IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL

NO. J4/49/2018

21ST NOVEMBER, 2018

SIC INSURANCE COMPANY LTD. ……..

DEFENDANT/APPELLANT/RESPONDENT

NYEMETEI HOUSE

RING ROAD EAST, ACCRA

VRS

KEN KWAME ASAMOAH ……. PLAINTIFF/RESPONDENT/APPELLANT

HOUSE NO. 18, COMMUNITY 20

TEMA

JUDGMENT

BAFFOE-BONNIE, JSC:-

In this judgment, the plaintiff/respondent/appellant shall be referred to as the appellant, whist the defendant/appellant/respondent, is referred to as the respondent.

The appellant initiated these proceedings at the High Court against the respondent for,

a. Recovery of GHC116,200.00 being the insured/claim/replacement cost in Chevrolet No. GN 8866 Z, lost under comprehensive insurance policy NO.P/200/10/1001/2009/134 with the defendant.
b. Interest on the said sum of GHC116,200.00 from April 2010, till date of payment at the commercial bank rate.

The facts of this case are fairly simple and admit of little controversy. The appellant imported a Chevrolet SSR Sport Car, (hereafter, The Car) into the country from the USA, and took delivery of same from the Tema Harbour in 2008. He initially entered into a purchase agreement with one, Alhaji Iddrisu Yusif who took possession and was supposed to pay for same later. The Alhaji took a Third Party Insurance Cover but the appellant later repossessed the vehicle since the Alhaji had failed to pay for same. The appellant then took a Comprehensive Insurance Policy to cover the car. The sum assured under the policy was GHC116,200.00 and the agreed premium was GHC5,759.00.

While the policy was subsisting, the Car was snatched from the wife of the appellant. The appellant put in a claim for the sum assured in terms of the policy which covered the incident. The respondent sought to repudiate his liability on several grounds. In an amended statement of defence, defendant pleaded that , the appellant initially transferred the vehicle to Alhaji Yusif who took a third party insurance cover, and later transferred same to one Derrick Asante Amoako, who in turn transferred same to EB ACCION SAVINGS AND LOANS COMPANY LIMITED, on 30/10/2009. All these transactions were supposed to be existing at the time that the appellant purported to take his comprehensive insurance cover. In effect, it was the case of the respondent that, the appellant did not have an insurable interest in the car. The respondent also contended that, the appellant had inflated the value of the vehicle far in excess of the value declared at the port of taking delivery of the vehicle because of which he paid a

lower custom duty thereby perpetrating fraud on the state, so the contract should be annulled. He counterclaimed as follows

a. *A declaration that the Defendant is entitled to avoid the contract of Insurance entered into between the plaintiff and Defendants in respect of Chevrolet SSR Sports Car with registration no. GN 8866 Z covering the period 27th March, 2009 to March 2010, on the grounds of non-disclosure of material fact or representation of fact which was false in some material particular*
b. *An Order setting aside the contract of insurance entered into between the plaintiff and the defendant in respect of The Car.*

Before the High Court several issues were joined. At the end of the trial, judgment was entered for the appellant against the respondent herein, who immediately appealed to the Court of Appeal on a number of grounds. Before the Court of Appeal, the court was of the view, which we share, that, the two main issues sought to be adjudicated were,

a. ***Whether the plaintiff had an insurable interest in the Car***
b. ***Whether the defendant is entitled to avoid the contract of insurance entered into between the plaintiff and the defendant on grounds of non-disclosure of a material fact and/or representation of fact which was false in some material particular.***

The Court of Appeal held that the Appellant had an insurable interest in the property but ruled that the respondent was entitled to avoid the contract for non-disclosure of some material facts and also for behaviour that bordered on fraud and forgery of official documents.

The appellant has therefore brought this appeal before us on the grounds

a. **The judgment is against the weight of evidence and,**
b. **The Court below erred when it held that the appellant misrepresented the value of the vehicle insured by the respondent for which reason the contract of insurance between appellant and the respondent is vitiated; the error lying in the fact that the court below failed to take**

into account the nature of misrepresentation and that it was separable from the contract of insurance.

Since the respondent has not filed any appeal against the Court of Appeal's holding that the appellant had an insurable interest in the vehicle, we take it that the only issue outstanding to be resolved in this appeal is, whether or not the Court of Appeal was right in annulling the contract between the appellant and the respondent. We have had the benefit of the written submissions of counsel and we are grateful to both counsel for their industry.

At page 16 of their judgment, (pg 307 ROA) the Court of Appeal stated thus,

" …The plaintiff represented to the defendant that the vehicle is valued $83,000.00 based upon Exhibit C which plaintiff referred to as receipt and the defendant insured it under comprehensive cover at a value of GHC116,200.00.... the equivalent of $83,000.00. This no doubt amounted to a misrepresentation of material fact by the plaintiff to the defendant which goes to the root of the contract of insurance based upon uberimae fidei which entitles the defendant under Exhibit A part F clause 2 to avoid the policy.

"Indeed, if the actual value of the vehicle was $83,000.00 as alleged by the plaintiff, then a fraud had been perpetrated at first instance on the state by the declaration of a lesser value for it when it came to the payment of custom duty to the state… When such fraud against and or violation of statute is brought to the attention of the court, the court cannot ignore it.

In support of their stance, the Court of Appeal cited the case of **Network Computer System Ltd vrs. Intelsat Global Sales & Marketing LTD where** Atuguba JSC said,

"A court cannot shut its eyes to the violation of a statute as that would be contrary to its raison d'etre. If a Court can suo motu take up the question of illegality even on mere public policy grounds, I do not see how it can fail to

take up illegality arising from statutory infraction which has duly come to its notice."

The court also cited the case of **Republic v, High Court (Fast Track division) Accra, Ex parte National Lottery Authority (Ghana Lotto Operators Association and Others interested parties)[2009] SCGLR 390, pg 402** where Date Bah JSC said.

> *"No judge has authority to grant immunity to a party from consequences of breaching an Act of Parliament. … The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders. The end of judicial oath set out in the second schedule of the 1992 Constitution is as follows; "I will at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana". This oath is surely inconsistent with any judicial order that permits the infringement of an act of Parliament"*

Thereafter, the Court of Appeal concluded their judgment as follows

"It is obvious that if the value of $83,000.00 had been declared as the value of the vehicle by the plaintiff's clearing agent, the duty that would have been assessed by CEPS would be higher. It would therefore be against public policy for this court to insist that the defendant should indemnify the plaintiff by paying GHC116,200.00 being the equivalent of $83,000.00 the plaintiff claims to be the cost of the vehicle.

"A declaration of a lesser value for the vehicle to CEPS is a clear infraction of PNDCL 330 which cannot be sanctioned by this court. It is for this reason that the defendant is given reprieve to avoid the contract of insurance entered into between the plaintiff and the defendant in respect of the vehicle the subject matter of the suit."

We find it very difficult to see how a simple contract of insurance covering a vehicle has occasioned such an incursion into the jurisprudence of fraud perpetration on the state on the grounds of some allegations of under declaration of value for purposes of

payment of custom duty. Shorn of all the red herrings thrown about by the respondent, this was a simple contract of insurance, and to resolve it the court need to look at the elements of an insurance contract and also the basic contractual document, ie. the proposal form.

A contract of insurance, in the widest sense of the term, may be defined as a contract whereby one person, called the Insurer, undertakes, in return for the agreed consideration, called the PREMIUM , to pay to another person, called the Assured, a sum of money or its equivalent, on the happening of a specified event.

Personalising this definition in relation to the case before us, the SIC(THE INSURER). Undertook, in return for the agreed consideration of GHC5,759.00 (the Premium), to pay KEN KWAME ASAMOAH(the ASSURED) a sum of money (GHC 116,200.00) or its equivalent, on the happening of an event.

This was the simple contract of insurance entered into by the parties. It was based on conditions embodied in a document which was tendered at the trial and referred to as

PRIVATE MOTOR VEHICLE INSURANCE POLICY COMPREHENSIVE COVER. Exhibit A

This document contains the “dos and don’ts” of parties to an insurance contract and so it remains the primary document that should be referenced in an attempt to resolve any problem that may arise from the contract.

In a desperate bid to renege on their promise to pay the sum assured, the respondent has thrown around a lot of red herrings. He suggested that by declaring a lower value to the CEPS the appellant succeeded in paying a lower amount as customs duty and so a claim for a higher amount as the insured sum is an attempt to perpetrate fraud on the state. This argument found favour with the court of appeal, but clearly it cannot stand critical scrutiny.

In the first place, duty payable on a vehicle is not based on values declared by the importer but rather on values decided by the state. If that were not the case, then every importer will just say the vehicle was a gift from a friend, then he would pay nothing. The reality is that duty on vehicles are calculated on a number of things

including, model of car, year of make, capacity of engine, and even recently, whether the vehicle is a luxury vehicle or not.

On the other hand, the sum assured is the value placed on the property by both the insurer and the assured. This may be influenced by how much the importer really spent on the vehicle from purchase, through shipment, to clearing it from the port, and licensing at the DVLA. Other things like how much is spent in replacing certain parts; the vehicle might have been reconditioned or upgraded; there are even situations where right handed steering machines are changed to left hand; vehicles may be resprayed and internal gadgets upgraded, etc. And where it is for sale, profit margins should be taken into consideration.

So when an importer, after taking into consideration all these, approaches an insurance company to take a comprehensive cover for his vehicle, he has in mind the value that he wants in the case of the occurrence of the event. It is for the insurer to decide whether or not to assume the risk and at what premium. Premiums are fixed based on sum assured and the nature of the risk being undertaken. A higher assured sum definitely commands a higher premium.

Indeed on the SIC INSURANCE COMPANY LIMITED, PROPOSAL FORM filled by the appellant, tendered by the respondent as exhibit 3 (found at pgs 231 and 232 of the ROA), nowhere is the purchase price of the vehicle required to be declared by the assured. The only column that talks about the value of the vehicle is the column that gives the sum Insured as GHC116.200.00. In that form, the appellant proposes to insure his vehicle for the amount of GHC116,200.00, answers some questions, and declares that the answers that he has given are true to his knowledge.

A lot of premium has been put on Part F Clause 2a and 2b. Indeed the Court of Appeal said,

"... the plaintiff represented to the defendant that the vehicle valued $83,000.00 based upon exhibit C...and the defendant insured it under comprehensive cover at a value of GHC116,200, the equivalent of $83,000.00. This no doubt amounted to a misrepresentation of a material

fact by the plaintiff to the defendant which goes to the root of the contract of insurance based upon uberimae fidei which entitles the defendant under Exhibit A Part F clause 2 to avoid the policy."

What does Part F Clause 2 " of Exhibit A actually say?

"We may avoid the Policy if you fraudulently:

a. *Failed to disclose to us before the contract was entered into every matter which you knew or which you could reasonably be expected to have known to be a matter* ***relevant to our decision whether to insure you and on what terms to accept the risk or***

b Misrepresented any facts to us before the contract was entered into, and if we ***would not have entered into the contract for the same premium and on the same terms and conditions expressed in the policy*** *but for your failure to disclose or the misrepresentation you made.(emphasis added)*

Under a contract of insurance the assured is under a duty to disclose all material facts relating to the insurance which he proposes to effect. In addition he must make no misrepresentation regarding such facts. Usually, these duties are modified by the terms of the contract. Whether a material fact is relevant depends upon the particular circumstances of the particular case. It does not necessarily follow that because a fact has been held to be immaterial in one case, a similar fact is not material in another. At the same time, similar circumstances may be assumed to be equally material or immaterial, whatever the nature of the insurance. In effect relevancy or materiality should be looked at on case by case basis.

The test for determining the materiality or otherwise of a fact for purposes of disclosure, has always been this,

"***Everything is material which will guide a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions." Preston and Colinvaux on the Law of Insurance, pg 102.***

See the case of **Guardian Assurance Co Ltd, v. Osei [1966] GLR 762**. In that case the defendant, Osei, insured a motor vehicle with Lion of Africa Insurance Co Ltd, a predecessor company of the plaintiff company. To a question in the proposal form, "Are you the owner of the vehicle" the defendant replied "yes". As a matter of fact the vehicle belonged to one Kwasi Manu who denied authorising the defendant to insure the motor vehicle in his (defendant's) own name. On the discovery of this fact the plaintiffs brought an action seeking a declaration that the policy of insurance taken out by the defendant was null and void for non-disclosure of a material fact relating to the ownership of the insured vehicle.

At the trial the plaintiffs testified as follows

"If Kwasi Manu had been known to my company that he was the true owner of vehicle No. AN 293, my company would have directed their inquiries in respect of him about his past claims with other insurance companies. The material fact has been hidden from my company."

The court held as follows

(1) A contract of insurance was one of the utmost good faith (uberrima fides) and the proposer must make full and true disclosure of material facts which would guide a prudent insurer in determining whether to assume or take the risk and if so at what premium and on what conditions.

(2) A statement as to the ownership of an insured vehicle was a material fact non-disclosure of which rendered the insurance contract void ab initio."

In the case before us is the fact of the value given and the custom duty paid thereon, relevant to the comprehensive insurance? Would its disclosure or non-disclosure have affected the insurance company's preparedness to enter into the agreement on the same terms and conditions? Our answers to both questions are in the negative.

In a contract of insurance of this nature, it definitely is material to disclose to the insurance company if, for example, the vehicle had been previously involved in a serious accident; or if the vehicle was originally left wheel drive and same has been

converted to right wheel; or if the vehicle has undergone massive body or engine repairs, etc.

In all such cases, it can be seen that disclosure is essential because, they are likely to increase the risk the insurance company is undertaking. But even then, I daresay its non-disclosure would not lead to annulment of the contract if the event that triggers the claim is unrelated to the undisclosed facts, as in this case, where the claim is for the snatching of the vehicle by armed robbers.

The customs duty paid on the vehicle was based on the assessment done by the CEPS relative to what they assessed to be the value of the vehicle at the time the vehicle was being cleared from the port. It had nothing to with the value placed on the property by the assured, and for which the insurance company computed and asked the assured to pay a premium.

We hold that, in simple terms, going by the classical definition of Contract of Insurance, SIC Insurance Company Ltd, undertook, in return for the agreed consideration of the amount of GHC5,759.00, to pay to KEN Kwame Asamoah, an amount of GHC116,200 on the happening of certain events including armed robbery. Ken Kwame Asamoah, paid the GHC5,759.00 premium. The event for which the policy was taken has occurred. It is now time for SIC to make do their promise!

The appeal succeeds and the judgment of the Court of appeal is set aside. The plaintiff is entitled to judgment on his reliefs. The defendants counterclaim is dismissed.

The plaintiff is given judgment on the amount of GHC116,200.00, being the sum assured, and interest on the said amount at the prevailing market rate till the date of the High Court judgment, and thereafter interest calculated in accordance with post judgment rates till the date of final payment.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I have had the benefit of reading beforehand the well considered opinions of my worthy and respected brethren Anin Yeboah and Baffoe-Bonnie, JJSC and my mind sides with the reasoning and conclusion of Baffoe-Bonnie, JSC. Nonetheless, I wish to express myself on the important issue of the alleged breach of the **Customs and Preventive Service (Management) Act 1993, (PNDCL330)** and the public policy issues that arise therefrom.

In his written submissions in support of his appeal against the judgment of the High Court the defendant argued before the Court of Appeal that the plaintiff under declared the value of his car, the object of the insurance policy, to the customs when he cleared it thereby defrauding the state of revenue so on public policy grounds the insurance contract should be set aside by the court. The defendant relied on the Supreme Court case of **Republic V High Court (Fast Track Division), Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Ass & Ors) (Interested Parties [2009] SCGLR 390,** which has also been referred to us in this final appeal, and submitted that a court of law ought not to shut its eyes to the breach of statute. The decision of the High Court Judge in the English case of **Geismar vrs Sun Alliance and London Insurance Ltd [1978] QB 383** was also referred to by the defendant. The Court of Appeal agreed with the above submissions and held as follows in their judgment on appeal before us;

"A declaration of a lesser value for the vehicle to CEPS is a clear infraction of PNDCL 330 which cannot be sanctioned by this court. It is for this reason that the defendant is given reprieve to avoid the contract of insurance entered into between the plaintiff and defendant in respect of the vehicle the subject matter of this suit."

I notice from the pleadings of the defendant that this alleged breach of the provisions of PNDCL 330 was not pleaded as is required by **Or 11 Rule 8(1) of the High Court (Civil Procedure) Rules, 2004 (C.I.47)** which provides as follows;

Matters to be specifically pleaded

8. (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality

a) which the party alleges makes any claim or defence of the opposite party not maintainable; or
b) which, if not specifically pleaded, might take the opposite party by surprise; or
c) which raises issues of fact not arising out of the preceding pleading.

However, in the case of **Belvoire Finance Co Ltd v Harold G. Cole Co [1969] 2 All ER 904** Donaldson J (as he then was) said at page 908 as follows;
"Illegality, once brought to the attention of the court, overrides all questions of pleadings". See also **Asare v Brobbey & Ors [1971] 2 GLR 331, CA**
But it is in the judgment of **Georgina Wood JSC (as she then was)** in the case of **ATTORNEY-GENERAL V FAROE ATLANTIC CO LTD [2005-2006] SCGLR 271** that we find a comprehensive statement of the law on points of law that are raised for the first time before an appellate court. At page 309 of the Report said as follows:

"The salutary and well-known general rule of law is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being of one of them. A jurisdiction issue can therefore be taken or raised at any time, even for the first time, on appeal. Another exception is where an act or contract is made illegal by statute.....Again, the well-established general rule is that where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence it should be allowed."

Therefore, what we need to advert our minds to in this appeal is whether the allegation of breach of PNDCL 330 required evidence to be proved or not. If it required evidence to be proved, was there sufficient evidence on the record that

the Court of Appeal could examine to determine if there was indeed a breach of the statute before applying the public policy to prevent the plaintiff from claiming on the insurance policy. Secondly, the public policy itself is not blindly applied to all breaches of statute. In the **Geismar case (supra)** relied on by the Court of Appeal, Talbort J reviewed a number of cases including decisions of the Supreme Court of the United States of America and then concluded as follows at page 395 of the Report;

"The plaintiff is seeking the assistance of the court to enforce contracts of insurance so that he may be indemnified against loss of articles which he deliberately and intentionally imported into this country in breach of the Customs and Excise Act 1952.

I am not concerned with cases of unintentional importation or of innocent possession of uncustomed goods. I would think that different considerations would apply in those cases. But where there is a deliberate breach of the law I do not think the court ought to assist the plaintiff to derive a profit from it, even though it is sought indirectly through an indemnity under an insurance policy."

Whether there was a breach of PNDCL 330 or not is undoubtedly a question of fact to be proved by evidence. The plaintiff who has appealed to this court has argued that the evidence that was before the Court of Appeal did not support the conclusion that there had been a breach of PNDCL 330. The charge against the plaintiff by the defendant is that he tendered a document showing that he purchased the car in question at USD83, 000.00 but on the Import Declaration Form he stated USD25, 472.87 and that he was therefore assessed less tax than he ought to have paid to the state. In answer, the plaintiff has submitted in his statement of case that the customs value of an imported used car is different from the purchased price and that the customs value is calculated in accordance with Sections 9(3) & (7) of PNDCL 330. He says that when those provisions are applied to calculate the customs value of his car it comes to USD25, 472.87. According to him, his clearing agent is the person who worked out the value. It

is common knowledge that custom house agents are those who are trained in matters of clearance of imported goods from ports. If we doubt this answer of the plaintiff, which on the face appears probable to me, then we have to resort to the record to see if there is evidence to the contrary. From the record, I find the following interesting piece of evidence by the defendant's witness, Mr. John Sterling Kudjo, who was reputed to be defendant's motor claims expert.

"John; My Lord the importer will first fill a Declaration Form stating the values and then they also have their way of calculating so when they see that the value you have given is not correct then it is there that they state their value. But if the values you have stated on the form are correct they work with that.

Judge; Are you sure?

Agyekum (defendant's lawyer); Yes My Lord that is what they do"

In this case it was the calculation entered by plaintiff's clearing agent that was applied by the customs officials to assess the import duty payable on the car. So, going by the testimony of defendant's own witness, that value was correct and in accord with PNDCL 330. It may well be that if the customs officials had been summoned to testify in the High Court additional information would have been made available to the court, but it appears that because the alleged fraud of the state contrary to PNDCL 330 was not pleaded, the trial did not involve that issue. But that is precisely the point made by Wood JSC (as she then was) in the **Faroe Atlantic case supra**. If additional evidence would be required to resolve a new point of law, then it cannot be raised for the first time on appeal.

In my considered opinion, there was not sufficient evidence of breach of PNDCL 330 in this case and the conclusion reached by the Court of Appeal is indeed against the weight of the evidence as argued by the plaintiff. If there was such evidence proving that the plaintiff had intentionally and deliberately evaded paying the appropriate customs duty, I would have agreed with the Court of Appeal that the plaintiff's claim be dismissed but I find no such evidence on the record. For the principle is *"ex dolo malo*

non oritur actio." No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

It is also for the above reasons that I am of the view that the appeal be allowed.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ADINYIRA, JSC (MRS): -

I had the privilege to read beforehand the well-written and erudite opinions of my learned brothers Yeboah, Baffoe-Bonnie and Pwamang, JJSC.

I concur with the reasoning and conclusions of Baffoe-Bonnie and Pwamang, JJSC that the appeal be allowed.

S. O. A. ADINYIRA (MRS.)
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I have had the opportunity to read beforehand the reasoned opinions of my brothers Anin-Yeboah, Baffoe-Bonnie and Pwamang, JJSC. The only controversy in this appeal had to do with the alleged fraud played on the Customs, Exercise and Preventive Services (CEPS) vide P.N.D.C Law 330; i.e. CUSTOMS, EXERCISE AND PREVENTIVE SERVICES (MANAGEMENT) ACT, 1993 and therefore the State and the so-called Public Policy involved as dilated by the Court of Appeal in its judgment on appeal before us.

The fact that, the contract of insurance entered into between the parties herein and the duty paid by the appellant at the Port for the clearance of his vehicle are mutually exclusive transactions, has not been disputed as well explained in the lead judgment of my able brother Baffoe-Bonnie, JSC. My brother Pwamang, JSC, in a concurring opinion

to that of Baffoe-Bonnie JSC, has excellently dealt with this legal issue of alleged fraud and public policy issue to my utmost satisfaction. I totally agree with these my brothers and I do not think there would be the need to add anything further to what they have written. I would therefore add my voice to theirs by allowing the appeal whilst I depart, regrettably, from the decision of my able brother Anin-Yeboah, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I had the opportunity of reading the majority opinion in this appeal but I am unable to agree with the reasons and the conclusions offered for the allowance of the appeal. I am thus compelled to give my reasons for the dissent.

The plaintiff/respondent/appellant herein (who shall in this appeal be referred to as the appellant commenced these proceedings against the defendant/appellant/respondent (herein after referred to as the respondent) for:

a. Recovery of Gh₵116,200.00 being the insured/claim/replacement cost in CHEVROLET Nº GN 8866Z lost under comprehensive insurance policy Nº P/200/10/1001/2009/134 with defendant.

b. Interest on the said sum of Gh₵116,200.00 from April 2010 to date of payment at the commercial bank rate.

c. Legal and solicitor's costs.

The facts of this appeal appear to be simple and devoid of any serious controversy. The appellant who was resident in Ghana and the United States of America imported a Chevrolet SSR sport car from the United States of America and same was discharged at

the Tema Habour in 2008. After the appellant had taken delivery of the said vehicle one Alhaji Iddrisu Yisufu expressed interest in the vehicle and the appellant sold offered same to him to be paid later. It was, however, registered in the name of Alhaji Iddrisu Yisufu. As the said Alhaji Iddrisu Yisufu failed to pay for the vehicle, the appellant retrieved same from him. The plaintiff subsequently took a comprehensive insurance policy to cover loss or damage to the vehicle at an insured value of One Hundred and Sixteen Thousand Two Hundred Ghana Cedis [Gh₵116,200.00]. The appellant paid Five Thousand, seven hundred and fifty nine Ghana Cedis [5,759.00] as premium to the respondent. On 1/08/2009, armed robbers snatched the vehicle from the appellant's wife while she was driving, unfortunately, a report to the Police yielded no results whatsoever. The appellant put in a claim for the respondent to indemnify him in terms of the policy which according to him covered the incident.

The respondent in an amended statement of defence and counterclaim denied liability to indemnify the appellant. It was pleaded that the vehicle was earlier transferred to one Iddrisu Yisufu who took a third party insurance policy on the vehicle when the comprehensive insurance policy was subsisting. Appellant also pleaded that the said Iddrisu Yisufu transferred the vehicle to one Derrick Asante Amoako who in turn transferred same to EB ACCION SAVINGS & LOANS COMPANY LIMITD on 30/10/2009. It was also contended that the value which appellant placed on the vehicle to insure it had been inflated by the appellant as the value which was placed on the vehicle at the port for custom duty was far lower. The respondent also alleged fraud and counterclaimed to avoid the contract of insurance between the parties.

Several issues are joined before the trial High Court which entered judgment for the appellant and dismissed the counterclaim. The respondent filed an appeal to the Court of Appeal, Accra and on 9/02/2017, the Court of Appeal set aside the judgment of the High Court and substantially granted the counterclaim of the respondent by setting aside the contract of insurance entered into between the parties herein.

Before me, the appellant has filed only two grounds of appeal to seek the reversal of the judgment of the Court of Appeal as follows:

1. The judgment is against the weight of evidence

2. The court below erred when it held that the plaintiff/respondent/appellant or his agent misrepresented the value of the vehicle insured by defendant/appellant/ respondent for which reason the contract of insurance between plaintiff/respondent/appellant and defendant/appellant/respondent is vitiated; the error lying in the fact that the court below failed to take into account the nature of misrepresentation and that it was separable from the contract of insurance.

Learned counsel for the appellant argued both grounds together. It appeared that counsel took time to go through the inferences drawn by the Court of Appeal and formed a view that most of the inferences are palpably wrong and invited me to rely on the facts found by the High Court as right. Counsel, however, failed to appreciate that all the inferences drawn by the Court of Appeal are from the primary findings of facts which the learned trial judge had found as proved. The Court of Appeal, did not, in the least substitute its own findings but limited itself to inferences drawn from the facts which turned on documentary evidence and undisputed facts. I think that it was exclusively within the province of the Court of Appeal. In the case of ASHITEY v DODOO [1969] CC CA [Full Bench] unreported, it was held thus:

> "where the facts upon which a judgment is based are inferences drawn from primary facts an appellate court is in just as good as a position as the trial court to draw these inferences and where a Court of Appeal is of the considered view that wrong inferences have been drawn by the trial court, it (appellate court) can properly substitute its own findings for those of the trial court".

The undisputed facts material for the determination of the issues as found by the learned High Court judge are all affirmed by the Court of Appeal. For example, the price at which the appellant bought the vehicle, the customs duty paid at the Tema

Port, the value of the vehicle given by the appellant to the respondent before the insurance, are all affirmed by the Court of Appeal.

On the issue of lack of insurable interest, the Court of Appeal affirmed the decision of the High Court and ruled that on the authorities of LUCEUA v CRAMFURD [1806] 2 BOS & PNR 267 HL and ROYAL EXCHANGE ASSURANCE v TAYLOR [1973] 1 GLR 226 the appellant had an insurable interest. The view of this court is that the Court of Appeal could not be faulted on this. Perhaps, the only issue which should be considered by me is whether the respondent was right in avoiding the contract which sought to indemnify the appellant for the loss of the vehicle.

In resolving this issue I think I must remind myself that contract of insurance and other contracts are conceptually different. What may be the material terms and requirements in an ordinary contract may be different from a contract of insurance. A contract for the sale of an immovable property for example, imposes obligations on the vendor to a limited extend only by showing good title to the subject-matter of the contract. The purchaser is required to make his reasonable searches and in some cases even conduct further inquiries to ascertain whether the subject matter is free from encumbrances. See KUSI & KUSI v BONSU [2010] SCGLR 60, and USSHER & ORS v DARKO [1977] 1GLR 476 CA.

In contract of insurance, utmost good faith is required of the proposer to disclose material facts to the insurer. Even though both the proposer and the insurer must make accurate statements, the proposer on whose representations the insurer usually would rely on, may in the appropriate cases be culpable for non-disclosure or misrepresentation. Since contracts of insurance are written, the extent of disclosure may usually appear in the contract itself. In this case before me, Exhibit "A" tendered on 9/04/2013 is labelled as PRIVATE MOTOR VEHICLE INSURANCE POLICY COMPREHENSIVE COVER. Carefully read, it would reveal all the contractual details.

For a more detailed appreciation of the contract or the policy, a reference may be made to PART F of Exhibit "A". It provides thus:

PART F IMPORTANT MATTERS;

1. The policy and the certificate are not transferable.
2. I may avoid the policy if you fraudulently:
    a. Failed to disclose to us before the contract was entered into every matter which you knew or which you could reasonably be expected to have known to be a matter relevant to our decision whether to insure you and on what terms to accept the risk, or

    b. Misrepresented any facts to us before the contract was entered into and if we would not have entered into the contract for the same premium and on the same terms and conditions expressed in the policy but for your failure to disclose or the mispresentation far made:

This policy (exhibit "A") was basically the contract executed between the appellant and the respondent. The conditions quoted above imposed a strict duty on the appellant as the proposer to the insurer. Admittedly, material facts in contracts of insurance may differ in different cases, the test as to what is a material fact has been succinctly stated in Halsbury's Laws of England 4th edition at page 202, paragraph 367 thus:

> "The basic test lingers upon whether the mind of a prudent insurer would be affected, either in deciding whether to take the risk at all or in fixing the premium, by knowledge of a particular fact if it had been disclosed. Therefore the fact must be one affecting the risk"

The learned authors proceeded further as follows;

> "It is for the court to rule as a matter of law whether a particular fact is capable of being material and give directions as to the test to be applied, but the decision ultimately is one of fact depending on the circumstances as proved in evidence"

In support of the above propositions of law are GLICKSMAN (PAUPER) v LANCASHIRE AND GENERAL ASSURANCE COMPNAY LIMTED [1927] AC 139, SCOTTISH SHIRE LINE, LIMITED & ORS v LONDON AND PROVENCIAL MARINE AND GENERAL INSURANCE COMPNAY LIMITED [1912] 3 KB 51 and SEATON v HEATH [1899] 1QB 782 CA.

The Court of Appeal revealed the evidence on record by considering Exhibit "C" the "Bill of sale" and came out concluding that nowhere on Exhibit "C" was the amount of US$83,000.00 stated as the amount paid by the appellant for the vehicle. On the Customs Declaration Form, the value declared on it was US$25,472.87 and it was based on this amount so declared that a duty of Gh₵5,906.96 was assessed by Customs, Excise and Preventive Service, Ghana (CEPS). Nowhere on the Customs Declaration Form does the sum of US$83,000.00 appear. The Court of Appeal found that the assessment of the duty paid was based exclusively on the documents made available by the appellant or his agent, and that upon the appellant becoming aware, no attempt was ever made by him to correct this serious error which indeed had denied the state some revenue. The appellant, however, on entering into the contract represented to the respondent that the value was US$83,000.00 which was exclusively within his knowledge and indeed relied upon by the respondent.

The Court of Appeal after reviewing the evidence on what constitutes material facts in this case held as follows:

> "This no doubt amounted to a misrepresentation of material fact by the plaintiff (appellant) to the defendant (respondent) which goes to the root of the contract of insurance based on unberrimae fides which entitles the defendant (respondent) under Exhibit "A" part "F"... to avoid the policy"

The Court of Appeal even proceeded to hold that the declaration of the value by appellant to be US$83,000.00 amounted to perpetration of fraud against the state when he paid a lesser amount to the customs officials. In this appeal, the onus was squarely on the appellant to show where the Court of Appeal erred on the facts or the law or finding that the non-disclosure of the material facts was sufficient for the respondent to

avoid the contract. In my opinion the appellant has not been able to convince this court that the non-disclosure of the actual price was not a material fact to enable the contract to be avoided.

Another point which was advanced by the Court of Appeal was the application of public policy to the case when it applied sections 95(a) and (c) and 251 (1) (d) and (f) and (2) of Customs Excise and Preventive Service (management) Act 1993, PNDCL 330 to conclude against the appellant for having engaged in forgery and falsification having regard to the value declared. According to the Court of Appeal, as the whole transaction at the instance of the appellant was fraught with illegality, it was bound to raise it. Reliance was placed on local cases like REPUBLIC v HIGH COURT (FAST TRACK DIVISION), ACCRA; EX PARTE NATIONAL LOTTERY AUTHORITY (GHANA) LOTTO OPERATORS ASSOCIATION & ORS (INTERESTED PARTIES) [2009] SCGLR 390. Indeed once illegality is apparent on record a court of law must consider it. In BELVOIR FINANCE CO LTD v HAROLD G. COLE & CO [1969] 2 ALL ER 904, Donaldson J (as he then was) said at page 908 thus:

> Illegality, once brought to the attention of the court, overrides all questions of pleadings"

The Court of Appeal was of the firm opinion that as it would be against public policy for the appellant to take any benefit out of the contract of insurance the respondent was right in avoiding the contract. The English case which cited in support is GEISMAR v SUN ALLIANCE AND LONDON INSURANCE LTD & OR [1977] 3 ALL ER 570. In my view, I think that the conduct of the appellant which was in clear violation of the law referred to above and should not benefit from his illegality.

I think the above reasons suffice to dismiss the appeal which is accordingly dismissed.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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