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**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. HCV 0852 OF 2003**

<b>BETWEEN</b>	<b>ABDULHADI ELKHALILI</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>INSURANCE COMPANY OF THE WEST INDIES LTD</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>FRASER FONTAINE &amp; KONG</b>	<b>2<sup>nd</sup> DEFENDANT</b>

A. Haughton-Cardenas instructed by Haughton & Associates for the Claimant

Lowell Morgan & C. Wignall instructed by Nunes Scholefield Deleon & Company for the 1<sup>st</sup> Defendant

**Heard: July 7, 24 and September 21, 2006**

**Beswick J**

Mr. Elkhalili, the claimant, seeks an order for specific performance, inter alia, against the Insurance Company of the West Indies (ICWI), the first defendant. Mr. Elkhalili insured his 1999 Evolution VI motorcar with ICWI. It was damaged in an accident on April 7, 2003 and ICWI informed him that the car was a “write off.” He could retain the wreckage as salvage and they would pay him the balance which would be due to him in accordance with the insurance contract.

Mr. Elkhalili sold the wreckage to someone but did not recover the agreed balance from ICWI. They refused to make the payment, alleging that Mr. Elkhalili

had not disclosed material facts. Mr. Elkhilili claims to have suffered loss because of the non-payment of the balance.

Mr. Elkhilili came to Jamaica in 1982 and became licensed to drive here in 1983. Before that he used a Kuwaiti licence.

On November 1, 2002, when Mr. Elkhilili insured the motorcar with ICWI, he did so through an agent, Fraser Fontaine & Kong, the second defendant. He was required to sign a proposal form providing information which had been requested by ICWI.

It is his evidence that he had had no personal accidents in the three years prior to November 1, 2002. He therefore put a tick in the "N" box which was part of the relevant question:

"(f) Give particulars of all accidents or losses during the past three years (whether insured or not) in respect of all vehicles owned, used or driven by you:

Y N

NAME	YEAR	NO.	DETAILS (INCLUDING COST)

He believed the question referred to any accident in a car in which he had been personally involved as the driver of the car in the previous three years.

When Mr. Elkhalili reported his April 7, 2003 accident, ICWI took steps to settle the claim. On May 6, 2003, he signed their “Discharge for Total Loss” form which detailed the settlement conditions.

Relying upon the information from ICWI, he sold the salvage and paid that amount towards a new car, on condition that he would pay the remainder by means of the settlement cheque which he would be receiving. He was told the cheque in final settlement of the claim would be ready by May 12, 2003.

Meanwhile, ICWI accessed a Claims Bank, a database used by insurance companies in Jamaica, and formed the view that Mr. Elkhalili had not disclosed the true accident history of himself and of his son who sometimes drove Mr. Elkhalili’s vehicles.

In cross-examination Mr. Elkhalili testified that his son had been driving an Evolution IV motor vehicle owned by Mr. Elkhalili when it crashed and was “written off.” This was before this April 7, 2003 accident and one month before he completed the proposal form for insurance of this Evolution VI car. Further he himself had been involved in a minor accident where he made no claim. Later, a vehicle owned by his Company, not himself, was damaged while parked. ICWI stated that they would not pay the balance because of what they perceived had been his misrepresentation of these material facts at the time when the vehicle was

insured, which would allow them to regard the policy as being void. He ought to have disclosed these other accidents.

Mr. Elkhilili's evidence is that he did not read over the proposal form. He signs many applications for insurance. Normally he himself does not complete the application. He signs and the clerk assists him because he himself does not understand much English. All the ticks on this form were done by a clerk. He did not understand the pertinent question concerning other accidents in the manner in which ICWI interpreted it.

It was when Mr. Elkhilili went to collect the cheque from ICWI, that he was informed that ICWI would not pay. In a letter dated May 14, 2003, ICWI indicated that the decision was based on Mr. Elkhilili's non-disclosure of material facts.

Mr. Elkhilili seeks damages for loss he claims to have suffered by selling the salvage cheaply instead of restoring it, expecting to receive the ICWI payment.

Ms. Moreen Marks testified as Vice President of Risk Management of ICWI, that the insurance proposal form which Mr. Elkhilili was required to complete and submit was to guide ICWI in determining whether or not to accept the risk, and if so, on what terms and conditions. An applicant's accident history is very material to ICWI's decision.

Because the car to be insured was a sports car, the matter of previous accidents and losses was of great importance.

According to her, ICWI would not have accepted the risk of insuring Mr. Elkhaili's sports car if there had been previous accidents involving a similar vehicle owned by him and if the drivers of the car were not mature individuals. It was therefore his misrepresentation and non-disclosure that induced ICWI to accept the risk of insuring the vehicle. ICWI has therefore counterclaimed for a declaration that ICWI is entitled to avoid the policy.

Ms. Marks acknowledged that the portion of the proposal form relevant to this matter was not worded as a question but said that the tick in the "N" box meant he had had no accident.

Counsel for ICWI argued that Mr. Elkhaili had a duty to disclose particular accident history but that he had deliberately concealed the information in order to secure coverage at a much lower rate than was to be expected.

In support of this argument Counsel urged the fact that it was only one month after the Evolution IV was written off by his son that Mr. Elkhaili sought insurance coverage for a similar vehicle through a different insurance company and different agent from the ones concerned with the Evolution IV.

Counsel invited the Court to find that Mr. Elkhaili made a false statement on the Proposal Form knowing it to be false, or recklessly, not caring whether or not it was false.

Counsel for ICWI concluded that ICWI is entitled to avoid the policy because of nondisclosure of the material facts of his previous accidents/losses and misrepresentation by responding negatively to the request for particulars of accidents/losses.

In considering these submissions, it must be determined whether the question posed in the Proposal Form was sufficiently clear to be understood by Mr. Elkhaili and whether he did in fact understand it to be asking what has been submitted by Counsel for ICWI.

In arguing about the meaning of the question posed in the proposal form, Counsel for ICWI said that it was reasonably clear and unambiguous.

In my view, the pertinent question as posed in the Insurance Proposal Form is not sufficiently explicit. The question comes under a section entitled "The Drivers (Including the Proposer)". A chart appears under this heading and the only name listed is Abdulhadi Elkhaili. Also inserted is information as to his occupation, date of birth, years of driving and licence details.

Interestingly, the answer to question (a) which is immediately below the chart indicates that the use of the motor vehicle would not be restricted solely to the drivers named above.

Question (f), the pertinent question in this matter, cannot be considered in vacuo. The context in which it is posed is important. Questions (b) to (e), immediately preceding question (f), make it clear that they are not restricted to the person seeking insurance coverage.

Those questions ask:

“(b) To the best of your knowledge has any **intended driver** (emphasis supplied) of the motor vehicle not driven for any consecutive six (6) month period in the past five (5) years?

Y N

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(c) To the best of your knowledge will **any person who will drive** (emphasis supplied) the motor vehicle be the holder of a provisional licence?

Y N

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(d) To the best of your knowledge does **any person who will drive** (emphasis supplied) the motor vehicle suffer from a physical infirmity or from defective vision or hearing?

Y N

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(e) To the best of your knowledge in the past five (5) years has **any person who will drive** (emphasis supplied) the motor vehicle: (1) been fined, (2) had their licence endorsed/revoked, (3) been prosecuted for a motoring offence?

Y N

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NAME	DATE	OFFENCE

These questions clearly cover anyone who will drive the motor vehicle.

Question (f) refers to vehicles “**owned, used or driven by you**” Counsel for ICWI invites me to find that those words mean **owned by the insured, used by the insured or driven by the insured.**

He submits further that the details of previous accidents, required to be disclosed are not limited to vehicles driven by the insured but extend to those owned or used by him, whether or not he had been the one driving at the time of the accident.

In my view, if this were correct, the details required would be startling.

Particulars of all accidents or losses in respect of all vehicles **owned** by Mr. Elkhaili would refer to vehicles in which his name is registered on the Title. It would include accidents or losses occurring **whether or not he was driving** any or all of those.

Particulars of all accidents or losses in the respect of all vehicles **driven** by Mr. Elkhaili would include those not owned by him but which he drives. This too would include accidents or losses occurring **whether or not** he was driving.



Particulars of all accidents or losses in respect of all vehicles “**used ...by you**” is not as clear.

This must refer to a vehicle neither owned nor driven by Mr. Elkhalili, but which is used by him. Is this a taxi, a bus? This too would include accidents or losses occurring **whether or not he was driving** any or all those vehicles.

This result, may well be considered to be undesirable, or even preposterous. However, the words “owned, used or driven by you” do not allow for any different interpretation to be given to any one of them. “Owned” cannot be treated differently from “used or driven by you” unless that is clearly stated.

Counsel argues that ICWI wishes details as they concern all vehicles **owned, used or driven** by Mr. Elkhalili “during the past three years” whether or not he was driving. If that is so, why are only two lines provided for this information?

Counsel for ICWI invites me to find that Mr. Elkhalili should have given the information of accidents or losses in respect of vehicles owned by him when they were not being driven by him, but by his son and also when they were parked or when he made no claim on the Insurance Company for damage done to them.

I reject the interpretation being urged by Counsel for ICWI.

Question (f) is not an example of clear and accurate drafting. It asks for particulars without posing a question, yet puts boxes for “yes” or “no” responses. It lumps together “owned, used or driven by you” which, at best, is unclear.

It is my view that the average person would understand the question to refer to the particulars of accidents and losses had by the person applying for insurance coverage.

I accept as true Mr. Elkhilili's evidence that he understood that question to refer to any accidents and losses as they concerned his driving, not the driving of others. He is not guilty of non-disclosure.

In **Sweeney v. Kennedy** [1949] 82 L1. L. R. 294 Moore J emphasised the importance of insurance companies using unambiguous expressions. He quoted Lord Atkinson who opined in **Glicksman v. Lancashire & General Assurance Co. Ltd** [1927] AC 139 at 144:

“I think it is a lamentable thing that insurance companies will abstain from shaping the questions they put to intending insurers in clear and unambiguous language.”

If precise and accurate answers are required by ICWI from proposed insurers then it is only reasonable that the questions posed be clear, precise and unambiguous.

The next question is this, “Can ICWI unilaterally refuse to honour the agreement made with Mr. Elkhilili?”

The “Insured's Discharge for Total Loss” form which Mr. Elkhilili signed says in part:

“Received from the Insurance Company of the West Indies this 6<sup>th</sup> day of May 2003 the sum of [\$870,000.00].....in full satisfaction and discharge of all claims.....and the salvage of damaged car becomes the property of the insured.....”

There is no provision for ICWI to sign.

In my view, when ICWI gave Mr. Elkhalili this document to sign if he so chose, this constituted an offer to him to accept a specified sum and the salvage in exchange for relieving ICWI of all liability in all claims.

Mr. Elkhalili’s signature recorded his acceptance of the terms and conditions being offered by ICWI.

A contract was created and ICWI became bound by it and so too did Mr. Elkhalili.

I accept the evidence of Mr. Elkhalili that he entered into arrangements for the sale of the salvage and purchase of another car based on his expectation of funds from ICWI.

Mr. Elkhalili has acted to his detriment based on the contract. ICWI must honour the agreement.

I give judgment for the claimant, Mr. Elkhalili against ICWI, the 1<sup>st</sup> defendant. The Action against the 2<sup>nd</sup> Defendant was discontinued on December 1, 2003. The counterclaim is dismissed.

As regards damages, Counsel for Mr. Elkhalili submits that he is entitled to special damages in the amount of either:

- (1) \$1,250,000.00 representing the difference between the value of the motor car before the accident and its damaged value, or
- (2) \$870,000.00 representing the amount which had been offered by ICWI and which had been accepted by Mr. Elkhalili.

She submitted further that Mr. Elkhalili is entitled to “damages beyond interest” for failure to honour the agreement but offers no authorities concerning the appropriate quantum.

In **Davis and Burke v. Fisher** SCCA/85/2001 Smith J.A. referred to **Moore v. D.E.R Ltd** [1971] 1WLR 1476 agreeing that where the Court held that a chattel was so damaged as to be a constructive total loss, the measure of damages is the market value of the chattel at the date of the loss less the scrap value of the damaged chattel together with any consequential loss arising out of the destruction.

Here the evidence is that the value of the car at the date of the loss was One Million Six Hundred Thousand Dollars (\$1,600,000.00) and the salvage was valued at Six Hundred and Fifty Thousand Dollars (\$650,000.00)

The appropriate damages would thus be Nine Hundred and Fifty Thousand Dollars (\$950,000.00) being the difference between these amounts.

There is no evidence given or any claim made of any consequential loss arising out of the damage to the car – no fees for wrecker or assessor, no loss of use or any other loss.

The claims listed in Mr. Elkhilili's Particulars of Claim include:

- “1. Specific Performance
2. Promissory Estoppel....”

Specific Performance is inapplicable here and Promissory Estoppel is not a remedy. These have not been pursued, though they were not abandoned.

The award for damages is therefore special damages in the amount of Nine Hundred and Fifty Thousand Dollars (\$950,000.00) with interest of 3% per annum from the date of service of the writ to today.

Costs to the claimant to be agreed or taxed.