GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 2003

BETWEEN:

CLICO INTERNATIONAL GENERAL INSURANCE LIMITED

Appellant

and

[1] FRANKLYN MATHESON
[2] PHYLLIS MATHESON

First Respondents

and

CHESTER JOHN

Second Respondent

Before:

The Hon. Mr. Adrian D. Saunders — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Haynes, QC with Mr. James Bristol for the Appellant
Mr. Karl Hudson-Phillips, QC with Ms. Elaine Greene for the first Respondents
Mr. Cajeton Hood for the second Respondent

2004: June 28; 29;
September 20;
2005: January 13 [Re-issued]

JUDGMENT

[1] SAUNDERS, C.J. [AG.]: The Matheson, brother and sister, were joint owners of a shop in Hillsborough, Carriacou. They were persuaded by Mr. Chester John, an Insurance Executive and a Principal Agent of the Appellant, ("CLICO"), to insure their premises with CLICO. The building and its contents were so insured against the risks of loss and damage by fire in the sum of $700,000.00.

[2] On 3rd March, 1994, the shop was completely destroyed by fire. The dispute in these proceedings revolves around who should bear this loss. CLICO has refused to pay on the insurance policy on the ground of material non-disclosure. They say that the proposal form leading to the policy wrongly stated that the walls of the building were made of concrete and timber. In fact the building consisted entirely of timber. Alternatively, CLICO has claimed against Mr. John for negligently effecting insurance on the wooden premises.

[3] The Mathesons instituted the action against both CLICO and Mr. John. The Mathesons say that CLICO is liable because Mr. John, as CLICO's agent, wrongly completed the proposal form. If the Court did not accept that Mr. John was CLICO's agent for those purposes, the Mathesons too have alleged negligence against Mr. John. There are therefore conjoined in these proceedings three different actions: the Mathesons versus CLICO and alternatively, the Mathesons versus Mr. John; and CLICO versus Mr. John. The fundamental questions before the trial Court were clear cut. Who completed or was responsible for the completion of the proposal form? If Mr. John was that person, was he acting then as CLICO's agent or the agent of the Mathesons? And finally, what, if any, was the personal liability of Mr. John in this matter?

[4] The learned trial Judge found in effect that the proposal form had been completed by Mr. John and that, at the relevant time, Mr. John was acting as CLICO's agent. The Judge therefore held CLICO liable to pay on the policy. The Judge also dismissed all claims against Mr. John. CLICO has appealed against the findings of the trial Judge.

The background facts

[5] The building in question had been formerly owned by the late Millicent Matheson. It was always a wooden building standing on a concrete floor. Ms. Matheson, deceased, used to insure the premises with Colonial Life Insurance Company

Limited ("COLFIRE") through Mr. John. The building was insured with COLFIRE between 1983 and 1988. The proposal form for the COLFIRE policy correctly described the premises as wooden.

[6] In 1988 the Mathesons were advised by Mr. John to switch the insurance to New India Assurance Company. The Mathesons followed this advice. Mr. John was at the time the agent in Grenada for New India. In the New India policies the building was also accurately described. In 1993, Mr. John persuaded the Mathesons to insure with CLICO. He was able to do so despite the fact that the CLICO premium was about $2,600.00 more than the New India premium.

[7] It is not surprising that the Mathesons always followed Mr. John's advice. Carriacou is a small island. The Mathesons had known Mr. John since school days. Mr. John was born in Carriacou and became a well-known insurance executive. He described himself as one of the most successful Carriacou men alive. He was certainly the most important man in the insurance field in Carriacou. He was held in high esteem by all and particularly by the Mathesons. He was thoroughly familiar with their building and its contents. He had inspected the premises many times.

[8] Mr. John had been the Principal Agent of New India Assurance Company since 1985. During that time the Mathesons insured their building with New India. About 1993, Mr. John was approached and he agreed to accept the position of Principal Agent of CLICO. It was agreed between CLICO and Mr. John that the latter would transfer to CLICO all his existing property business of New India. He accordingly wrote all the New India clients seeking to have them place their business with CLICO when each such policy came up for renewal. The Mathesons were among those to whom he wrote. They reluctantly agreed to pay the increased premium when Mr. John explained to them that the reason that the premium was higher was because the building was a wooden one.

[9] Mr. John did not require the Mathesons to go through the tedium of completing all the details on the proposal form. He would have known all those details from his years of dealing with the Mathesons. Moreover, he had full access to those details from his New India files. He led the Mathesons to understand that it was sufficient for them to sign in blank the CLICO proposal form and submit it to him. They did so and the form was subsequently completed partly, if not entirely, in Mr. John's handwriting. But it erroneously described the premises as being made of concrete and timber.

The Mathersons versus CLICO

[10] The proposal form in question had the usual provision that it was to be the basis of the contract. There are therefore two questions that must be answered. Was the proposal form completed by the agent of the Mathersons or by CLICO's agent? If it were completed by the former, was the mis-description material?

[11] In asserting that Mr. John, in completing the form erroneously, was not CLICO's agent, CLICO relied heavily on the case of Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.[1] That was a case where the insurance company's agent, who had no authority to fill in proposal forms, wrote down wrong answers on a proposal form even though the proposer had given him the correct answers. The proposer nonetheless signed the inaccurately completed form. It was decided in that case that the agent, in filling in the proposal form, was merely the proposer's scribe; that the knowledge of the true facts by the agent could not be imputed to the insurance company; and that therefore the company was entitled to avoid the policy.

[12] Newsholme's case is to be contrasted with the decision in Stone v. Reliance Mutual Insurance Society Ltd.[2] In Stone's case the insurance agent did have

[1] (1929) 2 K.B. 356
[2] (1972) 1 Lloyd's Law Reports 469

authority to fill in proposal forms. The agent filled in, inaccurately, a question on the form as to whether a previous policy had lapsed. The agent then had Mrs. Stone sign the wrongly completed form. The insurance company subsequently rejected a claim made on the policy. In reliance on Newsholme, the trial Judge found for the insurance company. But the Court of Appeal, led by Denning, M.R., unanimously distinguished Newsholme on the basis that in Stone the agent had authority to fill in the form. Lord Denning stated that a mistake was made by the agent. The latter had plucked the erroneous answer out of his own head. Mrs. Stone had also made a mistake in signing the form but her mistake was excusable as she was of little education and she assumed that the agent would have known that in fact a previous policy had indeed lapsed. She signed the form trusting the agent. Her mistake was induced by the misrepresentation of the agent and not by any fault of hers. The agent by his conduct had impliedly represented that he had filled in the form correctly and that he needed no further information from Mrs. Stone. The agent was acting within the scope of his authority and the insurance company was disentitled from avoiding the policy.

[13] Megaw, LJ opined that the case did "not give rise to any question of a principle of law. It is a case which depends upon its own special facts." He stressed in his judgment that no fraud or dishonesty could be attributed to Mrs. Stone; that the agent must have known that there had been a lapsed policy in the past but in writing down that there had been none, he had gotten himself into some "muddle, confusion or misunderstanding". He concludes his judgment by reiterating that if the erroneous answers were brought about by the fault of the company's own agent, acting in his capacity as such, the company could not rely upon Mrs. Stone's non-disclosures to avoid the policy.

[14] Stamp, LJ, the third member of the Court of Appeal, rested his judgment on the fact that Mrs. Stone had been forthright throughout and it was the agent who did not properly do his duty.

[15] Both Newsholme and Stone are decisions of the English Court of Appeal. *Stone* is later in time. It seems to me that a sensible way of reconciling these cases is to consider the actual or ostensible authority of the agent. In Newsholme the agent had no authority to complete the form. In Stone he had that authority.

[16] In The Western Australian Insurance Co. Ltd. v. Dayton[3] a proposal form contained untrue answers filled in by an agent of the company after the agent had obtained the signature of the assured. By a majority the Court held that the proposal was binding on the company as the agent had acted within the scope of his authority and the company was estopped from relying on the untruth of the answers.

[17] Blanchette v. C.I.S.[4], a decision of the Supreme Court of Canada, is to the same effect. The headnote reads:

> "Where a proposed insured, having signed a form for one type of insurance, requests an insurance agent to apply for another type of insurance by filling in blank sections of the form already signed, the agent is acting as agent of the insurer in filling in the blank sections. Consequently, if he makes a material misrepresentation, the proposed insured is not bound by it, and the insurer is not entitled to deny liability."

[18] In the instant case, the Judge relied on section 73 of the 1973 Insurance Act to find that Mr. John was the agent of the company for all material purposes. Section 73 states:

> "An agent, broker or salesman shall, for the purpose of receiving an initial premium for a contract of insurance, be deemed to be the agent of the insurer notwithstanding any conditions or stipulations to the contrary."

[19] I don't think it is necessary for me to determine the scope of this section because either way, there was evidence to support the learned Judge's finding that, unlike the agent in Newsholme, it was within Mr. John's actual or ostensible authority to assist in the completion of proposal forms. Mr. John himself said in evidence, "As

[3] (1924) 35 C.L.R. 355
[4] (1973) 36 D.L.R. (3rd) 561

an insurance agent I usually assist further to fill out insurance forms. This is accepted in the business. My principals know this." The administrative officer of the company agreed that Mr. John was authorized to complete proposal forms. She testified, "There is nothing wrong if Mr. John were to fill out a proposal form and the answers by the proposers and get them to sign it after they check it back."

[20] In determining whether, in completing the form, Mr. John was an agent of CLICO or of the Mathesons, the esteem which the Mathesons had for Mr. John cannot be overlooked. So close was the trust and friendship, Mr. John stated that the Mathesons would sometimes give him blank cheques signed by them. Mr. Haynes, QC for the company seeks to use this point to his advantage and to argue that the close family friendship between the Mathesons and Mr. John suggest that Mr. John, in completing the form, was doing the Mathesons a personal favour and was therefore their agent. I regret I cannot share that view. It strikes me as being quite artificial to hold that because you are my friend you must be my agent even in circumstances where, were you not my friend, you would have been held to be the company's agent.

[21] The trial Judge found as a fact that the residents of Carriacou looked up to Mr. John with trust in transacting their insurance business. The President of CLICO gave evidence that, "Chester John was at all material times the agent for CLICO. He was the agent in his personal capacity. All commission cheques were paid to him…" There was evidence that, in Grenada, Mr. John was and is still regarded as "Mr. CLICO". The company appointed Mr. John "Principal Representative" and "Principal Agent". In correspondence he was described as "Agency Manager" and he had the authority to fix rates. With all this evidence, I fail to see why Mr. John's knowledge of the Mathesons wooden building ought not to be imputed to CLICO. See: Ayrey v. British Legal and United Provident Assurance Co. Ltd[5].

[5] (1918) 1 K.B. 136

[22] It cannot be overlooked either that CLICO was here taking over the New India portfolio of Mr. John. CLICO did not consider the Mathesons as new clients. In these circumstances, Mr. John was therefore "an agent to know" in the context in which that expression is used in Taylor v. Yorkshire Insurance Co[6] and as such, the knowledge, as to the Matheson's building, acquired by him within the scope of his authority became the knowledge of his principal.

[23] In all the above circumstances, it is my view that the learned trial Judge was right to hold that in completing the proposal form Mr. John was the agent of CLICO and that, for this reason, CLICO was not entitled to avoid the policy on the ground of material non-disclosure. It follows from this finding that, in the case of the Mathesons versus CLICO, it is neither necessary to consider any issues regarding the materiality of the mis-description nor the liability of Mr. John to the Mathesons.

[24] The learned trial Judge had awarded the Mathesons the sum of $700,000.00 with interest at 12% per annum from October 1994 to the date of payment plus costs of $118,580.00. CLICO makes no complaint about the sum of $700,000.00 but takes issue with the interest sum and the costs awarded.

[25] At the hearing of the appeal, Mr. Hudson-Phillips QC, for the Mathesons, conceded that the relevant statute, section 27 of the West Indies Associated States Act, did not permit interest upon interest. It was agreed that the awarded costs should have been less than was actually ordered. As to the percentage of interest awarded, Mr. Haynes QC for CLICO had no quarrel with the 12% being awarded up to the date of the judgment. He states however that this rate should not apply beyond the judgment date and up to the date of payment.

[26] It appears that, unlike the case in other territories of the jurisdiction, Grenada does not now have a statutory rate of interest on judgment debts. Counsel for CLICO argues that since that is the case, the trial Judge had a discretion at large and the

[6] (1913) 2 IR 1 at page 21

Judge cannot be faulted for applying the same rate as was applied before judgment.

[27] The Judge gave no reason for applying the post judgment rate of 12%. That rate is at least twice the amount of what is applied in other parts of the jurisdiction and in the absence of any special reasons for justifying it I would consider it to be quite high. I would therefore reduce it to 6%. The result is that CLICO is liable to pay the Mathesons the sum of $700,000.00 with interest at 12% per annum from October 1994 until the date of the judgment. Interest will run on the judgment debt at the rate of 6% per annum until payment.

CLICO versus Mr. John

[28] The trial Judge dismissed the claim by CLICO against Mr. John. The judgment did not at all explore Mr. John's potential liability and no reasons were given for dismissing the action against him. In a Third Party Notice CLICO had claimed from Mr. John a full indemnity against any liability CLICO suffered in respect of the suit brought by the Mathesons. The particulars of negligence cited by the Mathesons in their alternative claim against Mr. John were repeated by CLICO in the Third Party Notice filed by CLICO against Mr. John. Those particulars related to obtaining the Mathesons signatures on a blank form; failing to inform the Mathesons that the answers in the proposal form were the basis of the contract and that incorrect answers could result in repudiation of claims made; mis-describing the building in question; and failing to give the Mathesons an opportunity to check back the completed form. CLICO further alleged that by a memorandum dated 28th June, 1993, Mr. John had been expressly prohibited from insuring wooden buildings.

[29] The record discloses a Defence to the Statement of Claim filed by Mr. John's solicitors on 4th May, 1999 but no Defence to the Amended Third Party Notice filed

on 13th June, 2001. Interestingly though, nothing was said of this by any Counsel throughout the appeal.

[30] During the hearing of the appeal Mr. Hood, Counsel for Mr. John, stated that Mr. John could not be liable to CLICO because CLICO had not been induced by the mis-description on the proposal form since the rate of the premium was apparently fixed before the Mathesons signed the proposal form.

[31] Even if it can be held, and I am not now so holding, that CLICO was not induced, Mr. John has put forward nothing to justify having the Mathesons sign a blank proposal form. Evidence was also led to the effect that, in accepting the Mathesons proposal, Mr. John flouted a memorandum dated 28th June, 1993, expressly forbidding him from insuring wooden buildings. As indicated before, I have seen no pleaded denial of this allegation. Nor was this evidence controverted at the trial.

[32] In my judgment, the case of negligence alleged by CLICO against Mr. John is made out. Mr. John clearly fell below the standard of care and skill that is reasonably to be expected of insurance agents and he is therefore liable to indemnify CLICO in respect of CLICO's liability to the Mathesons.

Costs

[33] On the issue of costs, it was conceded at the hearing that the costs of $118,580.00 awarded in the Court below were too generous to the Mathesons. Those costs, payable by CLICO to the Mathesons, should instead have been the sum of $108,212.00 and it is hereby so ordered. It follows that the costs to be awarded in this Court, payable by CLICO to the Mathesons, would be two thirds of that sum, namely $72,141.00. We would therefore so order. As to Mr. John's liability to indemnify CLICO, this indemnity would naturally extend to the above mentioned costs. The result of this is that Mr. John will pay to CLICO the costs

payable by CLICO to the Mathesons as well as CLICO's own costs both here and in the Court below. Those latter costs are in the same amount as the costs payable to CLICO to the Mathesons.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[Sgd]
I concur.

Albert Redhead
Justice of Appeal [Ag.]