[2016] JMSC CIV. 136

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 04909

BETWEEN	**INSURANCE COMPANY OF THE WEST INDIES**	**CLAIMANT**
AND	**MARGARET FOREST-DUNCAN**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 01667

BETWEEN	**MARGARET FOREST-DUNCAN**	**CLAIMANT**
AND	**INSURANCE COMPANY OF THE WEST INDIES**	**DEFENDANT**
AND	**BINOC VISIONS INVESTIGATIONS LIMITED**	**4TH DEFENDANT**

Ms. Sudene Riley Instructed by Kinghorn & Kinghorn for the Claimant

Mr. Gavin Goffe & Mr. Adrian Cottrell instructed by Myers, Fletchers & Gordon for 1st &2nd Defendants

HEARD: 6th and 7th April and 27th July 2016

CORAM: G.FRASER, J.

Insurance Law – Avoidance of policy by Insurer for misrepresentation and material non-disclosure – Arbitration clause and whether non compliance automatically determines the right to redress by the court – Breach of conditions – whether such breach material or entitles Insurer to avoid policy – treatment of disputed confessions in civil litigation- whether issues of undue influence, duress and involuntariness material to admissibility of confession – The Motor Vehicles Insurance (Third-Party Risks) Act, sections 8 & 18.

INTRODUCTION

[1] The Claimant Margaret Forrest-Duncan is the owner of a motor vehicle bearing registration plates numbered and lettered 5850EY. This motor vehicle was insured with the 2nd Defendant, Insurance Company of the West Indies (ICWI), under a comprehensive policy effected on or about 19th January 2007. The Claimant's vehicle whilst driven by her spouse was involved in a collision along the Mount Rosser Road and was damaged and a claim was subsequently made to the Insurers.

[2] Based on the circumstances of the claim including the delay in making it and how the fact of the collision first came to their attention; ICWI employed the services of the 4th Defendant, BINOC to make enquiries. The investigations unearth certain inconsistencies and discrepancies on the part of the Insured Claimant and her spouse relative to the usage of the insured motor vehicle and this appeared to have heightened the suspicions of the 2nd Defendant. Consequently the Defendants concluded that the Claimant had made material misrepresentations to ICWI and that she had an intention to utilize the vehicle as a PPV but applied for insurance for a vehicle as private usage.

[3] During an interrogation of the Claimant at ICWI's office on the 23rd October 2007; the Claimant allegedly confessed that to her prior knowledge the insured vehicle had been used as a 'robot' taxi. This alleged confession was reduced into writing and signed by the Claimant. The confession statement also included a release which operated to discharge ICWI from its obligations under the policy. The insurance policy was subsequently cancelled by ICWI and the Insured/Claimant was so advised by letter under the signature of Miss Raquel Ashman and dated 29th October 2007. The reason given for the cancellation was that the vehicle was used contrary to the terms and conditions of the policy contract.

THE CLAIMS

[4] The events which obtained thereafter resulted in suit being filed by ICWI via a ***Fixed Date Claim Form No. 2007 HCV 04909*** wherein the Insurance Company had sought to obtain declarations from the Court, justifying their action of voiding the Claimant's policy of Insurance consequent to the alleged breach of its terms and conditions by the Claimant. The 2nd Defendant in said suit is saying that the Mrs. Duncan deliberately withheld or misrepresented facts that may have influenced the underwriter's opinion as to the risk to be incurred, whether they would take such risk, or what premium they would charge, if they did take it. They are saying there is an obligation on the Insured to disclose, and the concealment of a material circumstance known to the Insured thereby avoids the policy. ICWI in their claim are seeking the following relief:

1. A declaration that it is entitled to avoid the Policy of Insurance No. 34152032/1 and to refuse to indemnify the Defendant in respect of loss, damage, expense or claims from third parties incurred as a result of an accident involving the Defendant's motor vehicle licence No. 5850EY on June 11th 2007, along the Mount Rosser Main Road, in the parish of St. Catherine, on the grounds of misrepresentation and/non disclosure of material facts.
2. A declaration that the Policy of Insurance No. 34152032/1 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 any liability there under
4. Costs
5. Such further and/or other relief as this Honourable Court deems just

[5] In response to the action of ICWI, the Claimant filed her own suit in ***Claim No. 2008 HCV 0166;*** wherein ICWI and BINOC were joined as Defendants. The Claimant is seeking the pronouncement of various declarations by the Court as also damages on the basis that the alleged confession was obtained by fraud,

duress and undue influence by the servants and or agents of both Defendant Companies. She insists that there still exists a valid and enforceable contract of insurance between her and ICWI and accordingly; Mrs. Margaret Forrest-Duncan is seeking declarations contrary to those sought by ICWI as follows:

1. That the correspondence of the 23rd October 2007 i.e. “the purported confession” written and signed by her was fraudulently produced by the Defendants and is consequently null and void
2. That the correspondence of 23rd October 2007 was produced by duress and is therefore null and void
3. That the correspondence was produced by undue influence
4. A valid and legally enforceable contract of insurance still exists
5. IWCI s obliged to honour the terms of the agreement and to provide compensation for damages and losses suffered by her and provide indemnity for her in respect of loss, damage, expenses or claims made by third parties arising out of the accident on the 11th July 2007.

[6] Both claims were consolidated on the 23rd January 2008 and subsequently; ICWI was permitted to amend their defence and to include pleadings and make reference to condition 8 of the Private Car Policy. This clause inter alia provides for arbitration as a condition precedent to suits being filed in the event there are disputes arising out of the policy of insurance; and specifically states that if claims are not referred to arbitration within twelve (12) calendar months from the date of disclaimer “then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable”. The Claimant is nonetheless insisting that she is entitled to satisfaction from the Defendant Insurer as she had a valid comprehensive policy of insurance on the vehicle and pursuant to her loss, her policy must be honoured.

[7] Whether an insured will recover for a claim at all, and if so, the amount he or she will be paid; depends largely on the policyholder's own knowledge of his or her rights and responsibilities as also the terms and conditions of the contract itself. The policy under consideration typically contains very brief insuring clause(s)

describing what is covered and conversely dozens of paragraphs and thousands of words are spent listing exclusions, exceptions and limitations. Policyholders are invariably at the mercy of their Insurance Company, and I say this because, the company wrote the policy, the company interprets the policy, the company evaluates the claim and the company holds the money. The insurer may however legitimately refuse to pay a claim because:

a) The Insured did not tell the truth when applying for insurance coverage
b) The Insured had failed to disclose something material which could affect the claim
c) The Insured withheld information or misled the insurers
d) The Insured had not followed the claims process correctly
e) The Insured had not kept to a warranty/condition of the policy.

In this case the Insurer, ICWI is alleging all of the above.

THE EVIDENCE OF MRS. FORREST-DUNCAN

[8] The evidence in support of the Claimant's case was provided by the Claimant herself and Mr. Duncan her spouse and driver of the motor car in question. Insofar as is relevant for the issues which the court must decide, she acknowledged that she had completed a proposal form; which was tendered into evidence as Exhibit 4. That proposal form asked certain questions and included questions about the use of the motor car which was to be for the personal use and business of the Insured. In the course of the cross examination of Mrs. Forrest-Duncan, Counsel Mr. Goffe sought her confirmation that she had signed the proposal form; she agreed. Mrs. Forrest-Duncan was directed to the provision in the proposal form which was in the following terms:

> 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 above referred to is/are in good condition and undertake that 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 be considered as incorporated in the policy to be issued hereunder which is in the ordinary form used by the Insurance Company of the West Indies Limited for this class of insurance and which I/We agree to accept.

[9] She testified that all the answers she provided were true for the time she was in insurance contract with ICWI. She also agreed that in relation to the question about using the motor vehicle for passenger hire she had stated “no”. She said she could not recall if at that time she was made to understand that if she had ticked “yes” the cost of the insurance would be more. She however conceded that since then it became her understanding that this was the situation.

[10] The Claimant was further taxed about the date of the accident which in her witness statement she had indicated to be July 2007. She had been relying she said on the contents of her witness statement prepared by her Lawyers as to this date. When confronted with a number of items including a police report and a letter written by law firm, Kinghorn and Kinghorn which was addressed to ICWI; and in which the said accident was indicated to be 11th June 2007, Mrs. Forrest-Duncan readily conceded that June must be the correct date.

[11] Having accepted that the correct date of the accident was 11th June 2007, Mrs. Forrest-Duncan further agreed that contrary to the terms and conditions of the

insurance policy she had not reported the accident within the stipulated thirty (30) days. She denied however that the reason for her tardiness in making the report of the accident was because she knew her vehicle was being used as a robot taxi. Counsel Mr. Goffe also highlighted a number of inconsistencies arising in relation to Mrs. Forrest-Duncan's witness statement, the statement which she had given to the private investigator from BINOC which was admitted into evidence, as also the accident report as contained in the claim form.

[12] The disputed document containing the alleged confession of Mrs. Forrest-Duncan and titled the 'declaration of admission', dated the 23rd October 2007 was also tendered into evidence and was the basis of a most rigorous cross examination conducted by Mr. Goffe. In that statement the Claimant had *inter alia,* admitted that "I had prior knowledge of my 2000 Toyota Caldina motor car registered 5850 EY being used as a taxi…" She now seeks to distance herself from that statement saying she had been induced by fear and threats of imprisonment and had made the same under duress. She said she was given a prewritten statement and told to copy it; which she did and signed it thereafter. Mrs. Forrest Duncan emphatically stated that when she made the claim she ***"honestly did not believe it (the car) was being used as a taxi. At the time in 2007, I did not believe my husband was generally using the vehicle as a taxi it was not for that purpose"***

[13] The Claimant's supporting witness; Mr. Duncan denied that his passenger Patrick at the time of the accident was a paying passenger. He insisted that he was just assisting a friend in transporting a container from the Kingston wharf. He claimed this man to be a longstanding friend but was unable to give many details about him. Mr. Duncan was adamant that he had not previously denied liability for the accident and even after he was confronted with his statement recorded by a BINOC Investigator he still maintained this posture. He denied telling the said Investigator that he was a part owner of the vehicle and when confronted again

by a previous recorded statement to that effect he continued his denials. Most importantly he denied operating the Caldina motor car as a robot taxi.

Counsel Mr. Goffe has submitted that Mrs. Forrest-Duncan and her spouse are not credible witnesses as highlighted by the many inconsistencies and discrepancies in their evidence.

[14] Having had the benefit of observing the demeanour of both witnesses and hearing the answers they gave in cross examination, I have concluded that Mr. Duncan is not entirely a witness of truth whose evidence is to be relied upon by this Court; I found him to be less than candid. My assessment of Mrs. Forrest-Duncan is somewhat different; she is not a person who appeared to be highly literate or very bright, but seems to be very trusting of her spouse and maybe her trust is misplaced. In the final analysis however the inconsistencies and discrepancies are not grave so as to cause me to entirely reject the evidence of Mrs. Forrest-Duncan.

THE EVIDENCE OF ICWI

[15] Two witnesses were called on behalf of the Defendants, ICWI; namely Mr. Andrew Green who at the material time was an investigator employed to BINOC, the 4th Defendant and Miss Raquel Ashman, a claims controller employed to ICWI, the 2nd defendant. Miss Ashman was the agent of ICWI who had been dealing with the insurance claim made by Mrs. Forrest-Duncan and had arranged the eventful meeting in October 2007.

[16] Mr. Green said he was contacted and invited to the interview with the Claimant; and he was made aware that ICWI had concerns. He further testified that he had gone to the meeting because the initial BINOC Investigator had died prior to completion of the investigations which he Green had completed. He also testified that the purpose of the October 23rd meeting was to speak to the owner of the vehicle and to find out if she was aware that her vehicle was being operated as a

taxi at time of the accident; and if she was aware of the accident. I find the latter assertion to be less than sincere because at that date the evidence is that the Claimant had already submitted a claim to the Insurance Company, ICWI in respect of that very accident.

[17] Miss Riley on behalf of Mrs. Forrest-Duncan sought to elicit from the two defence witnesses a concession that the 2nd Defendant had attempted through its investigations and BINOC, to intimidate the Claimant into discontinuing her claim, this was strenuously denied. Mr. Green said he did not threaten to lock her up but he agreed that he told her that police was waiting outside to lock her up; Mr. Green also admitted that he had raised the term "insurance fraud" with the Claimant and told her that police officers from Hunts Bay were waiting on the outside to lock her up. He agreed that these utterances were in fact falsehoods on his part but yet in the same breath he said he did not lie.

[18] Mr. Green denied that he told Mrs. Forrest-Duncan that if she confessed that the vehicle was used as taxi he would tell the police to go away and the issue would be resolved. He however admits that he did go on his cell phone and utter the words "officer everything is all right you can leave now" and that Mrs. Forrest-Duncan "confessed about red plates after I told her about the police". Mr. Green denied that he had as it were put words into Mrs. Forrest-Duncan's mouth. In his witness statement he said (at paragraph 17), "at no time did I tell her what to write in the body of her admission". He however admitted in oral evidence that "I assisted her in the wording of it (the confession)" and in later cross examination Mr. Green conceded that he previously stated that he had assisted Mrs. Forrest-Duncan in the spelling of certain words.

[19] Finally and contrary to his earlier assertions; Mr. Green confessed that the point or purpose of the meeting was to get at the truth and for the Claimant to understand the gravity of the situation, because the situation amounted to insurance fraud. So it is apparent that he had prejudged the Claimant and had concluded that insurance fraud had been committed. I am supported in this view having regard to Mr. Green's conclusions in a report written by him and dated 5th

October 2007 (exhibit 23). In the report he unequivocally stated “Based on our discreet checks we found that Party# 1 driver (Owen Duncan) has contravened his policy provisions/stipulations by using his car as a public passenger vehicle at the material time”.

[20] Miss Ashman fared no better in convincing this Court that she was a witness of truth, she contradicted Mr. Green at every turn including the reason for the meeting; she asserted that up to the point of the meeting she had formed no opinion that the vehicle was being used contrary to terms and conditions of the Insurance policy and ICWI had not formed such a view when BINOC’s report was received. This is contrary to Mr. Green’s testimony that he already had statement of Mr. Duncan and a tape that supported the contention that the vehicle being used as taxi and that Mrs. Forrest-Duncan was so confronted with this information.

[21] Miss Ashman also asserted that the reason Mr. Green was present was so the audiotape recording of Mr. Duncan purportedly contracting for hire could be played for Mrs. Forrest-Duncan’s benefit and in the circumstances she wanted a representative of BINOC to be present. Miss Ashman however admitted that no such tape recording was in fact played and that Mrs. Forrest-Duncan was merely told about it. Mr. Green for his part could not verify if such a recording was even present at the interview.

[22] Miss Ashman on her own evidence seemed to have played little or no role at all, at this so called interview or meeting that she convened. She said she had left the meeting on several occasions to deal with other duties and she was very busy in the office. It appears to me that she merely conducted Mrs. Forrest-Duncan to the meeting room and for the most part left her in the company of the two BINOC Investigators so that they could extract a confession. A confession that she admitted was the underpinning of ICWI’s subsequent decision to void Mrs. Forrest-Duncan’s policy.

[23] It is my assessment of both defence witnesses that their credibility has been severely eroded; I do not believe their denials that the meeting was specifically engineered so as to extract a confession from Mrs. Forrest-Duncan. It is my finding that the reason why a meeting was convened; was for the 2nd Defendant to obtain a confession from Mrs. Forrest-Duncan by whatever means necessary. This of course will impact my assessment of the confession document and ICWI's sincerity in its attempts to deny the accident claims and avoid the policy.

THE LAW

[24] Insurance is a contract upon speculation and the special facts, upon which the contingent chance is to be computed, is usually within the sole knowledge of the Insured. The Insured therefore has an obligation to frankly disclose all material information and not to misrepresent any material facts. If the insured conceals material information the Insurer is entitled to avoid the policy. This doctrine of concealment was first formulated in the famous old case of ***Carter v. Boehm***[1], where Lord Mansfield emphasized that a contract of insurance is based on the utmost good faith and that:

> ***The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured 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 risque 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***

[1] [1558 - 1774] All ER 183

> ***through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risqué understood and intended to be run at the time of the agreement.***

[25] This English rule as developed in their jurisprudence, contains three variables:

a. The Insured knew the fact;
b. The Insured did not disclose the fact to the Insurer, and the Insurer was not chargeable with its knowledge;
c. The fact was material.

[26] This principle has also been accepted and applied in this jurisdiction as is evidenced in several Court of Appeal decisions. Of note is the dictum of K. Harrison, JA in the case of ***Insurance Co. Of the West Indies v. Elkhalili***[2], where he said:

> ***In practice, the requirement of uberrimae fides means simply that an applicant for insurance has a duty to disclose to the insurer all material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts.***

[27] ***The Marine Insurance Act*** [1906] also confirms that insurance contracts are contracts *uberrima fides* and defines in section 23, what matters is material for the purposes of said contracts, in the following terms: ***"Every circumstance is material which would influence the judgment of a prudent underwriter in fixing the premium or determining whether he will take the risk".***

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[2] SCCA No. 90 of 2006, delivered on the 19th December 2008

[28] The House of Lords in ***Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd***[3] has held that for an Insurer to be entitled to avoid a policy on the basis of misrepresentation or non-disclosure, the alleged misrepresentation or non-disclosure must be material and must have induced the making of the policy. The UK Court of Appeal decision of ***Drake Insurance v Provident Insurance***[4] has decided that inducement must be proved by the Insurer.

The 2nd Defendant asserts that there has been material non-disclosure and misrepresentation on the part of the Claimant in securing the contract and that the contract is thereby voidable. In any event, the Defendant relies upon the terms of the contract, and in particular, the declaration signed by the Claimant which, by its very expressions, is made a term of the contract and ICWI is also averring that there has been a breach of the terms of the contract by the vehicle being used as a "robot taxi".

[29] It is settled law that an Insurer has the right to avoid the contract of insurance if the Insured was guilty of fraud, non-disclosure or misrepresentation before the contract was entered into. This is so because an insurance contract is one which is said to be *uberrimae fidei* or of the utmost good faith. There is therefore a duty on the insured to answer the questions on the insurance proposal form correctly and truthfully. Any failure to disclose even if it is innocent, gives the Insurer the right to avoid the contract *ab initio*.

[30] It is however important to note that the general principle is that the duty of disclosure ends when the contract is concluded. It must also be borne in mind that the burden of proving misrepresentation/non-disclosure is on the Insurer; these views were expressed by Caulfield, J in ***Woolcott v. Sun Alliance***

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[3] [1995] 1 AC 501
[4] [2003] EWCA Civ. 1834

Insurance[5]. In that case, the Claimant's property was destroyed by fire. There was no dispute that fire was one of the perils covered by the policy of insurance. The Defendants, who were the Insurers sought to avoid liability on the basis of non- disclosure. Caulfield, J. said***: "prima facie the defendants are liable to indemnify the plaintiff for the damage resulting … The onus is upon the defendants to show that they are entitled to avoid the policy".***

ICWI therefore, and not Mrs. Forrest-Duncan has the obligation of proving that:

A. There was a material misrepresentation or non-disclosure by the Insured at the time the parties entered into contract
B. There was an unauthorized use of the motor vehicle
C. The Claimant/Insured has breached warranty/condition of the policy which entitles the Defendant/Insurer to avoid the policy.

The above are by and large the same issues that this Court must resolve in the consolidated claim brought by Mrs. Forrest-Duncan. Additionally Mrs. Forrest Duncan is alleging fraud, undue influence and duress which must be proved by her.

ANALYSIS OF EVIDENCE

[31] So as to maintain some order and lucidity I will address the above issues individually and then determine if any of the allegations made by ICWI are proved and whether individually or collectively any proven allegation entitles them to the declarations sought. In so doing I believe I would have addressed all the material aspects of both claims.

Misrepresentation/non-disclosure

[32] A statement has to be false before there can be misrepresentation and it has to be made by the Insured or his agent. Statements of fact are to be assessed objectively and statements of opinion and intention are false only if the Insured

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[5] [1978] 1 W.L.R. 493

did not hold that opinion or intention. In order for the defence of misrepresentation/non-disclosure to succeed the Insurer must prove that the Insured failed to disclose a material fact and that the non-disclosure induced the making of the contract. In other words it must be proved that the Insurer would not have entered into the same contract if he was aware of the facts in question.

[33] The Defendant, ICWI is claiming from the Court a declaration that they are entitled to avoid the policy of insurance No 34152032/1 between them and Mrs. Forrest-Duncan and to refuse to indemnify her on the grounds of misrepresentation and/or non-disclosure of material facts. ICWI is relying upon the contents of a written confession to establish the alleged misrepresentation and or non-disclosure. The disputed document or confession was written in the following terms:

> **"I hereby confess that I had prior knowledge of my 2000 Toyota Caldina motor car Registered 5850EY being used as a taxi. I also admit that I had put in a claim for damage done to my vehicle. I now withdraw my claim for damage to my Caldina and all other claims relating to the said accident which occurred on June 11 2007. I hereby release my Insurance Company ICWI from all liability regarding this accident, and I now ask for leniency from ICWI concerning any future action which may be taken as a result of my misrepresentation. I agree that I have done something improper and give you my assurance never to use my vehicle in this manner again…"**

[34] What is it that ICWI is saying that the Insured misrepresented or did not disclose? Really they are alleging that the Insured deceive them as to the intended usage of the motor vehicle. Taken at face value there is no explicit indication in the alleged written confession by the Insured; that at the time of

contract she had misrepresented any material facts or failed to disclose any material facts as to the intended use of the vehicle. However in the confession document the Insured has asked for leniency "concerning any future action which may be taken as a result of my misrepresentation". There is no pellucid indication as to what the misrepresentation is, but the confession in the first two lines speaks to prior knowledge on the part of the Insured of her vehicle being used as a taxi.

[35] It is my understanding that ICWI is asking the Court to draw the inference that from the outset it was the Insured's intention to utilize the insured motor vehicle as a robot taxi, that she suppressed that fact so as to avoid the greater monetary rate of insurance payments that would result from such an arrangement and instead misrepresented that the vehicle was to be utilized for the Insured's pleasure and private business. Hence the suggestions were made to the Claimant and her witness in cross examination, that the driver routinely used the insured vehicle as a taxi in contravention of the policy terms. These suggestions were vehemently denied as also the suggestions that the Insured had expressed an intention to obtain "red plates". Has ICWI therefore established a case of misrepresentation and or non-disclosure in all the circumstances of the evidence led in this case? I will return to this thorny question anon as the answer depends on my resolution of the issue of the confession.

Unauthorized user of the insured vehicle

[36] It is ICWI's contention that the insured's vehicle, which was involved in a motor vehicle accident, was at the material time being operated as a "carriage for hire" and that this was a breach of the insurance policy on which ICWI is relying to avoid liability under the policy. This is also the basis of the declaration sought at paragraph 2 of their Fixed Date claim Form filed on 3rd December 2007.

[37] If the Court accepts at face value that the Insured confessed that she "had prior knowledge of [the] 2000 Toyota Caldina motor car Registered 5850EY being used as a taxi", then yes this would be evidence that the Insured had breached a condition of the insurance contract. What is lacking however is evidence as to

the frequency of this occurrence or whether the "prior knowledge" was in reference to the 11th June 2007; on the occasion of the collision when Mr. Duncan was allegedly utilizing the insured vehicle for hire. In the absence of information or evidence to the contrary I can only reasonably infer that the prior knowledge was in relation to 11th June 2007. Following from that assumption I next ask myself whether this one instance of breach amounts to evidence sufficient to establish a misrepresentation /non-disclosure and accordingly enables ICWI to avoid the contract.

[38] Having regard to the authority of ***Administrator General v. National Employers Mutual Association Limited***[6] on which ICWI is relying; it appears that a single instance of non-compliance of a condition of the insurance contract will not be sufficient to establish an unauthorized usage. To succeed on this plinth ICWI would have to establish on a balance of probability that, there was an unauthorized use of the insured motor vehicle and that such unauthorized usage was with such regularity and frequency from which this Court could conclude that the running of "robot taxi" was one of the motor vehicle's normal functions. There is no such evidence presented in this case so ICWI's case in this regard must fail.

Assessment of the Confession

[39] Counsel Mr. Goffe has submitted that in a civil trial where the voluntariness of a confession is disputed on the basis that it was extracted by threat and intimidation, the court is not to be concerned with issues of admissibility as obtains in criminal trials. Rather the court is concerned with whether the contents are true and the court ought to consider the worth or weight of the confession. Mr. Goffe further submitted that what determines the weight are credibility of the

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[6] (1988) 25 JLR 459

witnesses, general circumstances and common sense. Counsel relies upon the Canadian case of ***Bains et al. v Yorkshire Insurance Co. Ltd***[7] in support of this submission. In that case an allegation was made that the Insured house owner had deliberately set fire to his house. A confession had been secure by the police whilst investigating a case of arson, but at trial on the basis of involuntariness the confession was rendered inadmissible in the criminal proceedings. The situation was all together different in the subsequent civil proceedings. The Supreme Court of British Columbia adumbrated that:

> **"Admissions or confessions made to police officers which are inadmissible against the maker in criminal prosecutions because not proved to be voluntary are nevertheless admissible against him in civil proceedings… with respect to such civil proceedings the only question is the weight to be attached to the admissions having regard to the circumstances in which they were given"**

[40] My research has not unearthed any precedent in this jurisdiction dealing with this particular point, and I am well aware that this decision of the Supreme Court of British Columbia is from a court of first instance. I am also cognizant that while the case is from a jurisdiction of similar common law tradition it is not binding on this court. It can however be persuasive and in the absence of a binding precedent to the contrary I have accepted it to be representative of the common law and am prepared to follow the legal principles so eschewed.

[41] It is to be noted that Mrs. Forrest-Duncan had raised no objection to the issue of admissibility of the disputed confession document, and having accepted Counsel,

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[7] (1963) 38 DLR 2ND 417

Mr. Goffe's submission that the issue here is truth of the contents, then the Court's next task is an assessment of the circumstances surrounding the recording of the confession and consequently the weight if any to be ascribed to it. It is my observation that the evidence on both sides is replete with instances of contradiction which damages the credibility of all four witnesses to varying degrees. It is to be noted that Mr. Duncan was not present in the meeting and therefore cannot assist this Court as to what transpired there. For the purposes of my determination of this issue the truthfulness and credibility of witnesses Forrest-Duncan, Green and Ashman will be assessed by the Court.

[42] I have had regard to the demeanour of Mrs. Forrest-Duncan and have assessed that she is a semi illiterate woman, no disrespect intended. She struck me as a simple woman, an excitable individual. She was not able to neither give intelligent thought to certain questions asked of her in cross examination nor appreciate certain words used by counsel. To my mind she was not capable of constructing the contents of the so called confession as the words and terminology used therein appears to be beyond her vocabulary. It is my assessment therefore that the contents must be another person's words.

[43] Mr. Green and Miss Ashman; testified that the confession was truly the product of Mrs. Forrest-Duncan's mental ability and that she appeared to understand the entire proceedings and was most cooperative. They both gave the impression that the meeting was conducted in a calm atmosphere and that the claimant was treated courteously and she was the one who intimated that she wanted to come clean and make things right. On cross examination both reluctantly agreed that they had an input in the document in that:

- They assisted in the wording of the document
- They assisted in the spelling of certain words
- Miss Ashman admitted that the Claimant was not articulate, and
- The Claimant asked how to start it (the confession)
- Mr. Green admitted that "the words expressed in the confession are mine"

- Neither of them advised the Claimant to seek a 2nd opinion
- Neither advised her she could have a lawyer
- Never informed her that the statement could have legal implications and repercussions
- Both admitted that the involvement of BINOC investigators at such meetings was not standard practice

[44] This court also makes the observation that despite the pre-arrangements and pre-scheduling of the meeting by ICWI, no effort was made by the agents of the second or fourth defendants to record the proceedings of the meeting whether visually, acoustically or otherwise. Notably in the ***Bains*** case, the Court had the benefit of a transcript of the tape recorded interview conducted with the Insured and it was agreed between the parties at trial that such a transcript was an accurate and complete account of the interview with the Insured. The court in the ***Bains*** case was therefore able to independently assess this recording for itself and arrive at a position. Furthermore in the ***Bains*** case there was other physical and independent evidence and other witnesses' testimony which lent considerable weight to the confession. This is what McInnes, J. had to say in relation to the assessment of the issue:

> **"I turn to consider what weight should be attached to the contents of the statement ex. 23. It follows that if I accept the contents of the statement as true, there is in evidence an admission by Kalminder that he actually set the fire, coupled with an explanation as to how he did it. This was followed by an actual physical demonstration at the premises of the manner in which the fire was set, and following that the actual purchase of the soot remover. It is agreed by counsel for the plaintiffs that both the statement and ex. 27, the transcript of the tape recording, contain a true and accurate record of what Kalminder said".**

[45] McInnes, J. had an embarrassment of riches in the evidence as elicited by the Defendant Insurance Company and was therefore easily enabled to make an assessment of weight to be attached to the contents of the confession. This Court is not so enabled in this instance, owing to the paucity of evidence led by ICWI; in this case there is no independent evidence on which this court can rely. The evidence as to how the confession was recorded comes from the two defence witnesses and the Claimant, all of whom I regard as persons who have an interest to serve. There is therefore no independent evidence as to the circumstances surrounding the recording of the confession.

[46] The Defendants have demonstrated a penchant to record all things, even a telephone conversation with Mr. Duncan. Why then was no effort made to record the interview/meeting with the Insured? It is obvious that a confession was the aim of the meeting and that such a meeting was important to the Defendants. Since the interview/meeting was convened at their instance they would have had ample time to make preparations for it to be recorded. Additionally Mr. Green and Miss Ashman testified that the Insured had made certain utterances relative to operating as a PPV and which to my mind would have assisted in proving the claim for misrepresentation and non-disclosure. Significantly the following utterances attributed to Mrs. Forrest-Duncan are not capture in the alleged written confession:

a) She had intended to apply for red plates
b) She had intended to apply for a PPV license
c) That it was a lengthy and expensive process to apply for PPV license.
d) That “she was in the process of getting red plates for the vehicle, but did not get through to doing so prior to the accident”

[47] I have further considered the behavior as exhibited by Miss Ashman and Mr. Green at the time of the recorded statement, and it reposes no confidence in this Court so that I should accept them as witnesses of truth. According to their accounts as to how the confession was obtained and contrary to their denial it is

my view that the interview/meeting was conducted in an atmosphere of intimidation and duress. It is my further view that it was in fact the intention of Miss Ashman and Mr. Green to obtain a confession by fair means or foul. It is reprehensible that such trickery and unsavory tactics were utilized in claims handling. ICWI seems to have forgotten that they too are bound by a duty of good faith and an obligation to apply ethics in their dealings with their Insured clients. How then am I to accept their testimony that the content of the confession is true?

[48] I do not accept the evidence of Ashman and Green as truthful as to what occurred in that conference room, I do not accept that Mrs. Forrest-Duncan indicated a sudden need to confess. I accept Mrs. Forrest-Duncans evidence that a prerecorded document was given to her and she was instructed to rewrite it in her own penmanship and sign her name and that she did so under threats and duress. In the circumstances where Mrs. Forrest-Duncan is of limited education and admittedly "not articulate" I do not hold such a confession to be of any weight.

[49] It is ICWI who seeks to rely upon this confession and they must establish it to be true. Having accorded it of no weight and rejected it; by extension I find that there is no evidence presented by ICWI which establishes an intention by Mrs. Forrest-Duncan, at the time she applied for the contract of insurance to allow her spouse Mr. Duncan to utilize the Caldina motor car as a conveyance for hire. I find however that Mr. Duncan on the day of the accident did so utilize the MV for such a purpose without the prior knowledge and consent of the Insured. In such circumstances was there a misrepresentation and or non-disclosure on the part of the Claimant, which entitles the 2nd Defendant to avoid the contractual obligations under the policy? I say no.

Breach of Conditions

[50] The above issue of the confession is the strongest plinth upon which ICWI's case is built; but ICWI has denied liability of the accident claim and has also denied any obligation to indemnify the claimant against third parties. This is because they are contending that the vehicle was being used in breach of the terms and

conditions of the policy of insurance, which restricted usage for the insured's private use and business. Certainly it was not contemplated that the vehicle was to be used as a taxi or for hire or reward.

[51] An insurer should not be able to repudiate liability to indemnify a policy-holder on grounds of breach of a condition where the circumstances are unconnected with the loss unless fraud is involved. An insurer may however be entitled to avoid a contract of insurance where there has been a breach by the proposer of a term of the contract of insurance warranting that a certain set of facts is the case. Whether, and to what extent, there has been any such warranty is a matter of construction of both the insurance policy itself together with connected documents such as any proposal form.

[52] ICWI is saying that the proposal form was the agreed basis of the contract and the Insured warranted the truth of all answers given in it by her. Most significantly she warranted that the policy expressed to cover use for social, domestic, pleasure and the insured's business only. There are two separate issues here for determination, the first is the indemnity to the insure herself and the second is an obligation to indemnify regarding third parties claims.

[53] Where the issue concerns indemnity against third party claims, a distinction must be made where an insurer claims that there was no insurance coverage at the time of the occurrence in question because of an act or omission of its insured, as opposed to the claim that there was a policy in place but it was breached by the insured or its agent. If there was no coverage, then the insurer may be exempted. In the latter event however, a breach of a condition of an insurance policy merely amounts to a breach of contract between the Insurer and the Insured, but does not exempt the Insurer from fulfilling its statutory obligations to honour the judgment of a third party.

[54] In stating the above position I am seeking to rely upon the case of ***The Administrator General v National Employers Mutual Association Limited***[8] where the Court stated that, third parties would still be protected in cases where an insurer could avoid or cancel a valid policy for a breach. In my view the general position under the statute does not favour avoidance of third party claims, base on my understanding of section 18(1) of the ***Motor Vehicles Insurance (Third-Party Risks) Act,*** which provides that:

> **If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (l), (2) and (3) of section *5* (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.**

[55] Based on the evidence before this Court, I have already answer ICWI's allegation of the alleged material misrepresentation/non-disclosure and it is my finding that there is no evidence proving same on a balance of probability; consequently the

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[8] (1988) 25JLR 459

Insurer cannot avoid its obligations to third parties and is therefore liable to the Insured under section 18(1) of the Act.

[56] Alternative or additionally ICWI is alleging that there has been a breach of conditions 4 and 8 of the policy. Condition 4 relates to a stipulation to report an accident within thirty (30) days and condition 8 is the arbitration clause. In cross examination there was an admission by Mrs. Forrest-Duncan that she was obliged to report the accident to ICWI within 30 days of its occurrence and she had failed to do so. Undoubtedly this is a breach of that condition but what is the effect of such a breach; does this entitle the Insurer, ICWI to avoid the policy thereby? Significantly there is no penalty for such a failing as provided within the scope of the policy itself.

[57] In relation to condition 4 of the policy in question, I am to consider whether the fact of the non-reporting of the accident within the stipulated 30 days whether this is material to the contract? If the answer is no; then ICWI cannot succeed in reliance of any such breach to avoid its obligation to the Insured; because the late reporting of the accident amounts to a mere breach of conditions rather than making the policy itself inoperative ab initio. In considering the issue, I note that an insurer and its insured are free to decide on the terms and conditions of an insurance policy, but always subject to the law of the land.

[58] Sections 8 of the ***Motor Vehicles Insurance (Third-Party Risks) Act***, outlines certain statutory restrictions to be considered when deciding on the terms of an insurance policy. I have examined in particular section 8(1) of the Act which provides that***:***

> **Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall *be* of no effect in connection with such**

claims as are mentioned in subsections (I), (2) and (3) of section *5*

The claims mentioned in that provision are:

i. **the death of,**
ii. **or bodily injury to any person; and**
iii. **any damage to property, caused by or arising out of the use of the motor vehicle on the road.**

In all the circumstances therefore I find that ICWI is not entitled to avoid liability to Third Parties or even the Insured where the Insured failed to report an accident within the stipulated timeframe and therefore this plinth of ICWI's case also fails.

The Arbitration Clause

[59] The principle of good faith imposes a bilateral duty of disclosure on insurers as well as on the insured. In practice however, the duty tends to bear more heavily on the insured but the insurer does have a duty to disclose to the insured material facts within the insurer's knowledge and of which he knows the insured to be ignorant[9]. An insurance company must act in utmost good faith in the interpretation of their policies; as the principle of utmost good faith has consequences to both parties. It is the insurance company, not the policyholder, who has the obligation of proving the applicability of a "limitation" or "exclusion" in the policy. It is the insurance company, and not the insured that has the burden of proving that an exclusion or limitation in the policy is:

a) Clear
b) Conspicuous, and
c) Applicable.

[9] *Banque Keyser Ullman SA v Skandia* [1991] 2 AC 249, [1990] 1 QB 665, [1990] 2 All ER 947

[60] Now on reading the arbitration clause in this case, I agree that it does provide that in the event there is a dispute then the arbitration process should obtain and either party is at liberty to access or initiate arbitration. Counsel Mr. Goffe has submitted that there was no obligation on ICWI to initiate the arbitration process, and further submitted that ICWI had no obligation to bring to the attention of the Insured that this clause existed in the contract or that she could utilize it. He has offered the case of ***William McIlroy Swindon Ltd and another v Quinn Insurance Ltd***[10] (***Quinn***) in support of his submissions. I have noted that at first instance the trial judge had decided the following:

1. The arbitration condition was mandatory as a form of dispute resolution
2. The arbitration clause had been effectively incorporated as a term of the policy although unusual for Insurance policies
3. In general it was not reasonable to expect the Insurer to draw the attention of the Insured to particularly relevant terms
4. It was doubtful whether the Court had jurisdiction to grant an extension of time for starting arbitration.

[61] Since the hearing of this matter Counsel Mr. Goffe in the highest traditions of the Bar has alerted this Court as also counsel on the other side; that there has been a successful partial appeal in the above ***Quinn*** decision. Counsel has also kindly supplied this Court with a copy of the appellate decision and I now express my gratitude for the same. On appeal the decision in ***Quinn*** was overturned in so far as the period when arbitration would commence is concerned. It seems when there is third party liability involved the time for arbitration commences when liability has been established and quantified. There was no evidence led by ICWI in this case to satisfy this Court that in respect of Third Party Claims that this

[10] 133 Con L R 181

position had been arrived at before suit was filed by Mrs. Forrest-Duncan. Counsel Mr. Goffe has also quite candidly indicated that ICWI cannot therefore maintain its previous stance as regards declarations sought at paragraphs 1 and 3 of their Fixed Date Claim Form, in so far as these relate to third party claims.

[62] ICWI is notwithstanding the Court of Appeal decision in ***Quinn***, still maintaining its posture where Mrs. Forrest-Duncan's own loss claim is concerned. A number of considerations arise here and the approach to be adopted by the court; is not as cut and dry as counsel, Mr. Goffe proposed the Court adopts. I have had regard to Mrs. Forrest-Duncan's demeanour while she was in the witness box and clearly she is not a woman of much learning and this would have been obvious to the agent of the 2nd Defendant. I say this having regarded the testimony of Miss Ashman that Mrs. Forrest-Duncan was not fluent and had to be assisted in the spelling of words and how to formulate the alleged confession and release.

[63] Mr. Green also testified that he assisted the Insured in constructing sentences and in spelling words. It was therefore well within the 2nd Defendant's contemplation that the Insured may be ignorant of the arbitration clause although it was contained in the policy contract itself. Perhaps therefore this would be one of the exceptional circumstances that Edwards-Stuart, J. spoke about in the ***Quinn*** decision. It would have been no onerous duty when the letter cancelling the policy was penned by Miss Ashman for her also to have alerted Mrs. Forrest-Duncan of the arbitration clause and that she could utilize it. This would have been in keeping with the good faith obligation that is also cast upon the Insurer.

[64] Counsel Mr. Goffe has also submitted to this court that the time for arbitration is long past and that since it is a condition precedent to bringing a claim before the court, then the Claimant/Insured would not now be able to attempt the arbitration process at this stage. I am not entirely sure that this is an accurate assessment of the state of affairs as I have also noted that Appellate Court in ***Quinn*** did not say that an extension of time could not be granted they only clarified the issue as to when time starts to run.

[65] My own industry has unearthed the Jamaican Court of Appeal decision in ***United General Insurance Co. Ltd. V Sebert Hutchinson***[11] and I am thereby emboldened to disagree with counsel on the point as to whether the court can enlarge time in terms of arbitration. In the above decision Smith, JA. Had considered the ***Scott v Avery*** [12]clause or what is commonly referred to as arbitration clause incorporated in an insurance policy. The learned Law Lord was of the view that such a clause, providing that the rights of the parties shall be determined by arbitration as a condition precedent to suit being filed, is not an agreement ousting the jurisdiction of the court and hence was perfectly valid. He went on to say:

> ***However where the insured commences legal proceedings in breach of such a clause in my view, the reasonable, although not obligatory, course for the insurer to take is to apply to the court for a stay of proceedings pursuant to section 5 of the Arbitration Act. I say this because the insurers themselves could have taken steps to invoke the stipulation as to arbitration. More importantly it seems that such clause does not put on hold the limitation period.***

[66] Smith, JA. Then went on to consider whether there was any scope for arbitration been pursued after the expiration of the limitation period and particularly made reference to section 2 of the ***Arbitration Act*** as also the definition of the word "submission" in section 2 of the said Act which provides as follows:

> ***A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court.***

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[11] Resident Magistrate Civil Appeal No. 15/2004, del. 3rd November 2005
[12] [1856] 5 H.L. Cas. 811

> ***"submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.***

Smith, JA further expounded that:

> In light of the provisio that the "submission" is to be treated as an order of the Court, the question is can the Court enlarge the time within which the claim shall be referred to arbitration?

[67] Although the learned Judge of Appeal, Smith did not volunteer a definite answer to the question pose as he had not had the benefit of submissions made by counsel; he was prepared to say **"I will content myself by saying that, in my view, it is arguable that the Court may enlarge the time".** To my mind therefore there is no settled position in this jurisdiction on the particular issue and therefore has strengthened my resolve in declining to accept the Defendants position on the point.

Fraud and Undue Influence

[68] Fraud was alleged and specifically pleaded by Mrs. Forrest-Duncan in her claim and also in her defence to ICWI's claim and she has done so with particularity. The Claimant Mrs. Forrest-Duncan has alleged fraud was by way of deceiving her that she was in imminent danger of being arrested for a criminal offence and could only avoid arrest and incarceration by signing the confession. To my mind to succeed on the basis of fraud the false representations alleged would have to relate to the nature of the document itself. There is no evidence that Mrs. Forrest-Duncan was not at all times aware that it was a confession she was being asked to write out and sign. She might have been pressured into signing a confession and might have capitulated out of fear of incarceration but I cannot say that fraud had been established in the circumstances.

[69] Attorneys-at-law dealing with civil litigation have traditionally been admonished to treat the issue of alleging fraud very cautiously and carefully. Lord Selborne LC in ***John Wallingford v Mutual Society and the Official Liquidator*** [13] stated the general rule, He said:

> **"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."**

[70] In ***Associated Leisure Ltd and others v Associated Newspapers Ltd***[14], Lord Denning MR (as he then was) cautioned that fraud should not be pleaded unless there was "clear and sufficient evidence to support it". Similarly in ***Donovan Crawford and Others v Financial Institutions Services Ltd***[15], the Privy Council emphasized the standard in respect of the issue of fraud in civil litigation. The Court adumbrated at paragraph 13 of its judgment that "It is well settled that actual fraud must be precisely alleged and strictly proved."

[71] Although, on the assessment of the evidence I have eliminated fraud by way of deception, it is still necessary for me to address my mind to the issue of undue influence, as a subset of the issue of fraud, because in recent decisions actual undue influence has been characterized as a species of fraud. In ***CIBC Mortgages plc v Pitt*** [1993] 4 All ER 433, Lord Browne-Wilkinson said at page 439: "...Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right....".

[72] In the case of ***Moses Robinson v Cynthia Nunes*** (1994)31 JLR; Robinson the Plaintiff / Claimant, an elderly man, blind and illiterate, was the registered

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[13] (1880) 5 App Cases 685 at page 697
[14] [1970] 2 All ER 754 at pages 757-8
[15] [2005] UKPC 40

proprietor of a parcel of land. In 1988 the defendant who was the plaintiff's daughter told the plaintiff that it was necessary for him and her to sign a document in order to secure a loan from L.H., for the purpose of carrying out repairs to the premises. The plaintiff was not advised to obtain independent legal advice and upon finding out that the document was really a transfer sought to have it set aside. The Court adumbrated that:

1. The presumption of undue influence arises out of a fiduciary relationship where confidence and trust is reposed by one person in another.
2. The presumption may be rebutted if it is proved that the transaction was to the disadvantage of the person exercising the dominating influence or if the disadvantaged party received independent legal advice, which must be given with knowledge of all the relevant circumstances and must be of a nature that any competent and honest adviser would give.
3. The principle of *non est factum* can only apply if the document actually signed is fundamentally different from that which the person intended to sign.

In the instant case Mrs. Forrest-Duncan has not satisfied any of the pre-conditions as outlined above; so as to bring herself within the application of the law as it relates to undue influence; and her claim in this regard also fails.

Damages sought by Mrs. Forrest-Duncan

[73] This portion of her claim was not at all pursued by Mrs. Forrest-Duncan during the trial so perhaps inferentially she has abandoned same. In any event I agree with the submissions of Counsel, Mr. Goffe that she would be entitled to no more than the compensation as provided in the insurance policy. This aspect of Mrs. Forrest-Duncan's claim therefore fails.

DISPOSITION

[74] I have above indicated my findings in relation to both suits and I accordingly make the following orders:

I. The declarations sought in the lead Claim No. 2007 HCV 04909; brought by ICWI, at paragraphs **1, 2, 3 & 4** of the Fixed Date Claim Form; filed on the 3rd December 2007 are refused.

II. Costs are awarded to the Defendant, Mrs. Forest Duncan; in the lead Claim No. 2007 HCV 04909; brought by ICWI, in an amount to be agreed or taxed

III. The declarations sought by Mrs. Margaret Forrest-Duncan in the consolidated Claim No. 2008 HCV 01667; are granted, as against the 2nd Defendant in terms of paragraphs **iv, v & vi** of the Fixed Date Claim Form filed on 3rd April 2008.

IV. The declarations sought by Mrs. Margaret Forrest-Duncan in the consolidated Claim No. 2008 HCV 01667; are refused, as against the 4th Defendant in terms of paragraphs i – x of the Fixed Date Claim Form filed on 3rd April 2008.

V. Any costs claimed by the 4th Defendant are to be paid by ICWI

VI. These orders are to be prepared, filed and served by the Attorneys-at-Law for ICWI