[2017] JMSC Civ.35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV00715

CIVIL DIVISION

BETWEEN	**INSURANCE COMPANY OF THE WEST INDIES LIMITED**	**CLAIMANT**
AND	**DESMOND DAVIS**	**DEFENDANT**

Insurance Law – Whether failure to disclose the use of a motor vehicle amounts to misrepresentation and/or non-disclosure of material facts – Breach of warranty of contract – Avoidance of policy of insurance by Insurer – The Motor Vehicles Insurance (Third-Party Risks) Act, section 18.

Mrs. Michelle Shand-Forbes holding for and on behalf of Ms Suzette Radlein for the Claimant.

Miss Gaunique Williams instructed by Zavia Mayne and Company for the Defendant.

IN CHAMBERS

HEARD: 07th February and 10th March, 2017.

COR: V. HARRIS, J

Introduction

[1] This claim concerns policy of insurance No.33800448 which was issued by the claimant, the Insurance Company of the West Indies (ICWI), to the defendant Mr.

Desmond Davis on August 19, 2005 in relation to his 2000 Toyota Corolla motor car registered 0657 EP.

[2] Mr. Davis renewed the contract of insurance with ICWI on an annual basis thereafter. The last renewal was done on September 01, 2012 for the period September 9, 2012 to August 31, 2013.

[3] Mr. Davis' motor vehicle was involved in an accident on May 03, 2013 (the accident). ICWI is now seeking to avoid the policy of insurance and wishes not to indemnify the Mr. Davis in respect of loss, damage, expenses or claims from third parties incurred as a result of the accident.

[4] ICWI is claiming that it is entitled to do so on because the policy of insurance was obtained by virtue of misrepresentation and/or non-disclosure of material facts; or in the alternative the policy is void for breaches of warranty of contract and/or the conditions of the policy of insurance.

[5] ICWI is saying that it is entitled to do so because of the following reasons:

(i) The insurance coverage of the said vehicle in Mr. Davis' name was granted on the strength of a motor vehicle proposal form (proposal form) that was completed and submitted by Mr. Davis on August 19, 2005;

(ii) Mr. Davis named himself as the proposer in the proposal form and provided the details that were contained in it;

(iii) Item (c) of the proposal form required that Mr. Davis provide details of the intended use of the motor vehicle;

(iv) In response to item (c) on the proposal form Mr. Davis indicated that the vehicle would be used by him solely for social, domestic and pleasure purposes and not for the transport of passengers for hire or reward. As a result a private motor vehicle insurance policy

was issued to him by ICWI. However, during the life of the policy (between 2012 and 2013) Mr. Davis transported passengers for hire or reward;

(v) Mr. Davis also signed the declaration at the end of the proposal form which expressly stated that the information contained in it was true;

(vi) The contents of the proposal form, along with the declaration, formed the basis of the contract between ICWI and Mr. Davis; and

(vii) ICWI relied on the responses Mr. Davis gave in the proposal form when it the assumed the risk, decided the premium to be charged and issued the policy of insurance to him.

The evidence

[6] ICWI relied on the evidence of three (3) witnesses, Ms Sandra Touzalin, Branch Manager of ICWI Ocho Rios, Mr. Oswald Hemmings, a private investigator and Mr. Gilbert Gooden. Mr Gooden and Mr. Davis both reside in the same district. Mr. Gooden is also related to Mr. Davis' wife. Mr. Davis did not call any witnesses on his behalf.

[7] Ms Touzalin gave evidence that one of her duties is the underwriting of motor vehicle insurance. The main goal of the underwriting process, she said, was to determine whether the risk that was to be undertaken by the insurer was acceptable and the premium that was to be paid by the insured once the risk was accepted.

[8] She pointed out that information in relation to the intended use of the motor vehicle that was to be insured was material in the underwriting process. This, she said, was relevant to the assessment of the risk that was to be undertaken. She indicated that there were also other factors that were taken into account in this process.

[9] Those factors, Ms Touzalin said, played a significant role in determining whether the risk was acceptable or not and the premium that was to be paid by the insured. (Quite naturally, the greater the risk to be undertaken the higher the premium).

[10] Ms. Touzalin averred that in order to assist the insurer to make a proper assessment of the risk, the insured was required to complete a proposal form. The insured had a duty to disclose all facts relevant to the risk because the insurer proceeded on the footing that the information stated in the proposal form was in fact truthful.

[11] This duty to disclose was a continuing one and ought to be done at every renewal of the policy or whenever it became necessary to do so. It was therefore the responsibility of the insured to advise the insurer of any changes that had occurred during the policy period, Ms Touzalin stated.

[12] Ms Touzalin went on to say that by completing and signing the proposal form, the proposer warranted that the information provided was true and that the proposal, as well as, the declaration that was located at the end of the form, would be incorporated into the contract of insurance.

[13] She articulated that on August 19, 2005 Mr. Davis signed the proposal form. In that document he stated that he was a retiree and that his motor vehicle would be used only for social, domestic and pleasure purposes including transit to and from work. He further stated that his motor vehicle would not be used for the transport of passengers for hire or reward.

[14] Ms. Touzalin indicated that she considered all the information that was given by Mr. Davis in the proposal form (including his occupation and the intended use of the vehicle), concluded that the risk was an acceptable one and issued a private motor car policy to him.

[15] I interpreted this evidence to mean that it was the information that was contained in the proposal form that induced her (the underwriter) to decide the extent of the exposure (if it was great or small) and whether the risk would be accepted or not.

[16] Mr. Davis did not indicate at any time prior to the renewal of the policy (for the 2012 to 2013 period) or at any other time during the contract period that he intended to use his vehicle for any purpose other than that which was stated in his proposal form, Ms Touzalin said. Furthermore, she said, the use of a vehicle as a taxi carried a higher risk than one that was being used for social, domestic and pleasure purposes. Additionally, had she been aware that it was Mr. Davis' intention to use his vehicle to operate a taxi service a higher premium would have been charged, providing certain requirements were met and the risk accepted.

[17] ICWI commenced an investigation into the circumstances of the accident. The other motorist involved was Mr. Samuel White. He and Mr. Davis also resided in the same community. That investigation was carried out by Mr. Hemmings between June 21, 2013 and August 2013.

[18] Mr. Hemmings gave evidence that his investigations revealed that Mr. Davis had used his vehicle to operate as a taxi during the relevant policy period. This information came from Mr. White. Mr. Hemmings recorded a statement from him and it was exhibited with his affidavit.

[19] In that statement Mr. White said that he knew that Mr. Davis operated his vehicle as a taxi because he, his wife and step-daughter had driven in it and paid fares to him. (However, when and how many times this took place were not stated).

[20] Mr. Hemmings testimony was that he also spoke with other persons who resided in Mr. Davis' neighbourhood. However, those persons neither confirmed nor denied that Mr. Davis used his vehicle as a taxi.

[21] Mr. Gilbert Gooden told the Court that he knew Mr. Davis for over fifteen (15) years. They reside in the same area. He is related to Mr. Davis' wife. His evidence was that since 2012 Mr. Davis had been using his vehicle as taxi transporting passengers from Brown's Town to Retreat District.

[22] He testified that he had travelled in Mr. Davis' motor vehicle on several occasions during 2013 to the market to sell his farm goods and he would pay $50.00 as his fare. He also said that sometimes when he was going home to Retreat he, and other persons, would travel in Mr. Davis' vehicle and they would pay fares to him.

[23] Mr. Davis denied that he operated his vehicle as a taxi at any time. He said that he often transported persons to and from his community as a favour but never for hire or reward. On the day of the accident he said that he was doing just that. The three (3) passengers who were travelling in his car were not being transported for reward. They resided in his community and he was merely assisting them to get home.

[24] He told the Court that Mr. Gooden was untruthful and motivated by malice because Mr. Gooden was hired to do a job at his house and was subsequently fired because of a report he (Mr. Davis) had made to his employer. Mr. Gooden, Mr. Davis said, threatened that he would "get him" and that he was attempting to do so by giving false evidence against him. (Mr. Gooden of course denied all of this).

[25] Additionally, Mr. Davis said, since 2002 they have not spoken and Mr. Gooden had never driven in his car. He also gave evidence that this impasse which has existed between them was as a result of Mr. Gooden telling his wife tall tales about him. (This was also denied by Mr. Gooden).

[26] He admitted that he had a good relationship with Mr. White and that he had known him for over twenty (20) years. He said that while they were not really friends they had a "community spirit relationship." (I interpreted this to mean that

they got along). However, Mr. White, his wife and step-daughter have never driven in his car because Mr. White had his own vehicle, Mr. Davis said.

[27] These were the questions that appeared at paragraph (c) of the proposal form beneath the heading "THE VEHICLE":

> *"(c) Will the motor vehicle be used solely for social, domestic and pleasure purposes including transit to and from work?"*
> (The answer to this question was yes)
> *If not, will the motor vehicle also be used for:*
> *(1)...*
> *(2)...*
> *(3)...*
> *(4)...*
> *(5) The transport of passengers for reward?*
> (Mr. Davis answered no to this question)

[28] The declaration that appeared at the end of the proposal form and just above the signature of Mr. Davis stated inter alia:

> *"I/WE HEREBY DECLARE that all the above Statements and Particulars are true and I/we further declare that if any of the 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 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 by the INSURANCE COMPANY OF THE WEST INDIES LIMITED for this class of Insurance and which I/we agree to accept."*

Issues

[29] The following issues are to be resolved by the Court:

(i) Whether Mr. Davis used his vehicle for hire or reward at any time during the life of the policy. (Issue one);

(ii) Whether the use of the vehicle was a material fact and whether the failure by Mr. Davis to disclose the use of the vehicle constitutes misrepresentation and/or non-disclosure of a material fact (Issue two);

(iii) If the answer to iii) is yes, is ICWI entitled to avoid the policy of insurance;

(iv) Whether Mr. Davis' failure to disclose the use of the vehicle amounted to a breach of warranty of contract and/or the conditions of the policy which renders the contract void. (Issue three).

Submissions

[30] Written submissions were prepared and submitted by learned counsel Ms Suzette Radlein and Miss Gaunique Williams on behalf of ICWI and Mr. Davis on March 03 and 06, 2017 respectively. I wish to thank both attorneys for their industry and assistance in this matter.

[31] Miss Radlein submitted that in order for ICWI to succeed it must establish that there was non-disclosure or misrepresentation of a material fact and as a result the insurer was induced to enter into the contract of insurance. She relied on sections 18(3) and 18(5) of **The Motor Vehicles Insurance (Third-Party Risks) Act** (the Act) as supportive of her position.

[32] She further posited that an insurance contract was one that demanded the utmost of good faith (*uberrimae fidei*) and that if this was not observed by one party the non-offending party was entitled to avoid the contract. This, Ms Radlein

said, was founded on the long settled legal principle that contracts of insurance were usually based on facts that were nearly always in the exclusive knowledge of the insured. Therefore, unless that knowledge was shared the risk that was insured may be different from that intended to be covered by the insurer. She relied on the authorities of **Carter v Boehm** [1774] 1 All ER 183 and **ICWI v Abdulhadi Elkahili** SCCA 90/2006 delivered on December 19, 2008.

[33] Ms. Radlein also advanced that the insured's duty to disclose was a continuing one and that he/she was mandated to do so at every renewal of the policy. She cited the case of **Law Insurance Society Limited v. Boyd** [1942] SC 384, as the authority for this principle.

[34] She put forward that whether Mr. Davis used his motor vehicle as a taxi during the period of the policy will turn on the view that the Court took of the credibility of ICWI's witnesses, and in particular the evidence of Mr. Hemmings and Mr. Gooden.

[35] Ms Radlein asserted that if the Court accepted that Mr. Davis operated his vehicle as a taxi then this was a material fact concerning the use of the vehicle which was not disclosed. ICWI in those circumstances, she said, was entitled to avoid the policy. The cases of **Bonham v Zurick General Accident & Liability Insurance Company Limited** [1945] K.B. 292 and **Pan Atlantic Insurance Ltd & Another v Pine Top Ltd** [1995] 1 AC 501 were relied on.

[36] She also submitted that in light of the answers that were given to item (c) in the proposal form the misrepresentation and/or non-disclosure also amounted to a breach of Mr. Marshall's warranty as to the truth of his statements. This rendered the policy of insurance void. She cited in support of her submissions the cases of **Elkahili** (supra) and **Dawsons Ltd v Bonnin** [1922] 2 AC 413.

[37] Learned counsel Miss Gaunique Williams submitted on behalf of Mr. Davis that to prove that a motor vehicle was used for hire or reward, the Court must be satisfied, on the evidence, that there existed some agreement, whether expressly

or by implication, between the driver and his passenger(s) to transport them for remuneration.

[38] She put forward that the term "hire or reward" was premised on the frequency with which the passenger(s) were transported for hire or reward in order for this to be deemed the normal or habitual use of the vehicle. ICWI, she went on to say, must establish that Mr. Davis' vehicle was used regularly and frequently for this purpose in order for the Court to find that this was the normal function or use of the vehicle. She cited **Albert v Motor Insurer's Bureau** [1970] R.T.R. 315 and **Administrator General v National Employers Mutual Association** 1988 25 JLR 459 in support of her submissions.

[39] She advanced that ICWI had failed to do so in the case at bar. She also submitted that there was therefore no misrepresentation or non-disclosure by Mr. Davis of any material fact which would entitle ICWI to avoid the contract of insurance. She also contended that he had neither breached the warranty of the contract nor any conditions of the policy.

Issue One

Did Mr. Davis use his vehicle for hire or reward at any time during the life of the policy?

The Law

[40] In **Albert v Motor Insurer's Bureau** (supra) Lord Donovan said:

> *"... A vehicle for hire or reward is one in which passengers are normally or habitually carried for hire or reward...passengers being carried for hire or reward did not refer to the fleeting use of the vehicle to carry passengers some isolated occasion even though it may have been arranged at the outset that he shall contribute something towards his expense, but on the contrary some settled plan*

> *to carry passengers for reward which has been put into operation with a regularity and frequency (both actual and intended) which justifies the conclusion that this is one of the vehicle's normal functions."*

[41] In light of this authority I am of the view that ICWI would need to establish that Mr. Davis regularly and frequently used his vehicle for hire or reward, to the extent that this amounted to the vehicle's normal function.

[42] The terms "normally" and "habitually" do not mean a "one-off non-compliance" with the terms of the insurance policy. A motor vehicle that was used once for hire or reward would not satisfy the requirement that this was the vehicle's normal function and would therefore fail to meet the threshold of what was considered to be normal or habitual. (See the judgment of Forte JA in **Administrator General v NEM** (supra)).

Analysis and Disposal

[43] I agree with learned counsel Ms Radlein and Miss Williams that the resolution of this issue will depend on the view I take of the credibility of ICWI's witnesses and in particular the evidence that was given by Mr. Hemmings and Mr. Gooden.

[44] I wish at the outset to say that I have considered what Mr. Davis said about Mr. Gooden's evidence and why he said I should reject it. I have also considered the inconsistency that arose when Mr. Gooden was cross-examined.

[45] In examination in chief he said that he travelled in Mr. Davis' car to the market to sell farm goods on several occasions in 2013. However, in cross-examination he stated that he did so to buy farm goods. In the end, I accepted the explanation he gave in re-examination that before his farm went down he travelled to the market in Mr. Davis' car to sell his farm goods. However, after this took place, he went to the market to purchase farm goods.

[46] I have found that this inconsistency was not material and did not affect in any way the view I took of his credibility.

[47] Mr. Gooden's evidence, I find, is compelling. He struck me as (and I mean no disrespect) a simple countryman (as we would say in Jamaica) forthright in his demeanour and not given to deception and lies. He was not damaged by cross-examination. Rather he remained steadfast that he bore no malice against Mr. Davis. He said that it was not true that they had not spoken since 2002 and that as a result he had never travelled in his vehicle. He maintained that he had done so on several occasion in 2012 and 2013 on several occasions and whenever he did, he paid Mr. Davis for the trips.

[48] I also found that Mr. Hemmings was a truthful witness. I accept that he collected a statement from Mr. White and that Mr. White in that statement indicated that he knew that Mr. Davis operated his vehicle as a taxi.

[49] I wish to make the observation that what Mr. White had to say was not tested by cross-examination and the Court took this into account.

[50] However, it was Mr. Davis' evidence that he shared a good relationship with Mr. White. They both, like Mr. Gooden, resided in the same community. Mr. White was also the other motorist involved in the accident. The information he gave to Mr. Hemmings about the alleged unauthorised user of Mr. Davis' vehicle could very well impact in a negative manner any claim he may seek to make on Mr. Davis' insurers. What would he stand to gain, therefore, from concocting such a story?

[51] I find, on a balance of the probabilities, that Mr. Davis regularly and frequently in the years 2012 and 2013 used his vehicle for hire and reward, to the extent that this amounted to the vehicle's normal function. I have accepted that Mr. Davis used his vehicle, on occasions prior to the accident during the relevant contract period, for a purpose that was not permitted or allowed by the policy. The

outcome of this decision is that Mr. Davis shall be denied the protection and benefits of the insurance policy.

[52] As Forte JA said in **Administrator General v NEM** (supra), which I have found to be instructive and have applied to the case at bar:

> *"If the use to which the vehicle is put is contrary to the contract of insurance between the insured and insurer, then it is my view that its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user. Any liability arising out of such user, would therefore not be covered by the terms of the policy."*

Issue Two

Was the use of the vehicle a material fact and did the failure by Mr. Davis to disclose the use of the vehicle constitute misrepresentation and/or non-disclosure of a material fact?

The Law

[53] Section 18 (3) of the Act provides inter alia that no sums shall be payable by an insurer who obtains a declaration that it is entitled to avoid a policy of insurance "...on the ground that it was obtained by the non-disclosure of a material fact or by representation of fact which was false in some material particular..."

[54] Section 18 (5) of the Act defines the term "material fact". A material fact is any matter which is "of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk and if so at what premium and on what conditions..."

[55] It has long been settled that a contract of insurance demanded the utmost good faith (*uberrimae fidei*) because such a contract was based on facts which were usually in the exclusive knowledge of the insured. Full disclosure of material facts

was therefore essential because those material facts would influence the insurer whether or not to accept the risk and determine the premium to be paid.

[56] The genesis of this principle came from the dictum of Lord Mansfield in **Carter v Boehm** (supra) which was cited with approval and applied by the Court of Appeal in **Elkhalili** (supra).

[57] In the latter case Harrison JA at paragraph 12 of the judgment puts it this way:

> *"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 uberrimae fidei 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 to not misrepresent facts."* (My emphasis)

[58] In **Pan Atlantic** (supra) it was held that an insurer proved that a policy was obtained by misrepresentation and/or non-disclosure of material facts where it showed that there was a misrepresentation or non-disclosure on the part of the insured; in the case of non-disclosure, the fact was known by the insured; the fact which was misrepresented or not disclosed was a material one and the insurer was induced by the misrepresentation or non-disclosure to accept the risk in question.

[59] Harrison JA Harrison JA in **Elkhalili** at paragraph 14 said it succinctly in this manner:

> *"... a circumstance is material if it would have had an effect on the mind of the prudent insurer in weighing up the risk...*

> *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."*

[60] This duty to disclose continues every time the policy of insurance is renewed. In **Law Insurance Society v Boyd** (supra) it was held that the contract in the policy of insurance was a contract for one year only, renewable from year to year under an obligation upon the insured to disclose prior to each renewal any material change in circumstances adverse to the interest of the insurer.

[61] Clark LJ in that case had this to say:

> *"...on every renewal there at once arises an obligation on the insured to make such disclosure as may be necessary and proper and to correct any statement in his original proposal form which may no longer be accurate and which maybe material to the risk which he seeks to cover during the year still to come."*

Analysis and disposal

[62] I find that the use of the vehicle was a material fact and that Mr. Davis failed to disclose the fact that he was using the vehicle that had been insured under a private motor vehicle policy for hire or reward. I say so because:

(i) Mr. Davis, when he completed the proposal form, indicated that he intended to use the vehicle for social, domestic and pleasure purposes and a private motor vehicle policy was issued to him. This continued each time the policy was renewed by Mr. Davis. In other words, every time the policy was renewed, ICWI did so on the basis of the information that was contained in the original proposal form;

(ii) However, Mr. Davis used his vehicle to transport passengers for hire or reward and he failed to disclose that fact to ICWI;

(iii) The fact that he failed to disclose was known to him;

(iv) The fact was material because it would have affected a prudent insurer's decision whether or not it would accept the risk of insuring him and it did in fact induce ICWI to accept that risk;

(v) He also had a continuing duty to disclose to ICWI, every time he renewed the policy, any changes in the use of the vehicle as this could well be a "change in circumstances that could be adverse" to ICWI and to "correct any statement in his original proposal form which may no longer be accurate";

[63] Ms. Touzalin's evidence, which I accept, was that vehicles operating for reward or hire carried greater risks and premiums than vehicles that were used for social, domestic and pleasure purposes.

[64] She also said, which I accept as well, that if she had been aware that Mr. Davis intended to use his vehicle for hire or reward, this would have meant the risk would have been much higher than that proposed, and if accepted would have attracted a higher premium than that which was paid by him.

[65] It was also her unchallenged evidence that when she reviewed the proposal form which was submitted by Mr. Davis that he was a retiree and that he intended to use the vehicle for social, domestic and pleasure purposes, this induced her to accept the risk of insuring him and a private motor vehicle policy was issued to him.

[66] ICWI, in my opinion, on this ground alone, would be entitled to avoid the policy of insurance. However, in the interest of justice, I have gone on to consider whether there was a breach of warranty and/or a breach of the condition of the policy.

Issue Three

Did the failure by Mr. Davis to disclose the use of the vehicle amount to a breach of warranty of contract and *l*or a breach of the conditions of the policy which renders the policy of insurance void?

The Law

[67] In **Elkhalili** Harrison JA at paragraph 15 of the judgment stated:

> *"...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 was required to sign and did sign the declaration...The critical element in the declaration is the phase which state 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 of 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."*

[68] The authorities also established that where a proposal form contained a declaration of this kind, the insurer was entitled to terminate the contract of insurance and avoid the policy, if any of the statements in the form were not true. If this was the case, it then became unnecessary to determine whether the

inaccurately stated fact was material or not, or whether the proposer knew or did not know the truth. (See **Condogianis v Guardian Assurance Co** [1921] 2 AC 125, a decision of the Judicial Committee of the Privy Council which was applied in **Elkhalili**).

[69] Lord Shaw in **Condogianis** (supra) at page 129 of the judgment said:

> *"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."*

Analysis and disposal

[70] In this case Mr. Davis signed and submitted a proposal form. The significant component in the declaration was the phase which stated, "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..." Those words converted the answers and statements made in the proposal form into conditions of the policy.

[71] Based on the evidence I have accepted, when Mr. Davis renewed his policy in 2012, the answers given by him to the questions asked in item (c) were no longer true. The intended use of the vehicle, I have found, was not solely for social, domestic and pleasure purposes. Mr. Davis intended, and did use the vehicle for hire or reward in 2012 and 2013. By signing the declaration he was indicating to ICWI that the statements in the proposal form were true and he warranted that the answers he gave were also true.

[72] Mr. Davis had a duty to inform ICWI that the vehicle was transporting passengers for reward when he renewed the policy; or at any time during the relevant period of the contract of insurance. Utmost good faith demanded this. He had an obligation to correct any statement in his original proposal form that was no longer accurate and which was material to the risk that was to be covered. I find that he failed to do so.

[73] The declaration formed "the basis of and was incorporated in the policy". This made the truth of those statements a condition precedent to ICWI's liability. By making the false representation Mr. Davis was in breach of the express condition of the insurance policy.

[74] Therefore, in the circumstances, it was not necessary to determine whether the fact that was inaccurately stated was material or not. Neither was it relevant if this was done inadvertently or not. It was immaterial whether Mr. Davis knew or did not know the truth (although in this case I find that he did).

[75] It is therefore my view that ICWI is also entitled to avoid the policy of insurance for breach of the warranty.

Orders

1. Judgment for the Claimant.

2. It is hereby declared that the Claimant is entitled to avoid Policy of Insurance No. 33800448 on the ground of non-disclosure of a material fact.

3. It is hereby declared that the Policy of Insurance No. 33800448 is void for breach of warranty of contract by the Defendant.

4. Costs to the Claimant to be taxed if not agreed.