ANTIGUA AND BARBUDA

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

CLAIM NO ANUHCV221 OF 2013

BETWEEN:

FRANCENE SIMON

Clamant

And

ABI INSURANCE COMPANY LIMTED

Defendant

Appearances

Mr Lawrence Daniels for the Claimant
Ms Joy Dublin for the Defendant

2016: March 21; November
2017: March 7

JUDGMENT

INTRODUCTION AND RELEVANT BACKGROUND

[1] **LANNS,** J. [AG]: In this case, the Claimant claims (1) Damages for breach of a contract of insurance; (2) Compensation for the value of a chattel house in the sum of $75,000; (3) Interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act Cap 147 at the rate of 5% per annum; prescribed costs; court fees; and any other relief the court deems fit.

[2] The Claimant in her statement of claim pleads that on or about July 2010, she had her chattel house situated at Potters New Extension insured with the Defendant under a policy of insurance No. 2003/07/00533 for the sum of $75,000.00; that pursuant to the policy, she was required to pay premiums of $1875.00. On the 9th July 2010, she paid $1000.00 leaving a balance of $875.00. On

the 22nd February 2011, the Claimant paid $500.00. The final payment of $375.00 was made on the 4th of March 2011. These three payments are evidenced by Receipts.

[3] The statement of claim avers that it was a term of the policy that the Claimant's chattel house will be covered against any fire or damage, and that the Defendant will indemnify the Claimant against loss or damage to the Claimant's chattel house caused by fire.

[4] On the 25th April 2011, during the currency of the said policy, the Claimant's house was completely destroyed by fire. The Claimant notified the Defendant of the loss and damage and claimed that the Defendant was liable under the said policy to pay the Defendant the sum of $75,000, the insured value of the chattel house. The Defendant has failed or refused to honour the claim . The Claimant therefore claims the sum of $75,000 and otherreliefs as stated above in paragraph [1].

[5] The Defendant in its defence admits the policy, and the fact that the fire was reported, but it contends that the features of the insured chattel house differed significantly from the features of the chattel house that was partially destroyed by fire. The Defendant contend that the chattel house insured by the Defendant was designated and built in an L-shape with a kitchen being housed in the extended L- section of the building. Further, the Defendant contends that the chattel house that it insured was securely attached to the land by means of concrete pillars, and access steps to the house were located to the front of the chattel house; and to the L-shaped section. Additionally, the Defendant contends that the chattel house was not located on parcel835, Block:11:2091B; Registration Section: West Central.

[6] The Defendant admits that the Claimant paid the premium in the manner stated, but denied that the chattel house for which the claim was made was covered against any fire or damage. The Defendant avers that it was a condition of the policy that the Defendant would not be liable in the following circumstances:

(1) "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 the policy so far as it relates to property affected by any such misdescription, misrepresentation or omission ..."

(2) "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 upon the Policy by or on behalf of the Company if ... the property be removed to an{building or place other than that in which it is herein stated to be insured."

[7] The Defendant then alleges that the chattel house which it insured was at a different location on a different parcel of land in Potters, and not where the Defendant was shown a charred chattel house with no evidence of an L-- shaped partially destroyed chattel house on parcel 835.

[8] The Defendant denies that it refused to honour the claim and states that the Claimant was under a continuing duty to act in good faith and to disclose all material facts, alteration and movements regarding the insured chattel house. Further, the Defendant says that the Claimant was under a duty to inform the Defendant of its intention to remove the chattel house from its original location to any other location. The Defendant then puts the Claimant to strict proof as to whether she has suffered any loss and damage, or incurred any expense.

[9] In her reply, the Claimant, denies that she breached the policy of insurance. She denies that the chattel house was significantly different as alleged, or materially different in description. The Claimant admits that she erected an extension to the said chattel house, but as it had encroached on the neighbour's land, it was subsequently taken down. The Claimant does not admit that her chattel house was mounted on concrete pillars;.she says it was mounted on concrete blocks which can still be seen. As to the steps to which the Defendant referred, the Claimant says they were never concrete steps as alleged by the Defendant. As to the averment that the insured chattel house was not locate, d on parcel 835, the Claimant maintained that the insured chattel house was located on parcel 835 at the time of the application for the policy, and remained on parcel 835.

The issues

[1O] Counsel for the Defendant has identified the issues to be

a. Was the Claimant under a continuing duty of disclosure of any material fact connected with the insured property?
b. Did the Claimant without knowledge and approval of the Defendant Company cause the insured chattel house to be altered?
c. Did the Claimant without knowledge and approval of the Defendant Company cause the insured chattel house to be removed from its initial location
d. Did the Defendant's failure to disclose render the insurance policy voidable?

[11] Counsel for the Claimant has identified the issues to be

a. Whether or not the Claimant had a valid policy of insurance at the date and time of the fire?
b. Whether or not the Claimant's property was destroyed by fire on a parcel of land described in the Register as parcel 835, Block: 11: 2091B; Registration Section: West

c. Whether the Defendant has breached the policy of insurance by its refusal to honour the said policy.

d. Whether the Claimant is entitled to compensation for the chattel house destroyed by fire that was covered under the policy of insurance wlth the Defendant?

It seems to me that the main issues are:

1. Whether at the time of the fire the Claimant's chattel house was insured with the Defendant Company in the sum of $75,000 against the risk of fire; and if so whether the Defendant Company is obliged to indemnify the Claimant.

2. Whether the Claimant was in breach of conditions 1 and 8 of the said policy of insurance as pleaded?

3. Whether the Defendant is entitled to avoid the policy for non disclosure and misrepresentation material to the risk and lack of continuing good faith?

4. What damages, or other remedies, if any are available to the Claimant in the circumstances?

Whether at the time of the fire the claimant's chattel house was insured with the Defendant Company in the sum of $75,000 against the risk of fire

[12] The burden rests on the Claimant to prove that at the time of the fire, her chattel house was insured with the Defendant Company in the sum of $75,000 against the risk of fire.·

[13] The Claimant at paragraph 3 of her Statement of Claim stated that on the 9th July 2010 she had her chattel house situate at Potters New Extension insured with the Defendant Company under a Policy of Insurance, and that she had paid the requisite premiums. She repeated this averment in paragraph 4 of her witness statement.

[14] At paragraph 5 of the Defence, the Defendant denies that the chattel house for which coverage was sought and provided was covered against any fire or damage. The Defendant admitted that the Claimant obtained insurance coverage in respect of her chattel house beginning 2003, and renewed it on an annual basis over a period of 7 years. The Defendant in fact agreed, and specifically admitted that the policy provided coverage against fire and other perils. The Claimant claims that her policy was valid for the period 10th July 2010 to 10th July 2011. This claim has not been rebutted. Indeed, the Claimant produced in evidence receipts for the premium paid by

installments for the year ending 9th July 2011. The receipts signified that the Claimant paid, and the Defendant Company accepted the premium required for the renewal of the policy of insurance for the year July 2010 to July 2011.

[15] I therefore find as a fact that by a policy of insurance No. 2003/07/0053 dated 9th July 2003, made between the Claimant and the Defendant Company, in consideration of premiums paid and to be paid upon the terms mentioned therein, the Defendant Company agreed to insure the Claimant's chattel house at Potters New Extension against loss of damage by fire and other perils. The policy of insurance is before the court, and it shows on its face that the Claimant's burnt chattel dwelling house is/was in fact located Potters New Extension and was at the time of the fire, covered against fire and other perils.

[16] I also find as a fact, and it is not disputed that on the 25th April 2011, as a result of a fire of unknown origin, the Claimant's chattel house was destroyed. The Defendant Company was notified of the loss, whereupon an agent of the Defendant Company, along with the then Manager, attended the scene and took photos.

[17] I find that on the 28th April 2011, the Claimant made a claim on the form supplied by the Defendant Company. She also made a claim through her lawyer on or about the 11th July 2011. I find that the Defendant Company has not paid the claim, stating that it is entitled to avoid the policy because the Claimant breached conditions 1 and 8 of the policy of insurance contract.

[18] I therefore hold as a matter of law that the Claimant has discharged the burden placed on her, and that the Defendant is prima facie liable to indemnify the Claimant in the amount of the 'value of the property"[1] (being the chattel dwelling house) at the time of the fire. It is therefore for the Defendant to show that there are circumstances which entitles it to be released from its obligation to indemnify the Claimant, by proving a breach by the Claimant of the conditions upon which it is relying.

Whether the Claimant was in breach of conditions 1 and 8 of the said policy of insurance

Condition 1

[19] As shown above, Condition 1 of the policy 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 the policy so far as it relates to . property affected by any such misdescription, misrepresentation or omission ..."

1 See page 3 of the Policy of Insurance

[20] Misdescription: The Defendant Company alleges that it insured a house of a particular description and the Claimant altered or changed it without disclosing the alteration/change in description. The Defendant alleges that the description of the house that was insured was materially different in description and location to the one insured by the Defendant Company.

[21] The Claimant in her Reply and during cross examination, admitted that she did put on an addition to the chattel/dwelling house. She said it was a small bathroom. She testified that she made the addition after she took out the insurance policy. She further stated in cross examination that the addition was put on at the back of the house and not on the side to create an L-shape as alleged by the Defendant Company. She did not agree that-it was a kitchen that she added.

[22] Ms Keren Gillead was the first witness called for the Defendant Company. She described herself as the Senior Administrator in the Claims Department of the Defendant Company.

[23] Ms Gillead gave evidence that the Underwriting File contained photos of the insured property at the commencement of coverage. She stated that she was provided with photographs of the dwelling house which was destroyed by fire and in comparing the post-fire photos and the pre-fire photos she noticed several discrepancies regarding the structure. She noticed that the pre-fire chattel house had an L-shaped portion which housed the kitchen; whereas the damaged burnt out chattel was without the L- shaped portion, and had no kitchen attached thereon. In addition, she noted that the pre-fire chattel house was attached to the land by concrete pillars whereas the post-fire chattel was not. Ms Gillead stuck to the statement of Defence in relation to the observations made about the steps attached to the structure pre-fire and post-fire occurrence.

[24] During cross-examination, Ms Gillead was shown pre-fire and post-fire photos, whereupon she accepted that the pre-fire structure stood on concrete blocks and not attached to the land by concrete pillars as alleged. She also accepted that the steps in the pre-fire photos were of concrete blocks as well, and that all the blocks were still there to be seen.

[25] Mr Compton Walcott (the Officer/Agent who prepared the Proposal Form on behalf of the Claimant) gave evidence on behalf of the Defendant. He stated that upon directions of the Claimant, he visited the location of the property over which coverage was requested and he took pre-fire photos. He stated that the location was confirmed by the Claimant's children. who were at home at the time of his visit. Mr Walcott stated that upon receiving the claim, he again visited the location of the burnt out house and the Manager, who was present with him, took post-fire photos. According to Mr Walcott, the L-Shaped kitchen structure was absent; electricity cables were absent; concrete pillars attaching the house to the land were absent; concrete steps providing access to the front of the house were absent. Based on those observations, Mr Compton concluded that the house insured under Policy No. FPC 2003/07/00533 was not the same house which had been destroyed by fire and for which a claim was being made

[26] Under cross examination, Mr Walcott admitted that when he took the pre-fire photographs of the Claimant's house, the Claimant was not present, and she was never shown the pre-fire photographs that he, Mr Walcott took.

[27] In her written closing submissions, counsel for the Defendant submits that the features of the post fire photos of the chattel house did not fit the description of the burnt out property that was presented for compensation. It was counsel's further submission that there had been a material misdescription of the insured property as the property described and presented to the Defendant Company differed significantly from the property insured. Counsel Mr Daniel submitted, on the other hand, that there was no misdescription of the Claimant's house. As far as counsel was concerned, the pre-fire photographs taken by the Defendant Company were photographs of the wrong house; they were not photographs of the Claimant's house, submitted counsel. Mr Daniel's further submission was that the Defendant Company never took any measurements of the Claimant's house. As to whether it was required to do so, no authority was cited or offered for this supposition.

Findings on the issues of misdescription

[28] Looking at the Proposal Form, the closest question pertaining to the issue of misdescription of the chattel house is the question "Of what material is the building constructed? The answers were:

Outer walls:	Side Board
Interior Partitions	Plywood
Roof	Galvanise
Floor	Wood
Ceiling	T-1-11
Type of widows	Louvres

[29] Another important question was "Do you have any smoke detectors installed or provide fire extinguishers in this property? The Claimant answered 'No'

[30] In spite of those answers, the Defendant Company still proceeded to insure the house. Clearly the chattel house was to be regarded as insurable.

[31] That being said, the Claimant has admitted that since the issuance of the policy she added a bathroom to the chattel house, but it was subsequently taken down. The Defendant Company says it was a kitchen that created an L-shaped structure. The Claimant says that the addition was at the back and created no L-shape.

[32] I find as a matter of fact that the Claimant, in or around 2004, during the currency of the policy, did make changes to her chattel dwelling house by adding a bathroom structure to the back thereof, and that she subsequently removed it.

[33] I do not accept that the L-shaped structure in the photo exhibited at page 173 of trial bundle was the Claimant's house, or that the Claimant's house stood on concrete pillars in the land, or that the steps were also concrete steps. On the contrary, I find that the Claimant's house always stood on concrete blocks and that the steps were also made of concrete blocks, and that this is evident from the post-fire photographs taken of the burnt house.

[34] I find that Mr Walcott, in the absence of the Claimant, took pictures of a house, and these pictures were placed on the underwriting file without seeking confirmation from the Claimant as to whether they were in fact pictures of her house.

[35] Having considered the totality of the evidence on this aspect of the case, including the documentary evidence, and the photographs taken by Mr Walcott, agent of the Defendant Company, and the then Manager, I am satisfied that there is a strong probability that he (Mr Walcott) took photographs of the wrong house and that the photographs he took at the time of application for insurance (pre-contract) was not the Claimant's house, and thus, not the house for which indemnity is claimed. It must be remembered that the addition to the Claimant's house was made after coverage was sought and during contract. The Proposal Form provides no assistance as to whether the house was L- shaped or not. And the court cannot say with definition that the pre-fire photographs were those of the Claimant's house that was burnt.

[36] In the circumstances, the court is not of the view that there was any misdescription of the Claimant's property, or any misrepresentation at the preliminary stage of the negotiations for the policy or post contract.

Did the Claimant have a duty to disclose the fact that she had made an extension to the dwelling house

[37] It is a well established principle at common law that the insured is under a duty not only to abstain from making false representation, of material facts but also to disclose in the utmost good faith, such material facts as are within his knowledge, to the other party. Lord Mansfield in the case of **Carter v Boehm** (1766) 3 Burr 1905; at pages 4 and 5, explained the principle necessitating a duty of disclosure in these words:

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that

the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back of such circumstance is a fraud and therefore policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void because the risque run is really different from the risque understood and intended to be run, at the time of the agreement. The policy would be equally void, against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to cover the premium.... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of the fact, and his believing the contrary."

[38] And in **Bates v Hewitt** (1867) LR 2 QB 595 at page 60, Chief Justice Cockburn said that it is immaterial whether the omission to communicate the material fact arises from indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known. The duty applies continuously throughout the pre and post contractual stages.

[39] The Defence states at paragraph 10 that

> "The Claimant was under a continuing duty to act in good faith and to disclose to the Defendant 'all material facts, alterations and movement with regard to the insured Chattel house. The said duty was imposed at the commencement of the policy and continued to exist at the renewal of the policy. The Defendant was under a duty to disclose any change in description or any place where the insu.red chattel house was contained. Further the Claimant was under a duty to advise the Defendant if the insured property ... was to be removed to any other location other than that stated at the commencement of coverage ..."

[40] The Witness Statement of Ms Gillead stuck to the pleaded case of the Defendant pertaining to non-disclosure; the continuing duty to disclose material facts about description, the alteration, and movement, and to act in good faith. The Witness Statement also set out the provisions of Conditions 1 and 8 and concluded that the Claimant breached the contract of insurance.

[41] In this case, it is clear, and I find, that the Claimant was under a duty to disclose the addition that she had made to the house. It mattered not that at the time of the fire, it was already torn down. In fact, she should have also informed the Defendant Company that she had to remove the addition. I find that the Claimant renewed her policy each year after the addition, and omitted or failed to disclose to the Defendant Company the fact that she had made such addition to her house and was forced to remove it. But the matter does not end here. The question is, was the failure to disclose relate to a material fact that altered the risk and entitled the Defendant Company to avoid its liability to the Claimant. I will revert to this issue below after having determined an issue as to

issuance of the policy which arose during cross examination of the Claimant, and which is considered to be vital to the case.

Issuance of the Policy

[42] Significantly, during cross examination, the Claimant was questioned by Ms Dublin as to whether she informed the Defendant Company thatshe was making the change, the Claimant replied that she did not, because she did not khow that she had to do so. During reexamination, the Claimant stated that she has never seen, and was never issued with a copy of the insurance policy, and she was not apprised of the conditions at the time of making the application. This became a bone of contention and understandably so because in order to repudiate liability, the Defendant has to show that it issued the Claimant with the policy of insurance containing Conditions _1 and 8. And . it must show that the Claimant breached one or both conditions

[43] In her witness statement, Ms Gillead stated that based on the information recorded in the Underwriting File, she verily believes "that the Claimant was issued with Insurance Policy No. FPC 2003/07/00533 which provided insurance coverage in the sum of $75,000 against fire and other perils for her dwelling house situated at Potters New Extension, St John's, Antigua". Ms Gillead further stated in her witness statement that she was advised that the Claimant was issued with a copy of her insurance policy which outlined the conditions of the Insurance Policy. Ms Gillead produced a copy of the Insurance Policy. She explained that until premiums are paid in full, the insured would not get a policy, but when the payments are completed, then the policy would be issued to the insured. Ms Gillead gave evidence that based on the file, the initial period of insurance was from 9th July 2003 to 9th July 2004, and the policy was renewed on an annual basis upon payment of the renewal premium. Asked by Mr Daniel whether at any stage she herself issued a policy of insurance to the Claimant, Ms Gillead replied 'No I didn't'.

[44] Ms Gillead maintained that the Claimant renewed the policy on an annual basis down to 2010. She stated, however, that the Defendant Company never sent an officer to inspect the property each time the policy was renewed. to see the state the property was in.

[45) During cross examination, counsel for the Claimant referred Ms Gillead to Condition 1 of the Policy of Insurance, then the following exchange took place

BY MR DANIELS

Q: Can you tell this court whether, and if so when the Claimant got the policy, and if that condition was ever read to her

A: When she got the policy?

Q: Can you tell this court whether or not you are aware that the Claimant was aware of that condition

A: She would not be aware of that condition when she took out the insurance because she would not have the policy at that time

Q: The insurance policy was for the house and not the house and contents

A: No the contents were not insured. Just the building.

BY THE COURT

Q: At what point does the insured gets the policy in her hand? From the evidence before the court she seems to have paid up her renewal premiums to the 10th July 2011

A: She would be issued with the policy after completion of her payments

Q: I thought the evidence is that she has not yet received the policy

A: She got a policy; A policy was issued to the insured

Q: Just a while ago Mr Daniel referred you to paragraph 11 of your witness statement and read it and asked you to tell the court when the Claimant got the policy of insurance and if so whether the conditions were read to her. Your reply was she would not be aware of the condition because she would not have had the policy at the time. I would like to know when she got the policy.

A: She would have gotten policy from inception of the contract; you do not get policy each year; you get a renewal endorsement to say the policy is renewed for another year. She does not get a policy each year.

Q: I still do not know when she was issued with the policy.

A: The policy was issued to her in 2003 by the Underwriter. She came in on 9th July 2003 so **perhaps** in August 2003 she would have been issued the policy because we would have needed time to prepare and vet the policy (My emphasis)

Q: At what point would she know of the conditions

A: When she goes through and read the policy

BY MR DANIEL

:A: Do you agree with me that at the stage of completing the proposal form the Claimant would not be leaving with the policy of insurance?

Q: I agree

[46] During further cross examination, Ms Gillead insisted that the Claimant received a copy of the policy in 2003, but she had no evidence and could not state as a fact that the Claimant actually received it, or signed a book or anything indicating that she did receive the policy.

[47] Learned counsel Ms Dublin sought to refer the Claimant to the copy of the policy before the court, pointing out to her that the policy is dated 9th July 2003. However, that without more does not mean that the Claimant was issued with the policy. In any event, it was apparent that the policy was backdated to the 9th July 2003, the date of the completion of the proposal form, because the contract of insurance would have taken effect from then, and would have formed the basis of the contract, although theProposal Form does not say so expressly.

[48] Ms Dublin in her closing submissions submitted that the Claimant was indeed issued with the policy and she pointed to the pleadings and evidence which support this submission, and asked the court to find that the Claimant was indeed issued with a policy of insurance.

[49] I find that the Claimant contradicted herself in cross examination on the issue of whether she was i sued with the policy of insurance. She stated more than once that she was never issued with a copy of the policy. This statement was inconsistent with paragraph 1 of her statement of claim, where the Claimant stated as follows: "At all material times, the Claimant was a customer of the Defendant Company, having paid for coverage and was issued with a Policy of Insurance No. 2003.07/00533. It was also inconsistent with paragraphs 5 and 7 of the statement of claim and paragraphs 6 and 8 of her witness statement, where the Claimant made references to certain obligations and terms of the policy of insurance. The reasonable inference to be drawn is that the Claimant was indeed issued with the policy of insurance. I find it mind boggling that the Claimant would allow eight years to pass without being issued with a copy of the insurance policy, and say nothing, when her receipts are endorsed showing that it was a premium in respect of the renewal of the insurance policy.

[50] That said, it is noted that the Defendant admitted in paragraphs 1, of the statement of Defence that the Claimant was issued a policy of insurance. Then Ms Gillead, in her witness statement (at paragraph 10) gave evidence that the Claimant was issued with a copy of the policy of insurance.

However during cross examination, Ms Gillead accepted that the policy of insurance would not have been issued until after all the premiums for the year 2003/2004 had been fully paid.[2]

[51] Significantly, Ms Gillead could find or point to any documentary evidence on the Claimant's file to prove that the Defendant Company did deliver and the Claimant did receive the insurance policy, but I accept, based on the Claimant's own case, at paragraphs 1, 5 and 8 of her statement of claim, and paragraphs 5 and 8 of her witness statement, that she was issued a policy of insurance. She is bound by her pleadings and cannot now resile therefrom.. So notwithstanding that the Defendant has failed to prove the actual issuance of the policy of insurance by the signature of the Claimant that the policy was delivered to her, I find as a fact and hold that the Claimant was indeed issued a copy of the policy of insurance at some point in 2003 or 2004.

[52] Ms Gillead in cross examination stated that the Claimant would be aware of Conditions 1 and 8 when she reads the Policy. An examination of the policy of insurance shows the following words on a separate page at the beginning of the policy text:

> ***"FIRE POLICY***
>
> *Please read your Policy in* full, including its conditions,
> and if it does not meet your requirements, return
> it immediately for alterations"

[53] Obviously, the Claimant was required to read the policy. Ifit was issued to her and she did not read it then she would be deemed to have been made aware of the conditions. If it was not issued to her, then she would not be aware of the conditions, and if she was unaware of the conditions, it could not be said that she breached the policy. I find as a fact and hold based on the evidence that the Claimant was issued with the policy, did read it and was aware of the conditions.

Did the failure to disclose the addition of the bathroom constitute a material non-disclosure that altered the risk and entitled the Defendant Company to avoid the policy?

[54] Condition 1 contains terms such as "misrepresentation as to any fact material to be known for estimating the risk"; "omission to state such facts". A critical legal issue which arises is the proper interpretation and application of the terms "misrepresentation as to any fact material" in Condition 1.

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2 Neither party has provided *any* details or evidence showing the payment for premiums for the years prior to 2003/2004, so the court has no knowledge as to when the last installment for year 2003 and 2004 was made. The receipts provided *by* the Claimant were in relation to the year 2010/2011.

[55] Misrepresentation: Representations are said to be assertions of fact made to influence the insurers actions on the application. There is no allegation of misrepresentation of facts at the application stage.

[56] Materiality: How is materiality of a non disclosed fact determined? The test of materiality is set out in numerous cases. I will mention a few even though in my opinion they are to the same effect. In **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd** [1994] 3 All ER 581, the court held that a circumstance is material if it would have the effect on the mind of a prudent insurer in estimating the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk.

[57] **In *Johnson v. British Canadian Insurance* Co.,** 1932, Canlii 64, (SCC), it was held that determination of whether a fact is material requires consideration of whether or not the fact would influence **the insurer in assessing or accepting a risk or in fixing the premium".**

[58] **Finally, in Nelista Rambally et al v. Barbados Fire and General Insurance Company** Limited et al, SLUHCV 1129 of 2000), at paragraph 35, Justice Ola-Mae Edwards observed that 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. Justice Edwards also opined "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 Laws of England,** (4 ed.) Vol. 25 at para. 370. The Defendant Company must demonstrate by objective evidence that a fact would be regarded as material by a prudent underwater. **(Collinvaux"s Laws of Insurance** (7th ed.) at para 5 -21)."

[59] In this case, there is no clear evidence that the failure to disclose the alteration and tearing down of the alteration to the premises were material to the risk, nor is there any evidence before the court that had the Defendant Company been aware of the addition, the premium would have increased, or that the insurance coverage would have been denied or discontinued

[60] In the Jamaica case of **Surton Harding v The Insurance Company of the West indies Limited** [2013] JMSC Civ.33, the Senior Underwriter of the Defendant Company stated that had the Claimant informed the Defendant that the property was comprised of a woodwork shed and not just two buildings, she would have endorsed the brokers Slip "pending inspection" and made arrangements for a site visit. This the Underwriter said would have been done to ascertain whether the wood work shed was insurable. A careful examination of the defendant's evidence in this case as given by Ms Gillead and Mr Walcott discloses that nowhere in their witness statement, or cross examination, have they addressed the materiality of the information which is the subject of the averred non-disclosure. This is only addressed in the written submissions of the Defendant

[61] In the absence of such evidence, it cannot be said that the Defendant Company has discharged its burden. Consequently it cannot avoid the policy in my view on the ground of this non-disclosure. I am fortified in my view by the decision in the case **Nelista Rambally et al Barbados Fire and General Insurance Company Limited et** al, SLUHCV 1129 of 2000). There, Edwards, J. was interpreting an identical Condition in the policy of insurance. Edwards J found that the witness statements of the Defendant's insurers failed to address the materiality of the information which is the subject of non disclosure. She therefore held that in the absence of such evidence, it cannot be said that the Insurers have discharged their burden. Consequently, they cannot avoid the policy because it has failed to prove that the non disclosure of facts pleaded at paragraph 1 of the Defence was a fact material to the risk. Having found as I have, it is not necessary to go further to consider Condition 8. However, in the event that I am found to be wrong, I go on to consider whether the Claimant breached Condition 8 of the policy of insurance

Did the Claimant breach Condition.a of the policy by moving her chattel house from one location to the other?

[62] Condition 8 (c) is clear and decisive. Pursuant to Condition 8 (c), If the Claimant knew (pre-contract) that she was likely to move her house, she should have disclosed this to the Defendant Company at the inception. Or, if she subsequently (during contract or post contract) formed the intention, or found it necessary to move the house from one parcel of land to the other, she would have been obliged to inform the Defendant Company, before she did so, to obtain the sanction of the Defendant, endorsing such movement on the Policy.

[63] The Claimant in her witness statement stated that in 2003, when she applied for insurance coverage, she was squatting on the land on which her three bedroom chattel house was burnt, and that the land was formally allocated to her in November 2004 by the Government. The Claimant produced documentary evidence to prove such allocation.[3] But there is nothing in those documents to show that she was indeed squatting on the land before applying for converge. However, there is nothing in those documents to show that she was not squatting on the said land either. She further stated that she never had to move her house from parcel 838 to parcel 835 as alleged by the Defendant Company because she was always squatting on parcel 835.

[64] Learned counsel Ms Dublin sought to suggest to the Claimant that she indicated on a Location Plan. that the house moved from a different spot to the spot Where it was located at time of fire, by noting/writing on the said Location Plan the words "house moved from here". The Claimant replied that she did not recall making any such notation on a Location Plan. In fact, she said that she does not recall ever seeing the Location Plan before. In response to a question from the court as

3 See letter from the Government to Ms Dublin indicating that the Claimant had never been allocated any parcel of land other than parcel 835, attest to this.

to who drew the Plan, counsel replied that she was uncertain. If indeed the Claimant noted on the Plan that the house moved from one location to the other, the question is at what point did she make that notation; If she made that notation at the point of application for coverage, (pre-contract) then this supports her case that she did not move from one location to the other, during or post contract. The author of the Location Plan was never called by the Defendant who it appears disclosed the Location Plan.

[65] In these circumstances of uncertainty, the court can attach little or no weight to the words 'house moved from here" alleged to have been noted/written on the Location Plan by the Claimant.

[66] Mr Compton Walcott gave evidence on behalf of the Defendant on this aspect of the case. He stated that upon directions of the Claimant he visited the location of the property over which coverage was requested and he took pre-fire photos. He stated that the location was confirmed by the Claimant's children. who were at home at the time of his visit. Mr Walcott stated that upon receiving the claim, he again visited the location of the burnt out house and the Manager who was present with him took post-fire photos. Upon arrival at the site, he noticed that the structure was in a different location to that visited at the inception of the insurance coverage. the Managerwas not called to give evidence.

[67] During cross examination, Mr Walcott admitted that when he took the pre-fire photographs ofthe Claimant's house, the Claimant was not present, and she was never shown the photographs that Mr Walcott took. During cross examination by Ms Dublin, the Claimant was shown the pre-fire photographs that Mr Walcott took, and she said unhesitatingly, "That is not my house."

[68] Ms Dublin, in her written submissions asked the court to accept that the location of the burnt out property was not the location of the property presented for coverage. Counsel further asked the court to note the evidence by Mr Walcott as to the location of the insured property in 2003. Counsel also asked the court to accept the evidence of Mr Walcott, that he visited two different locations pre-fire and post fire, and to note that this evidence went unchallenged. The Claimant's failure to disclose to the Defendant Company that she moved the property means that she breached her obligation of continuing disclosure under the contract of insurance, submitted Ms Dublin.

[69] Mr Daniel's written submission on the issue as to whether the Claimant moved the chattel house to another location, was that the Claimant's chattel house was destroyed by fire on the parcel of land allocated to her, and on which she was squatting when she applied for coverage. His further submission was that the Defendant Company has produced no evidence to demonstrate that the Claimant had moved her chattel house. A further submission was that the Defendant Company has failed to produce any document from the Development Control Authority to demonstrate the issuance of any permit to the Claimant for the removal of her house. Counsel pointed to the

evidence of the Claimant that her house was never moved, but always stood on parcel 835, on which she was squatting.

Finding on the movement issue: Clause 8 of the Policy

[70] Having considered the totality of the evidence on this aspect of the case, the court can find no plausible evidence upon which it can make a definitive finding that the Claimant moved her house from parcel 838 to parcel 835. The evidence which I accept is that at the time of applying for coverage, the Claimant was squatting on the land on which her chattel house stood, and the said land was subsequently allocated to her. This is not unusual. It is a common occurrence that persons who had been squatting on Crown lands are subsequently allocated such lands. As to the notation on the Location Plan, I do not believe that the Claimant made the notation "house leave here" on the location plan referred to and shown to her by learned counsel Ms Dublin. I believe the Claimant when she said that she did not make any notation on the Location Plan, and that she did not understand the Plan. The proposal form completed by the Defendant Company's agent, (Mr Walcott), indicated that the house was situate at Potters New Extension, and at the time of the fire, the Claimant's house was indeed situate at Potters New Extension. There was no question on the Proposal Form asking for information pertaining to the land on which the chattel house stood, or whether it was likely/probable that the house would be removed from the parcel of land on which it stood, to another parcel. This does not mean that the Claimant would not be under a duty to disclose if in fact she knew the likelihood that the house was to be moved if in fact she knew that she was going to move it. But if she was already squatting on the land, it was not necessary to move the house.

[71] As to Mr Walcott's evidence that he sought confirmation from the Claimant's children as to whether he visited the right house, this evidence has been unsubstantiated, and I do not agree that his taking of photos of a house in the absence of the Claimant, and call it the Claimant's house, without more, can be regarded as fair dealing on the part of the Defendant Company, who is also under a duty to act in good faith In these circumstances, I am unable to find that the Claimant breached any duty to disclose that her chattel/dwelling house moved from parcel 838 to parcel 835, without the sanction by endorsement on the Policy by the Defendant Company, and therefore she did not breach Condition 8 of the policy of insurance.

[72] The result is that the Defendant is not entitled to avoid the policy by virtue of breach of Condition 8.

. Indemnity under the Policy

[73] The policy specifies the sum insured to be EC$75, 000.00 which represents the maximum sum for which the Defendant Company accepted liability·. The policy is taken 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 Defendant Company was that it "will pay to the Insured the value of the property at the time of the happening of its destruction, or the amount of such Loss or Damage or at its option, Reinstate or replace such property or any part thereof". Clearly, it is the value at the date or time of loss that is recoverable, or its replacement value. There is no evidence before the court as to the value of the house at the time and date of the fire, and thus, it would be difficult to ascertain the precise value of the house at the date and time of fire.

[74] The Defendant employed CENAS CIVIL ENGINEERING & ASSOCIATED SERVICES to provide a damage assessment report. The Report was prepared by Mr R. Everson Zachariah. It is dated 16th May 2011. Mr Zachariah estimated the reinstatement cost to be $85,000 broken down as follows:

Demolish existing structure and dispose of debris	$ 2,500.00
Reconstruct house	$ 90,000.00
Replace water catchment facility (PVC tank)	$ 1,500.00
Subtotal	$ 94.000.00
Depreciation	$ 9,000.00
Total Estimated reinstatement Cost	$ **85,000.00**

[75] When the demolishing cost of $2500.00 is deducted, the total value before the fire is taken as **$82,500.00.** As can be seen, the value of the property lost exceeds the sum insured. Where the value of the property lost exceeds the sum insured, $75,000 is all that the Defendant Company would be bound to pay; but the Defendant is entitled to exercise its option to reinstate in the amount of $85,000.00. **(Nelista Rambally** applied).

Interest

[76] Interest is normally awarded when an insurer has wrongfully detained monies which ought to have been paid. In an ordinary indemnity policy, it appears it will normally be awarded from the date when the insured called upon the insurer to pay to the date of Judgment.[4] It is however at the discretion of the court to award interest as it seems fit.

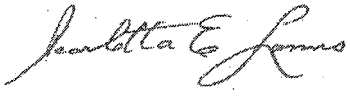
Conclusion

[77] Having found that the Defendant failed to prove that the non-disclosure of facts pleaded at paragraph 8 of the Defence was a fact material to the risk, I enter judgment for the Claimant in the Claimant in the amount of $75,000.00, with interest from the 8th April 2013 to the date of delivery of this judgment at the rate of 5 per cent per annum; and with Prescribed costs calculated

4 See Burts & Harvey Ltd v Vulcan Boiler & General Ins. Co [1966] 1 Lloyds Rep. 354; Cited with approval in .Modern Insurance Law, 2nd Ed, John Bird, London: Sweet & Maxwell, 1988, page 228.

pursuant to Part 65.5 (2) (b) (i); and interest on the Judgment debt from the date of delivery of the delivery of this Judgment at the rate of 5% per annum until full and final payment.

[78] Counsel have provided me with helpful submissions and authorities for which I am grateful.



PEARLETTA E. LANNS
HIGH COURT JUDGE [AG]