#020

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

A.D. 1996

Suit No. 286 of 1993

Between

DONALD JAWAHIR

- Plaintiff

and

N.E.M. (WEST INDIES) INSURANCE LIMITED

- Defendant

Mr. C. Rambally and Mr. M. Francois for Plaintiff
Mrs. S. Lewis and Miss C. Lewis for Defendant

1996: May 14;
June 7.

JUDGMENT

Matthew J.

On April 30, 1993 the Plaintiff filed a writ of summons indorsed with Statement of Claim asking for payment from the Defendant the sum of $345,000.00, interest and costs.

In his Statement of Claim the Plaintiff alleged that on May 29, 1991 he insured his building situated at La Pansee, Castries with the Defendant and during the contractual period, on February 5, 1992, the building was completely destroyed by fire and that the Defendant has refused to pay him the insured sum of $345,000.00.

The Defendant entered appearance on May 18, 1993 and filed a defence and counterclaim on September 24, 1993. The essence of the defence is that no policy existed between the Plaintiff and the Defendant because the Plaintiff untruthfully answered question No.

4 in the insurance proposal and the Defendant entered into the policy of insurance in pursuance of the truthfulness of the answers in the proposal.

The Defendant did not in fact have a counterclaim for under what it described as a counterclaim it claimed nothing against the Plaintiff. However there is included an important pleading in paragraph 13 which is in fact supportive of its defence. There the Defendant stated that it was provided in the declaration attached to the proposal form that the said proposal should form the basis of the policy and that the said declaration is deemed to be incorporated in the said policy.

In fact the declaration does not say all that. It merely stipulates the agreement of the Plaintiff that the proposal shall form the basis of the contract between the Plaintiff and the Defendant.

A request for hearing was filed on November 18, 1993.

At the trial the Plaintiff gave evidence but called no witnesses.

Hazel Joseph, the Assistant Manager of Minvielle and Chastanet, agent for the Defendant, gave evidence on behalf of the defence and called three witnesses. They were Lydia Blasse, Cyrus Charles and Claudius Francis.

Donald Jawahir stated that when he went to effect the insurance policy, he spoke and dealt with Peter Bergasse, deceased. He stated that Bergasse took the proposal form and filled it for him and then asked him to sign it. At first he said Bergasse did not explain anything in the proposal to him and did not read the proposal form to him line by line. He stated in particular that Bergasse did not read out to him question 4 in the proposal form. I shall set out that question below.

He stated that in or about 1988 he owned a pick-up T1427 and a Bedford Tipper, H3716. He said these vehicles were insured with Alliances and St. Lucia Insurances did not speak to him in May 1988 about the policies in respect of the two vehicles. He said he could not remember receiving correspondence from the company concerning those two vehicles.

He said in 1985 he had a building at Forestiere insured with St. Lucia Insurances and that while the policy was in effect the building was affected by fire partially. He said the company took about 2 - 3 years to pay him and because of that delay he did not ask St. Lucia Insurances to insure anything for him. He said after the time period of the vehicle insurances had run out he simply went elsewhere. He said he could not remember receiving money from St. Lucia Insurances in May 1988.

When he was cross-examined he reiterated that it was Bergasse who completed the proposal for him. When he was challenged in respect of certain answers, for example, the answer to question 8 and how could Bergasse arrive at such answers he said: "I say now very few of these questions Mr. Bergasse asked me."

He stated that he did not remember receiving any letter from St. Lucia Insurances cancelling the policies of the two vehicles or receiving in any letter a cheque for $103.00 as representing the balance of premiums returned.

He said he is not telling lies and is speaking the truth and he did not deliberately give the wrong answer to question No. 4. He said he did not know at the time that St. Lucia Insurances had cancelled the policies on his vehicles.

After the fire which destroyed the insured property in February 1992, Minvielle and Chastanet became agents of the Defendant in September 1992. Hazel Joseph stated that she became aware of the

claim after Minville and Chastanet took over the agency. She said the files in respect of that claim was handed over to her but she did not pay the Plaintiff any money. She said she appointed loss adjusters, Francis Rosemin and Company, and they made recommendations on the claim. She said she refunded the Plaintiff his premium.

Lydia Blasse has been an insurance clerk with J.E. Bergasse for the past fourteen years. She said she knew the Plaintiff and was familiar with the proposal form which the Plaintiff had tendered in evidence. She said her handwriting is on the form. She said she asked the Plaintiff questions and she ticked off the answers as the Plaintiff indicated. She said on the basis of the answers in the form she entered into the contract with the Plaintiff.

When she was cross-examined she said Mr. Bergasse did not fill the form and he did not give her the form after it was filled out. She said she would not complete a form without asking the client the questions.

Cyrus Charles has been in the employment of St. Lucia Insurances for thirteen years, the last ten of which being Managing Director. He stated that his company had an insurance on the Plaintiff's Forestiere property and in the course of the policy there was a fire at the place and the property went up in flames and was completely burnt.

He said arson was suspected but there was no concrete evidence to deny the claim so his company took a decision to cancel the existing policies which it had on the Plaintiff's two vehicles.

He tendered a letter dated 25th May, 1988 addressed to the Plaintiff.

"Mr. Mcdonald Jawahir,
Forrestiere,
ST. LUCIA."

It is not disputed that the letter clearly purports to cancel the insurances on vehicle T1427 and H3716. The letter also stated that a cheque of $103.00 was enclosed as representing the refund premiums for the unexpired terms of the insurance.

Charles stated that the letter was posted to the Plaintiff and it was not returned and that the cheque in the letter never came back to him.

When he was cross-examined he said that he assumed Jawahir received his letter for it was not returned and he had no other means of determining whether the Plaintiff received the letter.

He said he could not say whether the letter was registered or not. He stated further:

> "I have had letters in my mail box which did not belong to me. I agree mistakes are made in the Post Office. People have told me they posted things to me that I never received. There is the possibility that Plaintiff never received the letter or cheque."

Claudius Francis is employed with the firm Francis Rosemin and Company Limited, insurance loss adjusters and consultants. He carried out investigations for J.E. Bergasse and Co. Limited surrounding the circumstances of the fire which destroyed the insured property and he stated that his investigations revealed a misrepresentation by the Plaintiff with respect to the answer given to question 4 of the proposal. He was not cross-examined.

I think it is time to set out the questions and answers relevant to this matter.

"3. Have you or anyone with a financial interest in this property ever suffered a loss, whether insured or not, from any peril to be insured against at this or any other location? Yes ☑ No ☐

If "yes" please state:

(a) Date of loss _ _____.

(b) Cause of loss FIRE.

(c) Amount Not on this building.

4. Have you or anyone with a financial interest in the property to be insured ever had a proposal or policy - Refused, Declined, Cancelled or had Special Terms imposed? Yes ☐ No. ☑

If "yes" Please state the name of the Company and type of insurance. _____

_____

In her closing address Mrs. Lewis submitted that the gist of the matter was in clause 4 of the proposal form. Counsel submitted that the question and answer was a material fact forming the basis of any acceptance of the policy of insurance.

Learned Counsel referred to **Halsbury's Laws of England, Fourth Edition, Volume 25, paragraphs 367 and 369.**

She submitted that there was a duty imposed on the Plaintiff to disclose truthfully the answer to question 4 and he had not done so.

She referred to the following cases:

RE ARBITRATION between **YAGER V GUARDIAN INSURANCE COMPANY 1913 KBD**

38; 42.

GLICKSMAN V LANCASHIRE INC. 1926 H/L 139; 143.

LOCKER AND WOOLF LIMITED V WESTERN AUSTRALIAN COMPANY 1936 KBD 408; 413 -415.

Modern Insurance Law by John Birds, Third Edition, page 135.

MacGillivray and Parkington on Insurance Law 7th Edition, paragraph 831.

Mr. Francois in reply based his submissions on two premises. He submitted that in respect of the answer to question No. 4 there was no material non-disclosure of any facts.

Secondly, he said even if there was a material non-disclosure of facts the Defendant had not discharged the burden of proof in this case for whomsoever is saying there is a fraudulent misrepresentation the burden of proof is on him. He relied on the authority of **DERRY V PEEK 1899 14 A.C. 337.**

I should like to begin by stating some of the general principles of non-marine insurance, namely, the requirement of the utmost good faith and the duty to make disclosure of material facts. See **Halsbury's Laws of England, Fourth Edition, Volume 25 paragraphs 365 and 366.** The basic test of material facts hinges upon whether the mind of a prudent insurer would be affected, either in deciding whether to take the risk at all or in fixing the premium, by knowledge of a particular fact if it had been disclosed. Therefore the fact must be one affecting the risk. See paragraph 367. There are certain facts affecting the moral hazard and one such set of facts which it is often material to know is that in relation to insurances comparable with that sought there have been previous losses or claims or that in relation to any class of insurance the renewal of previous policies has been refused or premiums have been declined.

In Re An Arbitration between **YAGER AND GUARDIAN ASSURANCE COMPANY**

1913 KBD 38 the claimant had failed to disclose to Guardian Assurance that the Liverpool and London and Globe Company had declined to continue his insurance. When he claimed as a result of a fire the Court held that the fact that the L. Company had refused to continue the policy was a material fact, that when this fact became known to the claimant on the 20th September, there was no concluded contract, and that it was still the duty of the claimant to disclose such fact to the Guardian, and, having omitted to do so the claimant was not entitled to treat the policy as a valid policy.

Similarly in **GLICKSMAN** and **LANCASHIRE AND GENERAL ASSURANCE COMPANY, LIMITED 1927 A.C. 139** two partners had signed a proposal form and also a declaration at the foot of the form, pledging themselves that the answers to the questions were true, and that they had withheld no information that might tend to increase the company's risk, and agreeing that the declarations and answers should be the basis of the contract between them and the company. The fact was that an insurance company had refused a proposal for a burglary insurance made by the appellant on a former occasion. The House of Lords held that there was sufficient ground for supporting the finding of the arbitrator that the refusal by the insurance office of the proposal made by the appellant on the former occasion was a material fact, and that fact had been concealed.

More relevant to the facts of the present case is the case of **LOCKER AND WOOLF LIMITED AND WESTERN AUSTRALIAN INSURANCE COMPANY, LIMITED 1936 1K.B. 408.** In that case the Court of Appeal held that the obligation on a person making a proposal for insurance against fire to disclose all material facts is not limited to matters exclusively relating to fire risks, but extends to any matter which would influence the judgment of the insurance company in deciding whether to take or refuse the risk. The intending assured, in a proposal for fire insurance in respect of their premises, in answer

to the question: "Has this or any other insurance of yours been declined by any other company?" answered "No." Thereupon a policy was issued. It subsequently appeared that some time before that proposal the assured had applied to another company for a policy on motorcars, but the application was declined on the grounds of misrepresentation and non-disclosure of certain facts. Held, that the nor-disclosure of this refusal of the motor-car insurance was the non-disclosure of a material fact in the proposal for the fire insurance which therefore entitled the fire insurance company to avoid the policy.

There is no dispute that the Plaintiff answered question No. 3 correctly. In a sense the answer to that question should have put the insurer on inquiry and if he had made the necessary inquiries from St. Lucia Insurances Limited he may well have found, not only the circumstances of the Forestiere fire, but also the delay in payment of the claim and the resultant decision by St. Lucia Insurances Limited to cancel the Plaintiff's motor-car insurances. One might well wish to argue that the answer to question 4 of the proposal was not in fact material. Paragraph 366 of Halsbury's states in part:

> "However, it is sufficient if the facts which are disclosed put the insurers on inquiry and their inquiry would in the normal course elicit such further facts as may be material."

In **ANGLO-AFRICAN MERCHANTS, LIMITED AND ANOTHER** and **BAYLEY 1969 2 A.E.R. 421** the plaintiff companies wished to obtain insurance coverage against all risks for a quantity of army surplus clothing about 23 years old, which they intended for resale to buyers abroad. The plaintiffs instructed a firm of brokers and informed D. (a director of the firm) that the goods were government surplus and that they were new. D communicated with a second firm of brokers who insured the goods as new. A portion of the clothing was stolen and when the plaintiffs claimed on the policy they

failed for non-disclosure of material facts. In the course of his judgment **Megaw J.** held that even if it could properly be said that an insurer waived his right to complain of non-disclosure if he had received information which would put an ordinary, careful, insurer on enquiry and nevertheless failed to enquire, a normal prudent insurer would not have been put on enquiry as to the precise nature of the goods by reason of seeing them described as "new men's clothes in bales for export."

The declaration at the end of the proposal stipulated that the proposal shall form the basis of the contract between the Plaintiff and the Defendant. In **Glicksman's** case **Viscount Dunedin** had this to say at **page 143.** He said:

"Then I come to the law of it. The law has often been stated, but perhaps it is just as well to state it again. A contract of insurance is denominated a contract uberrimae fidei. It is possible for the persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to the materiality left, because the persons have contracted that there should be materiality in those questions."

I adopt that statement of the law and hold that the answer to question 4 of the proposal becomes material. See paragraph 391 of Halsbury's and paragraphs 815, 824, and 826 of the **Sixth Edition of MacGILLIVRAY** and **PARKINGTON** on **INSURANCE LAW.**

I do not believe the Plaintiff that it was the late Peter Bergasse who filled in the proposal form for him. I find Lydia Blasse to be a witness of truth and I believe her that she was the one who filled in the proposal for the Plaintiff and at his dictation. I find that Blasse filled in the form after receiving the appropriate responses from the Plaintiff. In particular I believe the witness that she asked the Plaintiff the question No. 4 and he answered in the negative. Since the proposal form was filled in as dictated

all the difficult questions of agency do not arise for consideration. See paragraph 831 et. seq. of the **Seventh Edition of MacGILLIVRAY** and **PARKINGTON** as well as **Modern Insurance Law by Jonh Birds, Third Edition, page** 135; and **BAWDEN** and **LONDON, EDINBURG & GLASGOW ASSURANCE COMPANY** 1892 2 Q.B. 534; **NEWSHOLME BROS. AND ROAD TRANSPORT & GENERAL INSURANCE COMPANY** 1929 2K.B. 356.

As I said earlier I believe the Plaintiff answered "No" to question 4 on the proposal form. The real issue in this case is whether the Plaintiff in giving that answer lied to the insurers as suggested by learned Counsel for the Defendant. The insurance adjuster, Mr. Claudius Francis, had suspicions as to the cause of the fire to the insured property and was of the view that the Plaintiff had fraudulently misrepresented himself in relation to the answer he gave to the said question 4. To determine this question it is crucial to find out whether the Plaintiff ever received the letter posted to him by St. Lucia Insurances. This letter dated 25th May, 1988 was not delivered by hand to the Plaintiff and he did not sign any document to indicate that he had received it. There is no evidence that the letter was registered to him. A cheque was enclosed in the letter. There is no evidence that he used that cheque. When he was cross-examined Cyrus Charles conceded that mistakes are made in the Post Office and people have told him that they have posted things to him which he had never received and he further conceded that there is the possibility that the Plaintiff never received the letter or cheque.

The law in this case has been correctly stated by learned Counsel for the Plaintiff but this case will turn on the facts. There was no doubt in Yager's case. He was told by the agent of the refusing company that he had bad news for him and when the claimant asked what was the bad news the agent told him that the insurer was not going to continue with the insurance.

In this case there can only be a presumption that the Plaintiff received the letter from St. Lucia Insurances cancelling his motor-car insurances. I have regard to Halsbury's Laws of England, Fourth Edition, Volume 17, paragraphs 35, 210 and 211. The Plaintiff has denied reading the letter. The Plaintiff has not shown himself to be a very truthful person. Besides lying on a dead man he tried to show that the house at Forestiere was only partially burnt whereas Cyrus Charles stated that the property went up in flames and was completely burnt. Nevertheless I cannot say on a balance of probabilities that I am convinced that he received the letter. I am therefore unable to conclude with any degree of assurance that when the Plaintiff gave the negative answer to question 4 in the proposal for insurance that he misrepresented, misstated, suppressed or withheld information. I am as suspicious as others have been but I should not be carried away by my suspicions and possibly do an injustice to the Plaintiff.

I would accordingly enter judgment for the Plaintiff in the sum of $345,000.00 and his costs to be agreed to taxed.

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A. N. J. MATTHEW

PUISNE JUDGE