IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

SUITS NOS. C.L. 1769 of 1973 and
C.L. 156 of 1974

BETWEEN	Chez Franchot Limited	Plaintiff
AND	Halifax Insurance Company Limited et al	Defendants
AND	Chez Franchot Limited v. Fletcher & Company Insurance Brokers Limited	

Tried 1976 May 10 - 13
Nov. 1 - 5

1977 Mar. 14 - 17
Nov. 14 - 18

D. Muirhead, Q.C. & W. K. Chin See for plaintiff

R. N. A. Henriques for Halifax Insurance Company and ten other named insurance companies

Dr. L. G. Barnett & W. Scholefield for Fletcher & Company.

April 26, 1978

Parnell, J.

This is a claim under a policy of insurance dated January 11, 1973, made between the plaintiff and a number of insurance companies. There are eleven insurance companies involved with the Halifax Insurance Company leading the team with 15% of the risk involved.

The defendant Fletcher & Company Insurance Brokers Limited acted as brokers in effecting the policy of insurance. Under the policy of insurance, the defendants agreed to insure the plaintiff against loss or damage by fire. On April 1, 1973, whilst the policy was in force, the stock, materials, fittings and equipment on the plaintiff's insured premises at 71, Orange Street, Kingston were destroyed by fire. In May 1973, the plaintiff delivered a claim in respect of the loss he suffered. The defendants have resisted the claim on the main ground that there was a failure on the part of the plaintiff to disclose certain material facts in or about the making of the policy of insurance.

In the case against Fletcher and Company Insurance Brokers Limited (hereinafter referred to as F&C), the plaintiff has alleged negligence and breach of duty in the filling up of a proposal form dated November 17, 1972 and which formed the basis of the insurance contract between the plaintiff and the defendants.

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The case lasted for 18 days over a period of about 18 months. And it was ably conducted and argued by the counsel engaged for the interested parties. In the mass of material put before me and in the volume of some ingenious arguments which I had the opportunity of listening to with the exercise of restraint and understanding, I find that there are only three main questions involved in this matter. And they are as follows:

(1) Was there a non-disclosure of a material fact to the defendants in the making of the insurance policy?

(2) Assuming the answer is "yes", did F&C in anyway, contribute towards the non-disclosure?

(3) Where a fire insurance is taken out by a limited liability company consisting of two directors - as is the case of the plaintiff - is the previous claims history of each individual director a material factor to be disclosed or can protection against non-disclosure be safe-guarded behind the veil of incorporation?

Questions 1 and 2 above depend on findings of fact. With regard to question 3, it involves a question of law. It is not out of disrespect, therefore, to the exertions and industry of counsel if I treat as irrelevant some of the material and authorities introduced and cited during the hearing. I am reminded of the words of a famous Lord of Appeal in Ordinary. Lord Macnaghten said this in Farquharson Bros. v. King & Co. [1900-3] A.E.R. Rep. 120 at 124:

> "But the case is peculiar in one point of view. I cannot remember any case in which the wealth of learning and argument was so far beyond the value of the poor and common-place material on which it has been expended."

Before I examine certain areas in the case which I regard as relevant, I shall cite condition No. 1 of the Policy of Insurance under which the claim is founded.

> "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 Insurers shall not be liable upon the Policy so far as it relates to property affected by any such misdescription, misrepresentation or omission."

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The condition abovementioned is founded on the well known principle that good faith is the basis of a contract of insurance and that an assured is under a duty to make full disclosure of all material facts which would influence the judgment of a prudent insurer. The insurer must be put in a position to decide whether he will accept the risk and if he so decides, at what premium the risk will be taken. And if the insurer is not put in a position freely to decide on the points outlined, he is free to reject any claim based under a policy issued to an assured who is guilty of non-disclosure at the time the contract was made or renewed.

A limited liability company is formed

The plaintiff company was incorporated on March 13, 1971 with registered office at 71, Orange Street, Kingston. It is a private company carrying on a dry goods business with two directors, Mr. Anis Hadeed and Mr. Franchot Seaga. Both gentlemen are brothers-in-law. They have long experience in the operation of a commercial business. In the case of Mr. Seaga, he once operated a shoe factory at 47 Luke Lane, Kingston and a garment factory at Luke Lane and Barry Street. Mr. Hadeed joined his brother-in-law in business at 71, Orange Street in 1970 and in March 1971, they formed a company.

Mr. Hadeed has had about 27 years' experience in the dry goods business. He spent 10 years doing business in Trinidad and has had about 17 years' experience in Jamaica. In answer to a question which the Court asked, Mr. Hadeed said:

> "I was always covered by fire and burglary insurance in Jamaica and in Trinidad."

Mr. Hadeed was educated in Syria. He attended Beirut University but did not pass any examination. He said that he was educated in Arabic. The english language was not taught but he can expalin himself in english though not very well. On the sixth day of the trial and during the cross-examination of Dr. Barnett, Mr. Hadeed was questioned as follows:

Q. In 1971, did you know that an insurance company in doing business, it is important to know whether the person to be covered is or is not experienced in doing the business to be insured?

A. Yes.

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Claims experience of Mr. Seaga and
Mr. Hadeed when personally treated

While doing business on his own, Mr. Seaga had two claims under a fire policy. It was proved that the first claim he made was in April 1967 in respect of his business at 47, Luke Lane. In cross-examination he admitted receiving about $4,500 under the claim. The second claim was in respect of a factory fire at 4, Beckford Street. A sum of about $16,000 was received by him. With regard to this claim, the adjusters appointed by the insurance company were Messrs. Graham Miller and Company of Jamaica.

There are some businessmen who have good memories. From their memory table they are prepared to cite facts and figures in order to prove a point. Graham Miller and Company of Jamaica have played a part in the early stages of the investigation leading towards an adjustment of the claim before the Court.

Hadeed's claim history

In the 17 years that Mr. Hadeed has been in business in Jamaica he has been engaged in the following:

(1) He operated a business at 73, Orange Street, Kingston under the name of A & S Hadeed. This started between 1957-1958.

(2) A branch of A. S. Hadeed was established at Balaclava in St. Elizabeth.

(3) In 1969, he started a manufacturing business upstairs 71, Orange Street under the business name of "Premier Fashion." A partner in that business caused his leaving the operation. He could not get along well with his business associate and he sold out his interest.

(4) In 1971, he joined Mr. Seaga and Chez Franchot Ltd. came into being.

A fire claim in respect of his business at Balaclava was settled - according to him - in the sum of about $5,000. The original claim was for $8,000. But there was a claim for a fire damage sustained at 73, Orange Street. The risk was shared by at least three insurance companies. In respect of this loss, Mr. Hadeed received approximately $170,000 in 1968.

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Chez Franchot Ltd. seeks insurance cover

Halifax Insurance Company is represented in Jamaica by Fletcher and Company Ltd. The latter company acts as agent and attorney for Halifax. Fletcher and Company (Insurance Brokers) Ltd. is a subsidiary of Fletcher and Company Ltd. Mr. David Fletcher is a director of both companies. The main office of both companies is in Montego Bay and Mr. Fletcher is based there. A branch office has been established in Kingston. The Kingston branch is operated by Mr. William Wanless, a director of the brokerage company. Mr. James Pawson, is the assistant branch manager.

Mr. Fletcher and Mr. Franchot Seaga are not strangers. At one time Mr. Seaga owned a stable at Caymanas Park Race Track. And Mr. Fletcher was a breeder of race horses at "Spot Valley Farm" in St. James. Mr. Seaga used to visit the breeding farm of Mr. Fletcher. He purchased young colts for his stable. The insurance for the stable and the horses was placed with the "Fletcher Company" of which - according to Mr. Seaga - Mr. Fletcher was the "boss."

Chez Franchot Ltd. carried a fire insurance with Central Fire Insurance Company which was to expire sometime between November 18 and November 20, 1972. Mr. Seaga has maintained that he and Mr. Fletcher used to have lunch together on occasions. This would take place when Mr. Fletcher was on a visit to Kingston. And on one of these dates, he having informed Mr. Fletcher that Central Fire Insurance Company insured the company's business, he Mr. Seaga was advised that the insurer was on the verge of bankruptcy. On hearing of this Mr. Seaga said he was disturbed and he offered the business of insurance to Mr. Fletcher.

Bad risk is to be shared

From the outset, Mr. Fletcher told Mr. Seaga that in the insurance field there was a certain area in Kingston which was considered as a "bad risk." The area covered North Street down Orange Street and then to the sea. The line then extends to Western Kingston. Any insurance risk for the business would have to spread. The term "spreading" was explained by Mr. Fletcher whereupon, according to Mr. Seaga he said this to Mr. Fletcher -

> "David I have had two claims and Anis had two claims."

Mr. Fletcher's reply - according to Mr. Seaga - was "this did not matter." And

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when Mr. Seaga was cross-examined by Dr. Barnett on this aspect of his evidence, he said that he did not know what Mr. Fletcher meant when he said that "the two claims for me and the two for Anis" did not matter.

No proposal form was executed by Mr. Seaga on the luncheon date. It was not Mr. Fletcher who took the proposal forms to the business place of Franchot Seaga Ltd. The examination of the premises at 71, Orange Street, the viewing of the stock and the filling up of the proposal forms were done by either Mr. Pawson or Mr. Wanless or by both together. A lot of time and energy was expended at the trial with regard to what part was played by four men, Mr. Seaga and Mr. Hadeed for the plaintiff and Mr. Pawson and Mr. Wanless for the brokers in the inspection of the stock and premises, and in the questioning and the supplying of information for the purpose of effecting the fire insurance for and on behalf of the company.

I do not intend to traverse most of this arid dispute nor do I find it necessary to make any findings on some of the side issues which were raised. What is not in dispute may be stated briefly as follows:

(1) Particulars for effecting a proposal were given on November 17, 1972.

(2) Mr. Anis Hadeed signed the form on behalf of the plaintiff.

(3) Mr. Pawson filled up the form; he did the questioning and Mr. Hadeed supplied the answers.

(4) The stock was insured for $190,000 while the fixtures and equipment were insured for $10,000.

(5) With effect from February 14, 1973 the total sum insured was increased from $200,000 to $220,000.

Area of dispute outlined

On the proposal forms, there are two questions which are important. The answers allegedly given by Mr. Hadeed to these questions or alternatively the information which in fact he supplied formed the basis of lively cross-examination and the spring board for ingenious legal objections and arguments at the trial. The two questions are as follows:

..../7

	Questions	Answers
A.	"Has applicant ever sustained an insurance loss? If so, give particulars."	"Yes. Adjoining building (old) burnt 1969 - $24,000" (Note: The figure $24,000 was later amended to read $14,000. How this came about will be referred to in due course).
B.	"Is there any other fact, knowledge or circumstance to be known for estimating the risk?"	"See details."

What is not seriously disputed is that on the 17th November, 1972, Mr. Pawson was supplied with information to the effect that Chez Franchot suffered damage in early 1971 as a result of smoke from a fire which took place in an adjoining building. This "smoke damage" was put at about two to three thousand dollars. When Mr. Pawson tried to spread the risk, he informed the insurers by letter what brought about the smoke damage claim. The evidence given by Mr. Pawson how this came about is this. He said that the answer first given by Mr. Hadeed to the second question (above mentioned) was "no." However, when the smoke damage claim was explained to him, he concluded that as he did not have sufficient space on the proposal form to explain the details, he put on the form "see details" and gave the details in a letter.

This is the second paragraph of a letter dated November 27, 1972 and addressed to Phoenix of Jamaica Assurance Ltd. one of the defendants herein.

> "We understand that there was a claim in 1971 (early part) when smoke from a small fire on the adjacent spare ground penetrated through the rear of the shop which was then open. The rear has been closed up completely and access can only be gained from the front. We also understand that the adjacent spare ground was originally filled by a building of substandard construction which was razed some years ago."

The voluminous details could not be accommodated in the limited space shown on the form. Explaining the whole thing in a separate document was the only prudent thing to do.

The cover note issued to Mr. Seaga is dated 27th November, 1972. Mr. Pawson took the cover note to 71½ Orange Street. And on this occasion there was a discussion between him and Mr. Hadeed concerning the insurance loss of $24,000 which Mr. Hadeed is said to have suffered in 1969 and which appears

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on the original proposal form. This original form had been despatched to Montego Bay but a copy was kept by Mr. Pawson. The evidence of Mr. Pawson - which I accept - is that Mr. Hadeed quoted a figure which he understood to mean that Mr. Hadeed's claim history in 1969 was not $24,000 but $14,000. As a result, the figure of $24,000 appearing on the copy of the proposal form was altered to read $14,000. It was not necessary to notify the insurance companies of the change since a better claim history was disclosed by the alteration. I reject the evidence of Mr. Hadeed on this aspect of the case when he said under the cross-examination of Dr. Barnett:

> "At no stage did I tell Mr. Pawson about a claim for $14,000."

The proposal form with its information and answers given to the two questions above mentioned, shows that in 1969, Mr. Hadeed had a claim for fire damage amounting to $24,000. And as explained in a letter giving details, there was a smoke damage claim made in the early part of 1971 and which was estimated to be about two to three thousand dollars and probably not exceeding four thousand dollars. The proposal form was executed by Mr. Hadeed for the applicant company on the basis -

> "that the declaration shall be the basis of the insurance policy between the insurers and the applicant."

Since this is the position, then one is compelled to ask at the outset, what has happened to a declaration or disclosure concerning the admission of both Mr. Seaga and Mr. Hadeed that each while carrying on business on his own had sustained insurance losses to the extent which I have already enumerated?

Mr. Seaga's position examined

I have already mentioned that in evidence, Mr. Seaga said that when he discussed the question of fire insurance with Mr. David Fletcher he Seaga said:

> "David I have had two claims and Anis had two claims."

.../9

Mr. Fletcher was emphatic in denying this when he gave evidence in chief. Under the cross-examination however, of Mr. Muirhead, Mr. Fletcher was hesitant in answering questions and displayed signs of not being too sure when suggestions were put to him. Probably he was either over awed by the grandeur and solemnity of the court room - a spectacle not easily detected in the business world - or he was unable to cope with a careful and well directed questioning by counsel. I will record what my note shows of part of the scene:

> Q. "Did Mr. Seaga say to you that he had had two claims and Anis had had two?
>
> A. No. (in a feeble tone)
>
> Q. I suggest to you that he did?
>
> A. (After a pause, no answer given - witness nevertheless looks intently at counsel).
>
> Q. Would previous fire claims affect one's entitlement to better rates?
>
> A. Yes, Sir, (without hesitation)."

When Mr. Seaga was cross-examined by Mr. Henriques, he said this:

> "Mr. Fletcher never asked me about the details of Mr. Hadeed's claims. I did not give him any details of my two claims; he did not ask me and he said that it did not matter."

For the purposes of dealing with the legal aspect of the claim, I will assume without deciding that Mr. Seaga's evidence on this part of the case is to be preferred.

A friendly chat between two friends over a drink or lunch is being used as a moment of serious contemplation when "facts" were disclosed which would affect the minds of about eleven insurance companies which were not yet identified on the day in question. What the details of the previous claims entailed, were not disclosed to Mr. Fletcher. However clever and transcendental he may be regarded in the insurance field, he is not a prophet who can reach the inner recesses of the mind of a businessman. What was the information which it is seriously being contended was known by Mr. Fletcher about four undetailed claims? The answer must be none. So that even if Mr. Fletcher is to be regarded as the agent of either Fletcher and Company (Insurance Brokers) Ltd. or the agent of all the Insurance Companies on the date when no proposal form

.../10

was executed by the plaintiff company - a proposition which I doubt - the assumption which I have made in favour of Mr. Seaga's evidence cannot avail the plaintiff.

In a fire insurance claim - as in any other claim under a policy of insurance - the assured may show that the facts not disclosed, were known and present to the minds of the insurers when the risk was accepted. Every proposal which is accepted forms the basis of a new contract. If an insurer once had knowledge of certain facts, the assured cannot say that those facts should be remembered by the insurer if he fails to disclose them at a later date however long, when he seeks a fresh policy of insurance. The point is summed up as follows at paragraph 208, p.115 of Halsbury's Laws of England, 3rd Edition, vol.22:

> "The assured cannot excuse his omission to communicate a material fact on the ground that it had previously come to the knowledge of the underwriter, unless at the time when the contract was made the fact was present to the mind of the underwriter."

Mr. Hadeed's position examined

The evidence of Mr. Hadeed is to the effect that on November 17, 1972, Mr. Pawson and Mr. Wanless visited 71, Orange Street. Mr. Seaga inquired whether Mr. Fletcher had informed them of the conversation which he had with Mr. Fletcher about the insurance. Their reply was "yes." After a brief dialogue, Mr. Seaga was called away by a customer and so he Mr. Hadeed answered the questions asked by the gentlemen of whom Mr. Pawson was the chief questioner.

Dealing with previous insurance claims, Mr. Hadeed indicated that questions were asked along the following lines:

(1) How much stock do you have to insure?

(2) Have you ever had any claim or fire before?

(3) Did Chez Franchot Ltd.ever have any claim before?

With regard to question 2 above, Mr. Hadeed said he mentioned receiving $24,000 from Phoenix Insurance Company and he intended disclosing how much he got from two other companies, namely, Motor Owners Mutual and R. S. Gamble but he was discouraged or prevented from answering by Mr. Pawson. According to him, Mr. Pawson inquired whether the claim was by Chez Franchot Ltd. The answer was that

.../11

it was Hadeed Ltd.which made the claim whereupon Mr. Pawson used words:

> "I am not concerned with Hadeed Ltd. or Anis Hadeed or Franchot Seaga but with Chez Franchot Ltd. alone."

With regard to question 3, the answer was "yes" and he gave particulars of the "smoke damage claim" to which I have referred earlier in the judgment. Mr. Hadeed has maintained that the last question on the proposal form was not asked at all. The question to which reference has already been made is here repeated:

> "Is there any other fact, knowledge or circumstance to be known for estimating the risk?"

To the Court, Mr. Hadeed said this:

> "I do not know what the last question means."
>
> Q. "Can you think of anything as a businessman what it could be referring to?
>
> A. I do not know the meaning of it."

It is accepted that Mr. Pawson filled up the proposal form. However, Mr. Hadeed said that Pawson did not tell him what he had written. This seems to follow from his evidence: that whereas the words "see details" appear on the proposal form as the answer to the last question above mentioned and whereas in fact the details in a letter to some of the insurance companies about "the smoke damage" are correct, nevertheless no question was asked in the form of the last question. And even if the question was asked in that form, it was not known to what it could be referring.

In the cross-examination of Dr. Barnett, Mr. Hadeed said this:

> "I always trust my broker. I always have faith in my broker. I never question him. I just sign."

And in chief, he was questioned as follows by Mr. Muirhead:

> Q. "Did you read the form?
>
> A. No, Sir.
>
> Q. Did either of them ask you to read the form?
>
> A. No, Sir.
>
> Q. Did either read the form to you?
>
> A. No, Sir."

Mr. Hadeed carried on a partnership business as A. S. Hadeed and then converted the partnership into a limited liability company under the name of A. S. Hadeed Ltd. This was in 1966. He was married in 1959.

..../12

Chez Franchot Ltd. was a partnership business when Mr. Hadeed joined the firm. On the advice of the firm's accountant, the partnership was converted into a limited liability company. When the "smoke damage claim" was made in early 1971, it was made by the partnership of Chez Franchot and not by Chez Franchot Ltd.

> Was the claim history of both Seaga and Hadeed in whatever capacity important and material?

The legal position as to materiality is summed up thus in MacGillivray on Insurance Law, 2nd Edition at page 453:

> "It is for the Court to rule as a matter of law whether the fact in question could be material. It is for the jury or for a Judge sitting as a jury to determine as a matter of fact upon the evidence whether the fact in question was material."

In considering this question, the Court should not ignore the general practice of insurers. There are many trades, occupations and enterprises which are guided by certain practices among their members. Any Court which ignores the views or opinions of a credible and experienced member touching the practice existing which is relevant to an issue before it, would be setting a course for committing an error in a matter where some enlightenment could be useful. For example, in a case where a claim was made under a policy of insurance, it was contended by the defendant that the assured had failed to disclose that he was in the habit of taking drugs and that he once suffered from an overdose of veronal. At the trial, McCardie, J. admitted examination and cross-examination of medical witnesses directed to two questions, namely:

(1) Is it material for an insurance company to know of a veronal habit or of insomnia trouble on the part of the proposer?

(2) Is illness following upon the overdose of veronal a matter of consequence?

(See Yorke v. Yorkshire Insurance /1918/ 1 K.B. 662.

When Mr. Fletcher, a veteran in the insurance business was cross-examined by Mr. Muirhead, he was asked this question:

Q. "In an application by a limited liability company are your agents required to obtain from all the directors their personal claim's history?

A. The instructions to the agents are that they should obtain all material facts necessary to underwrite the risk."

..../13

/12

Mr. Henriques in cross-examination put this question to Mr. Fletcher:

> Q. "If the insured had a previous loss of $168,000 would you consider this of importance to be known by the insurance company?
>
> A. Yes, Sir."

Mr. Pawson, a qualified insurance executive with 13 years experience made the following points during his evidence.

(1) He filled up the proposal form after getting answers to his questions.

(2) He had visited 71, Orange Street in June 1971 in connection with insurance coverage for Mr. Seaga's livestock.

(3) He visited the said premises on November 17, 1972 in connection with the fire insurance and there he saw both Mr. Seaga and Mr. Hadeed.

(4) He obtained information from both gentlemen and in particular, Mr. Seaga told him of $2,000 "smoke damage claim" while Mr. Hadeed told him of a claim of $24,000 made in 1969 which was subsequently corrected to read $14,000.

(5) That on November 27, 1972, he returned to the premises but on this occasion he took a blank proposal form which Mr. Hadeed assisted him in completing. On this occasion Mr. Seaga was not at the premises. The last question on the proposal form was explained to Mr. Hadeed. It was made clear that the question related to all previous insurance losses incurred or claims made by both Mr. Seaga and himself.

What I gather from the evidence of Mr. Pawson is that on his first visit on November 17, he got relevant information from both Mr. Seaga and Mr. Hadeed and he then returned to his office. A measure of exploration was then made with a view to placing 80% of the risk in Jamaica. This was done by his phoning several insurance companies in Jamaica. The response was favourable and he then phoned Mr. Seaga and told him of the result of his exploration. I gather further from Mr. Pawson that having obtained a provisional placing of 80% of the risk locally there would have been no problem in placing the remainder on the London market. The cover note dated November 27, 1972, was delivered on

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that date but in fact the proposal form was not completed and signed until that day when he wrote letters to some of the local insurance companies advising them of the true position as he understood it.

Mr. Pawson was firmly of the opinion that if he was informed of all the admitted claims history of Mr. Seaga and Mr. Hadeed, it would have been impossible for him to have placed the risk. And in particular he said this in relation to Mr. Hadeed's history:

> "If I had known that the previous claim was $24,000, I would have immediately informed all the insurance companies. If I had been advised of a previous claim in excess of $160,000, I would not have been able to place the risk."

Mr. Donovan DePass, an insurance executive of 20 years experience is the managing director of Tropical Insurance Ltd. His company is the agent and attorney in Jamaica for Insurance Company of North America one of the defendants in this action. Mr. DePass was asked this question in cross-examination:

> Q. "In considering whether or not you would accept the risk of a small company where the directors and shareholders are the same and they also manage the business, is the previous claims history of the directors in an individual capacity important to you in assisting the risk?
>
> A. Yes, Sir."

Mr. DePass said that if he was aware of a claim in 1968 totalling $168,000 by one of the directors, he would not have considered the 10% risk which his company accepted under the policy.

Another insurance executive Mr. William Wanless with 19 years experience was questioned about the practice in his field where the managing director of a small company has a previous claims history when he was trading on his own. In cross-examination, Mr. Henriques put the following question:

> Q. "As a matter of practice, if you seek to place insurance on behalf of a small company consisting of two shareholders who are also the managing working directors, would their individual previous claims history be important in determining whether or not you could obtain coverage for the business?
>
> A. This information is absolutely essential."

..../15.

Summary as to a practice in effecting insurance

For the defence, four witnesses have attempted to outline a practice which obtains in the insurance business in Jamaica where a small trading company seeks a fire insurance coverage. And I understand the practice to be this: it is important for a broker to know the individual insurance claims history of each and every working director of a small company which is the proposer for a fire insurance policy. The information is necessary so that the insurers may be informed of the position and to allow them to decide whether they will accept the risk at all and on what terms if they do. For the plaintiff, no evidence was forthcoming to contradict, vary or qualify the evidence touching the practice in question. What was put forward was a legal argument based on the famous case of Salomon v. Salomon /1897/ A.C. 22 followed with a discussion of some authorities. I shall refer to the submissions hereafter.

Certain developments after the fire

After the fire on April 1, 1973, there was a lot of correspondence which passed between the brokers, the insurance companies, the adjusters and the assured. The object was to arrive at an amicable settlement of the claim. Mr. Wanless played an important part in the correspondence. On July 11, 1973, he addressed the following letter to Mr. Seaga:

"Dear Mr. Seaga,

Re: Fire loss 31st March/1st April,1973

I refer to our telephone conversation and have pleasure in confirming that following investigations by the Loss Adjusters the Leading Office confirms that your claim has been accepted under the Policy. A report from the Loss Adjusters should be in your hands later in the week and it is hoped that an interim payment will be paid shortly pending settlement of final claim details. I confidently expect the final loss to be well in excess of $100,000."

It was Brutus in Julius Caesar (Act 4, scene 3) who said:

"There is a tide in the affairs of men, which, taken at the flood, leads on to fortune."

And there was a change in the tide when Graham Miller and Company of Jamaica were appointed Attorneys for the Halifax Insurance Company with regard to the fire claim of the plaintiff. As I have already mentioned, the adjusters in one

..../16

of Mr. Seaga's claims history were Graham Miller and Company. And having been brought into the picture, it seems that the memory of the adjusters was not slippery. On the 7th September, 1973, they wrote a letter to the plaintiff on behalf of Halifax Insurance Company. The second and third paragraphs were in these terms:

> " As you have no doubt been advised by your Brokers, information has recently come to the notice of co-insurers which had led them to seek legal advice as to the validity of the insurance contract.
>
> In view of this, it does perhaps go without saying that we must formally repudiate the information given to you in the Broker's letter of July 11, 1973."

The Brokers were advised in writing on August 30, 1973, that a meeting of the co-insurers would meet on September 5, 1973 and among the matters to be discussed would be:

> "to decide whether there had been, as it appeared to us, a material non-disclosure when the proposal form was completed."

Mr. Wanless, having been advised of this stand, summoned a meeting which was attended by Mr. Seaga and his solicitor. Mr. Hadeed was also contacted. The object of all this was to allow both Mr. Seaga and Mr. Hadeed to make a clean breast of all past insurance claims by each of them. The case for the assured was put with emphasis in a letter to the co-insurers. The letter is dated September 3, and was written by Mr. Wanless. Three points in the letter struck me. They are as follows:

(1) Mr. Seaga appeared to have adopted a stance to the effect that Mr. David Fletcher knew about his (Seaga's) previous record; and

(2) That the "fires" on which the past claims were made had no relevance to the present claim.

(3) There is no evidence that the $160,000 fire claim of Mr. Hadeed was divulged and not one iota of any suggestion that a full disclosure of previous claims would have been made when the proposal form was executed but for the action of Mr. Pawson who either advised against it or prevented Mr. Hadeed from detailing them. When the attorney of the plaintiff came into the arena, he wrote letters to the Brokers and to the adjusters. Here again, I can find no suggestion or

any remote hint that in the supplying of information for the proposal, the following in fact took place; namely:

(a) Relevant details concerning previous claims were given or offered which the brokers refused to note or advised against their disclosure.

(b) The directors of the company were misled or wrongly advised by the agent of the brokers in or about the completion of the proposal form.

I am, therefore, asked to conclude that a practice which I find is observed in Jamaica by insurance brokers and by insurance companies was totally ignored on the occasion when the proposal form in this case was executed. On the oral and documentary evidence, I find without any hesitation that with regard to previous claims the only disclosures made to the brokers when their representatives filled up the proposal form are those shown on the form and that at no time did Mr. Hadeed disclose or attempt to disclose, any other previous claim by himself.

I shall now turn to an aspect of the plaintiff's case which Mr. Muirhead urged with a certain amount of amiability and eloquence. The argument can be reduced to the following points:

(1) Full disclosure would have been made of all previous claims of the directors in their personal capacity but for the negligent advice of the broker's representative that what was necessary was the history of Chez Franchot Ltd. as an entity;

(2) Even if full disclosure of all the previous claims of each individual director was not made, this was not in law necessary because the real applicant was an incorporated person which is separate and apart from the persons comprising it.

With regard to (1), I have rejected it. This is a question of fact. In the case of (2), if this proposition is sound it means that if A and B have been refused insurance coverage as merchants and if each has had about ten

..../18

previous claims under a fire policy, all these facts may be suppressed in an application for insurance once they form themselves into a private company with each as a director. Such a situation is so startling and is so pregnant with mischief that one is bound to examine the authorities cited with a view to ascertaining whether common sense has been allowed to run wild in this area of the law.

Mr. Muirhead referred to Davies v. National Fire and Marine Ins. /1891/A.C. 485; 65 L.T. 560 (P.C.). In that case there was a claim under two policies, one of fire insurance and another of marine insurance. The action was brought by two gentlemen Davies and Phillips who carried on business at Sydney in the name of Messrs. Charles Davies & Co. The written proposal for the fire policy was signed by the plaintiff Davies, with the name of the firm Charles Davies & Co. Two questions on the forms were as follows:

(1) "Has risk been declined by any other office?"

(2) "Has proponent ever been a claimant on a fire insurance company, if so, state when and name of office?"

To each of these, answer "no" was written. The proposal form was written up by an insurance agent who got the information and particulars from Davies. The insurance company resisted a claim under the policy on the ground that the proposal contained two untrue statements. And in particular, the insurance company relied on claims made by Mr. Phillips against other companies before the partnership of Charles Davies and Co. was formed.

At the trial before a judge and jury at Sydney, the jury found that Davies did not state the two negatives to the questions aforementioned and they gave a verdict for the plaintiff. On a motion for a new trial, the court sustained the judgment on the footing that the answers were those of Davies. A detailed examination of the history of the claim is then made. The court took the view that the proponent was in fact Charles Davies and Co. and that the claims made by Phillips, when not a member of that firm, were not covered by the question and therefore, the answer was not untrue.

The case of Davies v. National Fire and Marine Insurance may be distinguished from the one before me as follows:

(a) There were special facts in the case and the jury at first gave a specific finding in favour of the plaintiff with [illegible]

(b) The two main questions under review in this case are differently worded from those in the case of Davies.

(c) The assertor Hadeed appreciated the importance of his divulging his own personal previous claims by quoting a global figure which was altered. However, what was stated was not all.

(d) The last question on the proposal form is so framed and is so wide that it has a sweeping movement of all other claims or other material matter not previously divulged. In the case of Davies there was no such sweeping-up clause in the proposal form to apprehend the prior claim of Mr. Phillips.

In Glicksman v. Lancashire & General Ass. Company /1925/ 2 K.B. 593; /1926/ All E.R. Rep. 161, an insurance company issued a policy of insurance against burglary to the appellant and one R. The appellant and R were partners in a tailoring business. During the currency of the policy, the partnership was dissolved and R went to America. The policy continued to run for the sole benefit of the appellant. A burglary took place and a claim was made. The proposal form contained this question, namely:

> "Has any company declined to accept, or refused to renew, your burglary insurance, or increased your premium, or required special terms or additional precautions to be taken?"

To the above question, the appellant and R replied jointly as follows:

> "Yorkshire accepted, but proposers refused on account of fire proposal."

When the appellant was trading on his own, he was refused a burglary insurance by the Sun Insurance Company. Arising out of the burglary, the appellant made a claim which the insurance company refused to pay on the ground of misrepresentation in the proposal form. When the matter was referred to arbitration, the arbitrator decided in favour of the insurance company but the award was reversed by Roche, J. on the ground that there was no proof of any concealment inasmuch as the answer was made in the plural. This decision was reversed by a strong Court of Appeal and affirmed by a unanimous House of Lords. The case turned on a fair construction to be put on the question asked in the proposal form. But one Law Lord (Lord Atkinson) lamented that the question

...../20.

was not put "in clear and unambiguous language." See /1926/ All E.R. Rep.161 at 163. The learned Law Lord was of the view that if the question was put:

> "Did you two or either of you make an application to the Sun Insurance Co. for a policy against burglary?"

the whole case and all the expense would have been prevented. Mr. Murihead has joined in the bewailing and produced during the hearing a proposal form of a local insurance company in which the view of Lord Atkinson is demonstrated in one of the questions asked.

Owing to the industry of Mr. Henriques, two cases were brought to my attention which are relevant to the point raised by Mr. Murihead. In Arthrude Press Ltd. v. Eagle Star and British Dominions Insurance Company /1924/, 19 Lloyd's 373 (C.A.), one of the arguments propounded on behalf of the appellants has the same ringing sound as the one I have heard in support of the claim. The proposition in the Arthrude Press Case may be put as follows:

> "If a company makes a proposal by one of its directors, the questions put to the company did not relate to the conduct of the directors in their private capacity."

But this argument was rejected on the facts. Here again, the question whether a true or untrue answer was given to a particular inquiry, depends on the nature of what is required and the form in which the question is put.

In March Cabaret Club and Casino Ltd. v. London Assurance, /1975/ Vol. I Lloyd's Reports, 169, the plaintiffs were a private liability company in which S and his wife were the sole directors. The company was insured against loss or damage by fire. After the policy was issued, S was convicted of handling stolen goods. When the policy was renewed, S failed to disclose his conviction. The policy fell due for renewal on April 20, 1970. On June 14, 1969, S was arrested for handling stolen goods and on November 28, 1969, he was committed for trial. On June 22, 1970, he was convicted at the Central Criminal Court. The fire which caused the damage and loss occurred on November 21, 1970, almost five months after the conviction of S. A claim under the fire policy was resisted on the ground of non-disclosure of a material circumstance, that is, the conviction of S, a director of the company. In a very careful and detailed judgment, May, J. rejected the claim and referred to certain principles which guide a Court in hearing a claim under a fire policy. Pages 175-176 of the report contain a gold mine of good sense and clear guidelines.

..../21

Let me outline in my own words, what I understand the case to be saying:

(1) 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.

(2) It is a question of fact, whether if the matters concealed or misrepresented had been disclosed, they would, on a fair consideration of the evidence have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

(3) There is a presumption that matters dealt with in a proposal form are material but there is no corresponding presumption that matters not so dealt with are not material. To put it another way, whereas the proposal form generally shows the questions asked and answers given, it does not follow that other questions which are material for the insurer were not asked and were not answered,

(4) The moral integrity of the proposer or his moral hazard is a matter which is always considered by an insurance company. And since an incorporated entity neither has a body to be kicked nor a soul to be dealt with hereafter, the moral integrity of those in the top management is a material circumstance which should not be suppressed.

Role played by the brokers - agents of whom?

Mr. Muirhead has urged with vigour that the brokers (Fletcher & Company Insurance Brokers Ltd.) were acting as agents of the insurance companies or alternatively they were acting for the insurers and the applicants. He argued that if the Brokers were the agents of the insurers and were aware of the existence of claims which Mr. Hadeed was not allowed to disclose or in the case of Mr. Seaga, which were known to Mr. David Fletcher, then the insurers are estopped from seeking to rely on non-disclosure. Alternatively, they would be deemed to have waived the entitlement to the information sought. This argument has courage on its side but has no merit to support it.

Mr. Fletcher in cross-examination said that Mr. Pawson went to the applicant as a broker but he acted as the agent for Chez Franchot Ltd. In a recent case, Megaw, J., stated the legal position as follows :

> "Counsel for the defendants conceded that, in all matters relating to the placing of the insurance, the insurance broker is the agent of the assured, and of the assured only. I do not think that this proposition of law has ever been doubted amongst insurance brokers or insurers."
> See Anglo African Merchants v. Bayley, /1969/ 2 W.L.R. 686 at p. 694 E.

The reason why the broker cannot be regarded as the agent of both the proposer and the insurer is stated clearly by Scrutton, L.J. a great master of commercial law and a former professor of law in that subject at London University:

> "No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal.....unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment."
> See Fullwood v. Hurley /1928/ 1 K.B. 498 at 502.

A summary of the true position is put in these words in Halsbury's Laws of England, 3rd edition, Vol. 22, p. 201 at para. 382:

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

When one looks at the picture one finds that it is difficult to follow the logic of the argument that a man who fills up a proposal form on behalf of a proposer for submission to an insurance company is by that fact alone, an agent of the insurance company. When the proposal reaches the insurer, there is no duty to accept it. It may be rejected summarily. But a principal does not reject the act of his agent unless it is manifestly foreign to the scope of his employment or is contrary to the relationship of principal and agent. The result, therefore, must be that the man who assists the proposer in filling up the proposal form for the purpose of submission to an insurer is the agent of the proposer and of no other person. That part of the case of the plaintiff which is based on the proposition that the brokers in this case acted as agents of the insurance company must be rejected.

In concluding this judgment I must refer to a part of the evidence of Mr. Seaga. He was under the cross-examination of Mr. Henriques:

..../23.

> "When Chez Franchot Ltd. had its fire in April, 1973, there were about 30-32 fires taking place in that area within a period of about two weeks... .....the fires were all over the place in Kingston. It was a case of burning and looting."

Insurance men are men of business. There are many skilled entrepreneurs among them. They follow events which tend to affect their business. No one would be surprised if several of these men kept a chart in their offices to indicate the movement of fires and their consequences as indicated by Mr. Seaga. Before the momentum of 30-32 fires monthly was reached, there would have been signs which the insurance field followed that a particular part in the corporate area was sensitive and susceptible to conflagration with disturbing regularity. Every material circumstance therefore touching the operation of business in that area and its immediate environs would be of concern in considering whether a risk should be accepted and at what price. And in doing this, the veil of incorporation should be pierced where necessary so that a bird's eye view may be afforded to look at the actors individually who in turn have taken steps to cover themselves with the veil.

In my judgment, the plaintiff has failed in its claim against the insurance companies and in its action against the brokers. I shall reduce a long judgment into simple terms and state my reasons as follows:

(1) The insurers are entitled to repudiate the claim because they were not informed of all the claims history of both Mr. Seaga and Mr. Hadeed at the time of the submission of the proposal.

(2) What was not disclosed is material which could have influenced a reasonable insurer to decline the risk or to accept it at his price.

(3) The veil of incorporation cannot be used as a shield against the disclosure of the personal claims of the managing directors of a small trading company which seeks coverage. A company can only function through its management. Knowledge of the company must be equivalent to knowledge of its management personnel.

..../24

(4) Where a broker completes a proposal form, he is acting as the agent of the proposer. Any act or omission of the broker in this regard, is not the act or omission of the insurer.

(5) Mr. Pawson who completed the proposal form was never given at any time the particulars which were suppressed and which the insurers were entitled to know.

(6) Mr. David Fletcher was not told the particulars of any previous claim made by either Mr. Seaga or Mr. Hadeed. And even if he was aware that Mr. Seaga had made claims on his own behalf in the past - and I find that he did have knowledge of this - it was still the duty of both Mr. Seaga and Mr. Hadeed to divulge the particulars to the brokers when the coverage was being sought.

(7) It has not been shown that any representative of the brokers has done anything which has contributed towards the suppression of the material which should have been divulged. Neither Mr. Pawson nor Mr. Wanless has failed to record, note or disclosed any material matter or thing which the proposer outlined at the occasion, whatever the date when the proposal form was executed.

There must be judgment for the defendants with costs on each of the consolidated actions. Costs to be taxed if not agreed. ~~The costs payable on the second action will be limited to such as may be occasioned as a result of the order for consolidation.~~