JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION

Claim No. 2008 HCV05023

BETWEEN	INSURANCE COMPANY OF THE WEST INDIES LIMITED	CLAIMANT
AND	MALVIE GRAHAM	DEFENDANT

Ms. Camille Wignall instructed by Nunes, Scholefield De Leon and Co. for the Claimant.

Mr. Orane Nelson instructed by K. Churchill Neita and Co. for the Defendant.

Heard : 11th March, 22nd October 2010.

Mangatal J:

1. This is an application by the Claimant I.C.W.I. seeking the following relief:

    1) A declaration that it is entitled to avoid the Policy of Insurance No. 34031839/1 and to refuse to indemnify the Defendant in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident involving the Defendant's motor vehicle Licence No. 0689 EJ on February 6, 2008, along the Four Path's Main Road, in the Parish of Clarendon, on the grounds of misrepresentation as relates to the insured's use of the vehicle to transport goods in connection with her business and/or non-disclosure of material facts.

    2) A declaration that the Policy of Insurance No. 34031839/1 is void for breach of warranty of contract by the Defendant.

    3) A declaration that the Defendant is in breach of the conditions of the Policy of Insurance, accordingly entitling the Claimant to avoid and/or repudiate same, and to avoid any liability thereunder.

    4) Costs

5) Such further and/or other relief as this Honourable Court deems just.

2. The application is supported by the Affidavits of Gretchen Garriques, sworn to on the 16th and the 29th of October 2009, "the 1st Affidavit", and "2nd Affidavit" respectively. Ms. Garriques is engaged by ICWI as a Court Representative and Marketing Agent and formerly served as ICWI's Claims Manager.

3. The Defendant Ms. Graham was at all material times the owner of a 2001 Toyota Corolla Motor Vehicle Licence Number 0689 EJ in respect to which ICWI issued a private motor car Policy of Insurance No. 34031839 /1 " the Policy".

4. Under the Policy ICWI was not to be held liable in respect of any loss, damage or liability sustained or incurred by its insured, Ms. Graham, whilst the insured motor vehicle was being used otherwise than in accordance with the limitations as to use under the Policy.

5. The Policy Schedule indicated that Ms. Graham's motor vehicle was to be used for social, domestic and pleasure purposes only and not for, amongst other things, the carriage of goods in connection with any trade or business. A Certificate of Insurance was issued by ICWI to Ms. Graham, setting out the terms of the coverage provided.

6. Ms. Graham applied for this insurance coverage by completing and submitting a Proposal Form to ICWI on October 3rd 2006. ICWI maintains that the Policy and Certificate of Insurance were issued on the strength of the representations made in the Proposal Form.

7. The Proposal Form:

   a). Warranted that all the statements and particulars contained in it are true;
   b). Agreed that the Proposal Form was to be the basis of the Contract of Insurance between I.C.W.I. and Ms. Graham; and
   c). Declared that the agreed facts and relevant information were disclosed in it.

8. It was also a term of the Policy that the truth of the statements and answers to the questions in the Proposal Form were conditions precedent to any liability on the part of I.C.W.I. to make payment under the Policy.

9. I.C.W.I's position is that in completing the Proposal Form Ms. Graham represented that her motor vehicle was to be used solely for social, domestic and pleasure purposes and not for the transport of goods in connection with her business. Further, the question on the Proposal Form as to the use of the motor vehicle is a material one as the response serves as a guide to ICWI in determining whether to accept the risk of insuring the particular vehicle, and if so, at what premium.

10. ICWI asserts that it was on the faith of the Proposal Form and in reliance on the truth of the statements contained in it that the Policy was issued for the period October 3, 2006 to October 2, 2007 and renewed for October 8, 2007 to October 7, 2008.

11. On or about February 8, 2008, Ms. Graham reported to ICWI that her motor vehicle was involved in an accident along the Four Paths Main Road, in the Parish of Clarendon on February 6, 2008.

12. After receiving the report, ICWI instructed Detect Investigations Company Limited to carry out investigations into the circumstances surrounding the accident and the use of the vehicle prior to, and at the same time, as the occurrence of the accident.

13. In her Affidavit, Ms. Garriques indicates that she is advised and verily believes that investigations, which included an interview with Ms. Graham, revealed that Ms. Graham was the operator of a shop which sold grocery and clothing and during the currency of the Policy, she caused and/or permitted her motor vehicle to be used routinely to transport goods in connection with her business. A copy of the typed version of this Statement by Ms. Graham dated March 18, 2008 is exhibited to the 1st Affidavit and the signed, handwritten Statement is exhibited to the 2nd Affidavit.

14. Ms. Garriques states that, in the circumstances, she verily believes that Ms. Graham's vehicle was being routinely operated in a manner contrary to the terms of the Policy issued by ICWI and that Ms. Graham was accordingly in breach of the conditions of the Policy.

15. Ms. Garriques also states that she believes that Ms. Graham's responses to the questions on her Proposal Form as to the use of her motor vehicle amount to misrepresentation of and non-disclosure of material facts in that she:

    (i) Falsely represented that her motor vehicle would be used for social, domestic and pleasure purposes only;

    (ii) Failed to disclose that her motor vehicle would be used for purposes other than social, domestic and pleasure;

    (iii) Failed to disclose that her motor vehicle would be used for the transport of goods in connection with her business.

16. ICWI claims to be entitled to avoid the Policy and to refuse to indemnify Ms. Graham in respect of any loss, damage, expenses or claims from third parties arising out of the accident on February 6 2008 on the grounds of misrepresentation and/or non-disclosure of material facts, pursuant to Section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act.

17. Further, ICWI asserts that Ms. Graham's misrepresentation and non-disclosure amounts to a breach of her warranty as to the truth of the statements and particulars contained in the Proposal Form and that this breach renders the Policy void.

18. As a result of these alleged misrepresentations, non-disclosures and breaches of warranty, ICWI claims that it is entitled to avoid the Policy issued and accordingly is not liable to satisfy any claim whatsoever in respect of the accident involving Ms. Graham's Toyota Corolla motor vehicle registration No. 0689 EJ on February 6, 2008.

19. No Affidavit has been filed on behalf of Ms. Graham and the basic facts do not appear to be in issue. Indeed, at the first hearing of this Fixed Date Claim on the 27th of April 2009, Straw J. made the following order:

i. The issues which fall for consideration and determination herein are as follows:

a. The facts as alleged in the Affidavit of Gretchen Garriques being unchallenged, are these sufficient to have the Policy of Insurance avoided for misrepresentation and/or non-disclosure of material facts pursuant to section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act?

b. If the Court finds that there has been misrepresentation and/or non-disclosure by the Defendant, has the Defendant breached her warranty as to the truth of the statements and particulars contained in the Proposal Form thereby rendering the Policy void?

Further and/or in the alternative:

c. If the Court finds that there has been no misrepresentation and/or non-disclosure by the Defendant has the Defendant breached the conditions under the Policy of Insurance as to the Limitation of use thereby entitling the Claimant to avoid liability under the Policy of Insurance?

20. In their submissions, ICWI's lawyers refer to the position at common law where it has long been established that an insurance contract is a contract *uberrimae fidei;:* it is a contract based on utmost good faith, and if the utmost good faith is not observed by either party the contract may be avoided by the other. Reference was made to our Court of Appeal's decision in **Abdulhadi Elkhalili v. Insurance Company of the West Indies** S.C.C.A. No. 90 of 2006, delivered December 19, 2008.

21. The submission continues that, sub-section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act, codifies this common law position. The sub-section, so far as relevant, 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, quite 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 a 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.

22. Ms. Graham was asked the following in the Proposal Form:

> *(c) Will the motor vehicle be used solely for social, domestic and pleasure purposes including transit to and from work?....*
> *If no, will the motor vehicle also be used for:*
>
> *(3) The transport of goods in connection with your business?"*

23. Ms. Graham responded "yes" to the question as to whether the vehicle would be used solely for social, domestic and pleasure purposes, and "no" to that as to whether it would be used for the transport of goods in connection with her business.

24. It should be noted that, in addition to the matters which the 1st Affidavit highlights with regard to Ms. Graham's statement to the investigator, Ms. Graham also indicated that at the time of the accident on the 6th February 2008, her vehicle was being used for a purpose which would constitute social, domestic and pleasure purposes, as she states that she was a passenger in her vehicle and had left her home in Westmoreland and was heading to Kingston to visit relatives.

Issue a. Are the facts as alleged in the Affidavit of Gretchen Garriques sufficient to entitle the Claimant to avoid the Policy of insurance for misrepresentation and/or non-disclosure of material facts pursuant to section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act.

25. In their written submissions, ICWI's Attorneys submit, amongst other matters, that Ms. Graham's responses were false and would as such amount to a misrepresentation or non-disclosure. Ms. Wignall submits that on the unchallenged evidence presented the Claimant must be held to have established that the responses were untrue.

Issue (b). Does the misrepresentation and/or non-disclosure on the part of the Defendant amount to a breach of her warranty as to the truth of the statements in the Proposal Form and does this breach render the Policy void?

26. The Proposal Form completed and submitted by Ms. Graham in applying for insurance coverage from ICWI contains the following declaration:

I/WE HEREBY DECLARE that all the above Statements and Particulars are true…I/WE hereby agree that this Proposal and declaration shall be the basis of and be considered as incorporated in the policy to be issued hereunder which is in the ordinary form used by THE INSURANCE COMPANY FOR THE WEST INDIES LIMITED for this class of insurance which I/we agree to accept.

27. Ms Wignall submits that in addition it was a term of the Policy which was issued in reliance on the Proposal Form that the truth of the statements and answers to the questions in the Proposal Form were conditions precedent to any liability on the part of ICWI to make payment thereunder .

28. The submission continues, that in instances where the Proposal Form contains declarations of this nature, the insurer is entitled to repudiate liability under the Policy if any of the statements in the Proposal Form are untrue, quite apart from the right to avoid. Further, the insurer is entitled to exercise this right irrespective of questions of materiality or inducement. The reason for this, according to ICWI, is that such a declaration creates a warranty whereby the truth of the statements in the Proposal Form is treated as a part of or the basis of the contract of insurance. As such, if any of those facts are demonstrated to be false, the contract is treated as discharged from both parties' perspectives.

29. Ms. Wignall referred to and relied upon the decision of the House of Lords in **Dawsons Limited v. Bonnin** [1922] S.C. (H.L.) 156, 2 A.C. 413. In that case the Claimant was seeking indemnity under a Policy of insurance issued by the Defendant in respect to its motor vehicle which was destroyed by fire. The Defendant refused indemnity on the basis

that there was a misstatement in the Proposal Form completed on the Claimant's behalf as to where the vehicle would be garaged. The Proposal Form was completed by the Defendant's agent, and he was the one primarily responsible for the misstatement. In addition there was evidence to suggest that the misstatement was not material.

30. However, the policy contained a recital that the Proposal Form should be the basis of the Policy of insurance. On the strength of this the Defendant successfully argued that this recital imported a warranty that the statements in the answers to the Proposal Form were true, and in law, the contract was avoided if any of these statements were untrue, whether the matters were material or not.

31. ICWI's Attorneys quite perceptively have chosen to make the point that, in dismissing the Claimant's appeal, the House indicated little sympathy for the position taken by the insurers, but nevertheless acknowledged that the law must be followed.

32. See also Good Faith and Insurance Contracts, 2nd Edition, para. 9.17, page 223 and **Unipac (Scotland) Ltd. v. Aegon Insurance Co. (UK) Ltd.** [1996] C.L.C. 918. These principles were also endorsed by our Court of Appeal in **Elkhalili v. ICWI** . The cases additionally make it clear that the word "warranty" does not have to be used in the declaration for it to have that effect.

33. ICWI therefore submits that the declaration at the end of the Proposal Form in the instant case constitutes a basis of contract clause which created a warranty on the part of Ms. Graham that the statements in the Proposal Form were true. As such Ms. Graham's untrue response to the questions relating to the use of the motor vehicle amount to a breach of that warranty, and ICWI is entitled, without more, to avoid liability under the Policy accordingly.

Issue c. If there has been no misrepresentation and/or non-disclosure of material facts on the Defendant's part, has she breached the conditions under the Policy as to limitations of use thereby entitling the Claimant to avoid liability for the accident in which she was involved?

34. Ms. Graham in the Proposal Form stated that her motor vehicle would be used solely for social, domestic and pleasure purposes including transit to and from work. She also responded in the affirmative to the question of whether or not she accepted that the Policy would provide coverage for only the permitted use as specified by her. Ms. Wignall submits that on the strength of that, the Policy was issued to her with a condition limiting coverage to use for social, domestic and pleasure purposes only, and to exclude among other things use for the carriage of goods or samples in connection with any trade or business.

35. Ms. Wignall's submission is that in the light of the actual question posed in respect to the use of the vehicle, the inclusion of the basis of contract clause in the Proposal Form, and the Limitations as to Use as stated on the Certificate of Insurance, it is clear that Ms. Graham's response amounted to a warranty that her motor vehicle would be used for social, domestic and pleasure purposes exclusively, and for no other purposes. It was for that reason that coverage was limited to such user alone.

36. Ms. Wignall submitted that Ms. Graham is in breach of the Policy condition in that regard, and ICWI is entitled to avoid liability under the Policy accordingly.

<u>The Defendant Ms. Graham's Submissions in Response</u>

Issue a - Whether Misrepresentation or Non-Disclosure.

37. In relation to the question of whether there was any misrepresentation by Ms. Graham, Mr. Nelson submitted that the answer/statement by Ms. Graham in the Proposal Form, that the motor vehicle would "not be used for business purposes...[or] the transport of goods in connection with [her] business", amounted not to a statement of fact

that was existing at the time of the execution of the Proposal Form, rather, that answer was a statement de futuro. Her answer falls within the category of a statement as to the intention of Ms. Graham at the material time.

38. Mr. Nelson therefore submitted that there could not have been any non-disclosure on the part of Ms. Graham because the answer given amounted to a statement of intention and not actual fact. Mr. Nelson further submitted that non-disclosure depends on the existence of facts:

(i) Within the knowledge of the 1st Party; and not known or deemed to be known by the 2nd party, and
(ii) Calculated, if disclosed to him, to induce the 2nd party either not to contract at all or else not to stipulate for better terms.

39. It was submitted that the criteria to found non-disclosure, does not exist in the instant case. Mr. Nelson submits that ICWI have the legal and evidentiary burden of proving that there was "suppression of material fact or the representation of the alleged fact by word or conduct influenced the judgment of the [said] prudent insurer in determining whether the risk should have been undertaken ; and that up to when the contract was concluded the insured had not repented with a view to speaking the truth" as per Justice Parnell at page 57 of Central Fire and General Insurance Company Limited v. Perrin (1977) 16 J,L,R, 51. Mr. Nelson submits that, save for the bare averment in Ms. Garriques Affidavit, there is no evidence coming from ICWI to establish that Ms. Graham calculated to prevent ICWI from contracting on better terms. ICWI has offered no evidence as to whether it would have taken the risk, what premium it would have taken it at, and on what conditions.

Issues b and c –Warranty or Description of Risk

40. With regard to this issue, Ms. Graham's Attorneys concede that the limitation as to use of the motor vehicle does stipulate that "the Policy

does not cover use ...for...the carriage of goods or samples in connection with any trade or business".

41. Mr. Nelson submits, however, that that term of the contract does not employ sufficiently unambiguous wording to make it a condition precedent to the insurer being liable to indemnify Ms. Graham. Rather, he submits that the said term is a term descriptive of the risk covered by the contract and as such is a suspensive condition. He submits that the effect of the contractual term is to avoid the insurer being liable to indemnify Ms. Graham while the promise is being broken. Accordingly, once the event and/ or occasion relating to the breaking of the promise passes then the insurers' liability returns in respect of any risk that occurs thereafter.

42. Mr. Nelson relies on the fact that in her statement, Ms. Graham indicated that she was heading to Kingston to visit relatives. He submits that the suspensive condition would not be in force at the material time, and therefore that ICWI was at the time of the collision, liable to indemnify Ms. Graham.

43. Mr. Nelson further submits that a limitation as to user of the insured motor vehicle does not come within the category of instances where a Policy may be avoided and/or cancelled because the condition is only a suspensive one. Mr. Nelson relies upon the Court of Appeal's decision in Administrator General v. National Employers Mutual Association Limited (1988) 25 J.J.R. 459, in particular, the dicta of Forte J.A. (as he then was) at page 464 where he made the observation that "if a vehicle was being used for a purpose not permitted by the Policy of insurance then it was not insured, and consequently there would be no valid Policy of insurance. Instances to which the reference of avoidance and cancellation may be found are (i) in the provisions of section 18(3) where an insurer may seek a declaration that he is entitled to avoid the Policy for misrepresentation or, non-disclosure; and (ii) for breaches of conditions stated in the Policy, as opposed to limitation of

user placed on the vehicle in respect of liability". Reliance is also placed on the decision in Farr v. Motor Traders Mutual Society [1920] 3 K.B. 669 and on Roberts v. Anglo-Saxon Insurance Company (1927) 27 Lloyd's Rep. 313 and on Provincial Insurance v. Morgan [1933] A.C. 240.

RESOLUTION OF THE ISSUES

Issue a. - Are the facts as alleged in the Affidavit of Gretchen Garriques sufficient to entitle the Claimant to avoid the Policy of Insurance for misrepresentation and/or non-disclosure of material facts pursuant to section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act.

44. In my view, this is a very difficult case. It has been partially made so because I have had to determine a number of aspects of the matter, including state of mind and intention, simply on "paper" evidence, without cross-examination taking place or my seeing any witnesses. This is not a desirable situation. The Defendant Ms. Graham has, however, chosen not to file an Affidavit in response, and so I have to conclude that the matters in the 1st and 2nd Affidavit of Ms. Garriques are unchallenged. This includes her statement that Ms. Graham's motor vehicle was being routinely used to transport goods in connection with her business. (My emphasis).

45. In my judgment, based upon the bare evidence before me, I find as a fact that Ms. Graham did not at the time of answering the questions on the Proposal Form, represent the true facts as the duty of utmost good faith required her to do. She did not indicate to the insurer, as she ought to have done, that she intended to use the vehicle to transport goods in connection with her business. Question (c) (3) specifically posed this question, and Ms. Graham answered it in the negative. I have pondered this matter long and hard, because it is my view that the Statement of Ms. Graham by itself, (I have considered the original statement exhibited to the 2nd Affidavit), where she states that "I used it (the vehicle) to help in the business to carry the goods I purchase",

would not have provided sufficient evidence upon which I could conclude that the vehicle was routinely used for purposes outside those permitted under the Policy because there was no information as to the regularity and frequency of such use. However, Ms. Graham has not contested Ms. Garriques' averments in the 1st Affidavit that Ms. Graham routinely used the vehicle for transporting goods in connection with her business. Nor indeed, has there been any challenge to Ms. Garriques allegation that Ms. Graham falsely represented that her motor vehicle would be used for social, domestic and pleasure purposes only, and that she failed to disclose that her vehicle would be used to transport goods in connection with her business. So that evidence stands.

46. To be actionable as a misrepresentation it must be a statement as to present or past fact and not de futuro. As stated at paragraph 16-43 of MacGilvray on Insurance Law, 10th Edition, : "If the applicant makes a representation de futuro relating to something within his control, it may very well be upon its true construction an expression of his then existing intention to see that something shall be done without amounting to a promise that it will be realized. It is then not a representation as to the future at all but a representation of present intention, and it will be a misrepresentation in law only when it is shown that the applicant never entertained the intention which he represented himself as having. The only statement of fact involved in a statement of intention is that the stated intention is currently present in the mind of the applicant. It follows that a subsequent change of intention or acts done contrary to the expressed intention will not invalidate the Policy." (My emphasis). In my judgment, Ms. Graham's statement was a statement of present intention. On a balance of probabilities, based on the evidence, I have to conclude that Ms. Graham never entertained the intention which she represented herself as having. In her statement to the investigators she indicated that she

had been operating her business for the past 15 years, and therefore she was so engaged prior to the entry into the contract of insurance with ICWI. She indicated that she used the vehicle to transport her business goods and she has not denied that she routinely so used the vehicle.

47. As regards the matter of the type of business that Ms. Graham was involved in, it cannot be said that this was concealed by Ms. Graham. She expressly on the Proposal Form stated her business as being "supermarket proprietor". Even if this was an innocent or negligent misrepresentation, because of the duty of utmost good faith, it can nevertheless affect the validity of the contract of insurance. See **Jester-Barnes v. Licenses and General Insurance Co. Ltd.** (1934) 49 LL L. Rep. at pages 234-235 per MacKinnon J.

48. To be entitled to avoid the Policy under sub-section 18(3) of the Act , the information or facts misrepresented must be material. I accept Ms. Wignall's submission that the replies to the questions as to the use to which the vehicle will be put, are material, and important to the insurers for the purpose of setting premiums and in relation to the terms of the Policy. As discussed in MacGilvray on **Insurance Law** , 10th Edition, paragraphs 17-40, 17-41. the materiality of the issue can sometimes be deduced without the need for evidence on the point. The intended use of the vehicle to my mind falls within that category.

In that regard, I note that Condition 13 of the Policy of Insurance requires the insured to immediately inform ICWI of any change in the use of the vehicle and stipulates that the insured must pay any additional premium required from the date of the notification of the change.

49. The next question that arises is whether the insurer was induced by the non-disclosure or misrepresentation to issue the Policy of insurance on the terms which it did. In **Hillary Smith-Thomas v. ICWI** Unrep.- Claim No. 2006 HCV 01883, judgment delivered 24th November, 2008,

Brooks J. referred to the decision in St. Paul Fire and Marine Insurance Co. (UK) Ltd.v. McConnell Cowell Constructors [1995] 2.Ll L Rep. 116, where the following principle was accepted:

> *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.*

50. In my judgment, the obvious nature of the materiality of answers as to the intended use of the motor vehicle justifies me in inferring that ICWI were induced by Ms. Graham's non-disclosure and misrepresentation to issue the Policy in the terms that they did. This has not been rebutted.

The Policy was renewed for another year, after the initial entry into contract, but the duty to disclose remained in place-see Law Accident Insurance Co. v. Boyd [1942] S.C. 384.

51. In the instant case, I think that it is important to note a number of answers on the Proposal Form. "Will the motor vehicle be used solely for social, domestic and pleasure purposes including transit to and from work?" Answer, "Yes." " If no, will the motor vehicle also be used for:

(1)Business purposes? Answer, No.

(2) Commercial travelling in connection with your vehicle? Answer, No.

(3) The transport of goods in connection with your business? Answer, No.

(4) The transport of goods for reward? Answer, No.

(5) The transport of passengers for reward? Answer, No.

(6) Other.....Answer, No.

(d) If the motor vehicle will be used for (3) or (4) above, give details below:

Answer, Tonnage:..... Description of Goods Carried : Personal effects."

52. Having responded to questions 3 and 4 by saying "No", in other words answering in the negative as to whether the vehicle would be used for transport of goods in connection with the insured's business, or for the transport of goods for reward, it is inconsistent for the insured to have then gone on to answer question (d) by saying that the description of the goods to be carried would be "personal effects". This is because question (d) was on its natural and reasonable construction only to be answered if the answer to question 3 or question 4 was affirmative; answered "Yes". In order to properly construe the questions and answers on the Proposal Form, they must be looked at in their entirety, and contextually. I have found the discussion of these principles in McGilvray on Insurance Law, at paragraphs 16-30, " Assured must be consistent in his answers" and paragraph 16-33, "The incomplete answer" , instructive. The learned author makes reference to the authority of **Kealing v. Pearl Ass Co. Ltd.** (1923) 129 L.T. 573:

16-30... ...

where the proposer's answers are obviously inconsistent on their face, as where in an application for life insurance the date of birth and the figure given for the applicant's age at his next birthday are contradictory. If the inconsistency is such as to be self-evident to anyone reading the completed Proposal Form, and yet the insurers issue a Policy and receive a premium without making further inquiry, they must be held to have waived their right to repudiate liability on the Policy on account of incorrect answers or non-disclosure.

16-33... .....

If,....the answer is obviously incomplete and unsatisfactory on its face, the acceptance of the form without making further inquiry may operate as a waiver of the insurer's right to obtain correct answers and full disclosure of material facts. The test must be, ought the form of the incomplete answer put the insurer on his guard? This must be, it is submitted, the explanation of the decision in Perrins v. Marine and General Travellers ((1859) 2 E. & E. 317) , *where the applicant for insurance on his own life was required to state the "name, residence, profession or occupation of the person whose life is proposed to be insured", and he wrote as follows: "I.T.P. Esquire, Saltley Hall, Warwickshire". He was in fact an ironmonger by occupation. The materiality of the concealment was irrelevant; because he had warranted the truth of his answers, and the central issue in the case was therefore whether the answer on its face conveyed the impression that the applicant was not in trade. Cockburn*

C.J. thought the word "Esquire" conveyed the impression that the applicant was not in trade, but the majority of the court thought that the answer did not amount to a statement that he had no occupation, but was on the face of it incomplete. The company had issued a Policy despite receiving this imperfect answer, so it could not avoid the Policy.

53. I have spent some time considering whether ICWI should have been put on its guard by these inconsistent answers and ought as a result, to be disallowed from repudiating liability on the ground of misrepresentation or non-disclosure. However, the point was not argued before me, and in any event, the answer which Ms. Graham gave to the question concerned with the description of goods carried, was "personal effects". Such an answer points more in the direction of social, domestic and pleasure purposes than in the direction of suggesting the carriage of any goods connected to the insured's business.

54. My answer to issue a. is, with some amount of reluctance because the insured does not seem, from her inconsistent answers, to have fully understood the contract, that ICWI is entitled to avoid the contract of insurance on the ground that the insured has failed to disclose and has misrepresented material facts pursuant to Section 18 (3) of the Act. As indicated in **Dawson v. Bonnin**, the law must be applied.

Issue b. - If the Court finds that there has been misrepresentation and/or non-disclosure by the Defendant, has the Defendant breached her warranty as to the truth of the statements and particulars contained in the Proposal Form thereby rendering the Policy of Insurance Void?

55. In instances where the Proposal Form contains declarations such as that discussed at paragraph 26 above, the insurer is entitled to repudiate liability under the Policy if any of the statements in the Proposal Form are untrue, quite apart from the right to avoid. Further, the insurer is entitled to exercise this right irrespective of questions of materiality or inducement. Such a declaration creates a warranty whereby the truth of the statements in the Proposal Form is treated as a

part of or the basis of the contract of insurance. As such, if any of those facts are demonstrated to be false, the contract is treated as discharged from both parties' perspectives.

56. In relation to contracts of insurance a warranty, is tantamount to a condition in any other contract, and a breach of that condition leads to the right of the innocent party to repudiate the contract.

57. The decisions in Dawsons Limited v. Bonnin [1922] S.C. (H.L.) 156, 2 A.C. 413 and of our Court of Appeal in Elkhalili v. ICWI are instructive in relation to this issue.

58. I accept ICWI's submission that the declaration at the end of the Proposal Form in the instant case constitutes a basis of contract clause which created a warranty on the part of Ms. Graham that the statements in the Proposal Form were true. As such Ms. Graham's untrue response to the questions relating to the use of the motor vehicle amount to a breach of that warranty, and ICWI is entitled, without more, to repudiate liability under the Policy on this basis, quite apart from the right to avoid.

Issue c.- Further and/or in the alternative:
If the Court finds that there has been no misrepresentation and/or non-disclosure by the Defendant has the defendant breached the conditions under the Policy of Insurance as to the Limitation of Use thereby entitling the Claimant to avoid liability under the Policy of Insurance?

59. I have in fact found that, on the uncontested evidence provided by ICWI, there has been misrepresentation and non-disclosure. However, I think that it is important to determine what the true nature of the questions and answers relating to the use of the vehicle really are in this case. In particular, it seems to me that the question arises as to whether the statements and answers constitute a warranty/condition or whether they are simply a description of the risk.

60. As stated in the work by Shawcross, 2nd Edition, on The Law of Insurance, at page 433, although the answers by the insured on the

Proposal Form are important for their bearing upon the premiums and terms of insurance, they are also crucial as affecting the uses to which the insured vehicle is intended to and may be put. Almost every motor car insurance Policy contains stipulations by which the risk insured is limited. In relation to the proposer's replies and their relevance to the purposes for which the vehicle may be employed, the learned authors engage in the following useful analysis, at pages 433-438:

Questions and Answers of this nature (as to the limitations as to the use of the motor vehicle) *fall into three classes:*

> *(i) representations as to the subject-matter to be insured;*
> *(ii) definition or description or limitation of the risks to be insured;*
> *(iii) continuous warranties, that is, stipulations the accuracy whereof is made essential to the contract.*

The effect of a question and answer relating directly or indirectly(as by reference to classification) to the user of the vehicle will depend upon whether such statement is to be construed as a representation, or definition of the risk insured, or a warranty.

In the first sense, questions concerning the use to which the vehicle to be insured is to be put can only be answered in accordance with the intentions of the proposer. If therefore, he replies with an honest and genuine statement of his intentions, he fulfils what is required of him and the insurers are not entitled to rely upon some later and different user of the vehicle as constituting a violation of the proposer's duty as a ground for repudiating liability under the Policy.

Wherever the question and answer as to "use" constitutes a definition of the risk insured, the position is different; there the liability of the insurer is limited to risk arising out of that particular user of the vehicle which is covered by the proposer's answer. The mere fact that the vehicle is used subsequently for extraneous purposes, does not entitle the insurer to repudiate liability unless the loss or liability with respect to which the proposer seeks to be indemnified arises when the vehicle is being used for purposes other than those defined in the Proposal Form and Policy. Thus where the question and answer provided the information which is used by the insurers, expressly or impliedly by its incorporation into the Policy under a general provision, as a limitation of the risk insured, the fact that the insured has made some use of his motor vehicle not in accordance with his answer, will not prejudice the validity of the Policy for the future, provided that there has been no failure by the proposer fully and accurately to disclose his intentions as to the use of the motor vehicle in the Proposal Form.

Where, however, the question and answer are read together as constituting a "warranty" the position may be wholly different. There the use of the insured vehicle for purposes other than those disclosed in the answer may constitute a breach of a stipulation going to the root of the contract which, whether it has any bearing upon a loss or liability incurred or not, entitles the insurers to repudiate their liability. It may, on the other hand, amount only to a limitation of risk.

It is, therefore, a matter of importance to differentiate between the various classes of answers according to their effect in the event of non-disclosure or misstatement. In particular, it falls to be considered whether the statement of the proposer as to the user of the insured vehicle binds him not to use it thereafter for any other purpose, and what the effect of his use of the vehicle for such other purpose will be.

In practice this inquiry is simplified by the inclusion of a term in every motor insurance contract either that the answers of the insured shall be of a "promissory nature", or otherwise importing them by way of "conditions precedent" or "bases" into the scope of the contract. The effect of the assured's answer, as to the user becomes, in every case, a question of the construction of the Policy.

61. In Farr v. Motor Traders Insurance Society [1920] 3 K.B. 669, the relevant insurance policy contained a term incorporating the truth and accuracy of the questions and answers on the Proposal Form into the Policy as a basis of the policy. In answer to the question "State whether driven in one or more shifts per twenty-four hours", the insured answered "just one". The insured vehicle, a taxi cab, was afterwards used for a short while for two shifts per twenty-four hours; later when the vehicle was back on one shift an accident occurred. The insurers denied liability, contending that the policy was void. They attempted to repudiate liability upon the ground that this question and answer constituted a term of the Policy, a breach whereof entitled the insurers to repudiate liability. The English Court of Appeal held that the Policy did not become void by reason of the cab having been run in more than one shift, inasmuch as the conditions imposed upon the assured did not amount to a warranty, the assured was entitled to recover from the insurers. It was held that the words should be construed as being words of description and not as warranties.

62. In **Roberts v. Anglo-Saxon Insurance Association** (1927) 27 Lloyds List Law Rep. 313, the assured had made the following answers in the Proposal Form: "State clearly the purposes for which the vehicles will be used?- Commercial. State nature of goods to be carried? Textile." The Policy contained a term warranting the truth of the proposer's answers and declaring them to be the basis of the contract and "promissory in nature". The policy also contained a term "warranted only to be used for commercial travelling." Whilst the insured vehicle was being used for pleasure, it was burned. The insurers repudiated liability on the ground that the vehicle was being used in breach of a warranty under the policy. The matter took the form of a dispute as to an arbitrator's award and whether there was an error of law on the face of the record. However, in the course of the judgment, the Court of Appeal appear to have determined that the answers as to the purposes for which the vehicle was to be used was a description of the risk, and not a warranty. Bankes L.J. stated:

> *In the first place, I do not think we can get away from the words "warranted only". I do not attach undue importance to "warranted", but when I find "warranted" used in conjunction with "only" it seems to me impossible to get away from the conclusion that it is there definitely stated by the parties as a condition that the user of this vehicle shall be only for the purpose indicated.*
>
> *Reading those two answers together with "warranted used only for the following purposes", I think that "used" in the Policy means "to be used". It is "will be used" in question 4, and "to be carried" in question 5, and "used" is quite capable of being interpreted as "to be used". But it is "to be used only". What is the effect of that? Looking myself at the Policy and the declaration, ...it seems to me that that is a promissory declaration as to the risk. "I will insure you in certain circumstances, but only in certain circumstances".*

63. As Shawcross indicates in his work, the question and answer of the assured may be read together as being a warranty. However, it may instead be held that use of the vehicle outside of the stated purposes

amounts only to a limitation of risk and that the insured can recover when the vehicle is being used for the described use, even if it had been used previously for some description not covered..

64. In Roberts v. Anglo-Saxon , Bankes L.J. also expressed the view that:

The true construction of this clause is the construction which was put upon the language of the Policy in the case of Farr v. Motor Traders' Mutual Insurance Society [1920] 3 K.B., 669, namely, that in this class of Policy when persons insert clauses whether described as warranties or whether described as part of the description of the motor vehicle, indicating that the vehicle is to be used in some restricted way, my opinion in that case, and in this case and in similar cases, is and would be that the parties had used that language as words descriptive of the risk, and that, as a result, when the vehicle is not being used in accordance with the description it is not covered; but it does not follow at all that because it is used on some one occasion, or on more than one occasion, for other than the described purpose, the Policy is avoided. It does not follow at all. If the proper construction, on its language, is a description of the limitation of the liability, then the effect would be that the vehicle would be off cover during the period during which it was not being used for the warranted purpose, but that it would come again on the cover when the vehicle was again used for the warranted purposes. ..(My emphasis).

65. In Provincial Insurance Company v. Morgan [1933] A.C. 240, in answer to the questions in the Proposal Form "State (a) the purposes in full for which the vehicles will be used; and (b) the nature of the goods to be carried," the proposer had answered , "(a) delivery of coal; (b) coal."

The Proposal Form contained a signed declaration that it should be deemed of a promissory nature and effect and should be the basis of the contract of insurance to be made. The Policy issued also contained a term making both the faithful observance of its terms and the truth, completeness and accuracy of the statements in the Proposal Form

conditions precedent to the insurers' liability. (My emphasis) On the day in question, the insured used the vehicle for transporting timber. Later the same day, while delivering coal, the vehicle was involved in a collision in which it was damaged and a third party sustained injuries. The insurers repudiated liability on the ground that the answers as to use constituted a warranty admitted breach of which entitled them to repudiate. The Court of Appeal unanimously held that the answers of the proposer constituted nothing more than a description of the risk, and that the liabilities in question having been incurred while coal and only coal was being carried, the vehicle was "on risk" during such period and the insurers were liable under the Policy. The insurers appealed further, and the House of Lords affirmed the decision of the Court of Appeal.

66. Lord Buckmaster stated, at pages 247-248:

> *To state in full the purpose for which the vehicle is to be used is not the same thing as to state in full the purposes for which the vehicle will be exclusively used, and as a general description of the use of the vehicle, it is not suggested that the answer was inaccurate.*
> *I am therefore of opinion that there was no bargain here so as to confine the use of the vehicle to the cartage of coal as to make any occasional use that did not destroy the general purpose of its user a breach of the condition upon which the Policy was based.*
> Lord Wright stated, at pages 251, and 253-254:
> *There can….be no breach involved unless the relevant warranty or condition imports that the vehicle is to be used for delivery of coal and no other purpose, that is, that the vehicle during the currency of the Policy is to be exclusively so used. In my judgment, on a fair construction of the material question and answer, this is not the true construction; accordingly, in my judgment the appellants fail in their contention that a condition was broken so that the Policy was not in force at the time of the accident.*
>
> Lord Russell of Killowen stated at pages 249-250:
>
> *I cannot read the above statements in the Proposal Form as being more than statements by the proposers of their intentions as to the user of the vehicle and the goods to be carried in it, and so as descriptive of the risk. If it had really been the intention of the insurance company that the carrying of goods other than coal at any time should free them from*

> *liability in respect of an accident happening subsequently, it was incumbent on them to make that abundantly clear to the proposers.... For myself I think it is a matter of great regret that the printed forms which insurers prepare and offer for acceptance and signature by the insuring public should not state in clear and unambiguous terms the events upon the happening of which the insuring company will escape liability under the Policy. The present case is a conspicuous example of an attempt to escape liability by placing upon words a meaning which, if intended by the insurance company, should have been put before the proposers in words admitting of no possible doubt.*

67. However, in Dawsons Ltd. v. Bonnin [1922] A.C. 413, the facts of which I referred to earlier, the House of Lords on the strength of the recital in the Policy that the Proposal Form should be the basis of the Policy of insurance, upheld the Defendant insurers argument that it imported a warranty that the statements in the answers to the Proposal Form were true. It was held that in law, the contract was avoided if any of these statements were untrue, irrespective of their materiality. Judgment was entered in favour of the Defendant and this was upheld both by the Court of Appeal and the House of lords. Viscount Haldane stated:

> *...when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability."*

Viscount Cave stated:

> *....when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must, I think, mean that the documents are to be the very foundation of the contract, so that, if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach....Upon the whole it appears to me, both on principle and on authority, that the meaning and effect of the basis clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the Policy; and if that be the contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered.*
>
> *....I must confess that I have little sympathy for the respondents, (the insurers), who seek to profit by a mistake to which their agent*

contributed; but the case must be decided according to law, and I think the law is on their side.

68. I find it interesting to note, that in **Provincial Insurance v. Morgan** , Lord Wright discussed the decision in **Dawsons v. Bonnin** at page 253 as follows:

> *That decision involved an extension of the earlier judgment of this House, in Thomson v. Weems ,((1884) 9 App. Cas. 671) where the Policy expressly provided that "if anything averred in the declaration...shall be untrue, this Policy shall be void, and all monies received by the said company in respect thereof shall belong to the said company for their own benefit". The later case held that the same effect resulted from the word "basis". On the other hand, it is clear that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the terms from the law of sale of goods), though it must be strictly complied with, must be strictly though reasonably construed"*

69. The Court of Appeal's decision in **Provincial Insurance v. Morgan** , reported at [1932] 2 K.B. 70, is also instructive. It seems to me that the learned Judges had a hard time, as indeed have I, in reconciling the decisions in **Farr v. Motor Traders Mutual Insurance Society**, and **Roberts v. Anglo-Saxon Insurance Association** with **Dawsons v. Bonnin**. Scrutton L.J. made a number of useful comments at pages 81-82 of the judgment:

> *During the argument in Roberts v. Anglo-Saxon , the decision of the House of Lords in Dawsons v. Bonnin was not cited. Mr. Wallington contends that the two decisions of the Court of Appeal are to be taken as overruled by that case. In my view that case materially differs in its facts from the two cases in this Court. The questions to be answered in the Proposal Form were : "Proposer's name?" Answer, "Dawsons, Ld." "Proposer's address?" Answer, " No. 46 Cadogan Street, Glasgow." "For what purpose will the vehicle or vehicles be used?" Answer, "Business purposes". "State full address at which the vehicles will usually be garaged?" Answer, "Above address-that is, No. 46 Cadogan Street, Glasgow." In fact the vehicle was not usually garaged, either when the answer was made or during the currency of the Policy at No. 46 Cadogan Street, Glasgow, but at a farm in the outskirts of Glasgow; and, the insurance being against fire, among other risks, the vehicle was destroyed by fire which occurred at the place where*

> *the vehicle was in fact garaged, and not at the place where the assured had said it would usually be garaged. The House of Lords by a majority decided that the assured's claim failed. On those facts it mattered little whether the answers of the assured were warranties or descriptions of the risk, because if there is an insurance against loss of a vehicle by fire in one place, and the vehicle is destroyed by fire in another place, it seems obvious that the risk which has destroyed it is not the risk insured against. Therefore it seems to me that the question which we have to decide, and which was decided in Farr v. Motor Traders Mutual Insurance Society , did not come up for decision in Dawsons Ld. V. Bonnin. The House of Lords gave long consideration to the effect of general clauses in policies of insurance, but although Farr's case was cited in argument it is not noticed in any of the judgments, no doubt because it was unnecessary for their Lordships to express any opinion on the point we are now considering.*

Four or five years after the decision in Dawsons, Ld. V. Bonnin, the Court of Appeal in Roberts v. Anglo-Saxon Insurance Association re-affirmed the view it had expressed in Farr's case. (My emphasis)

70. Even more clearly expressive of the difficulties in streamlining the decisions is the judgment of Slesser L.J. at pages 85-86:

> *I have found considerable difficulty in this case, because it is not clear to my mind that the majority of their Lordships in Dawsons v. Bonnin have not laid down principles which are inconsistent with the decisions of this Court in Farr v. Motor Traders Mutual Association and Roberts v. Anglo-Saxon.. ; but I have come to the conclusion that this appeal should be dismissed for the following reason.*
>
> *In Farr's case it was clearly and definitely decided that words similar to those which have been under discussion refer to the description of the risk insured against, and do not constitute a warranty or condition as to go to the root of the whole contract of insurance. That view has been rendered less clear to my mind by certain observations in the House of Lords in Dawsons. v. Bonnin, and particularly by a passage in the speech of Lord Cave which, if it relates specially to conditions precedent and not generally to the effect of mis-statements upon the validity of a contract, throws some doubt upon the clear statement of principle in Farr's case. Lord Cave's words are as follows: "When a document consisting partly of statements of fact and partly of undertakings for the future"-which exactly describes the document in the present case- "is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the*

contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach". There are similar passages in the speeches of Lord Haldane and Lord Dunedin, which I need not cite. But in Roberts v. Anglo-Saxon..., some five years after the decision in the House of Lords, this Court unequivocally reaffirmed what they had said in Farr's case. Now, from the mere fact that the report of Roberts case makes no mention of the decision in the House of lords, I cannot assume that the learned judges in this Court had not fully considered the matter in all its bearings. Rather I must take it that, having done so, they came to the conclusion that the distinction drawn in Farr's case between the words which are conditional and words which are merely descriptive is a valid and existing distinction which ought to be reaffirmed..."

71. In the instant case, I think that it is important to note that question (e) and its answer was in the following terms:

(e) Do you accept that this Policy will only provide cover for the permitted use of the motor vehicle specified above? Answer, Yes. " (My emphasis).

Further, in the Private Car Policy of Insurance, the following is noted under the heading "General Exceptions".

"The Company shall not be liable in respect of:

...

Any accident loss damage or liability caused sustained or incurred whilst any motor vehicle in respect of which indemnity is provided by this Policy is being used otherwise than in accordance with the limitations as to use ". (My emphasis).

72. In my judgment, this aspect of the matter falls squarely to be considered along the lines discussed by the English Court of Appeal in **Provincial Insurance v. Morgan** , which acknowledges that there is a distinction to be drawn between words which are conditional and words which are merely descriptive and in the decisions **Farr v. Motor Traders Mutual Insurance Society** and **Roberts v. Anglo-Saxon**. In **Dawsons v. Bonnin,** the Court was not there concerned with a question as to the limitations as to which a motor vehicle could be

used. It is also clear that the question being considered in Dawsons v. Bonnin is quite different from the issues involved in the instant case for another reason. As Scrutton L.J. observed in Provincial , on the facts involved, it mattered little whether the answers of the assured were warranties or descriptions of the risk, because if there is an insurance against loss of a vehicle by fire in one place, and the vehicle is destroyed by fire in another place, it seems obvious that the risk which has destroyed it is not the risk insured against. There was therefore no issue in Dawsons to do with whether the vehicle was "on risk" at the relevant time.

73. However, in the instant case, it is not disputed that at the time of the accident the insured's motor vehicle was being used for purposes permitted under the Policy. Further, in the House of Lords judgment in Provincial Insurance it is implied that it may have made a difference in that case if the Policy had used the term "exclusive" use, which I think is analogous to the word in the Policy in this case, "solely". However, as discussed in Dawsons v. Bonin, and Provincial Insurance the determination of the classification by which answers as to user in the Proposal Form should be governed, is generally, purely a question of the construction of the relevant documentation.. In my judgment, when the Policy is properly and strictly construed, but reasonably construed, as it must be, (Per Lord Wright in Provincial Insurance,) the questions and answers of Ms. Graham as to the use of the motor vehicle solely for social, domestic and pleasure purposes, was not a condition of the Policy but was simply a description, or limitation as to the risk.

74. Lord Russell of Killowen commented in Provincial Insurance, that if it had really been the intention of the insurance company that the carrying of goods other than coal at any time should free them from liability in respect of an accident happening subsequently, it was incumbent on them to make that abundantly clear to the proposers.

Indeed, those appeared to be the express terms of the Policy considered in *Thomson v. Weems* ,((1884) 9 App. Cas. 671) and the principles in that case were seemingly enlarged in **Dawsons v. Bonin.**

75. In my view, if it had been ICWI's intention to reflect in the Policy that any use of the vehicle for purposes other than social domestic and pleasure purposes, should free them from liability in respect of an accident happening subsequently, and while the vehicle was being used for the permitted purposes, they should have said so. They should also not have asked the insured the question (e) on the Proposal Form, i.e. "Do you accept that this Policy will only provide cover for the permitted use of the motor vehicle specified above?" It seems to me implicit in the question, that the insured was being asked to understand clearly that it is only whilst the vehicle is being used for the permitted purposes that it would be "on risk" or on cover, and that if and when it was used for any other purpose, it would be "off risk" or off cover as described by Bankes L.J. in Roberts v. Anglo-Saxon.

76. Our Court of Appeal has endorsed and accepted in Elkalili v. ICWI the principles set out in the cases regarding the effect of the "basis of contract" clauses in insurance policies. Further, the basis of contract clause in Elkalili was identical to that under consideration here. It was construed as a warranty in view of a false answer given by the insured to one of the questions on the Proposal Form thereby entitling the insurer to avoid. However, the distinction between this case and Elkalili is that in Elkalili, the Court was not being asked to consider the question of whether the statement of limitation as to use of the motor vehicle amounts to a warranty, where use of the vehicle for purposes other than those disclosed in the answer would constitute a breach of a stipulation going to the root of the contract, or whether it only amounted to a limitation of the risk.

77. It is important to note that in Roberts v. Anglo-Saxon, although the Policy had the words 'Warranted used only for....commercial

travelling"(my emphasis) and recited that the insured had made a proposal and declaration which it was agreed should be the basis of the contract, the Court indicated that on the true construction of the relevant contract, the questions and answers in the Proposal Form amounted to nothing more than a description or definition of the risk intended to be insured against, and did not constitute such a warranty or condition as to go to the root of the whole contract of insurance. In my judgment, the same construction applies to the contract and questions and answers in the Proposal Form in this case. The dicta of Forte J.A. in **Administrator General v. National Employers Mutual**, at page 464, referred to earlier in this judgment in my view support the position that I have taken, where he stated that one of the instances to which reference of avoidance and cancellation may be found is "for breach of *conditions* stated in the Policy, as opposed to a limitation of user placed on the vehicle in respect of liability".

78. The statement and answers in the Proposal Form indicating that the vehicle will be used solely for social, domestic and pleasure purposes, followed by the question at e), the effect of which was whether the insured accepts that the risk undertaken by the insured is so limited, was not a condition precedent to the liability of ICWI. They were simply descriptive of the risk to be insured. This is to be distinguished from the circumstance that the truth of the statements and answers in the Proposal Form is by the contract made a condition precedent. Therefore, if at the time of filling out the Proposal Form, an insured answered that the vehicle would be used solely for social, domestic and pleasure purposes, and genuinely had that intention, that would constitute the insured's true and genuine representation of his present intention. So that if he subsequently used the vehicle for some other purpose on another, or on some other occasions, provided not routinely so doing so as to suggest a misrepresentation or non-disclosure at the time of filling out the Proposal Form, then in my

judgment, if an accident or claim occurs while the vehicle is being used for permitted purposes, the insurer would be required to provide cover as the vehicle would then be "on risk".

79. In this case, however, the uncontroverted evidence is that the insured Ms. Graham routinely used the vehicle for purposes falling outside of the purposes permitted under the Policy. Therefore ICWI to my mind are entitled to relief on the basis of misrepresentation and non-disclosure, and breach of Ms. Graham's warranty as to the truth of the statements and answers in the Proposal Form. However, ICWI is not entitled to relief on the basis that the Questions and Answers as to Limitation of Use amount to a condition and not merely a description of the risk.

80. My answer therefore to Issue c is that, the limitation as to use constitutes a description of the risk, and not a warranty or condition.

81. There is no Counter claim by the insured. However, she ought to be refunded her premiums with interest at a commercial rate. This arises from the fact that Avoidance is Retroactive. See MacGilvray, paragraph 17-30. See also the judgment of Brooks J. in the **Hillary Smith-Thomas** case.

82. I therefore grant two of the three declarations sought,

(i) that ICWI is entitled to avoid the Policy of Insurance No. 34031839/1 and to refuse to indemnify the Defendant Ms. Graham in respect of loss, damage, expenses or claims from third parties incurred as a result of an accident involving the Defendant's motor vehicle Licence No. 0689 EJ on February 6, 2008, along the Four Paths Main Road, in the Parish of Clarendon, on the grounds of misrepresentation as relates to the insured's use of the vehicle to transport goods in connection with her business and non-disclosure of material facts.

(ii) That the Policy of Insurance No. 34031839/1 is void for breach of warranty as to the truth of the statements and particulars contained in the Proposal Form.

(iii) Costs are awarded to ICWI to be taxed if not agreed.

J. 22/07/15