# In The Supreme Court of Bermuda

**COMMERCIAL JURISDICTION**
**2017 No: 370**

**BETWEEN:**

**CAPITAL SECURITY LTD**
**FOR AND ON BEHALF OF ITS**
**MOTORSPORT INSURANCE GROUP SEGREGATED ACCOUNT**

Plaintiff

**And**

**MARK WOODRUFF**

Defendant

## EX TEMPORE JUDGMENT

| | |
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| Dates of Hearing: | Monday 16 April 2018 |
| Date of Judgment: | Monday 16 April 2018 |
| Date of Reasons: | Tuesday 17 April 2018 |
| | |
| Plaintiff: | Mr. Rod Attride-Stirling (ASW Law Limited) |
| Defendant: | Unrepresented by Counsel and not in attendance at hearing |

*Fraudulent Misrepresentation / Unjust enrichment / Restitution*

JUDGMENT of Shade Subair Williams A/J

### Introduction

1. The Plaintiff in these proceedings sought declaratory and restitutionary relief by a Specially Indorsed Writ of Summons filed on 6 October 2017.

2. The Defendant resides in Missouri, USA and is said to be represented by US attorneys who have not filed any documents in these proceedings. In fact, the Defendant has never entered an appearance in these proceedings.

3. On 20 October 2017 the Plaintiff filed a summons for orders granting leave to file a concurrent writ under RSC Order 6 and to serve out of the jurisdiction pursuant to RSC Order 11. Leave was granted by an Order made by the learned Justice Stephen Hellman on 26 October 2017.

4. By a summons, dated 1 February 2018, for trial directions pursuant to RSC Order 25, the Plaintiff's Counsel sought leave for the trial to proceed in the absence of the Defendant. (On account of the declaratory relief pursued, it was not open to the Plaintiff to make an application for judgment in default under RSC Order 13.)

5. An order in the terms prayed was made on 15 February 2018 and the trial of the action was listed before me. At the conclusion of the trial, which consisted of submissions from Counsel on the evidence and the relevant law, I granted judgment in favour of the Plaintiff in the following declarations and terms:

DECLARATIONS:

1. A declaration of non-liability in favour of the Plaintiff, with respect to certificate 2016-239 and the associated policy, on the basis of there having been a material non-disclosure by the Defendant.
2. A declaration of non-liability in favour of the Plaintiff, with respect to certificate 2016-239 and the associated policy, on the basis of there having been a fraudulent misrepresentation by the Defendant.
3. A declaration that certificate 2016-239 and the associated policy are void *ab initio* and /or void.
4. A declaration that the Defendant acted fraudulently and as a result the premium paid is forfeited.
5. A declaration that the advance payment of $35,000 on 21 September 2016, and the second payment of $35,000 on 15 September 2017, were made by mistake.

TERMS OF ORDER:

6. The Defendant make restitution to the Plaintiff and pay to the Plaintiff the full amount of the payments of $70,000, on the grounds above, and on the grounds that the Defendant has been unjustly enriched.

7. The Defendant shall pay to the Plaintiff, interest at the rate of ~~7%~~ 3.5% per annum (the statutory rate[1]), from the date of each payment to the Defendant, to the date of payment.
8. Costs follow the event in favour of the Plaintiff.
9. Written submissions with authorities to be filed within 7 days in support of the Plaintiff's application for the costs awarded to be on an indemnity basis.

6. Further to the above order, I indicated that would provide these written reasons.

## Summary of Facts:

7. The Plaintiff is a Bermuda registered insurance company pursuant to section 4 of the Insurance Act 1978 and operates as a segregated accounts company having been registered under section 6 of the Segregated Accounts Companies Act 2000 ("Capital Security"). The Motor Insurance Group ("MIG") is a segregated account operated by the Company. MIG underwrites property and casualty risks exclusively for members of the North American Motorsport Association ("NAMA"). The Defendant is a member and drag car racer of NAMA who was insured by MIG.

8. The assessment of the risk relevant to the insurance policy covering the Defendant was largely tied to the 'elapsed time' ("ET"), which is the drag car racing terminology used to measure the start to finish timeframe of the race. The payable premiums under the MIG policy varied according to the range of ET bands. The faster the ET, the higher the premium. However, MIG's policy was to refuse coverage in respect of any vehicle which exceeded an elapsed time of 4.20 seconds on a drag racing course of a distance of an eighth of a mile ("the maximum ET").

9. The Defendant was insured by MIG for two consecutive one-year periods in 2016 and 2017. The first certificate and policy expired on 25 March 2016 and the second one expired on 25 March 2017.

10. The Defendant, by his first application to MIG for coverage, dated 26 March 2015, warranted that the vehicle in question did not exceed the maximum ET ("the first warranty"). The Plaintiff alleged that the Defendant knowingly provided a false representation in providing the first warranty which amounted to a material and fraudulent misrepresentation of fact. The Plaintiff's alternative case was that the Defendant was negligent in this material

[1] Counsel erred in submitting that the statutory rate continued to be at 7%. Section 1 definition "statutory rate" of the Interest and Credit Charges (Regulations) Act 1975 was amended by 2017:27 and made effective on 2 June 2017. Thus judgment interest at the current statutory rate of 3.5% is ordered.

misrepresentation of fact. On both averments the Plaintiff submitted that it is entitled to avoid the policy *ab initio*.

11. The Defendant's second coverage application to MIG was facilitated by the Defendant's broker, Central Ohio Insurance Services ("COIS"), who on the Plaintiff's case acted as the Defendant's agent in sending the renewal request and posting payment of the premium to MIG. In this second application, the Defendant warranted, employing the same terms as the first warranty, that the coverage did not apply to any vehicle exceeding the maximum ET ("the second warranty"). The Plaintiff alleged that the Defendant acted fraudulently when he falsely represented that the maximum ET for his race car was 4.20 seconds, when in fact it ran ETs faster than 6.5 seconds on a quarter mile.

12. On 25 August 2016, COIS put MIG on notice that the Defendant's vehicle had been involved in a crash accident which occurred the day prior on 24 August 2016. The Plaintiff says that the Defendant fell technically short of compliance with the requisite steps for making a claim but that the Plaintiff permitted the Defendant to proceed with his claim in any event as a measure of good faith.

13. The procedural approach for making a formal claim involved a series of uploads to an online claim page. The Defendant received assistance from MIG administrators but in the end failed to successfully complete the claim process proving his loss. Notwithstanding, an advance claim payment in the sum of $35,000 was made to the Defendant by wire-transfer on 21 September 2016 ("the first claim payment").

14. It was discovered during the early stages of reviewing the Defendant's indemnity claim that he had wrongly caused his damaged vehicle to undergo repairs without having first obtain approved estimates, contrary to what was permitted by the policy. Consequently, MIG engaged in discussions with Europros Collision on the possibility of obtaining a second opinion on the Defendant's claim. These discussions led to it being made known to MIG that there was an online youtube video and other public postings suggesting that the Defendant's vehicle made multiple eighth mile runs in less than 4.00 seconds.

15. The Plaintiff's position was that the Defendant, as a matter of law, forfeited his right to an indemnity under the policy which restricted coverage to the maximum ET or less. On 16 January 2017 MIG notified the Defendant that his claim had been denied on the basis that his car was ineligible for coverage, having exceeded the maximum ET. MIG in the same notification demanded a return of the first claim payment minus $7,800.00 representing the full amount of premium which had been paid to date, leaving a remainder sum of $27,200.00 for reimbursement to the Plaintiff. The Defendant, however, never returned this sum or any part thereof.

16. On 10 September 2017, IOA's office underwent a power outage attributable to damage caused by the infamous Hurricane Irma. This led to the mistaken wire-transfer of a second $35,000.00 payment by IOA which was made without the knowledge of the Plaintiff ("the second claim payment"). In the witness statement of Mr. Serada, it was said that "… *the payment was the result of a simple error by IOA staff, who, out of dedication to their clients, had been working under adverse conditions in an effort to maintain business operations during a period of crisis*."

17. The Plaintiff argued before this Court that the Defendant was fraudulent in his misrepresentations on both the first and second applications and that such fraudulent conduct had the effect of disentitling him under the law of restitution from any possessory right to reclaim his paid premiums. The Plaintiff further submitted that it was entitled in any event to restitutionary relief for the recovery of the claim payments in the accumulated sum of $70,000.00.

## The Evidence

18. The only witness statement before this Court is that of Mr. Peter Sereda, the President of Laurel Consulting, who provided third-party consulting services to IOA in respect of the motorsports insurance program underwritten by MIG.

19. The Plaintiff previously made an application for the single witness statement of Mr. Peter Sereda to be admitted under section 27B (1) without requirement for his personal attendance at trial. Section 27B (1) provides: "*In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to the rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible*."

***The Evidence of the Misrepresentation***:

20. The Defendant's original 26 March 2015 insurance application is divisible by seven roman numerical sections. The application form refers to a single vehicle for coverage identifiable by, *inter alia*, its make, model and chassis details at Section III. The Max E.T. is stated to be '4.20'.

***The Evidence of the Fraud***:

21. Mr. Sereda referred to the Defendant's 26 March 2015 insurance application form sent through his broker, Central Ohio Insurance Services. A signed copy of this application form

was exhibited to his witness statement. Immediately preceding what is purported to be the Defendant's signature is the following warranty text:

"*APPLICANTS WARRANTY: Applicant warrants that the above information is true and complete. Applicant understands that the insurer will rely on this information for purposes of acting for Insurance. This application will become part of any policy issued. The provision of false information is an application for insurance is insurance fraud, which is a crime in many states*."

22. A copy the agreements outlining the policy for both periods ("the policy agreements") were exhibited to Mr. Sereda's witness statement. In block capitals, the following text appears in both of the policy agreements:

"…THIS COVERAGE IS NOT AVAILABLE FOR AND DOES NOT APPLY TO ANY VEHICLE THAT HAS A QUARTER MILE E.T. OR BRACKET TIME OF 6.5 SECONDS OR LESS AND/OR AN EIGHTH MILE E.T. OR BRACKET TIME OF 4.2 SECONDS OR LESS."

23. At paragraphs 45-46 of Mr. Sereda's statement it reads:

"*45. More recently, I have acquired additional evidence of the Vehicle running ET's (sic) faster than those permitted under the policy:*

*(i) The Facebook page for Mark Woodruff Racing, on 18 October 2015, posted a printout of the Vehicle running an eighth mile ET of 4.0261 [TAB 21]. This ET was run during the period of the First Policy, and was faster than the lowest ET permitted for coverage (specifically, less than 4.20 seconds in the eighth mile). Importantly, the Facebook page in question is the Defendant's own Facebook page, so the Defendant is clearly aware of this ET.*

*(ii) A YouTube video posted on 14 July 2014, entitled "Record 1/8 mile run 4.17@187.36mph in Radial Wars by Mark Woodruff's Twin Turbo '10," shows the Vehicle running an eighth mile in an ET of 4.17 seconds [TAB 11, Item 2 on flash drive]. This ET was run prior to the Application of 26 March 2015, and was faster than the lowest ET permitted for coverage (specifically, less than 4.20 seconds in the quarter mile).*

*46. The pre-Application ET of 4.17 (above) confirms that the Defendant knew at the time of the Application that the Vehicle's ET was less than 4.20. As such, I am fully confident that when he represented on the Application that the Vehicle's maximum ET was 4.20, the Defendant made a misrepresentation, and did so knowingly*."

24. The Plaintiff relied on this evidence as proof that the Defendant knew of the falsity in his misrepresentation, when he made it, that his vehicle did not exceed the maximum ET.

***The Evidence relevant to the Plaintiff's claim for Restitution***:

*Evidence of premiums paid*

25. The evidence showed that the total premium paid for the first year of coverage was $7,800.00. The evidence on the sum of the premiums paid on the second year of coverage was not obvious to me but nothing turned on this.

*Evidence of unjust enrichment*

26. At paragraph 44 of Mr. Sereda's witness statement, he stated:

> "*Furthermore, I wish to note that the Defendant is currently in possession of more money than he would have been entitled to even if the Vehicle were eligible for coverage (which it was not). According to the claim calculation [TAB 20], the total value of the Defendant's claim, before adjustments, would have been $85,365.51. Because the claim was subject to a deductible of $17,500 and included non-covered items, the total value of the claim would have been less than $67,865.51. This means that the $70,000 the Defendant currently holds (and refuses to return) is more than what he would have been entitled to even if the Vehicle were eligible for coverage (which it was not).*"

27. On the evidence, the first claim payment was made in good faith prior to the Plaintiff's discovery of the excessive ET of the Defendant's vehicle. The second claim payment was made by way of administrative error following a Hurricane Irma outage and without the Plaintiff's knowledge and consent. These two mistaken claim payments to the Defendant as an indemnity against the costs of the crash repairs are the evidence of the unjust enrichment.

## The Law

***The Law on Misrepresentation and Voidable Contracts***

28. Established principles on the law as it relates to a negligent misstatement was surmised by Lord Morris in *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 PC at 503*:

> "*Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise*."

29. An innocent misrepresentation which has induced the representee to enter a contract must be a material one before the Courts will find that the contract is void and liable to rescission (see *Pan-Atlantic Insurance Ltd v Pine Top Ltd [1994] 1 AC 501, at 533*). While there are instances where a material misstatement on an opinion may give rise to a misrepresentation on the facts by implication and thereby justifying an avoidance of the contract; traditionally, the misrepresentation must be a false statement of fact, whether it be in relation to the past or present.

***The Law on Unjust Enrichment***

30. "*The criticism that the principle of unjust enrichment is too vague to be of any practical use…overlooks the fact that there is a considerable body of case law dealing with the grounds of restitution, so that judges are not called upon to use their own sense of justice in order to apply or develop the law. The judges will follow the existing precedents, which cover most of the likely problems of restitution, and, if an extension of the law is sought, the meaning to be attached to "unjust enrichment" will be gleaned from those precedents*…" (See Chitty on Contracts Volume 1 Thirty-Second Edition Para 29-013).

31. It is well known and established law that a Plaintiff must prove on the facts that the Defendant has received a benefit before it can be said that there has been any enrichment. That enrichment must be shown to have been at the expense of the Plaintiff and its retention by the Defendant unjust without a meritorious defence to support a claim of unjust enrichment.

32. Unjust enrichment may arise in varying forms. Its existence is not restricted to the receipt of a tangible benefit such as money but may also arise where the Defendant has been unfairly spared from an expense otherwise owing.

***A General Overview on the Law on Restitution***

33. The law of restitution provides a remedy for cases where a Defendant has been unjustly enriched at the expense of a Plaintiff who, consequently, seeks to gain from the Defendant rather than to merely walk away with compensation for the loss suffered.

34. The essence of restitution is described in Chapter 29 of Chitty on Contracts Volume 1 Thirty-Second Edition Para 29-001:

"*The law of restitution is concerned with whether a claimant can claim a gain from the defendant, rather than whether a claimant can be compensated for loss suffered. Restitutionary remedies are therefore distinct from those which are traditionally available in*

*contract or in tort, as was raised by Lord Wright (in Fibrosia Spolka Akcyjna v Fairban Lawson Combe Barbour Ltd [1943] A.C. 32, 61):*

*"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."*

*The House of Lords recognized on a number of occasions that restitutionary remedies are available where the defendant has been unjustly enriched at the expense of the claimant…It appears, however, that unjust enrichment is not the only principle which will trigger restitutionary remedies, since such remedies may also be awarded where the defendant has obtained a benefit by the commission of a wrong…or where the claimant can bring a claim to recover property held by the defendant in which the claimant has a proprietary interest…*"

35. Restitutionary remedies are available in both common law and in equity. (This distinction is of particular importance in property cases where the assertion of a proprietary interest may be in relation to a legal interest or an equitable interest.)

36. An introductory analysis in The Principles of the Law of Restitution by Graham Virgo (Third Edition published in 2015 by Oxford University Press) described the law on restitution in the following simplified and helpful way:

"*Before the principles and rules which form the law of restitution are examined, it is important to identify what this body of law is actually about. The answer is simple, but it is an answer which has rarely been articulated by judges or commentators. The law of restitution is concerned with the award of a generic group of remedies which arise by operation of law and which have one common function, namely to deprive the defendant of a gain rather than to compensate the claimant for loss suffered... These are called the restitutionary remedies…*"

***Restitution on the Grounds of Money Paid by Mistake*:**

37. There are specific substantive grounds in English law upon which restitution may be ordered. Under circumstances where money was paid by mistake, a remedy in restitution may properly arise.

38. Chitty on Contracts Volume 1 Thirty-Second Edition Para 29-017:

> "*... The developments of the law of restitution in England has meant that the principle of unjust enrichment has not manifested itself in a general action for the recovery of money paid and other benefits conferred on the ground that they were not due, ...but instead as a number of specific substantive grounds upon which restitution may be ordered. In Moses v Macferlan Lord Mansfield stated that the action for money had and received:*
>
> *" ...lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or an undue advantage taken of the claimant's situation, contrary to the laws made for protection of persons under those circumstances."* "

***Restitution on the Grounds of Fraud*:**

39. The Plaintiff's claim in this case is contractual and principally founded on a claim for fraudulent misrepresentation. In *Pitt & Co Ltd and BGA Ltd v White and White [2014] Bda LR 16* Hellman J recognized this Court's longstanding tradition of paralleling the elements of fraudulent misrepresentation in contract law with the tort of deceit. Judicial analysis of this parity was made in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] 1 CLC 701, HC*, where Hamblen J linked the ingredients of fraudulent misrepresentation and deceit.

40. At paragraph 39 of *Pitt et al* Hellman J stated:
"*As stated by Rix LJ in AIC Ltd v ITS Testing Services (UK) Ltd ("The Kriti Palm") [2007] 2 CLC 223, EWCA, at para 251:*
*"The elements of the tort of deceit are well known. In essence they require (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on. Each of those elements may of course require further elaboration*."

41. At paragraph 48:
"*…fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false*."

42. It is for a Plaintiff to prove that one of the recognized grounds of restitution applies. In the Privy Council case of *Pao On v Lau Yiu Long [1980] AC 614* Lord Scarman held that justice requires that men who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud mistake or duress.

43. The Plaintiff's Counsel relied on *Feise v Parkinson [1812] 4 Taunt 641*, "…*where there is fraud, there is no return of premium*." Mr. Attride-Stirling in his written arguments submitted; "*This is consistent with the Marine Insurance Act 1906, which codified the common law. Section 84 (1) provides: "Where the consideration of the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is returnable to the assured*." "

44. *Feise v Parkinson* was referred to in the Principles of the English Law of Obligations edited by Andrew Burrows (First Edition published in 2015 by Oxford University Press) at para 1.179:

> "*A person who has been induced by a misrepresentation to enter into a contract can, to the extent that he has not performed his part, rely on the misrepresentation as a defence to an action on the contract… This defensive stance is sometimes regarded as a form of recission but it is not in all respects governed by the same rules as the process of a representee's claiming the return of what he gave under the contract. To make good such a claim, he must restore what he received under the contract; … but there is no such requirement where the victim of a fraudulent representation simply relies on it as a defence to a claim by the representor (foot-noting Feise v Parkinson). This somewhat harsh rule is probably meant to deter fraud…and there is no authority to support it where the representation is negligent or wholly innocent*."

45. Mr. Attride-Stirling produced an extract from MacGillivray on Insurance Law (Thirteenth Edition published in 2015 by Thomas Reuters (Professional) UK Limited) at para16-006:

> "Where the insurer seeks to rescind the policy on the ground of fraud, there is some authority for the proposition that, contrary to the general rule, he is not even bound to restore the consideration he has received, and may cancel the policy without offering to return the premiums (*Feise v Parkinson*). In any event fraud by the insured is always a defence to a claim brought on the policy, in which case the insurer is not bound to return the premiums. If the insurer discovers that a claim was fraudulent only after paying the loss, he can recover the amount paid out as damages for fraud (London Assurance v Clare (1937) 57 Lloyd's Rep. 254. For a recent example of discussion of the consequences of fraud, see *Aviva Insurance Ltd v Brown [2011] EWHC 362 (QB); Lloyd's Rep. I.R. 211 at [74]-[78].*

## Analysis and Findings

46. This Court was tasked to determine:
    (i) whether the Defendant had made a material misrepresentation on the facts which induced the Plaintiff to enter the insurance contracts;

(ii) whether that misrepresentation was fraudulent;
(iii) whether the two $35,000 payments were made mistakenly;
(iv) whether the Defendant had been unjustly enriched in his receipt of payment of the two claim payments totaling $70,000.00; and
(v) whether the Plaintiff is entitled to have the contract voided ab initio and to restitutionary relief.

47. It was clear on the evidence that the Defendant's vehicle exceeded the maximum ET. The Plaintiff's position that the policy would not have been made available to the Defendant had the Plaintiff known the true E.T. is expressly stated on the face of the policy agreements. I found that the misrepresentation was material for this reason and gave sufficient cause for an avoidance of the contract *ab initio*.

48. Fraudulent misrepresentation was established through the evidence of the Defendant's knowledge of his vehicle's ET exceeding 4.20. I was satisfied that the Defendant was aware of this vehicle speed capacity when he caused the application forms to be submitted to MIG.

49. I was further persuaded on the evidence that the first $35,000 advancement by the insurer was made in good faith and prior to any discovery by the Plaintiff that the Defendant had misrepresented the true ET capacity of his vehicle. This amounted to a payment by mistake as the Plaintiff was mistaken on the material facts which led to the payment. The second $35,000 payment was also made erroneously as it was an obvious administrative mishap of which the Plaintiff was unaware prior to and when it occurred. I, therefore, found that the aggregate $70,000 payment was paid to the Defendant by mistake. This mistake resulted in the Defendant having been unjustly enriched by his receipt of the said sum because his retention of the payment would have been unfair and at the expense of the Plaintiff.

50. As I found that the contracts are void *ab initio*, it followed that Defendant should be ordered to repay the $70,000. Had I not found that the misrepresentation was fraudulent, I would have likely deducted the paid premium payments from the recoverable $70,000. However, I am persuaded by the principles stated by Gibbs J in *Feise v Parkinson* that a finding of fraud will mean that there will be no return of premium.

## Conclusion

51. Judgment was entered in favour of the Plaintiff in the terms stated under paragraph 5 herein.

52. Costs to follow the event and a decision on the basis of taxation is reserved pending further submissions from the Plaintiff's Counsel within 7 days of the date of the hearing, failing which costs to be awarded on a standard basis.

Dated this 17th day of April 2018

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**SHADE SUBAIR WILLIAMS**
**ACTING PUISNE JUDGE OF THE SUPREME COURT**