THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(*Civil*)

SAINT LUCIA

Case No. SLUHCV 1179 of 2000

BETWEEN:

(1) NELISTA RAMBALLY individually and as personally representative of the Estate of HEZEKIAH RAMBALLY
(2) RUDOLPH RAMBALLY
(3) SIEANA RAMBALLY

Claimants

vs

(1) BARBADOS FIRE AND GENERAL INSURANCE COMPANY LIMITED
(2) THOMAS JEAN
(3) THOMAS M. JEAN INSURANCE BROKERAGE LIMITED

Defendants

Appearances:

Mr. V. Jude, Mr. A. George and Mr. C. Rambally for Claimants
Mr. R.L. Cheltenham Q. C. and Mr. E. Calderon for 1st Defendant (Mr. Cheltenham absent)
2nd and 3rd Defendants
Unrepresented and absent

2004: May 17, 18, 19, 20
June 8,
2005: October 31

J U D G M E N T

Background Facts

[1] EDWARDS J: On the 26th May 1997, the building housing the Country Style Bakery and Restaurant at Bexon - Castries, was destroyed by fire. At the material time there was in existence a policy of insurance with the 1st Defendant Barbados Fire and General Insurance Company Limited (*the Insurers*). This policy was dated 22nd July 1996. It covered the said building machinery, equipment and stock against loss or damage by fire, flood and other perils.

[2] This policy No. SLJC 0098, was effected by the 2nd Claimant Mr. Rudolph Rambally (*RR*) in the name of his uncle Hezekiah Rambally, who was then one of the registered owners of the property. The other registered owner was his wife Mrs. Nelista Rambally (*NR*) the first Claimant.

[3] The 2nd Defendant Mr. Thomas Jean acted as broker through his Company Thomas M. Jean Insurance Brokerage Limited (*the Brokers*) in this insurance transaction.

[4] The policy was procured through the Insurers' local agent J.E. Maxwell and Company Limited, whose Chief Executive Officer is Mr. Joseph E. Maxwell.

[5] The policy did not disclose that NR, RR and his wife Mrs. Sienna Rambally (SR) had a pecuniary interest in the said property. It only disclosed the interest of Hezekiah Rambally and the Mortgagee Royal Bank of Canada to whom Hezekiah Rambally was indebted.

[6] RR and SR were in the process of completing their purchase of this property from the owners. They had paid a deposit of $300,000.00 under a sale agreement dated 8th June 1995. There was a balance of $300,000.00 to be paid. RR and SR took possession of the property and occupied it from 1st July 1995 up to the date of the fire. RR and SR had also been paying $5,510.00 monthly from the 29th July 1995 to Royal Bank of Canada towards liquidating Hezekiah Rambally's outstanding Mortgage loan.

[7] On the 3rd January 1997, Hezekiah Rambally died. On the 14th July 1999, Letters of Administration No. 3 of 1999 were issued by the High Court to NR his widow. RR and SR are not beneficiaries of the deceased Hezekiah Rambally.

[8] By notice of loss dated 27th May 1997, the local agent of the Insurers was informed of RR's Claim under policy No. SLJC 0098, arising from the fire.

[9] Following a series of correspondence and oral discussions between the parties, their lawyers and the loss adjusters within an eleven months period, the Insurers by letters dated 12th February and 3rd May 1998, communicated their decision to reject the claim of RR.

[10] The Insurers contended then that RR being a stranger to the insurance contract, could not claim the proceeds of the insurance policy on the basis that he owned the said property, or was an assignee of or a beneficiary under the policy.

[11] By then the insurance policy had lapsed. It appears from the documentary evidence that the Insurers ought to have been aware of Hezekiah Rambally's death from the latest 27th May, 1997. The Initial Advice document at the back of the Insurers' Fire Claim file dated 27th May 1997 discloses this. However it was only after the letter dated 4th December 1997 from the lawyers for the Insurers concerning the date of death, that RR's lawyers supplied this information on the 5th January 1998.

[12] It is important to detail the sequence of events concerning the pleadings in this matter. On the 17th September, 1999 the Claimants commenced action against the Insurers only in Suit No. 709 of 1999. This suit was apparently discontinued after a Defence was filed on the 7th January 2000.

[13] By Writ of Summons filed on the 20th January 2000 another action in Suit No. 55 of 2000 was brought against the Insurers only. It is not clear whether this was discontinued. By Writ of Summons filed on the 4th December 2000 the present Suit No. 1179 of 2000 was brought.

[14] Pursuant to the Order of the Court made on the 20th March 2002, an Amended Statement of Claim was filed on the 26th March 2002, which added the Brokers as 2nd and 3rd Defendants.

[15] On the 5th September 2003 a Default Judgment Order was filed. This Order states that "*By Virtue of Order of the Honourable Acting Justice Murray Shanks Judgment be and in hereby entered for the Claimants against the Second and Third named Defendants for an amount to be decided by the Court*".

[16] By a Further Amended Statement of Claim filed on the 15th December 2003 the Claimants alleged that the Insurers mistakenly issued the policy SLJC 0098 with them not being insureds and not having business interruption coverage.

[17] Further, that the said policy and its proceeds are an asset of the Estate of Hezekiah Rambally to which the Administratrix NR is entitled as trustee of the insured property for the benefit of RR, SR and the Mortgagee. That NR, RR and SR are actual or implied insureds under the policy and/or third party beneficiaries with insurable interests. That at all material times NR and the deceased were trustees of RR and SR, and the brokers were agents of the Insurers. That the Insurers conduct and denial of the insurance claim of RR and SR therefore constituted a breach of Contract and a breach of Covenant of Good Faith and Fair Dealing.

[18] The Claimants seek 7 Declarations. These include Declarations relating to the validity of the sale agreement between the deceased, RR and SR, the validity and survival and effect of the policy after the death of Hezekiah Rambally, the

coverage of the Claimants insurable interests under the policy, the operation of estoppel by conduct to negative the Insurer's rejection of RR's claim, and the reformation of the Insurance Policy.

[19] The Claimants also seek to recover the sum of $750,000.00 for Special Damages, General Damages including punitive or exemplary damages for the alleged despicable, oppressive, fraudulent or malicious conduct of the Insurers, Interest and Costs.

[20] The Insurers by their Amended Defence filed on the 30th October 2003 in substance denied any breach of the insurance contract, while reiterating their previous contention articulated in the letters of the 12th February and 3rd May 1998. Further, they have invoked Conditions 7, 8 (d) and 13 of the Conditions and Stipulations under the insurance policy. These Conditions may serve to defeat the Claim of the Claimants. Their allegations of arson leveled against RR have not been proven. The other averments will be discussed later.

Issues

[21] The convoluted facts, the pleadings, evidence, law and submissions led Counsel for the Claimants to prepare an Agreed Statement of Issues filed on the 4th June 2004 identifying 34 issues to be determined in this case.

[22] However, I have identified 6 main issues some of which are very complex, for the resolution of this case. They are –

(1) Were the Insurance Brokers Agents of the Insurers in procuring the policy commissioned by RR? (*SEE paras 23 to 45*)

(2) Did Hezekiah Rambally through RR disclose to the insurers that the real property and items covered by the Insurance Policy had been sold in 1995 by Hezekiah Rambally to RR? (*SEE paras 47 to 74*)

(3) What insurable interests were covered by policy No. SLJC 0098? (*SEE paras 76 to 120*)

(4) What legal effect did the death of Hezekiah Rambally have on the said insurance policy? (*SEE paras 122 to 130*)

(5) Are the Insurers entitled to avoid the policy for non-disclosure and misrepresentation material to the risk and lack of pre-contract good faith or rely on the Conditions pleaded? (*SEE paras 131 to 189*)

(6) What measure of damages and other remedies if any, are available to the Claimants in the circumstances? (*SEE paras 191 to 214*)

The Brokers' Agency

[23] By paragraph 7 of the Claimants pleadings they allege that Mr. Thomas Jean, acting in his own name and/or through his Brokerage Company was at all material times agent and/or employee of the INSURERS. By paragraph 19, they allege that J.E. Maxwell and Company Limited and Thomas Jean were agents of the Insurers, and that the Insurers are bound by the promises, representations, acts, conduct and/or omissions to act by the said Defendants. The Claimants contend further that they and each of them, relied upon the representations and/or express or implied promises of the said agents that the Claimants, and each of them would be insured under the policy, and that the policy would have coverage for business interruption.

[23-A] By their Amended Defence at paragraph 1, the Insurers contend that neither of the Claimants was a party to any agreement for insurance of the property with the Insurers. By paragraph 9, The Insurers have denied each allegation in the statement of Claim.

[23-B] The burden of proof is upon the Claimants to establish on a balance of probability that the Brokers were serving 2 masters. In attempting to discharge this burden, the evidence presented by the Claimants included a Declaration made by Mr. Thomas Jean on the 23rd April 1998 which formed part of the Claimants' documents in the Trial Bundle. At paragraph 1 of this Declaration Mr. Jean stated:

> "*I am a licensed and qualified Insurance Broker for the securing and procuring of policies of insurance on behalf of various companies, including the Barbados Fire and General Insurance Company Limited*".

Mr. Jean stated also at paragraph 9 of his Declaration that upon completion of the proposal form, Rudolph Rambally gave him a personal cheque to cover the premiums due.

[24] The Claimants are also relying on the testimony of Mr. Joseph Maxwell and some of the answers he gave under cross examination. Mr. Maxwell's evidence was that Mr. Thomas Jean was a registered Insurance Broker who obtained quotations from J.E. Maxwell and Company Limited (*the Insurers' Local Agents*) and brought to him a proposal completed in the name of Hezekiah Rambally - (*Exhibit "JEM 2 and RR 16*"). He concluded that Thomas Jean was acting on behalf of Hezekiah Rambally although he did not speak to Mr. Jean or Hezekiah Rambally to ascertain if this was so. He simply made that presumption from the fact that there is such a relationship between a registered Broker with his client.

[25] Pursuant to the Court's Order made in March 2004, Mr. Maxwell deposed on the 16th April 2004. This Deposition formed part of the Trial evidence.

[26] Mr. Maxwell deposed in substance, that the Insurance Agents and Insurers were not in a position to determine the advice that Mr. Jean gives his clients since Mr. Jean is under an obligation to his clients and not to the Insurers or their Local Agents.

[27] Mr. Maxwell deposed further, that Mr. Jean had requested the proposal form from Mr. Maxwell's Office and Mr. Maxwell's Office sent the forms to Mr. Jean to be completed by his clients. Such forms are usually given to proposed insureds. That he Mr. Maxwell did not authorize Mr. Jean to sell the insurance policies, neither was he Mr. Maxwell authorized to delegate to brokers his responsibilities to sell policy for the Insurers. That Mr. Jean did not issue the Policy, the Insurers did.

[28] Mr. Maxwell also deposed that Mr. Jean received a commission payment for the sale of policy SLJC 0098 as broker presenting business to the Insurers. That Mr. Jean got a commission in the range of 10%. That there was a business relationship between Mr. Jean and the Insurers for the purposes of that policy.

[29] There was also testimony from an Expert Witness Mr. Davidson F. Peterson. He is an American lawyer practising in California, and also an Insurance Claim/Coverage/Bad Faith Expert/Consultant. He testified that there are multiple cases in the USA that an agent can act in a dual capacity, he can be acting both as an agent for the insured and at the same time an agent for the Insurance Company. He testified that what you look for is the act being performed to evaluate whether that person is acting for the insured or for the Insurance Companies. He referred to the evidence in the Witness Statement of RR concerning his expectations that the policy in question would cover business interruption for the Bakery and Restaurant business. RR referred there to his letter dated 11th July 1997 (*Exhibit "R 18*") which he wrote to the loss Adjusters Crawford – THG. At paragraph 2 of this letter RR stated the following –

> "*. . . After the loss while discussing coverage with my broker Mr. Thomas Jean I was under the impression by my Agent that I was covered under business interruption. Knowing I had gotten a quotation for such coverage I assumed my premium included business interruption*".

[30] There is also a document displayed at page 5 of the Trial Bundle Correspondence (*Exhibit "R 3*") dated July 3, 1996 to Mr. Randolph Rambally from Mr. Thomas Jean. This document is captioned Insurance Quotation. It refers to quotation for Fire and Perils and Business Insurance, and refers to and quotes figures provided by Mr. Jean for Business Interruptions.

[31] This evidence apparently led the Expert Mr. Peterson to conjecture that since Mr. Jean promised to get business interruption coverage and gave a quotation, that representation or that statement can only be attributed to the Insurance Company. I must confess I did not quite understand how Mr. Peterson could use this evidence as an example that Mr. Jean was acting as an agent for the Insurers.

[32] Learned Counsel Mr. Jude attacked Mr. Maxwell's testimony that Mr. Thomas Jean was the agent of Hezekiah Rambally. Mr. Jude described Mr. Maxwell's repeated denials that Mr. Jean was the agent of the Insurers, as willfully false or reckless statements, made with no regard for the truth of what was stated, since Mr. Maxwell admitted he did not know how the Application form for the policy was completed and no one at the Insurers' Company ever took steps to find out how this form was completed. Counsel concluded that Mr. Maxwell was guessing when he said that Mr. Jean was acting for Hezekiah Rambally.

[33] While commending the other evidence mentioned above, Mr. Jude urged the Court to find that there was an express written or oral appointment of Mr. Jean by the Insurers for the following reasons –

(a) The Insurers gave Mr. Jean application forms.
(b) Mr. Jean could collect premiums for the Insurers.
(c) Mr. Maxwell admitted he had received instructions on how the Insurers' Application Forms were to be completed.
(d) Mr. Maxwell also admitted that Mr. Jean was not given any instructions by the Insurers on how these forms were to be completed.
(e) Mr. Jean was paid 10% commission by the insurers for business he placed with the company.
(f) Mr. Maxwell admitted that Mr. Jean had a business relationship with the Insurers.
(g) There was no disclosure by the Insurers of agency documents between them and Mr. Jean which permits the Court to adversely infer that such a document existed.

[34] Mr. Jude canvassed his view that a Court could also find that there was an implied agency principal relationship between the Insurers and Mr. Jean and his company, because each party conducted themselves towards the other in such a way that it is reasonable to infer an agency relationship from that conduct.

[35] Counsel relied on the dicta of the dissenting Lord Wilberforce in Branwhite –vs- Worcester Work Finance Limited (1969) IA C 552, 587: There Lord Wilberforce said that "*While agency must ultimately derive from consent, the consent need not necessary be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from agency*".

[36] Mr. Jude referred to several cases on the Doctrine of Ratification and apparent or ostensible Authority and Ratification by Estoppel, also Mecham, Outlines of Agency (*4th ed*) p. 28 and 216. However Counsel did not provide the Court with the usual copies of any of these authorities cited. Counsel instead, provided the

Court with 31 Authorities from the USA which are not binding Authorities in this jurisdiction. Nevertheless, I consider it sufficient to take into account the principles stated in Counsel's submissions without reciting them in this Judgment.

[37] I have not had the benefit of any legal submissions from Counsel for the Insurers, owing to Counsel Mr. Calderon's abstention from actively participating in the trial in the absence of leading Queen's Counsel Mr. Cheltenham. The Court was informed that Mr. Cheltenham was unable to arrive in St. Lucia from Barbados for the trial due to interlocutory proceedings in Barbados involving Mr. Cheltenham QC, initiated by Claimants' Counsel on an application before this Court. There was a clash in the date scheduled for the interlocutory proceedings in Barbados and the trial dates in St. Lucia. Learned Counsel for Claimants sought to resolve this problem by discontinuing the interlocutory proceedings in Barbados without proper Notice. Mr. Jude also failed to communicate with Queen's Counsel Mr. Cheltenham in a timely manner. Since the Court would not permit a postponement of the trial for the third time, the trial proceeded in the absence of Mr. Cheltenham QC with Counsel Mr. Calderon present throughout the trial.

[38] I shall now review the applicable law. I am required by Article 917 A (1) of the Civil Code of St. Lucia Cap. 242, to apply the law of England for the time being relating to contracts and quasi-contracts, in the absence of local statutory provisions.

[39] At Common Law, the general rule is that a broker is the agent of the assured and not the insurer. The law has been stated with clarity and precision by Scrutton L.J. a great master of commercial law and a former professor of law in that subject at London University, in Fullwood –vs- Hurley [1927] ALL ER Rep. 610 at 611: "*No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal, from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment*".

[40] "*The principle is expressed in this way in BOWSTEAD ON AGENCY (13th Ed.) p. 144:*

> *"[As Broker] . . . he may not act for both parties to a transaction unless he ensures that he fully discloses all the material facts to both parties and obtains their informed consent to his so acting . . . Any custom to the contrary will not be upheld*".

If an insurance broker, before he accepts instructions to place an insurance, discloses to his client that he wishes to be free to act in the way suggested [accepting instructions from Insurers to obtain a report from Assessors to the Claim], and if the would be assured, fully informed as to the broker's intention to accept such instructions from insurers and as to the possible implication of such collaboration between his agent and the opposite party, is prepared to agree that the broker may so act, good and well. In the absence of such express and full informed consent, in my opinion it would

be a breach of duty on the part of the insurance broker to so act": PER Megaw J in Anglo – African Merchants –vs- Bayley [1969] 2 ALL ER 421 at p. 429.

[41] A summary of the true position is expounded in Halsbury's Laws of England (*4th ed*.) Vol. 25 para 397 thus –

> "*If a person wishing to obtain insurance of a non-marine character employs an insurance broker as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the proposer for the acts and omissions of the broker*".

[42] Mr. Jean's Declaration under oath that he "*secured or procured*" the policy in question "*on behalf of* " the Insurer, flies in the face of the general rule that brokers are agents of the assured under a duty to procure a contract of insurance in accordance with their instructions from the assured.

[43] "*It has nevertheless been recognized by the Courts that in certain matters a broker may undertake responsibility to the insurer, and that it is a question of fact in each situation whether the broker is acting for the insurer or the assured*": (*Collinvaux's Law of Insurance (7th ed.) at page 325, par. 15-27*).

[44] In my opinion the submissions of Learned Counsel Mr. Jude though courageous and made with force, lack merit for the following reasons –

(1) The collection of the premium by Mr. Jean from RR is not inconsistent with the rule that the broker is agent of the Insured, since the duty of the Insured or his agent is to pay the premium to the Insurer.
"*Outside the sphere of Marine Insurance and also policies issued by Lloyds, any dealings, with the premium by the broker will be on behalf of the assured and not on behalf of the insurer*" (*My emphasis) Collinvaux's Law of Insurance (7th ed.) at page 159 par. 7-04*).

(2) Regarding the remuneration of Mr. Jean by way of a 10% Commission - "*It is a long standing rule of English Law that the broker is remunerated not by the assured but by the insurer, by means of the deduction of Commission from the premium, and that commission is earned where the broker is responsible for arranging the insurance. The rule is anomalous, in that it contravenes the general equitable principle that the agent must not receive payment from the third party, but it is well*

established despite occasional dicta to the contrary. The level of commission is agreed as between the insurer and the broker, although the assured can apparently demand to be informed of what has been agreed and can object to excessive remuneration and where the Financial Services Act 1986 [UK] applies he has a statutory right to know. As the rule is derived either from custom or implied term, it can accordingly be ousted by an express arrangement to the contrary": (*Collinvaux's Law of Insurance (supra) at page 330 Para. 15-37*).

(3) That there must of necessity be a business relationship between the Insurer and the broker involving the giving of Application forms by the Insurers to the broker for the purposes of procuring the policy, this has been apparently recognized by the Court of Appeal in England to be another anomaly which is inconsistent with the general rule. "*. . .[T]he Court of Appeal has said that at least in the context of Lloyd's, the rule [that the broker is the agent of the assured and not the insurer] bears little relation to the reality of the close relationship between brokers and underwriters and ought to be reconsidered*": (*Collinvaux's Law of Insurance (supra) citing Roberts –vs- Plaisted [1989] 2 Lloyd's Rep. 341 footnote 32*).

(4) No evidence has been adduced by RR to prove that Mr. Jean before accepting his instructions to effect the insurance, had disclosed to RR that he wished to be free to act as agent for Barbados Fire and General Insurance Company, and had told RR of the possible implication and consequences that would flow from his double agency. Further, there is no evidence before me that RR on being so informed by Mr. Jean, agreed that Mr. Jean could act as agent for the Insurers also.

(5) There is also no evidence before me that Mr. Jean had made a similar disclosure to Barbados Fire and General Insurance Company and obtained their consent.

(6) Section 2 of the Insurance Act No. 6 of 1995 (St. Lucia) defines "*insurance broker*" to mean "*any individual who or any firm or company which for*

compensation as an independent contractor in any manner solicits, negotiates or procures insurance or the renewal or continuance of it on behalf of existing or prospective policy holders" (*My emphasis*).

(7) The Declaration of the proposer states that if anything on the proposal form was written by another person, that person acted as the agent of the Proposer for the purpose of the Proposal.

[45] I therefore reject the Claimant's allegations that the Brokers Mr. Thomas Jean and his Company acted as agents of Barbados Fire and General Insurance Company in procuring policy No. SLJC 0098.

[46] I now move on to consider the second issue concerning Disclosure.

Duty to Make Disclosure

[47] At common law, " *. . . it is the duty of the proposer during the preliminary negotiations [for a contract of insurance] to make full disclosure of all material facts. This duty is a positive duty to disclose and a mere negative omission constitutes a breach . . .*": (*Halsbury's Laws of England (4th ed.) Vol. 25 para. 366*).

[48] "Full disclosure must be made of all relevant facts and matters which have occurred up to the time at which there is a concluded contract. It follows from this principle that the materiality of a particular fact is determined by the circumstances existing at the time when it ought to have been disclosed and not by the events which may subsequently transpire": (*Halsbury's Laws of England (supra)para. 371*).

[49] The further Amended Statement of Claim at paragraph 8 and 9 allege –

> "*On or about the 21st July 1996, [the Broker Mr. Thomas Jean] . . . visited the residence of . . . [RR] for the purpose of selling an insurance policy with the . . . [Insurers]. This transpired in the presence of . . . [Hezekiah Rambally]. Consequently, . . . [RR] individually and . . . [Thomas M. Jean Insurance Brokerage Limited] through Mr. Thomas Jean were fully informed about the existing agreement between . . . [NR] and . . . [Hezekiah Rambally] and . . . [RR] and . . . [SR].*
>
> *On or about July 1996, . . .[RR] and . . .[the Insurers] entered into a contract of insurance, based upon representation made by . . . [Mr. Thomas Jean] individually and . . . [his brokerage company] and upon reliance on these said representations, the name of . . .*

[Hezekiah Rambally] was entered as the proposer or policy holder on the insurance policy number SLJC 0098 . . . This transaction was conducted with . . . [the Brokers'] full knowledge of the existing agreement between the Claimants and with the full knowledge that . . . [RR and SR] occupied and operated the bakery and restaurant and as a result the insurance policy was for the use and benefit of their financial interests".

[50] Concerning such pleaded allegations, RR's Witness Statement is as follows at paragraph 7-9 and 11-15 –

"*7. On and about June 21, 1995, the said Hezekiah Rambally, had a fire insurance policy and the bakery with Alliance Assurance Company Limited (hereinafter referred to as Alliance). Its date of expiration was June 21, 1996 and it covered the building for . . . (S400,000.00), the equipment for . . . ($280,000.00) and the fixtures for . . . ($20,000.00). The premium was . . . $4,550.00).*

8. In or about February, 1996, the Third named Claimant and myself obtained a policy with Alliance to cover a Rotary Rack Oven for . . . ($120,000.00). I was the named insured.

9. Prior to July 1996, the Third named Defendant acting through the Second named Defendant contacted me in order to attempt to persuade me to order insurance with the First named Defendant. We met regarding the Third named Claimant and my insurance needs for the bakery and the restaurant. I informed the Second named Defendant how I obtained the existing policies with Alliance and was told that one was in the name of Hezekiah Rambally and the other in my name as the named insured. Further, I explained the details of the sale, including the fact that the Third named Claimant and myself assumed responsibility for the bank loan at Royal Bank of Canada. I told the Second named Defendant that I wanted quotes for both fire and business interruption coverage. . .

11. On or about July 21, 1996 . . . [Mr. Thomas Jean] came to my home for the purpose of selling an insurance policy with . . . [the Insurers]. Prior to the day, all communications regarding the insurance were between [the Brokers] and myself. That day [the Broker Mr. Jean] was accompanied by his secretary, Mrs. Gloria Charles. The three . . .of us discussed . . . [the Brokers'] recommendation that I take out an insurance policy with the . . . [Insurers]. A copy of an affidavit sworn to by . . . [Mr. Thomas Jean] with the contents of discussion is hereto attached and marked "R 4".

12. During the course of this discussion and application process, Hezekiah Rambally came to my house. I explained

to . . . [Mr. Thomas Jean] during the application process all facts related to the sale and its terms and conditions, as well as the fact, that the policy was to protect . . .[RR's and SR's] financial interest in the buildings, equipment fixtures and possible business interruption. Ms. Charles pulled out on application for insurance and asked me questions and filled out the application which was signed by me. A copy is hereto attached and marked "R 5".

13. *With full knowledge of the sale the conditions of sale, and the fact that . . . [SR and RR] occupied and operated bakery and restaurant, . . . [Mr. Thomas Jean] represented that the named insured on the policy had to be Hezekiah Rambally because the mortgage and property was in his name (See also "R 4").*
14. *At that time, and all times thereafter, the . . . [Insurers and Brokers] knew or ought to have known that the insurance policy was for the use and benefit of the financial interests of [RR and SR], as well as Hezekiah Rambally. . . [Mr. Thomas Jean] did not explain why . . . [SR and RR] could not be named as additional insured under the policy.*
15. *I therefore contend that all the Claimants and each of them, had sufficient insurable interests in the real and personal property to be insured. I further contend that each Claimant should have been added as insured to the policy either as a named insured, additional insured or as an insured as their interest may appear*". (*My emphasis*).

[51] Ms. Gloria Charles an Insurance Underwriter for 15 years was in this capacity employed to Mr. Thomas Jean's Brokerage Company in July 1996. She confirmed in her testimony that RR informed Mr. Jean that he was not the legal owner of the bakery and restaurant, and also told him about the existing sale agreement between Hezekiah Rambally and himself. She said that RR did tell Mr. Jean about the Mortgage with the Royal Bank of Canada for which he was continuing to pay the Mortgage. She testified that "*Mr. Jean advised Radolph Rambally to effect the insurance policy using Hezekiah Rambally as proposer, since the mortgage and the property was in Hezekiah's name and not in Rudolph's name*".

[52] She said that after Mr. Jean went through the proposal form with both parties, securing the information from both Hezekiah and Rudolph Rambally, she wrote the responses onto the form which Mr. Rudolph Rambally signed. She testified that Hezekiah Rambally came in during the discussion, advised them that there was a Sale Agreement, and although he did not stay, before leaving he permitted RR to sign. The proposal form (*Exhibit "RR 16*") has the name, address and trade of the Proposer as "*HEZEKIAH RAMBALLY, Ravine Poisson, Bakery and Restaurant*" respectively. To the question – "*How are the premises occupied: -*

(a) by you?
(b) by other occupants (if any)?" the answer to (a) was "yes" and to (b) "No.".

[53] Now, a very curious thing happened with the signing of the Declaration on this proposal form. Ms. Charles testified that usually it is the Insured who signs the proposal form. However the signature on the form is RR's, he signed his signature to the Declaration on the Proposal of Hezekiah Rambally.

[54] Ms. Charles' evidence was that during the discussions with the Ramballys she contacted Ms. Suzan, Secretary of Mr. Joseph Maxwell at the Insurers' local agent company, and informed her of the new business. She informed Ms. Suzan that the policy was to be assigned to the Royal Bank of Canada because of the existing mortgage on the property. She explained to Ms. Suzan about the sale transaction for the bakery and restaurant between RR and Hezekiah Rambally. She said she also informed Ms. Joan Henry and Mr. Maxwell "*of the advice given to Mr. Rudolph Rambally regarding the manner in which the policy of insurance should be acquired*".

[55] The Declaration of Mr. Thomas Jean sworn to on the 23rd April 1998 in substance repeats the evidence of Ms. Gloria Charles.

[56] Mr. Joseph Maxwell the Chief Executive Officer testified that the Local Agent of the Insurers was presented with the proposal form with Declaration completed and signed with a scrawling signature he presumed was Hezekiah Rambally's. He did not regard the signature of any importance because as a matter of fact, Mr. Jean being the broker could have signed it he said, since "*contract can be entered into by one person for another*".

[57] Mr. Maxwell said that the Local Agent for the Insurers was not a party to any discussions between the Brokers and Hezekiah Rambally.

[58] Mr. Maxwell has not denied that Ms. Charles spoke to him and informed him of Mr. Jean's advice to Mr. Rambally regarding the manner in which the policy of insurance should be acquired. He has not denied that Ms. Suzan was at the material time his secretary. However, in his deposition taken on the 16th April 2004, he did not admit that Thomas Jean informed his Company of the circumstances under which policy No. SLJC 0098 had been sold to Rudolph Rambally. Ms. Charles did not explain who Ms. Joan Henry is, though Mr. Maxwell testified that she took RR's phone call subsequently concerning the flood at the Bakery, and her duty was to fill out claim forms and identify the relevant policy, person making claim, and the relevant property.

[59] I accept the evidence of RR, Ms. Gloria Charles and Mr. Jean as credible. I shall now look at the law on Imputation of Agent's knowledge for an insurance contract.

[59-A] Articles 1603 to 1661 of the Civil Code Chap. 242 (St. Lucia) are the statutory provisions dealing with agency. Article 1604 states that "*The agent can do nothing beyond the authority given or implied by the agency. He may do all acts which are incidental to such authority and necessary for the execution of the agency*". Article 1605 states that "*Powers granted to persons of a certain profession or calling to do anything in the ordinary course of the business which they follow, need not be specified; they are inferred from the nature of such profession or calling*". Article 1608 A states that subject to the statutory law of St. Lucia, the law of England for the time being relating to the contract of agency shall extend and apply to St. Lucia.

[60] The law as stated in Halsbury's Laws of England (4th ed.) Vol. 25 at paras. 392 is that the Insurers' agent's knowledge may be imputed to the Insurers where it has been proven that –

> *(a) Mr. Maxwell and/or Ms. Suzan and Ms. Joan Henry were acting in the capacity of the Insurers agent in the relevant transaction; and*
> *(b) It was their duty in that capacity to place such knowledge which each of them had acquired, however it might have been acquired, at the disposal of the Insurers; or*
> *(c) It was their duty to acquire on the Insurers' behalf knowledge as to the interests being insured under the said policy.*

[61] "*Even if the knowledge has come to the agent while acting in a distinct capacity, it will be imputed to the Insurers if it would be a breach of the agent's duty, as an agent to withhold it*". (*Halsbury's (supra) (ibid*))

[62] "*If the agent in fact has knowledge of relevant matters, it will normally be imputed to the insurers without any question . . . If the truth as to relevant matters ought to have been ascertained by the agent from his own inquiries in the performance of his duty, the insurers are precluded from setting up their own agent's misconduct in failing to make the necessary inquiries; they will be treated as knowing what they would have known if their agent had performed his duty*": (*Halsbury's (supra) (ibid*)).

[63] It is undisputed that Mr. Joseph E. Maxwell's Company is the local agent for the Insurers. Implicit in the issuing of the Cover Note in the name of Hezekiah Rambally on the 22nd July 1996 by J.E. Maxwell and Company Limited, is the conclusion that the offer made by the proposer was accepted by the local agent for the Insurers without qualification. "*The issue of such interim insurance falls within the authority of an insurance agent unless he is excluded, expressly or impliedly by the terms of his authority, from committing his principals in that way*": (*Halsbury's (supra) para. 401*).

[64] A look at the Deed of Deposit by J.E. Maxwell and Company Limited of Power of Attorney by Barbados Fire and General Insurance Company Limited in favour of J.E. Maxwell and Company Limited registered on the 25th September 1995 indicates that their was an Agency Agreement between them dated 5th August 1996. I am satisfied therefore that though at the time of the acceptance of the proposal this Agency Agreement and Power of Attorney may not have existed, nevertheless the local agents was apparently or ostensibly operating as the Insurers' agent, clothed with the authority to commit the Insurers in the circumstances presented in this case.

[65] Several authorities referred to in Collinvaux's Law of Insurance (supra) illustrate the operation of the ostensible authority of insurers' agents as it relates to the passing on of information received by them to the Insurers. They underscore the principle that an Insurance company may be estopped from denying that an agent has passed on information to them by reason of ostensible authority. I make no apologies for my extensive quotations from this work. At paragraph 15 – 06 in Collinvaux's the 2 types of ostensible authority which the law recognizes are described as –

> *"(1) Usual authority, which consists of authority that an agent of the status in question would normally possess but which is restricted in the particular case by private instructions not revealed to the other party – here private instructions cannot prevent the agent from binding the principal, although limitations expressly brought to the other party's attention are binding.*
>
> *(2) Apparent authority, which involves a power that an agent of the class would not normally be expected to have, but which the principal has held out this particular agent as having – this is also known as agency by estoppel, and rests on the statements or conduct by the principal, that of the agent necessarily not being sufficient. The basis of the rule is that where a third party deals in good faith with an agent in reliance on the credentials with which he has been entrusted by his principal, his principal is estopped from denying his agent's authority*".

[66] At paragraph 15 – 22 of Collinvaux's captioned RECEIPT OF INFORMATION the following is stated: *". . . an insurance company may be estopped by reason of ostensible authority from denying that an agent has passed on information to them thus, in Wing –vs- Harvey; [(1854) 5 De G.M and G. 265] an agent who had authority to do so, accepted premiums on his company's behalf and paid them to his directors. He knew at the time that the insured had broken a condition of the policy. It was held that the assured was entitled to rely on the agent passing on his knowledge to the directors, and*

that by accepting the premium through their authorized agent the company has therefore to be taken to have affirmed the policy. Those who deal in good faith with an agent are entitled to take it for granted that he does his duty. In Evans –vs- Employers Mutual [[1936] 1K.B. 505] it was held that, where it must have been clear to a Clerk of the insurers, from perusing a claim, that an answer in the proposal was untrue, his knowledge amounted to knowledge by the Company and that they had then to elect whether to continue with the contract. There are many other illustrations of the principle of estoppel. Where the assured orally volunteered material information to an agent, the company could not be heard to say that the assured concealed the matter even though no mention was made of it in his written proposal. 95 [footnote] 95: Avrey –vs- British Legal Assurance [1918] 1 K.B 136 explained by Greer L.J in Newsholme –vs- Road Transport [1929] 2 K.B. 356, 384. See also Holdsworth –vs- Lands and Yorks Insurance (1907) 23 T.L.R. 521 and Blackley –vs- National Mutual Life Association of Australasia [1972] N.Z.L.R 1038".

[67] Though Ms. Suzan is Secretary to Mr. Maxwell, no evidence has been adduced by Claimants to prove that she was a subordinate official or servant of the local agent for the Insurers, authorized to receive the information Ms. Charles communicated to her.

[68] In E*vans –vs- Employers Mutual Insurance Association Limited [1935] All E.R. 659* the clerk of the Insurers Mr. Mitchell was not a mere clerk. He had the duty to check over the statements in the claim form submitted by the assured, arising out of a motor vehicle accident. It was his specific duty to note any discrepancies between the proposal form and the claim form. Mr. Mitchell did notice the discrepancy where the assured had stated his driving experience as 5 years in the proposal form, but had put it as 6 weeks in the claim form. However, he chose not to convey this information to the Claim Managers of the Insurers because he did not consider it important.

[69] The observations of Greer L.J are very pertinent in considering Ms. Suzan's capacity. At pages 662 to 663 of his judgment, he opined –

> "*A limited company cannot know anything itself except through its agent or servants. The knowledge which is to be attributed to a company must be the knowledge of some agent or servant. If there be no evidence that the company has delegated the ascertainment of relevant facts to some officer of the company, it may well be that nothing short of knowledge by the Board of Directors will bind the company. But the knowledge of the directors is attributed to the company because they are agents of the company to whom the duty of knowing the particular facts in question has been delegated by the company. If it be established by evidence that the duty of investigating and ascertaining the facts has been delegated in the ordinary course of the company's business to a subordinate official,*

the company will in law be bound by his knowledge for the same reasons that they are affected by the knowledge of the board of Directors".

[70] It is obvious to me therefore from this statement of Greer L.J. that Ms. Suzan's knowledge cannot be imputed to the Insurers as knowledge of their local agent.

The Information Disclosed

[71] The Insurers have restricted the non-disclosure of material facts only to a failure to disclose that the real property and items covered by the policy had been sold in 1995.

[72] By paragraph 1 of the Amended Defence of the First Defendant, the Insurers averred – " *. . . in the Claimants' pleading it is disclosed that at the time insurance was effected the real property and items covered had been sold in 1995 and the non-disclosure of this to the insurer in 1996 when cover was sought entitles the First Defendant to avoid the policy which it hereby does for non-disclosure and misrepresentation material to the risk and lack of pre-contract good faith on the part of the insured. The First Defendant further says that on the same pleading the contract was void ab initio for lack of consensus ad idem caused by the undisclosed previous disposition of the property by the insured*".

[73] Though it is possible that Ms. Charles may have told Mr. Maxwell and Ms. Joan Henry that the relevant property had been sold by Hezekiah Rambally to RR since 1995, I find on a balance of probability that she did not. I do not know what information Ms. Charles communicated to them as the advice given to RR regarding the manner in which the policy of insurance should be acquired. Nowhere in her evidence has she stated that RR told Mr. Jean that the insurance policy was to protect the financial interest of his wife and himself. Neither has she testified that this was what she told Mr. Maxwell and Ms. Henry.

[74] Consequently, I find that Hezekiah Rambally and RR failed to disclose to the Insurers' local agent that the property in question had been sold to RR and SR in 1995. There was therefore no disclosure of this information to the Insurers.

[75] I will now consider the third issue relating to the interests covered by the policy.

The Insurable Interests

[76] The policy as it stands covered only the interests of Hezekiah Rambally and Royal Bank of Canada based on the Proposal form and the subsequent Assignment of the benefit to the Mortgage Bank.

[77] The fact that only Hezekiah Rambally's name was inserted in the policy with the mortgage interest endorsed, this by itself would not prevent NR, RR and SR from benefiting under it. There is no legal requirement that a policy covering fire risk must contain the names or identify the interests of all the persons who are able to seek indemnity under it: (Siu –vs- Eastern Insurance [1994] 1 All E.R. 213 (PC) *approving* ***Mark Rowlands Limited –vs- Berni Inns****. [1985] 3 AIII E.R. 473*).

[78] By paragraph 26 of their pleadings, RR and SR contend that they are actual or implied insureds under the policy and/or third party beneficiaries and are entitled to the policy's proceeds for the fire claim. By paragraph 24 they contend that NR as trustee of the property insured by the policy, is an actual or implied insured under the policy and/or a third party beneficiary. By paragraph 21 they pleaded that an actual controversy exists between the Insurers and RR, SR and NR since the policy was mistakenly issued without them being insured and not having business interruption coverage.

[78-A] By paragraph 1 of the Amended Defence the Insurers allege that neither of the Claimants was a party to an agreement for insurance of the property with the Insurers. They also have put the Claimants to prove their contention. There is a strong presumption that the policy embodies the real contract between the parties and a strong case is required to rebut that presumption: (***Collinvaux's*** *(supra) at para 1 – 34 page 23*).

[79] The Claimants have sought to prove their insurable interests in the property by their testimony and documentary exhibits. The Sale Agreement dated 8th June 1995 which was put in evidence by RR establishes that Hezekiah Rambally sold his property to RR. This document makes no mention that the property was co-owned by N.R, or that SR was also a purchaser. The only document that discloses this is a post fire claim correspondence dated July 11, 1997 written by Oswald W. Larcher, Attorney-at-Law, confirming Hezekiah Rambally's death, the ownership of the Bakery at Bexon by Hezekiah Rambally and his wife NELISTA Rambally before his death, and the sale of this Bakery, the portion of land and all the equipment to Rudolph and Seiana Rambally in August 1995.

[80] Mr. Larcher also stated in this "*TO WHOM IT MAY CONCERN*" correspondence that no Deed of Sale was effected because there existed a Mortgage on the said Bakery, land and equipment. Further that the vendors and the purchasers agreed that upon payment of the Mortgage a Deed of Sale would be effected.

[81] Accepting the evidence adduced, I have no doubt that Hezekiah Rambally, NR, RR and SR all had an insurable interest at the time the insurance contract was effected. In is trite law that a purchaser of land has an equitable interest in the premises of the contract until completion; and that this interest is insurable. The law also states that such property is at risk, and if it is burnt down before completion the purchaser still has to pay for it. The question is therefore –

Whether on a fair construction of the policy it can be established that Hezekiah Rambally had covered the insurable interests of NR, RR and SR?

[82] I am reminded by ***Collinvaux's*** that – "*In construing a Policy, regard may be had to the surrounding circumstances such as the nature of the transaction and the known course of business and the forms in the which the matters are carried out, but regard may not be given to and in this respect evidence is not admissible of, particular facts that occurred at the inception of the transaction or during the negotiations. The old rule that parole evidence is not admissible to explain the construction of a written instrument, applies to policies of insurance as to any other instrument. The construction of the policy is a question of law for the Court, and not a question of fact*". (***Collinvaux's*** *(supra) paras 2–12 and 2-15*).

[83] Since a policy of insurance must be construed like any other contract, I must apply the provisions of Articles 945 to 956 of the Civil Code of St. Lucia Chap. 242 where applicable.

[84] Though evidence of intention is clearly not admissible in aid of construing the insurance contract, such evidence becomes relevant when insurable interest is in question: (***Hepburn –vs- Tomlinsom (Hauliers) Limited*** *[1966] A. C. 451 per Lord Hodson at page 472-F*).

[85] The answer to the question I posed will depend on whether on a true construction of the policy as between Hezekiah Rambally and the Insurers, he contracted as agent or trustee for RR, SR and NR.

[86] Since Hezekiah Rambally and NR had only a limited interest in the property as legal owners, it is question of law and construction whether the policy covered either (a) the whole proprietary interest in the property, or (b) only Hezekiah Rambally's limited interest in the property and the Mortgagee's interest; or (c) the beneficial interest of RR as Purchaser, the limited interest of Hezekiah Rambally and NR as legal owners and the Mortgagee's interest, even though it did not say that Hezekiah Rambally was agent or trustee for RR, SR and NR.

[87] Before considering the applicable law, I wish to comment on the manner is which the case for NR, RR and SR has been pitched, since the Claimants' pleadings, their witness statements, and the submissions of the learned Counsel, have treated RR as the insured who applied for the policy. Though he may have intended to apply for the insurance, nevertheless according to the proposal, it was Hezekiah Rambally who applied for and obtained the insurance coverage for the property which is listed in the schedule to the policy. There can be no doubt about that. The intention of RR is therefore of limited relevance to this issue, and only to the extent that he was the person who directed the insurance to be effected, in my view. Otherwise, it is the intention of Hezekiah Rambally that matters.

[88] I am fortified in my view by the dicta of Lord Haldane in Dunlop Pneumatic Tyre and Company – vs- Selfridge and Company [1915] A.C. 847, 853 and Lord Wright in Vandepitte –vs- Preferred Accident Insurance Corp. of N.Y. [1933] A.C. 71 at page 79.

[89] Lord Haldane authoritatively expounded that – " *. . . in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam*".

[90] Speaking of this dicta of Lord Haldane, Lord Wright in Vandepitte –vs- Preferred Accident Insurance Corp. of N.Y. observed – "*In that case . . . only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principal which qualifies the legal rule, and which has received effect in many cases, as, for instance, Robertson –vs- West [(1863) 8 Ex 299]; Affréteurs Réunis Societé Anonyme –vs- Leopold Walford (London), Ld [[1919] A.C. 801]; Lloyds –vs- Harper [(1880) 16 Ch. D. 290] – namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee, if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant*": ([*1933] A.C. 71 at page 79*).

[91] Returning to the point in issue, I shall now consider the relevant terms of the policy.

[92] The recital on the front page of the Policy states among other things – "*Barbados Fire and General Co. Agrees (subject to the conditions contained herein or endorsed as otherwise expressed . . . deemed to be conditions precedent to the right of the Insured to recover hereunder) that if after payment of the premium the Property insured described in the . . . Schedule, or any part of such property, be destroyed or damaged by Fire . . . at anytime before 4 o'clock in the afternoon of the last day of the period of insurance named in the . . . Schedule . . ., the Company will pay to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property, or any part thereof. Provided that the liability of the company shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured here by . . .* ".

[93] Condition 8 of the Conditions and Stipulations on which the policy is granted states - "*8 – Under any of the following circumstances, the insurance ceases to attach as regards the property affected unless the Insured, before the*

occurrence of any loss or damage, obtains the sanction of the Company signified by endorsement on the Policy by or on behalf of the Company –

(a) . . .
(b) . . .
(c) . . .
(d) If the interest in the property insured pass from the Insured otherwise than by Will or operation of law".

[94] The policy does not disclose the nature of the interest insured. However, it is reasonable to infer from the surrounding circumstances that it probably was all of the existing interest Hezekiah Rambally had as legal owner.

[95] Condition 8 (d) is clear and decisive. In the existing circumstances presented by this case, pursuant to Condition 8, prior to the flood damage on the 3rd October 1996, and the fire loss on the 26th May 1997, Hezekiah Rambally should have informed the insurers that NR was co-owner and that they had only a limited interest in the property. Prior to those 2 occurrences, the Insurers should have sanctioned the sale of the property to RR and SR endorsing their interest on the Policy. There is no such endorsement on the policy.

[96] Condition 7 (a) states:-

"*7 – Unless otherwise expressly stated in the Policy this insurance does not cover:-*

(a) Goods held in trust or on commission".

[97] The Schedule to the Policy states the items and sum insured as follows:-

"*Item (1)* *On the one storey building occupied as a bakery and restaurant constructed of concrete roofed with galvanized iron situate at Ravine Poisson, Castries in the Island of St. Lucia = EC$450,000.00*

Item (2) *On stock in trade the property of the Insured contained in the building described in Item (1) = EC$50,000.00*

Item (3) *On trade fixtures, fittings, furnishings and utensils the property of the Insured contained in the building described in Item (1) = EC$100,000.00*

Item (4) *On Plant Machinery and Equipment the property of the Insured contained in the Building described*

in Item (1) = *EC$150,000.00*
EC$750,000.00"

[98] I shall deal with the Schedule and Condition 7 (a) when considering the law on insurance by a trustee. I now move on to consider the law on insurance by an agent, though the Claimants have not pleaded that Hezekiah Rambally was at the material time acting as agent for NR, RR and SR. I believe that it is prudent to do so.

Insurance by An Agent

[99] There is no evidence before me that Hezekiah Rambally was expressly authorized or under a duty to insure on behalf of RR and SR. Though Counsel Mr. Jude has referred me to no statutory provision in relation to NR's position, I have looked at Articles 1193, 1211 and 1220 of the Civil Code of St. Lucia, Chap 242. Article 1211 states that "*The spouses shall together administer the property of the community*". Under Article 1193 I should presume that Hezekiah Rambally and NR. jointly acquired the property in Community in the absence of evidence to the contrary. Article 1220 also states that: "*Husband and wife may contract obligations for the individual affairs of each other . . .* ". From these statutory provisions I conclude that RR was under a legal duty to insure on behalf of NR. The evidence directly discloses the intention of RR to protect his interest and that of SR by this insurance policy. "*If the assured was under no duty to insure on behalf of anyone else and if there is nothing to show that he intended to do so, the presumption will be that he intended to cover his own interest and nothing more*": (*Collinvaux's Law of Insurance (supra), para 3 - 37*).

[100] "*In the absence of express authorization, or an obligation to insure imposed upon the assured, a party on whose behalf insurance has been taken out may nevertheless ratify the assured's act and seek the benefit of the policy. However ratification requires (a) an intention on the assured's behalf to cover the other's interests, and this will be difficult to demonstrate in the absence of any authorization or obligation even where the policy is stated to extend to the other's interests, and (b) identification of the other to the insurer, on the basis of the rule that an undisclosed principal cannot ratify a contract made on his behalf*": (*Collinvaux's (supra), para 3 – 45 at page 80*).

[101] The fact that Hezekiah Rambally permitted the transaction in his name and confirmed that the property was sold to RR and allowed RR to sign the proposal for him, this is evidence which could satisfy the requirement under (a) in respect of RR in my view.

[101-A] However for SR, I can find no such intention. There is no probable evidence that Hezekiah Rambally intended to cover the interest of SR since she was not

mentioned in the Sale Agreement and Ms. Charles' testimony made no reference to her.

[101-B] It is significant that in the Proposal, NR was not named as co-occupier of the premises with Hezekiah Rambally. This fact along with my findings at paragraphs 73 and 74 above, prevents me from concluding that Hezekiah Rambally probably identified his wife NR to the Insurers as co-owner, or communicated to them his intentions that she be covered by the policy. No authority stating that she should be treated differently from RR and SR have been brought to my attention.

[101-C] My findings are also similar for RR and SR. There is no evidence from which I can conclude that Hezekiah Rambally directly or indirectly informed the Insurers that he was agent for RR and SR, and or that he intended to cover their interests under the policy.

[101-D] The communication of this intention appears to be essential under Condition 8 (d) of the policy, despite the statement of the law at paragraph 641 of Halsbury's (supra) which states –

> "*The person effecting the insurance need owe no duty or responsibility to the other persons interested. All that is required to make the insurance effective is that at the time of insuring it is his intention to cover their interests as well as his own. The intention must be that of the party to the insurance contract . . . If the requisite intention is established, the insurance is a valid insurance enuring for the benefit of all persons interested. The person effecting it must be regarded as effecting it as agent on their behalf. Therefore, if the insurance is unauthorized it must be ratified by the person claiming its benefit and the ratification may be given after loss".*

[102] The lack of clarity in the law was recognized by the House of Lords from as far back as 1901 in Keighley, Maxsted and Co. –vs- Durant [1901] 17 T.L.R, 527. The head note in this case reads that a contract made by a person in his own name, not purporting to act on behalf of a principal, but having an undisclosed intention to act for another, though without that other's authority, cannot be ratified by that other so as to enable him to sue or render him liable to be sued on the contract.

[103] There Lord Davey in his judgment, referred to the decided case Watson –vs- Swann (*11 C.B., N.S., 756*) which was an action upon a policy of insurance entered into by one John Smith in his own name. Lord Davey focused on Chief Justice Erle's statement in that case: "*It is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him and whose act has been ratified by him. Now here the contract was not made by the plaintiff, nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf*". In Watson –vs- Swann Willes J added – "*It is not necessary that he should be named,*

but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract".

[104] Lord Robertson in his Judgment in Keighley's Case summed it up in this following statement (*at page 528*) – "*It seems to be that the whole hypothesis of ratification is that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported, or professed to be done for him . . . Whether the unauthorized agent may be marked out as an agent by what he says, or by what he wears is, of course a mere matter of circumstance and of evidence; but an agent he must be known to be and as agent he must act*".

[105] In Hepburn –vs- Tomlinson (supra) [1966] A.C. (P.C) pages 476 to 479. Lord Pearce in reviewing the reason for the lack of clarity in the law, recognized that "*the question of the assured"s unilateral intention came into this branch of the law by way of Public Policy and Marine Insurance*". He also recognized that there were many cases in which commercial convenience allowed an assured with limited interest in goods as agent or trustee to insure the whole property in the goods and to recover the whole of the money, holding the balance in trust for those whose loss it represents. This was a case concerning a policy taken out by carriers on the goods which were the property of a third party. The rest of the facts are unimportant for the purposes of the present case.

[106] Lord Pearce also referred to and criticized the dicta of Brett J. in Allison –vs- Bristol Marine Insurance Co. Ltd. 1 App. Cas. 209, at 216 where he said – ". . . *by reason of the general understanding of merchants, which has been sufficiently made known to the Courts, it is to be held, as a matter of law, without further proof, that wherever the subject matter of a policy is described in it in general terms, it is to be taken to cover the interest, which is within its terms, which the assured has at risk, unless the contrary appears to have been the intention of the assured from other parts of the policy, or other proof*".

[107] Lord Pearce opined at page 479 –

> *"If and in so far as this dictum is intended to say that the unilateral intention of the assured can extend or narrow the interest which the policy covers there is force in Lord Atkinson's remarks in Boston Fruit Co. -vs- British and Foreign Marine Insurance Co. Ltd. [[1906] A.C. 336, 343; 22 T.L.R. 571, H.L.].*
>
> > `*"Under the old authorities the governing factor in determining the person or class of persons who came within such a clause, or was or were entitled to ratify and take advantage of the contract contained in it, was apparently the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he effected it. The underwriter, it would seem, was*

> *held to have insured those whom the person who dealt with him intended should be insured though that intention was never communicated to him. I doubt very much that doctrine can long survive the decision of your Lordships House in Keighley, Maxsted and Company –vs- Durant [[1901] A.C. 240; 17 T.L.R. 527] or whether the rule of construction thus adopted in the case of marine policies from early times is not inconsistent with the root principle which lies at the foundation of all the law of contract, namely, that there must always be the consent ad idem of the two contracting minds to make a valid contract*".

[108] I therefore accept the law to be that an undisclosed principal can take the benefit of a contract only where the insurers are aware that the person entering into the contract is a mere agent, or is likely to be insuring other interests as well as his own: (***Collinvaux's*** *(supra) para 3-45 at page 80*).

[109] Applying these statements of the law to my findings, I conclude that at the time the insurance contract was effected the Insurers were never aware that Hezekiah Rambally was professing to act as agent for RR, NR and SR, or that he was insuring their interests under the policy.

Insurance by Trustee

[110] The Claimants' pleadings allege at para (1) that Nelista Rambally and Hezekiah Rambally were at all material times the trustees of RR and SR.

[111] The law also recognizes that "*A party to a contract can constitute himself a trustee for a third party, although an unequivocal declaration of trust will generally be required where more than one person has an interest in the same subject matter and one of them insures to the extent of the whole value, constituting himself a trustee to the extent of the other's interest of any benefit he may receive under the policy, he cannot actually benefit to more than the extent of his interest, and the principle of indemnity will not be offended*": (***Collinvaux's*** *(supra) para 3 – 39*). (*My emphasis*)

[112] Though the circumstances surrounding the making of the proposal can probably permit an inference that Hezekiah Rambally intended to constitute himself as a trustee for the beneficial rights of RR and SR under the insurance policy, there must also be probable evidence that this was disclosed to the Insurers. I repeat my findings at paragraphs 73 and 74 above. There is no evidence that Ms. Charles told Mr. Maxwell or Ms. Joan Henry that Hezekiah Rambally had declared that the insurance was for the benefit of RR and SR. The fact that RR had paid the premium with his personal cheques is inconclusive, and therefore insufficient in my view.

[113] Article 916A (2) of the Civil Code Cap. 242 (St. Lucia) as amended provides –

> "*916 A (2) Implied, constructive and resulting trusts shall arise under the law of . . . St. Lucia in the same circumstances as they arise under the law of England.*
>
> *(3) Subject to the provisions of this Code or of any other statute the law of England for the time being in force governing the rights, powers and duties of trustees and beneficiaries under a trust shall extend to and apply in . . . St. Lucia.*
>
> *(4) Whenever by the law of England a beneficiary of a trust is entitled to a right in equity a beneficiary shall be entitled to a like right under this Code*".

[114] At common Law, a vendor under a contract for the sale of land has always been regarded as a constructive trustee for the purchaser pending completion: (Lysaght –vs- Edwards (1876) 2 Ch. D. 499; Raynar –vs- Preston (1881) 18 Ch.D. 1.). At common law, if property which is the subject of a contract of sale is damaged or destroyed in the interval between the signing of the contract and completion of the sale, the purchaser is not entitled to claim the benefit of the policy effected by the vendor, unless the benefit of the policy has been assigned to the purchaser by the contract and the insurers have consented: (*Halsbury's (supra) para 651*). "*One cannot pass the benefit of a fire insurance policy to the purchaser of one's property simply by declaring that one holds it on trust for him. But it is otherwise if one has the legal title or possession of such property and make the declaration on effecting the insurance. In such a case the principles applicable where an assured takes out a policy covering other interests also apply": (Collinvaux's (supra) para 10 – 15*".

[115] The Law of Property Act 1925 (U.K) Sections 205(1) (xx) and 47 (1) provide that where after the date of any contract for the sale or exchange of property, money becomes payable under any policy of Insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, on completion of the contract the money must be held or receivable by the vendor on behalf of the purchaser, and paid by the vendor to the purchaser on completion of the sale or exchange, or as soon afterwards as the money is received by the vendor, subject to the fulfillment of the following conditions –

> (1) There is no stipulation to the contrary in the contract; (*Section 47 (2) (a)*).
>
> (2) The consent of the insurers, if required, is obtained. The policy may contain a condition giving the benefit of the policy to any purchaser and rendering the consent of the insurers unnecessary; (*Section 47 (2) (b)*).

(3) The purchaser pays the proportionate part of the premium from the date of the contract: (Section 47 (2) (c)) SEE Halsbury's (supra) para 651.

[116] It appears to me that though there may have been no stipulation to the contrary --- in the Agreement for Sale pursuant to Condition 1 of Section 47 (2) (a) of the U.K. Act, RR would not benefit from the provisions of Section 205 (1) because of Condition 8 (d) in the insurance policy which Hezekiah Rambally failed to comply with. Such failure without further conditions could justify the refusal of the Insurers to settle the fire claim.

[117] Now Condition 7 (a) which the Insurers are also relying on relates to Items (2) (3) and (4) in the Schedule to the policy – (*See paragraph 96 and 97 above*). The policy does not expressly state that goods in trust were covered. It is obvious that it was not within the contemplation of the parties that Hezekiah Rambally would be trustee for any of the relevant items, since he was represented as the owner of the items

[118] Without further considerations, it is evident to me that the Items (2), (3) and (4) in the Schedule to the policy would not be covered if Hezekiah Rambally was trustee for these items.

[119] In relation to Condition (2) of Section 47 (2) of the U.K. Act, the Consent of the Insurers was not obtained, and Condition 8 (d) of the Policy specifically provided that in the absence of the Insurers' sanctioning the passing of the interest in the property from Hezekiah Rambally to any one else the insurance would cease to attach.

[120] Having reviewed the law and applied it to the facts and the terms of the policy, I am compelled to conclude that on a proper construction of the policy, only the legal insurable interest of Hezekiah Rambally and the Mortgagee's interest in the relevant property, were covered by this insurance contract.

[121] Though Hezekiah Rambally and NR were constructive trustees for RR and SR pending the completion of the sale agreement, the interest of RR and SR was not covered by the policy because of the insured's failure to disclose to the Insurers' local agent and/or the Insurers that the relevant property had -been sold in 1995 to RR and SR pending conveyance, and/or that Hezekiah Rambally was trustee or agent of RR and SR.

[122] I will now consider the fourth issue relating to the death of Hezekiah Rambally.

The Death of the Insured

[123] The Claimants seek a Declaration that the Insurers be estopped from asserting that the policy died upon the death of Hezekiah Rambally.

[124] It is stated in Halsbury's (supra) at para 472 that – "*In the case of certain types of insurance, such as a property insurance, which are not inherently personal to the assured, if the assured dies, his insurable interest and his interest in the policy normally pass to his personal representatives*".

[125] Also – "*Where an insurance is effected on property of the assured, . . . his death will not affect its duration in the absence of specific provision to that effect. Appropriate premiums having been paid, the value secured will normally pass as property, to the personal representatives. There are certain classes of insurance which are inherently personal to the assured in the sense that they insure him personally against specific contingencies, and it therefore follows that, once he personally has ceased by death to be capable of incurring such losses or liabilities or of being affected by such contingencies, the policy comes to an end. . .* " (*Halsbury's (supra) para. 481*).

[126] The insurance policy in question was effected on property. There seems to be no room for arguing successfully that this policy insured Hezekiah Rambally personally and upon his death the policy came to an end.

[127] There also seems to be no stipulation in the policy to prevent the law stated from operating. Indeed, it appears to me that Condition 8 (d) of the policy actually recognizes that the insurance does not cease to attach as regards the property affected where the interest in the property passes from the insured by Will and operation of law, without the sanction of the Insurers, signified by endorsement on the Policy.

[128] It would seem therefore that Hezekiah Rambally's death on the 3rd January 1997 did not affect the duration of the insurance effected on the relevant property since the premium of $7,875.00 had been paid up by RR; and the policy remained in force until the 22nd July 1997.

[129] It follows from this statement of the law in Halsbury's that the value of the property secured by the policy would pass to the personal representatives of Hezekiah Rambally upon his death.

[130] Consequently, my conclusions on this issue are that the insurance policy No. SLJC 0098 remained current until the 22nd July 1997 and did not come to an end upon Hezekiah Rambally's death.

Avoidance of the Policy/Relying on Conditions

[131] By paragraph 1 of their Defence the Insurers seek to avoid the policy on the grounds of non-disclosure and misrepresentation material to the risk and lack of pre-contract good faith on the part of the insured. The information they allege (and I have already found was not disclosed to the Insurers) is that the relevant property had been sold in 1995 (*See paragraphs 47 to 74 of this Judgment*). The Insurers contend further that the policy was void because there was non-consensus ad idem.

[132] The Insurers are also relying on Condition 8 (d) set out at paragraph 93 above. I have already made certain observations about this condition at paragraphs 95, 116, 119 and 127 above.

[133] The Insurers have further pleaded Condition 13 of the policy which states among other things that *". . . if the claim be made and rejected and an action or suit be not commenced within three months after such rejection . . . all benefit under this Policy shall be forfeited*".

[134] Learned Counsel Mr. Jude has dismissed these defences as spurious defences which have been destroyed by the evidence in the case. Learned Counsel Mr. Calderon in his skeleton arguments filed on the 6th November 2003, argued that the non-disclosure that the property had been sold in 1995 was material and would have entitled the insurer to avoid because the knowledge would have affected the mind of the insurer in accepting the risk or fixing the premium. Mr. Calderon cited K/S Merc Scandia –vs- Underwriters of Lloyds (2001) 2 Lloyds Rep. 563 as authority, without providing the Court with a copy of this authority. Consequently, I have not had the benefit of what this case decided.

The Materiality of Non-disclosed Facts

[135] For the pleadings at paragraph 1 of their Defence to succeed, the Insurers must prove on a balance of probability that the information that was not disclosed by the assured was material to the risk. The question of materiality is purely a question of fact in each case, and it is not a question of belief or opinion tested subjectively.

[136] Though the format of the proposal form provided by the Insurers' local agent did not include any questions as to who owned the relevant property, or whose interest was being covered, or whether the property had been sold to anyone, the absence of such questions on the proposal form would not preclude the proposer from orally disclosing such information for the reasons already stated at paragraphs 47 and 48 of this Judgment.

[137] In addition to this, the relevant Law Section 18 of the Marine Insurance Act 1906 (U.K), prescribes the rules for disclosure by the assured under the principles of utmost good faith. It provides –

> *"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract.*
>
> *(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk*".

[138] Though the Common Law principles of utmost good faith have been codified by Sections 17 and 18 of the Marine Insurance Act 1906 (U.K.), they have universal application to all types of insurance contracts.

[139] There is also a clause in the policy – Condition 1 which states: "*If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the company shall not be liable upon this policy as far as it relates to property affected by any such misdescription, misrepresentation or omission*". (*My emphasis*)

[140] A careful examination of Mr. Maxwell's evidence discloses that nowhere in his deposition, witness statement, or cross examination, has he addressed the materiality of the information which is the subject of the averred non-disclosure.

[141] It would seem from the law that the burden of proof is on the Insurers to prove that a fact is material. The Insurers discharge this burden by adducing evidence from experts as to insurance practice: (***Halsbury's*** *(supra) para 370*). The Insurers must demonstrate by objective evidence that a fact would be regarded as material by a prudent underwriter: (***Collinvaux's*** *(supra) para 5 – 21*).

[142] In the absence of such evidence, it cannot be said that the Insurers have discharged their burden. Consequently they cannot avoid the policy in my view on the grounds of this non-disclosure.

[143] Counsel Mr. Calderon argued further that the issue whether there was consensus ad idem is dependent upon general rules of Contract Law. That the basis of the Agreement was that the insurer was insuring Hezekiah's property in which he was carrying on business, but the facts show that he was in no position to insure on that basis. For those reasons Counsel argued, the parties were never ad idem and there was no contract.

[144] Counsel for the Claimants has failed to specifically address this contention. Instead, Counsel Mr. Jude has focused on certain conduct of the Insurers before

and after the fire claim which he argues should serve to estop the Insurers from avoiding the policy, and or denying that the interests of the Claimants were covered by the policy. These 2 occurrences, he argues amount to an affirmation by the Insurers that the contract with Hezekiah Rambally was valid, and that RR had an interest under the policy. I shall first deal with the Insurers' settlement of a flood claim.

The Flood Claim

[145] By paragraph 12 of their pleadings the Claimants aver – "*On or about the 25th day of November 1996, . . . [the Insurers] . . . paid . . . [RR] . . . the sum of . . . (S11, 774.92) on a claim made by . . . [RR and SR] who suffered a flood loss at the bakery/restaurant, which . . . [RR and SR] submitted . . . under policy No. SLJC 0098. At no time during this processing of this said claim did . . . [the Insurers] and or the said agent and/or employee advise anyone that . . . [RR and SR] were not insured under the policy, therefore the Defendants owed no payments, neither did the . . . [Insurers] refuse to honour . . . [RR's and SR's] claim*".

[146] A summary of the relevant evidence led to prove that the Insurers directly or indirectly acknowledged RR as having an interest under policy No. SLJC 0098 discloses:

(1) On the 21st July 1996 RR wrote a personal cheque payable to the Insurers' local agent for $7,500.00 as a down payment for the said insurance.

(2) On the 22nd July 1996 the local agent issued Cover Note No. 5920 for the said policy with Hezekiah Rambally as the insured.

(3) On the 24th July 1996, RR wrote a personal cheque for $375.00 as additional payment on the said policy.

(4) RR subsequently applied to the Insurers for a burglary policy for stock in trade owned or held in trust or on commission for which the Insured is responsible at the said bakery and restaurant in the name of Hezekiah Rambally and Rudolph Rambally. RR paid the premium $650.00 and policy No. SLJB 0032 dated 7th August 1996 was issued to cover Hezekiah Rambally and RR as the insured.

(5) On 3rd October 1996, rain caused flood damage to stock at Rambally's Bakery at Bexon. The Claim form submitted to the local agent of the Insurers shows the Insured as Hezekiah Rambally, who answered at Inquiry No. 10 "Yes" - to the question - Are you the owner of the premises or responsible for the repairs? On 16th October 1996, Claim Advice No. LJF 96059 in

the name of Hezekiah and Rudolph Rambally was prepared.

(6) On 17th October 1996 Mr. Joseph Maxwell wrote Thomas Jean Insurance Brokerage concerning Hezekiah Rambally – Policy No. SLJC 0098 and the 2 recent claims for flood damage to stock by heavy rain. Mr. Maxwell had visited the Rambally's Bakery to investigate flood claims on the 14th October 1996. This letter was copied to Mr. Jean Forde, Branch Manager, Barbados Fire and General.

(7) An undated Claim Settlement Minute on the Flood Claim File, (*part of the evidence in his case*) shows the Insured as Rudolph Rambally. The Loss Summary form #0002 on the said file shows the Insured as Hezekiah and Rudolph Rambally and the payee as Rudolph Rambally for 2nd November 1996.

(8) Receipt captioned "*Barbados Fire and General Insurance Beckwith Place, Bridgetown St. Lucia*" 25th November 1996 and signed by RR as Insured, is also a relevant document on this Flood Claim File. It is a receipt from the Insurers, in the sum of $11, 774.92 "*in full discharge of all claim upon them under Policy NO. SLJC 0098 for loss or damage occasioned by flooding on the 3rd October 1996*".

[147] It is very important to consider Mr. Maxwell's testimony carefully. Mr. Maxwell testified that this payment to RR on the flood claim was a mistake committed by his office, which he discovered sometime after the fire claim, when the Insurers' lawyers in Barbados informed him of this mistake. He said that before he proceeded to Rambally's Bakery to examine the stock arising from the flood claim, he did not check to see under which policy the claim was presented. Mr. Maxwell said that he expected Ms. Joan Henry to identify the policy covering the situation. She, he said, would have had to identify who the insured is under the policy.

[148] Mr. Maxwell testified further that on his visit to the bakery site to establish the damage, cause and value of the loss on the flood claim, as an experienced insurance man, he could only speak to the policy holder as it would be improper to talk to someone who was not the insured under the policy. At the flood site Mr. Maxwell said he spoke to RR who he saw occupying the bakery and running the business. He said that he treated RR erroneously as the insured. He admitted knowing who Hezekiah Rambally was, though he did not know him. He had not confused RR for Hezekiah Rambally, he said. He admitted also that on returning to his office, he had the opportunity to rectify the error by checking the notes he had made at the site with Ms. Henry.

[149] Mr. Maxwell also admitted that he was unaware of the Insurers' procedural manual or Claims Procedure (*Exhibit "RR 16*") Section 6.2 (f), requiring that before issuing

cheques to persons, checks must be made to ensure that the payment is made to the correct person. The guideline also required that the release document be signed by the insured.

[150] Despite admitting that he treated RR as the insured under the relevant policy in October 1996, and that he had the responsibility to make sure he was dealing with the insured as opposed to the owner, Mr. Maxwell denied that he effectively communicated to RR that the Insurers were accepting RR as the insured under the relevant policy.

[151] Mr. Maxwell testified also that it was RR who made the report for the fire claim. That though the insured was Hezekiah Rambally, he, the Insurers, and their loss adjusters dealt with RR in May 1997 on the basis that he had made the report.

[152] The law as stated in Halsbury's (supra) at para 519 is that payment of a claim must be made to the person entitled to it, that is the assured, his personal representative, assignee or trustee in bankruptcy. If a deceased assured was a trustee, his personal representative must account to the beneficiaries for the money received.

[153] Condition 11 of the policy required that: "*On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company . . .*".

[154] I accept the law as stated in Collinvaux's which is – "*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, by any person purporting to act on his behalf, and it may even suffice that the insurer has otherwise become aware of the loss*". (*para 9 - 4*).

Waiver and Estoppel

[155] It is stated also in Collinvaux's (supra) para 5 – 03, pages 117 to 118:

> "*The right to avoid the policy will be lost where (i) the insurer or his authorized agent knows all the facts; (ii) the insurer has had reasonable opportunity to make up his mind whether to affirm or avoid the policy; and (iii) the insurer has unequivocally elected to affirm the policy. Knowledge for this purpose means actual knowledge, it is not sufficient that the insurer is merely put on notice. Thus in the case where, although the assured has suppressed or misrepresented a material fact, he discloses it to the insurance office before they pay a claim, they cannot subsequently recover the money after payment, and where the insurers receive notice that the risks insured against have been misrepresented, concealed or incompletely disclosed, and accept further premiums on the same policy, they lose their right to avoid it . . . the most*

complex, case arises where the insurer has become aware of the assureds failure to disclose material facts while in receipt of a claim under the policy, as any substantive step taken by the insurer to consider the claim might be construed as waiver. An insurer who wishes to consider his position should proceed on a "without prejudice" basis only".

This statement of the law has been referred to as Waiver by Election in Chitty on Contracts 29th ed (2004) para 24 – 007.

[156] This doctrine would clearly not assist the Claimants, since in my view there is no evidence that upon investigating the flood claim Mr. Maxwell knew or became aware that RR had a beneficial interest in the insured property. With equal reasoning it could be inferred that Mr. Maxwell either became aware that RR was occupying the insured premises, or that RR was managing the business for Hezekiah Rambally, or that RR had an interest in the stock in trade at the Bakery under the Burglary policy.

[157] For Waiver by Estoppel or Equitable Estoppel to operate in favour of any of the Claimants, all of the following requirements must be capable of being inferred from the evidence –

(a) There was a previously existing legal relationship between each of the Claimants and the Insurers giving rise to rights and duties between the parties;

(b) The Insurers made representation by word or conduct that they would not enforce against NR, RR and SR their strict legal rights arising out of that legal relationship.

(c) The Insurers intended that NR, RR and SR would rely on their representation.

(d) That NR, RR and SR did in fact rely on the Insurers' representation.

[158] I have already expressed my views at paragraph 87 above concerning how the case for NR, RR and SR has been pitched. I stated then that they were being treated as the insured under the insurance contract when it was Hezekiah Rambally who was the insured. I also found subsequently at paragraphs 109, 120 and 121 above that each of them had an insurable interest which was not covered by the policy.

[159] It follows therefore that the legal requirement for a pre-existing legal relationship has not been satisfied, since in my view, there was no previously existing legal relationship giving rise to rights and duties between the Insurers on the one hand and NR, RR, and RR on the other hand under policy No. SLJC 0098.

[160] Such rights can arise only out of a legal relationship existing between NR, RR and SR and the Insurers before the making of the representation. To apply the doctrine of Equitable Estoppel or Waiver by Estoppel where there is no such relationship would contravene the rule: (***Chitty on Contract*** *29th ed. (2004) paras 3 – 088, 24 – 007 – 24 – 008, and 22 – 040*).

[161] Though Mr. Maxwell testified that the payment of the cheque for the flood claim was a mistake, Counsel Mr. Calderon made no submissions concerning this.

[162] Nowhere in their pleadings have the Insurers put forward in response to paragraph 12 of the Claimant's pleadings that the flood claim was settled and paid to RR by mistake or on the authority of Hezekiah Rambally.

[163] The Insurers had ample opportunity to comply with PART 10.5 of CPR 2000. PART 10.5 requires a defendant to set out all the facts on which the defendant relies to dispute the claim - PART 10.5 (4) requires a defendant to state the reasons for denying any allegations in the claim form or statement of claim where the defendant denies any allegations. Also where the defendant intends to prove a different version of events from that given by the Claimant, the defendant's own version must be set out in the defence. PART 10.5 (5) also requires the Defendant to state the reasons for resisting any allegations that is either not admitted or denied with a different version of events put forward. Mr. Maxwell's testimony about mistake should in the circumstances be disregarded. Nevertheless, the weight of the law is in favour of the Insurers in my view. Furthermore, I am guided by the observations in Collinvaux's where it is stated -

> "*It is unclear whether an insurer who agrees to settle without realizing that the policy is voidable for misrepresentation [or non-disclosure] is under a mistake of fact or law, but the general assumption is that a settlement contract can be set aside where the insurer subsequently avoids the policy*" (***Colinvaux's*** *(supra) para 9 – 19 at page 202*)

[164] Consequently, I find that RR and SR cannot rely on the doctrine of Equitable Estoppel or Waiver Estoppel since there was no contract between them and the Insurers.

The Two (2) Letters

[165] Learned Counsel Mr. Jude in his written closing submissions, verbally chastised the Insurers for their insincerity, focusing on 2 letters written by Attorneys-at-law for the Insurers. In the letter dated 12th February 1998, (*Exhibit "RR 23*") it appears that the Insurers were then communicating to the Claimants their acknowledgement that upon the imperfect sale of the property between Hezekiah Rambally and Rudolph Rambally, Hezekiah Rambally had retained legal ownership of the property sufficient to maintain an insurable interest in the

property. They also confirmed in this letter that "*on July 21st 1997, a valid insurance contract was completed in favour of Hezekiah Rambally to cover the property against fire until July 22nd 1997*".

[166] By this same letter it was stated: " *. . . because Rudolph Rambally was paid the sum of $11, 774.92 E.C. for damage sustained as a result of a flood under policy SLJC 0098 does not mean that my client recognizes the legitimacy of your client's claim. Indeed at that time the insured Hezekiah Rambally was still alive and the payment could have been made to him or to someone on his instructions*".

[167] Mr. Jude also referred to the Insurers' lawyer's letter dated 3rd May 1998 (*Exhibit "RR 24*"). There, the said Attorney-at-Law PK. Cheltenham reiterated - "*It is not my client's contention that the contract of insurance validly effected by Hezekiah Rambally was vitiated by the imperfect sale of the property to Rudolph Rambally. Rather my client's position is that Rudolph Rambally was neither a beneficiary of the deceased under the policy nor an assignee of the policy. He was and continues to be a stranger to the policy and is therefore not entitled to recover under it. The payment made to Rudolph Rambally was made in error. It should not have been paid to Rudolph or to the deceased. My client's Agent was entirely at fault in this regard*".

[168] At the time when these 2 letters were written, the lawyer for the Insurers, and the Insurers were aware of the facts giving rise to the Insurer's' right to repudiate the insurance policy, and or avoid the policy, on the grounds that Hezekiah Rambally had breached the contract, as alleged in paragraph 1 of their Amended Defence. The Insurers would also have been aware that Condition 7 (a) and Condition 8 (d) of the policy had been breached.

[169] The Insurers would therefore have the requisite knowledge for Waiver by Election to operate. Waiver by Estoppel could also operate against the Insurers. The notice of the Fire Claim was submitted on the 27th May 1997. The Insurers had approximately 9 months to assess the validity of the insurance contract with Hezekiah Rambally.

[170] Nine months was more than a reasonable period for the Insurers to determine whether to affirm or avoid the policy. The 2 letters were not written on a "***without prejudice***" basis. Consequently, I find that the Insurers by there letters unequivocally elected to affirm the policy. The Insurers should therefore not be permitted to rely on Conditions 7 (a) and 8 (a) in these circumstances.

[171] Learned Counsel Mr. Calderon sought to invoke Condition 11 of the policy, by arguing that NR as personal representative of Hezekiah Rambally did not give notice of the fire claim. No where in the Amended Defence was Condition 11 pleaded.

[172] Nevertheless, in my opinion this argument has no merit in light of the statement of the law at paragraph 154 above.

Condition 13

[173] Counsel Mr. Calderon, submitted that since rejection of the fire claim was communicated to the Claimants' Counsel in February 1998, the present claim which was filed after NR obtained letters of administration in Hezekiah Rambally's estate on the 14th July 1999, was brought outside of the 3 months time limit stipulated by Condition 13.

[174] Learned Counsel Mr. Jude submitted that the chain of correspondence in the case makes it clear that there was never an unconditional and unequivocal denial of the fire claim under Policy SLJC 0098, therefore the Insurers were precluded from invoking Clause 13.

[175] With every respect to Mr. Jude, I can find no clearer rejection of RR's fire claim than what was expressed in the letter dated 12th February 1998 and 3rd May 1998. It is clear from the correspondence that followed, that it was the Claimants' failure or refusal to appreciate the position that the Insurers had taken concerning the fire claim that prevented them from acting in accordance with Condition 13. From as far back as the 10th December 1997, learned Counsel for RR Mr. Clarence Rambaly informed the Insurers that he was representing only Rudolph Rambally. On the 5th January 1998 the said lawyer wrote to the lawyer for the Insurers, acknowledging that the ownership of the bakery and policy holder required verification by the Insurers and their Lawyers. The Lawyer Mr. Rambally also wrote – "*. . . However, this policy of insurance was purchased upon the understanding that it would provide coverage for the benefit of the following parties, Hezekiah Rambally, Rudolph Rambally and the Royal Bank of Canada.* In the letter he also wrote –

> *"1. Hezekiah Rambally died on January 3, 1997. (This information was provided to you by on Affidavit dated July 11, 1997.*
> *2. We do not have knowledge regarding the status of Hezekiah Rambally's estate. However, please inform me of the relevance of this information. Upon receipt of this information I will be in a position to approach the administrator of his estate for the required information. Again I am at a total loss in understanding why it took you so long to decide that this was relevant information and to make the request for same*".

[176] In his letter to the Insurers, dated 10th December 1997, Counsel Mr. Rambally wrote "*. . . We are instructed to inform you that our client will institute legal proceedings with immediate effect in order to have his claim settled as it*

would appear to him by your action that you do not intend to settle his claim".

[177] So, in light of the correspondence prior to and subsequent to the letter rejecting the fire claim of RR, the lawyer for RR should have been very aware of the nature of the action that had to be brought, and the fact that the personal representative for Hezekiah Rambally's estate had to be a claimant.

[178] I therefore cannot accept Mr. Jude's submissions that it was the dilatory conduct of the Insurers that caused the action to be filed out of time under Condition 13 of the policy.

[179] On the authority of Ingal –vs- Moran [1944] I ALL E.R. 97, NR had no cause of action vested in her before she had obtained letters of administration in Hezekiah Rambally's, estate. I can find nothing in any of the correspondence that Mr. Jude referred to which could have led the lawyers for the Claimants to reasonably and or probably conclude that the Insurers were contemplating a change in their position after the 3rd May 1998.

[180] I must therefore consider whether the breach of Condition 13 constitutes a bar to NR's right as Administratrix, to recover in respect of the fire claim, and whether the Insurers can rely on it.

[181] The question as to whether or not a Condition in a policy of insurance is a condition precedent affecting the right of the insured to be indemnified for any insured loss depends in each case upon the intention of the parties, as appears on a proper construction of the words used in the Condition, and the policy taken as a whole: (*Lord Blackburn in London Guarantie Company –vs- Fearnley (1880) 5 App. Cas. 911*).

[182] There are 5 categories of consequences where the insured fails to comply with the Conditions and Stipulations in this policy.

(i) *There is in Condition 1 a provision that the Insurers shall not be liable in cases of material mis-description of the insured property, or mis-representation or omission of material facts,*

(ii) *In Condition 19, the liability of the Insurers must be determined in respect of any loss or damage within 12 months, from the happening of the loss, unless there is a pending action or arbitration, otherwise the insurers are not liable,*

(iii) *In Condition 11, no claim is payable where notice of loss is not given and relevant information supplied to the insurers in a timely manner.*

(iv) *In Conditions 3, 12 and 13, all benefit shall be forfeited where there is a default in giving Notice of*

other existing relevant insurance (s); or where the Insurers are prevented from taking over possession of the property on the happening of loss or damage; or where there are fraudulent claims, or a failure to commence action in a timely manner after rejection of the claim or arbitration.

(v) In Condition 8, the insurance ceases to attach in 4 specific circumstances.

[183] NR is standing in the shoes of the deceased insured so she is bound by the Conditions of the policy.

[184] I can find nothing ambiguous in the words used in the relevant clause in Condition 13, that would allow NR to rely on the ancient principle, that such provisions inserted by the insurers in limitation of their promise to indemnify, must be construed contra proferentes.

[185] No cases have been brought to my attention in which a similar condition was considered. I shall therefore confine myself strictly to the Condition itself, and the clause in the promise of indemnity, appearing in the recital on the front page of the policy. It states –

> "*The Company Agrees (subject to the Conditions contained herein or endorsed or otherwise expressed herein which Conditions shall so far as the nature of them respectively will permit be deemed to be Conditions precedent to the right of the Insured to recover hereunder . . .* "). (*My emphasis*)

[186] Lord Watson in London Guarentie Company –vs- Fearnley (1880) 5 App. Cas. 911 (H.L.) said that "*When the parties to a contract of insurance choose in express terms to disclose that a certain condition of the policy shall be a condition precedent, that stipulation ought . . . to receive effect, unless it shall appear either to be so capricious and unreasonable or in its nature incapable of being a condition precedent*".

[187] There was no evidence adduced by the Claimant NR which would lead me to temper the seeming harshness of the Condition, and conclude that Condition 13 is an unreasonable or capricious term in this policy. In my opinion the presence of the declaration threatening for non-compliance, forfeiture, indicates that compliance with this provision is a condition precedent to recover under this policy.

[188] My understanding of the law generally does not coincide with the submissions of learned Counsel Mr. Jude, that as a rule, in order to rely on Condition 13 the Insurers must prove that the breach has caused them irremediable damage.

[189] I conclude therefore that on a true construction of Condition 13, this provision was a condition precedent, the breach of which, disentitles NR to recover any sum

relating to the fire claim under the policy. Having breached this Condition, NR as Administratrix is precluded from recovering any sum under the policy SLJC 0098.

[190] In the event that I have erred, I shall go on to consider the sum that NR could recover if the Insurers were not allowed to rely on Condition 13.

Indemnity Under the Policy Against Fire

[191] The policy specifies the sum insured to be $750,000.00 E.C, which represents the maximum sum for which the Insurers accepted liability. The policy appears not to be a valued policy, since the parties did not agree on the value of the property insured in the policy. The promise of the Insurers was that they "***will pay to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof***".

[192] Since it is not a valued policy, the assured would not be entitled to recover the insured sum of EC$750,000.00 because of the total loss: (***Collinvaux's*** *(supra) para 1 – 14 and* ***Halsbury's*** *supra para 652*).

[193] The fire policy is a contract of indemnity so NR would have been able to recover no more than the loss actually sustained by the estate of Hezekiah Rambally, given the fact that he had only a limited interest in the property as legal owner. To this extent therefore the market value of the property at the date of the fire would be irrelevant in my view since his limited interest relates to the balance of the unpaid purchase price.

[194] The assignment of the property insured to Royal Bank of Canada was not total. The Insurers agreed "***that in the event of loss or damage, the Company will pay the Mortgagees or said Assignees to the extent of their interest and that this insurance in so far as concerns the interest therein of the Mortgagees or said assignees only shall not be invalidated by any act or neglect of the Mortgagor or Owner of the property insured . . .***" It was further agreed ***"that whenever the Company shall pay the Mortgagees or said Assignees any sum for loss or damage under the Policy, and shall claim that as to the Mortgager or Owner no liability therefor existed, the Company shall at once be legally subrogated to all rights of the Mortgagees or said Assignees to the extent of such payment . . .*** ".

[195] By paragraph 8 of their Amended Defence, the Insurers pleaded that: ***"If – which is not admitted – the First Defendants are found liable to the Plaintiffs the Defendants will claim a set-off of $156,014.76 paid by the Plaintiff to the Mortgagees, The Royal Bank of Canada on the 17th June 1998 in respect of the Mortgage***".

[196] Based on the law expounded in the case Castellain –vs- Preston (1883) 11 OBD 380: "*In order to ascertain what the loss of the assured is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss"*.

[197] In that case vendors contracted with purchasers for the sale of a house at a specified sum. The house was insured by the vendors against fire before the completion of the sale. The agreement for sale contained no reference to the insurance. After the date of the agreement for sale, but before the date fixed for completion, the house was damaged by fire and the vendors received the insurance money from the company. The purchase was afterwards completed, and the purchase – money agreed upon, without any abatement on account of the damage by fire, was paid to the vendors. It was held in an action by the Insurance Company against the vendors, that the Company was entitled to recover a sum equal to the insurance money from the vendors for their own benefit.

[198] Bowen L.J. at page 401 reasoned – "*What is really the interest of the vendors, the assured? Their insurable interest is this – they had insured against fire, and they had then contracted with the purchasers for sale of the house, and after the contract, but before completion, the fire occurred. Their interest therefore is that at law they are the legal owners, but their beneficial interest is that of vendors with a lien for the unpaid purchase – money provided the matter did not go off owing to defective title. Such persons in the first instance can obviously recover from the insurance company the entire amount of the purchase money. That was decided in the case of Collingridge –vs Royal Exchange Assurance Corporation . . . [3 QBD. 173], but can they keep the whole, having lost only half. Surely it would be monstrous to say that they could keep the whole, having lost only half. Suppose for a moment that only 50L. remained to be paid of the purchase money, and that a house had been burnt down to the value of 10,000L., would it be in accordance with any principle of indemnity that persons who were only interested, and could only be interested to the extent of 506., could recover 10,000.L.? They would be getting a windfall by the fire; their contract of insurance would not be a contract against loss, it would be a speculation for gain. Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: - That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands, if he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters*". (*My emphasis*).

[199] Mr. Hezekiah Rambally collected $300,00.00 out of the $600,000.00 sale price of the property in June 1995. According to Counsel Mr. Larcher's correspondence

dated 11th July 1997, RR would pay up the Mortgage and thereafter the Deed of Sale would be effected. RR testified that as at the time of the fire, he had paid $5,510.00 to the Mortgagee Bank monthly from the 29th July 1995.

[200] So at the time of the fire RR would have paid a total of $126,730.00 towards the mortgage. If my arithmetic is correct, Hezekiah Rambally would therefore have a lien of $173,270.00 for the unpaid purchase money.

[201] It would seem therefore that NR as Administratrix of Hezekiah Rambally the deceased assured, would not be entitled to recover more than the value of his interest in the property insured, which is $173,270.00 at the time of the fire (*assuming my calculations are correct*). He was not interested to the full amount of the insured sum as he had only a limited insurable interest. It can be said therefore based on my previous findings that by accepting the assured's valuation of $750,00.00, Hezekiah Rambally had over- insured since the value of his limited interest in the property when the insurance was effected was then only $300,000.00 less the Mortgage installments paid by RR; and he failed to disclose to the Insurers that he was covering the Claimants' insurable interests. Accepting the law as stated in Collinvaux's, where the value of the property lost exceeds the sum insured, the $750,000.00 is all that the Insurers would be bound to pay. Where the value of the Hezekiah Rambally's interest lost is less than the sum insured, the Insurers are bound, except in the case of a valued policy, to pay no more than its actual value: (***Colinvaux's*** *(supra) para 1 – 15 to 1 – 16*).

[202] Assuming RR made no further mortgage payments after the fire, then the sum of $156,014.76 paid by the Insurers to the Mortgages Royal Bank of Canada would have to be set-off against the $173,270.00 that NR could recover.

[203] In my view, the difference therefore between the unpaid balance of the purchase price as at the 26th May 1997 and the sum of $156,014.76 would represent the sum that NR could recover under policy SLJ 0098 where Condition 13 is found not to operate in favour of the insurers.

[204] It is only where Hezekiah Rambally, NR, RR and SR had been found to be persons benefiting under the policy, that the full value of the property would be recoverable. Had that been the case, the pre-loss market value of the insured property up to the limit of $750,000.00 would form the basis for the measure of indemnity for total loss.

Remedies

[205] Finally, I turn my attention to the last issue. My previous findings and conclusions dictate that I deny the Claimants the claims and relief sought against the Insurers.

[206] The summary of my conclusions are that – the Claimants are not entitled to recover Special damages of $750,000.00 and/or General damages against the First – named Defendant for the following reasons –

(1) The insurance Brokers were not the agents of the Insurers in procuring the policy commissioned by Rudolph Rambally (*SEE paragraphs 23 to 45 of this Judgment*).

(2) Hezekiah Rambally through Rudolph Rambally did not disclose to the local agent of the Insurers or the Insurers that the real property and items covered by the insurance policy had been sold in 1995 by Hezekiah Rambally to RR (*SEE paragraphs 47 to 74 of this Judgment*).

(3) The insurable interests of Nelista Rambally, Rudolph Rambally and Sienna Rambally, were not covered by policy No. SLJC 0098. (*SEE paragraphs 76 to 121*).

(4) Though the Insurers cannot avoid the policy because they have failed to prove that the non-disclosure of the facts pleaded at paragraph 1 of their Amended Defence was a fact material to the risk, the doctrines of Estoppel and Waiver are not available to Rudolph Rambally and Sieana Rambally, in respect of the previous flood claim payment, since they were not parties to the insurance contract. (*SEE paragraphs 131 to 164*).

(5) Although the doctrine of Waiver and Estoppel have operated to prevent the Insurers from denying that the insurance policy with Hezekiah Rambally was valid, and relying on Conditions 7 (a) and 8 (d) of the policy, Condition 13 operates as a Condition precedent to bar Nelista Rambally, as Administratrix of the deceased assured, from recovering any sum of loss, since the Suit No. 709 of 1999 was filed more than 3 months after the Insurers had rejected the fire claim of Rudolph Rambally. (*SEE paragraphs 165 to 189 above*).

[207] There remains the task of assessing the damages that should be paid by the Brokers for their breach of the contract with Rudolph Rambally.

Assessment of Damages Against Brokers

[208] Despite being served with the Notice of Default Judgment and having notice of the trial dates the Brokers failed to appear at the trial.

[209] The measure of damages against the Brokers is the sums which would have been received from the Insurers had the Brokers not breached their duty, and had they effected an insurance contract according to the instructions of RR and Hezekiah Rambally. The Claimants are also entitled to the costs which the Claimants have

incurred in bringing unsuccessful proceedings against the Insurers: (***Collinvaux's*** *(supra) para. 15 – 32*). Such costs cannot be seen to be remote in my view, since the Claimants are entitled to be put in the same position, so far as money can do so, as if the contract had been properly performed by the brokers.

[210] Based on my findings at paragraph 204 the Claimants collectively, probably would have been able to recover the market value of the insured property that was lost to a limit of $750,000.00, as a result of the fire, less the sum of $156,014.76 that the Insurers paid to the Mortgagee Bank. The claim of RR for business interruption profits has no merit in my view, since RR acknowledged in his letter to loss adjusters that despite the preliminary discussions with the Brokers, he had not paid the premium for such coverage. In any event RR and SR have failed to prove what profits they would have made since the date of the fire.

[211] It is therefore probable based on the Witness Statements of the Claimants and their documentary evidence, that they would have recovered $593,985.24 under an insurance contract which reflected the instructions of RR to the Brokers.

[212] The Prescribed costs that the Insurers are entitled to is based on the sum of $750,000.00 claimed by the Claimants in their unsuccessful claim. According to my calculations, pursuant to PART 65.5 (2) (b) (i) and Appendix B of the CPR 2000, those Prescribed costs amount to $124,000.00. The damages that must therefore be available to the Claimants against the Brokers are assessed as $717,985.24. The prescribed costs will be $122,399.26.

Conclusion

[213] I therefore enter Judgment for the First Named Defendants against the Claimants with Prescribed costs calculated pursuant to PART 65.5 (2) (b) (i) being $124,000.00, and interest on the Judgment debt from the date of delivery of the Judgment at the rate of 6% per annum until full and final payment.

[214] UPON the Default Judgment entered on the 5th September 2003 for the Claimants against the Second and Third Named Defendants AND UPON the Assessment of damages, IT IS HEREBY ORDERED that the Second and Third Named Defendants do pay to the Claimants the sum of $717,985.24 for damages and Prescribed costs calculated pursuant to PART 65.5 (2) (b) (1) being $122, 399.26, with Interest on this Judgment Debt from the date of delivery of this Judgment until full and final payment.

DATED THIS 26TH DAY OF OCTOBER 2005.

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OLA MAE EDWARDS
High Court Judge