IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 00526

BETWEEN KEY INSURANCE COMPANY LTD. CLAIMANT

AND DAMIAN McCALL DEFENDANT

IN CHAMBERS

CORAM: JUSTICE DAVID BATTS

Ms. Kerriann Sewell for Claimant

Defendant was absent and unrepresented.

Heard: 17th & 20th September, 2012

JUDGMENT

1. This fixed Date Claim Form was filed on the 24th January, 2012. In it the Claimant Insurance Company seeks declaratory relief and allege that their insured the Defendant, made material non-disclosures which entitle them to avoid the policy of insurance.
2. At this, the first date for hearing of the Fixed Date claim form the Defendant was absent. By affidavit dated 18th June 2012 sworn to by Delroy Lawson, who describes himself as a process server, proof of service of the Fixed Date Claim form and affidavit in support was provided. The date of the service is the 13th March 2012.
3. The Claimant's attorney also indicated that attorneys for potentially interested parties had been served with a Notice of these proceedings. These were Messrs. Kinghorn and Kinghorn and Bignall Law, attorneys at law who represent persons with claims against the Defendant. The notice was served on Kinghorn

& Kinghorn on the 30th January, 2012 at 4:40 p.m. and upon Bignall Law on the 27th January, 2012 at 3:07 p.m.

4. Upon being satisfied as to service I invited the Claimant's counsel to commence her submissions. In particular I asked to be satisfied as to the jurisdiction of the court on a fixed Date Claim Form to make an order in these proceedings.

5. Counsel referred to Part 8 Rule 8.1(4) (d) (page 43) of the Civil Procedure Rules (2002) (as amended) which states,

> "Form 2 (Fixed Date Claim Form) must be used:
> a) –
> b) –
> c) –
> d) Where the Claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact;
> e) ……
> f)

6. Counsel submitted that in this matter the evidence was clear and mostly documentary and in any event was uncontested. Therefore it is a matter which is unlikely to involve a substantial dispute as to fact.

7. Counsel then submitted that section 18 (3) of the Motor Vehicle (Third Party Insurance Risks) Act gives a right to the insurance company to obtain from the Court a declaration that a policy of insurance is unenforceable. This declaration she submitted, will be enforceable against all the world including third party Claimants on the policy, provided the application is made within three (3) months of a claim being brought. She submitted that the declaration is in any event enforceable against the Defendant. Section 18 (3) reads as follows:

S. 18 (3)

> "No sum shall be payable by an insurer under the foregoing Provisions of this section, if , in an action commenced before, or within three months after, the commencement of the proceedings in which 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."

8. The court enquired of Counsel for particulars of the date on which the third party had commenced litigation against the Defendant. She indicated that although no evidence of it was filed the information on her file indicates two claims had been commenced on the 27th October, 2011 as follows:

    a). **Ricardo Robinson v. Damian McCall suit 06727/2011**

    and b). **Wespowre Hibbert v. Damian MCall Suit 06728/2011**

    This application was therefore within the three (3) month period stipulated by Section 18 of the Act.

9. Counsel then referenced the affidavit evidence and in particular the claims history. She relied on two authorities, one a decision of Brooks J, (as he then was) in ***Hillary Smith-Thomas v. Insurance Company of the West Indies Claim HCV 01883 of 2006*** (unreported judgment of 24th November, 2008) and the other a decision of the Court of Appeal of Jamaica in Supreme Court Civil Appeal no. 90 of 2006 ***Insurance Company of the West Indies v. Abdulhadi Elkhalili*** (unreported judgment of 13th December, 2008).

10. At the close of Counsel's submissions I reserved my decision until the 20th September, 2012 at 11:30 a.m.

11. Subsequent to the adjournment counsel Ms. Danielle Archer of the firm of Kinghorn & Kinghorn attended my chambers in relation to another matter. I brought to her attention this matter notice of proceedings in respect of which had been served on her firm.

12. I have considered the submissions of Counsel. I am satisfied that this Court has the jurisdiction on a Fixed Date Claim Form to entertain this application. I am also satisfied on the evidence that the Defendant completed a proposal for Insurance dated 3rd June 2011 in which he was asked among other things to detail all accidents in the previous five (5) years in which any vehicle whether owned or driven by him had been involved. He then listed one accident which occurred on the 28th November 2011. It was accepted that this date was

erroneous and ought to have been the 28th November 2010. This was not a material non-disclosure.

13. However, the policy coverage having been issued for one month being 3rd June 2011 to 3rd July 2011, the Defendant then attended to apply for its extension. A "No Accident Declaration," form was completed by the Defendant.

14. In this form which is attached as exhibit SP2 to the affidavit of Sheila Powell sworn to on the 16th January, 2012, the Defendant stated,

> "I, Damian McCall confirm that my vehicle with Chassis Number DR 61026159 insured under Policy Number APR 49451 was not involved in any accident from July 2, 2011 to August 18th, 2011."

15. The claimant on the 18th August 2011 extended coverage to the 17th July 2012.

16. It subsequently emerged that the Defendant's vehicle was involved in a motor vehicle accident on the 2nd day of July 2011 at 9:15 p.m. He attended on the Claimant to report that accident on the 8th October, 2011.

17 It has also emerged that on the 18th August, 2011 at 6:45 p.m. he was involved in another motor vehicle accident. An accident report dated 19th August, 2011 was completed by the Defendant but the Claimant states it received that report on the 22nd September, 2011.

18. The Claimant in consequence conducted a search of the claims bank which reported that the Defendant was also involved in an accident on the 23rd October 2008. This accident had not been disclosed in the proposal form.

19. The issue for this court to decide therefore is whether the policy of insurance was obtained by a non-material disclosure on which the Claimant relied when granting the contract of insurance.

20. The relevant test is stated by the Court of Appeal of Jamaica in the Elkhalili case (referenced above) as follows:-

> ***"The test of materiality has been settled by the House of Lords in Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd [1994] 3 All ER 581, [1995] 1 AC 501 on a 3:2 majority. The majority held that, for the purposes of marine and non-marine insurance, a***

> ***circumstance is material if it would have had an effect on the mind of a prudent insurer in weighting up the risk. The House also held that, for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure, the alleged misrepresentation or non-disclosure must be material and must have induced the making of the policy. Recently, the English Court of Appeal held in Drake Insurance v. Provident Insurance [2003] EWCA Civ. 1834 that inducement must be proved by the insurer. (per Harrison JA at page 6)***

In that case the Court of Appeal held that the failure to disclose an accident involving the insured's motor vehicle was a material non-disclosure, although the driver at the time of the accident was someone other than the insured.

21. Brooks, J (as he then was) also found non-disclosure material in circumstances where the motor vehicle involved in the collision was not driven by the insured and the collision had not been the fault of the driver. This is because the accident record of a person likely to drive the vehicle is material (see the ***Hillary Smith–Thomas*** case referred to above).

22. In the matter before me the Defendant made two non-disclosures and/or representations of fact which were false. Firstly, he stated he had only had one accident in the five years prior to the proposal for insurance. Secondly, he stated he had not had any accidents in the period 2nd July, 2011 to 18th April 2011. In fact there had been two accidents within the five year period and he had collided with a pedal cyclist on the 2nd July. The evidence suggests that he may have been of the view that no claim would be pursued against him. Indeed, in his October report to the Claimant he stated that the cyclist's daughter had promised to fix the damage to his car. However, none of that changes the fact of non-disclosure. A Contract of Insurance is one of *uberrima fides.* In the absence of evidence to the contrary it must be presumed that the Insurance Company requested the statement as to any accidents having occurred prior to issuing or extending the policy for a reason. That reason must involve underwriting concerns.

23. Those underwriting concerns are elaborated upon in the Affidavit of Shelia Powell dated 16th January, 2012 at paragraphs 7, 8, 9, 10 and 14. I am satisfied on the evidence that the issuing of the policy was induced by the material misrepresentations and non-disclosures within the meaning of Section 18 (3) of the Act.

24. In these circumstances and for the reasons set out above I find for the Claimant in this matter -

    The Declaration as prayed is granted in terms of paragraph (1) of the Fixed Date Claim Form as amended.

25. The Defendant has not attended to contest this matter, nevertheless I remind the Claimant that consequent on this policy being avoided they are obliged to refund to the Defendant all premiums paid in respect of that policy with interest thereon.

26. On the matter of costs and having heard Counsel I make no order for costs.

    The Defendant has not attended to contest the matter and it is an application that is mandated by statute. There will therefore be no order as to costs.

David Batts
Puisne Judge
17th September, 2012