THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 1998/0913

BETWEEN:

EDWARD SLIM FRANCIS

Claimant

and

NEW INDIA ASSURANCE COMPANY LTD

Defendant

Appearances:
Ms. V. Barnard for Claimant
Mr. K. Monplaisir Q.C. with Ms. C. Nathaniel for Defendant

2005: April 18, 29
2007: March 13

JUDGMENT

BACKGROUND FACTS

[1] EDWARDS, J.: On the early morning of 11th December 1997 between 12:30 to 1:00 a.m, a dwelling house on No. 25 Beanfield Estate, Vieux Fort was completely destroyed by fire. At the material time there was then in existence a policy of insurance with the 1st Defendant New India Assurance Company (Trinidad & Tobago) Limited (the Insurers) covering such loss.

[2] The Claimant Mr. Edward Slim Francis had taken out this Policy No. SLUHC/01/0050/96 on 9th August 1996, through the 2nd Defendant A.F. Valmont &

Company Ltd, local agents of the Insurers. This Policy was renewed on the 19th August 1997 for the period 19th August 1997 to 19th August 1998.

[3] The Proposal Form completed by Mr. Francis on 9th August 1996 stated that there were 3 buildings being insured. The location and value of each building was stated as –

"Plot 25	$185,000.00
Plot 34.....	$189,000.00
Plot 34.....	$182,700.00
TOTAL sum to be assured....	$556,700.00"

The house on Plot No. 25 was the one destroyed by fire.

[4] The period of insurance required was stated as: "From 15.8.96 to 15.8.97." No information was requested or disclosed regarding who owned the buildings or land on which the buildings were situate. No information was requested or disclosed as to the nature of the interest Mr. Francis had in the property or the nature of the interest that was being insured.

[5] Mr. Francis by Deed of Sale dated 25th October 1996, registered in the Land Registry on 25th November 1996 as Instrument No. 4936/96, is the owner of 2 parcels of land comprising 28,690 square feet, and 26,465 square feet dismembered from the Vendor's Hewanorra Housing Development in the Quarter of Vieux Fort, and known as Lot Nos. 25 and 34 respectively. The Deed of Sale states that the Vendor is THE NATIONAL DEVELOPMENT CORPORATION.

[6] Though the evidence discloses that the 3 buildings which were the subject of the Insurance Policy No. SLUHC/01/0050/96 were at all material times situate on Lots 25 and 34 which Mr. Francis bought under the said Deed of Sale, the ownership of the said buildings are in dispute.

[7] The Insurers have refused to indemnify Mr. Francis for the destruction of the house on Lot 25, despite the fact that the policy covers the peril of fire.

THE PLEADINGS

[8] By Writ of Summons filed on 17th September 1998, with an endorsed Statement of Claim, Mr. Francis seeks to recover from the Defendants:

1. $185,000.00 being the insured value of the destroyed house.
2. Interest thereon at 6% per annum from 11th December 1997 to the date of payment
3. Costs
4. Further or other relief as the Court sees fit.

[9] By paragraph 6 of this endorsed Statement of Claim, Mr. Francis pleaded:

> "On 15th April 1998 the Defendants' Solicitor informed the Plaintiff that the Defendants would not pay the Plaintiff's claim on the ground that the Plaintiff did not own the land and that the aforesaid house was not the subject matter of the sale of the land to him. A cheque in the sum of $9,937.09 was returned to the Plaintiff on 22nd April 1998 purporting to represent a refund of premium paid by the Plaintiff for the said insurance coverage. The Plaintiff promptly returned the said cheque to the Defendants requesting payment in full of his claim.

[10] The Defence filed on 17th November 1998 denies that at the material time the said property purported to be insured is the property of the Plaintiff. The Defendants deny that at the material time the buildings referred to belonged to the Plaintiff.

[11] Paragraphs 6 to 12 of this Defence pleaded as follows:

> "6. The Defendants further state that by a Proposal Form dated 15th August 1996 the Plaintiff requested the First Defendant to issue to him a policy of insurance in respect of a building situate at Beanfield Estate, Vieux Fort belonging to him.
>
> 7. The said Proposal Form and the said declaration contained questions pertaining to and answered by the Plaintiff as to a Dwelling house at Beanfield Estate, Vieux Fort.
>
> 8. In pursuance of the said Proposal Form and the said declaration and in reliance upon the same and upon the truth of the representations contained in the said answer that the building belonged to the Plaintiff and that its value was the true value the Defendants in consideration thereof accepted the premium paid by the Plaintiff.
>
> 9. It was provided in the said policy that the said proposal form and the said declaration should be the basis of the said policy and should be deemed to be incorporated therein.
>
> 10. The Defendants state that the Plaintiff by his said answer in the proposal form failed to disclose and/or misrepresented facts material to be known to the Defendants in or about the making of the said policy in that (a) he knew that the building did not belong to him and (b) he knowingly overstated the value of the property.
>
> 11. The Defendants state that as soon as they became aware of the misrepresentation and/or non disclosure in the Policy

they elected to avoid it and refund the premiums as they are legally entitled to do.

12. In the premises the Defendants pray that this action be dismissed with costs."

THE LAW

[12] Pursuant to Article 917A of the Civil Code of St. Lucia Cap. 242, the law of England for the time being relating to insurance contracts applies to St. Lucia. The law states that Mr. Francis cannot recover upon the insurance policy unless he shows that he has an insurable interest in the house. If he has no insurable interest in it, he cannot be prejudiced by its destruction, nor is there anything to which the right of indemnity given by the policy can attach.

[13] The law also recognizes that Mr. Francis' insurable interest may be based not only upon his ownership of the house. Where Mr. Francis is found to have had lawful possession of the house, coupled with a right to use it and an obligation to take reasonable care of it, he is to be regarded as having an insurable interest: (Collinvaux's Law of Insurance 7th ed. paras 3-19.

[14] Mr. Francis was also under a legal duty to disclose in the proposal form, all material facts relating to the insurance which he was proposing to effect. In addition to this, he should have made no misrepresentation regarding such facts.

[15] In the discharge of his duty of disclosure, Mr. Francis was required by the law, to state accurately all facts to which the duty applies, whether they are such as are material in themselves, or are shown by the asking of questions to be regarded as material to the insurance: (Collinvaux's (supra) paras 5-01 to 5:03; 5-09 to 5-13).

THE ISSUES

[16] The issues therefore for my consideration are:

A. Whether or not Mr. Francis had an insurable interest in the house at the date of effecting the insurance and on the date the house was destroyed?

B. Are the Insurers entitled to avoid the policy for non disclosure and misrepresentation material to the risk and lack of pre-contract good faith?

C. Whether or not Mr. Francis is entitled to be indemnified and if yes - how much compensation should be paid to him by the Insurers?

THE EVIDENCE FOR THE INSURABLE INTEREST ISSUE

[17] Mr. Francis is a businessman who had several business interests in 1989. He then resided in St. Croix, U.S. Virgin Island. He then owned and operated several Companies including Eagle Wings Air Services, St. Lucia Ltd. This Company was incorporated by Mr. Francis as a result of the Prime Minister's invitation to him, to establish a cargo carrier for St. Lucia, in order to aid the trade industry with the exportation of farmer's produce from St. Lucia to St. Croix.

[18] The Government facilitated this project by renting 3 wooden houses on Plots 25 and 34 Beanfield, Vieux Fort to Mr. Francis which were to provide accommodation for him and his pilots. The Permanent Secretary of Planning, Personnel, Establishment and Training, by letter dated 3rd July 1989, informed Mr. Francis: "Cabinet by Conclusion #629 of 9th June 1989 agreed to lease the Quarters

known as Beanfield No. 1 to your Company for a period of three (3) years in the first instance at a monthly rental of $300.00.

These rentals should be paid to the Accountant General's office and a copy of the receipt should be submitted to us . . ."

[19] An unexecuted Lease Agreement exhibited by Mr. Francis, dated 18th October 1989, supports Mr. Francis' testimony as to the terms and conditions of the tenancy, including the condition the houses were in when Mr. Francis entered into lawful possession of them. Paragraph 4 of this document signed only by Mr. Francis stated –

> "It is agreed that the premises are let to Mr. Francis in an untenable condition, and that as compensation for Mr. Francis being responsible to renovate the premises, that there will be no caution fee, and that costs of the renovations will be reimbursed to Mr. Francis in the form of relief from the payment of rent, equal to the amount expended by Mr. Francis on the renovations, for as long a period of time as is necessary to complete the reimbursement. Mr. Francis will present proof of expenditures in the form of receipts for labor and materials utilized."

[20] By paragraph 5 of this unsigned Agreement, the tenant agreed with the Landlord as follows:

> "A . . .
>
> B. To keep in good and tenantable repair the premises and all its constituted parts, and to maintain the premises in tenantable condition, normal wear and tear and damage by fire excepted.
>
> C. . . .

D. To use the premises for residential housing for Mr. Slim Francis and his employees or to accommodate his needs for housing of business related personnel.

E. To manage and keep the grounds forming part of the premises in a proper manner and so far as possible to keep the same in order and condition in which they shall have been put by Mr. Francis at commencement of the tenancy. Prior to Mr. Francis landscaping efforts grounds were in a totally unkempt condition.

F. At the termination of the tenancy quietly to yield up the premises in such a state of repair and condition as shall be in strict compliance with the conditions hereinbefore contained.

G. If Landlord does not agree to compensate Mr. Francis for renovations to the premises by way of rent reductions to the total amount of expenditures, then Landlord will reimburse Tenant by cash or some other form to be determined, in an equal amount."

[21] Though the relevant properties belonged to the Government, the Government divested its responsibility for the 3 buildings to the National Development Corporation and/or the National Housing Corporation and/or the Ministry of Planning, Personnel, Establishment and Training between 1989 to 1998.

[22] It appears that prior to the preparation of this unsigned Lease Agreement, Mr. Francis had second thoughts concerning the substantial expenditure necessary to make the termite infested wooden houses livable. He therefore proposed to the Government that the properties including the houses be sold to him.

[23] On 31st July 1989 the Secretary of the Cabinet wrote to the General Manager of the National Development Corporation (N.D.C.) concerning Mr. Francis' proposal as follows:-

"Re: Sale of land at Beanfield Eagle Wings

I am directed to inform you that Cabinet has agreed to recommend that your Corporation sell to Mr. Slim Francis, Owner/Manager of Eagle Wings St. Lucia Limited, three (3) Government buildings and the land on which they are situated, which properties are situated in Vieux Fort on the north-eastern corner of Club Med restaurant . . ."

[24] Mr. Francis deposed that he was informed that after this letter was written to the NDC by the Cabinet Secretary, there would be no need for the proposed lease since he was purchasing the properties. This apparently explains why the lease was never executed by the Government.

[25] The letter dated 15th March 1991 written by Mr. Francis to Mr. Ausbert d'Auvergne the Permanent Secretary in the Ministry of Planning, Personnel, Establishment and Training, explains what took place thereafter. This letter stated:

"Ref: Purchase of Beanfield Houses #1, #6, #7

Dear Sir:

With reference to Cabinet's decision as stated in conclusion numbers 831 and 629 of 1989 and a letter from the Prime Minister's Office dated 31st July, 1989 re: Sale of land and house at Beanfield Estate to Mr. Slim Francis of Eagle, I wish to inform you that I have negotiated for the purchase of plot numbers 25 and 34 as per NDC plot plan, on which houses numbers 1, 6 and 7 are located respectively.

Previously we had estimated the cost of renovations to these houses, and have since done extensive renovations on House #1

due to its advanced state of disrepair, and thus far have spent the amount of $30,360.00 with the roof repairs yet to be done. It is expected that final cost to renovate this house will reach or exceed the estimated cost of $58,000.00 - $60,000. We have yet to compete renovations on house 2 #6 and #7 though purchase of materials has begun. It is estimated that repairs will exceed the original estimated cost of $35,000 - $40,000 each. Therefore we are proposing a purchase price of the original remains of the above described houses as follow:-

House number 1	-	$14,500.00
House number 6	-	$12,500.00
House number 7	-	$11,000.00

Eagle Wings pilots have already been housed in House#1, though #7 and #8 are not as yet habitable, but are being cared for and maintained by Eagle Wings until repairs are complete.

We sincerely hope that this proposal will be favourably considered, as we have put considerable time, effort and finances into these structures to make them useful for Eagle Wings in the housing of our aircraft crews.

Thank you for your co-operation.

Sincerely,
Eagle Wings Air Services St. Lucia Ltd
Sgd. Slim Francis
President & Executive Director

cc: Rt. Hon. Prime Minister
Mr. Poyotte, Principal Assistant Secretary."

[26] A subsequent statement dated 20th January 1992 exhibited by Mr. Francis disclosed that the Total Cost for Previous Renovations to House #1 1990/1991 was $27,205.05; and Total cost for renovations to House #1 as of August 1991 excluding roof repairs was $3,634.68, both costs amounting to $30,839.73.

[27] The documentary exhibits show that although the NDC's Secretary/Accounts and Admin. Manager had by letter dated 4th February 1989 communicated to Mr. Francis that Lot 25 was reserved for the NDC and would not be sold to him, its subsequent letter dated 17th December 1992 stated:

> "Dear Sir:
>
> Re: Sale of Lots 25 and 34 in Hewanorra (Beanfield Development
>
> We write to confirm the decision taken by the Board of Directors at its 160th meeting that lots 25 and 34 measuring 28,690 and 26,465 sq. ft. respectively be sold to you at a price of EC$4.00 per sq. ft. of the total price of E.C.$220,620.00 we have to date received the following monies from you:
>
> | Date | Amount |
> |---|---|
> | 17.12.91 | EC$5,000.00 |
> | 20.1.92 | $5,000.00 |
> | | EC$10,000.00 |
>
> leaving a balance of EC$210,620.00 outstanding.
>
> Yours faithfully
> National Development Corporation
>
> Sgd. A. John
> Angelina John (Mrs)
> Financial Controller"

[28] On 23rd May 1995 Mr. Royden Barley a Builder/Designer issued a Report on the condition of the house situated on Lot No. 25. It is important to reproduce this Report at this point, though its significance becomes more pertinent later.

"DESCRIPTION AND VALUATION OF A RESIDENTIAL BUILDING

OWNER'S NAME	:	National Development Corporation
LOCATION OF BUILDING:		Lot No. 25, Beanfield Development, Vieux Fort
NO. OF STOREYS	:	One
AGE	:	Over fifty years
DIMENSIONS	:	20'–0"x 65'-0"
AREA	:	1300 sq. ft
DESCRIPTION	:	The structure is of wood construction on concrete columns about six feet (6' –0") off the ground level.
		The roof covering which is of corrugated galvanized sheets is completely corroded, causing water to enter the building and damaging the hardboard ceiling.
		The walls of the structure are infested

with termites which is also evident in most of the stud's, flooring boards and floor joints.

The paint is peeling off the walls of the structure.

ESTIMATED COST : The estimated cost of the structure which is basically salvage price is four thousand five hundred dollars ($4,500.00).

CERTIFICATE

I have personally inspected the property described above. I certify that the statements made by me are, to the best of my knowledge and belief, true and correct, and that no relevant information has knowingly been withheld. I have no interest in the property.

DATE : 23/5/95

Sgd. Royden Barley
Roydn Barley
Builder/Designer"

[29] Mr. Francis testified that from 1989 after he had received Cabinet's approval and entered into possession of the houses, he had been in occupation and possession of them on the basis that he was the owner. He deposed that "From July, 1989 and up to the time of the fire, no one, including the Government of St. Lucia, the Housing and Urban Development Corporation and their successor-in-

title the National Housing Corporation nor Nationwide Properties have ever made a claim to the three houses."

[30] At paragraph 23 of his witness statement filed on 14th October 2004, he deposed: "I completely renovated one of the houses which is the house which got burnt; I spent large sums of money to do so and brought the value of the house from an initial value of $4,500 to $185,000.00 which is the sum for which it was insured at the time it got burnt."

[31] He deposed further that he completely converted one of the houses and it is presently constructed entirely of concrete. The third wooden house was finally demolished as it was termite ridden and not economical to be fixed as it was infested with termites, he said. He emphasized that to date, no one neither the Government nor National Housing Corporation has made claim to these other 2 houses.

[32] At the time when Mr. Francis insured the houses, he said they were then nearing complete renovation. Interestingly enough, on 9th August 1996, the very date that he signed the Proposal for the insurance policy, the Executive Director for NDC wrote the following letter to Mr. Francis' Solicitor –

> "Mrs. Veronica Barnard
> Chambers
> Castries
>
> Dear Mrs. Barnard,
>
> Re: Slim Francis – Lots 25 & 34 – Beanfield Development
>
> Following a meeting with Mr. Francis today, we have agreed to a final settlement of $233,120.00 for the lots, <u>with the houses being a matter</u>

for future discussions. Of this amount $12,500.00 represents interest for late settlement.

This agreement holds, on condition that payment is made no later than Friday, August 16, 1996 . . .

. . .

Yours sincerely
National Development Corporation

Everist Jn Marie
Executive Director" (My emphasis)

[33] Mr. Francis obtained a loan from Caribbean Banking Corporation Ltd for $300,000.00 at the interest rate 12% per annum to complete the purchase price of the said Lots Nos 25 and 34. The Insurance policy issued on 15th August 1996 includes a Mortgage Clause in favour of Caribbean Banking Corporation.

[34] Mr. Bhaiya Sondawle, Resident Manager of the Insurers in St. Lucia, deposed in his Witness Statement dated 29th September 2004 about the investigations carried out concerning Mr. Francis' Claim and the reason why he was not compensated.

[35] The Insurers' posture is partly due to the fact that the Deed of Sale was executed and registered after the Insurance policy was taken out, and partly due to a letter from the Chairman of Nationwide Properties Ltd Mr. Winston Taylor, dated 9th January 1998 to the Insurers. This letter states: ". . . that the house which was situated at Beanfield Vieux Fort which was destroyed by fire on 11th December 1997, and which was occupied by Edward "SLIM" Francis or his agents is the property of the Government of St. Lucia. The lands on which the building was erected was vested in the National Development

Corporation and the house in Nationwide Properties Ltd (a fully owned Government Company) . . ."

[36] The Insurer's rejection of Mr. Francis' claim is also due to the fact that the Deed makes no mention of the buildings incorporated in the sale and the NDC letter dated 9th August 1996 (reproduced at paragraph 32 above) expressly excludes the houses.

SUBMISSIONS OF COUNSEL

[37] Both Counsel for the parties have referred to the documents mentioned and recited in this judgment in their submissions on this issue. The contents of these documents speak for themselves. Counsel for Mr. Francis adopted the following observations of Brett M.R. in Stock v Inglis (1884) 12 QBD 564, reproduced in Collinvaux's supra at para 3-25: "Insurance companies and underwriters do sometimes seek to evade their just obligations on the ground of want of interest, and it is duty of the Court always to lean in favour of an insurable interest, if possible, for after the underwriters or company have received the premium the objection that there was no immovable interest is often a technical objection and one which has no real merit as between the assured and the insurer."

[38] Learned Counsel Mrs. Barnard submitted that at the date of the fire 11th December 1997, Mr. Francis was the owner of the land and the house, since the Government had agreed to sell him the land and houses as a package. She argued further that the Deed of Sale states that the land was sold "Together with all appurtenances and dependencies thereof", and the chattel house was an appurtenance to the land.

[39] She relied on Articles 367, 368-370 and 372 of the Civil Code of St. Lucia Chap. 242 which state –

"367. A possessor is in good faith when he possesses in virtue of a title the defects of which as well as the happening of the resolutory cause which puts an end to it are unknown to him. Such good faith ceases only from the moment that these defects or resolutory cause are made known to him by proceedings at law.

369. Ownership of the soil carries with it ownership of what is above and what is below it, except that a mine may be alienated and owned apart from the land above it.

The owner may make upon the soil any plantations or buildings he thinks proper, saving the exceptions established in the book respecting servitudes.

He may make below it any buildings or excavations he thinks proper, and drawn from such excavations and products they may yield, provided that no injury is done thereby to the property of others.

370. All buildings, plantations and works on any land or underground, are presumed to have been made by the owner at his own cost, and to belong to him, unless the contrary is proved; without prejudice to any right of property, either in a cellar under the building of another or in any other part of such building, which a third party may have acquired or may acquire by prescription.

371. . . .

372. When improvements have been made by a possessor with his own materials, the right of the owner to such improvements depends on their nature and the good or bad faith of such possessor.

If they were necessary, the owner of the land cannot have them taken away. He must, in all cases, pay what they cost, even when they no longer exist; except in the case of bad faith, the compensation of rents issues and profits.

If they were not necessary, and were made by a possessor in good faith, the owner is obliged to keep them, if they still exist, and to pay either the amount they cost or that to the extent of which the value of the land has been augmented.

If, on the contrary, the possessor were in bad faith, the owner has the option either of keeping them, upon paying what they cost or their actual value, or of permitting such possessor, if the latter can do so with advantage to himself without deteriorating the land, to remove them at his own expense. Otherwise, in each case, the improvements belong to the owner, without indemnification. The owner may, in every case, compel the possessor in bad faith to remove them."

[40] Mrs. Barnard contended, that since prior to occupation by the Claimant, the building was valued at $4,500.00, it would be tantamount to unjust enrichment for the National Housing Corporation to claim that the entire value of the house at the time of its destruction, being $185,000.00 belonged to the Government, despite the extensive renovations done by the Claimant.

[41] Counsel Mrs. Barnard invoked the principles of estoppel and waiver against the National Housing Corporation's claim to the houses after 16 years. This of course cannot avail her in my view, since the National Housing Corporation is not a party in this action, and in any event this has not been pleaded by the Claimant.

[42] Mrs. Barnard concluded, that since at the date of the fire the chattel house that Mr. Francis took possession of in 1989 was non existent, with Mr. Francis having re-constructed it into part wood and part concrete in good faith, and since at that date Mr. Francis was already owner of the land, accordingly he should not be deprived of the proceeds of the insurance policy.

[43] Learned Queen's Counsel Mr. Monplaisir referred to the Cabinet recommendation communicated by the Cabinet Secretary, which Mr. Francis erroneously asserted was an agreement by the Cabinet that the 3 houses and land be sold to him. He also highlighted the fact that the Ministry of Planning, Personnel, Establishment and Training (MPPET) had the responsibility for the houses while NDC had responsibility for the land. He argued that there was no evidence showing that NDC got permission from MP PET to sell the buildings to Mr. Francis. He focused on paragraph 5 of the unsigned lease agreement and argued that this reflected the true position regarding the 3 houses.

[44] Mr. Monplaisir submitted that Mr. Francis could not have bought the buildings on the land, since the purchase price of $220,620.00 exactly covered the price of 55155 sq. ft of land (the total size of the tow lots) at $4.00 per sq. ft. This is compelling evidence that Mr. Francis only paid for the land, Queen's Counsel argued.

[45] Mr. Monplaisir contended further, that even if the Court finds that he purchased the buildings, on the date of the insurance on 15th August 1996 he was not the owner, since he would have purchased them on October 1996 according to the Deed of Sale.

FINDINGS

[46] Despite Mr. Francis' belief and assertions that he owned the 3 houses at the date he took out the insurance policy, the letter dated 9th August 1996 which discloses

that on 9th August 1996 Mr. Francis met with the NDC and agreed to a final settlement of $233,120.00 inclusive of interest for the lots, "with the houses being a matter for future discussions" defeats his pretension.

[47] At the date the insurance was effected, Mr. Francis was the purchaser in possession of the land – Lots 25 and 34 – pending completion of the sale agreement on 25th October 1996.

[48] In my judgment Mr. Francis was probably a "possessor in good faith" of the 3 houses on Lots 25 and 34, subject to the implied terms and conditions existing in paragraph 5 of the unsigned lease agreement. Article 372 of the Civil Code Cap 242 therefore applies.

[49] Since Mr. Francis in good faith renovated the houses with his own materials and at his own expense, and these renovations were necessary in order to make the houses habitable, the Government authority, be it NDC or National Housing Corporation or Nationwide Properties Ltd or MPPET, was obligated to reimburse Mr. Francis for the cost of such renovations subject to any sums outstanding for rent. On these facts Mr. Francis obviously had a substantial pecuniary interest in the continued existence and preservation of the renovated houses.

[50] The general principle to be applied to the circumstances in the instant case in my view, was stated by Lord Pearce in Hepburn v A. Tomlinson (Hauliers) Ltd [1996] A.C. 451, (H.L.) at 480 C-D. "Both those who have a legal title and those who have a right to possession have an insurable interest in real or personal property . . . There seems therefore no reason in principle why they should not be entitled to insure for the whole value and recover it. They must however (like plaintiffs in actions of trover or negligence), hold in trust for the other parties interested so much of the moneys recovered as is attributable to the other interests. But is proof of an intention to insure for the interests of others a necessary condition precedent for a plaintiff

seeking to recover on an insurance policy in such circumstances? I do not think so."

[51] At page 481 in Hepburn (supra) Lord Pearce re stated the principle thus:

> " A bailee or mortgagee, therefore (or others in analogous positions), has, by virtue of his position and his interest in the property, a right to insure for the whole value, holding in trust for the owner or mortgagor the amount attributable to their interest . . . [To] hold otherwise would be commercially inconvenient and would have no justification in common sense." (Though Mr. Francis was not a bailee, he was a mortgagee and a person in an analogous position).

[52] I have scrutinized the insurance policy and there is no provision in it from which it could be inferred that it was the proprietory interest of Mr. Francis that was covered by the policy.

[53] Contrary to paragraph 6 of the pleaded Defence, Mr. Francis made no request in the proposal form for an insurance of his proprietory interest in the buildings. He did not represent in the proposal form that he owned the buildings.

[54] I therefore hold the view that although Mr. Francis was not the owner of the renovated house that was destroyed by fire, he had a substantial insurable interest in it.

[55] I shall now consider the second issue (at paragraph 16 above).

NON-DISCLOSURE AND MISREPRESENTATION

[56] At common law, ". . . it is the duty of the proposer during 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).

[57] "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": (Halsburys (supra) para 371).

[58] The Insurers allege in paragraph 8 of their Defence that they relied upon the truth of the representations contained in the answers in the proposal form that the building belonged to Mr. Francis and that its value was the true value in accepting the premium paid by Mr. Francis. The Insurers allege further in paragraph 10 of their Defence that Mr. Francis failed to disclose and/or misrepresented facts material to be known since he knew that the building did not belong to him and he knowingly overstated the value of the building.

[59] For these pleadings to succeed, the Insurers bear the burden of proving on a balance of probability that there was material non-disclosure and misrepresentation by Mr. Francis.

[60] Mr. Sondawle as Resident Manager for the Insurers, only deposed that he had investigations carried out after Mr. Francis had submitted the Fire Claim Form on 11th December 1997, and he discovered that Mr. Francis was not the owner of the building destroyed by fire.

[61] Mr. Sondawle has provided no evidence to prove that Mr. Francis overstated the value of the building.

[62] Learned Queen's Counsel Mr. Monplaisir submitted that its is the duty of the proposer during the preliminary negotiations to make full disclosure of all material facts; and it is for the Court to rule as a matter of law whether a particular fact is capable of being material and to give directions as to the test to be applied which depends on the circumstances. Relying on Halsburys (supra) para 370, he submitted further that materiality is not a question of belief or opinion tested subjectively, and the proposer does not discharge his duty by a full and frank disclosure of what he believes to be material, however honest his belief, he must go further and disclose any fact which a reasonable man would have thought material. Mr. Monplaisir argued, that a reasonable man would consider Mr. Francis' ownership status of the building material, because the insurance is supposed to cover the full value of the building as stated in the policy, and any reasonable person or any insurer would think that only the owner or his agent could insure for that value.

[63] Mr. Monplaisir also contended that Mr. Francis wrote a revealing letter dated 16th October 1996 to Mr. Everistus Jn Marie of the National Development Corporation which shows that at the time he had insured the house he failed to disclose facts material to the risk.

[64] It is important to reproduce the contents of this letter. Mr. Francis stated:

"Dear Mr. Jn Marie:

We the owners of plot number 25 Beanfield Estate are seeking your permission to get rid of the termite ridden house on said plot, from November 1989 to this date December 1994.

We have spent in the excess of $52,000.00 on the house and yet are not able to make it habitable. The roof of the house is falling apart, the ceiling is on

the floor and the whole house is termite hidden. Consequently we wish to get rid of this house in order to properly utilize our land.

Thank you in advance and I await a prompt response from you."

[65] Mr. Monplaisir finally submitted that a contract of insurance is a contract "uberrimae fidei" (utmost good faith) and requires not only disclosure of material facts but also that there should be no misrepresentation however innocently and honestly made of a material fact: Halsbury's (supra) para 365. Applying this law to the facts, he submitted that the contract of insurance was properly avoided by the Insurers for Mr. Francis' failure to disclose that he was not the owner.

[66] Learned Counsel Ms. Barnard confined her submissions on this issue to the law concerning disclosure of insurable interests. Relying on some of the relevant principles stated in Collinvaux's Law of Insurance 6th Ed; Halsbury (supra); Chitty on Contracts 26th ed. She submitted –

(a) It is not necessary to state in a policy of insurance the precise nature of the interest; or whether the property be absolute or special. A person who has different kinds of interest in property may cover them all by one insurance without stating in the policy the number or nature of the interests. Only the subject matter of the insurance need be correctly described: Collinvaux's 6th ed at para 3-18.

(b) As a general rule, it is unnecessary for the assured to describe the nature or extent of his interest in the subject matter of insurance. The description of the subject matter sufficiently covers any interest which he may have. A bailer of goods need not describe the nature of his interest or state that he is bailee; an insurance on "goods" covers his interest as bailee even though

he may be intending to cover interests other than his own: Halsburys (supra) para 643.

(c) The nature of the assured's interest in the subject matter need not be stated in the contract of insurance, unless of course this information is required by an express term or the insurance be against loss of profits or other consequential loss: Chitty (supra) at para. 4209.

[67] In addition to this, Mrs. Barnard submitted that Mr. Francis was the owner of the destroyed house which I have found he was not, and that it was not in dispute that the value of the house on 11th December 1997 was $185,000.00.

[68] Though the value of the house may not have been in dispute on 11th December 1997, Mr. Francis' letter to Mr. Jn Marie dated 16th October 1996 after the insurance was taken out, refers to the "termite ridden house on plot #25" with roof falling apart and the ceiling on the floor. This letter puts the quality and condition of the house in issue as at the date the Proposal was made 9th August 1996, and the date the insurance was issued 15th August 1996.

[69] The proposal form states that the building on Plot 25 was to be insured for $185,000.00. Mr. Francis described the building, and the description was not in terms of the letter dated 16th October 1996. He then signed the Declaration on the Proposal Form which stated: "DECLARATION." I do hereby declare that the above answers are true and that I have withheld no material information regarding this Proposal. I agree that this Declaration and the answers given above as well as any further Proposal or Declaration or Statement made . . . [in] writing by me or anyone acting on my behalf shall form the basis of the contract between me and I further agree to accept indemnity subject to the conditions in and endorsed on the Company's Policy. I declare that the TOTAL SUMS INSURED REPRESENT NOT LESS THAN THE FULL VALUE OF THE PROPERTY as above mentioned.

Date – 9th August 1996

Sgd. Slim Francis

Signature of Proposer"

[70] Despite the implications of my observations, I have reminded myself that the non-disclosure and misrepresentation complained about in the pleaded Defence does not relate to the quality and condition of the house on plot 25 that was destroyed by fire. The complaint is about ownership and overstated valuation. I shall therefore rule this out of my mind.

[71] Though Counsel Ms. Barnard's submissions at paragraph 66 (a), (b) and (c) above accurately reflect the law generally, there are other principles to be taken into account when considering the materiality of non-disclosed facts.

[72] I noted very early in my judgment that the format of the proposal form did not include any questions as to who owned the relevant property, or whose interest was being covered. The absence of such questions on the proposal form would not preclude the proposer from orally disclosing such information for the reasons stated at paragraphs 56 and 57 above.

[73] Additionally, Section 18 of the Marine Insurance Act 1906 (U.K.), which codified the common law, and which prescribes the relevant rules for disclosure by the assured for all types of insurance contracts, under the principles of utmost good faith, 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."

[74] The Insurers assert that they avoided the policy because they relied upon the proposal and the declaration on the proposal form signed by Mr. Francis, and upon the truthfulness of the representations and answers that the building belonged to Mr. Francis. This pleading fails since Mr. Francis made no such representations.

[75] It is not enough for the Insurers to only raise the issue of misrepresentation and/or non disclosure of a material fact in their pleadings as they have done at paragraph 10 of their Defence. It appears from the law, that the burden of proof is on the Insurers to prove that a fact is material: (Collinvaux's 7th ed (supra) para. 5-18). 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. Thereafter, it will be presumed that the Insurers were induced to enter into the contract by the assured's misleading presentation of the risk. Accordingly, proof of materiality switches the burden of proving non-inducement to the assured, a burden which will be difficult to rebut: (Collinvaux's 7th ed. at para. 5-21).

[76] Since Mr. Sondawle gave no such evidence, and no expert underwriters were called, the Insurers have failed to discharge their burden of proof on this issue in my opinion.

[77] Consequently, they cannot avoid the policy in my view.

[78] Turning now to the final issue, I must consider what compensation should be paid to Mr. Francis under the policy.

INDEMNITY UNDER THE FIRE POLICY

[79] The policy specifies the sum insured to be $185,000.00 E.C. which represents the maximum sum for which the Insurers accepted liability. The policy appears to be valued policy since the parties seemed to have agreed on the value of the property insured in the policy.

[80] The promise of the Insurers was that they will indemnify the insured as indicated in the Schedule, i.e. $185,000.00 for Item 1 being the destroyed house. Where the policy is valued, the assured is entitled to the full agreed value. In the absence of fraud an excessive overvaluation is not itself a ground for repudiation of the contract: Collinvaux's 7th ed (supra) para 1-14.

[81] The Excess Clauses forming part of the Schedule, do not relate to fire loss.

[82] Condition 8 of the policy states –

> "Unless otherwise expressly stated nothing contained herein shall give any rights against the Company to any person other than the Insured. Further the Company shall not be bound by any passing of the interest of the Insured otherwise than by death or operation of law unless and until the Company shall . . . [by] endorsement declare the insurance to be continued. The extension of the Company's liability in respect of the property of any person other than the Insured shall give no right of claim hereunder to such person, the intention being that the Insured shall in all cases claim for and on behalf of such person and the receipt of the Insured shall in any case absolutely discharge the Company's liability hereunder."

[83] In light of Condition 8, since Mr. Francis is the person benefiting under the policy, the full value of the property being $185,000.00 would be recoverable by Mr. Francis subject to the Mortgages Clause of the Policy only, assuming my approach is correct.

[84] I am of the view also that Article 1009A of the Civil Code should apply in this case. It is a fitting case to order that there shall be included in the sum to be paid by the Insurers to Mr. Francis interest at the rate of 6% per annum from 1st October 1998 to 1st August 2005.

[85] There will also be prescribed costs paid to the Claimant pursuant to PART 65.5 (2) (a) and Appendix B of CPR 2000.

[86] I therefore set this case down for FINAL JUDGMENT on 15th March 20007 when the Court will be informed of the position and calculations regarding paragraphs 83 to 85 of this judgment, so that a final order can be made.

Dated this 9th day of March 2007

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OLA MAE EDWARDS
HIGH COURT JUDGE