SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2002/0456

BETWEEN:

ANTHONY ELIVIQUE

Claimant

and

NEM (WEST INDIES) INSURANCE LIMITED

Defendant

Appearances:
Mrs. Kim Camille St. Rose for the Claimant.
Mr. Mark Maragh for the Defendant

2003: October 23,24,
2004: January 26,
June 30

INSURANCE LAW…POLICY OF INSURANCE IN REPSECT OF BURGLARY…BURGLARY ALLEGEDLY OCCURRED DURING CURRENCY OF POLICY…CLAIMANT NOTIFIED DEFENDANT IN WRITING MORE THAN 30 DAYS LATER…DEFENDANT HAD CONSTRUCTIVE NOTICE OF ALLEGED BURGLARY BEFORE 30 DAYS…EFFECT OF LATE NOTICE…CLAIMANT ALLEGED THAT HE NEVER RECEIVED POLICY…WAS POLICY ASSIGNED TO BANK…WHETHER THERE WERE NON-DISCLOSURE AND/OR MISREPRESENTATION IN PROPOSAL FORM… UBERRIMAE FIDES…WHETHER INSURANCE COMPANY COULD AVOID POLICY..DAMAGES

JUDGMENT

1. HARIPRASHAD-CHARLES J: Mr. Anthony Elivique claims against NEM (West Indies) Insurance Limited ("NEM") an indemnity in respect of loss allegedly suffered as a result of a burglary which occurred at approximately 10.45 p.m. on 2nd January 2001 at his

premises ("the premises") at Bay Street, Soufriere. NEM has denied liability principally on the grounds that Mr. Elivique misrepresented and /or did not disclose material facts in the Burglary Insurance Proposal Form and secondly, that he has breached certain clauses of the Policy of insurance.

Some Relevant Facts

2. By Burglary Insurance Proposal Form dated 1st November 2000 and signed by Mr. Elivique, he proposed for burglary insurance with NEM [Exhibit AE1]. In response to the questions contained in the proposal form, Mr. Elivique specified among other things:

   - His name and address;
   - The property to be insured;
   - The declared value of the property and
   - The sum required to be insured in respect of the property

3. Like most insurance proposal forms, it required Mr. Elivique to provide true and complete particulars and not to misrepresent, mis-state, suppress or withhold any material facts which NEM would regard as likely to influence the acceptance and assessment of the proposal.

4. Acting through Mr. John Victor, an independent sales agent engaged in the sale of insurance policies, Mr. Elivique duly filled and signed the proposal form agreeing that it shall form the basis of the contract between him and NEM.

5. The proposal form recites the following sentence at the bottom of the first page namely:

   > "The insurance is subject to the more precise terms of the Policy, a specimen of which can be obtained on application."

6. In reliance upon Mr. Elivique's representations in the proposal form, NEM accepted the premium of $1,009.50 and issued the policy, WIB (LM) 350–025 ["the contract of insurance"]. Further, upon Mr. Elivique's instructions, the policy was allegedly assigned to Barclays Bank PLC, Soufriere.

7. By this policy, NEM agreed to provide Mr. Elivique with burglary insurance in respect of the premises and its contents and in particular to indemnify him and/or the assignee of the policy against loss resulting from theft of property from his premises between the period 29th November 2000 to 29th November 2001.

8. On 2nd January 2001, Mr. Elivique alleged that a burglary occurred wherein his premises were forcibly entered into and he was robbed at gunpoint, and items to a value of $154,250.00 were stolen and his premises were damaged.

9. Some time later, Mr. Elivique notified NEM of the alleged burglary and the loss resulting therefrom. He requested NEM to pay Barclays Bank the sum of $80,000.00 by way of indemnity and $10,000.00 as a result of the use and/or threat of violence accompanying the said burglary and/or damages to the said premises.

10. NEM has failed and/or refused to indemnify him or Barclays Bank, the assignee. Instead, NEM purported to cancel the said contract of insurance by sending a cheque amounting to the premium to Mr. Elivique. To date, he has not cashed it.

11. Consequently, Mr. Elivique instituted these proceedings claiming the sum of $80,000.00 being the total declared value of the jewellery; $10,000.00 for assault and violence, interest and costs.

Credibility

12. The standard of proof rests upon the insured to prove, on a balance of probabilities, that the loss insured against occurred and that such loss was covered by the policy.

13. In their defence, NEM is not alleging that a burglary did not occur but puts Mr. Elivique to strictly prove that it did. NEM contended that Mr. Elivique's testimony casts lurking doubt as to the veracity of the claim in that:

    (i) he has failed to produce a police report in support of his claim although he stated that he reported the matter to the police;

(ii) he has failed to call any police witnesses;

(iii) he has failed to call or name any of the alleged persons, whom he said was present in the vicinity at the time of the alleged burglary and

(iv) there are inconsistencies between his statement to NEM and his witness statement.

14. Mrs. St. Rose appearing as Counsel for Mr. Elivique agrees that the standard of proof in civil cases is on a balance of probabilities. As she correctly stated, the test is also referred to as the preponderance of evidence which is defined in Black's Law Dictionary as "the greater weight the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be."

15. Learned Counsel submitted that the defence is making much of the fact that there was no evidence from the police to support Mr. Elivique's contention that there was a burglary. She next submitted that Mr. Elivique was the only eye-witness present at the time of the burglary and his evidence ought to be able to stand alone, if believed; and the fact that the defence puts Mr. Elivique to strict proof does not alter the civil standard. The question of whether there is lurking doubt is irrelevant in civil case.

16. First of all, in my view, a report from the police would add nothing to the case as all that the police could say is that a report was made to them on the night of the alleged burglary. Secondly, the calling of police witnesses would be meaningless as the police cannot say anything much since the alleged burglars were never arrested. Thirdly, calling or naming persons allegedly present in the vicinity is also meaningless. It therefore seems to me that the only evidence to contradict what Mr. Elivique has asserted is that of NEM's witness, Mr. Claudius Francis, deemed an expert by the Court (to which Mrs. St. Rose strenuously objected). Mr. Francis is an Insurance Loss Adjuster, Investigator, Surveyor, Consultant

and Arbitrator. He has been a loss adjuster for the past 20 years. Underwriting Agencies Ltd, agents for NEM retained him to investigate and advise them on the alleged burglary.

17. In his oral testimony to this court, Mr. Francis said that he promptly attended at Soufriere where he interviewed Mr. Elivique, among other persons. Mr. Francis stated that during the interview, Mr. Elivique told him several things which raised serious doubts about the validity of the claim; for example,

    i. Mr. Elivique stated that he opened the business and remained opened longer than normal to accommodate one or two customers who had agreed to collect their jewellery. Despite verbal requests to do so, Mr. Elivique has never been able to produce those clients.

    ii. Mr. Elivique stated that immediately following the burglary he shouted at the top of his voice. Though the area in question was residential in nature, no-one else (at least those 'we' spoke with) appeared to have heard his shouts and

    iii. Mr. Elivique stated that the bandits made off in a blue Nissan Sunny with no licence plates. Here, too, none of the residents 'we' spoke with recalls seeing such a vehicle."

18. Under cross-examination, it turned out that Mr. Francis did not go to Soufriere as promptly as he testified. In fact, he went to Soufriere some 2 months after the alleged incident. Then he stated that when he visited the premises, the door was in perfect working condition. Mrs. St. Rose submitted that clearly, 2 months after a break-in, Mr. Francis did not expect the door to business premises to remain broken.

19. Mr. Francis claimed that he interviewed Mr. Elivique and unknown residents of Soufriere and from those interviews, he formed the impression that Mr. Elivique concocted the whole story and the claim. As a consequence, he advised NEM accordingly.

20. Mrs. St. Rose strenuously challenged Mr. Francis' evidence. She argued that while Mr. Francis may have some expertise in this field, he was not an expert for whom the court had previously given specific permission to give expert evidence. She next argued that at all times, Mr. Francis was a witness for the defence, paid by them and his statements were tainted and coloured with a definite bias towards the defence.

21. My difficulty with Mr. Francis' evidence is that it related to what he saw and was told some two months after the alleged burglary. It is pretty obvious that one would not expect to see a damaged door two months later. In addition, some of the allegations fell within the category of hearsay evidence, for example, "none of the residents we spoke with recalled seeing such a vehicle" and "we spoke with several individuals who informed us that the Claimant was indebted to them and prior to the alleged incident he had promised to settle the accounts soon. Following the incident, he told them that once he had gotten paid by the insurance company, he would settle them. Unfortunately, none of these persons gave evidence.

22. At the end of the day, I am left to consider the credibility of Mr. Elivique who contradicted his own evidence on many occasions. However, I attributed this to the fact that he is semi-literate who could not even fill in the proposal form but had to use the services of an insurance agent to do so. Despite all the inconsistencies, I still found him as a witness of truth and I believed him. I believed that on the night of 2nd January 2001, three masked men with a gun, forcibly entered his premises and stole jewellery and other items.

Policy of Insurance: Notice of Terms in Policy

23. It is not denied that Mr. Elivique received the Policy of Insurance for the first time after the alleged loss. He contends that not having received the policy, he is not bound by its terms and in particular, the requirement pertaining to Claim Notification within a particular time and in writing; the warranty contained in the policy in respect of burglar alarms and any other terms not set out in the proposal form.

24. Mrs. St. Rose argued that what constituted the policy has been specifically stated under the heading "Policy Information". She argued that there is a distinction between the policy, the Schedule and the operative Endorsements. And the mere fact that the Conditions are stated on the reverse side of the Endorsements and that the operative Endorsements are specifically included, the position in respect of the conditions is equivocal at the worst and at best, not part of the policy, for the specific items will naturally exclude those referred to according to principles of statutory interpretation. I do not share this view. In my opinion, the Burglary Insurance Policy consists of the Policy itself, the Schedule, the operative Endorsements as well as the Conditions. Suffice it to say, I do not think that this point necessitates any further debate.

25. Mr. Maragh appearing for NEM submitted that the law in respect of notice of the terms in an insurance policy is long settled. He relied upon Chitty on Contracts[1] where the Learned Authors stated:

> "As in contract generally, one party may be taken to have contracted on terms of which he was only constructively aware, and generally the insurer's proposal form, which the assured uses to give the insurer particulars of the risk, contains express reference to the insurer's terms and conditions."

26. Counsel next submitted that the proposal form clearly states at the bottom of the front page that the insurance is subject to the more precise terms of the policy, a specimen of which can be obtained on application. And the proposal goes on further to state at the declaration signed by Mr. Elivique that he wishes "to effect an insurance with NEM <u>in terms of the policy to be issued by NEM.</u>

27. According to Counsel, Mr. Elivique had express notice of the existence of the policy and its 'more precise terms" but chose not to examine it. He therefore, cannot now claim a lack of knowledge of its terms which govern and limit the terms of insurance.

28. Mr. Maragh finally submitted that Mr. Elivique instructed that the policy should be assigned to Barclays Bank PLC in Soufriere and as such, waived any requirement, if any, for

[1] Volume II, twenty-fifth edition, para. 3698

delivery of the policy to him and his instructions indicated his unequivocal acceptance of its terms.

29. I agree with Mr. Maragh that Mr. Elivique may be taken to have contracted on terms of which he was only constructively aware and the proposal form contains express reference to his terms and conditions.

Notification of Claim under Policy

30. NEM is seeking to avoid liability on the basis of Clause 3(b) of the Policy. NEM alleges that it was a condition precedent to liability under the said Policy that in the event of loss or damage, Mr. Elivique must notify NEM in writing as soon as possible stating the circumstances and within thirty days of the occurrence deliver to NEM a detailed statement of claim together with such particulars and proofs as NEM may reasonably require failing which NEM will be under no liability for any loss or damage arising out of such occurrence.

Meaning of Notice

31. "Notice" means more than vague information which, if followed up, would lead to notice, and has been held to mean such notice as "brings home to the mind of a reasonable intelligent and careful recipient such knowledge as fairly, and in a business sense, amounts to notice of" the subject-matter in question: Lindley MR in Greenwood v Leather Shoe Wheel Co.[2] But no general rule can be laid down: it depends on the interpretation of each individual statute.

How Notice should be given

32. Unless notice in writing is required by the policy, an oral notice will be sufficient.[3] Notice need not be given by the assured (or his personal representative) personally, even where the condition requires notice from him. It may be given by an agent[4] by any person

[2] [1900] 1 Ch. 421, 436
[3] Re Solvency Mutual; Hawthorn's case (1862) 31 L.J. Ch. 625
[4] Davies v National Fire of New Zealand [1891] A.C. 485 at 489 (PC)

purporting to act on his behalf,[5] and it may even suffice that the insurer has otherwise become aware of the loss.[6]

33. It is undisputed that around the middle of January 2001, Ms. Helena Baptiste, an Underwriting's Clerk employed with NEM received a telephone call from Mr. Victor informing her of the alleged burglary and on or about the 8th February 2001, Mr. Elivique submitted a written claim. It is also undisputed that some eight months after the alleged burglary, Mr. Elivique received a copy of the policy of insurance for the first time together with a copy of the letter addressed to the Manager of Barclays Bank PLC, Soufriere assigning the policy to the Bank, a letter seeking to avoid the policy and a cheque for repayment of the premium.

34. It is not denied that Mr. Elivique instructed NEM to assign the policy to the Bank. What is unclear is whether the Bank ever received the policy. Mr. Elivique stated that the Bank Manager, Mr. Joseph advised him that he never received the policy. On the other hand, Ms. Baptiste stated that the policy was forwarded to the Bank and a copy kept at their office for Mr. Victor to deliver to Mr. Elivique. No documentary evidence was produced to substantiate her allegation.

35. On a balance of probabilities, I am more inclined to find that neither the Bank nor Mr. Elivique received the Policy of Insurance prior to the alleged burglary. Further, like other terms of the policy, it is a matter of construction whether such provision is a condition precedent to Mr. Elivique's right of recovery.

36. Even if I were wrong to come to that conclusion, I am of the firm view that the mere acceptance of the claim form when it was brought in on 8th February 2001 amounted to a waiver. In any event, NEM was aware of the alleged burglary within the 30 days period. It is almost inconceivable that even if Mr. Elivique had breached the notice provision that it

[5] Murphy J. in Patton v Employers' Liability Assurance (1887) 20 LR Ir. 93
[6] Barret Bros. v Davies [1966] 1 WLR 1334

could ever be regarded as a repudiatory breach of contract by NEM: see Trans-Pacific v Grand Union.[7]

Uberrimae Fides (Utmost Good Faith)

37. While a misstatement by one party by which the other is induced to enter into a contract will generally entitle the latter to rescind the contract, mere non-disclosure does not usually do so.[8] However, in the case of certain contracts, the law demands a higher standard of good faith between the parties, and "there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance."[9] As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have the policy, to make full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith –*uberrimae fides.*[10]

38. So where the proposal includes a basis clause, the proposer warrants the truth of the answers therein provided and no question as to their materiality can later arise. According to Viscount Dunedin at page 143 in Glicksman v Lancashire and General Assurance Co[11]:

> "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 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 materiality left, because the persons have contracted that there should be materiality in those questions…"

39. In Pan Atlantic Insurance & Co. Limited v Pine Top Insurance Co. Ltd.[12], Lord Lloyd of Berwick considered the consequences of the principle that "a contract of insurance is a contract of utmost good faith." Having considered the duty on the assured to disclose

[7] 6 A.N.Z. Insurance Cases 60-949
[8] Waford v Miles [1992] 1 All ER 453
[9] Mackenzie v Coulson (1869) L.R. 8 Eq. 368, 375 per James V.C.
[10] Rozanes v Brown (1928) 32 LI.L.R. 98, 102 per Scrutton LJ
[11] (1926) A.C. 139
[12] [1995] A.C. 501

every material circumstance known to him before a contract of insurance is concluded, Lord Lloyd stated at page 555D:

> "Lastly, the duty of disclosure operates both ways. Although, in the usual case, it is the assured who knows everything, and the insurer who knows nothing, there may be special facts within the knowledge of the insurer which it is his duty to disclose, as where (to take an example given by Lord Mansfield in *Carter v Boehm*) the insurer knows at the time of entering into the contract that the vessel has already arrived. Thus the obligation of utmost good faith is reciprocal: see ***Banque Keyser Ullmann S.A. v Scandia (U.K.) Insurance Co. Ltd. [1991] 2 A.C. 249*** per Lord Bridge of Harwich, at p. 268 and Lord Jauncey of Tullichettle, at p. 281. Nor is the obligation of good faith limited to one of disclosure. As Lord Mansfield warned in *Carter v Boehm*, at p. 1918, there may be circumstances in which an insurer, by asserting a right to avoid for non-disclosure, would himself be guilty of want of utmost good faith."
>
> See also: Drake Insurance Plc v Provident Insurance Plc[13].

40. So, it is incumbent on both the assured and the insurer to be fair in their dealing with one another.

Non-Disclosure and Misrepresentation

41. It was the express condition of the Policy as stipulated at Heading "Conditions" Clause 1 thereof that the Policy "will be voidable in the event of misrepresentation, suppression or non-disclosure by [the claimant] of any material fact."

42. NEM alleges that the policy of insurance ought to be voided on the following (2) grounds namely:

    (i) That Mr. Elivique failed to disclose or misrepresented the fact that he did not have a burglar alarm installed at the premises and

    (ii) That he failed to disclose or misrepresented the fact that on the date of the incident there was no guard on duty or watchman at the premises.

[13] [2003] EWCA Civ 1834, delivered on 17th December 2003

Burglar alarm

43. At clause 12 of the proposal, Mr. Elivique answered "yes" to the question – are security measures employed to protect the property insured against the risk proposed for insurance? If yes, please give details overleaf." By giving details overleaf, where "Burglar Alarm" appears, Mr. Elivique stated as follows: "door sensors" and "of American make."

44. Mr. Maragh attractively argued that Mr. Elivique misrepresented in the Proposal Form that he had a burglar alarm installed at the premises, or alternatively, failed to disclose that he did not have a burglar alarm so installed, a fact then known to him but unknown to NEM which was material to NEM to know and in reliance upon which NEM granted the said policy.

45. Mrs. St. Rose argued that the question should have been: do you have a burglar alarm?' The enquiry ought to have been answered with a 'yes' or 'no.' But Mr. Elivique wrote 'door sensors'. According to her, the language in the proposal form in question is terse; it merely states "burglar alarm."

46. I think that the answer given by Mr. Elivique appears just as terse as the question. Mr. Maragh emphasized that the answer meant that Mr. Elivique has a burglar alarm with door sensors. Mrs. St. Rose maintained that it meant that instead of burglar alarm, he had door sensors of American make.

47. I am more inclined to agree with Mrs. St. Rose that the mode of answer indicated neither affirmative nor negative which probably meant that Mr. Elivique did not know whether what he had could be so categorized but in furtherance of his duty to disclose, he indicated that he had door sensors. I do not think that it conveyed the meaning that he had a 'burglar alarm with door sensors. In any event, as Mrs. St. Rose correctly argued, if the answer was ambiguous, Ms. Baptiste could have solicited some further explanation as she did with respect to other parts of the form. She did not require further clarification and it is not surprising as she testified, that burglary insurances could be obtained without there being

in place burglar alarm systems. Mrs. St. Rose eloquently argued that this was exactly what happened with respect to Mr. Elivique.

Endorsements B1 and B7

48. Mr. Maragh submitted that by Endorsement B1 and B 7 of the Contract, it was a condition precedent to liability under the contract that the burglar alarm at the premises would be set and in operation during the currency of the contract. NEM alleges that at the time of the burglary and in breach of the said condition the required burglar alarm was not installed nor in operation.

49. Mrs. St. Rose, on the other hand, asserted that the court ought to look carefully at the language in determining what information is being solicited and whether a warranty is created thereby. In Husain v Brown[14], Saville L.J. said:

> "There is no special principle in insurance law requiring answers in proposal forms to be read…as importing promises to the future."

50. In that case, the contention that a statement by the insured that he had a burglar alarm was a continuing warranty that the alarm was operational and would habitually be set was rejected.

51. Mr. Maragh submitted that Husain's case is distinguishable from the present case in that the question was simply asked whether the premises are fitted with any system of intruder alarm. In this case, the question asked is whether security measures are employed to protect the property insured against the risks proposed for insurance? Mr. Maragh argued that this question clearly indicated that the warranty is of a continuing nature.

52. It seems to me that on the authority of Husain, this answer cannot be taken as holding out or promising that he had a burglar alarm which was installed, operational and would remain so at all times during the period of the insurance. There is no indication at all of

[14] The Times of Friday, 15th December 1995

such a requirement except in the Policy of Insurance which he received months after the alleged burglary.

53. It is my firm view that Mr. Elivique indicated that his premises were equipped with door sensors which, in any event, was functional on the night of the burglary. Whether it was armed or disarmed is irrelevant to the facts and circumstances of the instant case.

Security Guard

54. Under the heading "Security Guard," and "how many", Mr. Elivique indicated "one." Under the heading "Watchman", he indicated "yes". How many, he indicated "one" whose hours of duty are between 9.00 p.m. and 6.00 a.m. The watchman is 40 years old and able-bodied.

55. Mr. Maragh submitted that Mr. Elivique misrepresented to NEM that there was a security guard and a watchman "employed to protect the property insured against the risk proposed for insurance" who would be present during the term of the policy which representation becomes a warranty under the policy by virtue of the basis clause.

56. Mrs. St. Rose argued that from the manner in which the form was completed, Mr. Elivique was representing that he had one watchman who was his security guard. The details of the watchman could only be a statement as to the present position as it is worded in the present tense and makes no reference to the future. It refers to a specific person of a specific age and description and this enquiry could hardly lead to the conclusion that Mr. Elivique was warranting that he would always in the future have that said watchman on penalty of having NEM avoid the policy.

57. In Woolfall & Rimmer v Moyle[15], workmen of the claimants were employed in painting the roof of a factory. Scaffolding had been erected with planks on which the men stood. At a point where 5 workmen were standing on a plank, it gave way, with the result that 1

[15] [1942] 1 K.B. 66

workman was killed and 3 injured. The claimants claim damages from Lloyd's underwriters who resisted the claim on (2) grounds; one being that a question on the proposal form was wrongly answered. The question in the proposal form which was said to have been inaccurately answered was: "Are your machinery, plant and ways properly fenced and guarded and otherwise in good condition and order?" To this the answer given was "yes." The underwriters did not allege that this answer was inaccurate at the time it was made, but maintained that the claimants were under a duty to inform them if it ceased in any way to be true. It was held that the answer to the question applied only to the condition of the machinery, plant and ways *at the date when the answer was made* [Emphasis mine]. Lord Greene M.R. said as pages 70- 71:

> "It was argued in this court, as it was argued before Asquith J., that that question means a great deal more than it professes on the face of it to ask. It is said that it does not merely relate to the moment of time at which the proposer answers it, but that it extends to the future condition of the machinery, plants and ways, during the currency of the policy.
>
> In my opinion, there is not a particle of justification for reading into that perfectly simple question any element of futurity whatsoever….If the underwriters intended to refer to the future, it is most unfortunate that a printed document of this kind, tendered to Lloyd's underwriters to persons desiring to insure with them, should not be so expressed. Had they intended that the question should carry the meaning which they now suggest, nothing would have been easier than to say so."

58. Mr. Maragh argued that unless such warranties are of a continuing nature, then they are of no use to the insurer. I totally agree but the insurer must specifically state what is intended. As Lord Greene so succinctly said in the Woolfall's case at pages 73-74:

> If underwriters wish to limit by some qualification a risk, which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is. They should with the aid of competent advice, make up their minds as to the qualifications they wish to impose and should express their intention in language appropriate for achieving the result desired. There is no justification for underwriters who are carrying on a widespread business and making use of printed forms, either failing to make up their minds what they mean, or, if they have made up their minds what they mean, failing to express it in suitable language."

59. Mr. Elivique alleged that his brother, Simon Elivique performed these functions from inside the building but, in his absence, he himself would do the watchman's job. At the time of the

burglary, he was performing the functions of watchman as his brother was unable to work on that night. It seems to me also, that there was nothing to preclude Mr. Elivique from temporarily or for that matter, permanently being the watchman even if the clause were to be construed as a continuing warranty.

Clause 2 (a)

60. Clause 2 (a) of the Conditions states that the insured must take all reasonable precautions for the safety of the Property as if it were not insured securing all doors and windows and other means of entrance and not to suffer or permit anything whereby the risk of loss or damage is increased.

61. Mr. Maragh contended that Mr. Elivique breached Clause 2 when he negligently permitted the alleged burglars to enter the premises by unlocking the door at 10.45 p.m. without ascertaining whether it was safe so to do in all the circumstances.

62. Mrs. St. Rose asserted that since Mr. Elivique never received the policy, NEM could hardly expect that terms, which were not apparent from the proposal form, would be operational, and the insured must be excused from performance. I agree with Mrs. St. Rose's submission. NEM alleged that since Mr. Elivique instructed them that the policy should be assigned to the Bank, he cannot now turn around and say that he never received the policy. But, as I have already held, there is no evidence to show that the Bank received the policy of insurance which was allegedly assigned to them.

Amount of Insurance

63. Mr. Elivique alleged that the amount of insurance in respect of the stolen property is ambiguous and that the sum insured for is $80,000.00.

64. The proposal form requested of Mr. Elivique, among other things:

Please indicate the sum insured required in respect of:	
(a) The property to be covered – First Loss Basis	$35,000
(b) Damage to premises) limited to 10% of sum insured	$5,000

	) or $5,000 [whichever is greater]	
(c) Assault and Violence	) unless you indicate otherwise	$10,000

If any of the following property is proposed for insurance, please indicate:

PROPERTY	VALUE
Jewellery or precious metals	$80.000

65. Mrs. St. Rose submitted that First Loss is defined in Endorsement B3 (b) of the policy and it has the specific meaning given to it therein. Interestingly enough, it is Mr. Elivique's case that as he did not receive the policy of insurance, he cannot be bound by the terms of the policy. He now turns around and wishes to enforce terms of the same policy which he claimed he is not bound by.

66. Be that as it may, in my view, the policy clearly indicates that the total sum insured is $35,000.00; the excess is $2,500.00 and the total value of property insured is $182,000.00 with First Loss Declared at $35,000.00.

67. There is nothing ambiguous about the amount of insurance coverage sought and approved and as such, there is no need to apply the *contra preferentum* rule.

Conclusion

68. For the reasons stated above, I would hold that NEM was not entitled to avoid the policy. In the premises, Mr. Elivique is entitled to damages in the sum of $35,000.00 less the sum of $2,500.00 in respect of the policy excess to be borne by him in the event of any loss. Both Counsel agreed on Costs in the sum of $8,000.00. Since neither party has scored a complete victory. I will therefore reduce the Costs to the Claimant to $6,000.00.

69. I will dismiss the claim for assault and the use of violence as being wholly unsubstantiated.

70. Finally, I wish to thank both Mrs. St. Rose and Mr. Maragh for their industry, skill and ingenuity.

INDRA HARIPRASHAD-CHARLES

High Court Judge