceptance of the proposal the insurers are bound to issue and the proposer to accept, a policy in accordance with the stipulations of the proposal – ***Solvency Mutual Guarantee Co. v Freeman (1861) 7H & N17***.

44. When Ms. Vernon signed that proposal and the insurance company accepted the offer, the conditions of the agreement were forged. In fact, The Policy states: *"**Whereas** the Insured by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein has applied to the Corporation for the Insurance herein after contained …"*And the proposal similarly states: *"… this proposal and declaration shall form the basis of the contract of insurance between The Corporation and myself and shall be held as incorporated in The Policy."*

45. On the first page of the proposal, Ms. Vernon indicates that she requested Class A (pleasure) usage. This is explained on the said form as *"Use by anyone for social, domestic and pleasure (including travel to and from usual place of work). Use for hiring and business purposes is excluded."* On the second page of

that form there is a section headed 'Drivers' followed by an explanatory note which reads *"when completing 1 and 2 below please give details for yourself and your spouse (whether likely to drive or not) and all other persons who to your knowledge may drive your car."*

The proposer then lists three names: Lisa Trapp/Vernon, Codwell Samuels, Pauleesha Bradley

46. Subsection B then asks *"Do you wish driving to be restricted to (1) yourself (ii) yourself and spouse."* The proposer answers no to both questions. The next question is *"If no who will be the main driver?* There is no answer. The follow box states '*Name drivers'* - that too is empty. There is also no response to the next question – *"How many people may drive your car?"*

47. *There is absolutely nothing stated therein about authorized drivers.* However, is terms appears on the Schedule of Insurance under a section called Authorized Driver(s) and on The Policy itself under the same caption.

48. I reproduce the section exactly:

Authorized Driver(s) Subject to the provisions below: Any Authorized Licensed Driver.
Persons or Classes of Persons entitled to drive: A, B, C:
Named Drivers: *Date of Birth:*
Lisa Trapp/Vernon
Codwell Samuels
Pauleesha Bradley

Provided that the person driving is permitted in accordance with law to drive such class of vehicle and is not disqualified by order of a court of law or by reason of any enactment in that behalf from driving the motor vehicle.

Below this in very small print is:

Persons or Classes of persons entitled to drive:
A *The Policy holder*
B *The Policy holder may also drive a private car or motor cycle not belonging to him and not hired to him under a hire purchase agreement*

C *The Policy holder may also drive a motor cycle not belonging to him and hired to him under a hire purchase agreement far less that only authorized drivers would be covered under The Policy*

D *Any person who is driving on the policy holder's order or with his permission*

E *Any person in the policy holder's employment providing the vehicle is being used for the policy holder's business …*

F *Any person in the policy holder's employment provided that he is driving on the policy holder's order or with his permission*

49. The Schedule of Insurance which is stated to be attached to The Insurance Policy and bears the same policy number, is worded in the same terms as The Policy. The same classes A – F are stated on a separate but attached sheet of paper in large print.

50. To my mind, it is clear from the wording of the proposal that is no certainty that the persons listed under 'Drivers' would even drive the vehicle far less that they would be the only authorized drivers in accordance with the policy to be issued. The stating of those names seem to be nothing more than an indication of the persons who, to the proposer's knowledge, may possibly drive the vehicle. Although Mr. Smith testified that he explained to Ms. Vernon that only the named drivers would be covered, there is a presumption in law that a written document contains all the terms of the contract. To rebut this presumption there must be proof that both parties did not intend for the written document to be exclusive rather their intent was for the document to be read with their oral statements. There is no evidence of any such intention in this matter. Therefore evidence of what Mr. Smith informed Ms. Vernon orally is rejected as inadmissible to vary the contents of the proposal.

51. However, when The Policy was issued, with specific limitations relating to authorized drivers, this was in fact a counter proposal of, what I find to be,

new terms. It was open then to the insured to reject same. The insured has never sought to take proceedings to enforce the issuance of a policy on the terms agreed in the proposal. She did not send The Policy back or complain. Her claim to ICB and her present attempt to enforce said policy is viewed by this court as positive acts which will be construed as an affirmation of The Policy. The Policy can therefore not be set aside and the insured is bound by all of its terms, whether she had read them or was aware of them or not.

52. The Claimant, through her submissions, raised that the particular 'Authorise Driver' term in The Policy is ambiguous. And where there is any doubt, it ought to be resolved in a way most favourable to the Claimant as The Policy is the Defendant's own words. I have scrutinized the terms and can find no ambiguity which would assist the Claimant . The included classes stated are A, B and C. Class D has not been stated as an authorized driver and is therefore excluded. It defies logic how the submission could be made that the section could be interpreted, and was in fact interpreted, to include what is plainly stated in Class D. Counsel for the Claimant is unnaturally silent about Class D and its effects on the interpretation or alleged ambiguity of the section. It is pellucid to me that persons simply driving on the policy holder's order or with her permission are not authorized drivers. Consequently, when Ms. Vernon permitted Mr. Estava to drive that vehicle he was not an authorized driver under The Policy.

53. Counsel for the Claimant then raised that from the moment Ms. Vernon revoked her permission, the breach ceased to exist. He relied on ***Samuelson v National Insurance and Guarantee Corp Ltd. [1986] 3 All ER 417*** and urged that there could be instances when the insurers are put on and off risk

at short and recurring intervals depending on the way in which the contract of insurance is construed.

54. In that case the contract contained two clauses, one which avoided liability where the motor vehicle was *"being driven by or for the purpose of being driven in the charge of any person other than an authorized driver described in the Schedule"* with an exception where it was *"in the custody or control of a member of the Motor Trade for the purpose of its … repair."*

55. The repairman drove the car to the dealers to purchase spare parts. While parked outside, it was stolen. The Court of Appeal had to construe both clauses. They determined that while the vehicle was being driven by the repairman who was not an authorized driver, the policy was inoperative. But when it was stolen it was clearly in the repairman's custody for repair and the insured was covered under the exception at that time as the policy became operative again. They ordered the indemnification of the appellant.

56. There is no similarity between this matter and the one at bar. The vehicle here was placed into the charge of an unauthorized driver where upon the unauthorized driver stole it. There is no clause which excludes this type of control in particular circumstances. In fact Goff LJ stated:

> *"It seems to me that the function of the exception in para 1(c) is plain. It is essentially directed to excluding the cover where the vehicle is driven by an unauthorised person, but it is recognized that there are circumstances in which, although the car is not actually being driven by an unauthorized person, nevertheless it may, for the purpose of being driven be in his charged. For example, an unauthorised person may be driving the car and he may briefly pause in his journey. If so, it may be that he is no longer actually driving the car, but it is nevertheless thought right that the cover should not apply because the car is, for the purpose of being driven, still in his charge.*

> *It is important to note that the question which is posed by these words in the exception is not 'Why is the car in the charge of the unauthorized person?: it is whether, at the relevant time, the car is, for the purpose of being driven, in the charge of the unauthorized person. These questions are not, I think, the same, and the answer to the second question is not dependent on ascertaining the purpose for which the insured entrusted the car to the unauthorized person or the purpose for which that person was driving the car. We are concerned here only with the question whether the car is, for the purpose of being driven, in the charge of the unauthorized person. It is the immediate situation of the car with which we are concerned. The ultimate purpose, whether of the insured or of the unauthorized person, is, I think irrelevant."*

57. This court need say no more. It is clear that had there not been an exception clause authorizing the car to be in the repair man's custody or control for the purpose of repairs the insured would not have been covered. Ms. Vernon entrusted the vehicle into Mr. Estava's charge for the purpose of driving. He was an unauthorized person. Even when she apparently remotely revoked her permission, the car continued to be in the charge of an unauthorized driver. Mr. Estava was and is an unauthorized driver under The Policy and I so hold.

58. The issue now to be considered is what effect this may have on the enforceability of this contract. This calls for a discussion of the conditions and collateral terms. You see, if this amounts to a breach of a condition the insurer has a right to repudiate liability or to reject the insurer's claim. This is so whether or not the insurer has suffered loss. So, was the use of the car by an unauthorized driver a breach of a fundamental term of the contract, did it go to its root? The term in the policy which exempts the insurer from liability falls under the caption "***Exception"*** and reads: "*The* Corporation shall not be liable in respect of

1. any claim arising whilst the motor vehicle is
   a. Being used otherwise than in accordance with The Limitations of Use

b. being driven by or is for the purposed (sic) *of being driven by him in the charge of any person other than an Authorized Driver.*

59. This particular clause limits the scope of The Policy, it is a determination of risk. From the moment the policy was accepted the use of the vehicle by authorized drivers only became one of the guarantees for performance by the insurer and is properly classified as a condition precedent. Further, Condition 9 provides that *"The observance and fulfillment of The Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Corporation to make any payment under this policy."*

60. Breach of the condition relating to authorized drivers by Ms. Vernon was fundamental and ICB is entitled to rescind the contract and to refuse payment. Having so found the court really need delve no deeper but the issues having been agreed, I feel obliged.

b. Was there an unreasonable delay in reporting the theft to the Defendant:

61. ICB relies on the following condition in the policy:

"Condition 4: In the event of any occurrence which may give rise to a claim under The Policy the insured shall as soon as possible give notice thereof to the corporation with full particulars …"

62. The unrefuted evidence of the Claimant is that the incident occurred two weeks after the 23rd March, 2015. So around the 6th April, according to her, the vehicle ought to have been returned. It was not. Clearly she did not panic. She waited until the 21st April, 2015 to report it to the police and to the insurers, verbally, on the 2nd June, 2015. She gave written proper notice to ICB on the 9th June, 2015.

63. She explained this delay saying that she trusted Mr. Estava and expected him to return the vehicle. When he did not she reported it to the police, hoping that they would recover it. When they were unable to, she reported it to ICB.

64. Counsel for the Defendant submitted at paragraph 17:

> *"e. The Learned Authors of Macgillivray on Insurance Law (11th Ed page 533)[TAB 4] explains that "The purpose of a notice clause is to enable the Insurer to test the genuineness of the claim within a reasonably short time of the occurrence of the loss and to ensure that immediate steps are taken to mitigate the consequences of the loss.,": The authors go on to opine that even in the absence of expressed words requiring notice the insured should give notice within a reasonable time and as part of his general obligation to act with good faith toward the insurer.*
>
> *f. Where the policy does stipulate that the giving of notice is a condition precedent to the liability of the insurer it is submitted by the learned author that "such clauses should not be treated as a mere formality which is to be evaded at the cost of a forced and unnatural construction of the words used in the policy but should be construed fairly to give effect to the object for which they were inserted…"*

65. Counsel then urged that the giving of notice in the case at bar is a condition precedent. The Claimant, by her submissions, seem to agree as she states, while referring to ***Verelst's Administratrix v Motor Union Insurance Company Limited 2 KB 137*** where the issue of giving notice as soon as possible was considered, *"within the meaning of the condition, all existing circumstances must be taken into account."*

Counsel then continued:

> *"Judicial decisions highlight that the term 'as soon as possible' in the condition relating to reporting of claims is subject to interpretation and is determinable based on the circumstances."*

66. Having considered the particular circumstances of this case I find Ms. Vernon's delay to be unreasonable. As far as this court is concerned Ms. Vernon was always aware of The Policy and its terms. From the moment

she thought it prudent to report the matter to the police she must have formed the belief that Mr. Estava was not going to return the vehicle of his own volition ie he had stolen it. Whether or not the police could recover the vehicle or decide to charge Mr. Estava had nothing to do with giving ICB notice that her vehicle had, for all intents and purposes, been stolen. Theft and recovery are two separate matters. She was bound to report the theft as soon as possible. This, to my mind, was not done and she offers no reasonable or acceptable excuse for her non-compliance. Her non-compliance with this condition likewise entitles ICB to rescind the contract.

c. Was there a material non-disclosure or fraudulent misrepresentation made by the Claimant:

67. An insurance contract is one of the utmost good faith. There is a duty on the part of the insured to disclose all material facts which may influence the insurer's decision to accept the risk. Utmost good faith requires one party to voluntarily reveal all important information in its knowledge to the other party even if not asked to do so. This is a concept unique to insurance contracts. Where ordinarily silence is not a misrepresentation, in these types of contract it may amount to such. As explained by Scrutton LJ in ***Rozanes v Brown (1928) 32 Lloyds LR 98 at 102***:

> *"It has been for centuries in England the law in connection with insurance of all sorts, … that as the underwriter knows nothing, and the man who comes to him to ask him to insure knows everything it is the duty of the assured, the man who desires to have the policy to make full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith – uberrima fides."*

68. ***Pan Atlantic Insurance Co. Ltd. v Pine Top Insurance Co. Ltd (1995) 1 AC 501 at p. 538*** describes material facts as *"all matters which would have been*

taken into account by the underwriter when assessing risk." ***Carter v Boehm ER 96 KB 343*** resolves "*that the insurer or the underwriter alone determines what is material."* Likewise, the burden of proving that there has been a breach of this duty by the insured rests on the insurer. Proof of a material a non-disclosure or misrepresentation of these matters entitles the insurer to avoid the contract ab initio, if the insurer was induced to enter into the agreement by that non-disclosure or misrepresentation. The editors of The Law of Contract Treitel 14th Ed. Paragraph 9-146 explain that: *"A fact may be material even though its disclosure would not necessarily have an effect on the decision whether to take the risk, or at what premium but as for misrepresentation generally the non-disclosure must have induced the contract."*

69. So at the very least, the insurer has to prove that had it not been for the non-disclosure or misrepresentation he would not have agreed to the same terms. It makes no difference whether or not the non-disclosure or misrepresentation was deliberate – ***Hazel v Whitlam [2004] EWCA Civ 1600***.

70. However, ***Kausar v Eagle Star Insurance Co. Ltd. [2000] Lloyd's Rep IR 154 at p 157*** informs:

> *"Avoidance for non-disclosure* is a drastic remedy. It enables the insurer to disclaim liability after and not before, he had discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he had contracted and paid for. Of course, there are occasions where a dishonest insured meets his just desserts if his insurance is avoided; and the insurer is justly relieved of liability. I do not say that non-disclosure operates only in cases of dishonesty. But I do consider that there should be some restraint in the operation of the doctrine. Avoidance for honest non-disclosure should be confined to plain cases."

71. Where the insurer does not ask something on the proposal form there is a risk that he would be unable to rely on any failure to disclose. In ***Newshome Brothers v Road Transport & General Insurance Co. 1929 2 KB 356 at 363*** it was stated:

> *"The insurance companies also run the risk of the contention that matters they did not ask questions about are not material, for, if, they were, they would ask questions about them."*

72. On the other hand the absence of a specific question may well lead the court to believe that there was no intent to conceal or defraud by the non-disclosure.

73. In the present case what is most noticeable is that there are no questions in relation to any previous damage to the vehicle. The proposal questions whether the vehicle has been converted, adapted or modified in any way, none of which is applicable. Therefore, the non-disclosure is of a fact not specifically required on the form. But to my mind information on the past condition of the vehicle is obviously pertinent. In situations where this is clear, then whether or not a direct question is asked, the proposer remains duty bound to disclose. The question to be answered now is whether Ms. Vernon did in fact disclose that the vehicle was a salvage. We turn to the evidence.

74. I considered Ms. Vernon's demeanour. I watched how she became belligerent when questioned about Mr. Estava under cross-examination. Her speech slowed, became hesistant. When questioned about the circumstances surrounding the loan and eventually disappearance of the vehicle, she answered quickly, as if rehearsed. But when asked about the policy she became loud, sometimes even aggressive.

75. I also considered the sequence of events leading up to the signing of the proposal which she proffered in her second witness statement. She says she informed Mr. Smith that the vehicle had a salvage title and queried whether a mechanic would need to inspect and Mr. Smith assured her that this would not be necessary.

76. However, in her earlier affidavit, in response to the Defendant's application to amend his defence, this is what she stated at paragraph 6 – 8:

> *"6. When I visited the offices of ICB on Central American Boulevard in March, 2015 to obtain insurance Mr. Dishon Smith, branch manager for ICB, only requested that I provide them with a copy of my social ssecurity card, driver's license and certificate of registration for the Honda. At no time was the request made for any additional information such as the customs declaration or title from the United States although this information was available from them.*
> *7. After I provided the requested information he then gave me the insurance to sign which I did.*
> *8. I add that Mr. Smith, at the time when the proposal was being made, knew that I was in the business of buying and selling motor vehicles bought in the United States of American and brought to* Belize."

77. Nowhere is it stated that she offered any documents and Mr. Smith refused. In fact, paragraph 14 states:

> *"When I met with Dishon Smith at the office of the Insurance Corporation of Belize on Central American Boulevard in March, 2015 to complete the insurance proposal at no time when going over the proposal, did he asked me any questions relating to the US title of the Honda, despite the fact that this information was readily available. He asked me general questions not relevant* (sic) *the insurance proposal. The only information relevant to the insurance proposal which he asked me to provide were two additional names of people who may drive the Honda. He never specified to me why this was needed."*

78. To my mind this was a sterling opportunity for Ms. Vernon to state that she had offered him the salvage title, he had rejected her offer and made assurances of his own. But Ms. Vernon was silent save and except to say

the information was readily available. That empty sentence says nothing as to her valiant effort to make same readily available and Mr. Smith's equally valiant effort in declining.

79. I then juxtaposed her evidence against that of Mr. Smith. He testified that they never discussed any salvage title and that he was never told by Ms. Vernon that the vehicle had been a total write-off in the USA. I next considered his actions after the proposal. He took photographs which he plainly admitted would not assist him in the valuation of a vehicle already involved in an accident. His action therefore was not consistent with having that knowledge.

80. It must not be forgotten that that sequence of events is the same as recounted by Ms. Vernon herself at paragraph 5 of her second witness statement. *"Mr. Smith, after completing the form, gave it to me to sign. After that he did an inspection of the Honda and took pictures of it. He then provided me with the certificate of insurance."*

81. Having done all that, I found Ms. Vernon to be less than truthful and I rejected her assertion that she had revealed the information about the salvage title to Mr. Smith. I also find that this omission was deliberate, especially in light of the section of the proposal quoted at paragraph 26 of this judgment which I believe Mr. Smith read over to her. She has never refuted this. To my mind, Ms. Vernon wanted that vehicle insured as if it was in almost pristine condition. She wanted the value associated therewith and withheld the material fact that it was a salvaged vehicle restored to operational condition.

82. Counsel for the Claimant submitted that Mr. Smith under cross-examination admitted *"that he was aware that the vehicle was bought from the United States from an auction site and that he told the Claimant he would not need the title document from the states."* He continued *"(h)e went as far as to admit that he told her he would not need the US title despite not being (sic) to recall is she offered the information to him."*

83. I do not have this note and on listening to the court recording it is inaudible. What I do have is that he was aware that she had brought the vehicle from the US but he did not know where she had bought it. Later he said he could not recall if she had told him that she had title documents from the States. In any event offering the US title is not the same as disclosing that the vehicle was a revived salvage. Counsel seemed to be urging that by refusing the title the insurer waived the duty of disclosure in relation to any information that document contained or that he had constructive knowledge of its contents. I cannot agree with either of these contentions.

84. A waiver, in these circumstances, refers to failure to enquire into circumstance material to the risk when a reasonable insurer would make such enquiry. The fact that a document exists and is available for inspection does not relieve the insured of the independent obligation to disclose all material facts including such facts as may appear on that document to the insurer. It is a duty to provide complete and accurate information.

85. From the evidence of both Mr. Smith and Ms. Evans I also find that the material which was not disclosed would have affected the sum for which the vehicle would have been insured. Therefore, the insurer was induced to make the policy on those terms because they did not know of the true

condition of the vehicle. This amounts to a material non-disclosure and similarly entitles ICB to rescind the contract.

86. Having lost on three legs I find it futile to engage in discussing the issue of the premium which was never pleaded but only agreed as live by the parties.

87. **It is hereby ordered:**

1. Judgment for the Defendant.
2. Costs to the Defendant in the agreed sum of $7,500.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT