IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No: G 464/2012

BETWEEN:

THE INSURANCE COMPANY OF THE WEST INDIES (CAYMAN) LIMITED

PLAINTIFF

AND:

VICTORIA JANE BANKS

FIRST DEFENDANT

AND:

SUSAN C. YEE
(Widow and Executrix of Richard Douglas Martin, Deceased)

SECOND DEFENDANT

Appearances: **Mr. Thomas Lowe Q.C. instructed by Mr. William Jones of Ogier for the Plaintiff**

Mr. Paul Murphy of Stuarts Walker Hersant Humphries for the First Defendant

Mr. Matthew Dors of Ritch & Conolly for the Second Defendant

Before: **Mr. Justice Robin McMillan (Actg.)**

Heard: **4th – 5th March 2015**

JUDGMENT

1. In these proceedings The Insurance Company of the West Indies (Cayman) Limited[1] ("the Plaintiff") seeks a declaration that it was entitled to avoid a Policy of Insurance entered into with Victoria Jane Banks ("the First Defendant") on the ground that a renewal of the Policy was obtained through the non-disclosure of a material fact, viz., that the First Defendant was facing pending prosecutions, and a declaration that the Plaintiff has duly avoided the Policy.

2. The issue is set out in these terms in paragraphs 4 and 5 of a Note Pursuant to GCR O. 34, r 10(1)(e):

> *"4. Section 15(3) of the Law states that:*
>
> *No sum shall be payable by an insurer under subsection (1)* [which requires insurers to satisfy judgments against persons insured in respect of third party risks], *if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it...".*
>
> *5. The trial will accordingly be concerned with whether the First Defendant's failure to disclose the fact that she was facing the Motoring Prosecutions at the time of renewal of the Policy constituted a material non-disclosure within the meaning of section 15(3) of the Law, which entitled the Plaintiff to avoid the Policy."*

[1] References to "ICWI" throughout this judgment are references to The Insurance Company of the West Indies (Cayman) Limited.

FACTUAL BACKGROUND

3. A helpful narration of the background is provided in the Plaintiff's Skeleton Argument dated 26 February 2015, which in relevant part states as follows:

> *"1. These are the submissions of the Plaintiff ("ICWI") in proceedings concerning the avoidance of a motor insurance policy taken out by the First Defendant ("Miss Banks"), the benefit of which would otherwise be available to Second Defendant ("Miss Yee").*
>
> *On 22 May 2009 Miss Banks completed a Motor Vehicle Proposal Form (see Core Bundle Tab 5, Exhibit "HL-1, pp13-14), in which she confirmed, inter alia, that no person who would drive the subject motor vehicle (the "Vehicle"): (1) had been fined, (2) had their licence endorsed/revoked, or (3) had been prosecuted for a motoring offence in the past 5 years.*
>
> *3. Later on 22 May 2009 ICWI issued the Policy to Miss Banks for twelve months from 22 May 2009 to 21 May 2010 (see Core Bundle Tab 5, Exhibit "HL-1", pp16, 19).*
>
> *4. Unbeknown to ICWI a number of prosecutions for motoring offences (the "Motoring Prosecutions") were initiated against Miss Banks "in about mid 2010" (see Core Bundle Tab 14 §22), including charges in indictment 05818 of 2010 for:*
>
> *(1) careless driving;*
>
> *(2) driving under the influence of alcohol; and*
>
> *(3) using a vehicle with an expired licence.*
>
> *5. It is accepted that at the time Miss Banks completed the Proposal Form she did so honestly. Indeed had the Motoring Prosecutions been live at that time the Proposal Form would have contained an active misrepresentation.*
>
> *6. ICWI agreed to reinstate the then lapsed Policy on 21 June 2010 from that day to 20 June 2011 (Core Bundle Tab 5, Exhibit "HL-1", pp26-29):*
>
> *(1) There was therefore a period of some 4 weeks between 21 May 2010 and 21 June 2012 during which the Policy had lapsed and Miss Banks was uninsured during that time.*

(2) *In addition during that year the Policy lapsed on a number of occasions for non-payment of premiums and had to be reinstated (see Core Bundle Tab 5, Exhibit "HL-1", pp32, 34 and witness statement of Miss Banks Core Bundle Tab 14 §14).*

7. *On 15 June 2011 ICWI agreed that the Policy would be extended for the period 21 June 2011 to 20 June 2012 (see Core Bundle Tab 5, Exhibit "HL-1", p39).*

8. *It is common ground that Miss Banks was not asked to complete a further proposal form on reinstatement or renewal of the Policy.*

9. *It is also common ground that Miss Banks never disclosed the Motoring Prosecutions when the Policy was renewed both in June 2010 or June 2011.*

10. *The Vehicle was involved in a collision on 30 November 2011. The collision tragically resulted in, inter alia, the death of Mr. Martin.*

11. *The Summary Court of the Cayman Islands circulated its Traffic Court hearing list on 14 May 2012 which provided, inter alia, that Miss Banks was facing the Motoring Prosecutions (see Core Bundle Tab 5, Exhibit "HL-1, p43)*

12. *ICWI wrote to Miss Banks on 30 July 2012 (see Core bundle Tab 5, Exhibit "HL-1", p44) to advise her that it was avoiding the Policy on the basis of the non-disclosure of a material fact, namely the nondisclosure of the fact that the First Defendant was facing the Motoring Prosecutions.*

13. *On 14 November 2012 Miss Yee, as widow and executrix of the Estate of the late Mr. Martin, issued a Writ and began an action (Cause Number 453 of 2012) against Miss Banks and a Mr. Patrick Ramon Brooks-Dixon ("Mr. Brooks-Dixon"), claiming damages on the ground that the death of the late Mr. Martin was caused by Mr. Brooks-Dixon's negligent driving of the Vehicle (see Documents Bundle, tab 60).*

14. *On 22 November 2012 ICWI issued the Writ of Summons and Statement of Claim (see Core Bundle Tab 1) and gave notice to Miss Yee of the Miss Banks' Non-Disclosure (see Core Bundle Tab 2). Miss Banks filed a Defence on 4 January 2013 (Core bundle Tab 3) and Miss Yee was added to these proceedings by consent (Core Bundle Tab 4).*

15. *On 18 February 2013 Miss Banks pleaded guilty to two of the Motoring Prosecutions, namely driving under the influence of alcohol and using a vehicle with an expired licence. The charge of careless driving was left on the file (see Core bundle Tab 5, Exhibit "HL-1", p45 and Core Bundle Tab 14 §23)."*

4. In addition, in formal terms paragraphs 1-12 of the Statement of Claim dated 22 November 2012 are admitted in the Defence which correctly is dated 4 January 2013. Paragraphs 1-12 state:

"1. The Plaintiff is an insurer within the meaning of sections 2 and 15 of the Vehicle Insurance (Thirty Party Risks) Law (2012 Revision) (the "Law").

2. The Defendant is a resident of the Cayman Islands.

3. On 22 May 2009, the Plaintiff, in consideration of the payment of a premium of six hundred and forth six Cayman Islands dollars and thirty five cents (CI$646.35)(as a first quarterly instalment of a total premium of CI$2,020.68), issued to the Defendant a policy of motor vehicle insurance bearing policy number '34594221 1' (the "Policy"), by which the Plaintiff agreed that for the period of twelve (12) months from 22 May 2009 to 21 May 2010 it would, inter alia, indemnify the Defendant in the event of an accident caused by or arising out of the use of the Defendant's Chevrolet Trailblazer motor vehicle, registration number 132 916 (the "Vehicle"), against all sums including a third party claimant's costs and expenses which the Defendant should become legally liable to pay in respect of:

(a) death of or bodily injury to any person, subject to a maximum sum payable of CI$1,000,000.00; and

(b) damage to property, subject to a maximum sum payable of CI$250,000.00 arising out of one event.

4. The foregoing liability is such liability as is required to be covered by a policy of insurance under section 4(1) of the Law.

GRAND COURT - CAYMAN ISLANDS

5. *The Plaintiff made the contract of insurance on the basis of and in reliance upon the truth of a proposal form and declaration competed by the Defendant dated 22 May 2009 (the "Proposal Form"). In the Proposal Form the following question, amongst others, was put to the Defendant under the section headed "THE DRIVERS (INCLUDING THE PROPOSER)":-*

> *"(e) To the best of your knowledge in the past five (5) years has any person who will drive the motor vehicle: (1) been fined, (2) had their licence endorsed / revoked, (3) been prosecuted for a motoring offence?*

After the said question, the Proposal Form contained boxes marked 'Y' and 'N' for the proposer to tick its answer 'yes ' or 'no', and also further boxes for details to be proved in the event that the proposer answered 'yes' to the question.

6. *The Defendant answered 'no' to the question set out in paragraph 5 above by ticking the box marked 'N' next to that question.*

7. *As stated in paragraph 3 above, the Plaintiff duly issued the Policy, for the period 22 May 2009 to 21 May 2010. In May 2010, the Defendant failed to ask the Plaintiff to renew the Policy, and the Policy therefore expired on 21 May 2010.*

8. *On or about 21 June 2010, the Defendant sought to reinstate the then lapsed Policy, and the Plaintiff agreed to reinstate it for the period 21 June 2010 to 20 June 2011. The Defendant duly paid to the Plaintiff a renewal premium of CI$543.99 (as a first quarterly instalment of a total premium of CI$1,683.96) and the Plaintiff duly renewed the Policy for an additional twelve (12) months and delivered to the Defendant a Certificate of Insurance for the period 21 June 2010 to 20 September 2010 (on the basis that further certificates would be issued as and when the remaining quarterly instalments were paid). This renewal of the Policy was confirmed by way of an endorsement (Endorsement No. 1153503) to the Policy dated 21 June 2010.*

GRAND COURT - CAYMAN ISLANDS

9. *On or about 15 June 2011, the Defendant asked the Plaintiff to renew the Policy for a third year, and the Plaintiff agreed to extend the Policy for the period 21 June 2011 to 20 June 2012. The Defendant duly paid to the Plaintiff a renewal premium of CI$440.82 (as a first quarterly instalment of a total premium of CI$1,359.72) and the Plaintiff duly renewed the Policy for an additional twelve (12) months and delivered to the Defendant a Certificate of Insurance for the period 21 June 2011 to 20 September 2011 (again on the basis that further certificates would be issued as and when the remaining quarterly instalments were paid). This renewal of the Policy was confirmed by way of an endorsement (Endorsement No. 1305040 to the Policy dated 21 June 2010.*

10. *On or about 14 October 2011, the Defendant paid the second quarterly instalment of the insurance premium, in the sum of CI$306.30, to the Plaintiff and on 14 October 2011, the Plaintiff delivered to the Defendant a Certificate of Insurance for the period 14 October 2011 to 20 December 2011 (the "Certificate of Insurance").*

11. *On 30 November 2011, during the third policy period and whilst the Certificate of Insurance was in full force and effect the Vehicle was involved in a collision (the "Collision") which resulted in , inter alia, the death of the late Richard Douglas Martin (the "late Mr. Martin").*

12. *On or about 14 May 2012, the Summary Court of the Cayman Islands circulated its Traffic Court hearing list, which set out details of the matters listed before Chief Magistrate Hall. That hearing list provided, inter alia, that the Defendant was due to appear in the Summary Court for a mention on a number of prosecutions for motoring offences, including charges in indictment 05818 of 2010 for: i) careless driving; ii) driving under the influence of alcohol; and iii) using a vehicle with an expired licence (the "Motoring Prosecutions")."*

GRAND COURT - CAYMAN ISLANDS

5. Furthermore, paragraph 19 of the Plaintiff's Skeleton Argument states:

> *"19. It is not in dispute that these proceedings were commenced by ICWI 8 days after proceedings were commenced by Miss Yee against Miss Banks and Mr. Brooks-Dixon and that notice of the proceedings was given on 22 November 2012, in compliance with the requirements of section 15(3)."*

THE GOVERNING LEGISLATION

6. At this point and for general convenience I now set out the full terms of s.15(3) of the Vehicle Insurance (Third Party Risks) Law (2012 Revision) ("the Law"), which states:

> *"(3) No sum shall be payable by an insurer under subsection (1), if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:*
> *Provided that an insurer who has obtained such a declaration in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment contained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the proceedings specifying the non-disclosure or false representation on which he propose to rely, and any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto."*

7. Additionally, section 15(5) of the Law states in part:

> *"(5) In this section –*
> *"material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk, and if so, at what premium and on what conditions;..."*

THE PROPOSAL FORM AND THE GUIDELINES

8. Among the questions set out by the Plaintiff and answered by the First Defendant as the Proposer in the original Proposal Form dated 22 May 2009 is the following:

> *"(e) To the best of your knowledge in the past five (5) years, has any person who will drive the motor vehicle (1) been fined, (2) had their licence endorsed/revoked, (3) been prosecuted for a motoring offence?*

NAME	*DATE*	*OFFENCE*

"

In this context it is to be noted that reference is made to a box headed "*Offence*" as distinct from simply "*Conviction*". The First Defendant signified a negative response to this question.

9. At the bottom of the Proposal Form is a declaration inter alia that *"I/WE HEREBY DECLARE that all the above Statements and Particulars are true".*

10. The Plaintiff also adduced evidence of its applicable Motor Underwriting Guidelines and Rates, including a list of the following identified persons where a referral by staff to a more senior underwriter would be required. This list comprised the following:

GRAND COURT - CAYMAN ISLANDS

"PERSONS

1. PERSONS UNDER 23 OR OVER 70 YEARS OF AGE

2. PERSONS WHO HAVE HAD THEIR LICENCE FOR LESS THAN 1 YEAR

3 PERSONS WITH MOTOR CONVICTIONS, OTHER THAN PARKING TICKETS, WITHIN PAST 3 YEARS

4 PERSONS WITH PHYSICAL DISABILITIES

5 PERSONS WITH ACCIDENTS WITHIN THE PAST 12 MONTHS

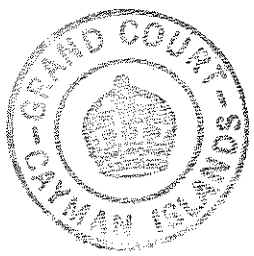
6 OPEN DRIVE COVER FOR INSUREDS NOT LICENSED TO DRIVE

7 PERSONS WHOSE COVER HAS BEEN DECLINED OR CANCELLED BY ANOTHER INSURANCE COMPANY

8 PERSONS REQUESTING REINSTATEMENT WHO HAD LOSSES DURING THE PERIOD THEIR POLICIES WERE LAPSED"

11. In this context it is to be noted that no class of persons is explicitly identified who have outstanding or pending traffic offence charges or even where any have already been acquitted of any such charges. At the same time, it should also be noted that the list of persons includes persons with accidents within the past 12 months, whereas the Proposal Form refers more broadly at (f) to accidents or losses during the past five years.

12. Accordingly, it would seem that the Guidelines, which form an internal administrative document, and the Proposal Form itself are not entirely complementary nor are they necessarily designed to be exhaustively comprehensive.



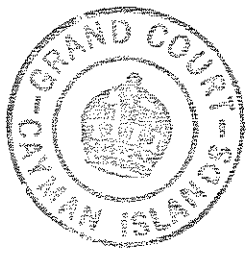
THE CENTRAL ISSUES

13. This matter concerns possible non-disclosure and the effect of non-disclosure, and at least initially it also concerned alternatively whether by failing to request additional disclosure the Plaintiff thereby waived the duty to disclose. However, as I now understand it the Defendants no longer rely upon the proposition that a waiver of duty took place at the time of renewal of the Policy.

14. As set out in Paragraph 14 of the Defendants' Skeleton Argument dated 2nd March 2015, the Defendants invited the Court to consider the issues in the following way:

> *"14. The issues that the Court must determine are:*
>
> *a. Can the Plaintiff prove that the Alleged Material Fact was a material fact that would influence the judgment of a prudent motor insurer?*
>
> *b. Was the First Defendant under a duty to disclose the Alleged Material Fact to the Plaintiff at the time of the 2011 renewal?*
>
> *c. Can the Plaintiff prove that, if the First Defendant had disclosed the Alleged Material Fact, the Plaintiff would not have renewed the Policy in June 2011 on the same terms?*
>
> *d. If the Plaintiff is successful on all of the above issues, in the circumstances of this case, is the Plaintiff entitled to avoid the Policy?"*

15. The Plaintiff on the other hand submits that the issues should be addressed thus:



"*1.* *Had the First Defendant a duty to disclose the fact of prosecution on obtaining a renewal of the Policy on the last occasion, and was the fact of prosecution a material fact?*

2. *If the First Defendant had a duty to disclose was the Policy induced by her failure in the sense that had the Plaintiff known it would have refused coverage or required more onerous terms?*

3. *If there should have been disclosure and no disclosure in fact occurred, nonetheless is it contrary to the insurer's duty of good faith to avoid the policy?"*

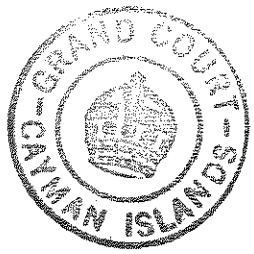
16. In examining the law and the facts I propose in due course to adopt the Defendants' suggested approach while at the same time bearing in mind the very helpful methodology of the Plaintiff.

THE GENERAL OVERVIEW

17. The general principles upon which the duty of disclosure is based have been described by Lord Mansfield in the leading case of ***Carter v Boehm***[2], where he states at 1909-1910:

> *"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge ... mislead the underwriter into a belief that the circumstances does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement...The policy would be equally void against the underwriter if he concealed...Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary."*

18. The common law in relation to renewal is admirably set out in ***Law Accident Insurance Society Limited v. Boyd***[3]. There the Court held that the contract in a particular insurance policy was a contract for one year only, renewable from year to year under an obligation upon the insured to disclose prior to each renewal any material change in circumstances adverse to the interest of the insurers, and that no distinction could be made between the policy and the contract. The Lord Justice-Clerk (Cooper) states at page 391:

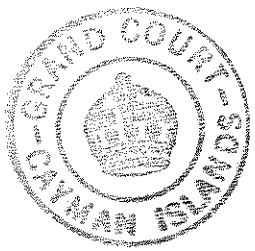


[2] (1766) 3 Burr 1905
[3] 1942 S.C. 384

"As a matter of construction of the policy which is the written record of the contract of insurance, I suggest to your Lordships that there is no doubt that this - like most motor accident policies - was a contract of insurance which only persisted for a year at a time and which required by means of a new contract between the parties to be renewed at the end of each "period of insurance", and that it does not fall into the very special category of contract under which the insurance persists indefinitely without the necessity for periodic renewal and without reference to the wishes of the parties. If that is the position and if this is a contract of insurance which lasts only for a year at a time and which requires at the expiry of each year to be renewed, then a new contract of insurance is entered into on each renewal and it seems to me that on every renewal there at once arises an obligation on the insured to make such disclosure as may be necessary and proper, and to correct any statement in his original proposal form which may no longer be accurate and which may be material to the risk for which he seeks cover during the year still to come. I find that the rule is stated on page 429 of MacGillivray on Insurance Law, second edition, in these terms:- "In fire policies and similar risks where the insurers may decline to renew the policy at the expiration of the original period, each renewal is made on the faith of the continued truth of the original representations, and if there has been any material change adverse to the interest of the insurers which has not been disclosed on or before payment of the renewal premium the insurers may repudiate liability or limit their liability to the amount of which they would have been liable if there had been no change."

19. Similarly Lord Wark states at page 392:

"I am quite clear that the contract of insurance was a contract from year to year, and that there was no obligation upon either party to renew that contract at the end of any particular year. That being so, I think that there was a duty upon the proposer for renewal to disclose all the material facts in exactly the same way as at the date when the policy was originally taken out. If there was a non-disclosure in 1940 of a fact which was most material to the policy, I think, with your Lordship, that Mr. Walker's argument fails."



THE PRINCIPLES IN THE PAN ATLANTIC INSURANCE CASE

20. As the Defendants have accepted in Paragraph 12 of their Skeleton Argument:

> *"It was settled by the House of Lords in Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd. [1995] 1 A.C. 501 that an insurer who wishes to avoid a policy for breach of the duty of utmost good faith must prove two separate matters: (1) the fact withheld or misstated was material; and (2) the insurer was induced by the assured's presentation to enter into the contract. The former test is objective; the latter is subjective."*

21. Lord Mustill describes the issue of materiality at page 541A, the test of materiality being whether the information would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. Correspondingly at page 571 E-F Lord Mustill identifies the further question being as to whether the misrepresentation or non-disclosure induced the actual insurer *"to enter into the contract on those terms."*

22. Lord Mustill also states at page 550 C-D that if the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which the expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract.

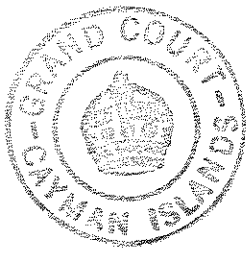
23. I should also note in passing Lord Mustill's further comments at page 551 B-D:

GRAND COURT CAYMAN ISLANDS

"I will add one brief rider. Differing from the C.T.I. case and hence from the principle which the Court of Appeal was bound to apply in the present case I have concluded that it is an answer to a defence of misrepresentation and non-disclosure that the act or omission complained of had no effect on the decision of the actual underwriter. As a matter of common sense however even where the underwriter is shown to have been careless in other respects the assured will have an uphill task in persuading the court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference. There is ample material both in the general law and in the specialist works on insurance to suggest that there is a presumption in favour of a causative effect. It is not necessary for present purposes to give the proposition this formal label, or to explore it in detail."

24. I shall conclude my reference to this critically important case by setting out Lord Mustill's affirmation of Lord Mansfield's previous propositions on this subject in the *Carter* case. Lord Mustill states at page 536 F-G:

"Whilst it is true that this decision has been criticized on the facts, and that the wide general contractual duty of good faith which Lord Mansfield propounded has long since ceased to hold sway, the courts have never been deflected from the high standard of duty prescribed in his judgment. The assured is not to keep anything back which goes to the computation of the "contingent chance," for otherwise there is no "fair representation," and the underwriter is led to approach the "risk understood to be run" on a false basis. Such is the principle on which insurance law has been developed and insurance contracts have been made for more than 200 years and I would do nothing to dilute it now. I can see no room within it for a more lenient test expressed solely by reference to the decisive effect which the circumstance would have on the mind of the prudent underwriter."



THE EVIDENCE OF MS. HEATHER LANIGAN

25. The Plaintiff relies upon the evidence of Ms. Heather Lanigan, a Manager and a Senior Underwriter of the Plaintiff. Ms. Lanigan provided a Written Statement dated 24 June 2014 and an Affidavit dated 22 July 2013, the contents of both of which were incorporated in conjunction into the evidence-in-chief in this matter. Ms. Lanigan states at Paragraphs 5-8 of her Affidavit:

> *"5. On 22 May 2009, the Plaintiff, in consideration of the payment of a premium of six hundred and forty six Cayman Islands dollars and thirty five cents (CI$646.35)(as a first quarterly instalment of a total premium of CI$2,020.68), issued the Policy to the Defendant, by which the Plaintiff agreed that for the period of twelve (12) months from 22 May 2009 to 21 May 2010 it would, inter alia, indemnify the Defendant in the event of an accident caused by or arising out of the use of the Defendant's Chevrolet Trailblazer motor vehicle, registration number 132 916 (the "Vehicle"), against all sums including a third party claimant's costs and expenses which the Defendant should become legally liable to pay in respect of:*
>
> *(a) death of or bodily injury to any person, subject to a maximum sum payable of CI$1,000,000.00; and*
>
> *(b) damage to property, subject to a maximum sum payable of CI$250,000.00 arising out of one event.*
>
> *A copy of the Policy, together with various endorsements and certificates of insurance, is at pages 1 to 42 of the Bundle.*
>
> *6. I entered into the contract of insurance, on behalf of the Plaintiff, on the basis of and in reliance upon the truth of a proposal form and declaration completed by the Defendant dated 22 May 2009 (the "Proposal Form"). In the Proposal Form the following question, amongst others, was put to the Defendant under the section headed "THE DRIVERS (INCLUDING THE PROPOSER)":-*

GRAND COURT CAYMAN ISLANDS

"(e) To the best of your knowledge in the past five (5) years has any person who will drive the motor vehicle: (1) been fined, (2) had their licence endorsed / revoked, (3) been prosecuted for a motoring offence?"

7. After the said question, the Proposal Form contained boxes marked 'Y' and 'N' for the proposer to tick its answer 'yes' or 'no', and also further boxes for details to be provided in the event that the proposer answered 'yes' to the question. The Defendant answered 'no' to the question set out in paragraph 6 above by ticking the box marked 'N' next to that question. A copy of the Proposal Form is at pages 13 to 15 of the Bundle.

8. I duly issued the Policy, on behalf of the Plaintiff, for the period 22 May 2009 to 21 May 2010."

26. She then states at Paragraphs 10-12:

"10. On or about 15 June 2011, the Defendant asked the Plaintiff to renew the Policy for a third year, and the Plaintiff agreed to extend the Policy for the period 21 June 2011 to 20 June 2012. The Defendant paid to the Plaintiff a renewal premium of CI$440.82 (as a first quarterly instalment of a total premium of CI$1,359.72) and the Plaintiff renewed the Policy for an additional twelve (12) months and delivered to the Defendant a Certificate of Insurance for the period 21 June 2011 to 20 September 2011 (again on the basis that further certificates would be issued as and when the remaining quarterly instalments were paid). This renewal of the Policy was confirmed by way of an endorsement (Endorsement No. 1305040) to the Policy dated 15 June 2011. A copy of Endorsement No. 1305040 is at page 39 of the Bundle.

11. On or about 14 October 2011, the Defendant paid the second quarterly installment of the insurance premium, in the sum of CI$306.30, to the Plaintiff and on 14 October 2011, the Plaintiff delivered to the Defendant a Certificate of Insurance for the period 14 October 2011 to 20 December 2011 (the "Certificate of Insurance"). A copy of the Certificate of Insurance is at page 40 of the Bundle.

12. *On 30 November 2011, during the third policy period and whilst the Certificate of Insurance was in full force and effect the Vehicle was involved in a collision (the "Collision") which resulted in, inter alia, the death of the late Richard Douglas Martin (the "late Mr. Martin").*

27. Ms. Lanigan continues at Paragraphs 14-21:

"14. Although the Plaintiff does not know the specific date on which the Motoring Prosecutions were brought against the Defendant, I believe that it is clear that at the very least they were brought prior to the June 2011 renewal, as the indictment is indictment number 05818 of 2010, which I understand means that the Motoring Prosecutions were brought during the year 2010. The Defendant, however, failed to disclose the fact that she was facing the Motoring Prosecutions when she renewed the Policy in June 2010 or in June 2011.

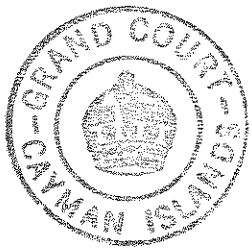
15. The fact that the Defendant was facing the Motoring Prosecutions was material in that it would have influenced me (and thus the Plaintiff), and would have influenced the judgment of any prudent insurer, in deciding whether to take the risk of insuring the Defendant or fixing the premium of insurance.

16. In relation to motor insurance, the underwriting of a risk has as its ultimate goal the determination of whether the risk is one that is acceptable to the insurer who will assume the responsibility of providing indemnification to the proposed insured in the event of accidental damage to or destruction of the insured's property or the property of a third party, or of injury or death to the insured or a third party as a result of the use of the insured's vehicle, and further to determine the premium at which the insurer would be prepared to accept the proposed risk.

17. The underwriting practices adopted by ICWI have developed as a result of assessing risk, premiums and losses in particular areas of motor vehicle insurance business in various locations over a number of years. ICWI's underwriting policy is also affected by the premium to reinsure a particular class of risk.

18. *As a senior underwriter, when I underwrite a new piece of business I consider the proposed insured's age, occupation and address, the type of vehicle, the use of the vehicle, who has custody and control of the vehicle, the proposed insured's driving history and experience (including whether the proposed insured had received any fines, had their licence endorsed or revoked, or had been prosecuted for any motoring offences) and the proposed insured's claim history (and the driving history and experience and claim history of any named drivers). I also assess the risk to determine whether the proposed insured is a 'moral hazard', this is, whether he or she is likely to do anything to increase the risk to be undertaken by ICWI. I would also consider whether the proposed insured has previously been denied insurance or had a policy cancelled and the reasons given by the previous insurer for having taken such steps. In my experience these factors are standard when assessing risks and are applied throughout all branches of ICWI (in Cayman and overseas, such as in Jamaica).*

19. *The applicability of these factors to a proposed risk may lead an underwriter to conclude that the risk is acceptable at the standard premium. On the other hand there are circumstances where, on an assessment of the risk, it may be felt that the risk exposure is increased and though the risk is acceptable it cannot be accepted at the standard premium rate but at some increased premium. In order to facilitate the assessment of these factors ICWI requires a proposed insured to complete a proposal form in order to obtain insurance coverage, and the questions raised on that form are designed to elicit information relevant to the various factors considered in the underwriting process. The risk is then underwritten based on the information provided in the completed proposal form, and that information is taken as all the material facts relevant to the assessment of the risk.*



20. *It is of course the proposed insured's duty to disclose all facts relevant to the risk which ICWI is being asked to undertake and the decision at the end of the underwriting process to insure the proposer is premised on the truthfulness of the information provided. The insured's duty to disclose all relevant facts applies equally at inception and upon any renewal of a policy.*

21. It is vitally important for insureds or those seeking motor insurance to fully advise me (or indeed any underwriter) of all motoring offences, as the proposer's driving history is one of the key factors which I take into account when deciding whether to take on the risk of insuring the proposer or of renewing a policy in the case of an existing insured. In this case, had the Defendant told me that she was facing the Motoring Prosecutions, I am certain that I would have declined to renew the Policy, as a driving history involving charges for the offences of careless driving and driving under the influence of alcohol would mean that the risk of insuring that individual would be too great for the Plaintiff to take on."

28. Then in her Witness Statement Ms. Lanigan proceeds to set out her background, education and experience at Paragraphs 5-10.

29. Ms. Lanigan returns to the subject of how the Plaintiff conducts its motor insurance business at Paragraphs 12-16:

"12. Once ICWI has given the customer the initial quote, and if the customer wishes to proceed to apply for insurance with ICWI, the customer will be required to complete ICWI's Motor Vehicle Proposal Form (the "Form"). As I stated in paragraph 6 of the Affidavit, ICWI enters into contracts of insurance on the basis of and in reliance upon the truth of the customer's answers on the Form. The customer/proposer is therefore required to answer each and every question on the Form, including questions regarding whether they have had any previous insurance proposal declined, questions regarding the subject vehicle and questions regarding the drivers of the vehicle. In the event that ICWI was to subsequently discover that any of the proposer's answers on the form were wrong, we would invariably void the policy.

13. The section of the Form regarding the drivers of the vehicle includes questions regarding whether the proposed drivers have been fined, had their licence endorsed or revoked, or been prosecuted for nay motoring offence (i.e. question (e) in that section of the Form). If, for example, the

proposer had received a speeding ticket, I would not normally see that as a reason to penalize the proposer, unless there had been an accident as a result, and I quite often see proposers who have received a ticket for not wearing their seatbelt, which is not a real reason to decline a proposal. In the event that a proposer has been involved in an accident or if there is anything else out of the ordinary on the Form, the customer service representative will come to speak to me (or one of the other two supervisors at ICWI who are also responsible for underwriting) about whether we wish to take on the risk of insuring that person. In the case of a minor accident, I would normally be willing to take on the risk of insuring such a person, but if an accident involved driving under the influence of alcohol or resulted in any personal injury or death I would reject the proposal.

14. *Although ICWI does have a Motoring Underwriting Guidelines and Rates manual (the "Guidelines"), I (and the other two supervisors at ICWI who are also responsible for underwriting) will not typically need to consult the Guidelines to determine the applicable insurance rate, as we know how to rate a proposal from past experience. I will however occasionally consult the Guidelines in respect of proposals in relation to certain vehicles, as the Guidelines contain a list of high performance vehicles and/or sports cars which ICWI will always decline to insure.*

15. *In the cases of proposers who have been prosecuted for the offence of driving under the influence of alcohol ("DUI"), ICWI will always reject their proposal. My, and ICWI's real concern with those who have been prosecuted for a DUI offence (and even more so in the cases of those who have been convicted of a DUI offence), is that there is no way for us to determine whether the proposer is an alcoholic or is likely to be a repeat offender, and the next time such a person drives under the influence of alcohol there is a risk that they could injure or kill someone. Although I understand that other insurers in the Cayman Islands are willing to take on the risk of insuring those who have been prosecuted for or convicted of a DUI offence (I assume by charging an increased premium), ICWI will always turn down such business.*

16. *Once the proposer has completed the Form, the customer service representative will prepare a cover note, and either I or one of the other two supervisors will review the completed Form and draft cover note, and will proceed to underwrite the new business (either one of the other supervisors or I must sign the first cover note). I set out details of the factors which I will take into account when underwriting a new piece of business in paragraph 18 of the Affidavit, and whilst I do not intend to repeat myself in this Statement, I confirm that I take all of those factors into account."*

30. In Paragraphs 20-21 Ms. Lanigan reiterates the Plaintiff's practice as to materiality and disclosure:

"20. *In cases where an insured wishes to renew a policy and properly discloses the fact that they have been prosecuted for or convicted of a DUI offence, ICWI will always decline to renew the policy, for the same reasons that we would decline to take on the risk of insuring a proposer in the same circumstances (as set out in paragraph 15 above). In those cases, the insured will often ask if ICWI would be willing to insure someone else to drive the vehicle, but ICWI always refuses to do so, as ICWI is unwilling to take on the risk that the insured would continue to drive the vehicle in any event.*

21. *In Ms. Banks' case, had she disclosed the fact that she was facing prosecutions for the motoring offences of: i) careless driving; ii) driving under the influence of alcohol; and iii) using a vehicle with an expired licence, when she sought the renewal of her policy in June 2010 or June 2011, I would have declined to renew her policy. As I stated in paragraph 21 of the Affidavit, I would have declined to renew Ms. Banks' policy because a driving history involving charges for the offences of careless driving and driving under the influence of alcohol would mean that the risk of insuring that individual would be too great for ICWI to take on."*

GRAND COURT - CAYMAN ISLANDS

31. In cross-examination, Ms. Lanigan accepts that the First Defendant had received no warning from the Plaintiff of a duty to disclose material facts.

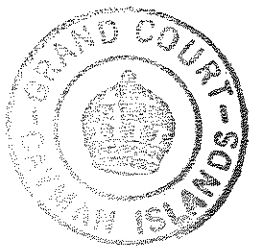
32. Ms. Lanigan also confirms that she is one of three senior underwriters in the Plaintiff's local office.

33. When a customer came to the office the customer would initially see a customer service assistant. Then, if no issues arose on the Proposal Form *"and nothing that sets any alarm bells ringing"*, the customer service assistant would give an underwriter the Proposal Form with a draft cover letter and an underwriter would *"sign off on it"*.

34. Ms. Lanigan also agrees in cross-examination that the Proposal Form was changed in August 2013.

35. Ms. Lanigan states that as far as her evidence was concerned "*prosecuted*" means prosecuted *"from the time at which somebody is charged with an offence"*.

36. Ms. Lanigan reiterates that she is a very prudent underwriter and that she always looks at whatever is brought to her attention that may affect risk.

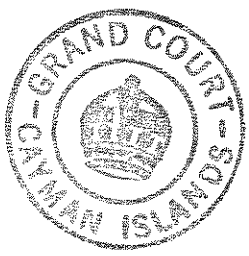


THE EVIDENCE OF VICTORIA JANE BANKS

37. The Defendants rely upon the evidence of Ms. Victoria Jane Banks, the First Defendant and the Proposer. Ms. Banks provided a Witness Statement dated 9 September 2014, the contents of which were incorporated as evidence-in-chief in this matter.

38. Ms. Banks states at Paragraphs 3-7:

> *"3. I have seen a document called the 'Motor Vehicle Proposal Form' which is signed by me and dated 22 May 2009 (the "Proposal Form"). I signed this form at the ICWI office after answering a series of questions by the ICWI representative. I hereby exhibit a true copy of the Proposal Form as exhibit 'VJB-1".*
>
> *4. To the best of my recollection, I sat down with the ICWI representative whilst they asked me a series of questions which were either based on the Proposal Form or directly taken from the Proposal Form. The ICWI representative input my answers to their questions on their computer. The process took approximately 20 minutes.*
>
> *5. The majority of the questions required a 'yes' or 'no' answer. I answered all the questions honestly and I understand that there is no issue with the fact that the answers that I gave were accurate at the time.*
>
> *6. The ICWI representative did not explain any of the questions.*



7. *After I had answered the questions the ICWI representative printed out the completed Proposal Form. I was asked to check through the form, ensure that all the questions were answered correctly and sign and date the form. I notice on the first page of the Proposal Form that the question '(e)' tick box has been filled in by hand and I have initialed next to the tick box."*

39. Ms. Banks goes on to state at Paragraphs 16-17:

"16. Despite the fact that there were periods of time when it appears as though I was uninsured, on each occasion when I would go back into ICWI's offices I would simply tell them that I was making my quarterly payment. The customer service assistant would bring up my details on the computer, give me the figure that I had to pay and I would hand over the cash. The customer service assistant would give me a Certificate of Insurance from the date of the payment until the end of the next quarter.

17. The whole process took a matter of minutes. At no time was I asked any questions about the insurance policy, the Proposal Form or the details which I had previously provided to ICWI."

40. Ms. Banks adds at Paragraph 21:

"21. The entire process in June 2010 and June 2011 took no longer than 10 minutes. At no time was I asked to complete a new proposal form, at no time was I asked whether the Proposal Form was still accurate, at no time was I asked whether I had been arrested, charged or convicted of any criminal offences and at to time was I asked whether I had 'been prosecuted' for any driving offences."

41. Ms. Banks states at Paragraphs 22-24:

"Motoring Prosecutions

22. I am unaware of the precise time when I was charged with the motoring offences. From memory I think that it was sometime in mid-2010. From recollection I first appeared in court sometime towards the end of 2010. I received a bundle of prosecution papers and I pleaded 'not guilty' to the motoring charges. My 'not guilty' pleas were entered at a separate hearing to my first hearing and I instructed Samson & McGrath to represent me and give me legal advice.

23. On or about 23 July 2012, I pleaded guilty to two of the charges and I was finally sentenced on 18 February 2013.

24. In June 2010 and June 2011 I can categorically say that I had pleaded 'not guilty' to the motoring charges and I had made no admission of guilt."

42. Ms. Banks continues at Paragraphs 25-36 as follows:

"Understanding of the proposal form and duty of good faith

25. I understand that ICWI claim that they are entitled to avoid the policy of insurance on the basis that the insurance policy was obtained by the non-disclosure of a material fact, namely, that when the policy was renewed in either June 2010 or June 2011 I did not tell ICWI that I had been charged with the motoring offences.

26. Firstly, I cannot say that I had been charged in June 2010 and, in the absence of any evidence to the contrary, I would ask the court to proceed on the basis that any charges could have arisen after June 2010.

27. Secondly, I only decided to plead guilty to two of the charges on 23 June 2012 after receiving legal advice, therefore, in June 2011 I had made no admission of guilt to any of the charges.

GRAND COURT - CAYMAN ISLANDS

28. *Thirdly, the Proposal Form asks, 'has any person who will drive the motor vehicle...been prosecuted for a motoring offence. 'Prosecuted' is not defined within the Proposal Form and having been through the criminal justice system, I can say that there are four elements to the criminal justice process. There is an 'arrest' for an offence where the police arrest somebody on suspicion of having committed an offence. There is then a 'charge' which means that you are given a date to appear before court to answer a 'charge'. The final two elements are entering a 'plea' to the charge and, if convicted, there is a sentence.*

29. *Any person can obviously plead 'guilty' or 'not guilty' to a charge and if found 'not guilty' there is no criminal conviction for the offence.*

30. *The ICWI Proposal Form is ambiguous in two main respects. Firstly, 'has been' suggests that a prosecution has been completed. Reading the Proposal Form, my interpretation of the question would be that any criminal proceedings have been concluded after somebody 'has been' convicted (i.e. prosecuted successfully) for an offence and sentenced. Secondly, 'prosecuted', with reference to my knowledge of how motoring offences proceed through the criminal justice system, is not a term that I ever heard and bears no resemblance to any of the processes which I have mentioned above.*

31. *The question could well be asked, what part of the criminal process does 'prosecute' relate to? My own opinion and interpretation is that without an admission of guilt I fail to see how someone could ever have been said to have 'been prosecuted', especially given that until someone either pleads guilty or is found guilty by the court there is the prospect of them being found not guilty of the alleged offences.*

GRAND COURT - CAYMAN ISLANDS

32. *What is even more confusing is that ICWI could have very easily remedied any ambiguity by changing the question to read 'has any person who will drive the motor vehicle...been arrested for a motoring offence?' or 'has any person who will drive the motor vehicle...been charged with a motoring offence?' or 'has any person who will drive the motor vehicle...been convicted for a motoring offence?'. In all of these questions it is clear what ICWI are asking and there could be no room for an alternative interpretation.*

33. *Finally, I went to ICWI's offices on approximately 10 separate occasions before the accident. At no time was I asked to complete a new proposal form nor was I asked any questions whatsoever about my circumstances. In none of the materials that ICWI gave to me, that is the Certificates of Insurance, the Reminder Letters, the quarterly payment forms, the original Proposal Form or the Schedules of Insurance was there anything which stated that I had to inform ICWI about any changes to my personal circumstances.*

34. *I hereby exhibit a copy of the Road Angel Motor Vehicle Policy as exhibit 'VJB-10' and note that on page 15, paragraph 8, which is the section dealing with 'Utmost Good Faith and Due Observance of Terms', it says: 'The due observance and fulfilment of the Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this Policy.'*

35. *There are no other sections that relate to 'Good Faith'. The answers that I gave on the Proposal Form were truthful and there is no issue in relation to this. At no time was I asked to complete a new proposal form nor was I asked any other questions by any ICWI representative.*

GRAND COURT - CAYMAN ISLANDS

36. *I acted in 'good faith' towards ICWI and firmly believe that I am not guilty of failing to disclose a material fact. If ICWI want to take the view that a person should disclose the fact that they have been charged with a motoring offence they should make this abundantly clear when the policy is entered into, including letting the insured person know when they should tell ICWI about the charge."*

43. In cross examination the First Defendant agrees that she had been drinking at the time of the incident which led to her convictions.

44. The First Defendant states that the charges arose *"mid-2010"*.

45. In addition the First Defendant states that it did not come into her mind to mention the charges to the Plaintiff's representative, but that if she had been asked she would have told the Plaintiff's representative about them.

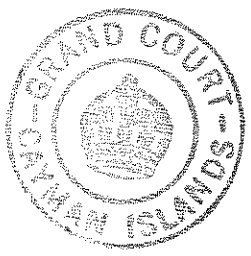
MATERIALITY

46. In addressing the issue of materiality, the burden of proving which rests upon the Plaintiff, it is important to bear in mind the observations of Henderson J in ***British Cayman Insurance Company Limited v. Lindo and Brown***[4] at Paragraph 29:

> *"29. Mr. Lindo's obligation was to provide truthful answers to the questions posed in the proposal. Its wording required him to declare that his answers were correct. Nothing in the wording of the form allowed him to answer to the best of his knowledge and belief; the declaration is worded so as to obtain from Mr. Lindo a guarantee of truthfulness. This fact serves to distinguish the decision of the Privy Council in* ***Zeller v. British Caymanian Ins. Co.*** *(6) relied upon by Mr. Lowe. In Zeller's case, the questionnaire called repeatedly for answers which were true to the best of Mr. Zeller's knowledge and belief. The insurer's attempt to avoid the policy failed because its evidence did not establish that the insured knew or believe his answers to be false."*

47. In more general terms, the learned Judge also states at Paragraphs 31-32:

> *"31. Materiality is judged by an objective standard: the insured's duty is to disclose everything which a reasonable man would recognize as material: Joel v. Law Union & Crown Ins. Co. (2).*
>
> *32. However, and this is crucial in the present case, the general duty to disclose extends only to matters within the knowledge of the applicant for insurance. The test on this aspect is subjective; it is not a question of what facts a reasonable man would have knowledge of when applying for insurance. The question turns on what the individual insured actually knew at the material time. The onus of proving that he knew of a fact which he failed to disclose rests upon the insurer."*



[4] 2011 (2) CILR 282

48. Upon a total review of the evidence, the most salient features of which I have set out above, I find as a fact that the First Defendant actually knew at the latest at the material time of her proposing renewal of the insurance contract in June 2011, and was aware, that she had motoring charges which were pending. Indeed, Paragraph 22 of the First Defendant's Witness Statement, as read in conjunction with Paragraph 14 of Ms. Lanigan's Affidavit, would indicate that inevitable conclusion.

49. In those circumstances it is necessary to consider whether upon the relevant wording of section (e) of the second page of the Proposal Form the pending charges could properly amount to the First Defendant having been prosecuted for a motoring offence or motoring offences.

50. Having examined the language in question and having taken into account the circumstances in which the original contract was formed and the subsequent renewals were effected, I find that in their natural and ordinary meaning the words in issue do encompass a clear reference not merely to convictions but also to pending charges and also to acquittals as appropriate. In other words, the language encompasses information as to the prosecution process as a whole.

51. Notwithstanding the somewhat distinct scope of the Plaintiff's Guidelines which have earlier been examined, those Guidelines do not in any way detract from the finding which I have now made.

GRAND COURT CAYMAN ISLANDS

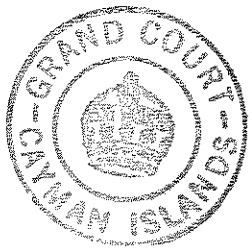
52. Accordingly I accept on a balance of probabilities that this information as to motoring offences was material to a fair presentation of the risk proposed to be undertaken by the Plaintiff. Indeed, it should be noted that the historical requirement of a *"fair presentation of risk"* is referred to by Rix LJ in ***Drake Insurance Plc v. Provident Insurance Plc***[5].

53. I have noted and considered the evidence of Ms. Lanigan as to the undertaking of risk and her assertions as to her expressed concerns on any taking on of risk where the First Defendant was facing prosecution for the motoring offences of i) careless driving; ii) driving under the influence of alcohol; and iii) using a vehicle with an expired licence, when the First Defendant sought the renewal of the policy in June 2010 or June 2011.

54. In addition, as I have now interpreted the Proposal Form no ambiguity arises which should be considered c*ontra proferentem,* against the Plaintiff, under the principle in ***Zeller v. British Caymanian Insurance Company***[6].

55. In the process of coming to my conclusions I have regard to the following comments of the learned authors of ***MacGillivray*** on Insurance Law, the Twelfth Edition, at Paragraph 17-041:

> *"17-041 Evidence of materiality. Although it is proper for the court to formulate legal tests governing the materiality of facts, the question whether a given fact is or is not material is one of fact to be determined by a jury or a judge as the trier of fact. The decision rests on the judge's own appraisal of the relevance of the disputed fact to the subject-matter of the insurance; it is not something which is settled automatically by the current practice or opinion of insurers."*

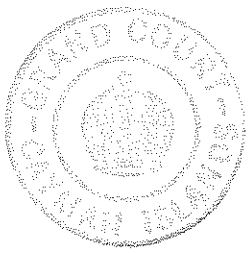


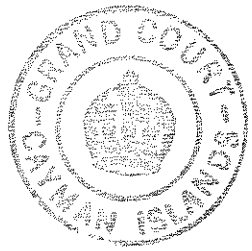
[5] [2004] Q.B. 601 at page 628.
[6] 2008 CILR 11

56. I consider that the information in question was material of such a nature as to influence the judgment of a prudent insurer in determining whether he would take on the risk, and if so, at what premium and on what conditions.

57. Accordingly, I accept on a balance of probabilities that the Plaintiff has proved the statutory requirements of what is "*material*" in section 15(5) of the Law.

58. Bearing fully in mind the formal objective test in the ***Pan Atlantic Insurance*** case as to whether the information would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium, I reiterate that the information is legally and factually material in the sense provided for in s.15(5) of the Law.





THE DUTY OF DISCLOSURE

59. The duty of disclosure in contracts of insurance is closely interconnected with the issue of materiality. Nonetheless, as I have previously indicated I shall address it as a separate matter for consideration.

60. It is fundamental law that where there is a duty to disclose then upon each renewal of the policy there at once arises an obligation on the insurered to make such disclosure as may be necessary and proper and to correct the statement in the original proposal form which may no longer be accurate and which may be material to the risk for which the proposer seeks cover during the period still to come. This principle is clear from the decision in the *Law Accident Insurance Society* case as already set out.

61. In broad terms, the learned authors of ***MacGillivray*** describe the duty to disclose in this manner at Paragraph 17-009:

> *"The general rule stated. Subject to certain qualifications considered below, the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms. The question of materiality is treated separately after a consideration of the other elements of the doctrine."*

62. As Smellie CJ points out in ***Royal Star Assurance Ltd. v Allen A. Foster and William Causley Archer*** [7] at paragraph 31 a contract of insurance

> *"imposes an obligation of utmost good faith upon the parties"* [and] *"Mr. Foster was under a general duty to disclose all material facts to RTSA"*

[7] Unreported, dated the 7th November 2014

63. The scope of this responsibility likewise is confirmed in the ***Zeller*** case, where the Judicial Committee of the Privy Council held inter alia that the insured's duty of disclosure under the doctrine of *uberrima fides* was to make honest disclosure, rather than to disclose what a reasonable man would have thought he should disclose.

64. In practical terms, and in the circumstance of this case, this requirement means that the First Defendant's duty was to disclose what she knew.

65. Fletcher Moulton LJ explains the nature of the duty in ***Joel v Law Union and Crown Insurance Company***[8]:

> *"The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment."*

66. In this context it will be recalled that I have already made a finding of fact that the First Defendant knew that she had motoring charges pending at the latest at the time of her proposing the renewal of the insurance contract in June 2011.

67. The Plaintiff submits at paragraph 26 of the Plaintiff's Skeleton Argument that Miss Banks knew that the Motoring Prosecutions had been initiated against her and that she knew all the relevant facts about those proceedings. In this regard I accept the Plaintiff's submission as correct.

68. The Plaintiff further submits at Paragraph 28 of the Plaintiff's Skeleton Argument:

[8] [1909] 2K.B. 863 at page 884

> *"28. Once it is shown that she knew of the Motoring Prosecutions and if their materiality is accepted, Miss Bank had an absolute duty to disclose them, whether or not she appreciated that they were material:*
>
> *"I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so". Joel v Law Union and Crown Insurance supra again at p884 and see also Zeller v British Caymanian Ins §17"*

In this regard I also accept the Plaintiff's submission as correct.

69. In light of the governing law to which I have referred, and in light of the evidence adduced in this case, I find that the Plaintiff has proved on a balance of probabilities that the First Defendant had a duty of disclosure of information which was material and that she breached that duty.

70. The duty depends on the knowledge which she possessed and she did in fact possess the relevant knowledge at the relevant time.

GRAND COURT CAYMAN ISLANDS

INDUCEMENT

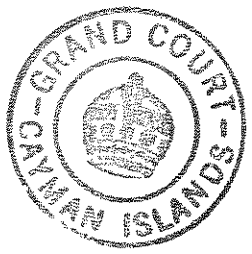
71. The general principle as to inducement appears in ***MacGillivray*** at Paragraph 17-029, which states in part:

> *"Inducement. To succeed in a defence of non-disclosure the insurer must prove not only that the assured failed to disclose a material fact but also that the non-disclosure induced the making of the contract in the sense that he would not have made the same contract if he had known the matters in question. This means that the non-disclosure must have been an effective cause of the underwriter making the contract on the terms agreed, but it need not have been the sole cause. The insurer must establish that, had he known the undisclosed circumstances, he would not have concluded it either on the same terms or at all. If he would have made the same contract, the non-disclosure cannot have made a difference."*

72. The applicable law is further explained by Buxton LJ in ***Brotherton v. Aseguradora Colseguros S.A***[9]:

> *"39. First, it is agreed on all sides that materiality is to be judged at the time of accepting the risk. Materiality depends on the effect of the circumstances on the decision of a prudent underwriter. I do not see how that effect can be sensibly judged in any particular case except in the context of the circumstances that existed at the time of acceptance of the risk. It seems self-evident that a prudent underwriter will or at least may be affected by rumour or allegations about matters that are material to the risk. I venture to repeat my Lord's citation, in his para. 32, from Phillips J in The Dora [1989] 1 LI Rep 69 at p 93:*
>
> > *'When accepting a risk underwriters are properly influenced not merely by facts which, with hindsight, can be shown to have actually affected the risk but with facts that raise doubts as to the risk'.*
>
> *The reaction of the underwriter has therefore to be judged at the time of placement. That is not unfair to the assured, who in relation to a matter likely to be of legitimate interest to the underwriter can disclose to him all the circumstances, and seek to direct the underwriter towards an informed and favourable decision.*
>
> *40. Second, it is necessary to examine further the proposition that if the rumour proves to be false the underwriter has lost nothing in writing the policy, because he has written the risk that he thought he was writing. He has however lost the opportunity to take an informed decision at the time of placement. As Lord Mustill said in Pan Atlantic [1995] 1 AC at p. 881A; 528C:*

[9] [2003] 2 C.L.C. 629 at Paragraphs 39-40



'the vice of misrepresentation and non-disclosure is not that after the event the underwriter has suffered from having taken on a parcel of risks one of which led to a loss, but that a breach of the duty of good faith has led the underwriter to approach the proposal on a false basis'.

Here again, it is the position of the underwriter at the date of the proposal that is crucial."

73. Therefore the question whether knowledge of the materiality of a given circumstance would have induced the actual underwriter to act differently must be judged at the time of the placing of the risk.

74. Finally in this regard as I have already set out it is established in the ***Pan Atlantic Insurance*** case that before an underwriter can avoid a contract for non-disclosure of a material circumstance he has to show that he has actually been induced by the non-disclosure to enter into the policy on the relevant terms.

75. I have reviewed the evidence in this case and in particular the evidence originally set out at paragraphs 16-21 of Ms. Lanigan's Affidavit and at Paragraphs 15-16 and 20-21 of Ms. Lanigan's Witness Statement.

76. In the context of the law of inducement and for the purpose of complete clarity I set out once again paragraph 21 of Ms. Lanigan's Witness Statement which states:

> *"21. In Ms. Banks' case, had she disclosed the fact that she was facing prosecutions for the motoring offences of: i) careless driving; ii) driving under the influence of alcohol; and iii) using a vehicle with an expired licence, when she sought the renewal of her policy in June 2010 or June 2011, I would have declined to renew her policy. As I stated in paragraph 21 of the Affidavit, I would have declined to renew Ms. Banks' policy because a driving history involving charges for the offences of careless driving and driving under the influence of alcohol would mean that the risk of insuring that individual would be too great for ICWI to take on."*

77. I accept and believe Ms. Lanigan's evidence upon this point.

78. Applying the legal principles to which I have alluded to the evidence in this case, I accept on a balance of probabilities that the Plaintiff has proved that the non-disclosure by the First Defendant of a material fact has induced the making of the relevant contract at the relevant time in the sense that the Plaintiff would not have made the same contract if the Plaintiff had known the matters in question, and I find that the Plaintiff has actually been induced accordingly.

THE PLAINTIFF'S ENTITLEMENT TO AVOID THE CONTRACT OF INSURANCE

A. REGULATION

79. Extensive submissions have been made on behalf of the First Defendant and the Second Defendant to the effect that in the circumstances of this case the First Defendant's duty of disclosure if it arises is or alternatively should be circumscribed in light of the fact that the Plaintiff has failed to act in accordance with widely recognized standards for good insurance practice. The Defendants argue that therefore by failing to act with utmost good faith the Plaintiff has forfeited any entitlement to the remedy which it seeks. The Plaintiff on the other hand argues that any such factors are irrelevant.

80. The Defendants rely upon a range of authority in support of their propositions. They draw first upon United Kingdom law and practice as to what constitutes good practice in the area of what is commonly called consumer insurance along with by way of example the ***Association of British Insurers Statement of General Insurance Practice 2005*** (**"ABISGIP"**) and the ***International Association of Insurance Supervisors Insurance Core Principles, Standards, Guidance and Assessment Methodology 1 October 2011***, as amended 12 October 2012, (**"IAISC) (IPIS"**).

81. In addition the Defendants rely upon a Statement of Guidance of the Cayman Islands Monetary Authority (CIMA") 2 March 2009 and a CIMA Rule of the same date dealing with Market Conduct-Class A Insurers, Agents and Brokers, in conjunction with judicial dicta from specific legal authorities to which I shall also refer.

GRAND COURT - CAYMAN ISLANDS

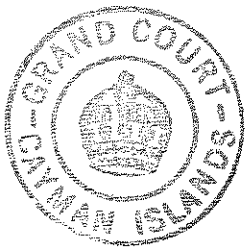
82. The Defendants' submissions summarise the broader regulatory sources in their Skeleton Argument in the following manner at paragraphs 21-23:

> *"21. In 1977, the insurance industry in the UK made voluntary proposals to mitigate some of the severity in the law of non-disclosure. The British Insurance Association, (now the Association of British Insurers)("ABI") introduced a revised Statement of General Insurance Practice in 1986 ("ABISGIP") which remained in force until 2005 [AB22]. The ABISGIP does not apply directly to the Plaintiff but it is a good example of the expected standards of good practice for insurers. It provides, inter alia, that:*
>
> *"An insurer will not repudiate liability to indemnify a policy holder on grounds of non-disclosure of a material fact which the policy holder could not reasonably be expected to have disclosed;" and that:*
>
> *"Renewal notices shall contain a warning about the duty of disclosure including the necessity to advise changes affecting the policy which have occurred since the policy inception or last renewal date, whichever was the later."*
>
> *22. The Financial Services and Markets Act 2000 established the Financial Services Authority ("FSA") and the Financial Ombudsman Service ("FOS") in the UK. The FSA laid down rules of conduct to achieve good practice in the conduct of insurance business ("ICOB Rules"). The OCOB rules prevented an insurer dealing with a private individual from relying on the strict letter of the law of non-disclosure. An insurer was not entitled to reject a claim on the ground of non-disclosure of material facts in the absence of fraud if a consumer policyholder could not reasonably have been expected to disclose them. Any private individual assured whose claim was rejected could complain to the FOS. In 2005, the FOS issued guidance [AB23] on how it would deal with complaints relating to non-disclosure and avoidance. An insurer would only be entitled to avoid a policy of motor insurance if it could show that: 1) the insurer asked a clear question, at the inception or renewal of the policy, about the matter now under dispute; 2) the answer to the question induced the insurer to enter*

GRAND COURT CAYMAN ISLANDS

into the contract on terms that it would not otherwise have accepted; 3) the answer to the question was deliberately misleading or reckless as opposed to innocent or inadvertent.

23. In the UK, the Consumer Insurance (Disclosure and Representations) Act 2012 [AB28], which came into force in April 2013, restricted the duty of disclosure on any consumer to a duty to take reasonable care not to make a misrepresentation to the insurer when answering questions asked a the inception or on renewal of a policy. An insurer is only entitled to avoid a policy if the misrepresentation was deliberate or reckless and it induced the contract."



83. As I understand it, the Plaintiff does not take issue with the substance of these quoted submissions themselves but the Plaintiff maintains that they have no relevance or application to the law of insurance in the Cayman Islands.

84. By way of illustration the ABISGIP states inter alia:

"Proposal Forms

(a) The declaration at the foot of the proposal form should be restricted to completion according to the proposer's knowledge and belief.

(b) Neither the proposal form nor the policy shall contain any provision converting the statements as to past or present fact in the proposal form into warranties. But insurers may require specific warranties about matters which are material to the risk.

(c) If not included in the declaration, prominently displayed on the proposal form should be a statement:

(i) drawing the attention of the proposer to the consequences of the failure to disclose all material facts, explained as those facts an insurer would regard as likely to influence the acceptance and assessment of the proposal;

(ii) warning that if the proposer is in any doubt about facts considered material, he should disclose them.

(d) *Those matters which insurers have found generally to be material will be the subject of clear questions in proposals forms."*

85. Also by way of illustration the ABISGIP later states:

"Renewals

(a) *Renewal notices shall contain a warning about the duty of disclosure including the necessity to advise changes affecting the policy which have occurred since the policy inception or last renewal date, whichever was the later.*

(b) *Renewal notices shall contain a warning that the proposer should keep a record (including copies of letters) of all information supplied to the insurer for the purpose of renewal of the contract."*

86. By way of separate illustration Paragraph 19.5.14 of the IAISCPIS states inter alia:

"Disclosure of rights and obligations

19.5.14 Retail customers in particular often have only limited knowledge about the legal rights and obligations arising from an insurance contract. Before an insurance contract is concluded, the insurer or intermediary, as relevant, should therefore inform a retain customer on matters such as:

- *General provisions – including the law applicable to the contract*
- *Obligations to disclose material facts – including prominent and clear information on the obligation on the customer to truthfully disclose material facts. Ways of ensuring a customer knows what he or she must disclose include explaining the duty to disclose all circumstances material to a policy and what needs to be disclosed, and explaining the consequences of any failure to make such a disclosure. Alternatively, rather than an obligation of disclosure, the customer may be asked clear questions about any matter material to the insurer."*

GRAND COURT CAYMAN ISLANDS

87. I also note that in the ***CIMA Regulatory Handbook – Volume*** 1 there appears the following statement on page 8:

> *"Regulatory Philosophy*
> *The Authority endeavours to fulfil its regulatory and supervisory mandate having due regard to international standards such as the Core Principles for Banking Supervision issued by the Basel Committee on Banking Supervision; the Core Principles for Insurance Supervision issued by the International Association of Insurance Supervisors;...",* etc.

88. I do not find these various references to be specifically helpful in the context of the actual insurance law of the Cayman Islands, other than generally as providing instances of what seems to be good contemporary regulatory practice, and I do not consider the references as detracting from or modifying in any way the common law duty of disclosure as I have previously outlined it.

89. I now turn to the remaining range of authority identified by the Defendants, both regulatory and judicial.

90. The Defendants have brought to my attention Rule 5.2.4 of Market Conduct Rules which they submit have been issued by CIMA pursuant to the Monetary Authority Law ("MAL"). This Rule states:

> *"5.2.4 Customers must also be informed about their duty of disclosure according to insurance contract law and the implications of a failure to disclose material information."*

91. I consider that the reference to a *"duty to disclose according to insurance contract law"* indicates that the Rule in question is of regulatory scope only, and that it does not alter nor can it alter the Cayman Islands law of the duty of disclosure itself. It is regulatory only and it is to be considered exclusively in that light.

92. Indeed I am reinforced in forming this conclusion by Rule 6, which states:

> *"Enforcement*
> *Whenever there has been a breach of the Rules, the Authority's regulatory policies and procedures as contained in its Enforcement Manual will apply, in addition to any other powers provided in the Insurance Law and the MAL."*

93. I have also been shown the separate CIMA ***Statement of Guidance*** concerned with the Market Conduct of Class A Insurers, Agents and Brokers. That Statement sets out inter alia the following guidance:

> *"Statement of Guidance*
>
> *Market Conduct – Class A Insurers, Agents and Brokers*
>
> *1. Statement of Objectives*
>
> *1.1 To provide guidance on the requirement imposed on licensees by the Rule on Market Conduct.*
>
> *1.2 To provide a standard of best practice to insurance licensees in conducting business with customers.*
>
> *2. Introduction*
>
> *2.1 The Insurance Law seeks to provide for stability within insurance markets thereby maintaining confidence in the relationship between policy holders, Insurers and Intermediaries.*
>
> *2.2 There is a need for sound market conduct guidance to reinforce legislation, the Rule on Market Conduct and to provide basic standards of business conduct to strengthen consumer confidence and protection. Such guidance will provide direction as to what are legitimate and acceptable practices in the domestic insurance market.*
>
> *3. Scope of Application*
>
> *3.1 This Statement of Guidance applied to all Class A insurers, agents and brokers licensed under the Insurance Law to carry on domestic insurance business.*

GRAND COURT CAYMAN ISLANDS

4. *Guidance pertaining to Rule on Market Conduct*

4.1 The system for complaints handling established by Insurers, Agents and Brokers should aim to deal with complaints of customers quickly, effectively and fairly. The required complaints process should be simple and equitable, to facilitate resolution effectively.

4.2 Agents licensed under the Insurance Law may, as appropriate, receive their training from the insurers for which they act.

4.3 Agents and Insurers should act in a timely manner, and employ all resources to ensure proper consideration of the customers needs.

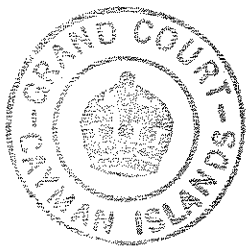
4.4 Brokers should use their skill objectively in the best interest of the insured when recommending an insurer and product to the insured.

4.5 Insurers, Agents and Brokers should pay due regard to the information needs of their customers and treat them fairly. This includes communicating:

4.5.1 relevant and meaningful information in a timely and comprehensive manner to reasonably enable the customer to make a balance and informed decision;

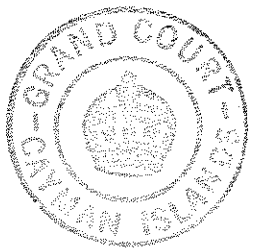
4.5.2 the benefits and any risks of any particular product or contract to the customer in a fair and balanced way;

4.5.3 the obligations of the parties involved, being the Insurers, Agents and Brokers and the customer, in a clear and understandable way.



4.6 Insurers, Agents and Brokers should take reasonable care that information is accurate in all material respects, easily understandable, not misleading, and available in writing or equally accessible electronic means.

4.7 In addition to the information that must be provided at the time of concluding the contract, the frequency with which additional information is to be disclosed during the course of the contract depends on the type of contractual arrangement. For example long term insurance could require disclosure on a annual or bi-annual basis whereas non-life annual insurance may not require any disclosure, other than on renewal.



4.8 Insurers, Agents and Brokers should seek from their customers all material information before giving advice or concluding a contract.

4.9 The relationship with customers should be one of trust and utmost good faith.

4.10 Information that a customer might reasonably expect to be confidential should be treated as such."

94. Once again: I am unable to accept that this ***Statement of Guidance,*** in any way, alters, (nor can it alter), the Cayman Islands law of the duty of disclosure itself. The Statement of Guidance is regulatory only and it is to be considered exclusively in that light.

95. Nonetheless, the fact that the First Defendant on renewal was never given any information or warning whatsoever regarding the duty of disclosure and the consequences of failing to comply with it is in its own terms a serious and unsatisfactory circumstance. It is clearly not consistent with the widely recognized standards for good insurance practice which I have reviewed.

96. The Second Defendant understandably puts the issue in this way at paragraph 13 of her Note on Closing:

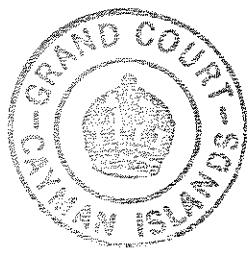
> *"Unless or until legislation similar to that which has been introduced in the UK is introduced in the Cayman Islands, only the Court, when it is considering claims under s. 15(3) of the Vehicle Insurance (Third Party Risks) Law (2012 Revision), can offer any protection for the innocent victims of motor vehicle collisions and the public policy behind that law."*

97. It now remains to consider whether the Court is empowered to intervene in the circumstances described.

B. WANT OF UTMOST GOOD FAITH

98. Although any purported regulatory breach has no direct bearing on the common law of the duty of disclosure as it is presently constituted, nonetheless the further question arises as to whether such a regulatory breach can amount to want of utmost good faith on the part of the Plaintiff and whether if it does so amount to want of utmost good faith it has any legal consequences.

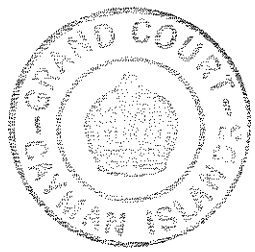
99. By way of preliminary issue, the Plaintiff has questioned whether the issue has adequately been raised in the Defence pleading. The First Defendant however argues that by virtue of paragraphs 20, 22 and 29 of the Defence it has adequately been raised. Having reviewed the relevant Paragraphs I have concluded that want of utmost good faith has in substance been sufficiently raised and I shall proceed to consider the matter upon that basis.



100. The Defendants contend that the English Courts have previously demonstrated a willingness to develop and modernise the law relating to avoidance for non-disclosure to reflect the changes in the insurance industry. However, they argue that judicial consideration of the legal principles that apply when a court is considering whether or not to restrict the right of an insurer to avoid a consumer's policy of insurance has ultimately been limited because of the additional consumer protection legislation summarily referred to above.

101. The Defendants accordingly make the following submission which is central to their argument on avoidance at Paragraph 39 of their Skeleton Argument.:

> *"39. Unless or until similar legislation is introduced in the Cayman Islands, when dealing with consumer motor insurance, the Courts of Cayman Islands should refuse to allow an insurer to avoid a policy of insurance on the grounds of material non-disclosure when the insurer has failed to act in accordance with its duty of utmost good faith, for example by failing to comply with IAISCPIS and the CIMA Rule and CIMA SOG requirements. Such an approach is an essential and necessary protection for consumers, innocent victims and the public policy behind compulsory third party motor insurance."*



102. The Defendants rely upon certain comments by Rix LJ in ***Drake Insurance Plc v Provident Insurance Plc***[10]. The learned Judge states at Paragraph 89 that the existence of widespread insurance contracts of a consumer nature presents new problems and that it may be necessary to give wider effect to the doctrine of good faith and recognize that its impact may demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing.

[10] [2004] QB 601

103. However, prior to making that observation Rix LJ discusses this question in considerable detail. The Defendants place major emphasis upon those relevant passages and in fairness to the Defendants' case I shall now set them out.

104. Rix LJ states at Paragraphs 83-89:

> *"83. It is clear that the duty of good faith is mutual and binds the insurer as well as the insured, for section 17 of the 1906 Act provides that "if the utmost good faith be not observed by either party, the contract may be avoided by the other party". The mutual aspect of the obligation has been referred to in a number of cases, see for example Banque Keyser Ullmann SA v Skandia (UK) Insurance Do Ltd [1990] I QB 665; [1991] 2 AC 249, although I am not aware that it has actually been successfully invoked to provide the insured with any remedy other than a return of premium. The only remedy spoken of by the statute is that of avoidance of the contract. Such a remedy is not likely to be often of much assistance to an insured. See in general Eggers & Foss, Good Faith and Insurance Contracts (1998).*
>
> *84. Nevertheless, in Carter v Boehm (1766) 3 Burr 1905 Lord Mansfield said, at pp 1918-1919:*
>
> > *"The underwriter, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question. If the objection 'that he was not told' is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain , if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence...If he thought that omission an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection then; he cannot take it up now, after the event."*
>
> *85. I am not sure that this is an example of good faith acting as a remedy, as distinct from it helping to inform and define the extent of the insurer's obligation of disclosure or as supporting a doctrine of waiver of information (see now section 18(3)(b) and (c) of the 1906 Act). However, in Pan Atlantic Insurance Col Ltd v Pine Top Insurance Co Ltd [1995] I AC 501, 555 Lord Lloyd of Berwick appears to have regarded this passage as using the doctrine of good faith to curtail the right to avoid, for he said:*
>
> > *"Nor is the obligation of good faith limited to one of disclosure. As Lord Mansfield warned in Carter v Boehm Burr 1905, 1918, there may be circumstances in which an insurer, by asserting a right to avoid for non-disclosure, would himself be guilty of want of utmost good faith."*

GRAND COURT - CAYMAN ISLANDS

86. *Moreover, in Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd. [2003] I AC 469 where the ramifications of the doctrine of good faith in the post-contractual period were under consideration, Lord Hobhouse of Woodborough appears to have contemplated that its role in that context may be more versatile than being simply restricted to the statutory right to avoid (see pp 494-495, paras 51-52 and pp 496-497, para 57); and he also said, at p 497, para 57: "The courts have consistently set their fact against allowing the assured's duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith." In his conclusion Lord Hobhouse said, at p 505, para 79:*

> *"Such authorities show that suitable caution should be exercised in making any extensions to the existing law of non-disclosure and that the courts should be on their guard against the use of the principle of good faith to achieve results which are only questionably capable of being reconciled with the mutual character of the obligation to observe good faith."*

87. *In my opinion it would be consonant with these views that the doctrine of good faith should be capable of limiting the insurer's right to avoid in circumstances where that remedy, which has been described in recent years as draconian, would operate unfairly. After all, Lord Hobhouse in the Manifest Shipping Co case described, at p 493, para 48, the doctrine of good faith as a "a principle of fair dealing". It is true that Lord Mansfield's conception that the doctrine of good faith would play a role across the law of contract generally has not borne fruit; and even within the insurance context where the doctrine has survived it has been used almost exclusively to protect the insurer against the insured, especially in the context of pre-contract disclosure and the requirement of a "fair presentation of the risk". Nevertheless, more recently there appears to have been a new realization that in certain respects English insurance law has developed too stringently or at any rate insufficiently flexibly: and leading cases of the last few years have shown the courts to be willing to find mean to introduce safeguards and flexibilities which had not been appreciated before: see the Pan Atlantic case [1995] I AC 501 itself, which discovered the requirement of inducement to be implicit in the 1906 Act, the Manifest Shipping Co case, which discusses the role of good faith in the post-contractual situation, and K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters subscribing to Lloyd's Policy No 25T IO5487 [2001] Lloyd's Rep 563, which limits the operation of the right to avoid for want of good faith on the part of the insured in the post-contractual context to situations where the law of contract would justify termination on repudiatory grounds.*

GRAND COURT CAYMAN ISLANDS

88. *However, examples where Lord Hobhouse's principle of fair dealing has been exercised to prevent an insurer from utilizing a prima facie right to avoid are not to hand: and it may readily be appreciated that, if once an insured has been found wanting in good faith in the matter of pre-contractual non-disclosure, it is likely to be hard to conclude that the same doctrine of good faith itself prevents the insurer from exercising his right to avoid. On the whole English commercial law has not favoured the process of balancing rights and wrongs under a specie of what I suppose would now be called a doctrine of proportionality. Instead it has sought*

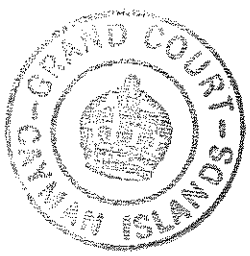
for stricter and simpler tests and for certainty. As Lord Hobhouse again said in the Manifest Shipping Co case [2003] I AC 469-492, para 45:

> *"Lord Mansfield's universal proposition did not survive. The commercial and mercantile law of England developed in a different direction preferring the benefits of simplicity and certainty which flow from requiring those engaging in commerce to look after their own interests."*

89. However, in insurance Lord Mansfield's proposition did survive (in a form). Moreover, not all insurance contracts nowadays are made by those who engage in commerce. The existence of widespread insurance contracts of a consumer nature presents new problems. It may be necessary to given wider effect to the doctrine of good faith and recognize that its impact may demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing."

105. The Defendants also rely upon the comments of Colman J in ***Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd. ('The Grecia Express')***[11], where the learned Judge states at page 474:

> *"In my judgment, it can confidently be concluded that, whatever the conceptual origins of the substantive requirements of s. 17 of the Marine Insurance Act, the remedy for non-compliance with the requirement of the utmost good faith is one derived from the equitable jurisdiction of the court to avoid contracts for misrepresentation in cases where it could not be said that the contract had been rendered void ab initio as distinct from voidable. Accordingly, that jurisdiction is to be exercised consistently with the policy of the law as regards the insured which underlies s. 17, but it has to be exercised in such a way as to take into consideration countervailing policies. Thus, if it would be unconscionable for there to be avoidance because, for example, the insurer had affirmed the contract, the contract will be enforced. The policy of permitting the underwriter to rely on non-compliance with the duty of the utmost good faith would be superseded by the unconscionability of doing so after he had represented to the insured that the contract was continuing in force. The court's jurisdiction to avoid for misrepresentation or non-disclosure therefore cannot be exercised without regard to whether the insurer has acted consistently with his duty of the utmost good faith. If he has failed to do so, the court must decide whether such failure should disentitle him to avoidance of the policy."*



[11] [2003] 1 C.L.C 401

106. It is clear from this passage however that Coleman J is concerned with unconscionable conduct on the part of an insurer, and accordingly if that approach is correct I should give consideration to whether at the time of renewal there has been any unconscionable conduct in the present case.

107. Meanwhile although Rix LJ refers to a broad principle of fair dealing identified by Lord Hobhouse in ***Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd***[12], he nonetheless accepts that examples where the principle has been exercised to prevent an insurer from utilizing a prima facie right to avoid are not to hand.

108. The ***Drake*** case was not one where breach of good regulatory practice was alleged and that case does not of course raise directly the issue of whether such a breach could in fact amount to want of utmost good faith and to unfair dealing in any event.

109. Even if a defence of want of utmost good faith is currently available in law, a matter to which I shall return below, I am not persuaded that professional inadvertence or even a lack of competence, taking the form of a regulatory breach, constitutes an absence of fair dealing as it has been described. Likewise I am not persuaded that there has been unconscionable conduct on the part of the Plaintiff at the material time.

GRAND COURT CAYMAN ISLANDS

110. At the time of renewal there was no intention on the part of the Plaintiff to take advantage of the First Defendant in any way. Whether intentionally or through oversight, it was regrettably the First Defendant who failed in her obligation to make full disclosure and who actually induced the contract.

111. I therefore find that there was no want of utmost good faith on the part of the Plaintiff.

[12] [2003] 1 AC 469

THE PRINCIPLE IN THE BROTHERTON CASE

112. Even if my finding that an absence of utmost good faith does not arise in this case is incorrect a further issue then arises as to whether an established finding of a want of utmost good faith would in any event be relevant as a matter of law to the broader question of the Plaintiff's entitlement to avoid the contract.

113. The Plaintiff contends that a want of utmost faith, even where found to exist, is immaterial to the issue of whether the Plaintiff has an entitlement to avoid the contract.

114. The Plaintiff bases this legal proposition on various dicta of the English Court of Appeal found in the ***Brotherton*** case, an authority to which I have earlier referred in relation to inducement. I shall set out those statements for consideration.

115. Mance LJ states, *inter alia,* at paragraph 27:

> *"It is clear that rescission in the general law of contract is by act of the innocent party operating independently of the court: see Abram Steamship Co V Westville Shipping Co [1923] AC 773 (rescission of a shipbuilding contract for misrepresentation) and Horsler v Zorro [1975] 1 Ch 302 (rescission of a contract for sale of land). I see no basis for saying that avoidance of an insurance contract for non-disclosure or misrepresentation is any different."*

GRAND COURT CAYMAN ISLANDS

116. Mance LJ also states at Paragraph 34:

> *"Firstly, rescission under English law is not generally subject to any requirement of good faith or conscionability. It is unnecessary to address the academic chestnut, delicately handled by Lord Mustill in Pan Atlantic at p. 893-894; 544, of the juristic origin of the duty of disclosure in insurance law, in particular whether or to what extent the origin is equitable and what role the common law played: cf. Carter v Boehm. The mere fact that a right to rescind has an equitable origin does not mean that its exercise is only possible if that is consistent with good faith or with a court's view of what is 'conscionable'. Secondly, recent authority has in any event tended to limit the scope of any post-contractual duty of good faith to circumstances of repudiatory breach or fraudulent intent: cf. Manifest Shipping Co Ltd. v Uni-Polaris Shipping Co Ltd ('The Star Sea')*

[2001] UKHL 1; [2001] CLC 608; [2003] 1 AC 469; Merc-Scandia XXXXII (K/S) v Lloyd's Underwriters ('The Mercandian Continent') [2001] EWCA Civ 1275; [2001] CLC 1836 and Agapitos v Agnew ('The Aegeon') [2002] EWCA Civ 247; [2002] CLC 886. Even if there were any scope in any circumstances for development of the first strand in English insurance law (and for qualifying, in effect, a clear principle recognized as long ago as 1811 in Lynch v Dunsford), as to which I need express no view at all, it could not be in a case like the present where reinsurers did not at the time of avoidance accept or know for certain of the incorrectness of the intelligence constituting the basis of their avoidance."

117. Finally, Buxton LJ states at Paragraphs 47-48:

> *"47. The appellant however sought to avoid this general jurisprudence of the law of rescission by urging that insurance was a special case, being a contract uberrimae fidei in both directions. It showed mala fides on the part of the insurer to stand on a rescission when he now knew that the rumour on the basis of which he rescinded had been untrue. The court should find some means of depriving the insurer of the fruits of that act on his part.*
>
> *48. This argument does not circumvent the difficulties arising from the nature of rescission that have already been set out. Nor does it have merit in general terms. The duty of good faith, or of utmost good faith, applies in the formation of the contact. It is simply inept to extend it to the enforcement of the contract in litigation. Nor would the insurer be acting wrongly in the circumstances posited. Once it is accepted that he is entitled to complain of the failure to disclose relevant allegation or rumour; and entitled to rescind the contract once he learns of the undisclosed allegation or rumour; then in resisting claims on the basis that the contract no longer exists he is doing no more than standing on his rights both in law and in equity. The unconscionability argument is in truth no more than a way of seeking to avoid by a side-wind the effects in law of the insured's non-disclosure."*

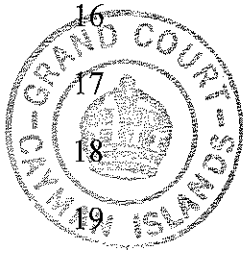
118. These statements of principle are extremely clear and they are founded upon the classical concept that the duty of utmost good faith applies in the formation of the contract and that where recission or avoidance is justified that recission or avoidance should not be impeded or frustrated nonetheless by a contrary requirement to enforce the contract.

119. Indeed Buxton LJ explicitly warns against seeking to avoid by a side-wind the effects in law of the insured's non-disclosure. I should perhaps add that I have already set out in the course of this Judgment what I consider the effects of the First Defendant's non-disclosure to have been.

120. However, in taking this authority into account I remind myself that I must also have regard to the apparently countervailing views expressed by Rix LJ in the ***Drake*** case.

121. In Paragraph 38 of the Defendants' Skeleton Argument the point has also been made that judicial consideration of the legal principles that apply where a court is considering whether or not to restrict the right of an insurer to avoid a consumer's policy of insurance has been limited. This was because of the introduction of consumer protection legislation.

122. Within the narrow context of Rix LJ's discussion of the doctrine of utmost good faith the submission of the Defendants is essentially correct: the law in England has not developed in the particular way that Rix LJ appears to have envisaged, a circumstance which necessarily limits the degree of emphasis to be given to his quoted judicial comments.



123. As we have also seen, even at the time of the ***Drake*** Court of Appeal decision examples where Lord Hobhouse's principle of fair dealings had been exercised to prevent an insurer from utilizing a *prima facie* right to avoid were not to hand.

124. In due course potential development of the common law was in fact overtaken at least partially by primary legislation itself. Sections 2 and 3 of the English ***Consumer Insurance (Disclosure and Representation) Act 2012 ("the Act")*** state as follows:

"Pre-contract and pre-variation information:

2 Disclosure and representations before contract or variation

(1) This section makes provision about disclosure and representation by a consumer to an insurer before a consumer insurance contract is entered into or varied.

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer.

(3) A failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of this Act (whether or not it could be apart from this subsection).

(4) The duty set out in subsection (2) replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied.

(5) Accordingly –

(a) any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of this Act, and

(b) the application of section 17 of the Marine Insurance Act 1906 (contracts of marine insurance are of utmost good faith), in relation to a contract of marine insurance which is a consumer insurance contract, is subject to the provisions of this Act.

3 Reasonable care

(1) Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances.

(2) The following are examples of things which may need to be taken into account in making a determination under subjection (1) –

(a) the type of consumer insurance contract in question, and its target market,

(b) any relevant explanatory material or publicity produced or authorised by the insurer,

(c) how clear, and how specific, the insurer's questions were,

(d) in the case of a failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so),

(e) whether or not an agent was acting for the consumer.

(3) The standard of care requirement is that of a reasonable consumer: but this is subject to subsections (4) and (5)

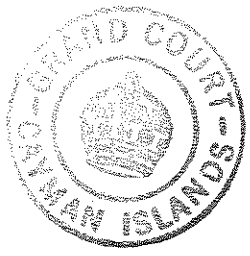
(4) If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account.

(5) A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care."

125. The Defendants however additionally referred to various provisions under two statutory bodies, the Financial Services Authority and the Financial Ombudsman Service, which are summarized in ***MacGillivray*** at paragraph 17-110 and 17-111 and which have no relevance to the development of the common law as distinct from regulatory oversight.

126. Having careful regard to the principle set out in the ***Brotherton*** case, I am unable to agree with the submissions of the First Defendant and the Second Defendant that the judicial dicta in the ***Drake*** case upon which they rely represent or alternatively should represent the current state of the common law in the Cayman Islands in relation to avoidance and a want of utmost good faith on the part of an insurer.

127. Accordingly, even if my finding that a want of utmost good faith on the part of the Plaintiff does not arise in this case is incorrect and even if a want of utmost good faith were to be established, I am still persuaded by the Plaintiff's argument that the legal principle expounded in the ***Brotherton*** case to which I have referred represents the current state of the common law and I would therefore accept and apply that proposition in this case.



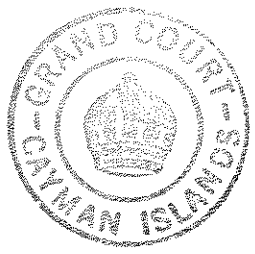
CONCLUSION

128. For the reasons set out in the course of this Judgment the Court finds that the Plaintiff was entitled to avoid the Policy dated 22 May 2009 on the ground that the renewal of the Policy was obtained by the non-disclosure of a material fact and the Court finds that the Plaintiff has duly avoided the Policy. Accordingly declarations will be granted to that effect.

129. Before concluding I have one further observation which I wish to make. It is clear that a disparity exists between the regulatory framework and the common law governing non-disclosure in the Cayman Islands. It may be that the time has come for the appropriate authorities to consider whether it is in the public interest that this disparity should be permitted to continue.

130. I shall hear the parties as to costs.

Dated this the 30th day of June 2015



Robin McMillan

Mr. Justice Robin McMillan (Actg.)
Acting Judge of the Grand Court