[2019] JMSC Civ 199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV02177

BETWEEN	**PAULINE COLE**	**CLAIMANT**
A N D	**INSURANCE COMPANY OF THE WEST INDIES**	**DEFENDANT**

Ms. C. Brydsen instructed by Archer, Cummings & Co. for the Claimant

Mrs. C. Wignall & Ms. K. Michelle Reid instructed by Nunes Schofield Deleon & Co. for the Defendant

February 23 & 24; May 18, 2012 and October 10, 2019

Admissibility of statement of unavailable witness – proof of conditions precedent to reception in evidence – procedure to determine admissibility at trial – Statement must be relevant and its prejudicial effect should not outweigh its probative value – Contract of insurance is a contract uberrima fides – Assured has obligation to be truthful and make full disclosure of material facts – Insurer seeking to avoid contract has a duty to establish that material facts were misrepresented/undisclosed and that it was induced by the misrepresentation/ non-disclosure to accept risk on the terms it did – Insurer may in appropriate circumstances rely on presumption of inducement where there is no direct evidence – Applicable principles of interpretation of insurance contract – Breach of Warranty – Breach of Terms of Coverage of Policy – Circumstances in which insurer may avoid contract – Effect of failure of insured to refer dispute to arbitration within the time limit specified in the contract.

D. FRASER J

INTRODUCTION

[1] The claimant Pauline Cole through Thwaites Finson Sharp, Insurance Brokers took out a policy of insurance dated June 29, 2006 with the defendant the Insurance Company of the West Indies (ICWI). This policy was in respect of her 1993 Freightliner motor truck registered CF 4506. The period of insurance was from September 1, 2006 to August 31, 2007.

[2] On August 10, 2007, Mr. Gregory Gray was driving the said motor truck along the Llandovery main road in Saint Ann when it was involved in an accident with another motor vehicle. The claimant having submitted a claim for indemnification the defendant company declined to honour the claim.

[3] In response to the posture of the defendant company, on July 15, 2011 the claimant filed a claim seeking the following relief:

(a) A declaration that pursuant to the policy of motor insurance certificate numbered 34052437/1 dated the 29th of June 2007 between the claimant and the defendant, the defendant is liable to indemnify the claimant in respect to her liability arising out of the accident which occurred around the 10th of August 2007, in which the claimant's motor vehicle with registration no. 4506CF collided with other motor vehicles along the Llandovery Main Road in the parish of Saint Ann; and

(b) That the claimant be indemnified under the aforementioned insurance policy in respect of the said loss sustained by the claimant by her liability arising from the said accident, or in the alternative, damages for breach of contract.

[4] The defence of the defendant is that it was entitled to avoid the contract of insurance between the parties because of the claimant's non-disclosure

and misrepresentation of material facts at the time that she applied for coverage. Alternatively, that the said contract was void for breach of warranty, therefore, the defendant was discharged from any liability of indemnity thereunder.

[5] The defendant also maintained that in any event, any loss sustained by the claimant as a result of the accident, whether in the form of claims by third parties or otherwise, was not recoverable under the policy as the claimant's claim in respect of same was not referred to arbitration within the time period specified under condition 9 of the Policy of Insurance.

[6] Accordingly the defendant counterclaimed for a Declaration that it was entitled to avoid the policy of insurance on the grounds of the misrepresentation and non-disclosure as aforesaid, (pursuant to section 18(3) of the **Motor Vehicle Insurance (Third Party Risks) Act**), and that by virtue of the said avoidance, the defendant was not required to indemnify the claimant against any third party claims arising as a result of the motor vehicle accident of August 10, 2007. Alternatively, the defendant sought a declaration that the Policy of Insurance was void for breach of warranty of contract.

[7] Further in the alternative, it was the defendant's position that by virtue of condition 9 of the Policy of Insurance the claimant was deemed to have abandoned her claim and was not entitled to recover under the Policy.

THE ISSUES

[8] The issues for determination were identified by counsel on either side. I have combined and adapted both of their formulations in stating the relevant issues and sub-issues as follows:

(a) Is the defendant entitled to avoid the policy of insurance due to misrepresentation or non-disclosure of material facts by the claimant at the time she completed the Proposal Form which

induced the defendant to offer her insurance coverage on the terms and conditions contained in the policy? The alleged misrepresentations and non-disclosures complained of are as follows:

i. A misrepresentation that she was the owner of the motor vehicle;

ii. A misrepresentation that the vehicle would have been in her custody and control / A failure to disclose that the vehicle would not have been in her custody and control;

iii. A misrepresentation that the vehicle would have been used in connection with her business / A failure to disclose that the vehicle would have been hired or rented out for use in connection with the business of another?

(b) Is the claimant in breach of the warranty of the contract by providing untrue responses to the questions of:

i. The intended use of the truck in her business

ii. Where the truck was to be garaged

(c) Is the claimant in breach of the terms of coverage of the policy?

i. Was Mr. Gregory Gray an authorized driver for the said truck under the subject policy at the material time?

ii. Was the claimant's Motor Truck used in contravention of the insurance policy in that it was not used by the claimant in connection with her business but was hired out to another for use in connection with their business?

(d) By virtue of Condition 9 of the Policy of Insurance should the claimant be deemed to have abandoned her claim?

Preliminary Consideration

Admission of Witness Statement pursuant to section 31E of the Evidence Act

[9] Section 31 E of the **Evidence Act**, as it was at the time of hearing of this matter, so far as relevant provided:

> (1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
>
> (2) …
>
> (4) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person-
>
> (a) is dead;
>
> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
>
> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
>
> (e) is kept away from the proceedings by threats of bodily harm.
>
> (5) …

[10] Having considered the evidence adduced and the submissions of counsel during the trial, I had ruled, giving brief oral reasons, that the statement of Mrs. Lee was admissible in her absence. I now outline those reasons in full.

[11] Counsel for the defendant, who made the application, adduced affidavit evidence from a process server, Mr. Michael Swaby, and from counsel Ms. Wignall, who herself spoke to efforts undertaken to locate Mrs. Lee. Mr. Swaby indicated that on January 7, 2012, he visited the home of Mrs Lee in Keystone Heights armed with a sealed copy of a witness summons addressed to Marie Angella Lee of Lot 196, Keystone Heights, Mount View Estate, Saint Catherine. There he saw and spoke to a woman who identified herself as the mother of Mrs Lee. She advised him that Mrs. Lee was overseas and the date of her return was unknown. Despite his entreaties this lady declined to accept the summons or to provide an e-mail address or telephone number for Mrs. Lee.

[12] Ms. Wignall for her part spoke to all the steps she took in seeking to have Mrs. Lee located. These included the engagement of Mr. Swaby to locate and serve Mrs. Lee, at the address she had given on the statement she gave to investigator Jehu Billett a few months after the accident, to secure her attendance at the trial, and engaging another process server, a Mr. Richards to make further efforts to locate Mrs. Lee.

[13] She also indicated that through Mr. Richards' efforts she was able to speak to a gentleman identified as Herbert Lee, the father-in-law of Mrs. Lee. Subsequently, she was able to speak to Mrs. Delma Lee who is Mr. Herbert Lee's wife/the mother-in-law of Mrs. Lee. Ms. Wignall indicated that she spoke to Mrs. Delma Lee on at least 4 occasions during a period of over a month. She was however unable to obtain from her a location, e-mail address or telephone number for Mrs. Lee, nor did she manage to speak with or ultimately locate Mr. Jeffrey Lee who, based on her first conversation with Mrs. Delma Lee, had still been in Jamaica at that time.

[14] Counsel for the defendant submitted that the evidence had satisfied both paragraphs c *(witness is outside of Jamaica and it is not reasonably practicable to secure his attendance)* and d *(witness cannot be found after all reasonable*

steps have been taken to find him) of section 31 E, on a balance of probabilities. She relied on dicta from Sykes J, (as he then was) in, ***R v Frank Richards*** HCC–071(3) (jud. del. September 3, 2009) particularly at paragraph 24 (4), (5) and (6).

[15] She further submitted that the power to exclude the statement under section 31L of the **Evidence Act** should not be exercised, as it was clear that the prejudicial effect of the statement did not exceed its probative value. She contended that the statement touches and concerns the arrangements between the parties, including those in relation to the driver, which were part of what the defendant used to come to its decision. Additionally, counsel argued that, it could not be said that the claimant would be unfairly prejudiced by the reception of the statement given the extensive reliance she had placed on Mrs. Lee and the arrangements they had entered into. It was noteworthy counsel maintained that despite this the claimant had not called her and it was the defendant who was seeking to adduce her statement. Counsel cited ***Steven Grant v R*** [2007] 1 AC 1 in particular page 14, paragraph 21.

[16] In opposing the application counsel for the claimant argued that the claimant should have been given an opportunity to cross-examine the persons involved in attempting to find Mrs. Lee. She further advanced that there was no affidavit from Mr Richards therefore any reference to his actions amounted to second hand hearsay evidence. There was also no affidavit from the investigator who had taken her statement. They should, she maintained have at least made themselves available for cross-examination.

[17] She contended it was not sufficient for the defendant to rely only on information received from a reluctant mother-in-law. Efforts should have been made to contact the National Bakery with whom the Lees had been working. Further, no checks were made at the airports or last known place

of work of Mrs. Lee, nor was any advertising done. Counsel advanced that the Lees lay at the centre of the defence and is therefore not for the claimant to bring them. She submitted that in the circumstances it could not be said that it was proven that Mrs. Lee was off the island and it was not reasonably practicable to secure her attendance or that all reasonable steps had been taken unsuccessfully to locate her. She relied on the cases of ***R v Bray*** (1988) 153 JP 11, ***Bryan Rankin and Carl McHargh v R*** SCCA Nos 72 & 73/2004 (jud. del. July 28, 2006), ***R v Frank Richards,*** and ***R v Maloney*** [1994] Crim. LR 525.

[18] Counsel for the defendant in reply argued that the Lees were no longer working with the National Bakery so there was no need to pursue trying to find them there. Further, they were conversing with a person who was actually in touch with Mrs. Lee. Therefore the extraordinary measure of advertising was unnecessary. She also submitted that the requirements were stricter in criminal matters and reiterated that adequate steps had been taken in this matter which was to be judged on the civil standard.

Ruling

[19] In order for the defendant to succeed in this application, as it did, the court had to be satisfied:

(a) under section 31 E (4) (c) of the **Evidence Act**, that Mrs. Lee was outside of Jamaica and it was not reasonably practicable to secure her attendance;

(b) and/or under section 31 E (4) (d) of the **Evidence Act**, that Mrs Lee could not be found after all reasonable steps had been taken to find her.

[20] The cases cited provided useful guidance on the factors that the court should consider. The court was however careful to be always mindful of the fact that they were all considered in relation to criminal matters where

the threshold of acceptable proof is higher. Thus, the rigor that was necessary in this matter, it being a civil case, would not be as strict as in the cases cited. Against that background a number of principles extracted from the cases, guided the court's decision as follows:

(a) The question whether it was reasonably practicable to secure the attendance of a witness at court who is said to be outside of the jurisdiction of the court must be examined not as at the time when the trial opened but against the whole background of the case (***R v Bray***);

(b) "Reasonably practicable involves…the duty to secure the attendance at trial by taking the reasonable steps which a party would normally take to secure a witness's attendance having regard to the means and resources available to the parties. Such steps,…, are not merely to be judged at the date when the application to admit the statement is made"; ***(R v Maloney)***

(c) The requirement for a party, (under section 31 D (d) [sic]), of the **Evidence Act**) to establish beyond reasonable doubt both that the witness is off the island and that it is not reasonably practicable to secure the attendance of the witness at the time the application is made, is not a requirement to establish whether it is possible or reasonably practicable for the witness to attend, but whether it is reasonably practicable to ***secure*** the attendance of the witness; (***R v Frank Richards***).

(d) The party seeking to rely on section 31 D (d) [sic] does not have to prove extraordinary efforts to secure the attendance of the witness; (***R v Frank Richards***)

(e) The normal steps taken to secure the attendance of witnesses are to be taken into consideration; (***R v Frank Richards***)

*It should be noted that in **R v Frank Richards** the relevant section of the Evidence was, it appears by inadvertence, indicated as 31 D (d) when it should have been 31 D (c).*

(f) The question whether all reasonable steps have been taken must be assessed on the particular circumstances of each case. ***R v O'Neil Smith*** SCCA No 113/2003 (unreported) (jud. del. December 20, 2004 page 11, quoted at paragraph 18A of ***Bryan Rankin and Carl McHargh v R***. Also at paragraph 18A it was noted that, *"…checks should be made at the places with which the witness has a contemporary connection, and contact made with known relatives or friends with whom he would have been reasonably expected to be in touch."*

[21] With regard to the evidence put before the court, in retrospect the concern raised by counsel for the claimant that there was no opportunity for cross-examination, has some merit. The matter was heard in open court with the evidence generally taking the form of witness statements. It was only in respect of this aspect of the case, that affidavit evidence was relied on. Had the evidence been put forward in the form of witness statements, as it should have, there would have been the opportunity for cross-examination.

[22] That acknowledgement does not however mean that the ruling to admit he statement was without proper justification. The evidence received, albeit on affidavit and untested by cross-examination, revealed attempts to locate Mrs. Lee at the home address that she had provided for the statement she had given.

[23] As I indicated when giving my oral ruling, I did not place unqualified reliance on the evidence of Michael Swaby as he didn't even get a name for the lady who indicated she was Marie's mother and that Marie was overseas. The value of his evidence is however additionally that he went

to the premises armed with a witness summons, which helps to demonstrate the steps taken by the defendant to secure the attendance of the witness.

[24] The evidence of Ms. Wignall indicated that apart from Mr. Swaby, she also engaged the services of one Mr. Richards. Despite the location of the parents-in-law of Mrs. Lee, she was unable to get any useful information as to Mrs Lee's whereabouts. She also indicated that ICWI retained another investigator one Mr. Newton Simpson but he reported no success in locating the witness. It was clear to this court, that the efforts being made to locate Mrs. Lee were stymied by her reluctant mother-in-law, with whom the main contact was made in trying to find her.

[25] Given the specific information as to the home address of Mrs. Lee and the fact that her parents in law were spoken to, there was no need to pursue speculative means such as going to her former place of work or advertising to find her. The course recommended in ***Bryan Rankin and Carl McHargh v R*** was adopted. Checks were made at a place that it was known that Mrs. Lee had a contemporaneous connection and with her relatives. From the information put before the court it was open to the court to infer from the evidence, and the court did so infer, that Mrs. Lee did not want to be found.

[26] Having regard to the law and the evidence adduced on a balance of probabilities I found that the defendant had satisfied the requirements under both section 31E (4) (c) and (d) of the **Evidence Act** permitting the statement of Marie Lee to be admitted in evidence through the relevant witness if properly proved. I found that the nature of the evidence contained in the statement was relevant and that it should not be excluded pursuant to section 31L of the **Evidence Act**, as the prejudicial effect of the evidence did not outweigh its probative value. In this regard it is interesting to note, though this is not the sole basis on which the court

found that admitting the statement would not cause unfair prejudice, the claimant herself did place some reliance on the statement of Marie Lee in the context of the entire case, but did not seek to call her.

[27] Based on the testimony of Jehu Billett who was able to identify the statement he had recorded from Mrs. Marie Lee on January 4, 2008, her statement was received in evidence. I did however note, that the ultimate weight to be accorded to the statement was still to be determined. I will address that issue at appropriate points, later in the judgment.

ISSUE A: Is the defendant entitled to avoid the policy of insurance due to misrepresentation or non-disclosure of material facts by the claimant at the time she completed the Proposal Form which induced the defendant to offer her insurance coverage on the terms and conditions contained in the policy?

The Law

[28] As noted by counsel on both sides a contract of insurance is a contract *uberrima fides*. An applicant for insurance coverage is therefore under a duty of utmost good faith that requires her to be truthful and to disclose every material fact that would influence the judgment of a prudent insurer in determining whether or not to take the risk or in setting the premium.

[29] This fundamental principle has been recognised in the **Motor Vehicle Third Party Risks Act** which entitles insurers to avoid contracts induced by misrepresentation or non-disclosure by the insured. Section 18 (3) of that Act provides as follows:

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

> **avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it**:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto. (Emphasis added)

[30] The *uberrima fides* principle governing insurance contracts has been in existence for hundreds of years, long before the effect of its breach was enshrined in legislation. Its rationale was perhaps first stated by Lord Mansfield CJ in ***Carter v Boehm*** 1766 3 Burr 1905 at 1909 – 1910 as follows:

> Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué, 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 risque run is really different from the risque understood and intended to be run, at the time of the agreement…Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from the ignorance of the fact, and his believing the contrary.

[31] Restating the principle Purchas LJ in ***Roberts v. Plaisted*** [1989] 2 Lloyds Rep 341 at 345 said that

> 1. Subject to waiver by insurers there is a duty upon the proposed assured to disclose all facts material to an insurer's appraisal of

> the risk which are known or deemed to be known to the assured, but not known or deemed to be known to the insurer…

[32] A breach of this principle or duty by the proposed assured entitles the insurer to avoid the policy of insurance ab initio.[1] The principle and the right flowing from its breach have been recognised in a number of cases. In ***Merchants and Manufacturers Insurance Company Limited v Charles and John Hunt (an infant) and Percy Thorne and Matilda Thorne*** [1941] 1 K.B. 295 an insurer sought to avoid a contract of insurance based on material non-disclosures/misrepresentations of the insured. It was held that the right to avoid a contract, whether of insurance or not, induced by misrepresentation did not depend on any implied term of the contract, but arose by reason of the jurisdiction originally exercised by the Court of Equity to avoid imposition. Further, that it appeared that the common law duty to make full disclosure of material facts was not merely based on an implied term of the contract.

[33] These principles have been applied locally in two fairly recent cases. In ***Insurance Company of the West Indies v Adulhadi Elkhalili*** SCCA 90/2006 (December 19, 2008) at paragraph 36 K. Harrison JA stated:

> [A]n insurance contract is one *"uberrimae fidei"* – of utmost good faith and a breach of the insured's duty to disclose all material facts would therefore entitle the appellant as the insurer to avoid the contract of insurance *ab initio*.

[34] In ***Hilary Smith-Thomas v Insurance Company of the West Indies*** 2006 HCV 01883 (November 24, 2008) Brooks J (as he then was) had this to say at page three:

> 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

[1] Chitty on Contracts, Volume 2, para. 41-033; Hillary Smith-Thomas v. ICWI (Unrep. – Claim No. 2006 HCV 01883; heard 21st, 27th, October and 24th November 2008, per Brooks J.)

> utmost good faith. On the part of the assured...,that duty requires 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)

[35] As Brooks J noted in relation to what he highlighted in the quote from Mackinnon J, even an inadvertent misrepresentation by the proposer would entitle the insurer to avoid the policy. He also pointed out however that innocence is a defence to non-disclosure as one can only disclose what one knows. See ***Joel v Law Union and Crown Insurance Co.*** [1908] 2 K.B. 608.

[36] It is also important to note especially in the context of this case that the proposer's obligation to be truthful and to disclose extends to statements of intention. Therefore a misrepresentation of, or failure to disclose the assured's intention on the proposal form in relation to a material fact, will also entitle the insurer to avoid the policy of insurance. See ***Insurance Company of the West Indies v. Malvie Graham*** 2008HCV05023 (22nd October 2010).

[37] The question of what makes a fact material is answered by section 18 (5) of the **Motor Vehicle Insurance (Third Party Risks) Act**. As it regards materiality it reads:

> In this section the expression "material" means 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,...

[38] The case of ***Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Ltd*** [1995] 1 AC 501 interpreted section 18 (2) of the **Marine Insurance Act** of 1906 (England) which provided, "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". The House of Lords held that under this section which was applicable by analogy to a non-marine case, "material circumstance" was one that would have an effect on the mind of the prudent insurer in estimating the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk or on the amount of premium demanded.

[39] Of note is that the section interpreted in ***Pan Atlantic Insurance Co. Ltd*** is similar in concept and to a large extent in wording, to section 18 (3) of the **Motor Vehicle Insurance (Third Party Risks) Act** in Jamaica and was in any event recognised by Lord Mustill to be a partial codification of the common law.

[40] It is the duty of the insurer who seeks to avoid a contract of insurance to establish that material facts were misrepresented or not disclosed. See ***Joel v Law Union and Crown Insurance Co.*** To succeed, the insurer however has to go one step further. As also held in ***Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Ltd***, the insurer has to additionally prove that it was induced by the misrepresentation or non-disclosure to accept the risk in question on the terms it did. Proof of inducement is therefore subjective and the best evidence of that is to call the actual underwriter to give evidence seeking to establish that

inducement. Where no such evidence is available the insurer has to rely on a presumption of inducement if the facts are capable of raising such a presumption.

[41] Both scenarios were present in the case of ***St. Paul Fire & Marine Insurance Co. (UK) Ltd v McDonnell Dowell Constructors Ltd & Ors*** [1995] C.L.C. 818. Proof from actual underwriters was available through the testimony of three of the four underwriters in the case. Given the absence of evidence from the fourth underwriter, in respect of the relevant claim, the court in explaining the principle of the presumption of inducement at page 831, referred to **Halsbury's Laws** vol. 31, (4th edn) para. 1067 where the law is stated as follows:

> Inducement cannot be inferred in law 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 counter evidence.

Therefore, in the absence of direct evidence, the presumption can only be raised by obvious materiality. Where the presumption arises, it is subject to rebuttal and the evidential burden shifts to the insured to displace it if he can. See ***Drake Insurance plc v Provident Insurance plc*** [2004] 2 WLR 530.

[42] Apart from the requirement of obvious materiality, judicial pronouncement has included another prerequisite. In ***Hilary Smith-Thomas v Insurance Company of the West Indies*** Brooks J at page 6 cited the learned editors of **Insurance Disputes** 2nd Ed. who reported at paragraph 4.62 that Longmore J in the case of ***Mark Rich & Co AG v Portman*** [1996] 1 Lloyd's Rep 430 held that the presumption of inducement would not apply unless the actual underwriter could not be called "for good reason". (See page 442 Col.1). However this had not been seen as a necessary requirement in the earlier case of ***St. Paul Fire & Marine Insurance Co.***

(UK) Ltd v McDonnell Dowell Constructors Ltd & Ors. where the fourth underwriter was available but not called. Admittedly though, the court there had abundant evidence, as reliance was placed on the evidence of the three underwriters who were called, as well as on the evidence of expert witnesses to find that the presumption of inducement applied without rebuttal and that the fourth underwriter would have been induced by the relevant misrepresentations and non-disclosure.

The Facts

The Alleged Material Misrepresentations/Nondisclosure that operated as inducements

Sub - Issue (a) i

Did the claimant misrepresent that she was the owner of the motor vehicle at the time she applied for insurance coverage from the defendant?

[43] The claimant maintains that this question is conclusively answered in her favour by an examination of the face of the Motor Vehicle Certificate of Title (Exhibit 4) and Motor Vehicle Registration Certificate (Exhibit 3), which both show that the motor truck was owned by Pauline Cole. It was submitted by counsel for the claimant that nothing short of showing a better title to defeat the Motor Vehicle Certificate of Title would suffice. The evidence of the claimant and of Mr. Cortland Wilson was also that the claimant was at all material times the owner of the motor truck.

[44] Counsel for the defendant on the other hand contended that the truck was owned by the Lees. The only evidence that could support that claim was the excerpt from the statement of Gregory Gray which was received in evidence as exhibit 14 after he denied making it. It reads, *"This truck belongs to Jeffery Lee and Marie Lee. Miss Pauline Cole was the real owner but the Lees were in the process of purchasing the truck."* It is

significant that in that exhibit Mr Gray was maintaining that the claimant was the real owner. It is relevant here to advert to section 31I of the **Evidence Act** which makes a previous inconsistent statement admissible as evidence of the facts stated therein. This is a departure from the common law position whereby previous inconsistent statements, unless accepted as true, could only have been received in evidence to impugn the credit of the witness, in light of the contrary testimony given by that witness in court. The exhibit having been received in evidence in proof of the facts stated therein, I accept those facts as true regarding the ownership of the truck.

[45] While on the evidence accepted the Lees were in the process of purchasing the truck, all evidence points to the truck being still owned by the claimant at the time of the insurance contract being entered into through to the time of the accident. Further, in the statement of Marie Lee, received in evidence under section 31E of the **Evidence Act**, Ms. Lee consistently referred to the truck as being owned by Ms. Cole and never sought to claim ownership.

[46] It is manifest therefore that the defendant brought no evidence to substantiate its claim that the said motor truck was owned by Marie and Jeffrey Lee at the time of the completion of the proposal form, or any time at all. There is therefore no evidence of misrepresentation by the claimant on this point.

Sub - Issue a (ii)

Did the claimant misrepresent that the vehicle would have been in her custody and control / fail to disclose that the vehicle would not have been in her custody and control

[47] In the claimant's evidence she stated that at the time she completed the proposal form she knew that the Lees would be the ones keeping the truck which would be coming in at all hours of the night and so would not be parked at her address but somewhere else. She further stated that from the time she acquired the truck it was kept in Spanish Town by the Lees when it was not on the road doing deliveries.

[48] However, Mr Wilson, the claimant's agent, said he was aware of the whereabouts of the truck at all times. It was therefore the claimant's contention that custody and control of the truck had not been relinquished and that the claimant could have gone back for her truck at any point in time.

[49] The defendant on the other hand, maintained that the truck had been hired out to the Lees, the claimant had surrendered custody and control of it to the extent that it was kept at the Lees premises when it was not with the driver and that the Lees paid and instructed the driver what to do as their employee[2]. Further, the evidence revealed that when the truck needed repairs and maintenance it was the Lees who were responsible for that.

[50] The facts outlined establish that the claimant had very little if any contact or engagement with the driver of the truck and that for all intents and purposes, custody and control of the truck itself was almost exclusively if

[2] This will be explored in detail under sub-issue c(i)

not totally the preserve of the Lees. It has therefore been shown that the claimant did engage in misrepresentation in respect of this sub-issue.

Sub-Issue (a) (iii)

Did the claimant misrepresent that the vehicle would have been used in connection with her business / Fail to disclose that the vehicle would have been hired or rented out for use in connection with the business of another?

[51] The facts concerning the usage of the claimant's truck by the Lees are not in dispute, though there is some difference between the parties concerning the terms of engagement. On the claimant's case it was the evidence of both the claimant and Mr. Wilson that he informed the claimant of the Lees' business, hauling baked goods for the National Bakery Company (NBC), and that the Lees were in need of extra trucks to use under that contract. The Motor Truck was therefore acquired by the claimant to enable her to participate in the haulage arrangement shared between NBC and the Lees.

[52] It was the claimant's evidence that she did not handle the management of the Motor Truck which she entrusted to her agent and son-in-law Mr. Wilson. Mr. Gregory Gray was identified as the driver for the truck. There is some dispute concerning in whose employ Mr. Gray was engaged and that will be addressed in detail later[3]. For now, it is sufficient to indicate that he was to be paid by the Lees. On the claimant's case his payment was deducted from the amount due to the claimant and on the defendant's case he was paid as an employee of the Lees. The truck was used to do deliveries between Kingston and Montego Bay.

[3] Under sub-issue c (i)

[53] On the claimant's case Mr. Wilson maintained that there was no need for the Lees to give Mr. Gray dispatch instructions as the truck only operated between set locations and that he was in touch with the driver while he was in transit and knew his whereabouts at all material times. It was therefore the claimant's contention that custody and control of the truck had not been relinquished and that the claimant could have gone back for her truck at any point in time. The defendant on the other hand maintained that the truck had been hired out to the Lees, the claimant had surrendered custody and control of it to the extent that it was kept at the Lees premises when it was not with the driver and that the Lees paid and instructed the driver what to do as their employee. I have already resolved the issue of custody and control having held under sub-issue a (ii) that the Lees had custody and control of the truck.

[54] The main item for determination under this head is whether the truck was *"hired or rented out by the claimant for use in connection with the business of another"*. The answer to that matter is dependent on how the relevant questions and answers on the proposal form are to be construed and then matched against the claimant's intention concerning how the motor truck was to be, and was used.

[55] Counsel for the claimant highlighted that on the first page of the Proposal Form under the section with the general heading "THE VEHICLE" by ticking the appropriate boxes either "Y" for "yes" or "N" for "no", the claimant was required to declare the purposes for which the vehicle was to be used. The instructions given at the top of the questionnaire under the said section state: "If the response to any of the questions below is yes, please provide the details in the space provided". Counsel pointed out that items (c) 1-5 were separate and disjunctive questions denoting different ways in which the vehicle could be used commercially but no line was provided for clarification of any answers given. Only item 6 "Other" had a line for details to be provided.

[56] The claimant indicated on the form that the vehicle would be used for:

> (c (1)) - Business Purposes
> (c (3)) -The transport of goods in connection with your business; and
> (c (4)) -Transport of goods for reward

Under item d) the claimant disclosed the description of goods to be carried as "BAKED GOODS."

[57] Counsel relied on ***Thomson v. Weems*** (1884) 9 App. Cas. 671 concerning how questions in a proposal form are to be interpreted. Lord Watson at page 688 stated as follows:

> The question must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal, and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed contra proferentes, and in favour of the assured.

[58] More generally counsel also cited ***Melanesian Mission Trust Board v Australian Mutual Provident Society*** [1997] 2 EGLR 128 where the Judicial Committee of the Privy Council advised on how the words of a document are to be construed. At page 129 Lord Hope of Craighill said:

> The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and

> unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

[59] These authorities were cited in support of the submission that questions c(1), c(3) and c(4) on the Proposal Form are plain and unequivocal and therefore the natural and ordinary meanings should be given to the words used. Therefore counsel argued that in respect of c (1), "business purposes" needs no further explanation and the word "business" should be understood as having been used broadly in that specific question especially as no line was provided for the proposed insured to elaborate or provide details. Item d was the only one which sought amplification by way of description of the goods to be carried which the claimant duly answered indicating "Baked Goods".

[60] Concerning item c (3) "the transport of goods in connection with your business", counsel for the claimant submitted that question was simply asking if the claimant would use the Motor truck in her business of hauling baked goods. Counsel relied on extracts from Mrs. Lee's statement to support the submission that Ms. Cole was participating in the contract that the Lees had to deliver baked goods for NBC "in her own right". She highlighted lines 11-13 of Mrs Lee's statement: "I sometimes hire extra trucks when I have excess goods to deliver and *they pay me a percentage*" and lines 15-16 where she said "the extra truck *we take 1/3 of the earnings.*" (counsel's emphasis added). The payment arrangement outlined by Mrs. Lee, counsel argued, suggested that the claimant was paying the Lees to participate in their contract with NBC by using her truck to make deliveries thereunder and it was not that the Lees were using the motor truck solely for their interest.

[61] Concerning c (4) “transport of goods for reward” counsel submitted the natural meaning was simply whether goods would be carried for the purpose of gaining a reward. There was no stipulation that this reward would have to be gained through a business owned/operated solely by the claimant. Counsel sought support for this interpretation from the evidence of Ms. Jarrett, Senior Underwriter employed to the defendant. She testified that items c (3) and (4) were complete and separate each from the other.

[62] Further, she provided critical answers to hypothetical situations put to her. She stated that if someone who had no established business had a truck insured under a similar policy as the one in this case, was approached by another with a business in transporting baked goods, to use their truck to transport baked goods for payment, that activity would be captured under item c(4). She also stated that if the person was asked to make several trips per week instead of just one, and the insured’s employee drove the truck, that activity would still be captured under item c(4). The witness however denied the suggestion that the business venture in which the claimant participated would be captured under c (4).

[63] Counsel for the claimant rebutted the position advanced by the defendant that the truck was “hired out” to the Lees and that this was against the insurance policy. Counsel submitted that having regard to items c(1) and c(4), the policy did allow for the Motor Truck to be used outside of an “established” business by the claimant for the transport of goods for reward. The only limitation on use of the truck for hire was in respect of the carriage of passengers which was prohibited by clause 6.

[64] Counsel for the defendant submitted that on the claimant’s evidence, it was clear that the vehicle was acquired by her to be used for the purpose of hauling and transporting goods for and in connection with the Lees’ business as haulage contractors for National. Counsel highlighted that on the Proposal Form the Claimant stated that the truck was to be used in

connection with her business. In evidence however, she stated that she did not have a contract with National and she had no dealings with them at all. Counsel pointed out that the evidence was that this truck was only used in connection with the transportation of baked goods for National. Counsel submitted this was never disclosed in the Proposal Form and amounted to a non-disclosure and/or misrepresentation.

[65] Counsel for the defendant also drew attention to the fact that Ms. Jarrett in re-examination stated that if in respect of transporting goods for reward the vehicle was passed over by the insured to the person making the request to use the vehicle to transport/deliver baked goods, that would not fall under c(4). The contention of the defendant therefore is that the hiring out of the truck was in effect a handing over or rental of the truck to the Lees to conduct their business and the claimant was therefore not transporting goods for reward nor operating the truck in her business under the policy.

Analysis

[66] There is much to commend the submission of counsel for the claimant that questions c(1), c(3) and c(4) on the Proposal Form are plain and unequivocal and therefore the natural and ordinary meanings should be given to the words used. That is in keeping with the cases of ***Thomson v Weems*** and ***Melanesian Mission Trust Board v Australian Mutual Provident Society*** cited by counsel for the claimant. The evidence of Ms. Jarrett that each question was separate is also important. Given the nature of the questions I find that item c (1) which speaks to business purposes and item c (4) which addresses transport for reward, should be broadly construed especially since no line was provided on the Proposal Form for any qualification to be made or specific indication to be given. In any event, there is no real dispute that the motor truck was being used for business purposes or to transport goods for reward. The challenge from

the defendant is that the usage of the truck did not fall within c(3), as it was not being used in the claimant's business but was handed over for use in the business of another.

[67] The resolution of this issue turns on questions of fact and degree. Ms. Jarrett's evidence was that if someone with no established business who had a truck insured under a similar policy as the one in this case, was approached by another with a business in transporting baked goods, to use their truck to transport baked goods for payment even every week, that activity would be captured under item c(4). However if in respect of transporting goods for reward the vehicle was passed over by the insured to the person making the request to use the vehicle to transport/deliver baked goods, that would not fall under c4.

[68] What are the facts I accept in this regard? For reasons which are outlined in detail under sub-issue c (i) I have found that Mr. Gray was employed to the Lees and not to the claimant. I have also found as outlined under sub-issue a (ii) that custody and control of the truck was handed over by the claimant to the Lees. Mrs. Lee speaks to having hired the claimant's truck and of being paid a percentage equal to 1/3rd of the earnings of trucks that she hires when she has extra work. Having duly considered that Mrs. Lee was not tested by cross-examination and I was therefore unable to assess her demeanour, I nevertheless find I can place some weight on her assertions concerning the course of dealings between her and the claimant, especially as no reason has been put forward why she may have been less than candid in her statement. The arrangement disclosed by the evidence that I have accepted is that the Lees had control over all the movements of the truck. It was driven by Mr. Gray an employee of the Lees, the truck was retained by the Lees or the driver, and a sum of money was paid to the claimant arising from the arrangement between the parties.

[69] The degree of control over the truck enjoyed by the Lees, and all the arrangements for its use, lead me to the conclusion that 1) the truck was hired by the Lees to conduct their business with the claimant being paid for the use of her truck and 2) it was not the business of the claimant that was being conducted for the purposes of the insurance policy. On the evidence the claimant was not herself engaged in the transport of goods for reward but was engaged in the hiring out of her truck for that purpose.

[70] That is however not the end of the matter. The claimant has submitted in the alternative that in light of questions c(1) and c(4), to omit to ask if the Motor Truck would be "hired/rented out in connection with another business", which can be logically deemed a genus of "transport of goods for reward", the defendant had properly waived the materiality of any matter which may have arisen from failing to ask that specific question. Counsel relied on ***Roberts v. Plaisted*** in which Purchas LJ said at page 345 that:

> 3. The right to receive full disclosure of material matters known or deemed to be known by the proposed assured is subject to expansion, restriction or waiver by the insurers. In the case of non-marine insurance these aspects of the problem normally fall to be considered in the context of questions asked or omitted in the proposal form issued by insurers to be completed by the proposed assured. …the issue of such a proposal form could found a defence of waiver to protect a proposed assured from the consequences of material non-disclosure but … (1) that the proof of waiver rested not upon the insurer but upon the assured; and (2) that any waiver must be directly related to the subject matter of a question in connection with the risk under consideration, or a kindred matter. Otherwise the duty to disclose material matters imposed by the common law remained unaffected.

[71] The claimant might have had a good argument if the court's finding was that the claimant was engaged in her business as well as having hired/rented out the truck in connection with another business. However

the finding is that the truck was not engaged in the claimant's business as she had stated it would be. Therefore, even though the questions c(1), c(3) and c(4) are separate, their cumulative effect has to be considered. If the claimant had not indicated the truck was to be used in her business but had indicated that it would have been engaged in transport of goods for reward, then it could have been more successfully argued that the failure to provide for amplification or to ask the specific question whether or not the truck would be hired out to be used in another business, would have waived the materiality of any answer that would have flowed from the amplification or specific question. As it stands, since the misrepresentation/non-disclosure complained of relates to the fact that the truck was not engaged in the claimant's business as was stated in the proposal form, no waiver of materiality concerning the failure to ask the specific question about the use of the truck in the business of another arises.

[72] In the further alternative counsel for the claimant submitted that the questions asked at c(1), c(3)and c(4) are so wide that they were ambiguous in their meaning. This is an interesting submission given that counsel initially submitted that questions c(1), c(3) and c(4) on the Proposal Form are plain and unequivocal and therefore the natural and ordinary meanings should be given to the words used.

[73] Addressing the effect of ambiguity, in ***Sweeney v. Kennedy*** [1950] IR 85, relied on by counsel for the claimant at pages 97 to 98 Kingsmill Moore J adopted the words of Lord Shaw in ***Condogiania v Guardian Assurance Co***[4] where he stated that:

> In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a

[4] [1921] 2 AC 125, at p. 130

> sense different from or more comprehensive than the proponent's answer covered where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by courts of law.

[74] Counsel also relied on the case of ***Roberts v. Plaisted*** where Purchas LJ in outlining the law stated at page 345 that:

> Whatever one may think of the merits involved, the law is clear in the following respects which have not been in dispute…
>
> …(3) The right to receive full disclosure of material matters known or deemed to be known by the proposed assured is subject to expansion, restriction or waiver by the insurers. In the case of non-marine insurance these aspects of the problem normally fall to be considered in the context of questions asked or omitted in the proposal form issued by insurers to be completed by the proposed assured. …the issue of such a proposal form could found a defence of waiver to protect a proposed assured from the consequences of material non-disclosure but … (1) that the proof of waiver rested not upon the insurer but upon the assured; and (2) that any waiver must be directly related to the subject matter of a question in connection with the risk under consideration, or a kindred matter. Otherwise the duty to disclose material matters imposed by the common law remained unaffected.

[75] The statements of law relied upon by counsel for the claimant are clear. In the application of the law to the facts of this case however, it must be reiterated that the cumulative effect of the questions must be considered. While one question standing on its own might have led the court to find that its width necessarily embraced ambiguity, the questions read together I find are plain and unequivocal. The general terms of “business purposes” indicated at c (1) and “Transport of goods for reward” indicated at c (4) are necessarily and obviously limited by the indication at c (3) of “The transport of goods in connection with your business”. Taken together, the questions at c on the Proposal Form I therefore find are not ambiguous.

Did the misrepresentations/non-disclosures found proved by the court operate, as material inducements that led the defendant to accept the risk of insuring the claimant's motor truck on terms and conditions which it otherwise would not have, but for the misrepresentations/non-disclosures?

[76] The court has found that the motor truck was:

(a) used for hire in connection with the Lee's business and not the business of the claimant;

(b) at all material times in the custody and control of the Lees and not the claimant;

(c) garaged at the Lees house by them;

contrary to the representations made by the claimant at the time of signing the insurance proposal form.

[77] The definition of what is material and the test for materiality were outlined earlier by reference to section 18(5) of the **Motor Vehicle Insurance (Third Party Risks) Act**, and the cases of ***Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Ltd***, and ***Insurance Company of the West Indies v. Malvie Graham.*** Importantly in the ***Insurance Company of the West Indies v. Malvie Graham*** case it was explicitly recognised that statements of intention may also qualify as material facts.

[78] Further, as noted in ***Joel v Law Union and Crown Insurance Co.*** an insurer who seeks to avoid a contract of insurance has the duty to establish that material facts were misrepresented or undisclosed. Additionally the insurer has to prove subjectively that the misrepresentation or non-disclosure operated as an inducement for it to accept the risk in question on the terms it did. See ***Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Ltd***. Proof of inducement is therefore subjective and the best evidence of that is to call the actual

underwriter to give evidence seeking to establish that inducement. Where no such evidence is available the insurer has to rely on a presumption of inducement if the facts are capable of raising such a presumption.

[79] In the absence of the best evidence of inducement, the actual underwriter who was unavailable at the time of trial, defendant relied on the evidence of Senior Underwriter Marcia Jarrett. At paragraph 11-14 of her Witness Statement she outlined certain facts which she indicated were material and important to the underwriting assessment as they served as a guide to the defendant in determining whether to accept the risk, or if so accepted to determine the terms and conditions, including premium on which the risk should be accepted. These paragraphs are outlined below:

> 11. The act of underwriting is the assessment of risk for insurance purposes the aim being the financial protection of the insured in the event of among other things the accidental damage or destruction of the insured property. The assessment of a proposed risk by an underwriter determines two things generally: firstly whether the risk is one that is acceptable by the insurer and secondly at what premium is the risk to be accepted.
>
> 12. The underwriting practices adopted by ICWI have developed as a result of assessing risk, premiums and losses in particular areas of motor vehicle insurance business in various locations over a number of years. The underwriting policy is also of course affected by the premium to reinsure a particular class of risk.
>
> 13. When I underwrite a new business proposal I consider a number of material facts including:
>
> i. the proposer's age and occupation;
>
> ii. the type of vehicle;
>
> iii. the use of the vehicle;
>
> iv. the goods to be transported and where;

v. who has custody and control of the vehicle;

vi. was a public carrier licence obtained;

vii. the proposed insured's driving experience;

viii. if the driver is not the insured – that person's driving experience;

ix. the proposed insured's claim experience; and

x. if the driver is not the insured – that person's claim experience

14. I assess the risk to determine whether the proposed insured is a potential moral hazard. I would also consider whether the proposed insured has previously been denied insurance or had a policy cancelled and the reasons given by the previous insurer.

[80] Against the background of Ms. Jarrett's statement, counsel for the defendant argued that the fact that the Proposal Form sought express answers to questions concerning: i) the intended use of the vehicle, ii) the goods to be carried, and iii) where the vehicle would be parked overnight, was clearly an indication that ownership, use and custody, were material factors in the defendant's determination of the claimant's application for insurance.

[81] Regarding the evidence of Ms. Jarrett, counsel for the claimant submitted that proof of materiality should have been adduced through expert evidence. Noting that Ms. Jarrett was not appointed as an expert under the Civil Procedure Rules counsel submitted that her evidence should be viewed as self-serving and subject to very narrow consideration. In support of this position reference was made to Chitty on Contracts, 26th Edition Vol. 2 Para. 4228 which states:

> Materiality is a question of fact, but it has long been the practice to adduce expert evidence on the point from insurers.

[82] While Ms. Jarrett was not formally designated an expert, there is no disputing her over 25 years of experience and her position as a senior underwriter in the defendant company. The court always has to be alive to the possibility of self-serving evidence. However, it should be remembered that as indicated in ***Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Ltd***., the best evidence of inducement would come from the actual underwriter who could be potentially open to even more strident suspicions of bias than another underwriter who did not actually write the business. The concern is however misconceived. Both the claimant and the defendant, as in all litigation, have the interest to serve that they represent. The risk in this type of case is no greater than in any other case. The court is perfectly able to give due weight and consideration to the evidence of all the witnesses having regard to all the circumstances.

[83] In light of the evidence of Ms. Jarrett which I accept, I have concluded that viewed objectively, the misrepresentations/non-disclosures outlined at paragraph 76 were material. In fact, in respect of the issue of custody and control, counsel for the claimant conceded that if the court found that the claimant had relinquished custody and control of her motor truck to the Lees, that would qualify as a material fact, in respect of which there had been a misrepresentation.

[84] Counsel for the claimant however submitted there was a final subjective hurdle that the defendant had not overcome. Counsel contended that the defendant had not discharged the onus of establishing that the material misrepresentations/non-disclosures by the claimant at the time of completion of the Proposal Form, actually induced the defendant to offer the policy on the terms that it did.

[85] Counsel referred to the evidence of Ms. Jarrett who stated at paragraph 9 of her witness statement that:

> Though the broker department of the branch will give the broker advice as to the likely acceptability of the risk, the final determination is left for the underwriter who must consider each new business proposal and authorize coverage.

[86] She continued at paragraph 10 to indicate that the risk in question was underwritten by Ms. Ingrid Thompson, the Underwriting Manager for the defendant at the time, who was now working in the Turks and Caicos Islands.

[87] Counsel noted in her submissions that Ms. Jarrett accepted that one would be unsure what the client/ assured had in mind when s/he indicated on the proposal form that the vehicle in question would be used for "business purposes" and that the company would usually take steps to ascertain what was meant by this. She highlighted that Ms. Jarrett was unable to say whether any steps had been taken by Ms. Thompson to seek clarification.

[88] Counsel then advanced that Ms. Jarrett evidence should not be accepted by the court as proof of inducement of the defendant by any misrepresentation or non-disclosure of the claimant on the Proposal Form as that evidence was hearsay and inadmissible. She cited dicta of Colman J in ***North Star Shipping Ltd. & Ors. v Sphere Drake Insurance plc and Ors***. [2005] EWHC 6, where on the issue of inducement he said at para 254:

> In evaluating the underwriters evidence it is importance to keep firmly in mind that all their evidence is necessarily hypothetical and that hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interests of the party on whose behalf it is given. It is very easy for an underwriter to convince himself that he would have declined a risk or imposed special terms if given certain information. For this reason, such evidence has to be rigorously tested by reference to logical self-

> consistency, and to such independent evidence as may be available.

[89] The submissions of counsel for the defendant however apprehended none of the evidential difficulties raised by counsel for the claimant. Relying on ***Pan Atlantic Insurance Co. Ltd and Another v. Pine Top Ltd*** counsel submitted that the court was entitled to draw the inference that the defendant was induced to enter the contract on the basis that had the claimant disclosed and/ or represented that the vehicle would be used for hire it would have either refused to accept the risk or would have accepted it only at a significantly higher premium.

[90] Further counsel argued that once this presumption is raised the evidential burden shifts to the claimant to show that the defendant was not in fact induced to accept the risk on the terms that it did [per Brooks J. in ***Hillary Smith - Thomas v Insurance Company of the West Indies Limited*** (supra) citing Rix, L.J. in ***Drake Insurance plc v Provident Insurance plc***. This evidential burden counsel argued had not been discharged.

[91] Counsel for the defendant also pointed out the evidence of Ms. Jarrett at paragraph 38 of her witness statement where she stated that the Commercial policy which was issued does not permit the hiring out or renting out of the vehicle to another by the insured, and at paragraph 39 that if the claimant or her brokers had advised ICWI that she intended to hire the vehicle out for use in connection with other people's business, ICWI would have considered the intended use to be the rental of the vehicle, and would not have accepted the risk.

[92] Relying on ***St. Paul Fire & Marine Insurance Co. UK Ltd. v McConnell Dowell Constructors Ltd.*** where in the absence of the actual underwriter the presumption of inducement was established through evidence from other underwriters that the actual underwriter would have been induced,

counsel submitted that the evidence of Ms. Jarret was sufficient in that regard.

Analysis

[93] It should firstly be noted that paragraph 39 along with paragraphs 26, 27, 28, 30, 31, 32, 37, 44 of the witness statement of Ms. Jarrett were not received in evidence in proof of the truth of the assertions they contained in relation to the alleged misrepresentations or non-disclosures of the claimant, but based on the fact that the information they contained informed the decision of the defendant to deny the claimant indemnity.

[94] I accept the authorities cited by counsel for the defendant concerning the inferences of inducement that may be drawn from material misrepresentations or non-disclosures and the shifting of the evidential burden once that inference has been raised. I also find that the case of ***St. Paul Fire & Marine Insurance Co. UK Ltd. v McConnell Dowell Constructors Ltd*** is applicable to this situation and therefore the evidence of Ms. Jarrett was capable of and did raise the presumption of inducement though she was not the actual underwriter who sold the policy to the claimant. The presumption of inducement in relation to the material misrepresentations earlier identified having been adequately and sufficiently raised by the defendant, that presumption has not been rebutted by the claimant.

[95] As a consequence, I therefore find that the defendant was induced to enter the insurance contract with the claimant on the basis of material misrepresentations and non-disclosures, in the absence of which the defendant would not have entered into a contract with the claimant or if it did it would have been on different terms. Accordingly, the defendant is entitled to avoid the contract.

ISSUE B: Is the claimant in breach of warranty of the contract by providing untrue responses to the questions of:

i. **The intended use of the truck in her business**

ii. **Where the truck was to be garaged**

[96] It is common ground that the claimant signed to the following clause at the foot of the Proposal Form:

> I/WE 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(s) above referred to is/are in good condition and undertake that the 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 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 agree to accept.

[97] Counsel for the claimant submitted that the claimant was at all material times truthful and accurate in the answers she provided. However in light of my findings of material misrepresentations and non-disclosures in relation to sub-issues b (i) and (ii) that argument naturally fails.

[98] Counsel for the defendant firstly relied on the case of ***Insurance Company of the West Indies Limited v Abudulhadi Elkhalili*** At page 18 of that case Harrison JA stated that:

> [T]he declaration at the foot of the proposal form which made it clear that the statements were true, and that the declaration formed the basis of and is considered as incorporated in the policy made the truth of the statements a condition precedent to the liability of the insurer. The respondent (defendant) by signing the proposal form signified his agreement to it. It is also abundantly clear that where the truth of the statements were made the basis

> of the contract, it was unnecessary to consider whether the fact inaccurately stated was material or not, or whether the applicant knew or did not know the truth. See Condogianis v Guardian Assurance Co [1921] 2 AC 125.

[99] This case therefore establishes the proposition that where the truth of statements are made the basis of the contract, it is unnecessary to consider whether, the fact inaccurately stated was material or not, or whether the applicant new or did not know the truth.

[100] Counsel also cited **MacGillvray on Insurance Law** 10th edn. Pg. 224 at para 10-3 where it was stated that:

> The essential characteristics of a warranty are briefly these:
>
> (i) it must be a term of the contract;
>
> (ii) the matter warranted need not be material to the risk;
>
> (iii) it must be exactly complied with;
>
> (iv) a breach discharges the insurer from liability on the contract notwithstanding that the loss has no connection with the breach or that the breach has been remedied before the time of the loss

[101] The effect of a breach of warranty was also highlighted in another case relied on by counsel for the defendant. In ***HH Casualty & General Insurance Ltd v. New Hampshire Insurance Co.*** [2001] 2 Lloyds Report 161 where at pages 184-185, para. 122 Rix LJ said:

> [I]t is well established that a breach of warranty produces an automatic discharge of the contract of insurance from the moment of the breach… once this is appreciated it becomes readily understandable that if a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach or warranty for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer. This moreover reflects the fact that the rationale of warranties in

> insurance law is that the insurer only accepts the risks provided that the warranty is fulfilled. This is entirely understandable and it follows that the immediate effect of a breach of a promissory warranty is to discharge the insurer from liability from the date of the breach.

[102] From the outline of the law above, I find that the two sub-issues specifically highlighted, satisfy all the criteria for the establishment of a breach of warranty. Counsel for the defendant submitted, and I accept, that the intended use of the vehicle was clearly a term of the contract as the claimant responded in the affirmative to the question, *"Do you accept that this policy will only provide cover for the permitted use of the vehicle specified above?"* The claimant's misrepresentations as to the intended use of the truck in her business and where the truck would be garaged I have found were both material to the risk undertaken by the defendant company, though they need not have been material for the breach of warranty to be established. Therefore the evidence accepted by the court actually exceeds the criteria necessary for the establishment of a breach of warranty. The identified misrepresentations singly and together amount to a breach of the warranty created by the basis of contract clause. As the legal principles dictate, the result is the automatic discharge of the defendant company from liability under the policy.

ISSUE C: Is the claimant in breach of the terms of coverage of the policy?

Sub-Issue (c) (i): Was Mr. Gregory Gray an authorized driver for the claimant's Motor truck under the subject policy at the material time?

[103] The case of ***Melanesian Mission Trust Board v. Australian Mutual Provident Society*** (1997) 74 P. & CR. 297, relied on by counsel for the defendant established that when construing a clause in a formal document, when ordinary words are used the intention of the parties is to be discovered from the ordinary meaning of the words. Both in

Melanesian Mission and in ***R & R Developments Ltd. v. AXA Insurance UK Plc*** [2009] EWHC 2429 also cited by counsel for the defendant it was stated that unless there was ambiguity there was no need to apply any rules of interpretation geared towards resolving ambiguities.

[104] On the proposal form the claimant indicated that open driving coverage was required but the regular drivers of the vehicle would be Gregory Gray and Jeffery Lee.

[105] As it relates to authorized drivers under the subject insurance policy, the relevant part of Clause 5 of the Certificate of Insurance states as follows:

> Persons or classes of persons entitled to drive
>
> Any person except Pauline Cole provided he is in the Policyholder's employ and is driving on her order or with her permission… Excluding Drivers under 25 years and Drivers with a licence for less than 3 years (driving a similar vehicle).

[106] The words used are clear and unambiguous and as recognised by counsel for the claimant, the only matters for resolution under this sub-issue was whether at the material time, Mr. Gray was within the employ of the claimant and was driving on her order or with her permission.

[107] It is the claimant's evidence that she did not handle the management of the Motor Truck per se, as she was otherwise employed and knew nothing much about the haulage business. Instead, she entrusted management to her son-in-law Mr. Courtland Wilson to act as her agent at all material times. The claimant at paragraph 11 of her witness statement indicated that after discussing the matter with Mr. Wilson she instructed Mr. Wilson to employ Mr. Gregory Gray to drive the truck and he was paid out of the moneys which Mr. and Mrs. Lee would have paid her for operating the

said Motor Truck under the contract which they had with the National Bakery Company ("NBC").

[108] Mr. Wilson's evidence was to the same effect, also noting that at all material times, he was aware of the operations of the truck such as when it was in transit. He further stated that there was really no need to instruct Mr. Gray where to go on a day to day basis because there were only two set locations where Mr. Gray would have gone to collect and deliver the baked goods in Kingston and Montego Bay respectively. The evidence of Mr. Gray was also that his employer was the claimant who paid him through the Lees who were merely the overseers of the truck.

[109] Counsel for the defendant however maintained that Mr. Gray was in the employ of the Lee's. In seeking to establish that claim, counsel for the defendant firstly vigorously challenged Mr. Gray based on a statement that he had voluntarily given to the investigator and signed. He having denied making certain statements two exhibits were received in evidence relevant to the question of his employment.

> Exhibit #13:
> *At the time of the accident I was working for Lee's Trucking Company Limited.*
>
> Exhibit #15:
> *I also called my boss and informed her of the accident and they came down the following morning.*

Exhibit 15 is relevant as there was uncontested evidence that Ms. Cole never went to the scene of the accident, whereas the Lees did.

[110] Counsel for the defendant urged the court to reject the *viva voce* evidence of Mr. Gray and accept the contents of his statement admitted as exhibits as true, noting that the statement was made to the investigator shortly after the accident when there were no demands of litigation and when he was not summoned by any party to attend court to give evidence. The

exhibits having been received in evidence I accept their contents as true and in proof of the facts they state pursuant to section 31I.

[111] The second challenge to the claimant's case and Mr. Gray's *viva voce* evidence that he was in the employ of the claimant, was by reference to exhibit # 12. This is a Continental Baking Company Limited delivery voucher dated March 24, 2006, where G. Gray is stated as the name of the driver delivering goods for National to Mo-Bay. This is significant as the date of that voucher being prior to the date of the commencement of the insurance contract between the claimant and the defendant it lends credence to the view that Mr. Gray was employed to the Lees from before he started to drive the claimant's truck.

[112] Counsel for the defendant also highlighted that in the statement of Marie Lee she indicated that "Gregory Gray is one of my driver at the time he was driving Ms. Cole's Truck." Due regard having been paid to the fact that Mrs. Lee was not tested by cross-examination and I was therefore unable to assess her demeanour, I nevertheless find I can place some weight on that statement especially as the assertion that Mr. Gray was one of her drivers is supported by the contents of exhibit 12.

[113] Considering all this evidence, while Mr. Gray was clearly driving with the claimant's permission, I find that Mr. Gray was not employed to the claimant, but rather to the Lees and hence was not authorized to drive the claimant's truck under the terms of her insurance policy, thereby taking the accident outside of the terms of coverage.

Sub-issue c (ii) Was the claimant's Motor Truck used in contravention of the insurance policy in that it was not used by the claimant in connection with her business but was hired out to another for use in connection with their business?

[114] The policy taken out by the claimant expressly excluded liability whilst the vehicle was being used otherwise than in accordance with the Limitations as to Use.

[115] This sub-issue was extensively traversed during the discussion and analysis under sub-issue a (iii). Nothing further needs to be said in that regard, it having been already established then that the claimant's Motor Truck was not used by the claimant in connection with her business, but was hired out to another for use in connection with their business. The claimant's Motor Truck was therefore used in contravention of the insurance policy thereby on that basis also taking the accident outside of the terms of coverage.

ISSUE D: By virtue of Condition 9 of the Policy of Insurance, should the claimant be deemed to have abandoned her claim?

[116] Condition 9 states in part that:

> If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereafter.

[117] The claimant remained adamant throughout the trial that she was totally unaware of the letter dated February 8, 2008 ("Exhibit 9") the purpose of which was to put her on notice that the defendant would not indemnify her in relation to the subject accident and by which condition 9 would be engaged. This letter was submitted to the brokers under cover letter dated

February 11, 2008 (Exhibit 8). The claimant however maintains that this was not proper service as Condition 7 of the policy stated that the defendant may cancel the Policy by sending ten days' notice by post to the insured's last known address. Counsel submitted that while the letter had the last known address, as it was sent through the broker, she was not properly notified of the repudiation of the policy by the defendant. Consequently, counsel maintained the defendant was estopped from raising Condition 9 as the claimant was never properly served with the proper notice to cause Condition 9 to be properly invoked

[118] The defendant on the other hand maintained that, as the claimant admitted in evidence the accepted and established method of conveying information between herself and the defendant was by way of her broker, hence she was properly served and condition 9 was properly invoked.

[119] In the case of ***Hopeton Wilson v National Employers Mutual General Insurance Co. Ltd.*** CL W 288/76 and ***Henry v UGI*** 2005 HCV 05420 judgment delivered May 29, 2009, relied on by the defendant, the issue of the appropriateness of service on the insured by service on the insured's broker was considered. The case noted that the brokers in question were agents of the insured and not of the insurance company. At page 5, Gordon J (as he then was), noted that:

> This is settled law and is clearly stated in 22 Halsbury's Laws of England (3rd Edition) 201 paragraph 382.
>
> > "If a person wishing to obtain insurance of a non-marine character employs and insurance broker, as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the proposer for the acts and omissions of the broker".

[120] In light of this authority, I am not persuaded by the highly technical objection raised by the claimant concerning service. The purpose of service is to bring important matters to the attention of the person served. The claimant's broker Thwaites Finson Sharp was the claimant's agent,

and the method of service on the claimant through service on the broker was accepted by the parties through the course of dealings between them. There being an acknowledged method of service through the broker, that was the natural way to ensure that the information came to her attention. There is no indication that she changed brokers.

[121] I therefore find that despite the fact that the letter wasn't sent directly to her as contemplated by condition 7, the method of service used was acceptable. In any event, the claimant obviously became aware of the defendant's position as this claim was filed on July 15, 2011. Therefore, even if condition 9 was not triggered by the letter of February 8, 2008, by the time the claim was filed the procedures contemplated by condition 9 would by then certainly have been activated.

[122] The claimant did not confine her challenge to the application of condition 9, on the issue of service. In the alternative, the claimant argued that the defendant having submitted to the jurisdiction of the court, cannot now successfully maintain that the claimant had abandoned her claim because she did not pursue arbitration within the time stipulated by condition 9.

[123] For her part, counsel for the defendant maintained that the claimant having not referred the dispute concerning liability to arbitration within the time limited by condition 9 of the policy, was deemed to have abandoned her claim and was now barred from pursuing it. Counsel relied on ***Hopeton Wilson v National Employers Mutual General Insurance Co. Ltd.*** and ***Henry v UGI*** as well as ***ICWI v Dalvester Wray*** Suit No. C.L. 2000 I-051 judgment delivered January 18, 2002.

[124] In ***Hopeton Wilson,*** the contract of insurance contained a condition in the same terms as condition 9 in the instant case indicating reference to arbitration where the insurance company disclaimed liability. The defendant insurance company erroneously sought to avoid the contract of insurance on the basis that the plaintiff had left the fire damaged house

unoccupied in breach of one of the terms of coverage. Despite the fact that the court found on the facts that the defendant insurance company had acted on a wrong premise since the house had not been unoccupied, the court held that as the plaintiff had not referred the matter to arbitration within the specified period, he had failed to conform with the terms of the condition, his rights had been determined and he was therefore unable to recover under the policy.

[125] The court also made the point that had the plaintiff filed an action within the time stipulated the defendants would likely have invoked the provisions of section 5 of the **Arbitration Act** 1900 and sought a stay of proceedings.

[126] In ***ICWI v Dalvester Wray,*** the claimant insurance company disclaimed liability to indemnify the defendant whose insured vehicle was involved in an accident on the basis that the vehicle was being used in a manner in contravention of the policy and the terms of the proposal which had been signed by the insured. The insurance company applied for a declaration that condition 8 of the insurance policy, which was in the same terms as condition 9 in the instant case, was legally binding on and enforceable by or against the insured. It was held, applying ***Hopeton Wilson,*** that the expiration of the time limited in condition 8 for the referral to arbitration of disputes arising from a disclaimer without such referral, barred the insured under the policy from bringing any proceedings whatsoever in relation to that claim.

[127] On the authorities outlined, the defendant has to succeed on this point. No issue of estoppel or waiver arises as advanced by counsel for the claimant. The provisions of section 5 of the **Arbitration Act** of 1900 by which a party could apply for a stay of proceedings brought in court, before “delivering any pleadings” or “taking any other steps in the proceedings”, where an arbitration was pending, presupposed that an

arbitration had been commenced within the time limited by the agreement that established arbitration as the means to settle certain disputes arising between the parties.

[128] In the instant situation, there being no possibility of arbitration at the time the suit was filed, it was entirely appropriate and logical for the defendant company to seek to demonstrate all the bases on which it maintained the claimant's action was doomed to fail, including that it was deemed abandoned due to the non-referral to arbitration within the stipulated time. The pursuit of other defences in parallel to the defence based on condition 9, could in no way amount to a waiver of the defendant company's right to assert that by operation of condition 9 and the failure of the claimant to take timely action in accordance with its terms her claim was deemed abandoned.

CONCLUSION

[129] On the basis of the foregoing the court makes the following orders::

(a) Judgment for the defendant on the claim and counterclaim.

(b) A declaration is granted in the following terms:

i. ICWI is entitled to avoid the policy of insurance number CP-156398 issued in the name of the claimant in respect to a Toyota Corolla motor vehicle registered 3045 EZ on the grounds that the said policy of insurance was induced by the misrepresentation and non-disclosure of material facts;

ii. By virtue of ICWI's entitlement to avoid the policy the claimant is not entitled to be indemnified by ICWI;

iii. The said policy of insurance number CP-156398 is also void by reason of breach of warranty of contract by the claimant;

iv. By virtue of Condition 9 of the Policy of Insurance, as the claimant did not refer ICWI's disclaimer of liability to arbitration within the time limited in the condition, she is deemed to have abandoned her claim and is therefore unable to obtain any indemnification under the Policy.

(c) Costs are awarded to the defendant to be agreed or taxed.