IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA NO: 18 OF 2015

G464 of 2012

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

BEFORE:

THE HON JOHN MARTIN QC, JA
THE HON DENNIS MORRISON, JA
THE HON SIR RICHARD FIELD, JA

BETWEEN

VICTORIA JANE BANKS

APPELLANT

AND

THE INSURANCE COMPANY OF THE WEST INDIES (CAYMAN) LIMITED

FIRST RESPONDENT

AND

SUSAN C YEE

SECOND RESPONDENT

Appearances: Paul Reed QC and Farrah Sbaiti of Stuarts Walker Hersant Humphries for the appellant. Thomas Lowe QC and William Jones instructed by Ogier for the first respondent and Cherry Bridges of Ritch and Conolly for the second respondent.

Hearing: 19 April 2016
Judgment: 4 November 2016

JUDGMENT

MORRISON JA

Introduction

1. The Vehicle Insurance (Third Party Risks) Law (2012 Revision) ('the Law') provides for compulsory motor vehicle insurance, requiring users of motor vehicles on the road to insure against third party risks in accordance with the Law.[1] Subject to the conditions set out in the Law, an injured third party is given a right of recovery against the motorist's insurer[2], unless the insurer, in an action brought pursuant to section 15(3) of the Law, obtains a declaration that –

> "… apart from any provision 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."

2. Section 15(5) of the Law adds that "'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".

3. This is an appeal from a judgment given in the Grand Court by McMillan J (Ag, as he then was) on 17 August 2015, in proceedings brought by the first respondent ('ICWI'), which is an insurer within the meaning of the Law, against the appellant, its former policyholder, pursuant to section 15(3). By its judgment, the court ordered that ICWI was entitled to avoid a policy of motor vehicle insurance, first taken out by the appellant on 22 May 2009 ('the policy'), on the ground that renewal of the policy had been obtained by non-disclosure of a material fact.

4. The non-disclosure alleged against the appellant arose out of her negative response to the following question in the proposal form for the insurance:

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[1] Section 3(1)
[2] Section 15(1)

> "To the best of your knowledge, in the past five 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?"

5 As would later emerge, in or around the middle of 2010, possibly prior to the renewal of the policy in June of the year, but certainly before its renewal in June 2011, the appellant was charged with a number of motoring offences, including careless driving, driving under the influence of alcohol and using a vehicle with an expired licence. The discovery of this fact would prompt ICWI to avoid the policy and to launch proceedings in the Grand Court for a declaration that it was entitled to do so.

6. The issues on this appeal are (i) whether the judge erred in fact or law in deciding that ICWI was entitled to avoid the policy on the ground that its renewal had been obtained by non-disclosure of a material fact; and (ii) assuming that the judge was correct on the first issue, whether he erred in fact or law in concluding that ICWI did not breach their duty of good faith to the appellant and were therefore not prevented from avoiding the policy.[3]

7. Lastly by way of introduction, I should mention that the second respondent is the widow and executrix of the late Mr Richard Douglas Martin ('the deceased'). The deceased suffered fatal injuries and died on 30 November 2011, as a result of a collision between his vehicle and a vehicle owned by the appellant and driven by her husband, Mr Patrick Brooks-Dixon. By writ of summons filed on 14 November 2012[4], the second respondent commenced proceedings against the appellant and Mr Brooks-Dixon, on behalf of the estate of the deceased, and on behalf of herself and the other dependants of the deceased. By the consent of the parties, the second respondent was added as a defendant in these proceedings.[5] Save appearing by counsel (Miss Bridges) to support the appeal, the second respondent took no part in the appeal.

The factual background

8. The relevant facts are not in dispute and can be shortly stated. The appellant signed the proposal form on 22 May 2009. After the question set out at paragraph 4 above, the proposal

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[3] I gratefully adapt this formulation of the issues from that put forward at para 10 of the appellant's printed skeleton argument

[4] Cause No. Civ 453 of 2012

[5] See Administrative Order made by Mettyear J (Actg) on 9 July 2013

form contained boxes marked 'Y' and 'N', in which the proposer was required to indicate 'yes' or 'no' in the appropriate box. There was a further box for details to be provided in the event that the proposer answered 'yes' answer to the question. The appellant answered 'no', by marking an 'x' in the box marked 'N' next to the question. It is accepted that at the time she completed the form, the appellant did so honestly and that the answers she gave were accurate.

9. ICWI duly issued the policy to the appellant, initially for a period of 12 months, from 22 May 2009 to 21 May 2010. The policy provided the appellant with cover against all sums which she should become 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 any one event. These were liabilities which were required to be covered under the Law[6]. The appellant did not renew the policy immediately upon its expiry in 2010, but it was in due course reinstated, on her application, for a further period of 12 months from 21 June 2010 to 20 June 2011. And, in June 2011, the policy was again renewed for the period 21 June 2011 to 20 June 2012.

10. It is common ground that the renewal notices issued by ICWI to the appellant in respect of the 2010 and 2011 renewals were silent on the question of disclosure[7]. The appellant was not asked to complete a new proposal form upon the reinstatement and the renewal of the policy in 2010 and 2011, respectively. Nor would she have been shown the original proposal form and asked to review it. The appellant's evidence was that, on each occasion, the entire process took "no longer than 10 minutes" and that she was not asked whether she had been arrested, charged or convicted of any criminal offences, or whether she had been prosecuted for any driving offences.[8] It is also common ground that, on each occasion, the appellant made no disclosure relating to the question posed in the proposal form.

11. As I have already indicated, the accident which resulted in the death of the deceased occurred on 30 November 2011. As at that date, the policy, which had been renewed in June of that year, was in full force and effect and the accident was reported to ICWI. While the accident

[6] Section 4(1)
[7] Renewal notices dated 22 April 2010 and 11 May 2011
[8] See the appellant's witness statement dated 9 September 2014, para 21

was being investigated, ICWI got sight of a copy of the Cayman Islands Judiciary Summary Court hearing list for 14 May 2012. The list revealed that the appellant was due to appear before the court that day in connection with charges, under indictment number 05818/2010, for careless driving, driving under the influence of alcohol and using a vehicle with an expired license. As a result of this information, ICWI wrote to the appellant on 30 July 2012, to advise her that:

> "… it has come to our attention that in 2010 you were charged with careless driving and driving under the influence of alcohol. As you would no doubt be aware the contract of insurance is one of utmost good faith which requires you to disclose all facts material to the risk to be undertaken by the Company. The duty bites both at the inception stage and at renewal.
>
> Accordingly it was incumbent upon you to disclose these prosecutions. The failure to do so constitutes a misrepresentation and or non disclosure of a material fact which renders the policy void.
>
> In the circumstances we advise that no indemnity will be offered in the event that suit is filed by yourself or any third party involved in the loss. We intend to seek the appropriate relief under the Motor Vehicle Insurance (Third Party Risks) Law."

12. Subsequently, on 18 February 2013, the appellant was convicted, based on her pleas of guilty previously entered on or about 23 July 2012, of the offences of driving under the influence of alcohol and using a vehicle with an expired license. For driving under the influence, the appellant was sentenced to a fine of $555.00 or 2 months' imprisonment, and disqualified from driving for two years; and, for using a vehicle with an expired license, she received a fine of $45.00 or 5 days' imprisonment. The charge for careless driving was left on the file.

The proceedings below

<u>The pleadings</u>

13. ICWI filed action on 22 November 2012, serving notice of it on the second respondent that same day. Among other things, ICWI said this in its statement of claim[9]:

[9] At paras 13-15

> "13. The Defendant failed to comply with her continuing duty of utmost good faith by failing to disclose the fact that she was facing the Motoring Prosecutions when she renewed the Policy in June 2010 or in June 2011.
>
> 14. Although the Plaintiff does not know the specific date on which the Motoring Prosecutions were brought against the Defendant, it is clear that they were brought prior to the June 2011 renewal, as the indictment number is 05818 of 2010, which means that the Motoring Prosecutions were brought during the year 2010.
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> 15. The fact that the Defendant was facing the Motoring Prosecutions was material in that it would have influenced 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."

14. On this basis, ICWI asked the court to declare that it was entitled to avoid the policy on the ground that its renewal was obtained by non-disclosure of a material fact, and that it had duly avoided the policy.

15. In her defence, the appellant took a number of points, which may be summarised as follows:

(1) Given the express terms and required disclosures set out in the proposal form, failure to disclose the fact that she was facing motoring prosecutions was not a breach of the duty of disclosure, in that the ordinary and natural meaning of the phrase "been prosecuted", in the context in which it appears in the proposal form, related to the completion of that process.[10]

(2) In any event, the questions in the proposal form should be construed *contra proferentem*.[11]

(3) Accordingly, the disclosures made in the proposal form remained fully accurate and complete when the policy was renewed in June 2010 and in June 2011.[12]

(4) Upon the renewals of the policy in either 2010 or 2011, ICWI at no time requested, as it was obliged to do, that the appellant reconfirm her past disclosures or

[10] Defence dated and filed 4 January 2013, paras 6, 13 and 14
[11] Para 12
[12] Para 16

complete any new proposal form.[13] Nor did it warn her that the duty of disclosure included the necessity to advise of any changes affecting the policy which had occurred since its inception or last renewal date, as required by the Association of British Insurers Statement of General Insurance Practices, 2005.[14]

(5) Alternatively, ICWI's failure to request specific disclosure, either in the proposal form or otherwise, as to whether the appellant was facing any motoring offences amounted to a waiver of any requirement to disclose same[15].

(6) In the premises, ICWI was not entitled to avoid the policy on the basis alleged and the policy therefore remained fully in effect.[16]

Some aspects of the evidence

16. In addition to a considerable body of agreed documentary evidence, the judge had the benefit of (i) an affidavit[17] and a witness statement[18] from Miss Heather Lanigan, ICWI's manager and senior underwriter; and (ii) a witness statement[19] from the appellant. Both Miss Lanigan and the appellant also gave oral evidence before the judge. Much of their evidence covered the ground which I have already attempted to summarise, so for present purposes I will refer specifically to a few matters only.

17. By the time of the trial, Miss Lanigan had had over 25 years of experience in the insurance industry, including 10 years with ICWI in the Cayman Islands. The majority of her early career in the industry was spent as an underwriter, so she had, as she put it[20], "always dealt with looking at risks and how to assess those risks". In her affidavit, Miss Lanigan stated[21] that she entered into the contract of insurance with the appellant on behalf of ICWI on the basis of and in reliance on the truth of the proposal form completed by her. And, in her witness

[13] Paras 19 and 20
[14] Para 22
[15] Paras 7 and 17
[16] Paras 32 and 33
[17] First affidavit of Heather Lanigan, sworn to on 22 July 2013 and filed 2 August 2013
[18] Witness statement of Heather Lanigan dated 24 June 2014
[19] Witness statement of Victoria Jane Banks dated 9 September 2014
[20] At para 10 of her witness statement
[21] At para 6

statement[22], she spoke to the importance of the proposal form and the utility to ICWI of the answers provided by a prospective policy holder:

> "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 any 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 penalise 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.
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> 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

[22] At paras 12-15

> 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."

18. Then, specifically in relation to disclosure of the offence of driving under the influence of alcohol, Miss Lanigan added this:[23]

> "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 DIU offence, ICWI will always decline to renew the policy, for the same reasons that we would decline to take the on 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 ... 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."

[23] At paras 20-21

19. In examination-in-chief, Miss Lanigan drew attention to a couple of amendments to ICWI's usual proposal form and renewal notice, both made in August 2013. Firstly, the standard proposal form was amended to include a notice at the top of the form in the following terms:

> "**IMPORTANT NOTICE**
>
> All the information given below must be true, complete and correct. You are under a duty to disclose all material information whether the information is asked for or not. Material information is information that might influence our decision to insure you and if so on what terms and conditions. Your duty to make full and frank disclosure occurs (1) at the time of proposing for insurance (2) during the currency of the policy, if there are any changes or variations in the information given and (3) at each renewal. Failure to disclose all material information will entitle ICWI to avoid your policy in which case you will not be insured and any claims made will not be paid."

20. Miss Lanigan told the court that this amendment came about as a result of ICWI's operations manager reading "an article in a magazine saying that if you put this at the top of the proposal form, persons were less likely to lie or not tell the truth on the proposal form".

21. Secondly, the standard renewal notice was amended to add, right at the end of the single page document, the following statement:

> "You are reminded of the obligation implied in every contract of insurance to advise the Underwriter at the Renewal of every alteration in the risk: eg. a change of occupation or in the use of the vehicle. The underwriters must be advised of any conviction or pending prosecution (other than for parking), or any physical or mental defect of the driver, of which the Underwriters are not aware."

22. Miss Lanigan's evidence was that the purpose of making this amendment was "to remind people that they have to disclose", and that she thought that, "by making these two changes … [ICWI] had improved on the form that existed before".

23. Hardly surprisingly, Miss Lanigan was cross-examined in some detail. Among other things, she was shown a copy of ICWI's Motor Insurance Guidelines and Rates, with effective dates of 1 April 2008 and 1 May 2008 in respect of new business and renewal business respectively ('the guidelines'). Listed under the specific heading "Underwriting Guidelines", there was a list of instances in which, Miss Lanigan said, customer service agents were obliged to refer the particular matter to an underwriter for a decision. These included "persons with motor convictions other than parking tickets within the past 3 years". Miss Lanigan accepted that there was a difference between this wording and that of the proposal form, which spoke to persons who had had their licences endorsed or revoked, or "been prosecuted for a motoring offence". In her understanding, the word 'prosecuted' in the latter document meant "from the time at which somebody is charged with an offence".

24. Miss Lanigan was also shown a copy of the Statement of Guidance, Market Conduct - Class A Insurers, Agents and Brokers, issued by the Cayman Islands Monetary Authority ('CIMA') on 2 March 2009. Miss Lanigan accepted that the guidance provided set out in this statement ('the CIMA rules') applied to ICWI and that, in respect of the question of disclosure of material facts, the warnings required by the rules had not been communicated to customers in "a clear and understandable way", at any rate in 2009-2011. However, Miss Lanigan did not accept the suggestion that, in these circumstances, ICWI had not acted in good faith in seeking to avoid the policy, adding that "[o]ne of the core principles of insurance is that if some material fact arises it must be disclosed".

25. In her witness statement, the appellant stated[24] that, although she was "unaware of the precise time" when she was charged with the motoring offences, her recollection was that it was sometime in mid-2010 and that her first appearance in court was "sometime towards the end of 2010". Her pleas of guilty to two of the offences were entered on or about 23 July 2012 and she was finally sentenced on 18 February 2013. In June 2010 and June 2011, the appellant said, "I can categorically say that I had pleaded 'not guilty' to the motoring charges and I had made no admissions of guilt". The appellant added the following[25]:

[24] At paras 22-24
[25] At paras 25-36

"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.

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 process, 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 to a 'charge'. The final two elements are entering into 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.

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 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 their 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.

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**."

(Emphases in the original)

26. Under brief cross-examination, the appellant revealed that she was a legal secretary. While she could not recall the level of alcohol in her blood at the time of her arrest, she agreed with the suggestion that she was "quite a lot over the limit". At the time of her arrest, she knew that she had been drinking, but had felt it necessary to drive for personal reasons. Asked whether she thought that her insurer might be interested to know that she had been charged with drink driving and had no real defence to the charge, the appellant said this:

> "To be honest sir, it didn't even come into my mind that I needed to let them know this – I would not have purposely withheld this information just to be in this position today I would not have personally withheld any information from anyone …
>
> It just didn't come into my mind that I need to let them know this … It just didn't occur to me. I didn't know how the insurance process works. I don't know the ins and outs of what to do exactly. If they had asked me questions then I would have told them truthfully."

27. In addition to the oral and documentary evidence, the appellant also referred to and relied on the CIMA rules (to which Miss Lanigan was taken in cross-examination) and a substantial body of United Kingdom ('UK') material to demonstrate, as the appellant contended, modern best practices relating to consumer insurance. These included the Association of British Insurers' Statement of General Insurance Practice[26] ('ABISGIP'); and the International Association of Insurance Supervisors Insurance Core Principles, Standards, Guidance and Assessment Methodology[27] ('IAISC').

28. Thus, for example, the CIMA rules state one of their objectives as being "[t]o provide a standard of best practice to insurance licensees in conducting business with customers"[28]. The rules also provide that insurers "should pay due regard to the information needs of their customers and treat them fairly"[29], which will involve "communicating … the obligations of the parties involved, being the Insurers, Agents and Brokers and the customer, in a clear and

[26] Withdrawn 15 January 2005
[27] Issued 1 October 2011, and amended 12 October 2012
[28] Rule 1.2
[29] Rule 4.5

understandable way"[30]; further, "[c]ustomers must also be informed about their duty of disclosure according to insurance contract law and the implications of a failure to disclose material information"[31]. The ABISGIP recommendation was that, "prominently displayed on the proposal form should be a statement … drawing the attention of the proposer to the consequences of a 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". And the IAISC advised that:

> "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 … should therefore inform a retail customer on matters such as:
>
> - General provisions – including the law applicable to the contract
>
> - Obligation 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."[32]

<u>The judge's decision</u>

29. The judge approached the matter on the basis of the questions proposed by the appellant in her skeleton argument in the court below[33]:

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[30] Rule 4.5.3
[31] Rule 5.2.4 of CIMA's Market Conduct Rules
[32] 19.5.14
[33] See para 14 of the judgment

a. Did the non-disclosure relied on by ICWI relate to a material fact that would influence the judgment of a prudent insurer?
b. Was the appellant under a duty to disclose the alleged material fact at the time of the 2011 renewal?
c. Was it proved that, if the alleged material fact had been disclosed by the appellant, ICWI would not have renewed the policy in 2011 on the same terms?
d. In all the circumstances, was ICWI entitled to avoid the policy?

30. On the question of materiality, the judge found that (i) the appellant knew at the latest by June 2011 that she had pending motoring charges[34]; (ii) notwithstanding "the somewhat distinct scope of the … guidelines"[35], the words in section (e) of the proposal form, in their natural and ordinary meaning, "encompass a clear reference not merely to convictions but also pending charges and also acquittals as appropriate"[36]; and (iii) on a balance of probabilities, the information as to the offences pending against the appellant "was material to a fair presentation of the risk to be undertaken by [ICWI]"[37].

31. On the duty of disclosure, the judge found that the requirement meant that the appellant was under a duty to "disclose what she knew"[38]. Accordingly, in the light of his earlier finding that she knew that there were motoring charges pending against her from at latest the time of the 2011 renewal of the policy, the judge considered it to be proved on a balance of probabilities that "the [appellant] had a duty of disclosure of information which was material and that she breached that duty"[39].

32. In relation to the question of inducement, the judge considered, based on the authorities, "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 in the relevant terms"[40].Then, after a further review of Miss Lanigan's evidence on the point (which,

[34] Para 48
[35] Para 51
[36] Para 50
[37] Para 52
[38] Para 64
[39] Para 69
[40] Para 74

the judge said[41], "I accept and believe"), the judge concluded that ICWI had proved, on a balance of probabilities, that the appellant's non-disclosure of a material fact –

> "… induced the making of the relevant contract at the relevant time in the sense that [ICWI] would not have made the same contract if [it] had known the matters in question, and I find that [ICWI] has actually been induced accordingly."[42]

33. Finally, in relation to ICWI's entitlement to avoid the policy in all the circumstances of the case, the judge took the issue in two parts. First, as regards the UK material referred to by the appellant, he considered that, while it provided instances "of what seems to be good contemporary regulatory practice", it did not detract from or modify the common law duty of disclosure.[43] Similarly, the judge characterised the CIMA rules as "… regulatory only and … to be considered exclusively in that light"[44]. In this regard, the judge directed particular attention[45] to rule 5.2.4, and its reference to the "duty of disclosure according to insurance contract law", as indicating "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". However, the judge did express the view that ICWI's omission to give the appellant "any information or warning regarding the duty of disclosure and the consequences of failing to comply with it … is clearly not consistent with the widely recognized standards for good insurance practice which I have reviewed"[46].

34. Secondly, the judge considered in some detail the question whether, by virtue of its failure to comply with these "widely recognized standards for good insurance practice", ICWI was in breach of its duty of utmost good faith to the appellant and thus disentitled from avoiding the policy on the ground of non-disclosure. The judge found that there was no want of good faith on ICWI's part, stating[47] that –

> "109. Even if a defence of want of utmost good faith is currently available in law … I am not persuaded that professional

[41] At para 77
[42] Para 78
[43] Para 88
[44] Paras 91 and 94
[45] At para 90
[46] Para 95
[47] At paras 109-110

> inadvertence or even 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 [ICWI] at the material time.
>
> 110. At the time of renewal there was no intention on the part of [ICWI] to take advantage of the [appellant] in any way. Whether intentionally or through oversight, it was regrettably the [appellant] who failed in her obligation to make full disclosure and who actually induced the contract."[48]

35. But, in any event, the judge considered, even if there was bad faith on ICWI's part, its right to avoid the policy on the ground of non-disclosure remained unaffected by any such considerations. At the conclusion of his judgment, the judge added this:

> "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 allowed to continue."[49]

36. I will return to aspects of the judge's detailed reasons in due course.

The submissions on appeal

37. Mr Reed QC for the appellant first invited us to consider whether, as a matter of construction of the proposal form, the judge was correct in holding that the appellant was obliged to disclose the fact that she had been charged with motoring offences. He pointed out that each of the three types of information that were required to be disclosed in answer to question (e) of the proposal form is expressed in the past tense. Accordingly, he submitted, the phrase "*been* prosecuted for a motoring offence", properly construed by a reasonable person in the context of and consistent with the two surrounding phrases would be taken to refer to completed actions only, that is to say in this case, convictions. So on this basis it was submitted that the natural and ordinary meaning of the whole of the language of question (e) is that the same category of information is required for each of the three categories. This interpretation of question (e), it was observed, is consistent with the evidence of the appellant and ICWI's contemporaneous evidence

[48] Paras 109-110
[49] Para 129

as seen in the guidelines, which includes in the list of persons whose proposals must be referred to a more senior underwriter, 'Persons with motor convictions other than parking tickets within past 3 years'. But, in any event, the declaration in (e) only required disclosure, to the best of the appellant's knowledge, as to whether any person who would drive the motor vehicle had been prosecuted for a motoring offence. In this regard, the appellant's evidence was consistent with the fact that she genuinely did not know and honestly did not believe that the pending charges amounted to having been prosecuted for a motoring offence. Finally on the construction point, it was submitted that if the court were to conclude that question (e) is unclear and capable of more than one meaning, it should be construed *contra proferentem* in favour of the appellant and against ICWI.

38. Next, taking a related point, Mr Reed submitted that, if the question whether the appellant had been prosecuted for a motoring offence is interpreted as meaning that ICWI's interest was in convictions only, then it must be taken to have waived disclosure of the charges because of the limited nature of the question asked by it in the proposal form.

39. Then, on the question of materiality, Mr Reed submitted that although the burden of proving materiality rested on ICWI, it adduced no independent evidence as to whether the alleged material fact would have influenced the judgment of a reasonably prudent insurer when deciding whether to take this particular risk and on what conditions. In this regard, it was submitted that Miss Lanigan's expression of opinion on the point was not independent and therefore provided an insufficient evidential basis upon which the court could proceed. In particular, it was said, Miss Lanigan's evidence was inconsistent with the contemporaneous evidence in the form of the underwriting guidelines, which referred only to motoring convictions within the past three years being required to be referred to a senior underwriter.

40. On the question of good faith, Mr Reed in his skeleton argument posited the following principles as being "central to the question of whether the Learned Judge ought to have found on the facts that ICWI could not avoid the Policy"[50]:

[50] Appellant's skeleton argument, para 49

(i) the Cayman Islands has no legislation which adequately protects consumers' rights in relation to motor insurance contracts;

(ii) it is therefore for the courts of the Cayman Island to interpret the common law and to identify and explain the grounds upon which an insurer should be entitled to avoid a policy of insurance for material non-disclosure, including in circumstances where there may be a want of good faith;

(iii) there is a mutual duty of good faith between parties to an insurance contract under English Law;

(iv) if there is a breach of the duty of good faith by one party, then the other party may be entitled to avoid the contract, but there may be circumstances in which an insurer, by asserting a right to avoid for non-disclosure, would himself be guilty of want of good faith;

(v) a want of good faith by an insurer may arise in circumstances where his actions are not consistent with good regulatory practice;

(vi) if the facts of a particular case render an insurer's remedy of avoidance draconian, or cause it to operate unfairly in the context of the principle of fair dealing then an insurer ought not to be permitted to avoid the contract;

(vii) there is no reason in principle why a discretion to refuse rescission is not an acceptable approach to address unfairness.

41. It was accordingly submitted that the judge was wrong to find that a lack of good faith required only unconscionable conduct and that neither professional inadvertence nor even a lack of competence was sufficient to amount to a lack of good faith. Further, "[c]ommercial standards of decency, fairness and fair dealing required ICWI to have notified the Appellant that she had to inform ICWI of all material changes in circumstances and any change to the answers that she provided in the Proposal Form and as a result ICWI ought not to be permitted to avoid the Policy"[51].

42. Lastly, it was submitted that the judge was wrong to characterise reference to accepted standards of good practice as regulatory only and irrelevant for the purposes of ascertaining the requirement of fair dealing. And on the matter of fair dealing generally, Mr Reed placed heavy

[51] Appellant's skeleton argument, para 69

reliance on certain dicta of Rix LJ in **Drake Insurance v Provident Insurance plc**[52], to which I will come in due course.

43. For ICWI, Mr Lowe QC supported the judge's judgment on a number of bases. On the point of construction of the policy, it was submitted in ICWI's skeleton argument that a reasonable person would have understood the phrase "been prosecuted" to refer simply to the existence of criminal proceedings. But in any event, it was submitted, even if it were possible to construe the proposal form in the way contended for by the appellant, it did not follow that a reasonable person would conclude that, in the context of later renewals, ICWI had "forever waived its right to whatever information was outside the strict ambit of the question in 2009"[53]. The reasonable man would consider this issue by reference to the materiality of the particular information in issue and, the more material the information, the more difficult it will be to infer a waiver of disclosure by the insurer. The appellant's duty of utmost good faith required her to disclose all material facts known by her, so as to ensure a fair presentation of the risk to be undertaken to the insurer. Further, a contract of motor insurance being a contract from year to year, there was an equal obligation of good faith on the part of the assured upon renewal, requiring disclosure of all material facts and any material change in circumstances adverse to the assured. A material fact, such as a prosecution for a criminal offence connected with the driving by the assured, is one which would influence the mind and judgment of a prudent underwriter in fixing the premium or determining whether to take the risk and the test of materiality was stated to be objective. Materiality is a question of fact, in respect of which expert evidence is not needed and a finding by a tribunal of fact will not lightly be disturbed on appeal.

44. On the question of ICWI's alleged breach of the duty of good faith, Mr Lowe submitted, in reliance on the decision of the Court of Appeal of England and Wales in **Brotherton & Others v Aseguradora Colsegura SA and Another**[54], that, rescission being the act of a party, the court has no discretionary power to prevent an insurer from exercising the right of rescission conferred by non-disclosure. Mr Lowe submitted further that there is no decided case in which an insurer has been prevented from avoiding a policy on the ground of bad faith. Nor has there

[52] [2004] QB 601
[53] ICWI's skeleton argument, para 30
[54] [2003] 2 CLC 629, per Mance LJ at 654

been a case in which an insurer's failure to explain the duty of disclosure to the insured has been held to constitute bad faith and it would be tantamount now to judicial law-making for the court to impose such a duty. In any event, bad faith in this context must mean something approaching a knowing disregard of the rights of the assured and in this case it is not suggested that ICWI deliberately disregarded a duty to warn the appellant of her duty of disclosure. Something more than negligence would be needed to constitute a breach of the duty of good faith on the part of ICWI. In this case, the allegation of bad faith was made at the trial for the first time, despite it not having been pleaded, and the judge was right to dismiss it for the reasons he gave. There was no evidence before the judge as to the best practices of insurers in the Cayman Islands and the CIMA rules, which are purely regulatory, give rise to no private law consequences. This is made clear by section 34(6) of the Monetary Authority Law, under which the rules were made, which states that "a breach of the rules … shall not constitute an offence, or of itself give rise to any right of action by persons affected, or affect the validity of any transaction".

Some considerations of principle

45. In support of these submissions, counsel on both sides referred us to a number of authorities, to some of which I will now come. Most of what follows is uncontroversial and can therefore be taken shortly. There is general agreement that the starting point is the following passage from the classic judgment of Lord Mansfield in **Carter v Boehm**[55]:

> "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly within the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist.
>
> The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the under-writer is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run, at the time of the agreement.

[55](1766) 3 Burr. 1905, 1909-1910

> The policy would be equally void, against the under-writer, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.
>
> The governing principle is applicable to all contracts and dealings.
>
> 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."

46. As can be seen, Lord Mansfield proceeded in this passage on the basis of a general doctrine of good faith, applicable to all classes of contract. But although the proposition did not survive as a matter of general doctrine[56], it has continued to describe the rule applicable to contracts of insurance right up to the present time. In the field of marine insurance, it was codified in section 17 of the Marine Insurance Act 1906, which provided that "A contract of marine insurance is a contract based on the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party". And, as the learned editors of MacGillivray on Insurance Law[57] put it, "It is now established beyond doubt that the duty of disclosure applies to all species of insurance …".

47. As regards the duty on the insured, MacGillivray states the general rule as follows[58]:

> "… the insured 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 insured but neither known nor deemed to be known by the insurer. Breach of this duty by the insured 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."

48. The requirement that the insurer must show that he was induced by the alleged non-disclosure to enter into the contract derives from the important decision of the House of Lords in

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[56] See the judgments of Lord Mustill in **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd**[1995] 1 AC 501, 543; and Lord Hobhouse in **Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and others** [2003] 1 AC 469, para 45

[57] 13th edn, para 17-007

[58] At para 17-009

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd. In that case, after an exhaustive review of the relevant authorities, Lord Mustill said this[59]:

> "… 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 that 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."

49. As regards materiality, the question of what is material is, as has been seen, governed by section 15(3) of the Law, by virtue of which "'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"[60]. But, as Lord Mustill also pointed out in **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd**[61], a matter may yet be material, "even though full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium". In **Brotherton & Others v Aseguradora Colsegura SA and Another**[62], Mance LJ confirmed that "[m]ateriality falls to be considered as at the date of the placing, by reference to the circumstances (which may include no more than intelligence) within an insured's knowledge at that date".

50. The opinion of the insured as to the materiality of a particular fact known to him will not generally be relevant, since, as Fletcher Moulton LJ put it in **Joel v Law Union and Crown Insurance Co**[63], "[i]f 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". But Fletcher Moulton LJ did go on to add this:

> "But the question always is, Was the knowledge you possess such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an

[59] At page 550
[60] Substantially mirroring section 18(2) of the Marine Insurance Act 1906
[61] Ibid
[62] At para 18
[63] [1908] 2 KB 863, 884

> insurance company of all the casual headaches he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action."

51. This last consideration proved decisive in **Zeller v British Caymanian Insurance Company Ltd**[64]. The insured answered No to a question in the proposal form whether, to the best of his knowledge and belief, he had had any departure from good health. The insurer sought to repudiate the policy on the ground of misrepresentation and/or non-disclosure when it was subsequently discovered, after the insured had had to undergo expensive major surgery to replace the aortic valve and effect a complex repair to the mitral valve, that he had previously been told, during the course of routine doctors' visits prior to taking out the policy, that he did have a heart murmur and that his cholesterol level was high. On those occasions, beyond being advised of the importance of diet and exercise, the insured had been prescribed no treatment or medication, nor had he been ordered to do any further investigation. He had continued to engage in sports such as extreme free diving and, apart from a thyroid condition, which had been disclosed from the outset, and minor ailments, he honestly believed himself to be and to have been in excellent health. In these circumstances, the Board considered[65], differing from the trial judge and the majority in this court, that the insured had answered the insurer's questions "completely correctly to the best of his knowledge and belief".

52. It is naturally important in every case to consider carefully the wording of the particular policy and, on this basis, **Zeller v British Caymanian Insurance Company Ltd** was distinguished by Henderson J at first instance in **British Caribbean Insurance Company Ltd v Lindo and Brown**[66]. In that case, the learned judge considered[67] that, on the wording of the particular policy, the insured's "obligation was to provide truthful answer to the questions posed in the proposal".

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[64] [2008] CILR 11
[65] At para 22
[66] [2011] 2 CILR 282
[67] At para 29

53. Materiality is a question of fact to be determined by the tribunal of fact[68]. Accordingly, although expert evidence may be called to assist the court with respect to the general practice of the insurance profession as a whole, such evidence is not decisive and the ultimate decision "rests on the judge's own appraisal of the relevance of the disputed fact to the subject-matter of the insurance"[69].

54. Each case will, of course, turn on its own facts. But, under the rubric, "Allegations of Criminal Offences", MacGillivray states the following[70] in relation to the insured's obligation to disclose the fact that he or she has been charged with a criminal offence:

> "If at the time of placement the insured is under investigation for, or has been charged with, an offence which he knows he did not commit and of which he is subsequently acquitted, the investigation or allegation are nonetheless material and should be disclosed. Given that the criterion of materiality is what would influence the prudent underwriter when assessing the risk … the prudent underwriter is entitled to take into account facts raising doubts about the risk …"

55. In **Re Wilson and Scottish Insurance Corporation Ltd**[71], it was held that the renewal of a fire policy was impliedly made on the basis that the statements in the original proposal were still accurate. And, in the Scottish decision of **Law Accident Insurance Society Ltd v Boyd**[72], Lord Justice-Clerk Cooper said, in relation to a policy of motor insurance lasting for a year and renewable annually, 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."

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[68]**Taylor and Another v Eagle Star Insurance Co Ltd** (1940) 67 Lloyd's Rep 136, per Macnaghten J at page 141
[69]MacGillivray, para 17-042; and see **Glicksman v Lancashire and General Assurance Co** [1925] 2 KB 593, per Scrutton LJ at page 609
[70]At para 17-061
[71][1920] 2 Ch 28
[72][1942] SC 384, 391

56. Subject therefore to any question of waiver, the insured's duty of disclosure will generally be the same upon a renewal of the insurance as it is at the time of the application for the original policy[73].

57. MacGillivray states that "[t]he questions put by insurers in their proposal forms may either enlarge or limit the applicant's duty of disclosure"[74]. Among the older cases, an example of this is probably to be found in **Revell v London General Insurance Company Ltd**[75], in which the insured answered no to the question in a proposal form whether he or any of his drivers had "ever been convicted of any offence in connection with the driving of any motor vehicle". The insured's driver had in fact been previously convicted of (i) unlawfully driving a car without a suitable reflecting mirror; and (ii) unlawfully using a car without having in force an insurance policy covering third party risks. The insurer's defence that it was entitled to avoid the policy on the ground of non-disclosure failed on the basis that, as MacKinnon J put it[76], "a reasonable person reading this question might quite reasonably regard the purpose of the question as being directed to the carefulness of the driver who is likely to be driving the cars under this policy". MacKinnon J was accordingly not satisfied that "a reasonable person would and ought to have read it that it was untrue or inaccurate to reply 'No' … by reason of these two convictions, one about the reflecting mirror and the other about the insurance policy".

58. **Revell v London General Insurance Company Ltd** was to an extent applied in **Taylor and Another v Eagle Star Insurance Co. Ltd**[77], in which the insured answered no to the same question asked by the insurer in the proposal form. As it turned out, the insured had in fact been previously convicted of certain drinking offences, and also on charges of permitting a car to be used without a policy of insurance and of driving a car with no road fund licence in force. Macnaghten J held that the arbitrator had correctly concluded, in reliance on **Revell v London General Insurance Company Ltd**, that the insured's answer was not untruthful, since the question was ambiguous and if –

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[73]**Lambert v Co-Operative Insurance Society Ltd** [1975] 2 Lloyd's Rep 485, per McKenna J at 487
[74]At para 17-018
[75](1934) 50 Lloyd's List LR 114
[76]At page 117
[77](1940) 67 Lloyd's Rep 136

> "… a person *bona fide* understands it in a particular sense and that sense is a reasonable sense, he cannot be said to be giving an untrue answer if he answers it truly in the sense in which he understands it."

59. However, in addition, the arbitrator found as a fact that the insured's previous convictions were material to the insurance and Macnaghten J held that he was also right to do so, since -

> "Taking it that all the answers to the questions that were asked were truthfully answered, nevertheless, altogether apart from an obligation on the part of the assured to answer the questions asked truthfully, he was bound by the law to disclose to the insurers all the material facts."

60. In **Doheny v New India Assurance Co Ltd**[78], Longmore LJ observed that "when a proposal form is submitted to the insured who answers the relevant questions, authority has laid down that an insurer as a result of asking certain questions may show that he is not interested in certain other matters and can, therefore, be said to have waived disclosure of them". Just as Woolf J had done in the earlier case of **Hair v Prudential Assurance Co Ltd,**[79] Longmore LJ went on to refer with approval[80] to the test laid down in the following passage from MacGillivray[81]:

> "Whether or not such waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?"

61. I have been considering the insured's duty of disclosure in the context of his duty of utmost good faith. However, it is clear from the passage in his judgment in **Carter v Boehm** to which I have already referred[82] that Lord Mansfield had in contemplation a duty of good faith applicable to both insured and insurer. In any event, the obligation as codified by section 17 of

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[78] [2004] EWCA Civ 1705, para 17
[79] [1983] 2 Lloyd's LR 667, 673
[80] At para 19
[81] Para 17-020
[82] See para 46 above

the Marine Insurance Act 1906 clearly imposes a duty of good faith on both; though, as Rix LJ pointed out in **Drake Insurance v Provident Insurance plc**[83], the only remedy mentioned in the statute is that of avoidance of the contract, and "[s]uch a remedy is not likely to be often of much assistance to an insured".

62. Some indication that the reciprocal duty of good faith may have a yet wider reach can be found in, for instance, **Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd**[84], in which Lord Hobhouse observed that (i) "there is a weight of dicta that the principle has a continuing relevance to the parties' conduct after the contract has been made"[85]; (ii) "[t]he courts have consistently set their face 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"[86]; and (iii) "…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].

63. Not dissimilarly, in the Australian case of **CGU Insurance Ltd v AMP Financial Planning Pty Ltd**[88], Gleeson CJ and Crennan J, speaking for the majority in the High Court of Australia, stated as follows:

> "We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity."

[83] [2004] QB 601, para 83
[84] [2003] 1 AC 469
[85] Para 48
[86] Para 57
[87] At para 79
[88] [2007] HCA 36, para 15

64. And, perhaps more specifically for present purposes, in **Strive Shipping Corp v Hellenic War Risks Association (The Grecia Express)**[89], Colman J seemed prepared to contemplate, albeit obiter, a denial of the insurers' right to avoid a policy of insurance on the ground of a breach of their duty of utmost good faith to the insured:

> "Having regard to the equitable origin of the jurisdiction to avoid a policy for breach by the assured of the duty of the utmost good faith, the court should not be inhibited from giving effect by appropriate orders to the insurers' countervailing duty of the utmost good faith to the assured. The breach of that duty by the insurers would be so unconscionable as to disentitle the insurers from invoking the equitable jurisdiction of the court to avoid the contract on the grounds of non-disclosure by the assured."

65. But in the subsequent decision of the Court of Appeal in **Brotherton & Others v Aseguradora Colsegura SA and Another**[90], Mance LJ roundly rejected the notion, implicit in Colman J's reasoning, "that the court has a role in permitting (or refusing to permit) insurers to avoid a policy for non-disclosure":

> "It is in my judgment wrong in general principle. 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. Ss.18(1) and 20(1) of the 1906 Act also indicate that it is not."

66. Mance LJ was equally dismissive of the implication of Colman J's judgment that the insurers' right to avoid was conditional upon the consistency of any such avoidance with good faith or conscience, observing[91] that "... rescission under English law is not generally subject to any requirement of good faith or conscionability".

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[89] [2003] 1 CLC 401, 480
[90] At paras 26-27
[91] At para 34

67. In a concurring judgment, Buxton LJ dealt with the question even more robustly, observing[92] that "rescission is an act of the party, effective as soon as it is made, and regarded by the courts as so effective provided that the appropriate circumstances for rescission existed at the time". Further[93], "[t]he duty of good faith, or of utmost good faith, applies in the formation of the contract ... [i]t is simply inept to extend it to the enforcement of the contract in litigation". And further still[94], "[t]he 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".

68. The high-water mark of the appellant's case on this issue is the decision of a differently constituted Court of Appeal in **Drake Insurance v Provident Insurance plc**, decided a few months after **Brotherton & Others v Aseguradora Colsegura SA and Another** in 2003. For present purposes, it is happily unnecessary to dwell on the facts of the case, save to note that Rix LJ, who delivered the leading judgment, was moved to observe at the outset[95] that they"might have been set by a committee of law professors with the express design of giving rise to points of interest and difficulty". In point of form, this was an action between two insurance companies who were both insurers of the same loss, it being common ground that, in cases of double insurance, the insurer who pays the insured's loss (in this case 'Drake') would ordinarily be entitled in equity to recover a rateable proportion from the other insurer ('Provident'). But the matter was complicated by the fact that Provident had purported to avoid the insured's motor insurance policy on the ground of his non-disclosure of a previous speeding conviction. It therefore disputed its liability to Drake to share in the loss on the ground that, because it had validly avoided the insured's policy, there was in fact no double insurance. In addition, Provident maintained that a special clause in Drake's policy limited its liability in a case of double insurance to only half of the loss, thereby preventing Drake, which paid the insured's loss in full, from recovering against it.

69. At first instance, Moore-Bick J found for Provident on both grounds of defence. Moore-Bick J also found that, in seeking to avoid the policy, Provident acted "in perfectly good faith"[96]. On appeal, Rix LJ identified four principal issues in the case. First, whether Provident had been

[92] At para 45
[93] At para 48
[94] Ibid
[95] At para 1
[96] See para 52 of Rix LJ's judgment

entitled to avoid the insured's policy on the ground of his non-disclosure[97]; second, whether the mutual duty of utmost good faith owed by an insurer to its insured operated in some way to limit Provident's right to avoid the policy in the particular circumstances of the case[98]; third, whether there had been a waiver by the Provident of any right of avoidance, or a reinstatement of the policy[99]; and fourth, whether Drake's claim against Provident failed on the ground that it had made a voluntary payment in excess of its liability under the policy of insurance[100].

70. In considering the first issue, Rix LJ said this[101]:

> "On analysis this issue cannot be completely answered without taking notice of the question of good faith raised under the second issue: for if as a matter of good faith Provident was not entitled to avoid its policy, then that is an answer to this first issue. No authority, however, so far as is known, has ever decided that the insurer's mutual obligation of good faith limits its rights of avoidance. The role of this first issue therefore is to ask whether, *irrespective* of any argument that can be raised as a matter of good faith, Provident was entitled to avoid the policy. If the answer is No, then the second issue does not matter. If the answer is Yes, then the second issue must be faced."

71. In the result, Rix LJ (with the agreement of Clarke LJ[102]) found against Provident on the first issue, holding that it had failed to discharge the burden of proving that the insured's non-disclosure had induced it to enter into the contract of insurance. Despite the fact that it was therefore not necessary to face the second issue, Rix LJ considered that it was "another important issue, which I do not think it would be right to ignore, but which I would not wish to decide"[103].

72. On this issue, Rix LJ referred to, among other authorities, **Carter v Boehm** itself, **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd** (in which Lord Lloyd of Berwick had observed that "… 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"), and Lord

[97] Para 9
[98] Para 19
[99] Para 24
[100] Para 47
[101] At para 57
[102] See paras 131-142
[103] Para 79

Hobhouse's judgment in **Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd**. Against this background, Rix LJ, in a passage upon which the appellant relies most heavily, said this[104]:

> "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 Star Sea* described the doctrine of good faith as "a principle of fair dealing" (at para 48). 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 realisation 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 means to introduce safeguards and flexibilities which had not been appreciated before: see *Pan Atlantic v. Pine Top* itself, which discovered the requirement of inducement to be implicit in the MIA, *The Star Sea*, 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 105487 (The "Mercadian Continent")* … 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.
>
> 88. However, examples where Lord Hobhouse's principle of fair dealing has been exercised to prevent an insurer from utilising 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 species 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 Star Sea* (at para 45):

[104] At paras 87-90

> ‘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 give wider effect to the doctrine of good faith and recognise that its impact may demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing.
>
> 90. The present case permits an opportunity to explore these considerations. At the end of the day, however, I do not think it is open to this court to go behind the finding of the judge that Provident acted in perfectly good faith in avoiding the contract.”

73. At the end of the day, Rix LJ therefore concluded that Drake could not succeed on the second issue. Clarke LJ said[105] that, while he was “inclined to agree with” Rix LJ’s views on the second issue, he preferred not to rest his decision on these considerations. On the other hand, Pill LJ considered[106] that Provident was guilty of a breach of its duty of good faith to the insurer and that the contrary finding of the judge below, not being “a finding of primary fact … or a factual inference”, was “not a barrier to that conclusion”.

74. And finally, on the third and fourth issues respectively, the court found unanimously that (i) Provident had not unequivocally avoided the policy, and therefore remained bound by it; and (ii) Drake had not acted as a volunteer so as to remove its right to an equitable contribution of 50% from Provident.

75. On the present state of the common law, it therefore seems accurate to say, as MacGillivray concludes[107], after considering **The Grecia Express**, **Brotherton & Others v Aseguradora Colsegura SA and Another** and **Drake Insurance v Provident Insurance plc**,

[105] At para 143
[106] At paras 177-178
[107] At para 17-098

that the insurer's right to avoid the contract of insurance on the ground of the insured's non-disclosure "is not conditional upon the insurer acting in good faith".

76. The common law rules relating to the insured's duty of disclosure have attracted much criticism over the years, particularly with regard to the perceived inflexibility and sometimes draconian nature of the insurer's remedy of avoidance[108]. But, as the judge observed[109], "potential development of the common law [of England and Wales] was in fact overtaken at least partially by primary legislation itself". The judge's reference was to the English Consumer Insurance (Disclosure and Representations) Act 2012, which has gone some way towards ameliorating the situation in relation to what has been described as consumer insurance. Under this Act, any previous duty relating to disclosure or representations by an insured to an insurer in respect of a consumer insurance contract is replaced by a duty to take reasonable care not to make a misrepresentation. And, under the English Insurance Act 2015, in respect of non-consumer insurance contracts, the insured is under a duty to "make to the insurer a fair presentation of the risk"[110] and the rule permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished[111].

77. However, no similar legislation has been enacted in the Cayman Islands. Further, as Mr Lowe pointed out, section 34(6) of the Monetary Authority Law, under the authority of which the CIMA Rules were promulgated, makes it clear they are not intended to affect private law rights by providing that:

> "A breach of the rules or statements of principle or guidance issued under subsection (1) shall not constitute an offence, or of itself give rise to any right of action by persons affected, or affect the validity of any transaction."

78. By way of postscript to this discussion, I should refer briefly to the recent decision of the Supreme Court in **Versloot Dredging BV and another v HDI Gerling Industrie Versicherung**

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[108]See para 87 of Rix LJ's judgment in **Drake Insurance plc v Provident Insurance plc**; and see generally MacGillivray, para 17-107, where the defects in the common law are summarised

[109]At para 124

[110] Section 3(1)

[111] Section 14(1)

AG and others[112], in which the judgments were handed down on 20 July 2016, after the conclusion of the argument in the instant case. By a long established rule of the common law, if an insured makes a fraudulent claim on his insurer, the latter is not liable to pay the claim. However, a hitherto unresolved question has been what should be the position where, as Lord Sumption explained, "the entire claim may be justified, but the information given in support of it may have been dishonestly embellished". These were generally called 'fraudulent devices'. Lord Sumption went on to say this:

> "The expression is borrowed from a standard clause avoiding contracts of fire insurance which was widely used in the 19th and early 20th centuries. But it is archaic and hardly describes the problem. I shall use the expression collateral lies, by which I mean a lie which turns out when the facts are found to have no relevance to the insured's right to recover. The question is whether the insurer is entitled to repudiate a claim supported by a false statement, if the statement was irrelevant, in the sense that the claim would have been equally recoverable whether it was true or false."

79. By a majority[113], the Supreme Court answered the question posed by Lord Sumption in the negative, holding that the fraudulent claims rule does not apply to justified claims supported by collateral lies.

80. On the face of it therefore, the decision is of no direct relevance to the instant case and, in any event, it would not be right to dwell on it in any detail without the benefit of submissions from counsel. But I nevertheless think that it is possible to note three points without controversy. The first is Lord Sumption's remark[114] that, while "the law of insurance is concerned more with controlling the impact of a breach of good faith on the risk than with the punishment of misconduct ... [t]he extension of the fraudulent claims rule to lies which are found to be irrelevant to the recoverability of the claim is a step too far ... It is disproportionately harsh to the insured and goes further than any legitimate commercial interest of the insurer can justify". The second is Lord Hughes' observation[115] that, while "the fraudulent claims rule is of considerable importance and must be preserved … its extension to collateral lies ('fraudulent devices') is not

[112] [2016] UKSC 45
[113] Lords Sumption, Clarke, Hughes and Toulson, Lord Mance dissenting
[114] At para 36
[115] At para 103

based on sound authority and would result in a remedy disproportionate to the breach of duty involved". And the third is the following statement, again by Lord Hughes[116], on the difference between non-disclosure by the insured at the pre-contract stage and a lie told by him at the stage of making a claim:

> "The important difference between the [two] stages lies in the power of decision in the hands of the insurer. Pre-contract, he is free to take or to refuse the risk. A failure of disclosure or false statement deprives him of the opportunity to consider something. If it might have affected his decision, it is 'material'. And if he had known the truth, he would have had a perfect right to refuse to issue the policy. Post-contract, the insurer has no such freedom of choice. If the claim is good, he is legally obliged to pay it. A lie told in the making of the claim may well affect his handling of the claim, or the speed at which he pays it, or the inquiries which he calls for, but it can make no difference to his liability to pay."

Discussion and conclusions

<u>(i) Did the judge err in fact or law in deciding that ICWI was entitled to avoid the policy?</u>

81. There is no dispute as regards the appellant's general duty of disclosure, either at the inception or upon a renewal of a policy of insurance. However, much turned in argument on the question whether the words "been prosecuted for a motoring offence", properly construed by a reasonable person in their context, require disclosure of convictions only. On this argument, the appellant, having been charged in 2010 but not convicted until 2013, would not have been guilty of non-disclosure of the motoring offences at the time of the 2011 renewal of the policy.

82. In my respectful view, this is an untenable argument. The reasonable person faced with this question would, I think, apply the dictionary meaning of the verb 'to prosecute'. According to the Concise Oxford English Dictionary[117], it means "to institute or conduct legal proceedings against; institute legal proceedings in respect of (a claim or offence) ..." And, according to The Chambers Dictionary[118], it means "to pursue by law; to bring before a court ... to carry on a legal prosecution". Neither meaning, it will be seen, supports the view that the reference in the

[116] at para 91
[117] 11th edn, page 1152
[118] 12th edn, page 1248

proposal form to the applicant for insurance having "been prosecuted" must be taken to connote a conviction. Rather, it seems to me, both meanings plainly indicate that a prosecution is a process, not a conclusion.

83. In this regard, I am not particularly detained by Mr Reed's submission that the phrase "been prosecuted" must be taken to refer, as in the case of the preceding phrases in the same section of the proposal form ("been fined" and "had their licence endorsed/revoked"), to completed actions: there appears to me to be no inconsistency in the insurer requiring different kinds of information in different sections of the proposal form. Nor do I take the apparent inconsistency between this construction of the proposal form and the underwriting guidelines, which referred only to motoring convictions within the past three years being required to be referred to a senior underwriter, to be a significant indicator of what the clear language of the proposal form would have conveyed to the reasonable man. It is clear from Miss Lanigan's evidence on the point that the underwriting guidelines were merely part of ICWI's internal documentation and were consulted from time to time by her and the other two supervisors responsible for underwriting as an aid to underwriting decisions.

84. I therefore consider that the judge was entirely correct in his conclusion[119] that -

> "… in their natural and ordinary meaning the words in issue do encompass a clear reference not merely to convictions but also pending charges and also to acquittals as appropriate. In other words, the language encompasses information as to the prosecution process as a whole.
>
> Notwithstanding the somewhat distinct scope of [ICWI's] Guidelines ... those Guidelines do not in any way detract from the finding which I have now made."

85. Accordingly, I also agree with the judge's further finding[120] that "no ambiguity arises which should be considered *contra proferentem* in favour of the appellant".

86. In the light of this conclusion on the construction point, it seems to me that the appellant's waiver point, which was explicitly premised on the supposition that the questions

[119] At paras 50-51
[120] At para 54

asked by ICWI required disclosure of convictions only, must necessarily fall away. Accordingly, neither **Revell v London General Insurance Company Ltd** nor **Taylor and Another v Eagle Star Insurance Co. Ltd**, upon which Mr Reed relied on this point, can be of any assistance in this context.

87. But, even if I am wrong about this, and the questions asked in the proposal form were in fact so limited, it further seems to me that, by analogy to **Taylor and Another v Eagle Star Insurance Co. Ltd**, this is a case in which, quite apart from the information sought by the questions, a reasonable person would have recognised that it was material to disclose the fact that she had been charged with motoring offences, given its clear relevance to the subject matter of the insurance. It is true that the appellant maintained, as Mr Reed was careful to emphasise, that she genuinely did not know and honestly did not think that she was obliged to disclose the pending charges. However, the circumstances of this case are, in my view, wholly different from those in **Zeller v British Caymanian Insurance Company Ltd**, in which the question which the insured was called upon to answer was whether, to the best of his knowledge and belief, he had had any departure from good health. His honest answer, based on his belief held on reasonable grounds, was held to be appropriate. In this case, on the other hand, the information which the appellant was required to disclose was, by her own admission, known to her. In these circumstances, the question of whether the information was material was a question of fact to be determined by the court, rather than by the appellant's belief – even if sincerely held - that it was not. The appellant's duty in this case was, as the judge observed[121], "to disclose what she knew".

88. The appellant's further complaint that there was no independent evidence of materiality before the judge flies in the face of the authorities which assign to the court the task of determining the issue in the light of all the circumstances. In my view, Miss Lanigan's evidence, albeit not independent of ICWI, provided a sufficient basis for the judge's conclusion[122] that "the information as to motoring offences was material to a fair presentation of the risk proposed to be undertaken by [ICWI]". Quite apart from this court's strong disinclination to disturb a trial judge's finding on an issue such as this based on the evidence heard by him, it seems to me that the fact of a prosecution for driving under the influence of alcohol must plainly have been such

[121] At para 64
[122] At para 52

as to influence the judgment of a prudent insurer in determining whether to take the risk, and if so, at what premium and on what conditions.

89. Lastly on this issue, I should mention the question of whether ICWI was induced to enter into the policy by the appellant's non-disclosure of the pending charges against her. This question was not pursued in the appellant's submissions in this court and I think that this was a sensible decision: the judge's clear finding[123], based on Miss Lanigan's unchallenged evidence, was that the appellant's non-disclosure had induced the making of the contract, "in the sense that [ICWI] would not have made the same contract if [it] had known the matters in question".

90. For all of these reasons, in addition to those given by the judge, I have therefore come to the conclusion that the judge was entirely correct in his decision that ICWI was entitled to avoid the policy on the ground of the appellant's non-disclosure of the pending motoring charges.

<u>(ii) Did the judge err in fact or law in concluding that ICWI did not breach their duty of good faith to the appellant and were therefore not prevented from avoiding the policy?</u>

91. As has been seen, the judge considered that ICWI's failure during the relevant period to provide "any information or warning regarding the duty of disclosure and the consequences of failing to comply with it" was inconsistent "with the widely recognized standards for good insurance practice which I have reviewed"[124]. And, in concluding his judgment, the judge lamented the disparity "between the regulatory framework and the common law governing non-disclosure in the Cayman Islands". The appeal proceeded on the basis that the judge was fully justified in making these observations and I consider that it was right for him to do so.

92. Against this background, the appellant's case on this issue explicitly invites the court to say that, given the mutuality of the obligation of good faith in insurance contracts, a departure from good regulatory practice on the part of the insurer may be such as to disentitle the insurer from exercising the remedy of avoidance of the contract in a case in which the insured has been found to be guilty of a material non-disclosure. This is particularly so, it is contended, in a case in which the remedy of avoidance is draconian or will operate unfairly against the insured. In my view, as attractively as the argument has been put, this is an invitation which, on the present state

[123] At para 78
[124] See para 34 above

of the law of the Cayman Islands, this court is obliged to decline. In the light of my earlier discussion on this aspect of the matter[125], I can state my reasons for this conclusion relatively shortly.

93. Firstly, notwithstanding Lord Hobhouse's statement in **Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd** that "there is a weight of dicta that the principle [of utmost good faith] has a continuing relevance to the parties' conduct after the contract has been made"[126], there remains a complete want of authority for the proposition that avoidance of an insurance contract on the ground of non-disclosure by the insured may be refused by reason of a show of bad faith by the insurer. Rix LJ confirmed as much in **Drake Insurance v Provident Insurance plc**, when he observed that "[n]o authority … so far as is known, has ever decided that the insurer's mutual obligation of good faith limits its rights of avoidance"[127].

94. It is of course possible that the recent decision of the Supreme Court in **Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others** may yet portend a greater general recognition that, as Rix LJ put it in **Drake Insurance v Provident Insurance plc**, "the doctrine of good faith … may demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing". However, even so, it is clear that, in the context of the duty of non-disclosure of material facts, it will remain necessary to keep in mind the critical importance of full disclosure as a decision-making tool in relation to the insurer's assessment of the risk which he is being asked to undertake. But, in my view, be all that as it may, the position remains that the common law has yet to recognise any limitation on an insurer's right of avoidance for material non-disclosure by the insured, arising out of a want of good faith on the part of the insurer.

95. Secondly, and further, as Mance LJ stated in **Brotherton & Others v Aseguradora Colsegura SA and Another**, "rescission in the general law of contract is by act of the innocent party operating independently of the court"[128]. In the older case of **Abram Steamship Co v**

[125]Paras 61-80 above
[126]See para 62 above
[127]See para 70 above
[128]See para 65 above

Westville Shipping Co[129], to which Mance LJ made specific reference, Lord Atkinson put the matter even more plainly in the context of misrepresentation:

> "Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished; but if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election, and the latter gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract."

96, It therefore seems to me that, despite Rix LJ's cogently articulated view that, in certain circumstances, "the doctrine of good faith should be capable of limiting the insurer's right to avoid", it is not now open to this court to take this step, unless some other warrant for it can be found in the law of the Cayman Islands.

97. Which brings me to the third point, which is that I think that the judge was correct, for the reasons which he gave, in holding that the CIMA Rules and the other material prayed in aid by the appellant on the concept of "good insurance practice", were purely regulatory in scope and did not detract from or modify the common law duty of disclosure. In this regard, it suffices to note, as I have already done, section 34(6) of the Monetary Authority Law, which expressly provides that a breach of the rules or statements of principle or guidance issued under its authority "shall not constitute an offence, or of itself give rise to any right of action by persons affected, or affect the validity of any transaction". So, it seems to me, a failure to conform with rule 5.2.4, which provides that "[c]ustomers must also be informed about their duty of disclosure

[129] [1923] AC 773, 781

according to insurance contract law and the implications of a failure to disclose material information", cannot of itself operate to curtail or qualify those implications.

98. And fourthly, even if I am wrong about all of this, and the law of the Cayman Islands is that an insurer's right to avoid the contract of insurance on the ground of the insured's non-disclosure is conditional upon the insurer acting in good faith, I do not think any basis has been shown for this court to interfere with the judge's clear finding, after a trial contested in part on this very point, that there was no unconscionable conduct or want of good faith by ICWI.

99. On this issue, I would therefore conclude that, ICWI having validly avoided the policy on the ground of the appellant's non-disclosure, there is no basis upon which this court can, in the particular circumstances of this case, declare that avoidance to be ineffective.

Disposal of the appeal

100. For all of the reasons which I have attempted to state, I consider that this appeal must be dismissed.

MARTIN JA

I agree.

FIELD JA

I also agree.