IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO 2006 HCV 01883

BETWEEN	HILLARY SMITH-THOMAS	CLAIMANT
AND	INSURANCE COMPANY OF THE WEST INDIES	DEFENDANT

Ms. Latoya Stephenson for Claimant

Miss Camille Wignall instructed by Nunes Scholefield DeLeon & Co. for Defendant

Insurance Law – Motor vehicle insurance policy – Whether Non-Disclosure or Misrepresentation on Proposal Form – Whether insurer induced by breach to accept the risk - Whether insurer entitled to repudiate policy – Whether renewal affected insurer's right to repudiate

Heard: 21st, 27th October and 24th November, 2008

BROOKS, J.

On 18th August 2005 Mrs. Hillary Smith-Dyer, then Mrs. Smith-Thomas, accidentally crashed her Toyota 4 Runner motor car into a utility pole. The vehicle was extensively damaged. She claimed indemnity for her loss on her motor insurance policy but her insurer, the Insurance Company of the West Indies (ICWI), has refused the indemnity. ICWI claims that Mrs. Smith-Dyer breached the requirement of utmost good faith by failing to fully and truthfully answer a question on the proposal form for the insurance policy. This form was completed on July 12 2004. Her breach, ICWI says, lies in the fact that Mrs. Smith-Dyer concealed from it the fact that two

vehicles owned by her were involved in separate collisions a few months before the proposal form was completed. The concealment, ICWI says, was of a material fact which, if the information had been revealed, would have affected its decision to accept the risk of insuring her vehicle on the terms that it did, or at all.

Mrs. Smith-Dyer accepts that the two collisions were not set out on the proposal form but denies any concealment on her part. She contends that she did tell ICWI's representative about one of the collisions (where her sister was the driver) but that the representative failed to include it on the form. In respect of the second collision, Mrs. Smith-Dyer states that she did not know about that collision; she was not aware that her vehicle, which was being driven by her brother at the time, had been damaged and she did not know that an accident report had been made to her insurer for that vehicle; British Caribbean Insurance Company Ltd. (BCIC). She insists that ICWI is wrong to refuse her indemnity and asks this court to order it to pay the cost of repairing her Toyota 4 Runner.

In deciding whether ICWI is entitled to avoid the policy, the questions to be answered by the court are:

1. Was there a misrepresentation or non-disclosure on Mrs. Smith-Dyer's part?

2. Was it a material misrepresentation or non-disclosure, that is, one which could have affected ICWI's decision to accept the proposal on the terms that it did?

3. Did the misrepresentation or non-disclosure actually induce ICWI to accept the risk?

4. Should ICWI have done an investigation of Mrs. Smith-Dyer's claim record on the common insurance claims website before it accepted her claim?

The Law

It is one of the foundation principles of insurance law that the parties to a contract of insurance owe to each other a duty of utmost good faith. On the part of the assured (Mrs. Smith-Dyer in this case), that duty requires full disclosure of every material fact which may affect the insurer's decision to accept the risk involved in entering into the contract. It has long been a principle that an insurer is entitled to avoid liability under the policy if the assured has breached the duty of full disclosure. In *Jester-Barnes v Licenses and General Insurance Co. Ltd.* (1934) 49 Ll. L. Rep 231 at pages 234-5 MacKinnon, J. stated:

> "...and in regard to that contract, being one of insurance, it is obvious that the ordinary implied term of any contract of insurance would be part of it, namely, that if the assured had made any misrepresentation of fact, **even innocent**, or had failed to disclose any material fact, the insurance company should have a right to be relieved of any liability under the policy." (Emphasis supplied)

The phrase highlighted above indicates that even an inadvertent misrepresentation on the part of the proposer will not excuse a breach of the duty to disclose.

While innocence is not a defence to misrepresentation it does excuse non-disclosure, although the line between the two is sometimes blurred. The authorities recognize that non-disclosure can arise for any number of reasons. The case of *Joel v Law Union and Crown Insurance Co.* [1908] 2 K.B. 863 is often cited as authority for the principle that a proposer can only disclose what he knows. The case is also cited for the proposition that the burden of proving non-disclosure or misrepresentation is on the insurer.

In *Joel v Law Union* Ms. Robina Morrison effected insurance on her own life, in pursuance of a proposal in which she answered, in the negative, the question whether she had ever suffered from mental illness. She, however, was not aware that she had been previously treated for acute *mania*. She committed suicide and the insurer sought to avoid the policy on the basis of misstatement and non-disclosure.

In the Court of Appeal, Fletcher Moulton, L.J. outlined the nature and the rationale of the duty to disclose. At page 883 he quoted from the judgment of Lord Blackburn in *Brownlie v Campbell* 5 App. Cas. 925 at p. 954:

> "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides (sic)* that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy."

Fletcher Moulton, L.J. at page 884, stated however:

> "But in my opinion there is a point here which often is not sufficiently kept in mind. **The duty is a duty to disclose, and you cannot disclose what you do not know**. The obligation to disclose, therefore, necessarily depends on the knowledge you possess....Your opinion of the materiality of that knowledge is of no moment." (Emphasis supplied)

It is also necessary to cite the principle that "[w]here the assured has signed a proposal or warranted the accuracy of a declaration the onus of proof is on him to establish that, despite formal appearances, he did not in fact give the answers written down and attributed to him". (See *MacGillivray on Insurance Law* 10th Ed. paragraph 18-49.)

Whereas the older cases on the point emphasised only the duty on the insurer to prove the non-disclosure or misrepresentation of a material factor, in 1994 the House of Lords added to the requirement by stating that the insurer also had to prove that the non-disclosure or misrepresentation actually induced it to accept the risk on the terms that it did. This was in the case of *Pan Atlantic Insurance Ltd. and another v Pine Top Ltd.* [1995] 1 A.C. 501. The principle has since been accepted as valid but there has been some divergence as to the level of evidence which would satisfy that duty.

In the *Pan Atlantic* case Lord Mustill and Lord Lloyd of Berwick disagreed as to whether a material non-disclosure or misrepresentation gave rise to a presumption of inducement. In the later case of *St. Paul Fire and Marine Insurance Co. (UK) Ltd. v McConnell Cowell Constructors Ltd. and others* [1995] 2 Ll. L. R. 116, the Court of Appeal held that there was a presumption in favour of the innocent party and that that party need only prove that the non-disclosure or misrepresentation was **an** inducement to take the risk, and not necessarily that it was **the** inducement so to do. The court also accepted the principle that inducement cannot normally be inferred from proved materiality and approved as a correct statement of the law the following excerpt from Vol. 31 of *Halsbury's Laws of England* 4th Ed. at paragraph 1067:

> "Inducement cannot be inferred from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a *prima facie* one and may be rebutted by contrary evidence."

At paragraph 4.62 of *Insurance Disputes* 2nd Ed., the learned editors report that Longmore, J. in the case of *Mark Rich & Co. AG v Portman* [1996] 1 Lloyd's Rep. 430, ruled that the presumption of inducement did not apply unless the underwriter could not "for good reason", be called to give evidence (pg. 442 col. 1). The finding was not addressed on appeal. In *St. Paul* the Court of Appeal did uphold the presumption despite the absence of

an underwriter, though it could fairly be said that there were three underwriters from other companies who would have assisted the court in determining that the absent underwriter was actually induced.

I shall now examine the questions which I have previously posed.

Was there a misrepresentation or non-disclosure on Mrs. Smith-Dyer's part?

The Proposal Form

There were very few disputes as to fact. Those that there were, surrounded the preparation and completion of the Proposal Form. The relevant question on that form was question (f). It stated:

> "Give particulars of all accidents or losses during the past three years (whether insured or not) in respect of all vehicles
> (1) owned by you, whether or not you were the driver
> (2) used or driven by you, whether or not you were the owner
> (3) used or driven by any other person who will regularly drive the motor vehicle.

The questions do not have the level of ambiguity which Beswick J. found in the proposal form in *Elkhalili v ICWI & anor* 2003 HCV 0852 (del. 21/9/06)

The issue as to whether there was misrepresentation or non-disclosure must be addressed in two parts:

1. Did Mrs. Smith-Dyer know about the damage to the vehicle when it was being driven by her brother;
2. Did Mrs. Smith-Dyer tell ICWI's representative about the collision involving her sister as the driver;

I shall examine the circumstances of each of the subject accidents individually. These incidents occurred on May 14, and April 29, 2004, respectively. I have reversed the chronological order for convenience and begin with the collision of May 14.

The May 14 collision

Mrs. Smith-Dyer says that she did not know of this collision. The report made to her, then, insurer BCIC was contained in an Accident Report Form. Mrs. Smith-Dyer said in her witness statement that the signature on the form, as being that of the assured, is not hers. No suggestion to the contrary was made to her and indeed, the signature purporting to be the insured's on that form, bears no resemblance to that contained in the subject Proposal Form or Mrs. Smith-Dyer's witness statement herein.

Mrs. Smith-Dyer testified that the vehicle in question, a Toyota Corolla, was mostly kept at her home. She said it was usually driven by her then boyfriend, and occasionally by her brother. It would be reasonable then to presume that if the damage to her vehicle was anything but slight, that she would have seen it and demanded an explanation.

The Claim Form in respect of the collision suggests that the damage was significant, not only because of what is reported there as the damage, but from the manner in which the collision occurred. I do not think,

however, that the contents of the Claim Form are admissible for the truth of its contents. Mrs. Smith-Dyer is not the maker and ICWI has not proved the nature of the damage was such that she must have been made aware of it. Mrs. Roye, the representative from BCIC, who was called to give evidence for ICWI, was unable to fill the gap, because BCIC did not have anything to do with the assessing or repair of the damage to Mrs. Smith-Dyer's Corolla. The vehicle had only Third-Party cover and BCIC paid the third party involved. Mrs. Roye sought to testify that Mrs. Smith-Dyer contacted BCIC concerning that collision but I reject that evidence. The contact, according to Mrs. Roye, was by telephone and Mrs. Roye did not say that she was the person with whom Mrs. Smith-Dyer spoke.

In the circumstances I find that ICWI has not proved that Mrs. Smith-Dyer was aware of that collision with the Corolla. Applying the principle in *Joel v Law Union* I obviously cannot find that she should have disclosed it.

The April 29 collision

Mrs. Smith-Dyer witnessed the collision on April 29, 2004 involving her sister's driving. The vehicle involved was a Subaru Justy. It too was insured with BCIC. In attempting to assess whether this collision was disclosed to ICWI, an examination of the Proposal Form and the manner in which it is said to have been completed, is necessary.

On the testimony of Mrs. Gretchen Garriques, on behalf of ICWI, the Proposal Form would have been completed on a computer by ICWI's representative, based on Mrs. Smith-Dyer's answers to the questions on the form. The form would then have been printed and reviewed and, if necessary, adjustments would have been made. Mrs. Smith-Dyer's initials would then have been placed where changes were made to the form.

Mrs. Smith-Dyer confirms that that was the procedure used but she says that the answer to question (f) quoted above, did not have any adjustment or change to it when she signed the form. She said, in her witness statement, that she saw only one accident mentioned on the form when it was printed and that she commented on the omission to the representative. She testified that the ICWI representative, (since identified as a Mrs. Harper) said "that all the information was on the computer and that only the current one would be printed". (Paragraph 6 of her witness statement) She testified that the form was in that condition with regard to that question when she had signed the form and left ICWI's offices. Curiously, ICWI did not produce Mrs. Harper as a witness. I shall address the failure during the course of this opinion.

The Proposal Form tells a different story to Mrs. Smith-Dyer's. True enough, it has one collision report printed thereon in answer to question (f)

but immediately below that item there are three other reports completed in Mrs. Harper's handwriting (identified by Mrs. Garriques). In addition, the word "pending" is written in the vicinity of the printed recorded accident as a description of the status of that item. It is critical to observe that Mrs. Smith-Dyer's signature appears above these items, but clearly in reference to question (f) for which they formed the answer. All the other places at which Mrs. Smith-Dyer's signature appears on that form, except for the penultimate (the acknowledgement of the premium payable) and the last (in relation to the declaration of truth), are places in relation to an adjustment, in some way, to the form. The probabilities therefore are that Mrs. Smith-Dyer signed the place at question (f) to indicate her confirmation of the adjustment made to the answer thereto.

There is one other factor which negatively affects Mrs. Smith-Dyer's credibility. It is that when she was first made aware that ICWI was refusing to honour the claim on the basis of non-disclosure, Mrs. Smith-Dyer wrote a letter to ICWI which took a different stance from the one taken before this court. She said, in part, in that letter:

> "I wish to state that any information that was inadvertently left off the application was not done to mislead the insurance company."

My interpretation of that statement is that Mrs. Smith-Dyer was accepting responsibility for the absence of information about the vehicles

insured with BCIC. She was also asserting that the omission was not deliberate but rather was through inadvertence. There is no hint of blame being cast on Mrs. Harper.

I therefore reject Mrs. Smith-Dyer's testimony that the insertions in answer to question (f) were not made in her presence. I further find that she failed to inform Mrs. Harper of the collision involving her sister's driving. The failure amounts to non-disclosure and/or misrepresentation. On the principle that what was required of Mrs. Smith-Dyer was honesty, I am more inclined to find misrepresentation on her part. ICWI has discharged its burden of proof on this issue.

ICWI's failure to call its representative

It may be thought strange that I should make these findings when ICWI has failed to produce Mrs. Harper as a witness, in order to contradict Mrs. Smith-Dyer. Mrs. Garriques testified that Mrs. Harper still works with ICWI. No explanation was given in evidence for Mrs. Harper's failure to give evidence. Miss Wignall, for ICWI submitted that Mrs. Harper's absence was due to the fact that Mrs. Smith-Dyer's accusations were not pleaded in her statements of case. According to Miss Wignall, it was only when Mrs. Smith-Dyer's witness statement was served that it was observed that she was accusing Mrs. Harper of making the omission. Miss Wignall

may be accurate on her recounting of those facts but, in my view, they do not excuse ICWI from facing the issue frontally, by calling Mrs. Harper. ICWI was aware of Mrs. Smith-Dyer's position on the matter of the Proposal Form even before it had filed its own witness statements. The relevant steps could therefore have been taken to address the matter.

In the case of *Palace Amusement Co. (1921) Ltd. v C.D. Alexander Co. Realty Ltd.* SCCA 34/2003 (delivered 29/7/05), the Court of Appeal addressed the principle, of a court, in such circumstances, taking a view adverse to the party who has, without explanation, failed to adduce material evidence which was available to that party. At page 16 of the unreported judgment, Panton, J.A. (as he then was) made it clear that the failure is not necessarily conclusive of the issue to be resolved. His Lordship at page 17 said, "[t]he case has to be tried on the basis of the evidence presented, not on evidence not presented". I find that Mrs. Smith-Dyer's signature, at the particular location on the Proposal Form, outweighs the negative effect of Mrs. Harper's inadequately explained absence.

Was the non-disclosure or misrepresentation material?

Having found that Mrs. Smith-Dyer failed to report the April 29 collision, it is necessary to determine whether the information which was not disclosed, was material. Miss Stephenson appearing for Mrs. Smith-Dyer

submitted that the information was not material because ICWI would have accepted the proposal at the same premium, even if the information had been disclosed. She based her submission on the fact that BCIC had denied liability in respect of the collision. The collision was therefore without fault on Mrs. Smith-Dyer's sister's part.

Section 18 (5) of The Motor Vehicles Insurance (Third Party Risks) Act defines information as material when it is of such a nature as to influence the judgment of a prudent insurer in determining whether he should accept the risk and if so, at what premium. It would seem to me, on that definition, that the accident record of the persons likely to drive the assured's vehicle must be material information. This was clearly the finding in the case of *Dunn v Ocean Accident & Guarantee Corporation Ltd.* (1933) 47 Ll. L. R. 129. Lord Hanworth, M.R. at page 131 stated the position quite forcibly:

> "Any person, any business person, with sufficient knowledge and common sense must know that there is a greater risk in insuring a person who is likely to have an accident because of the way he drives a car."

That case involved the non-disclosure of a motoring conviction, but in my view the principle equally applies to motor vehicle accidents. Both involve the risk of the insurer being called upon to make a payment to compensate for someone's loss as a result of the vehicle being operated.

Did the non-disclosure or misrepresentation actually induce ICWI to accept the risk?

Miss Stephenson cited *Pan Atlantic v Pine Top Ltd. (supra)*, in support of the principle that before the insurer could avoid the policy on the basis of non-disclosure of a material circumstance he had to show that he had "actually been induced by the non-disclosure to enter into the policy on the relevant terms". The evidence of Mrs. Garriques, at paragraph 23 of her witness statement, is that ICWI was induced by the non-disclosure to accept the risk of insuring Mrs. Smith-Dyer's vehicle. Mrs. Garriques said:

> "Had we known that the Claimant's accident history was so extensive and that included accidents in which her driver was at fault, as in the case of the accident of May 14, 2004 where he disobeyed the traffic lights, ICWI would not have accepted the risk of insuring the vehicle."

I have already indicated that the May 14 collision was not a relevant factor. In any event, Mrs. Garriques admitted in cross-examination that it was "an employee from the underwriting department [of ICWI], who would have decided whether or not this risk was accepted". No such employee was called by ICWI to testify. Mrs. Garriques' statement in examination in chief is therefore hearsay and not admissible in proof of the issue.

In applying the principle stated in the excerpt from *Halsbury's Laws of England* which was cited above in the section explaining the applicable law, I find that the non-disclosure, being an obviously material one, would raise a presumption in ICWI's favour that it was in fact induced to accept the

proposal on the terms that it did. There would then be an evidential burden placed on Mrs. Smith-Dyer to show the contrary.

In *Drake Insurance plc v Provident Insurance plc* [2004] 2 WLR 530 Rix, L.J. accepted at paragraph 64 that in certain circumstances there would be a shift of the evidential burden. He said:

> "If the case had simply been about an undisclosed conviction which in itself would have caused an increase in the premium, then the evidential burden might have shifted with or without the help of the presumption in *Redgrave v Hurd* (1881) 20 Ch. D 1."

I respectfully accept the correctness of that statement.

Ms. Stephenson relied heavily on *Drake v Provident* in support of her submission that ICWI had not discharged the duty to show that it had been induced by the non-disclosure. The *Drake* case is, however, distinguishable from the instant case, on the facts. This is because of the detailed information which was made available to the court in *Drake*, as to the manner in which that insurer calculated its risks and the relevant premium. No such information was led in this case.

So, the question is whether the presumption raised is enough. Or, put another way, in raising the issue of BCIC denying liability on her behalf relating to her sister's collision, has Mrs. Smith-Dyer discharged the evidential burden placed on her? I would hold, although with some amount of diffidence, that she has not. The evidence is too speculative to be so

influential. I would have been much more confident in taking this position if ICWI's underwriter had given evidence concerning his or her decision on this proposal. That was, however, not to be and no explanation was given for the failure. Despite the reasoning of Longmore, J. in *Mark Rich v Portman (supra)* concerning the calling of the underwriter as a witness, I find that there is sufficient basis to apply the presumption. I have placed much emphasis on the fact that Mrs. Smith-Dyer breached a fundamental principle of insurance by her non-disclosure and misrepresentation and ought not to be allowed to escape the consequences of that breach by merely "throwing up" speculation as to the insurer's inducement.

I draw support from the decision in the case of *Parsons v Bignold* (1846) 15 L.J. Ch. 379. In that case the proposer applied to the agent of the insurer to effect insurance on the life of the proposer's son. He filled in some of the information on the printed form of application but not others. The agent enquired about the missing information and filled it in after the proposer had left the office. A portion was, however, incorrect. The insurance was effected but upon the death of the son, the insurer refused to pay the sum insured, on the basis that the proposer had made a false statement. The court was asked to rectify the information on the form. It declined to do so. Lord Lyndhurst, L.C. stated at page 382:

> "It was said, the Court will not presume that the plaintiff would make a false statement, the effect of which would be to invalidate the policy. But when the Court is called upon to reform a declaration of this nature, it would not be justified in doing so merely on loose presumption that the plaintiff could not have misrepresented the nature of the interest on which the policy was to be effected. **Nothing short of the most clear and distinct evidence would be sufficient for this purpose.**" (Emphasis supplied)

I would extend the requirement to the displacement of the presumption.

Did a Renewal affect the Duty to Disclose

I now turn to an ancillary issue. The initial policy was for the period July 12, 2004 to July 11, 2005. It was renewed on August 16, 2005 to run for a further period which included the date of the damage to the 4 Runner. Does the renewal affect the issues to be resolved? The principle seems to be that if the information was material and should have been initially disclosed, then, if it remains material, the duty to disclose that information remains at the time of any renewal of the policy.

Some guidance may be found in the opinion of the learned authors of *Good Faith and Insurance Contracts* 2nd Ed. 2004. At paragraph 3.59, in speaking about renewals, the learned authors state:

> "...if it is reasonable for an insurer to assume that a representation as to the risk which was made originally still holds true, then the duty will require the assured to rectify that representation when renewing. **Similarly, if a material fact was withheld at the time of the original contract, it should be disclosed at the time of renewal if it remains material.**" (Emphasis supplied)

The learned authors of *MacGillivray (supra)* are of the same opinion. At paragraph 17-24 they state, in part:

> "When renewal is dependent on the insurer's consent, the full duty of disclosure attaches. The assured must disclose not only circumstances which have occurred during the expiring period of cover, but **also any matters which he omitted to disclose when the old insurance was concluded** and are still relevant to the new one, assuming them to be material and unknown to the insurer." (Emphasis supplied.)

Rix, L.J. has expressed a view contrary to that stated above. He said at paragraph 68 of his judgment in *Drake v Provident*:

> "In the absence of authority to the contrary, and none has been cited, I would not regard a renewal as incorporating automatically and implicitly all questions asked in the proposal form, nor a request for updates on all answers given in the proposal form."

The cases cited by the learned authors of *MacGillivray,* do not specifically address the point. However, in *In re Wilson and Scottish Insurance Corporation, Ltd.* [1920] 2 Ch. 28, the question was whether the valuation given for a motor vehicle in the proposal, for the first issue of the insurance policy, continued to be applicable after three renewals of the policy, despite the fact that the market value of the vehicle had appreciated. Though he did not decide the question, Ashbury, J. at page 31, stated:

> "...I cannot help thinking that on renewing the policy...the insured must be deemed to have continued or repeated his [statement in the original policy]"

In the absence of any authority cited by Rix, L.J., I would respectfully prefer the reasoning of the learned authors of the texts. It seems to me that the principle of full disclosure is so fundamental that no insurer should remain bound by a contract made in breach of that principle, simply because

there has been a renewal of the contract. This is so even if the renewal was made automatically without further questions being asked of the assured.

In the instant case no evidence was led concerning the procedure involved in renewal of the policy, or as to whether Mrs. Smith-Dyer was given an opportunity to review her original statements. I find that her original non-disclosure or misrepresentation, concerning the April 29 collision, remained relevant to the contract.

The Claims Bank Website

There is one final point to be discussed. Ms. Stephenson cross-examined Mrs. Garriques about ICWI having the benefit of a Claims Bank website to provide it with the information which had not been disclosed. In her witness statement, Mrs. Garriques had stated that the website, "serves as a source of claims data for the insurance industry in Jamaica" and that "all general insurance companies share their claims experiences on this website". The thrust of the cross-examination was to enquire whether ICWI did make checks on the website before accepting Mrs. Smith-Dyer's proposal. Mrs. Garriques stated, in answer, that she did not know whether that had been done. The question was impliedly raised as to whether ICWI had a duty to have made use of such a source of information which was available to it.

In fairness to Ms. Stephenson, she made no submissions on the point, and perhaps rightly so, because no effort was made to show that the information was in fact available on the website at the time of the proposal being made. Two principles are relevant on this point. Firstly, insurers are credited with knowledge of matters of public knowledge or notoriety as well as matters which, in the ordinary course of their business, ought to know. (Section 23 (3) of the Marine Insurance Act. It is accepted that the Marine Insurance Act is a codification of the common law in respect of insurance.) Similarly, an insurer cannot properly complain of having been misled by the assured's concealment of information where the insurer already had received the information from another source. Indeed, an insurer may "be presumed to know matters which they have the means of learning from sources available to them". The learned editors of *MacGillivray* (*supra*) at paragraph 17-73 cite the case of *Foley v Tabor* (1862) 2 F. & F. 663 at p. 672 in support of the proposition.

It would seem to me that, even if the principle in *Foley*, were applicable to the website in this case, Mrs. Smith-Dyer would have had to prove that the information was in fact available to ICWI at the time if it had sought to make the enquiry. It is an evidential burden placed on the party guilty of the non-disclosure or misrepresentation (*Drake v Provident*

(supra)), and no effort was made to discharge it in the instant case. The burden is different from the insurer's burden of proving non-disclosure or misrepresentation. The learned editors of MacGillivray (*supra*), in my view, state the law correctly at paragraphs 16-46 and 16-47:

> "When the assured has made a misrepresentation about a fact material to the risk and which, by definition, would influence the mind of a prudent insurer in deciding to take the risk and on what terms, it should not be difficult for a court to presume that it induced the making of the contract. **The assured can rebut this presumption only by showing that, even if the misrepresentation had not been made, the particular insurer would still have granted cover on the same terms**...The assured who wishes to prove that his misrepresentation did not influence the particular insurer may do so in a variety of ways..." (Emphasis supplied)

It is accepted that there are some differences between the results of misrepresentation as against those of non-disclosure. I would hold, however, that those differences would not affect the need of an assured in default, to show, on a balance of probabilities, that a particular circumstance existed and that the insurer could have discovered it with reasonable effort.

With the advance of technology, perhaps the Claims Bank website could be said to have been a source of information which was available to ICWI in the course of its business. It could perhaps then be said that ICWI has not proved that it sought to make use of the website but that it was not of assistance, either because the information was not there or that the website was, for one reason or another, not available at the time. In light of the fact that the burden of proof in respect of the misrepresentation and non-

disclosure rests on ICWI, the argument is an attractive one. I find, that the court has not been provided with enough information concerning this website and as to how it is used (especially in regard to the promptness of posting claims thereon), in order to find that ICWI ought to have consulted it before accepting the proposal. That finding must await another case.

Conclusion

I find that Mrs. Smith-Dyer failed to disclose the collision involving her car at a time when her sister was driving. It was a material non-disclosure, because it would have affected a prudent insurer's decision as to whether or not it would accept the risk of insuring her. I find that it did in fact induce ICWI to accept that risk. For her breach, ICWI is entitled to refuse to indemnify Mrs. Smith-Dyer on her latest claim concerning the Toyota 4 Runner. It is entitled to treat the policy as being void from the date of its renewal but it must return Mrs. Smith-Dyer's premium to her.

In fact, ICWI, having decided to treat the matter in this way, should have returned Mrs. Smith-Dyer's premium to her immediately. It did not. It hedged its bet, hoping that it would have been successful in the litigation, but kept the premium just in case it was not. That was not in keeping with the principle of utmost good faith; "[t]he very idea of [which] is that it should be reciprocated" (*per Good Faith and Insurance Contracts (supra)* at

paragraph 3.31). Mrs. Smith-Dyer has lost the use of those funds in the meantime. She should be compensated for that loss by an award of interest. The transaction was clearly a commercial one and so should attract commercial interest rates. However, no material concerning commercial interest rates have been produced to the court. I am not entitled to fill the void. In the circumstances, I find that Mrs. Smith-Dyer should have her premium returned to her with interest thereon, at the rate for judgment debts, from the date of ICWI's decision to revoke the policy; September 30, 2005, to today's date. The amount of the premium paid was not mentioned in evidence and although there was divergence between the parties on the pleadings, as to the sum, I shall accept ICWI's figure; which is higher than that quoted in Mrs. Smith-Dyer's Particulars of Claim.

For the reasons stated above, it is hereby declared that the Defendant is entitled to avoid Policy numbered 33642397/1.

It is also ordered that:

1. Judgment for the Defendant on the Claim and on the Counterclaim;
2. The Defendant shall pay to the Claimant the sum of $19,265.02 together with interest thereon at the rate of 12% p.a. from 30/9/05 to 22/6/06 and at 6% p.a. from 23/6/06 to 24/11/08 ;
3. Costs to the Defendant to be taxed if not agreed.