[2017] JMSC Civ. 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 01921

BETWEEN **ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**
(formerly United General Insurance Company Limited) **CLAIMANT**

AND **MARK ANTHONY FRANCIS** **DEFENDANT**

IN CHAMBERS

Ms. Claudine Stewart instructed by Campbell & Campbell for the Claimant

Defendant absent and unrepresented

Heard: October 18 and December 4, 2017

Whether insurer entitled to declaration – Whether defendant has insurable interest in subject matter of insurance – Whether there was nondisclosure and/or misrepresentation – Whether warranty clause was breached – Whether insurer entitled to avoid policy

ANDREA PETTIGREW-COLLINS, J. (AG.)

[1] The claimant Advantage General Insurance Company Limited (hereinafter referred to as AGIC) filed its fixed date claim form on the 26th of March 2016 seeking the following declarations:

1. That the defendant Mark Anthony Francis had no insurable interest in Toyota Coaster motor vehicle licensed PD 5884 on the 12th day of May 2008 when he applied for insurance coverage of same and on the 4th August 2010 when

the said vehicle was involved in an accident along Spanish Town Road in the parish of Kingston.

2. That by virtue of the order at 1. above the defendant is not entitled to and cannot claim an indemnity under the motor vehicle insurance policy numbered MPPCB-456164 issued by the claimant to the defendant providing coverage of the motor vehicle licensed PD 5884

3. That the said motor insurance policy numbered MPPCB-456164 is void ab initio as it was obtained by misrepresentation and/or nondisclosure of material facts.

4. That the warranty as to the truth of the statements contained in the proposal form by which the defendant applied for insurance is a condition precedent to liability under the policy

5. An order that the defendant is in breach of the warranty mentioned at 4. Above and cannot claim an indemnity under the policy of insurance.

6. An order that the claimant is not liable to satisfy the judgment entered against the defendant or his servant and/or agent as a result of the said accident.

7. That cost of that application be awarded to the claimant.

BACKGROUND TO THE CLAIM

[2] The facts on which AGIC rely are set out in the affidavit of Miss Ruthann Morrison filed in support of the fixed date claim form. She states in paragraph 3 of her affidavit that on the 12th of April 2008, Mr. Francis completed and submitted to the claimant a proposal form applying for insurance in respect of a Toyota coaster motor vehicle licensed PD 5884. In the form he stated that he was the owner of the vehicle and that the vehicle was registered in his name. Further, that in response to a question in relation to the source of the funds used to purchase the vehicle, he stated that it came from his salary as a bee farmer

and from his brother. Further, that the defendant stated in the proposal form that he had not misrepresented and/or failed to disclose any material fact in relation to the vehicle and he warranted the truth of the statements contained in the proposal form. She further stated that based on the misrepresentations made in the proposal form, a policy of insurance MPPCB 456164 was issued to him providing coverage of the vehicle for the period 12th of May 2008 – 11th of May 2009. She said that there were several subsequent renewals of the policy ending with that for the period 12th May 2010 – 11th May 2011.

[3] Miss Morrison further deponed that on or about the 4th day of August 2010, AGIC received a letter from K. Churchill Neita and Company, Attorneys-at-Law alleging that one George Morgan had been injured in an accident involving the said Toyota coaster motor vehicle. As a consequence, AGIC caused an investigation to be done by Precision Adjusters Limited. The investigator interviewed the defendant (Mr. Francis) and recorded a statement from him. In that statement, Mr. Francis said that although the registered title of the motor vehicle was in his name, he did not provide or contribute to the funds for the purchase of the vehicle. He stated that the funds used to purchase the vehicle came from a friend overseas but he refused to disclose the name of that friend. Mr. Francis further said in that statement that he had entered into an agreement to pay the friend the cost of the vehicle but that up to the time of the accident, he had not repaid the friend any of the money. A copy of the proposal form as well as a copy of the statement given to the investigator and a transcript of same, were exhibited to Miss Morrison's affidavit.

THE CLAIMANT'S SUBMISSIONS

[4] The claimant's submission is that based on those facts, it is entitled to the remedies sought. Miss Claudine Stewart representing the claimant provided useful guidance as to the relevant law. She states that an insurance contract is a contract of utmost good faith (uberrimae fidei). This simply means that at the beginning and throughout the existence of the contract, all the parties to the

contract are under a duty to deal fully and frankly with each other. The duty of good faith requires the applicant for insurance to disclose all facts within his knowledge which are relevant to the risk for which he is seeking cover.

[5] She cited the leading authority on the matter, **Carter v Boehm** [1766] 97 ER 1162, [cited in the **McGillivray and Parkington on Insurance Law (8th edition)]** which was decided some three centuries ago by the English courts. She quoted Lord Mansfield in what has become the seminal statement of the legal principle. He said:

> *'Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only. The underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into the belief that the circumstance does not exist. The keeping back of such circumstance is a fraud and therefore the policy is void.'*

Ms. Stewart observed that this principle remains good law and applies to all contracts of insurance.

[6] She stated that the duty of the applicant to provide full disclosure was discussed and clarified further in **Roselodge Ltd. v Castle** [1966] 2 Lloyd's Rep. 113 where the English court said that although specific questions may be put on a proposal form by the insurer, this does not limit or relieve the applicant of his independent duty to disclose all material facts. The general duty of disclosure compels the applicant for insurance to state all material facts in his possession even if this is outside the ambit of the questions asked by the insurer.

[7] She submitted that the assured is duty bound to disclose all material facts while negotiations are proceeding and before the proposal is accepted and she alerted the court to what constitutes a material fact as was defined by **Pan Atlantic Insurance Company Ltd. v Pine Top Insurance Co. Ltd.** [1995] 1 AC 501. A material fact was stated in that case to be any matter which would have an effect on the mind of a prudent insurer in weighing up the risk.

[8] She pointed out that to succeed in a defence of nondisclosure, the insurer must prove not only that the assured failed to disclose a material fact, but also that the nondisclosure and/or misrepresentation induced him to make the contract of insurance that is, he would not have made the same contract or not made the contract at all if full disclosure had been made. She alerted the court to the decision in **St. Paul Fire & Marine Insurance Co. (UK) Ltd. v McConnell Dowell Constructors Ltd.** [1995] 2 Lloyd's Rep. 116. She said the court found that even in the absence of evidence from the underwriter, the very nature of the undisclosed fact may create a factual presumption of inducement.

[9] Counsel further submitted that misrepresentation also allows an insurer to avoid a contract of insurance and that it is now settled law that parties negotiating a contract of insurance owe each other a duty not to make erroneous statements. She further pointed out that where a person is induced to enter into a contract on the basis of the misstatements made to him by the other party, he has a claim for rescission of the contract and that he also has a right to avoid the contract of insurance for misrepresentation.

[10] She also submitted that in addition to the common law position, by virtue of section 18(3) of the Motor Vehicles Insurance (Third-Party Risks) Act, an insurer may seek an order of the court to avoid a policy of insurance where there is a misrepresentation or nondisclosure of material facts by the applicant for insurance.

[11] Her submission continued that in the **Pan Atlantic Insurance** case, the court held that the insurer's sole remedy for nondisclosure and misrepresentation is avoidance of the contract. The insurer may on discovering the full facts avoid the policy. The contract is avoided ab initio and not merely for the future. It is as if the policy never existed. Where there has been wilful or fraudulent concealment on the part of the assured, he is not entitled to a return of his premium.

[12] She asked the court to note that the common law and statutory provisions discussed above are now strengthened by the requirement of some insurers that

an applicant for insurance must sign a warranty to the truth of all answers on the proposal form and that the warranty is usually contained in a declaration on the proposal form and is considered part of the policy of insurance. She pointed out that the effect of the declaration is to make the truth of the statements given a condition precedent to the liability of the insurer and that a proposer by signing it, signifies his agreement to it.

[13] Counsel referred to the case of **Condogianis v Guardian Assurance Co.** [1921] 2 AC 125, a decision of the English Court of Appeal in which it was held that where the truth of the statements is made the basis of the contract, it is unnecessary to consider whether the fact inaccurately stated is material or not or whether the applicant knew the truth or not. She pointed out that **Condogianis** was accepted and applied by our local Court of Appeal in **Insurance Co. of the West Indies v Abdulhadi Elkhalili** SCCA No. 90 of 2006. She directed the court to page 9 of the judgment of Harrison JA where the court said that a breach of warranty entitles the insurer to terminate the contract of insurance and avoid the policy.

[14] She urged the court to say that on the facts of the instant case, the answer to the question whether the defendant has misrepresented and/or failed to disclose material facts must be a resounding yes. She asked the court to examine the defendant's statements in the proposal form, compared with the statement he gave to the investigator and to find that the defendant has not acted in good faith and is therefore liable for nondisclosure and misrepresentation. She claimed that on the proposal form, the defendant said that he is the registered owner of the Toyota Coaster motorbus which he says was financed from his earnings as a bee farmer. The effect of the statement she said, is to give the defendant an insurable interest in the motor vehicle. Without such an interest the defendant could not obtain insurance coverage of the bus.

[15] Miss Stewart further cited the case of **Macaura v Northern Ireland Assurance Co. Ltd. & Ors.** [1925] AC 619 and observed that at page 632 of that judgment,

the court said that the want of insurable interest is a question going to the root of the contract and an insurer is entitled to raise the defence that the assured either has no interest or insufficient interest to constitute an insurable interest in law.

[16] Counsel urged the court to find that the defendant's statement to the investigator contradicts his previous assertions and disclosed that the defendant did not contribute at all to the purchase price of the motorbus and had misrepresented that the source of his funds came from his earnings as a bee farmer. She asked the court to consider the information provided to the insurers against the background that the claimant had no prior dealings with the defendant and could therefore only rely on the representations made by him in assessing the risk. She further urged the court to say that the contract is voidable on account of the three warranty clauses to which the defendant signed. The effect of these clauses she said, is to make the truth of the statements made by the defendant a condition precedent to the claimant being liable to honour its obligations under the contract of insurance. She cited two cases in support of this proposition namely, **Advantage General Insurance Company Limited v Shereen Andrea Henry** [2012] JMSC Civ 133 and **Abdulhali Elkhalili** which was previously referred to.

THE ISSUES

[17] The issues arising in this case are:

1. Whether the claimant is entitled to a declaration.

2. Whether the defendant had an insurable interest in the subject matter of the insurance that is, the Toyota coaster motor vehicle registered PD 5884

3. Did the insured fail to disclose or did he misrepresent material facts to the insurer?

4. If he failed to disclose or if he misrepresented material facts, what is the effect of the nondisclosure/misrepresentation.

5. What is the effect of signing the warranty clause on the proposal form?

WHETHER THE CLAIMANT IS ENTITLED TO A DECLARATION

[18] Before I proceed to deal with the substantive matters raised in the claimant's submissions, I will briefly address the question of whether or not the applicant is entitled to a declaration prior to a third party being granted judgment against the policy holder, who is the defendant in this case. In **Advantage General Insurance Company Limited v Annette Nelson** Claim No. 2007 HCV 02316. Edwards J, concluded that upon a true construction of section 18(3) of the Motor Vehicles Insurance (Third Party Risks) Act;

> *"an insurer may obtain a declaration from the court that it is entitled to avoid a policy of motor insurance, on the ground of nondisclosure of a material fact or the making of a false representation before judgment has been obtained by any third party against the policy holder".*

Section 18(3) in part states that:

> *"No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:"*

Section 18(3) can only be understood in light of the provisions of section 18(1) which states:

> *"If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."*

Without embarking on a detailed analysis of the issue, the court accepts Edwards' J, conclusion on the matter and will proceed on that basis.

WHETHER THE DEFENDANT HAD AN INSURABLE INTEREST IN THE SUBJECT MATTER OF THE INSURANCE

[19] One of the issues arising in this matter is whether the defendant had an insurable interest in the subject matter of the insurance, namely the Toyota Coaster motor vehicle registered PD 5884.

In **McGillivray and Parkington on Insurance Law (8th edition)** page 4, the following is said at paragraph 8 in relation to insurable interest:

> *"Insurable interest may be defined as the assured's pecuniary interest in the subject-matter of the insurance. There is no general rule of contract law which requires such an interest, since any contract is prima facie enforceable at common law so long as it is not illegal, immoral or contrary to public policy. A person insured under a contract of insurance is, however, required to have some insurable interest either because the requirement is inherent in the nature of the particular contract of insurance or because it is stipulated by statute as a condition of the validity of the policy, or for both reasons."*

[20] Further in paragraph 9, the following is stated.

> *"If upon a proper construction of the policy, the insurer has undertaken to indemnify the assured against pecuniary loss caused by or arising from particular risks, an interest is required by reason of the nature of the contract itself. If the assured has no interest at the time when the event insured against occurs, it is clear that he cannot recover anything on an indemnity policy, because he has suffered no loss against which he can be indemnified. Similarly, if he has an interest limited to something less than the full value of the subject-matter, he can suffer no greater loss than the total value of his actual interest at the time of loss, and his claim to an indemnity cannot exceed the value of his interest."*

[21] In **Macaura v Northern Assurance Company Limited and others** earlier referred to by Miss Stewart, the owner of a timber estate sold all the timber on the estate to a company, in consideration of fully paid up shares in the company. The owner then in his own name insured the timber against fire with several insurance companies. The owner/claimant was the sole shareholder in the company and was also a significant creditor of the company. Much of the timber

was destroyed by fire and he sued on the policies. It was held that the claimant neither as shareholder nor creditor had any insurable interest in the goods. Lord Sumner on page 630 of the judgment observed the following:

> *"The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no "legal or equitable relation to the timber at all. He had no "concern in" the subject insured. His relation was to the company, not to its goods and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire."*

[22] The Jamaican case of **Advantage General Insurance Company Limited v Shereen Andrea Henry** [2012] JMSC Civ 133 raised similar issues as are raised in the case at bar and will therefore be discussed at length, not only in relation to the question of insurable interest but also in relation to misrepresentation and non disclosure and the consequences flowing there from, as well as the effect of signing a warranty clause and the consequences following from so doing.

[23] In **Shereen Henry** the claimant (who will hereinafter be referred to as AGIC), sought declaration as follows:

i. A declaration that the defendant had no insurable interest in Toyota Corolla motor car licensed 8172 FD on the 4th day of December 2007 when she applied for insurance coverage of same and on the 5th day of February 2008 when the said vehicle was involved in an accident along the Kent Village main road, Bog Walk in the parish of St. Catherine.

ii. A declaration that by virtue of the order at (i) above, the defendant is not entitled to and cannot claim an indemnity under the motor insurance policy... issued by the claimant to the defendant...

iii. A declaration based on the common law and pursuant to section 18(3) of the Motor Vehicles [Third Party Risk] Act that the said motor insurance policy... is void ab initio as it was obtained by misrepresentation and/or non-disclosure of material facts.

iv. A declaration that the warranty as to truth of the statements contained in the proposal form by which the defendant applied for insurance is a condition precedent to liability under the policy.

v. An order that the defendant is in breach of the warranty mentioned at (iv) above, and cannot claim an indemnity under the policy of insurance.

vi. An order that the claimant is not liable to satisfy any judgment entered against the defendant as a result of the said accident.

[24] The defendant Miss Henry had completed a proposal form in December 2007, which she signed at the time she applied for insurance in respect of the motor vehicle in question. She answered "yes" on that form to the following two questions:

1. Do you own the vehicle?
2. Is it/are they registered in your name?

In March 2008 AGIC received Notice of Proceedings in respect of a claim which had been filed in the Supreme Court against Miss Henry for damages as a result of an accident involving the insured motor vehicle. Miss Henry had not made a report to AGIC regarding any accident. During investigations on behalf of AGIC, Miss Henry disclosed to an investigator among other things, that one Stanford Johnson (who was then deceased), was her brother, that he had purchased the car in question along with others and had registered them in her name. Further, that she did not contribute to the purchase of the car.

[25] Straw J, rejected AGIC's submission that Miss Henry had no insurable interest in the motor car in question. She reiterated the unassailable principle that a want of insurable interest renders the contract of insurance unenforceable by the insured and she discussed the two salient "requirements for the possession of a valid insurable interest identified in English law" and discussed in McGillivray [10th edition], she stated "firstly, the assured must be so situated to the insured property that he will suffer economic loss as the proximate result of its damage or destruction". This requirement she observed, was distilled in McGillivray from

Lucena v Craufurd [1806] 2 Bos. & Pul. [N.R.] 269. [**McGillivray and Parkington on Insurance Law (8th edition)]** Where Lawrence J, said the following:

> *"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; and a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."*

The second requirement she pointed out is the possession of a legal or equitable right in the property.

[26] Straw J's, finding as it relates to whether or not Miss Henry had an insurable interest in the motor vehicle in question is stated in paragraph 24 of her judgment. She said:

> *"it is not necessary for this court to strain the decision in **Lucena** or **Macaura** in relation to sufficiency of interest. Miss Henry has the legal title. The vehicle was comprehensively insured in her name.*
>
> *The fact, however that she did not purchase the vehicle or obtained any economic advantage from its existence is not decisive of the point that there was no insurable interest. The subject is a motor vehicle. By law, motor vehicles must be insured, at the least, in relation to third party risks. As long as she is the legal owner, the vehicle would have to be insured in her name. She is the legal owner as against third parties and would be subject to financial prejudice if the driver operating the vehicle under the comprehensive policy proved to be negligent in relation to third parties. This is in effect what has happened as there is a suit pending against her."*

She stated further at paragraph 25

> *"A common sense approach to the broad definition could not be that she should satisfy each of the following conditions of benefit from its existence, prejudice from its destruction in light of the law relating to motor vehicle insurance."*

[27] The defendant Mr. Francis in the instant case stands in a more favourable position than did Miss Henry in **Shereen Henry** as it relates to whether or not he

had an insurable interest in the motor vehicle in question. As was the case with Miss Shereen Henry, the vehicle was registered in the defendant's name. Unlike Miss Henry, he was the operator of the motor vehicle in question. Contrary to what Miss Henry did after the accident, the defendant in this case stated that he was the owner even though he stated that the vehicle was paid for fully by the unnamed friend. His statement that the agreement between himself and the friend was that he intended to repay the friend over time, stands uncontroverted. He said he had not in fact been earning from the vehicle and that he had not been making a profit, and so he had not been making the repayments as agreed. Again, his statement in this regard stands uncontroverted. The fact that he said he didn't know how much the vehicle was sold for because after signing the title, it was passed on to another friend locally who took care of the transaction (inferentially, the sale of the bus) and gave the sale amount to "my friend abroad" does not in my view change the position. At this point he still owed the friend the full purchase price. There are to my mind obvious explanations as to why matters could have been dealt with as he stated. However, he did not explain precisely why and the court has no need to speculate. There might be a number of things to be said about the defendant's dealings with the friend but they are not in my view necessary to a resolution of the issues arising in this case. I find that Mr. Francis had an insurable interest in the motor vehicle in question.

WAS THERE NONDISCLOSURE AND/OR MISREPRESENTATION?

[28] I accept Miss Stewart's statement as to the principle of *uberrimae fidei* as laid down in **Carter v Boehm** and as discussed and applied in **Roselodge Ltd. v Castle** [1966] 2 Lloyds Rep 113. The latter case will be revisited in due course.

[29] An examination of the decision in **St. Paul Fire and Marine Insurance Co. (UK) Limited v McConnel Dowell Constructors Limited** (supra), demonstrates how the principle has been applied. In that case, Brokers had placed insurance of a building to be constructed with the plaintiff on the basis that the building would be constructed on pile foundation. The building was in fact constructed on spread

foundation. The initial plan was to use pile foundation but there had been a change of plan to the use of spread foundation without the underwriters being informed. This change of plan had occurred before the proposal for the insurance was made. There was serious subsidence damage to the building and as a consequence, there was a claim made under the policy of insurance. It was then that the plaintiffs who were the underwriters discovered that the building had not been constructed on pile foundation. The plaintiff sought to avoid the policy on the grounds of nondisclosure and misrepresentation.

[30] Potter J, in stating the applicable principle observed that:

> *"The law applicable to the case is to be found, ... in the judgment of the Court of Appeal in* ***Container Transport International Inc. v Oceanus Mutual Underwriting Association (Bermuda) Limited*** *[1984] 1 Lloyds Rep. 476 (the Ct I case) as explained and supplemented in the case of* ***Pan Atlantic Insurance Co. Limited v Pinetop Insurance Co. Limited*** *(3 March 1993, unreported)...*

In **Container Transport International Inc.,** Kerr LJ, set out the test as follows [1984] I Lloyd's Rep. 476 at 496:

> *"Having regard to all the circumstances known or deemed to be known to the insured and to his broker, and ignoring those which are expressly excepted from the duty of disclosure, was the presentation in summary form to the underwriter a fair and substantially accurate presentation of the risk proposed for insurance so that a prudent insurer could form a proper judgment either on the presentation alone or by asking questions if he was sufficiently put on enquiry and wanted to know further details whether or not to accept the proposal, and if so, on what terms?*

[31] Potter LJ further referred to the decision in **Inversiones Manria SA v Sphere Drake Insurance Co., the Dora** [1989] I Lloyd's LR 669 at 88 as quoted by Steyn LJ, in **Pan Atlantic**.

> *" (a)that there is no requirement that the particular underwriter should have been induced to take the risk or to charge a lower premium than he would otherwise have done as a result of the nondisclosure: the sole yardstick is the impact on the judgment of a hypothetical prudent underwriter; (b) that it was not necessary to show that the nondisclosure would probably have had a decisive influence in the sense that the prudent underwriter would have declined the risk or would have written the risk on different terms in respect of the rate of premium or otherwise"*

[32] Potter J, further stated that in **Pan Atlantic** Stern LJ, stated the applicable test in the following words:

> *"As the law now stands, the question is whether the prudent insurer would view the undisclosed material as probably tending to increase the risk."*

Potter J, ultimately concluded on the facts of the case before him that in relation to nondisclosure:

> *"from the point of view of the prudent underwriter, the foundation change would have called not only for reassessment of what would have appeared to be an increased risk, but might well have led to an exclusion in respect of foundation design."*

Further he found in relation to misrepresentation that:

> *"(a) by the time the proposal was made to the underwriters there had ... been a plain decision and/or intention to employ spread foundations, subject only to satisfactory tests ....) and (b) that, in the context of construction contract proceedings and CAR insurance, (contractor's all risk policy of insurance) the proposal indicated that an engineering and/or design decision to that end had already been reached in principle. I hold that the plea of misrepresentation had been made out."*

[33] The decision in **Shereen Henry** is also instructive in this regard. It was submitted on behalf of AGIC in that case that the defendant's failure to disclose the following facts were fatal to her case.

1. That the motor vehicle in question was only registered in her name.
2. That Stanford Johnson who had provided the purchase money for the car was its true owner.
3. That the motor car was and would be in the custody and possession of Stanford Johnson.
4. That the defendant had no custody or control over the vehicle.

Those facts were not in dispute. It was pointed out in the judgment that two distinct questions were asked about the ownership of the vehicle and whether the vehicle was registered in Miss Henry's name. Straw J, pointed out that "this ought to have alerted her to clarify the issue of ownership" (Paragraph 37 of her judgment) and further that "if she had alerted the insurers in the proposal form

about the issue of ownership, then she could have argued successfully that the proposal form failed to request information as to whether other individuals had any kind of interest" (paragraph 38).

[34] Straw J, referred to the case of **Sweeney v Kennedy** [1948] 82 Lloyd's Law Report, 294 where Kingsmill Moore J, stated the following:

> *"in a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by courts of law."*

[35] Straw J found that there was misrepresentation/nondisclosure on Miss Henry's part as she would have understood the distinction being made between registration in her name on the one hand, and ownership on the other.

Straw J also found that given the definition of material information as found in section 18(5) of the Motor Vehicles Insurance (Third Party Risks) Act, that is information is material "when it is of such a nature as to influence the judgment of a prudent insurer in determining whether he should accept the risk and if so, at what premium". She concluded that the information was material.

[36] As to whether or not AGIC had discharged the burden of showing that misrepresentation or nondisclosure had induced them to take the risk, Straw J, took the view that Miss Henry had not displaced the presumption of inducement.

[37] Case law over the years demonstrates that "there is a presumption as a reasonable inference of fact that where a material misrepresentation has been made and a policy has been issued, the insurers must have acted upon the misrepresentation and were misled by it. See for example **Smith v Chadwick** (1882) 20 Ch.D. 27, **Redgrave v Hurd** (1882) 20 Ch.D. 1 (referred to in McGillivray 8th edition paragraph 618-619). Therefore it is the assured who has

the duty to rebut the presumption and to show that a misrepresentation did not influence the insurer in the particular case.

[38] The decision in **Roselodge Ltd. v Castle** (supra) is critical to the outcome of this case. The plaintiff Diamond Merchants insured their diamonds against all risks with the defendant insurer, after completing a proposal form in which no question was asked as to previous convictions of employees whether in managerial positions or otherwise. The insurers repudiated liability under the policy on grounds inter alia that the plaintiff had failed to disclose that one Mr. Rosenberg, a principal director of the plaintiff company who was responsible for administration and the day to day running of the plaintiff company had a criminal conviction from some twenty (20) years prior. Also that the plaintiff had failed to disclose that one Mr. Reginald John Morfett, who was the plaintiff's sale manager and senior sales representative and who was entrusted with jewellery of significant value, also had a criminal conviction in the United States of America for smuggling diamond. The plaintiff's contention was that convictions of employees known to their employers were to the knowledge of the defendant and his agents and of underwriters generally, not believed to be material by such employers including the plaintiffs when proposing similar insurance to the policy of insurance being sued on. It was also contended that such convictions were not voluntarily disclosed or regarded by them as necessary or required to be disclosed otherwise than in answer to some question in a proposal form reasonably referable there to. Further, there was no question in the proposal form that was reasonably referable to that issue. The court rejected that position and placed reliance on the oft quoted statement in **Carter v Boehm** referred to by Miss Stewart in her submissions. Mc Nair J at page 131 of the judgment also referred to the following passage which he observed was taken from the case of **Joel v Law Union and Crown Insurance Company** [1908] 2 K B 863**.**

> *"There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that*

> *he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so."*

Mc Nair J also placed reliance on a passage from the 2nd (Hailsham) ed. of the Laws of England Volume 18. This quotation is found at page 131 of the judgment and is as follows:

> *"Materiality is a question of fact, not of belief or opinion. The assured does not therefore discharge his duty by a full and frank disclosure of what he honestly thinks to be material: he must go further and disclose every fact which a reasonable man would have thought material."*

[39] He ultimately found that the average reasonable business man would have wanted to know about Mr. Morfett's conviction in making a determination whether to accept the risks. However, he decided that it was not established to the court's satisfaction that Mr. Rosenberg's conviction on a matter which had no direct relation to trading as a diamond merchant was a material fact which would have influenced a prudent underwriter. The plaintiffs lost their claim to be indemnified under the policy of insurance.

[40] Also of relevance is the decision of Sykes J in **JN General Insurance v Debbie Ann Fairweather** [2015] JMSC Civ 249. In that case the defendant, who was the insured, had purchased a car in Jamaica with funds sent from the United States of America by her boyfriend. The defendant resided in Jamaica. The car was registered in her sole name. On the proposal form, she stated that she was the sole owner and that the vehicle would be registered in her name only. It was not denied that she had also stated on the proposal form that she was using remittance money from overseas as the purchase money. The vehicle was involved in a collision at a time when her boyfriend was in Jamaica and had possession of the car and had loaned it to a friend. The claimant sought to avoid

the policy of insurance on the basis of a material nondisclosure as well as on the basis of a warranty clause.

[41] Sykes J, acknowledged that the questions designed to elicit the information that the insurance company required were badly drafted. The questions designed to assist the insurers to determine whether it would take the risk and if it did at what premium were the following two questions:

1. Are you the sole owner of the vehicle?
2. Is it registered solely in your name?

The defendant had answered "yes" to both questions.

Sykes J, found that in the circumstances, the defendant's answer to the question of ownership was not entirely accurate. The basis of that finding was that although the defendant was the legal owner, her boyfriend was also an equitable owner. He observed in paragraph 17 of the judgment that the defendant had been

> *"undone by the Anglo-Jamaican law's insistence that the insured must think of what would be material and disclose that information to the insurer even if the insurer had not thought of it. The balance of the law favours the insurer in this context and so Miss Fairweather's incorrect answer to the question of ownership was a material nondisclosure" and that "the insurer can avoid the policy on this basis"*

He had also observed at paragraph 11 that:

> *"The sole provider of the purchase money of property which is registered in the name of another has a trust in his or her favour unless the circumstances of the purchase show that the provider of the purchase money was not intended to retain any interest (equitable or legal) in the property purchased."*

Sykes' J decision turned on the fact that Ms. Fairweather was not the sole owner of the vehicle since her boyfriend was also an equitable owner and that fact which was material had not been disclosed.

[42] The defendant did not participate in these proceedings and so the court did not have the benefit of submissions from the defendant's perspective. However, a close examination of the proposal form in question will show that the instant case

is distinguishable from both **Shereen Henry** and **Fairweather** in material ways. The court has also observed from a perusal of the proposal form itself that there are significant flaws in the facts as represented by Miss Morrison from AGIC in her affidavit, and consequently by Miss Stewart in her submissions.

[43] The form in question is quite detailed with various different sections. In section A, the applicant for insurance is required to give his bio-data information. In section B which I regard as being critical in the circumstances of this case, the first question is "is the vehicle registered in your name?" there are two boxes requiring the applicant to tick "yes" or "no". His answer was "yes". In bold it is written "if no, complete the questions below in relation to the vehicle's owner. If yes continue to section C. Based on how the form is designed, given that the vehicle was in fact registered in the defendant's name, he was mandated to move to section C. There was no lie or misleading response. Section C requested information regarding the vehicle, its condition and use. Section D required information regarding the driver. Section E asked questions regarding the details of the coverage required. Section F asked for information in relation to claim history and discounts. There is a section towards the end of the form headed "understanding" which merely gave information to the person filling out the form and provided no scope for the giving of information by such person. Then there is a declaration. The two last aspects will be dealt with elsewhere in this judgment. Below the declaration, it states in bold "for external use only".

[44] A number of things are apparent. Unlike in **Shereen Henry** and **Fairweather**, there was no specific question regarding ownership of the vehicle. It is true that the heading in section B is "vehicle ownership". There was however, no opportunity given to the defendant in filling out the form to give information other than in the way of answering the questions. If the applicant in this case needed to elicit that information, it should have designed its proposal form in such a way as to do so. There is no question of ambiguity here, the question was simply not

asked. The claimant is in the business of soliciting clients to purchase policies of insurance and has been for many years.

[45] The question of ownership of the vehicle would be important for a dual reason. Firstly, it is necessary in order for the claimant to make a determination as to whether the individual seeking to insure the vehicle in question has an insurable interest in it. It is also relevant to the extent that it enables the insurer to be able to make a determination as to whether it should accept the risk and if so, at what premium. If the insurer fails to ask such relevant questions, it ought not to be allowed without more to visit upon the insured punitive consequences. The claimant company in the instant case based on the question asked regarding ownership, seemed concerned only with the name in which the vehicle was registered. Unlike in **Shereen Henry**, there was nothing in the instant case to alert the insured that there was need for clarification of the fact that someone else had advanced the purchase money for the vehicle in question. Unlike in **Shereen Henry** where the defendant exercised no act of ownership over the vehicle, never had the vehicle under her control and apparently never derived any economic advantage from the vehicle and went as far as denying ownership of the vehicle when interviewed by the investigators for the applicant company, the defendant in this case had direct control of the vehicle, was the driver and operator and maintained when he spoke to the investigator that he owned the vehicle. The defendant in the instant case did not in my view misrepresent anything and so the question of the materiality of any misrepresentation does not arise and there can be no issue as to whether any misrepresentation induced the applicant company to take the risk.

[46] It is the claimant's contention that the defendant made a number of untruthful statements in the proposal form. The claimant would have had to come to this conclusion based on information provided by the defendant in either section A or section E of the proposal form. A close examination of these sections of the form is warranted. In section A, he checked off his status as employed and stated his occupation to be that of a farmer/bee keeper and the industry in which he is

engaged as “agriculture”. It is in my view inaccurate for Miss Morrison to say and for counsel to submit that the defendant said that the motorbus was purchased by him from funds earned as a bee farmer. He made no such statement in section A; he simply stated his occupation as farmer/bee keeper. It cannot and should not be inferred that income earned from his occupation is the source of the purchase money for the vehicle.

[47] If the claimant is relying on the information provided in section E, a close analysis of the information therein will show that such reliance cannot be sustained. In section E dealing with “details of cover required,” certain terms: “comprehensiveness”, “laid up”, “third party”, “third party fire and theft” and, “act” are defined. These all deal with types of insurance coverage. Then there is a section directing the applicant to choose the type of benefits required. Options given are: “increased benefits” such as for loss of use, wrecker fees, manslaughter defence, act, cover for towing, for windscreen/glass and for third party limits. These all required the applicant to tick the relevant box/es and insert a dollar amount. Then there are further questions such as; “do you want an increased excess/deductible”, to which the applicant was required to tick “yes” or “no”. Immediately below that the applicant is allowed to choose the type of cover for drivers. The options are “open cover”, “standard cover”, “restricted to the driver specified in E”. Immediately below are the words “source of funds”. The applicant was allowed to tick one or more of the following: salary, spouse, parents, other and for “other”, to explain. Where it stated “explain”, the words “brother” and also “Bee Farmer” were inserted. Given that the heading of the section was “details of cover required”, I clearly understood any questions in relation to source of funds to relate to the source of funds in relation to the payment for the insurance coverage. Source of funds in the context could not have been reasonably understood to be referring to the source of the purchase money for the motor vehicle in question. If that question had appeared in section C, it would have been reasonable to infer that information was being requested in relation to the source of the purchase money. The articulation of Kingsmill Moore J earlier quoted in paragraph [34] is of relevance, and is most apt.

[48] I also do not accept that the defendant's information in the form was in conflict with the information he gave to the investigator after the accident. He reiterated that he was the owner of the vehicle in question and said that the purchase money had come from a friend overseas. I accept the observation of Sykes J in paragraph 11 of **Fairweather**

> *"the sole provider of purchase money of property which is registered in the name of another has a trust in his/her favour **unless** the circumstances of the purchase show that the provider of the purchase money was not intended to retain any interest (equitable or legal) in the property purchased."*

[49] As has been demonstrated by case law and pointed out by Miss Stewart in her submissions, this court recognizes that an applicant for insurance is not relieved from his independent duty to disclose material facts even where specific questions are put on the proposal form. The applicant is compelled to state all material facts even if such facts are outside the ambit of the questions put in the proposal form. I place emphasis on the word material. I must point out however, that in the instant case, there was no general question in the proposal form such as "is there any other information that you consider relevant" or "is there any other information that you consider important" or whatever terminology might have been used. The existence of such question would have offered Mr. Francis the opportunity to mention the fact of the arrangement between himself and the friend who initially provided the purchase money for the motor vehicle in question.

[50] In circumstances where the purchase money is provided by someone other than the insured, it is often the case that that person, whether it be an individual or a legal entity, holds some kind of interest in the subject matter of the purchase; in this case the motor vehicle, the subject matter of the policy of insurance, but each case must turn on its own facts. In my view, the circumstances of the purchase in the case at bar shows that the person who is said to have advanced the purchase money, did not intend to retain ownership or any interest whatsoever in the motor vehicle in question and is therefore not an equitable

owner. The uncontroverted statement of the defendant is that he intended to repay the person who advanced the purchase money. From all indications there was no lien in favour of the person who it is said advanced the purchase money. In the transcript of the defendant's statement given to the investigator is to be found the following statement:

> *"The agreement between me and my friend who had purchased this vehicle was for me to repay him back overtime but because I was not earning from it, I did not get a chance to repay him. The vehicle was originally bought for $4,000,000.00 and was sold for far less than that and the sale amount was given back to my friend abroad. I do not know how much it was sold for because after signing the title it was passed onto another friend locally who took care of the transaction and gave the sale amount back to my friend abroad."*

The fact that when the vehicle was sold, the proceeds of sale is said to have been given back to the provider of the purchase money does not in my view lead to an inevitable conclusion that this individual had retained an interest in the motor vehicle. The simple explanation for such a course of action would be that he had failed to honour his obligation to repay the money as agreed and so he reimbursed the provider of the purchase money. What transpired after the fact based on his inability as he said, or his failure to repay the purchase money cannot be definitive of the state of affairs as at the time the policy of insurance was entered into. Mr. Francis had what seemed to have been an informal arrangement with this person who he said was his friend. The claimant has not brought evidence to contradict Mr. Francis' evidence in that regard.

[51] This leads me to the question as to whether there was nondisclosure as distinct from misrepresentation. I am mindful that there is certain information that would be solely within the knowledge of the defendant at the time he filled out the proposal form, and which information could not have been known to the insurance company.

As Mc Nair J observed in the case of **Roselodge Ltd. v Castle**

> *"the issue as to disclosability is one which has to be determined as it is was in Lord Mansfield's day by the view of the jury of reasonable men."* (Page 131 of the judgement)

I am bound by the following statement of law which is quoted in **Roselodge:**

> *"Materiality is a question of fact, not of belief or opinion. The assured does not therefore discharge his duty by a full and frank disclosure of what he honestly thinks to be material; he must go further and disclose every fact which a reasonable man would have thought material."*

[52] It is doubtful that Mr. Francis' mind would have been engaged in relation to what was material and what was not when he was in the process of seeking insurance for the motor vehicle in question. He was more than likely simply concerned with answering the questions that were put in the proposal for. In all the circumstances based on the state of the law, I find that there was nondisclosure on his part. This finding is not however the end of the matter. The claimant has not in my view addressed the question in relation to whether the nondisclosure was as to a material fact and if it was a material fact whether such nondisclosure induced it to take the risk. This court accepts that there is a presumption of inducement in circumstances where the matter that the insured failed to disclose is a material fact.

[53] He who alleges must prove. The claimant has not put forward any evidence as to how the assessment of the risk was determined and as to whether or not the fact that the purchase money was provided by another is material and would have any effect on the mind of a prudent insurer in weighing the risk. This in the light of the present circumstances where there was no lien on the subject matter of the insurance coupled with the fact that the person in whose name the vehicle is registered has been found to have an insurable interest and in all the circumstances is properly to be regarded as the owner.

WHAT IS THE EFFECT OF SIGNING THE WARRANTY CLAUSE ON THE PROPOSAL FORM?

[54] This issue was dealt with in **Condogianis v Guardian Assurance Company Limited** (supra). The facts briefly as taken from the head notes are that the appellant filled out a proposal form in an application for insurance for certain laundry premises against fire. The proposal form contained this question "has proponent ever been a claimant on a fire insurance company in respect of the property now proposed, or any other property?" If so, state when and name the company. The appellant's answer was "yes 1917, Ocean". That answer was true but he omitted to state that he had also made another claim against another company in a similar loss. The proposal from had stated that it was the basis of the policy and that the particulars given by the appellant were to be expressed warranties. The policy contained a condition that if there was any misrepresentation as to the fact material to estimating the risk, the respondents would not be held liable upon the policy.

[55] The appellant sued the respondent upon the policy. The court found that there was a breach of warranty, whether or not the misrepresentation was as to a material fact and that the appellant could not recover on the policy. Lord Shaw of Dunfermline in delivering the judgment, stated that the case was one of express warranty and that;

> *"if in point of fact the answer is untrue, the warranty shall hold, not withstanding that the untruth might have arisen inadvertently and without any kind of ground. Secondly, the materiality of the untruth is not an issue, the parties having settled for themselves by making the fact the basis of the contract, and giving a warranty that as between them, their agreement on that subject precluded all inquiry into the issue of materiality".*

[56] The issue was considered in the Jamaican case of **Insurance Company of the West Indies (ICWI) v Abdulhadi Elkhalili** (supra). Mr. Elkhalili was the owner of a Mitsubishi Lancer Evolution motor car which was comprehensively insured with The Insurance Company of the West Indies (ICWI). He had applied for and obtained coverage by submitting a proposal form in which particulars of

accidents or losses were requested by the appellant ICWI. He suffered loss and claimed on his policy. He had not disclosed in the proposal that a vehicle owned by him had been involved in an accident. ICWI refused to indemnify him. Mr. Elkhalili brought a claim in the Supreme Court. The trial judge accepted as true, Mr. Elkhalili's evidence that he understood the question as to previous accidents and losses as being concerned with his driving and not the driving of others and determined that he was not guilty of nondisclosure and determined the matter in Mr. Elkhalili's favour.

[57] On appeal, the decision of the trial judge was overturned. In giving the judgment of the Court of Appeal, Harrison JA had this to say (at paragraph 45)

> *"It is further my judgment that the declaration at the foot of the proposal form which made it clear that the statements were true, and that the declarations form "the basis of and is considered incorporated in the policy, made the truth of the statements a condition precedent to the liability of the insurer. The respondent, by signing the proposal form, signified his agreement to it. It is also abundantly clear that where the truth of the statement was made the basis of the contract, it was unnecessary to consider whether the applicant knew or did not know the truth see* ***Condogianis v Guardian Assurance Company Limited*** *[1921] 2AC 125"*

[58] In the instant case, at the end of the proposal form were the following three clauses signed by the defendant. The first of the three fell under the section headed "Understandings" and stated**:**

> *"That the policy is voidable if false statements are given or information withheld for the purpose of obtaining insurance cover or reducing premium."*

The following two clauses fell under the heading "Declaration" and thereafter followed Mr. Francis's signature and date as well as the name and signature of the witness Miss Nakeisha Bell. The first is as follows:

> *"I/We the undersigned do hereby declare and warrant that the above answers and particulars which I/We have read over are true, that I/We have not suppressed or misstated any material fact...I/We*

agree that this proposal and any declaration forms completed by the other driver shall form the basis of the contract between me/us and the insurer, and shall be deemed as incorporated in the policy to be issued."

And the other stated that:

"I have read, understood and accepted the understandings and declarations as stated above and any breach thereto renders the policy of insurance void from inception."

Ms. Morrison in her affidavit, stated that the truth of the statements given by the defendant in the proposal form was a conditioned precedent to indemnity being allowed under the policy of insurance.

[59] There can be no dispute as to the effect of these clauses. The decision in **Condogianis** as applied in **Shereen Henry** and **Abdulhali Elkhalili,** is recognized as representing the law. Notwithstanding my finding that it cannot be said that the defendant has made false statements or misrepresented any material fact, I find that he did fail to disclose certain facts. He did not state the initial source of the purchase money. This cannot in the circumstances of this case constitute a misrepresentation. That fact however, constitutes non-disclosure but it has not been proven to the satisfaction of this Court that this non-disclosure was in relation to a material fact. Consequently, it has also not been established that the non-disclosure of a material fact induced the applicant to issue a policy of insurance. The fact that the defendant did not disclose information not requested of him is not the same as saying that he inaccurately stated any information on the proposal form. Further, in the light of my finding that the defendant did not lie or give a misleading answer regarding the source of the purchase money and my finding that he had an insurable interest in the subject matter of the insurance, impel me to conclude that the warranty clause was not breached.

[60] Consequent on the forgoing, I disagree that the claimant has established its right to avoid the policy of insurance. The claimant and is therefore not entitled to any of the declarations sought. There will be no order as to cost.