IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: HCV 04439 of 2007

BETWEEN	**ANDRENE BROWN**	**CLAIMANT**
AND	**INSURANCE COMPANY OF THE WEST INDIES**	**DEFENDANT**

Heard: March 11, 12; July 8, 9 and August 31,2010; March 4 and July 27, 2011

Mr. Jeffrey Daley instructed by Jeffrey Daley & Co. for the Claimant; Mr. Walter Scott and Ms. Elizabeth Salmon instructed by Rattray Patterson Rattray for the Defendant.

Claimant alleging breach of contract by Insurer refusing to honour claim for allegedly stolen vehicle; Insurer purporting to avoid liability for misrepresentation and material non-disclosure and/or breach of warranty in declaration on proposal form; whether materiality is relevant where the defence is breach of warranty in proposal form; application of the principle enunciated in Dawsons v Bonnin.

CORAM: ANDERSON J.

[1] In the instant case, Miss Andrene Brown, the "Claimant", commenced an action against the Insurance Company of the West Indies, ("ICWI" or the "Defendant") by way of a Fixed Date Claim Form in which she alleges that the Defendant has breached the insurance contract it had with her. She has sought reliefs from the Defendant as follows:

1. The sum of Two million Nine hundred and Forty-Five Thousand Dollars ($2,945,000.00) being monies due to the Claimant from the Defendant under the motor vehicle policy;
2. Damages for breach of contract;

3. The sum of Three Hundred One Thousand Five Hundred Thirteen Dollars and Fifty-Two cents ($301,513.52) being monies paid out by the Claimant to the lien holders as loan payment;
4. Loss of Use for the said motor car in the sum of Nine Hundred and Eighteen Thousand Dollars ($918,000.00);
5. Interest pursuant to the Law Reform Miscellaneous Provisions Act;
6. Such further and other relief as to this Honourable Court appears just;
7. Costs.

[2] By an Order of Jones J. made on the 8th April 2009, the Fixed Date Claim Form was converted to a Claim Form and affidavits from the Claimant and Joan Mattis, a representative of the Defendant were ordered to be treated as "Particulars of Claim" and "Defence" respectively.

The Background to the Claim

[3] The Claimant is, and was at all material times, a civil servant employed in the Ministry of Labour as a Labour Administrator. She is a graduate of the University of the West Indies with a Bachelor's Degree and also holds a Masters Degree in Human Resource Development. It is not disputed that in or around January 2005 the Claimant entered into a contract of insurance with the Defendant to provide comprehensive insurance coverage of a 2005 Mitsubishi Pajero motor vehicle, licence # 2847 EL, which the Claimant had purchased with the benefit of a Twenty Per Cent (20%) duty concession, awarded to the Claimant by virtue of her position as a travelling officer and civil servant.

[4] To assist in the financing of the purchase of the said motor vehicle, she acquired a loan from RBTT Bank which loan was

secured with the assistance of Mr. Jamelah Skeene, her then fiancé, and her main witness in this case. The policy of insurance was renewed up to 2007. On or around the night of December 31, 2006, the vehicle, the subject of the insurance contract, was allegedly taken from Mr. Skeene when he was purportedly held up at gun point in the vicinity of the Old Harbour Main Road, in the Parish of St. Catherine. In consequence of this loss, the Claimant claimed against the Defendant on the policy of insurance. Subsequently, the Defendant purported to accept the claim and offered to indemnify the Claimant for her loss. However, after investigating the circumstances in which the claim had been made, the Defendant sought to deny the Claimant's claim and to assert that it was entitled to reject it based on the terms of the policy.

[5] The Claimant in her claim insists that she is entitled to compensation from the Defendant insurer as she had a valid comprehensive policy of insurance over the vehicle and pursuant to her loss, her policy must be honoured. The Defendant, on the other hand, says it is entitled to deny the Claimant's claim on the basis of material non-disclosure and on the further basis that by virtue of a breach of a provision of the contract which was a warranty, it is entitled to avoid the policy.

[6] The Claimant provided a witness statement, a supplemental witness statement and, in addition, was allowed to amplify her witness statement in Court. A witness statement was also given

by Mr. Skeen for the Claimant and he was subjected to extensive cross-examination.

[7] The Defendant has sought to deny the Claimant's claim on the basis that the Claimant has breached her duty of utmost good faith, a fundamental premise of contracts of insurance, by non disclosure of material facts or deliberate misstatements of facts in the completion of the proposal form. The Defendant also avers that by virtue of the declaration made by the Claimant in the proposal form, her answers to questions in the proposal were made warranties, the breach of which allowed the Defendant to avoid the policy.

[8] The Claimant avers that she did not breach her duty of good faith, by non-disclosure of material facts in her signing of the proposal form. She also avers that the declaration does not allow the policy to be avoided.

The Evidence

[9] The evidence in support of the Claimants case was provided by the Claimant herself and Mr. Skeene. Insofar as is relevant for the issues which the court must decide, she acknowledged that she signed the proposal form which was tendered into evidence as Exhibit #1. That proposal form asked certain questions and included questions about the place where the car would be garaged overnight and who would be the driver. (These are referred to further below). In her evidence, the Claimant explained how she paid for the vehicle with a Manager's cheque of her own which she bought in the sum of four hundred and

eighty thousand dollars ($480,000.00), with help from her fiancé Mr. Skeene and a loan from RBTT Bank. In respect of the loan, it was her evidence that Mr. Skeene acted as a guarantor. The loan is evidenced by a letter of commitment dated January 14, 2005 from RBTT Bank Jamaica Limited addressed to Ms. Brown and Mr. Skeene in which the bank agreed to extend to Ms. Brown and Mr. Skeene *as borrowers*, (my emphasis) facilities of one million five hundred and fifty thousand dollars ($1,550,000.00). This letter was admitted into evidence as exhibit #2.

[10] With respect to the payment for the motor vehicle, Ms. Skeene in cross examination acknowledged that the far greater amount of the four hundred and eighty thousand dollars ($480,000.00) was money from Mr. Skeene who owed her four hundred thousand dollars ($400,000.00) for working in his wholesale establishment for a year without remuneration. The loan from RBTT Bank was serviced by monthly deductions from her salary which was deposited to her bank account. Also during cross examination Ms. Brown acknowledged that she had signed a Customs Entry form in which she had confirmed that the vehicle would be used "exclusively for the purposes of Ms. Andrene Brown". From the other evidence adduced, it is clear that this had not been the case.

[11] Ms. Brown also said that it was her understanding that under the comprehensive insurance policy she had effected, the vehicle would have been covered for insurance purposes while anyone

drove it, as long as that person was authorized by her as owner of the vehicle.

[12] She confirmed that Mr. Skeene often drove the car as he preferred that to another car, a Camry, which she also owned and had insured with the Defendant. She then recounted in her evidence the allegation of the car having been stolen from Mr. Skeene and this fact being reported to the police. She said she subsequently received a letter dated July 18, 2007 from the Defendant in which it had confirmed that it would settle the amount owed to the Bank. She claims she relied upon that letter to her detriment. That letter was followed by another, dated the 19th July 2007 from the Defendant to RBTT, indicating that it had decided not to honour the Claimant's claim. She says that this decision refusing to honour her claim is a breach of her insurance contract with the Defendant and she claims damages for breach of contract, including transportation costs of three thousand dollars ($3,000.00) per day for three hundred and six (306) days for a total of some nine hundred and eighteen thousand dollars ($918,000.00).

[13] In her witness statement the Claimant also alleges that the Defendant acted in a "retaliatory and discriminatory manner" and claims:

a) The sum of $2,945,000.00 being monies due to me from the Defendant under the motor vehicle policy;

b) damages for breach of contract;

c) the sum of $1,000,000.00.

d) loss of use in the sum of $918,000.00 and continuing;

e) interest at commercial rates on sums found to be due.

[14] It must be remembered that it is for the Claimant to establish, on a balance of probabilities, that there has been a breach of contract such as to entitle her to the reliefs sought. It will be crucial to examine in some more detail, the cross examination of Ms. Brown as that is very relevant to the nature of the defences raised by the Defendant. In the course of his cross examination of Ms. Brown, Mr. Scott sought her confirmation that she had signed the proposal form. She agreed. She was directed to the provision in the proposal form which was in the following terms:

> 'I hereby declare that all the above statements and particulars are true and I/We declare that if any such particulars and answers are not in my/our writing the person or persons filling in such particulars and answers shall be deemed to be my/our agent for that purpose. I/We further understand that the vehicle above referred to is/are in good condition and undertake that vehicle(s) to be insured shall not be driven by any person who to my/our knowledge has been refused any motor vehicle insurance or continuance thereof. I/we hereby agree that this Proposal and declaration shall be the basis of and be considered as incorporated in the policy to be issued hereunder which is in the ordinary form used the Insurance Company of the West Indies Limited for this class of insurance and which I/We agree to accept".

[15] While the Claimant said she did not think she read the proposal form, she did accept that she was, by signing the form, confirming the truth of her answers. Although Ms. Brown said the answers she gave to the questions posed in the form were true, she nevertheless said she signed without reading the answers.

[16] The proposal form also sought to elicit details of the driver of the vehicle. It asked who the driver would be and in answer Ms. Brown had placed only her own name. She was asked whether Mr. Skeene was going to be a driver and she said yes. In seeking to explain why his name was not placed on the proposal form in answer to the relevant question, she said that since the policy was comprehensive she thought that it did not matter who drove the vehicle as long as that person did so with the approval and authority of the owner. She also admitted in cross examination that Mr. Skeene drove the vehicle "most of the time".

[17] In the course of cross examination of Ms. Brown it became clear that there were answers given as response to questions on the proposal form completed by the Claimant, which answers were factually incorrect. For example, on the form there was a question asking where the car would be kept overnight, whether in a locked garage, in a carport or in the open. The Claimant had indicated by ticking "carport" that the vehicle would be kept in a carport. From the evidence it became clear beyond a peradventure that there was no carport at the home of the Claimant's mother where she lived, nor was there a carport at the home of Mr. Skeene who often kept the car overnight, nor at his mother's home where he would sometimes stay. Indeed, in answer to the question on the proposal form as to whether the vehicle would be kept at the proposer's address, this question was answered in the affirmative although, from the evidence, it is clear that this was not the case.

[18] Ms. Brown was shown to have also been inconsistent in relation to the statement which she had given to the private investigator and which was admitted into evidence as Exhibit 3. In that statement she had indicated that "custody care and control of the vehicle had been with Mr. Skeene from the time of purchase". She now sought to back away from that statement saying she had not read over her statement when she signed it. The statement to the investigator also revealed other inconsistencies so that, for example, it was stated that the Claimant and Mr. Skeene were "joint borrowers" of the money from RBTT Bank, whereas she had said in her witness statement that he was a guarantor of her loan. She also contradicted herself in cross examination when she said that Skeene had bought the vehicle for her as a gift, quite different from her averment that he acted as a guarantor.

[19] The witness Jamelah Skeene supported the story of the Claimant as to the issue of the purchase of the vehicle. He says that he agreed to help with financing of the purchase but never regarded the vehicle as belonging to anyone else but the Claimant. He also denied that he had read over the statement which he had given to the investigator

[20] I should note that there were clear conflicts between the evidence of the Claimant and that of Mr. Skeene. He denied that the Pajero was a gift from him to Ms. Brown. He stated that there was a carport where he lived which directly contradicted her evidence. He denied that from the time of purchase it was the understanding of Ms. Bown that he would be a driver. He

contradicted her evidence that from the time of purchase he had "custody care and control" of the vehicle. Under cross examination Mr. Skeene also contradicted his own evidence given in his witness statement, where he had said he sometimes supplemented the Claimant's income by depositing funds in her account. Further, Mr. Skeene was found to be less than honest when he denied that the money borrowed from RBTT Bank was stated to be to invest in a business for working capital support. He continued to deny this even after he was confronted with a document, a letter from the bank with his signature and describing as "borrowers" both himself and Ms. Brown.

[21] Having had the benefit of observing his demeanour and hearing the answers he gave in cross examination, I have concluded that the witness Skeene is not a witness of truth whose evidence is to be relied upon by this Court.

Evidence for the Defendant

[22] Evidence for the Defendant was given, inter alia, by Mrs. Alrea Washington Hoilett, the Claims Manager of the defendant company. Her witness statement which was accepted as her evidence-in-chief, evidenced the Defendant's issuing of a policy of insurance to the Claimant. She confirmed that the Defendant had been made aware, on or about January 3, 2007, of the alleged theft of the Claimant's vehicle when the Motor Vehicle Theft Claim Form was completed and signed by the Claimant and Mr. Skeene. She also indicated that the Defendant had written to RBTT Bank seeking confirmation of the amount outstanding on the loan. Although the Defendant had commenced an

investigation into the alleged theft of the motor vehicle, on July 18, 2007 she, on behalf of the Defendant, had "erroneously" written to the Bank to advise that the Defendant would settle the claim for the lost vehicle in respect of which the bank, as lienor, had an interest, on a total loss basis. A day later, on July 19, 2007, the bank was written to again, to advise that the Defendant intended to carry out further investigations and would therefore not settle the Claimant's claim at that time.

[22] Mrs. Washington-Hoilett agreed that she was not an underwriter but asserted that in the course of her career she had experience in how underwriting operates. She recognized that on the proposal form there was nothing about Mr. Skeene or that the vehicle had been purchased with the benefit of a 20% duty concession which would have assisted the underwriter in determining the extent of the risk which it was undertaking.

[23] Although much effort was expended by Mr. Daley for Ms. Brown in seeking to elicit from the witness a concession that the Defendant had sought through its investigations and reports to the police and the Ministry of Labour, to intimidate the Claimant into discontinuing her claim, this she strenuously denied. In any event, although this witness was prepared to say that the investigations the Defendant had carried out suggested that there may have been fraud, the Defendant was not relying upon the fraud to avoid the policy.

[24] Evidence was also given for the Defendant by Kevin Virgo, an insurance investigator. His witness statement indicated that he

was contacted by a Fitzmore Coates, a forensic analyst declared by the Court to be an expert and who had previously been engaged to investigate the circumstances of the alleged theft of the said motor vehicle. Virgo did in fact produce a report for the Defendant. While both the witnesses Virgo and Coates according to their witness statements concluded that the claim by the Claimant was fraudulent, the terms of those statements do not assist the Claimant nor the defendant in terms of the issues raised in the pleadings. Attempts were made to discredit both these witnesses but nothing in their evidence adds anything to the matters pleaded.

[25] A witness statement was also provided on behalf of the Defendant by Jose Nunez, an employee of Motor Sales and Service Ltd., the company from whom the motor vehicle had been purchased initially. Again, the witness statement of this witness does not contribute to the resolution of the issues herein.

The Submissions For The Claimant

[26] The Claimant's counsel submitted that the Defendant is refusing to honour the Claimant's claim on the basis of fraud by the Claimant and her authorized driver; lack of an insurable interest in the motor vehicle and non-disclosure and material misrepresentation. It should be noted however, that notwithstanding the Defendant's earlier stated position and the reports it received alleging fraud, the Defendant is only resisting the claim on the basis of material non-disclosure and misrepresentation of a warranty. That is the basis of the

pleadings. I shall, nevertheless, examine the submissions made by the Claimant.

[27] Claimant's counsel sought to focus on the evidence given by ICWI's witness, Mrs. Alrea Washington-Hoilett. It was submitted that her evidence was "filled with gaps". Specifically, it was stated that she had not been able to provide a credible explanation as to why the Defendant had reversed its position from agreeing to settle the claim and beginning negotiations to deciding that it would not honour the claim. (In that regard, see the Claimant's submissions on "Approbation and Reprobation" which is dealt with briefly below). It was also submitted that the Defendant was insincere in its attempts to deny the claim and that this insincerity was shown by the varied defences which it had purported to raise against the validity of the claim. For example, it had raised fraud which was now abandoned, lack of insurable interest and misrepresentation.

[28] It was also submitted by Claimant's attorney-at-law that Mrs. Washington-Hoilett was not the officer at ICWI responsible for assessing risk and that there was no evidence of Mr. Skeene's insurable risk or how that risk may have affected the premiums payable under the policy. Further, the question was raised as to why it had been necessary to involve the Claimant's employer at the Ministry of Labour as well as the Fraud Squad and the Spanish Town Police during the course of the Defendant's investigations into the claim of the alleged robbery. It was suggested that the sole purpose of these approaches was to

intimidate the Claimant and dissuade her from pursuing he claim.

[29] The Claimant further submitted that the evidence given by the Defendant's witnesses, Coates, Nunez and Virgo did not assist the court in determining the issues with which it is faced. I agree, and as noted above in the Court's comments on these witnesses, their testimonies are not of any great moment.

[30] Mr. Daley stated that the Defendant was asserting that the Claimant failed to disclose or deliberately concealed the fact that Mr. Skeene had an interest in the vehicle. (That he had such an interest is not admitted). It is not clear to me as to the basis for this submission in light of the Defendant's pleadings and submissions. In any event, says counsel, the Defendant has failed to show the materiality of the non-disclosure or that it was induced to enter into the insurance contract with the Claimant by the non-disclosure.

[31] The Claimant's counsel spent some time in his submissions on the question of whether the Defendant was asserting that the Claimant was not the owner of the motor vehicle. Similarly, the Claimant's counsel's made submissions in respect of the defence of lack of an insurable interest which had previously been raised by the defendant. It will be recalled, however, that the claims manager of the Defendant, Mrs. Washington Hoilett conceded that the Claimant did in fact have an insurable interest and, by inference, this aspect of the defence had been abandoned. In light of the foregoing, I do not believe that this court needs to be

detained by any analysis or examination of the cases of **Elma Stennett v the Attorney General** Claim No. HCV 790 of 2003, or the case of **Aye Aye Naing v The Attorney General and Anor**, Claim No HCV 00025 v 2005.

[32] In response to the Defendant's pleadings of non-disclosure and misrepresentation, the Claimant's attorney denies that the Claimant failed to disclose or deliberately concealed the fact that Mr. Skeen had an interest in the motor vehicle. He submitted moreover, that there had been a failure on the part of the Defendant to show how such a non-disclosure was material or that it induced the defendant to enter into the insurance contract.

[33] A further submission made by the Claimant's attorney was that since the insurance policy was one of a "comprehensive open cover" it would still apply to cover any authorized driver who had possession and/or control of the motor vehicle. In the same vein, it was suggested that since the Claimant had answered the question, "Will the use of the vehicle be restricted solely to the drivers named above?" by stating "No", this somehow meant that there was no material non-disclosure or misrepresentation. This submission is wholly misconceived.

[34] Counsel for the Claimant submitted that in order to give rise to a policy being avoided, it was necessary for the insurer to show that the non-disclosure had induced it to enter into the insurance contract. He cited the English Court of Appeal decision, **Drake Insurance Co. v Provident Insurance** [2003] EWCA 1834

and paragraph 62 of that decision, where the court purporting to apply the earlier case of **Pan Atlantic Insurance Co. Ltd. V Pine Top Insurance Co. Ltd**. [1995] AC 501 stated the following:

> "An insurer who seeks to avoid for non-disclosure must show that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms. Provident cannot do that without showing that if the conviction had been declared it would have charged a higher premium".

[35] In further support, Claimant's counsel also referred to a leading insurance text **MacGillvary on Insurance Law, 10th Edition** which at paragraph 17-26 states that "The onus of proving non-disclosure is on the insurer" and further, at paragraph 17-28 further stated:

> "To succeed in a defence of non-disclosure, the insurer must prove not only that the assured failed to disclose a material fact but also that the non-disclosure induced the making of the contract in the sense that he would not have made the same contract if he had known the matters in question. Where the materiality of the un-disclosed is obvious it may justify the court in presuming that the underwriter was induced but this is an evidential presumption which may be rebutted by contradictory evidence addressed by the assured."

[36] Counsel also relied upon a first instance decision of her ladyship Lawrence-Beswick J, in the case of **Abdulhadi Elkhalili v Insurance Co. of the West Indies and Anor**, Claim No. HCV 0852 of 2003. It should be noted that the decision of the judge at first instance was later overturned by the Court of Appeal. I shall return to that Court of Appeal decision later in the judgment.

[37] With respect to the question as to whether disclosure of any interest Mr. Skeen may have had in the vehicle would have affected the rating for premium purposes, counsel submitted that there was no evidence to this effect. In fact, he pointed to the evidence of the claims manager who had indicated that a decision on rating of the premium would have been left up to the underwriting department. He further submitted that for the claims manager to have stated at paragraph 16 of her Witness Statement that the Claimant "had failed to disclose material facts which would have affected the Defendant in fixing the premium at the rate it did or in determining whether it would assume the risk at all," was hearsay and therefore inadmissible in proof of the issues.

[38] I should state at this point that this is a misunderstanding of the evidence presented by the Defendant. The Defendant's Claim Manager in her evidence was gave evidence to indicate that she was an experienced insurance executive. She had had training in underwriting and was clearly qualified on that evidence to speak to how the underwriter would have viewed the information which had not been disclosed.

[39] I do not find any additional support in the case of **Hillary Smith Thomas v The Insurance Company of the West Indies**, Claim No. HCV 1883 of 2000 which deal with the question of ownership, not essential to the decision I am called upon to make in this case.

[40] The Claimant's attorney also spent some amount of time on the question of fraud and the efforts made by the Defendant to establish that there had been fraud. However, as I have stated elsewhere, this is not being pursued by the defendant as a basis to resist the claim and I do not think that it is necessary to deal with this.

[41] Finally, there was an attempt to advance the proposition that there had been an approbation by the Defendant because of its conduct in first advising the Claimant that it would settle the claim. According to this submission, the subsequent decision by the Defendant to reject the claim was a reprobation and one is not allowed both to approbate and reprobate in respect of the same issue. I must say, with respect, that while in my view the submissions on this issue are irrelevant to a claim for breach of contract, the very authority cited by counsel for the Claimant, **Halsbury Laws of England, 4th Edition, Vol. 16** and paragraph 1057 does not support the submission. As will be seen from that citation, the Defendant would have had to have secured a benefit arising out of the course of conduct which he had first pursued and with which the subsequent conduct would be inconsistent. There is no evidence that the Defendant secured any such benefit and there was certainly no submission as to the nature of any such benefit gained by the Defendant nor any detriment suffered by the Claimant.

Submissions for the Defendant

[42] The Defendant for its part denies that it has breached its contract and asserts that there has been material non-disclosure

and misrepresentation on the part of the Claimant in securing the contract and that the contract is thereby voidable. In any event, the Defendant relies upon the terms of the contract, and in particular, the declaration by the Claimant which, by its very terms, is made a term of the contract.

[43] The Defendant's starting point is to define exactly, a contract of insurance. Such a contract is one which is described as one *uberrimae fides.* That is, it is one of the utmost good faith. The genesis of this principle is found in the 18th century decision of Lord Mansfield in the case ***Carter v Boehm*** (1766) 3 Burr 1905 (at page 1909) in which the learned judge stated the following:

> *'The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured 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 a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risqué understood and intended to be run at the time of the agreement.'*

[44] That this proposition remains intact was recently reaffirmed in the case of **HIH Casuality and General Insurance Limited v Chase Manhattan Bank** 2003 UK HL 6.

[45] Mr. Scott for the Defendant submitted that it was the duty of the insured to be open and honest and to make full disclosure of all

material facts. In support of this proposition he cited the English Court of Appeal case, **Lee v British Law Insurance Company Limited** [1972] 2 Lloyd's Report 49 where Karminski L. J. stated that full disclosure is the very essence of the insurance contract. It was submitted that the basic test as to what was material is set out in **Halsbury's Laws of England 4th Edition** vol 25 paragraph 351 which indicates that that test hinges on whether the mind of a prudent insurer would be affected in deciding whether to accept the risk at all or in the fixing of the premium, by knowledge of a particular fact if it had been disclosed. It was further submitted that support for that proposition would also be found in **Zurich General Accident and Liability Insurance Company Limited v Morrison and Others** [1942] 2 KB 53 and also in a case out of the Supreme Court of Canada, **Henwood v Prudential Insurance Co. of America** [1967] Can LII 17.

[46] Not surprisingly the defendant also relied upon the case of **Pan Atlantic Insurance Company** previously cited by the Claimant in further support for what is meant by material. It was submitted that based upon authority that there are some instances where it would be so clear that there would be no need to prove, whether a particular fact would be material. It was accordingly submitted that the questions which the Court had to decide in this matter was whether the proposer, Ms. Brown, had provided all the material information which was within her knowledge to the Defendant. In that respect it was pointed out that the Claimant herself admitted that the risk profile of Mr. Skeene was different from her own, and that she had failed to disclose material information which the Defendant would have

had no way of knowing unless it was disclosed. Notwithstanding the materiality of any undisclosed statement or of any misrepresentation the Defendant submitted that the declaration at the foot of the proposal form which was signed by the Claimant made the truth of the answers a condition precedent and that the insured by signing it agreed there to.

[47] The case of **Dawsons Limited v Bonnin and Others** [1922] 2 AC 413 was cited as providing authority for this proposition. The headnote in the Report is as follows.

> A firm of contractors in Glasgow insured a motor lorry at Lloyd's against damage by fire and third party risks. The policy recited that the proposal should be the basis of the contract and be held as incorporated in the policy, and it was expressed to be granted subject to the conditions at the back thereof. By the fourth condition, "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." In reply to a question in the proposal form, "State full address at which the vehicle will usually be garaged," the answer given was "Above Address'" meaning thereby the firm's ordinary place of business in Glasgow. This was not true, as the lorry was usually garaged at a farm on the outskirts of Glasgow. The inaccurate answer in the proposal was given by inadvertence. The lorry having been destroyed by fire at the garage, the insured claimed payment under the policy :- Held, (1.) that the misstatement in the proposal was not material within the meaning of condition 4 ; (2) (by Viscount Haldane, Viscount Cave, and Lord Dunedin; Viscount Finlay and Lord Wrenbury dissenting) that the recital in the policy that the proposal should be the basis of the contract made the truth of the statements contained in the proposal, apart from the question of materiality, a condition of the liability of the insurers; that the effect of this recital was not cut down

by the special conditions on the back of the policy; and that the claim failed.

[48] In the instant case the Claimant had, in answer to the question whether the motor vehicle would be kept overnight at the proposer's address and the further question whether it would be in a car port, answered "yes" to both questions. It was submitted that by signing the declaration she had warranted the truth of the statements and not merely made a statement of intention as to her future conduct. If that proposition is correct it was submitted that all the insurer, the Defendant in this case, would be required to prove is the inaccuracy of this statement which was placed on the proposal form by the proposer. Nor would it matter if the information had been placed there inadvertently. It was further pointed out that in any event, there had been no assertion by the Claimant that any information had been placed on the proposal form inadvertently.

[49] With respect to the question of fraud, while the Claimant had vigorously denied any fraudulent behaviour either on her part or, as far as she was aware, on the part of Mr. Skeene, and it was no longer a defence relied upon by the Defendant, the question remained relevant in so far as it affected the credibility of her evidence and that of her main witness. That evidence is replete with instances of contradictions and severely damages the credibility of both witness and Claimant. I accept as a fact that it was always the intention of the Claimant at the time she applied for the duty concession to allow Mr. Skeene to have custody, care and control of the vehicle. This therefore raises

issues of truthfulness and credibility which the court must consider in arriving at a determination of this case.

Decision

[50] It must always be remembered that the burden of proof lies upon the Claimant. He who alleges must prove. The Claimant here must prove, on a balance of probabilities that there has been a breach of her contract of insurance by the Defendant and that any damages suffered flowed from the breach and were reasonably foreseeable. The burden on the Defendant is an evidential one and only arises after the Claimant has provided sufficient evidence in support of her claim to require that the Defendant respond. The breach alleged is the refusal to satisfy the claim made by the Claimant under the terms of her policy. It is not at all clear to me that the Claimant has established on a balance of probabilities that there has been a breach of her contract with the Defendant. If that is correct, that would be the end of the action. If however, I am wrong in that view and it is considered that she has done enough to shift the evidential burden and that the Defendant must respond, the Court must then examine the defences which have been raised.

[51] The defences put forward by the Defendant are, as noted above in submissions on its behalf, that the Claimant is guilty of material non-disclosure and misrepresentation and that the Claimant by signing the declaration at the foot of the proposal form, is in breach of the warranty given thereunder. The Defendant submits that if it establishes either of those defences, that would be the end of the Claimant's claim. The Claimant denies that it is guilty of either non-disclosure or

misrepresentation but asserts that, in any event, it would have to be shown that the misrepresentation or non-disclosure induced the insurer to enter into the particular contract.

Has there been Misrepresentation and/or Non-Disclosure.

[52] The evidence accepted by the Court is that the Claimant made the certain representations on the proposal form which were not true. She had stated that the motor vehicle would be garaged overnight in a carport and that the Claimant would normally be the one who would have had custody and control of the vehicle. This was shown to have been untrue. When asked for "details of persons who would drive the car", the only name inserted was that of the Claimant but, as the Claimant herself said in cross examination, it was always intended that Mr. Skeene would also be a driver. In fact in her statement to the private investigator she had said that from the time of its acquisition, Mr. Skeene was the "regular driver of the vehicle". When asked why she had not put Mr. Skeene's name on the proposal form, she said it was not asked for and the insurance was comprehensive.

[53] On the evidence I have accepted, there was non-disclosure in that she had not revealed that the person who would be the main person who would have control of the vehicle. She did not, in that context, reveal that she would continue to drive her Toyota Camry motor car while Mr. Skeene would mostly drive the Pajero. She did not reveal that the other likely driver of the vehicle was Mr. Skeene who was a self employed businessman and who carried on the business as a wholesaler and entertainment co-ordinator. It is not in dispute, and the Court

so finds, that the insurance profile of Mr. Skeene was significantly different from that of the Claimant.

Was the misrepresentation or non-disclosure "material"?

[54] The definition of what is material has already been set out above in the submissions of the Defendant. A circumstance is material if it would have had an effect on the mind of a prudent insurer in weighing up the risk. (**Pan Atlantic Insurance Co. Ltd**.) It was the submission of the Claimant that if there were non-disclosure or misrepresentation, they were not material, that materiality had to be proven and shown to have induced the insurer to enter into the particular contract. Thus the citations above, of the **Pan Atlantic Insurance Co** case and **MacGillvary on Insurance Law** were made by the Claimant's attorney. In **Drake Insurance v Provident Insurance** [2003] EWCA Civ. 1834, (also referred to below in the judgment of Karl Harrison JA in **ICWI v Elkhalili**) the English Court of Appeal re-affirmed that inducement had to be proved by the insurer.

[55] It is the law that there are instances in which the non-disclosure or the misrepresentation is so clearly material that the Defendant would not have to prove materiality. I would find as proven that in the instant circumstances the misrepresentation as to where the motor vehicle would be kept was material. I would also be prepared to hold that the non-disclosure of the fact that the person who would be more often the driver of the vehicle and in whose custody and control it would more often be, is also material as likely to affect a reasonable underwriter's mind in considering whether to accept the risk at all or at the

premium decided upon. The evidence of Mrs. Washington-Hoilett for the Defendant, was that the nature of the information which had not been provided by the insured in the proposal form was such as could have affected the insurer's consideration as to whether the risk should be accepted and at the premium at which it was.

[56] But the authorities seem clear that in addition to materiality, inducement must be demonstrated if the contract is to be avoided. In **Ansari v New India Insurance Co Ltd** [2009] EWCA Civ 93, Moore-Bick LJ, referring to **Pan Atlantic v Pine Top** said:

> **Pan Atlantic v Pine Top** was concerned with the *concept of materiality* (My emphasis) in the context of misrepresentation and non-disclosure in the course of negotiations leading to the formation of a contract of insurance. It is trite law that the insured is obliged to disclose to the insurer before the contract is made all material circumstances known to him, a material circumstance being defined as one which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. That principle, which is contained in section 18 of the Marine Insurance Act 1906, applies to contracts of insurance of all kinds. The question for determination in **Pan Atlantic v Pine Top** was whether, in order to influence the judgment of a prudent insurer, a circumstance must be of such importance as to have a decisive effect on his decision whether to accept the risk at all and if so on the terms to be applied, or whether it is sufficient that it is something he would take into account when making his decision, without its necessarily having a decisive effect on his mind. *The House of Lords held that the latter was the case, recognising that an insurer who seeks to avoid the contract on the grounds of misrepresentation or non-*

> *disclosure must also establish that it induced him to accept the risk on terms to which he would not otherwise have agreed*. (my emphasis)

[57] In my view there are clear misrepresentations and non-disclosure on the part of the Claimant and these were material within the terms of that definition. However, dicta in **Ansari**, a case in which similar questions were raised, is instructive. It involved an appeal against the order of the judge at first instance dismissing the appellant's claim against his insurance company in respect of damage caused by fire to commercial premises. Moore-Bick LJ in referring to materiality said:

> It is true that the expression has a well established meaning in insurance law, but that is in the particular context of negotiations leading to the formation of a contract. It has long been recognised that the insurer depends on the insured to provide him with much of the information he needs to enable him to assess the risk; hence the need for utmost good faith, both in relation to disclosure and description of the facts. *In that context a relatively undemanding test of materiality is appropriate and the consequences of adopting it are to a large extent controlled by the need for an insurer who seeks to avoid the contract on the grounds of misrepresentation or non-disclosure to establish that he was thereby induced to enter into it*.

[58] Despite the evidence of Mrs. Washington Hoilett, it is not at all clear to me that the Defendant has established that it was *induced* by the misrepresentation or non-disclosure, to enter into the particular contract with the Claimant.

[59] Notwithstanding this finding, I do accept the alternative submission of the Defendant that the signing of the declaration

at the foot of the proposal form amounted to a warranty to the Defendant, the breach of which allows the Defendant to avoid the policy. A recent decision which makes me satisfied that this is the correct view in the instant matter is that of the Jamaican Court of Appeal in the case of **ICWI v Abdulhadi Elkhalili** SCCA # 90 of 2006. In that case, Karl Harrison J.A., in delivering the main judgment of the Court stated:

> "This appeal raises issues of some general importance: what constitutes material facts which ought to be disclosed in a proposal form for motor vehicle insurance and what is the legal effect of the warranty clause in this form"?

[60] These were, in my view, the same issues which the Court faces here. In **Elkhalili**, the Court of Appeal reversed the earlier decision of Lawrence-Beswick J. at first instance. That decision was strongly relied upon by the Claimant in its submissions on materiality. The learned judge, Karl Harrison J.A. provided a comprehensive analysis of the law both in relation to materiality as well as to the effect of signing of the declaration. The declaration in the case before the Court of Appeal was in the following terms:

> "1/WE HEREBY DECLARE that all the above statements and Particulars are true" and... "I agree that this Proposal and declaration shall be the basis of and be considered as incorporated in the policy issued hereunder which is in the ordinary form used by the INSURANCE COMPANY OF THE WEST INDIES LIMITED for this class of Insurance and which 1/WE agree to accept".

[61] This was the same declaration as is contained in the instant case. There, as in this case, the Claimant claimed not to have read the proposal form. He also said that he did not fully understand it owing to his limited grasp of English. I hope I may be forgiven if I quote extensively from the extremely well-reasoned judgment of his lordship. His lordship said:

> 12. Before examining the several grounds of appeal, I think it convenient at this stage to set out the legal principles which apply to proposal forms and to the conditions of an insurance policy vitiated by fraud or misrepresentation.
>
> 13. A contract of insurance is one of utmost good faith (uberrimae fidei) and, as such, the requirement of good faith must be observed by both the insured and the insurer throughout the existence of the contract. In practice, the requirement of uberrima fides means simply that an applicant for insurance has a duty to disclose to the insurer all material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts.
>
> 14. The test of materiality has been settled by the House of Lords in **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd** [1994] 3 All ER 581, [1995] 1 AC 501 on a 3:2 majority. The majority held that, for the purposes of marine and non-marine insurance, a circumstance is material if it would have had an effect on the mind of a prudent insurer in weighing up the risk. The House also held that, for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure, the alleged misrepresentation or non-disclosure must be material and must have induced the making of the policy. Recently, the English Court of Appeal held in **Drake Insurance v Provident Insurance** [2003] EWCA Civ 1834 that inducement must be proved by the insurer.

15. The proposal form which precedes the issuance of the policy of insurance is the document which helps the insurer to make an informed decision as to whether he will indeed insure the proposer's risk. In order therefore, to ensure the utmost good faith on the part of the insured, it is commonplace among insurers to require that the proposal form be filled up accurately and to have the proposer for insurance warrant the accuracy of the answers and statements made on the form. Thus, as in this appeal, the proposer (Mr. Elkhalili) was required to sign and did sign the declaration (reproduced at (9), above). The critical element in the declaration is the phrase which states that "this proposal and declaration shall be the basis of and be considered as incorporated in the policy...." This declaration, in my view, forms the basis of the contract, so that, the declaration at the foot of the proposal form that the statements are true, and that the declaration shall be considered as part of the policy of insurance, makes the truth of the statements a condition precedent to the liability of the insurer. A proposer, by signing it, signifies his agreement to it.

[62] He also referred to **Condogianis v Guardian Assurance** Co [1921] 2 AC 125 which supports the Defendant's submissions on the effect of the declaration in the proposal form.

16. **Condogianis v Guardian Assurance** Co [1921] 2 AC 125 illustrates 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 or did not know the truth.

17. In **Condogianis** (supra) an appeal to the Judicial Committee of the Privy Council from Australia, the appellant sued the respondent insurers on a policy issued by them insuring a laundry 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 of company.'

The appellant answered this question, 'Yes. 1917, Ocean.' That answer was true to the extent that in 1917 he had made a claim against Ocean Insurance Company in respect of the loss of a motor car by fire. However, in 1912 he had made a claim against another company in respect of a similar loss. The proposal form contained a 'basis clause' and a statement that the particulars given by the appellant were to be express warranties. In the policy was a condition that if there was any misrepresentation as to any material fact to be known in estimating the risk, the insurer was not to be liable under the policy. The Privy Council held that the applicant's answer was untrue and that there was a breach of warranty, whether or not the misrepresentation was as to a material fact. The applicant was not allowed to recover under the policy.

18. Lord Shaw said ([1921] 2 AC 125 at page 129)

> 'The case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in 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.'

19. Commenting on the status and effect of a 'basis clause', the authors of **MacGillivray on Insurance Law** (1Oth edn, 2003) para 10-32 put the matter thus:

> '[It] has been held that the all-important

> element in such a declaration is the phrase which makes the declaration the "basis of the contract". These words alone show that the proposer is warranting the truth of his statements, so that in the event of a breach of this warranty, the insurer can repudiate liability on the policy irrespective of materiality.'
>
> 20. Of similar effect is the case of **Dawsons Ltd v Bonnin** [1922] 2 AC 413. Viscount Haldane, approving an earlier passage of Lord Blackburn in **Thomson v Weems** (1884) 9 App Cas 671, held that the basis clause made the truth of the statements contained in the proposal a condition precedent to the liability of the insurers quite apart from the question of materiality.
>
> 21. The law does not require that the word 'warranty' be used in the declaration. Viscount Finlay explained in **Dawsons** (supra) at 428-429 that-
>
> > 'any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty the materiality of the facts in themselves is irrelevant; by contract their existence is made a condition of the contract'.
>
> 22. Breach of warranty then entitles the insurer to terminate the contract of insurance and avoid the policy.

[63] I adopt without reservation the reasoning of his lordship set out above. In particular, I adopt his reference to **Condogianis** which he says supports the proposition 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 or did not know the truth”. Nor is it necessary, as Harrison JA stated, that the

word warranty be used in the declaration. I am of the view that the "form of words expressing the existence" of the particular state of fact as a condition of the insurance contract herein, is "enough to constitute a warranty". That warranty has been breached and the Defendant is therefore entitled to avoid the policy.

[64] In the circumstances, I give judgment for the Defendant and I award costs to the Defendant, to be taxed if not agreed.

ROY K. ANDERSON
JUDGE OF THE SUPREME COURT
JULY 27, 2001