JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. HCV 00008 OF 2009

BETWEEN	**RIO BROWN**	**CLAIMANT**
AND	**N.E.M. INSURANCE COMPANY (JA) LTD.**	**DEFENDANT**

Mr. Ronald Paris instructed by Paris & Co. for the Claimant.

Miss Camille Wignall and Mrs. Tashia Madourie instructed by Nunes Scholefield De Leon & Co. for the Defendant.

Heard : 7th November, 2nd December and 2nd March 2012.

IN CHAMBERS

INSURANCE POLICY-LAW OF CONTRACT- WHAT CONSTITUTES OFFER BY INSURED AND ACCEPTANCE BY INSURER-WHETHER ACCORD AND SATISFACTION, RELEASE AND DISCHARGE-WHETHER AVERAGE CLAUSE APPLICABLE-SIGNIFICANCE OF TERM "SUBJECT TO THE TERMS AND CONDITIONS OF THE POLICY"

Mangatal J:

1. This matter was commenced by Fixed Date Claim Form and Particulars of Claim and a Defence have been filed. Affidavits have also been filed by both sides and, at a case management conference in March 2010, and subsequently on the 22nd of September 2011, it was ordered that all Affiants were to attend for cross-examination on the trial date.

2. The Defendant N.E.M. Insurance Co. (J'ca) Ltd. "NEM" is a limited liability company duly incorporated under the Laws of Jamaica and carries on the business of general insurance, including property insurance.

3. The Claimant Rio Brown "Mr. Brown" was at all material times insured with NEM for property damage, under a Fire and Insurance Policy No. 02 FAP 1210138 "the subject Policy". This was in respect to commercial premises owned by Mr. Brown at Lot 2 Salt Marsh in the Parish of Trelawny. The contract of insurance which culminated in NEM issuing the subject Policy was originally entered into in or about June 2003. There have been a number of subsequent renewals.

4. On the 7th of November 2011, when this matter was scheduled to commence, I exercised my case management powers under Rule 26.1(f) of the Civil Procedure Rules 2002, "the CPR". I ordered that the following issue, which is a matter of law not requiring cross-examination, be tried first:

> 'The question of whether the Claimant having executed the Form of Acceptance and having accepted payment of the sum due on the said Form of Acceptance, is still at liberty to pursue a claim for relief under the Policy of Insurance. Whether the Claimant is estopped from so doing.'

5. Whilst NEM's Attorneys agreed with my view that these were discrete legal issues, and that it may save time and costs if they were to be resolved first, Mr. Paris thought that the matter should be heard in its entirety, including cross-examination. Having heard argument on this preliminary matter, I made the order set out in paragraph 4 above, requiring these legal issues to be tried first.

Mr. Brown's Case

6. The Particulars of Claim state that NEM in or about June 2003 entered into a contract of insurance under the subject Policy. The subject Policy of Insurance is exhibited to the Particulars. Thereafter the parties annually renewed the subject Policy during the period 2004-2007 so that during that period the sum insured was increased from the original sum of $8,000,000.00 to $10,580,000.00.

7. In 2006 Mr. Brown obtained and provided NEM with a Valuation Report in relation to the subject property dated 4th July 2006 from Lawrence Rentals & Investments Ltd. which valued the replacement cost of the Claimant's building at $20,000,000.00. NEM then revised the sum insured for the period June 2006 to June 2007 from $10,580,000.00 to$20,000,000.00.

8. Mr. Brown avers that since 2006 NEM failed to increase the sum insured for the period 2007 to 2008 and 2008 to 2009 and only increased it to $22,100,000.00 for the period 2009 to 2010.

9. On the 30th September 2008 Mr. Brown's building was damaged by fire and the estimated cost of repairs was assessed by Mr. Desmond Simpson, Quantity Surveyor, at $9,173,650.00, by letter dated 17th February 2009. The quantity surveyor's fee was $137,604.75.

10. Crawford Jamaica Ltd. "Crawford", Loss Adjusters, and Mr. Simpson then together adjusted the sum of $9,173,650.00 to $8,470,523.00 and Mr. Brown accepted this adjustment.

11. By letter dated the 21st of December 2008 Crawford applied a formula to arrive at an average of the loss suffered by Mr. Brown based on their valuation of Mr. Brown's property after the 30th September 2008 at $27,000,000.00 instead of at the sum insured of $20,000,000.00. As a result, Crawford determined that Mr. Brown was only entitled to recover $6,056,538.00 as the amount of his loss due to fire.

12. At paragraphs 10-12 of the Particulars of Claim, it is alleged:

> *10. The said Policy of Insurance does not include any provision for the application of any average formula for the determination of the value of the amount of the loss occasioned to the Claimant as a result of the damage to his property by fire.*
>
> *11. The said Policy of Insurance specifically states that "the Defendant company agrees with the insured (Claimant) that if the property……shall be damaged by Fire……..the Company will pay to the Insured…..the amount of such damage." The Defendant company instead caused Crawford J'ca Ltd. to prepare a Form of Acceptance by which the Claimant agreed to accept the sum of $6,056,538.00 in full discharge and satisfaction of his claim for loss and damage to his property. There is annexed and exhibited hereto*

as marked "R.B.5" a copy of the Form of Acceptance prepared by Crawford J'ca Ltd. and signed by the Claimant.

12. The Claimant under the terms of the Form of Acceptance and of the said Policy of Insurance is not bound thereby to accept the said sum of $6,056,538.00 in full discharge and satisfaction of his claim and is accordingly not precluded from obtaining from the Defendant company payment of the full amount expended by him to repair the said damage caused by fire.

13. Mr. Brown is claiming against NEM the sum of $2,413,985.00 plus the Quantity Surveyor's fee of $137,604.00 and interest thereon under the Law Reform (Miscellaneous Provisions) Act, together with costs.

NEM's Case

14. NEM admits that it entered into a contract of insurance with Mr. Brown in or around June 2003 but further states that it entered into the contract with Mr. Brown on the basis of the Proposal Form which was signed by him, by which he applied for coverage, including the representations which he made in it.

15. The Proposal Form required Mr. Brown to indicate the full value of the property to be insured, and in June 2003, he stated that value to be $8,000,000.00. NEM agreed to insure Mr. Brown's property at that value based on this representation.

16. NEM, at paragraphs 5 and 6 of its Defence pleads:

5. The said Proposal Form included the following:

i. a notice indicating that the insured should for his own protection state the full value of the property to be insured.

ii. a notice in red setting out the terms of one of the standard conditions in the policy to be issued, the Under-Insurance Clause ("Average") which takes effect where property is insured for less than its full value as follows:

If the property hereby insured shall, at the breaking out of any fire or at the commencement of any destruction of or damage to such Property by any other peril thereby insured against, be collectively of greater value

than the sum insured thereon, then the Insured shall be considered as being his own Insurer for the difference, and shall bear a rateable proportion of the loss accordingly. Every item, if more than one, of the Policy shall be separately subject to this condition.

6. In the premises, the Claimant was at all material times under a duty to advise the Defendant of the full value of his property and of any changes in same and the sum insured under any policy issued in his favour by the Defendant was informed by his said advice.

17. NEM agrees that the policy was renewed annually but it avers that the value at which the property was insured on each renewal was based on Mr. Brown's representation as to the value of the property.

18. NEM further admit that the policy was renewed for the period June 2006 to June 2007 with a sum insured of $20,000,000.00 and they state that this was based on Mr. Brown's representation made to NEM through his agents Marathon Insurance Brokers Limited which acted on his behalf in requesting insurance coverage from NEM, of the value of his property at that time.

19. NEM admits that the sum insured under the policy remained at $20,000,000.00 for the periods 2007 to 2008 and 2008 to 2009, but they say it so remained because of Mr. Brown's failure in breach of his duty to advise NEM of any changes in the value of his property. NEM relies upon a letter dated July 16 2008 from Mr. Brown's Brokers Marathon requesting the renewed coverage at $20,000,000.00.

20. In respect of the period 2009 to 2010, NEM admits that the policy was renewed at a value of $22,100,000.00 on the strength of a letter received from Marathon Insurance Brokers dated July 1 2009, requesting insurance at that value on behalf of Mr. Brown.

21. NEM admits that Mr. Brown's building was damaged by fire, that he submitted an estimate of repairs prepared by Desmond Simpson, and that they retained vastly experienced Loss Adjusters Crawford to investigate and assess Mr. Brown's claim.

22. NEM avers that Crawford provided them with two written reports of its findings indicating the reasonable costs of repairs at $8,470,523.00 and that Mr. Brown's property had a value of $27,000,000.00, which exceeded the sum for which the property was insured. NEM states that Crawford advised Mr. Brown of these values and Mr. Brown agreed to the determination of his entitlement under the subject Policy on the basis of those values. Copies of Crawford's Preliminary Report and Final Report dated 27th January 2009 are exhibited to the Affidavit of Miss Donna Brown, Chartered Insurer, employed to NEM as its Claims Manager.

23. NEM states that the formula which Crawford used to determine the amount due to Mr. Brown involved a pro rating of the repair costs based on the ratio of the sum insured to the actual value of the property. NEM avers that it was entitled to apply this formula pursuant to the Under – Insurance ("Average") Clause contained in the subject Policy at General Condition 17, as well as special condition 17 of which Mr. Brown was notified on the Proposal Form by which he applied for coverage.

24. In response to paragraph 11 of the Particulars of Claim, NEM admits that Mr. Brown did, as is pleaded in that paragraph, agree to accept the rateable share of the loss in the sum of $6,056,538.00 in full discharge and satisfaction of his claim for loss and damage to his property and duly executed a Form of Acceptance in confirmation of this agreement.

25. NEM avers that the Form of Acceptance duly executed by Mr. Brown constitutes a valid and binding agreement on his part to accept the sum of $6,056,538.00 in full and final settlement of his claim. NEM further avers that Mr. Brown is estopped from now denying the agreement and from demanding any further sums from NEM on account of his claim in respect to fire damage.

The Arguments Advanced on Behalf of Mr. Brown

26. Mr. Paris, who appeared for Mr. Brown, sought to rely upon the words "subject….to the terms and conditions of the policy". He argued that those words in the Form of Acceptance mean that, whatever Mr. Brown agreed to in this document is subject to the terms and conditions of the subject Policy. He submitted that NEM who was the maker of the document,

would have had to comply with the terms and conditions of the subject Policy ab initio. He submitted that NEM did not comply with section 120(1) of the Insurance Act. Counsel for NEM objected to any such reference since nowhere in the claim had Mr. Brown pleaded such a breach. Reference was made to Rules 8.8 (c) and 8.9A of the CPR. Rule 8.8(c) requires that where a Claimant uses a Fixed Date Claim Form to bring the claim, where the claim is being made under an enactment, it must be stated what that enactment is. Rule 8.9A states that the Claimant may not rely upon any allegation which is not set out in the Particulars of Claim, but which could have been, unless the court gives permission. Mr. Paris then sought, in mid-stream of his submissions, to apply to amend to add such a claim. I refused this amendment as it was objected to, and there was no notice given to NEM's Attorneys of an intention to make such an application,(so that, for example, they could have considered whether they would need to file any evidence in response, or to amend their pleadings). Nor was there any Affidavit to support a case being raised for the first time, to in essence allege that the insurer did not, before the contract was entered into, inform the insured of the nature and effect of the pro rata condition of average clause. This late application took place against the background of previous case management conferences having been held some time before.

27. Mr. Paris went on to submit that the law of estoppel did not apply to his client's case, because NEM has not changed its position by reason of the execution of the Form of Acceptance by Mr. Brown and that NEM have not placed any reliance to its detriment. He submitted further that the court must ask itself whether it would be unconscionable for Mr. Brown, in the circumstances of this case, to go back on the document and to say he is not bound by it. Mr. Paris argued that this was not a true case of Accord and Satisfaction. Reference was made by Mr. Paris to a number of authorities, including Elizabeth Cooke on **the Modern Law of Estoppel**, pages 100-103, **Anson's Law of Contract,** 28th Edition, and **The Modern Law of Insurance** by Andrew McGee. In Chapter 25, under the heading **Under-insurance**, Mr. McGee, an English Barrister, at paragraph 25.2 provides an interesting view. He states:

The doctrine of average

25.2 *This may be summarised as being the principle that where property is insured for less than its true value and an insured loss occurs, the insurer is liable only for the proportion of the loss which the sum insured bears to the true value of the property. Many insurers appear to regard the principle as more or less self-evident, but it is submitted that it is no such thing. There are logically two ways of dealing with the situation where the insured value is less than the real value. The doctrine of average is one,* ***but the other is simply to say that the policy covers all loss up to the insured value but not beyond. The two solutions obviously produce different results, but there is no inherent reason why one is superior to the other. Moreover, it is submitted that the average policyholder, if he were to put his mind to the question, would be more likely to assume that the second solution was the correct one. Whilst policyholder expectation is of course not by itself conclusive of the law, it is submitted that in a case of this kind where either solution is equally logical, it ought to be allowed to have some weight.***

(My emphasis).

The arguments advanced on behalf of NEM

28. The Form of Acceptance constitutes an agreement between Mr. Brown and NEM to release NEM from its obligations under the policy of insurance. The Form of Acceptance signed by Rio Brown was his offer to NEM to accept the sums stated in full and final satisfaction of his claim. This constituted an accord which was made legally binding and effective by NEM's acceptance of the offer and the payment to Mr. Brown of the sum of $6,056,538.00. This was the sum that Mr. Brown agreed to accept in full and final settlement of his claim. Both parties have performed the obligations under the agreement; Mr. Brown has accepted the sums proposed and paid to him pursuant to the Form of Acceptance without

reservation. There was therefore valuable consideration passing from NEM to Mr. Brown. Mr. Brown's rights have therefore been extinguished and NEM has therefore been fully discharged from liability under the contract of insurance. Reliance is placed upon a number of authorities, including **Direct Line Insurance Plc v. Fox** 2009 WL 634995.

29. NEM submits that there has been a valid Release and Discharge due to application of the principle of accord and satisfaction. Further, that the words of the Policy of Insurance are clear and unambiguous and set out the application of the average formula in the event that an insured premises is underinsured at the time of loss. Even if, which NEM denies, the policy does not include a provision for the application of an average formula NEM submits that the Form of Acceptance is still legally binding on Mr. Brown based on the decision in **Kyle Bay Ltd. (t/a Aston's Nightclub) v. Underwriters** [2007] EWCA Civ 57 judgment delivered 7 February 2007.

RESOLUTION OF THE ISSUES

30. The general principles of contract law plainly apply to contracts of insurance. This includes principles of offer, acceptance, consideration, accord and satisfaction and release.

31. In our Court of Appeal's decision in **Alcan Jamaica Company v. Delroy Austin and Hyacinth Austin** Supreme Court Civil Appeal No. 106/2002 delivered December 20, 2004, the principles of accord and satisfaction, and release and discharge, are discussed by learned Justice of Appeal Smith J.A. as follows:

> *Any person who has a cause of action against another may agree with him to accept a substitution for his legal remedy any consideration. The agreement by which the obligation is discharged is called Accord and the consideration which makes the agreement binding is called Satisfaction-see* ***Clerk and Lindsell*** *on Torts, 17th Edition, 30-06 p.1559. Thus Accord and Satisfaction is the purchase of a release from an obligation arising under contract or tort by means of*

> *any valuable consideration, not being the actual performance of the obligation itself.*
>
> *When the satisfaction agreed upon has been performed and accepted, the original right of action is discharged and the Accord and Satisfaction constitute a complete defence to any further proceedings upon that right of action. Where the demand is disputed or the amount unliquidated, payment of any sum agreed upon by the parties is a good satisfaction….*

32. The decision in the **Alcan** case was applied by my sister Mrs. Justice McDonald –Bishop in **Elaine Dotting v. Carmen Clifford(Executrix of the Estate of Dr. Royston Clifford) and the Spanish Town Funeral Home** unreported decision in Claim No. 2006 HCV0338 delivered March 19, 2007. McDonald-Bishop J.'s decision was upheld on appeal in SCCA No. 49 of 2007, delivered January 23, 2008. In **Dotting**, reference was made to the leading decisions of the English Court of Appeal and of the House of Lords in **British Russian Gazette and Trade Outlook Limited v. Associated Newspapers Limited** [1933] 2 K.B. 616, and **Jameson and Another v. Central Electricity Generating Board and others** [1999] 1 All E.R. 193.

33. NEM relies quite heavily on the decision in **Direct Line Insurance Plc v. Fox**. In that case, the defendant was insured under a contract of insurance with the claimant which provided cover to his house and contents against the risk of damage from fire and smoke. It was a condition of the policy that if the insured submitted a fraudulent claim the policy would become void and all benefits under the policy would be forfeited. During the currency of the policy the defendant sustained loss due to a fire in his kitchen. A claim was made under the policy which was accepted by the claimant. A written settlement agreement was reached between the insurer and Mr. Fox which provided as follows:

> ***...subject to your approval and subject to the terms and conditions of the policy*** *I agree to accept the sum of £46,521.50* ***in full settlement and discharge*** *of all my building claims under*

your Policy No. 40595540/01 for loss and damage by Fire which occurred on the 8th April 2007.

I understand that my insurers will make an interim payment of £42,412.00 followed by a final payment of £4,112.20, subject to me providing invoices demonstrating any outlay in respect of the VAT element of replacement bespoke kitchen which will be manufactured by Darren Brett Furniture Ltd.

34. The insurer paid the initial sums agreed under the settlement agreement. In order to claim the remaining sums the insured submitted an invoice by someone who did not do the work represented on the invoice. This was not denied by the insured. The insurer commenced proceedings against the insured to recover all the monies paid to him relying on the provision in the policy regarding fraudulent documents.

35. The insurer had argued that the written agreement was not a contract but merely a mechanism of quantifying the sums payable under the policy. The court applied the decision in **Magee v. Pennine Insurance Co. Ltd.** [1969] 2 Q.B. 507, where it was ruled that the written agreement when signed by the insured was an offer on his part to the insurer to accept the sums set out in full and final satisfaction of his claim under the policy. In **Magee** the court came to this conclusion as the settlement had the words "in settlement of your claim" and held that those words "import that it is to be settled without any further controversy"-page 514. The offer in **Direct Line** contained similar wording and had been accepted by the insurer who then paid the agreed sum. Given the insurer's acceptance, the court found that the written agreement constituted a new contract regarding the compromise of the insured's claim. The insurer was therefore bound by the new agreement having accepted the insured's compromise and thereafter performed its obligation by paying the agreed sum. The insurer had no further entitlement thereafter to revert to the terms of the policy. The payment of the agreed balance was subject to a condition precedent, namely the provision of invoices in respect of the VAT element in respect of the agreed balance. It was held that the false invoice enclosure was not sent to establish an element of claim under the policy, but rather was sent in order to assert that the condition precedent in the written agreement

had been satisfied. The insured, however, never satisfied that condition precedent (because what he had produced was dishonest and false), and so the balance of the agreed sum was never due. This however did not change the fact that the written agreement when initially written and signed by the insured represented an offer on his part to the insured to accept the sums set out in full and final settlement of his claim and that that offer was accepted by the insurer.

36. The facts in the present case are a lot simpler than those in the **Alcan**, Dotting or **Direct Line** cases because here, the whole sum which Mr. Brown, the insured had offered to accept in full and final settlement of his Fire Damage claim, and which offer NEM his insurers agreed to and accepted, has been paid over to Mr. Brown. In my judgment, there can be no question of Mr. Brown now looking back to raise anything about the terms of the policy and their meaning. The satisfaction agreed upon has been performed and accepted, the original cause of action under the policy of insurance is discharged, or extinguished, and the Accord and Satisfaction is a complete defence to Mr. Brown's claim. As in the **Direct Line** decision, the Form of Acceptance is properly considered an offer by Mr. Brown, even though it was drafted by Crawford, the loss adjusters retained by the insurer NEM –see paragraphs 2-12 of **Direct Line**. There is a reason why one must be very careful what one signs. Appending one's signature to the document can signify authorship or adoption of its terms, and render the signatory the maker of the document.

37. It is true that in its Final Report dated 27th January 2009, under the heading "Adjustment", Crawford does state that Mr. Brown contested the value that they had arrived at of $27,971,500.00 "strenuously" and further states:

"Eventually, our position was accepted and average applied as follows:

Sum Insured	J$20,000,000.00	X J$8,470,523	= J$6,056,538
Value at Risk	J$27,971,500.00 ".		

(My Emphasis).

38. I have also referred to the interesting comments by McGhee in **The Modern Law of Insurance** which suggest that an average clause is not the only way of dealing with the situation where property is insured for less than its true value and a loss occurs. McGhee discusses the other way of dealing with the situation, which the policy-holder may be more likely to assume is the correct approach, and that would be to simply state that the policy covers all loss up to the insured value but not beyond.

39. However, that is not what the parties agreed upon. They finalized their agreement upon the basis of an Under Insurance Average Clause being applicable. An agreement is still a finalized agreement even if at the negotiation stage, certain matters offered by one side are strenuously resisted by the other, and for an extended period of time. Unfortunately for Mr. Brown, we have no Unfair Contract Legislation in Jamaica and parties are left to freely bargain as they see fit. Nevertheless, even if we did have such legislation, it is not clear that this would have availed Mr. Brown, – see paragraph 42 of **Direct Line.** As we do not have any Unfair Contract legislation, I am afraid that I am unable to accede to Mr. Paris' argument that I should look to see whether it would be unconscionable for Mr. Brown to go back on the Form of Acceptance and to say he is not bound by it. In fact, the arguments raised by both Mr. Brown's and NEM's lawyers having to do with estoppel are unnecessary and inapplicable, since this is not a matter requiring equity to step in. The common law of contract and discharge by agreement operates in this case because there has been both accord and satisfaction and full consideration has been provided in relation to the discharge of NEM from any obligations under the insurance policy –see **Anson's Law of Contract** 28th Edition, Chapter 13 "Discharge by Agreement" pages 516-519, and **Halsbury's Laws of England** (Volume 9(1) Re-issue), paragraph 1031. Further, whilst it may be odd that the value which was used for the period 2009-2010, which was subsequent to the claim, was $22,100,000, (as opposed to the $27, 971,500 value, nearly $28,000,000 used by Crawford in January 2009 for assessing the claim), that cannot affect retrospectively the fact that accord and satisfaction have already occurred.

40. In this case, there has been no pleading of the very limited grounds upon which a contract can be held invalid or upon which an agreement can be vitiated, for example material non-disclosure, undue influence or mistake.

41. Even if I am wrong in my finding that there has been accord and satisfaction, release and discharge, and if Mr. Brown is at liberty to revert to, and attach weight to the term "subject to the terms and conditions of the policy", it is hopeless to argue that the Policy does not contain an Under-Insurance Average Clause. Condition 17 is plainly such a clause and it is contained in the Policy exhibited to Mr. Brown's own Particulars of Claim. Indeed in paragraph 11 of the Particulars of Claim, it is difficult to see how reference to material terms such as "subject to the conditions and stipulations overleaf, or otherwise expressed hereon, which are to be taken as part hereof" could have been left out in examining the parameters of what was agreed under the subject Policy. This term means that NEM's liability under the subject Policy was not absolute, but was curtailed by provisions, including Condition 17.

42. Further, and in any event, even if the policy did not include a provision for the application of the average formula, which I have held it clearly has, I agree with Miss Wignall and Mrs. Madourie, Counsel for NEM that the decision in **Kyle Bay Ltd. (t/a Astons Nightclub v. Underwriters** demonstrates that the Form of Acceptance would still be binding on Mr. Brown. In **Kyle Bay Ltd.,** the claimant operated a night club. Its broker, T, had requested business interruption cover from the defendant's agent, SK, on a non-average declaration linked basis. A serious fire occurred at the club and the claimant made a claim for compensation for business interruption. The claimant and the defendant appointed loss adjusters and the claim was settled on the erroneous basis that the policy was not declaration linked, but was on the gross profits basis and was accordingly subject to average. On the gross profit basis the policy would state a figure for the gross annual profit. If that figure is less than the actual profit which has been lost, average is applied and the sum paid out is appropriately reduced. This average formula would not be applicable to a declaration linked policy.

43. The claimant agreed with the defendant to settle the claim in the sum of

£205,500, due to the application of an average formula. If the settlement basis had been carried out on a declaration linked formula the claimant would have been entitled to receive £100,000 more. It was argued on the claimant's behalf that the policy did not have a provision for the application of an average formula and the result of this would be that the settlement was based on a common mistake and/or assumption by the defendant that average applied. The claimant accordingly argued that he was not bound by the settlement.

44. The English Court of Appeal held that in order to vitiate the settlement contract the mistake had to render the subject matter of the settlement agreement essentially and radically different from the subject matter which the parties believed to exist. It was found that whilst there was difference which could certainly be characterised as "significant", it did not qualify for the label "essentially and radically different". The fact that the claim was settled on an erroneous belief that average applied was not a sufficient basis upon which to set aside the agreement.

45. Applying that reasoning to the instant facts, Mr. Brown intended to settle a claim for damage to his property due to fire and that is what occurred. The basis on which the loss is quantified would not have radically altered what the parties had intended to do, even if it could arguably have been characterised as significant. However, this submission was only a fall-back position for NEM as they have argued, and I have held, that the contract of insurance clearly contained provision for the application of the Under-Insurance "Average" clause. In any event, Miss Wignall's submission was correct that in the instant case "Mistake" was not pleaded. Hence, assessment of whether the difference in subject matter of the settlement is essentially or radically different does not arise.

46. Earlier in this judgment I indicated that I would not grant the amendment sought by Mr. Brown at this eleventh hour to add a claim under section 120(1) of the Insurance Act. In my view, it would not have been just or fair to NEM to grant the amendment. For completeness, I would just add that such an amendment would have served no useful purpose in any event as any claim under this head would have been fanciful and fishing. Section 120(1) states:

"*Disclosure of pro rata condition of average*

120-(1) Where a contract of insurance contains a *pro rata* condition of average,

The condition is of no effect unless, before the contract is entered into, the insurer informs the insured in the prescribed manner of the nature and effect of the condition."

47. It is not in dispute that the Proposal Form, which was executed by Mr. Brown prior to the initial entry into a contract of insurance in 2003, contained a notice in red setting out the terms of one of the standard conditions in the policy to be issued, i.e. the Under-Insurance 'Average" Clause. Immediately after this Notice follows the words:

> "PROPERTY TO BE INSURED
>
> (For your FULL PROTECTION the FULL VALUE of the property must be insured)".

At the foot of the Proposal Form the following words of incorporation also appear, as well as what is called a "basis for contract" clause:

> "I/We warrant that the above answers are true and correct to the best of my/our knowledge and belief. I/We desire to effect an Insurance with the Company in the terms, conditions and exceptions of the Policy to be issued by the Company. I/We agree that this proposal shall form the basis of the Contract between me/us and the Company, and shall be deemed as incorporated in the Policy to be issued. ".

48. It is therefore manifest that NEM did inform the insured of the nature and effect of the condition-("the insured shall be considered as being his own insurer for the difference, and shall bear a rateable proportion of the loss accordingly"). I do not agree with Mr. Paris that although there is notification of an average clause and its effect, the insurer failed to state an average formula. The nature and effect of the condition is clearly stated in the words used and there is no need to say, for example, "the following is the average formula: the ratio between the sum insured and the actual replacement value of the property, multiplied by the adjusted cost of repairs", which was one of Mr. Paris' complaints.

49. Mr. Brown, by executing the basis of contract clause which appears at the foot of the proposal Form, signified his agreement that the Under-Insurance Clause contained in the Proposal Form formed the basis of the contract between himself and NEM and he was therefore bound by the application of this provision.

50. In all the circumstances, the answer to the legal question to be determined first, is that Mr. Brown is not entitled to, and is not at liberty to pursue a claim for relief under the subject Policy of Insurance No. 02 FAP 1210138. This is because the Form of Acceptance dated the 5th of January 2009 represented an offer on Mr. Brown's part to NEM to accept the sum of Six Million & Fifty-Six Thousand Five Hundred & Thirty Eight Dollars set out in the Form in full and final satisfaction of his claim under the subject Policy in respect of loss and damage to the insured property as a consequence of a fire which occurred on the 30th September 2008. That offer was accepted by NEM and Mr. Brown has been paid the entire settlement sum. There has therefore been Accord and Satisfaction and the original cause of action under the Policy has been extinguished.

51. The Claimant's claim on the Fixed Date Claim Form filed September 30 2009 is dismissed, and judgment is entered for the Defendant NEM, with costs to be taxed if not agreed.