[2013] JMSC Civ. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 03459

BETWEEN	**SURTON HARDING**	**CLAIMANT**
AND	**THE INSURANCE COMPANY OF THE WEST INDIES LIMITED**	**DEFENDANT**

Mr. Ruel Woolcock instructed by Ruel Woolcock & Company for the claimant.

Mr. Maurice Manning and Miss Arlene Williams instructed by Nunes Scholefield DeLeon & company for the defendant.

Heard: April 11, 12, 13, 2012 and March 20, 2013

INSURANCE LAW – AVOIDANCE OF POLICY BY INSURER – NON-DISCLOSURE

SIMMONS J

[1] This action arises out of the defendant's/ insurers' refusal to indemnify the claimant for damage to his property. The policy which was in force, provided coverage for damage by fire and other perils.

[2] The claimant is a businessman engaged in the manufacture of furniture. This business is situated at 32 Pelican Parade, Kingston 11 which is also his residence.

[3] On or about the 20th April, 2009 there was a fire at the said premises which resulted in damage to the claimant's dwelling house and its contents. A second building at the back of the premises which was used for the manufacture of furniture along with its contents was completely destroyed.

[4] The claimant notified the defendant of his loss orally through Guardian Insurance Brokers (the Broker) and on the 21st April 2009 submitted a written claim. The defendant has refused to honour the claim.

[5] On October 20, 2009 the claimant filed an action against the Defendant, the Insurance Company of the West Indies Limited in which he sought the following:

(i) A Declaration that a valid and enforceable Contract of Insurance exists between the Claimant and the Defendant in respect of:
    (a) The Claimant's house situated at 32 Pelican Parade, Kingston 11 in the parish of Saint Andrew and its contents; and
    (b) The Claimant's stock in trade situated at 32 Pelican Parade, Kingston 11 in the parish of Saint Andrew.

(ii) An Order that pursuant to the said Contract of Insurance the Defendant pays over to the Claimant the sum of $17,700,000.00 for the loss of the Claimant's said house, household contents and stock in trade which were destroyed by fire on the 20th day of April, 2009.

(iii) An Order that interest of 12% or such other interest as this Honourable Court deems just be paid upon the said sum from the 20th day of April 2009 to the date of payment.

(iv) The Costs of this application being $56,000.00 be paid by the Defendant to the Claimant.

[6] Mr. Harding also alleged in his pleadings that the Broker was the agent of the defendant.

[7] The defendant denied that the Broker was its agent and has stated that the said broker was the agent of the claimant. However, it has admitted that a claim was received from the claimant and that it refused to honour that claim.

[8] The defendant has alleged that the claimant breached the contract of insurance and in particular conditions 4 (a) and 8 (a).

The Particulars of the breach of contract are stated to be as follows:-

(a) Failing to take all reasonable precautions to prevent damage to the subject premises;

(b) Using the property in a manner that was manifestly unsafe and which increased the risk of damage by fire;

(c) Using the subject premises that was wired for residential use only for both commercial and residential use;

(d) Failing to ensure that the electrical wiring at the premises was suitable for both residential and commercial use;

(e) Failing to maintain the said property so as to prevent damage by fire.

[9] The defendant has also filed a counterclaim in which it seeks the following declarations:-

(a) That Defendant is entitled to avoid Fire and Special Perils Policy (Material Damage) of insurance number FF34-369244 issued in the name of the Claimant in respect of premises located at 32 Pelican Parade, Kingston 11 on the grounds that the said policy of insurance was obtained by the non-disclosure and/or misrepresentation of material facts;

(b) By virtue of the said avoidance of Policy the Claimant is not entitled to indemnity from the First Defendant.

[10] In its counterclaim the defendant has alleged that the claimant failed to disclose that the building was not properly wired and that the electricity had been disconnected by the Jamaica Public Service Company (J.P.S. Co). It is further alleged that the claimant was being supplied with electricity without the knowledge of the J.P.S. Co at the time when he entered into the contract with the defendant. The result of this it said, was an increase in the risk of fire.

[11] The defendant has also alleged that although the premises were being used for commercial purposes it was only wired for residential use and that this increased the risk of fire.

[12] It was also stated that the claimant failed to disclose that there was a work shed on the premises. The presence of this structure was said to be unsafe and hazardous to the risk for which the property was insured.

[13] The information pertaining to the electricity supply, wiring and the presence of the shed are stated to be material facts which the claimant had a duty to disclose to the defendant. It was further stated that the disclosure would have assisted the defendant to ascertain the full extent of the risk and to make a decision whether or not to accept that risk.

[14] The particulars of non-disclosure are as follows:-

(a) Failing to disclose that the supply of electricity to the property was unauthorized and/or illegal;

(b) Failing to disclose that the property was electrically wired for residential use only;

(c) Failing to disclose that the property was not wired for commercial use;

(d) Failing to disclose that the electrical wiring for residential purposes was being used for both residential and commercial purposes;

(e) Failing to disclose that the property was not approved or certified for the purposes for which it was being used;

(f) Failing to disclose that there was woodwork shed that was attached to the structure(s), part of subject matter of the Policy.

[15] The claimant in his defence to the counterclaim has denied that the cause of the fire was electrical. He has also stated that the defendant had full knowledge with respect to the buildings on the premises and the fact that they

were wired for residential use. It has also been denied that the electricity supply to the premises was illegal and that there was a failure to disclose material facts to the defendant.

THE CLAIMANT'S EVIDENCE

[16] The claimant in his evidence stated that the premises consisted of two main buildings and that the building at the back was connected to an area which was used for the manufacture of furniture. Mr. Harding also gave evidence that in 2002 his family which is comprised of six persons lived in the first building which has five bedrooms.

[17] He stated that he commenced operating his business at the premises in 1990 and listed Courts Jamaica Limited as one of his clients. His evidence is that although he had several machines which required electrical power, they were never in constant use.

[18] He also stated that there were four breaker panels, one for the house and three for the furniture shop. The wiring was said to have been done by a licensed electrician. Mr. Harding also stated that there were two meters on the premises but the second one was not installed. There were also two pot heads on the premises.

[19] The claimant admitted that he did not provide any information to the defendant in respect of the wiring at the premises or the incomplete meter as he was not asked to do so. He did agree that the state of the wiring would be an important consideration for a policy which provided coverage for damage done as a result of fire. He also stated that the wiring for the incomplete meter was done after he had taken out the policy as it was his intention to get a separate meter for the second building.

[20] Mr. Harding's evidence is that in 2002 he applied for his own account with

the J.P.S. Co. and the premises was rewired. At that time the premises was being used for residential purposes. He indicated that the purpose of the rewiring was to accommodate residential as well as commercial activities.

[21] Mr. Harding also gave evidence that the Fire and Special Perils policy which he took out on the 22nd April 2008 with the defendant covered the buildings, their contents, plant, machinery and stock in trade. He did not recall any question being asked on the proposal form with respect to the electrical wiring. He also stated that no one from the defendant company had ever visited the premises prior to April 2009.

[22] On the 20th April 2009 the premises was gutted by fire and its contents destroyed. He stated that his income was approximately $250,000.00 per month. He also indicated that at that time, he was in arrears with the J.P.S. Co. His evidence is that a few weeks before the fire someone from the J.P.S. Co. had come to disconnect his electricity supply but he persuaded them not to do so. He asserted that at the time of the fire his electricity supply was lawfully connected and he had received bills up to the 30th June 2009.

[23] In cross examination, the claimant stated that he supplied furniture to large companies, specifically Courts Jamaica Limited and Bargain Furniture. The furniture was stored in the second building on the premises which had three rooms. Goods were also stored in that building. He indicated that he began to operate a business at the premises and that prior to that it was only used for residential purposes.

[24] Mr. Harding disclosed that he had three circular saws, two jig saws, two drills, a rotor, an air compressor, a band saw, a lathe and two sanding machines. There were three air conditioning units at the house, three or four televisions, a refrigerator, ceiling fan and other small appliances. He also had a generator.

[25] The claimant admitted that from 2002 when he established an account with the J.P.S.Co he was always in arrears except for one occasion. He also stated that the electricity supply at the premises was disconnected on one occasion and that he had paid the reconnection fee on the 22nd April 2004. On March 16, 2005 the account was up to date but by July 2009 there were arrears in the sum of three hundred and thirty three thousand dollars ($333,000.00). He stated that despite this his electricity was never disconnected as he usually asked the persons who came to disconnect for leniency. He could not recall how many times he did this but it could have been two or three times. He said "I ask and they leave".

[26] He was unable to say whether there was a red tag on the meter at the time of the fire. He was also unable to recall whether the generator was in use although he admitted that it was possible that it was being used.

[27] The claimant stated that the two buildings on the premises are separate. There is a covered space between them that is used for spraying. The roof of that area is supported by the wall between his premises and the neighbouring property. There were electrical outlets in that section and a breaker panel had been installed to serve that area.

[28] The claimant denied that the premises were not wired for commercial operations. He also said that he did not know whether the contract with the J.P.S. Co was for a residential or commercial supply of electricity.

[29] Mr. Carl Wilson, who is a Quantity Surveyor, gave evidence in support of the claimant's claim for loss of earnings.

DEFENDANT'S EVIDENCE

[30] The defendant called three witnesses, Miss Jennifer Williams, Miss Marcia Jarrett and Mr. Aggrey Palmer.

[31] Miss Williams who is a Customer Care Officer at the J.P.S. Co stated that the claimant established a residential account with that company in January 2002. Her evidence is that no application was ever made to change the contract to one for a commercial supply of electricity. She said that had such an application been made, the J.P.S. Co. would have checked to ensure that the claimant had installed the proper wiring and that it was certified as such by the Government Electrical Inspector. She also stated that the company would have arranged for one of its technicians to visit the premises to determine whether any changes were needed in relation to the power lines to accommodate the commercial usage. This was a means to ensure against overload of the lines which served the particular customer.

[32] It was further stated that the records of the company indicate that the claimant's electricity supply was disconnected on the 20th April 2004 for non payment of bills. The supply was reconnected on the 22nd April 2004 after he made payments on the account and entered into an agreement to pay the outstanding sum. The account was brought up to date on or about the 16th March 2005.

[33] The witness also indicated that the J.P.S. Co's records indicate that the claimant's electricity supply was disconnected on eight occasions between October 2, 2006 and March 19, 2009 and that no reconnections were recorded on the account during this period. Miss Williams also indicated that the balance on the account up to April 2009 was three hundred and thirty four thousand nine hundred and forty three dollars ($334,943.00).

[34] Miss Williams also explained that an account is still treated as active by the J.P.S. Co. even when the customer's supply has been disconnected and a bill will still be generated. In the event that the meter shows that there has been usage since disconnection the customer will be billed and the supply disconnected again.

[35] In cross examination, she stated that disconnections are done by independent contractors and that once the meter is tagged with a red seal it means that the power supply has been disconnected. She also indicated that where there are major arrears the J.P.S. Co. may remove the customer's meter. The witness also said that she had not seen anything in the claimant's records which indicated that he had been prosecuted for trespassing on the works of the J.P.S. Co. She also stated that the claimant although in arrears had been making payments on the account.

[36] Miss Williams also expressed the view that in a situation where there had been six reconnections by a customer, that would be a clear indication to disconnect the supply of electricity at the pole. She also said that the decision as to whether the supply should be disconnected at the meter or the pole may be influenced by the fact that the customer is making payments on the account.

[37] Miss Marcia Jarrett, a Senior Underwriter of the defendant stated that where the client uses a Broker, a Broker's Slip would be submitted to the defendant. The information contained in that document would be used to assess the risk.

[38] Her evidence is that on the 16th April 2008 the defendant received a Broker's Slip from Guardian Insurance Brokers seeking coverage for the claimant's property. She then assessed the risk to be incurred. Among the matters deemed to be material were:-

(a) The location of the property to be insured,

(b) The construction and the lighting of the buildings,

(c) The occupation or use of the building to be insured and its estimated value,

(d) The proximity and occupation of the neighbouring buildings on all sides,

(e) The stock in trade and the contents to be insured,

(f) Whether the construction of the buildings were adequate or suitable to secure the quality and quantity of the content,

(g) Stock-in- trade and equipment to be insured, the extent of the coverage; and

(h) The applicable extensions being proposed by the Broker as set out in the Broker's slip.

[39] Miss Jarrett stated that the Broker's Slip revealed the following:-

(i) The property to be insured was quasi-commercial and quasi-residential consisting of two buildings, stock-in-trade, plant machinery, equipment and tools used in connection with the furniture manufacturing and assembly business, and household contents.

(ii) One of these buildings was a single storey structure valued at $2,600,000.00 and used for furniture manufacturing and assembly. It was constructed of reinforced concrete walls and metal angle iron and mesh with roof of corrugated zinc sheeting, and used for furniture manufacture.

(iii) The said single storey structure contained stock-in- trade such as plant machinery, equipment and tools to be used in connection with the furniture manufacturing business to the value of $2,500.000.00.

(iv) The other building on the property was a single storey five bedroom dwelling house constructed of reinforced concrete and nog walls with a roof of corrugated zinc sheeting and had a value of $8,600.000.00.

(v) The household contents within the said dwelling house were valued at $2,000,000.00.

[40] The broker is said to have then submitted a Binder and Specification Cover which did not contain any additional information that would have affected the defendant's coverage of the risk. The defendant issued a Fire and Special Perils Policy of Insurance to the claimant with a sum insured of seventeen million seven hundred thousand dollars ($17,700,000.00) for the period April 22, 2008 to April 21, 2009.

[41] The witness 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 Broker's Slip "pending inspection" and made arrangements for a site visit. This would have been done to ascertain whether all three buildings particularly the woodwork shed were insurable.

[42] The witness stated that the claimant did not disclose :

(i) The presence of the "woodwork shed";

(ii) The alleged illegal connection; and

(iii) The alleged unsuitability of the wiring for commercial purposes.

Miss Jarrett indicated that the matters listed above were relevant to the defendant's assessment of the risk. She stated that had the claimant disclosed to her that his electricity had been disconnected by the J.P.S. Co. on numerous occasions and was never reconnected she would have declined to accept the risk on the basis that he was a moral hazard.

[43] In cross-examination, the witness stated that she did not ask any questions about lighting or the proximity of the buildings on the claimant's property. She also said that she did not inspect the property prior to accepting the risk. She did however indicate that she knew that the claimant was engaged in the manufacture of furniture at the premises. The witness also stated that when she read Mr. Palmer's report and saw reference to a shed, it caused some concern as she formed the view that there was now a third building on the premises.

[44] Miss Jarrett also stated that she did not have personal knowledge of whether the claimant's electricity supply had been disconnected prior to April 2008 and whether the connection at the premises was legal or illegal. She also indicated that information as to prior disconnections at the premises may be relevant to her decision as to whether or not to accept the risk depending on the circumstances.

[45] Mr. Palmer who is a licensed electrician gave evidence that he inspected the claimant's premises on the 4th May 2009 in the presence of the claimant. He stated that he saw two structures with an adjoining roof between them and that the area in which the claimant's workshop was located was burnt out. He took photographs and observed that the electricity supply had been disconnected at the pothead which is the entrance point for power to the building. Mr. Palmer also made the following observations:-

(i) The meter #771147 was seen with a red seal which indicates that the meter was disconnected by the J.P.S. Co.

(ii) There was a second meter socket which was incomplete;

(iii) The PVC insulated wires that enter the Main Distribution Panel had no bushing.

[46] He expressed the view that the wiring at the main distribution panel was not electrically safe or mechanically strong. In this regard he made reference to the Jamaica Standard 21 manual which governs electrical installations. The absence of bushings was said to be a fire hazard. The witness explained that bushings serve as a second layer on insulation and are used to prevent short circuiting. He also stated that the regulations provide for double insulation where wires enter the panel and the absence of bushings can result in a fire hazard.

[47] Mr. Palmer stated that the premises was wired for residential use and that in order for it to be upgraded to a commercial power supply, the Government Electrical Inspector would have to check to ensure that the wiring is suitable for commercial needs. He said that wires were seen running along the walls at the premises and in touching distance. He also stated that whilst it is permissible for residential wiring to run along the wall where commercial premises are concerned, they must be encased in conduits or placed in the wall.

[48] He also said that the wires entering the pothead were small and insufficient to meet the possible demand for the previously connected load. The

witness did however indicate that he was unable to make a conclusive determination as to the cause of the fire. He also stated that he did not see any bushings at the main distribution panel. He explained that these are grommets or sleeves made of material that does not support burning which are used to protect wires. Mr. Palmer also stated that in a commercial installation, isolators would be used so that equipment would not be directly plugged into the wall. This he said was designed to facilitate the use of a lock out tag which would prevent a machine from being accidentally energized. He also opined that the premises would not be certified for commercial use without the installation of isolators.

[49] He referred to the provisions of the Jamaica Standard 21 manual in support of his assessment of the wiring at the Claimant's premises.

[50] In cross-examination, Mr. Palmer stated that it was possible for plastic type bushings to disintegrate if they are exposed to fire. He also said that there was smoke damage to the main distribution panel which was situated in a bedroom that was not affected by the fire. He said that in arriving at his opinion that the premises were not electrically safe or sound, the absence of bushings was a factor that was considered. He also stated that he examined all of the panels and saw no remnants of bushings for the main panel. Mr. Palmer also stated that the code R10 on the claimant's electricity bill indicates that the supply of electricity is at the domestic rate. He also indicated that where a red seal is attached to a meter it means that the supply was disconnected.

CLAIMANT'S SUBMISSIONS

[51] Mr. Woolcock submitted that the parties to a contract of insurance owe each other a duty of utmost good faith. This he said means that the insured must disclose every material fact which may affect the insurer's decision to accept the risk. Counsel also submitted that this duty to disclose only applies to facts that were in existence as at the time of entering the contract of insurance unless the insured was under a continuing duty to disclose pursuant to the terms of the

contract.

[52] Counsel also asked the court to accept the claimant's evidence that at the date of the formation of the insurance contract the supply of electricity at the premises was lawful, in that, there was no unauthorized reconnection of the electricity supply to his premises. He also urged the court to find that with the exception of on occasion in 2004 the supply had not been disconnected by the J.P.S. Co. He referred to the three electricity bills from that entity in support of this assertion (exhibits 2A-2C) as well as the claimant's statement of account for the period February 2002 to July 2009 (exhibit 3) as confirmation that as at the date of the formation of the contract as well as up to the time of the fire on April 20, 2009 he was considered a lawful customer by the JPS who billed him monthly and collected his money whenever he made payments for electricity usage.

[53] Reference was also made to the evidence of the J.P.S. Co's representative, Miss Jennifer Williams that disconnections are carried out by independent contractors. Counsel highlighted the fact that although Mr. Harding's account was in fact in major arrears, Miss Williams could not say as a fact whether the supply was disconnected at the pole. He also referred to the fact that although Miss Williams stated that the J.P.S. Co. would remove a meter where there have been unauthorized reconnections, Mr. Harding's meter was never removed. This was said against the background of her evidence that the records show several disconnections without same being reconnected by the J.P.S. Co.

[54] The court was asked to reject the witness' evidence as being unreliable on the basis that it is highly unlikely that in the circumstances as alleged, the J.P.S. Co. would have allowed the claimant's meter to remain in place. Counsel asked the court to note that the records in support of Miss Williams' assertion that there were several disconnections were never tendered in evidence nor were any of the independent contractors who carried out these alleged disconnections called

to give evidence of such disconnections.

[55] In addition there was no record of Mr. Harding having been prosecuted for the alleged unauthorized reconnections. In those circumstances he asked the court to find that the claimant had a legitimate supply of electricity at the date of the formation of the contract on April 22, 2008.

[56] It was also submitted that the Defendant can only succeed in avoiding indemnity on the basis of a non-disclosure if such non- disclosure related to a material fact. In this regard he referred to the case of ***Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.*** [1994] 3 All ER 581, in which the Court held that a circumstance is material if it would have had an effect on the mind of a prudent insurer in weighing up the risk. He stated that Miss Jarrett had admitted that a disconnection of electricity would not have been important to her in determining whether to accept the risk and submitted that any non- disclosure in that respect was not material and is therefore irrelevant.

[57] Counsel also referred to the case of ***Joel v. Law Union and Crown Insurance Co.*** [1908] 2KB 863 in support of the proposition that the burden of proving non-disclosure rests on the insurer. He submitted that the Defendant has failed to prove more than one disconnection and/or that there was an illegal connection.

[58] He asked the court to find that there was no illegal connection on the basis that the claimant was billed by the J.P.S. Co. and payments collected from him.

[59] With respect to the wiring of the premises, Mr. Woolcock urged the court to find that they were properly wired. He referred to the claimant's evidence that he had enlisted the services of a licensed electrician, who rewired the entire property which was subsequently inspected by someone from the Government Electrical Inspectorate before the new meter was installed.

[60] It was submitted that information as to whether the wiring was adequate for the commercial operations being undertaken at the premises would not have been within the knowledge of the Claimant and as such, could not have been disclosed by him. Reference was made to the case of ***Joel v Law Union*** (supra) as authority for the principle that the insured can only disclose what he knows. In that case Fletcher Moulton L.J said this at page 884;

> *"…In my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess…. Your opinion of the materiality of that knowledge is of no moment".*

The Court was also urged to find that the Claimant was a simple furniture maker who could not have known whether his premises was wired for commercial use and as such the duty to disclose did not arise.

[61] It was further submitted that even if the Court were to find that the adequacy of the electrical wiring was within Mr. Harding's knowledge at the time when the contract was concluded, the Defendant has failed to prove any of the particulars of non-disclosure pleaded in its counter claim.

[62] Counsel also submitted that given the state of the building at the back of the premises, Mr. Palmer could not definitively say whether the wiring in that section was suitable for a commercial operation. It was also submitted that the electricity bills only establish that Mr. Harding's billing rate was residential and not that the wiring was not suitable for a commercial operation.

[63] Mr. Woolcock submitted that the issue of the incomplete meter box is irrelevant to the Defendant's case of non-disclosure as this was never pleaded by the Defendant and nothing was said by the expert for the Defence, Mr. Palmer, to indicate whether the presence of a meter socket had any bearing on the state of electrical wiring on the premises.

[64] Counsel urged the court to find that there is no evidence that there was a

woodwork shed on the premises. Reference was made to the testimony of the claimant and that of Mr. Palmer who he said stated that there were two buildings on the property. He also referred to exhibit 6, the building appraisal report, which was prepared from an actual inspection done by Mr. Karl Wilson on or about March 11, 2008.

[65] It was also submitted that Miss Jarrett ought to have inspected the premises before accepting the risk. Counsel made reference to her evidence in which she stated that certain matters would have impacted on that decision and pointed out that in spite of this, she did not make any enquiries of the broker. In this regard counsel relied on the case of ***Manor Park Homebuilders Limited v AIG Europe (Ireland) Limited*** [2008] IECH 174 in which Justice McMahon commenting on the principle of utmost good faith (*uberrimae fidei*) in the law of insurance said:-

> *"The principle of uberrimae fidei, which applies to all insurance contracts, imposes a heavy onus of disclosure on the insured. . . . . This does not, however mean that the insurer can cover its eyes or abstain from making normal inquiries or investigations, in the expectation that, in the event of the risk materializing, it can point to the insured's omission and repudiate the contract. The insured's duty is balanced by a reciprocal duty on the insurer to make its own reasonable inquiries, to carry out all prudent investigations and to act at all times in a professional manner. In fact the onus to do this, because of its experience and expertise, lies primarily on the insurer."*

He went on to say:-

> *"It would be strange indeed if the Court placed such a heavy onus on the insured without also insisting on the insurer to look out for its own interests. Uberrimae fidei is not a charter for indolent insures"*

[66] Reference was also made to the dictum of Davitt P. in the case of ***Krelinger and Fernau Ltd. v. Irish National Insurance Co. Ltd*** [1956] I.R 116 at 151 where he said:-

> *"While the duty to make full disclosure of all matters material to the risk rests upon the insured, it does not fall to the insurer to relieve him of that duty by making inquiries, the converse is to this extent true, that the insured does not have to conduct the insurer's*

business for him. Where the contract, the performance of which the insures is asked to cover, contains a clear intimation that a matter, which is specifically referred to but not fully set out, is of importance, and full information is to be had for the asking, it would seem quite unreasonable and unjust to allow the insurer to repudiate liability on the grounds that he did not know and was not told the details of something which he was in fact told about."

[67] The court was asked to find that on a balance of probabilities the Claimant has established that at the date of the fire, a valid and enforceable insurance contract existed between the parties and that the Defendant is obliged to indemnify the Claimant for his loss.

[68] With respect to quantum, counsel asked the court to infer from the evidence that Mr. Harding suffered a total loss in the early morning hours of April 20, 2009 and enter judgment for the entire amount of the cover, that is, Seventeen Million Seven Hundred Thousand Dollars ($17,700,000.00) plus interest and costs.

DEFENDANT'S SUBMISSIONS

[69] Mr. Manning submitted that the claimant breached conditions 4a and 8a of the contract when he failed to disclose to the claimant that:

(a) There was a woodwork shed on the premises;

(b) He was operating a commercial enterprise on property that was wired for residential supply of electricity;

(c) The premises was not wired for commercial use;

(d) The electricity supply to the premises had been disconnected on numerous occasions and he was operating with an illegal supply.

[70] Conditions 4a and 8a state as follows:-

"4a. ***Alterations Repairs and Changes***
Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured, before the occurrence of any DAMAGE, has obtained the sanction of the INSURER signed by

endorsement upon the Policy and paid an additional premium if required:

(a) If the trade or manufacture carried on is altered, or if the nature of the occupation of or other circumstances affecting the building insured or containing property insured is changed in such a way as to increase the risk of DAMAGE by any of the perils insured.

8 ***Reasonable Precautions***

The insured shall maintain the property insured in a proper state of repair and shall take all reasonable precautions to prevent DAMAGE thereto."

[71] It was also submitted that the matters listed at items (a) to (d) in paragraph 69 above were material facts which would have impacted on the defendant's decision as to whether or not it would accept the risk. In these circumstances the claimant was said to be a moral hazard.

[72] In this regard, reference was made to the claimant's evidence that the building at the back of the premises was connected to an area which was used for the manufacturing of furniture. This area was put up after the construction of the two buildings on the premises. Counsel also referred to his evidence that there were electrical outlets in that area and that he did not disclose its existence as no questions were asked of him. It was also submitted that the evidence of Mr. Palmer supports the defendant's contention that there was a shed on the premises.

[73] Where the supply of electricity to the premises is concerned, counsel asked the court to reject the claimant's evidence that his electricity supply was not disconnected despite there being arrears of approximately three hundred and thirty three thousand dollars ($333,000.00).

[74] Counsel also directed the court's attention to the claimant's evidence that he did not provide his broker or the defendant with any information with respect to the condition of the wiring at the premises because he was not asked about

this issue. He did however indicate that the condition of the wiring would have been relevant as fire was among the perils that were covered by the policy.

[75] With respect to the issue of non-disclosure, counsel referred to the dictum of Lord Mansfield in the case of ***Carter v. Boehm*** [1558 - 1774] All ER 183, in which it was emphasized that a contract of insurance is based on the utmost good faith. Reference was also made to the dictum of K. Harrison, JA in the case of ***Insurance Co. Of the West Indies v. Elkhalili*** SCCA No. 90 of 2006, delivered on the 19th December 2008, where he said:

> *"In practice, the requirement of uberrimae fides means simply that an applicant for insurance has a duty to disclose to the insurer all material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts".*

[76] Counsel also relied on the cases of ***Smith-Thomas v. Insurance Company of the West Indies,*** claim no. 2006HCV01883, delivered on the 24th November 2008 ***and Jester-Barnes v. Licenses and General Insurance Company Ltd.*** (1934) 49 Ll. L. Rep. 231. Reference was also made to sections 22, 23 and 25 of the ***Marine Insurance Act.***

[77] It was submitted that the duty of good faith imposes a duty on the insured not to misrepresent facts and to disclose all material information that is known to him at the time when the contract is being concluded. Where there was a breach of that duty the insurer was entitled to avoid the policy ab initio.

[78] Counsel further submitted that the duty to disclose is not restricted to matters that are raised in the proposal form nor does the absence of a proposal form relieve him from that duty. Reference was made to the case of ***Woolcott v. Sun Alliance Insurance*** [1978] 1 W.L.R. 498 which dealt with the issue of moral hazard and the duty of disclosure.

[79] It was indicated that whilst there was no proposal form in this matter, the

claimant was proposed for insurance through a broker who submitted a broker's slip on his behalf. Miss Jarrett who gave evidence on behalf of the defendant indicated that whilst the broker's slip did not contain questions, all material facts were required to be stated.

[80] Counsel argued that based on the case of ***Pan Atlantic Insurance Ltd. & another v. Pine Top Ltd.*** (supra), the defendant had the right to avoid the policy if it is established that:

(i) There was either a misrepresentation or non-disclosure by the insured;

(ii) The fact which the insured failed to disclose was known or ought to have been known to him;

(iii) The fact was a material one; and

(iv) The insurer was induced by the misrepresentation or non-disclosure to accept the risk.

[81] Counsel also stated that the broker's slip did not contain any information that the power supply was for residential use only or that the electrical wiring was incomplete. It was also submitted that the claimant failed to disclose the presence of the woodwork shed and that there was an illegal supply of electricity at the premises.

[82] With respect to the issue of materiality, counsel submitted that the test which is to be applied is whether a circumstance would be taken into account by a prudent insurer when assessing the risk. That is, would it have impacted on his decision to accept the risk and if so at what premium. In this regard, counsel referred to the evidence of Mrs. Jarrett who had stated that had the claimant disclosed that the supply of electricity was for residential purposes only and had been disconnected by the J.P.S. Co. on several occasions and had not been reconnected by them she would have declined to cover the risk on the basis that the claimant was a moral hazard.

[83] It was also submitted that based on the evidence, the claimant was a moral hazard and the policy was obtained on the basis of the non-disclosure of material facts.

[84] Reference was made to the case of ***Locker and Woolf Limited v. Western Australian Insurance Company Limited*** [1936] 1 K.B. 408, which was concerned with a failure to disclose a previous refusal of motor insurance.

[85] Counsel also cited the case of ***Insurance Corporation of the Channel Islands (ICC) and Royal Insurance (UK) Limited v. The Royal Hotel Limited and others*** [1997] EWHC 373 in which it was not disclosed that the defendant had caused a number of fictitious invoices to be created in order to improve the appearance of its financial performance for banking purposes. This was held to be a material fact for the assessment of whether to renew the defendant's fire insurance risk.

[86] With respect to inducement, it was submitted that there is a presumption of inducement and that the court is entitled to infer that the defendant would have refused to accept the risk if it had known about the wiring of the premises, the presence of the woodwork shed and the illegal supply of electricity. Counsel also argued that once the presumption is raised, the claimant has the evidential burden to show that the defendant was not induced to accept the risk and had failed to do so.

[87] Reference was made to the case of ***Hillary Smith-Thomas v. Insurance Company of the West Indies*** claim no. 2006HCV01883, delivered on the 24th November 2008 in which Brooks, J.A. said:-

> *"I find that the non-disclosure, being an obviously material one, would raise a presumption in ICWI's favour that it was in fact induced to accept the proposal on the terms that it did. There would be an evidential burden placed on Mrs. Smith-Dyer to show to the contrary."*

Specific reference was also made to paragraphs 31 to 43 of Miss Jarrett's

witness statement.

[88] Counsel for the defendant also argued that the claimant breached conditions 4(a) and 8(a) of the policy which imposed a duty on him to take reasonable precautions not to increase the risk of damage to the property and to maintain the property in a proper state of repair. It was submitted that the defendant through the evidence of Mr. Palmer and Miss Williams with respect to the wiring and the supply of electricity at the premises has established that the claimant was in breach of the above conditions. The court was urged to find that the wiring at the premises did not satisfy the requirements of Jamaica Standards 21 and was likely to increase the risk of damage to the property.

[89] The court was urged to find that the defendant was entitled to avoid the policy on the grounds of the non-disclosure of material facts and the claimant's alleged breach of the policy.

THE ISSUES

[90] The main issue in this matter is whether the defendant is entitled to avoid the policy of insurance in respect of the premises on the basis of non-disclosure. However, in order to make that determination the following issues need to be resolved:

(i) Whether there was a shed on the claimant's property;

(ii) Whether the premises was wired for the purpose for which it was being used;

(iii) Whether the supply of electricity to the claimant's premises was unauthorized and /or illegal prior to and subsequent to the conclusion of the contract of insurance;

(iv) Whether the condition of the wiring was disclosed to the defendant;

(v) Whether the condition of the wiring increased the risk of damage to the property;

(vi) Whether the disclosure of the information listed above was material

to the contract and;

(vii) Whether the defendant was induced to enter into the contract as a result of the non-disclosure of these material facts.

THE LAW

[91] It is settled that an insurer has the right to avoid the contact of insurance if the insured was guilty of fraud, non-disclosure or misrepresentation before the contract was entered into. This is so because an insurance contract is one which is said to be *uberrimae fidei* or of the utmost good faith. There is therefore a duty on the insured to answer the questions on the proposal for insurance correctly and truthfully. An applicant for insurance also has a duty to disclose to the insurer before the contract is concluded all material facts that the insurer does not or is not deemed to know but are known or deemed to be known to the insured. Any failure to disclose even if it is innocent, gives the insurer the right to avoid the contract *ab initio.*

[92] The principles which underpin this duty of disclosure were stated by Lord Mansfield in ***Carter v. Boehm*** [1558-1774] All ER Rep 183 at 184 - 185. He said:

> *"… 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 insured 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 risk as if it did not exist. Keeping back such circumstance is a fraud, and, therefore, the 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 risk run is really different from the risk understood and intended to be run at the time of the agreement. The policy would equally be void, against the underwriter if he concealed… The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary".*

[93] It has been accepted that this duty is codified in section 18 of the 1906 Marine Insurance Act (UK) which is similar to section 22 of the Jamaican ***Marine Insurance Act***. Section 22 states:-

> *"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."*

[94] Lord Mansfield in ***Carter v. Boehm*** also formulated the test which is to be applied in order to determine what needs to be disclosed by an insured. He said:-

> *"There are many matters, as to which the insured may be innocently silent. He need not mention what the underwriter knows… an underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge. The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of.*
>
> *The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation: as for instance—The under-writer is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, & etc. He is bound to know every cause which may occasion political perils; from the ruptures of States from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, etc.*
>
> *If an under-writer insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere—he needs not be told the secret enterprizes they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information…Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence.*
>
> *But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.*
>
> *The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.*

The question therefore must always be " whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run."

[95] In order for the defence of non-disclosure to succeed the insurer must prove that the insured failed to disclose a material fact and that the non-disclosure induced the making of the contract. In other words it must be proved that the insurer would not have entered into the same contract if he was aware of the facts in question.

[96] The common law position as it relates to disclosure was codified in the UK Act. Section 18 of that legislation which is replicated in section 23 of the Jamaican ***Marine Insurance Act*** deals with the insured's duty of disclosure. Section 23 states:-

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

The section also states that the issue of whether a particular circumstance is material or not is a question of fact.

[97] Where an insured fails to communicate about a matter of which he has or is deemed to have knowledge which is of such importance to affect a prudent underwriter's judgment and which induces him to enter into a contract of insurance this amounts to a material non-disclosure.

[98] In ***Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.***

(supra), it was held that under section 18 of the UK Act, a material circumstance was one which would influence the mind of the prudent insurer in estimating the risk but it was not necessary that it should have a decisive effect on his acceptance of the risk or on the amount of the premium. However, an insurer could only avoid the contract for non-disclosure if he shows that he was actually induced by the non-disclosure to enter into the contract of insurance on the particular terms.

[99] It is however important to note that the general principle is that the duty of disclosure ends when the contract is concluded. It must also be borne in mind that the burden of proving non-disclosure is on the insurer. This view was expressed by Caulfield, J in ***Woolcott v. Sun Alliance Insurance*** [1978] 1 W.L.R. 493. In that case, the claimant's property was destroyed by fire. There was no dispute that fire was one of the perils covered by the policy of insurance. The defendants, who were the insurers sought to avoid liability on the basis of non- disclosure. Caulfield, J. said: *"prima facie the defendants are liable to indemnify the plaintiff for the damage resulting from the fire. The onus is upon the defendants to show that they are entitled to avoid the policy".* See also ***Joel v. Law Union*** [1908] 2 K.B. 863 at 881.

[100] At common law, the issue of whether or not a material fact is known to the insured is also a question of fact. However according to Cockburn, C.J. in ***Bates v. Hewitt*** (1867) L.R. 2 Q.B. 595 at 607, *"...it is immaterial whether the omission to communicate a 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 was material to make known."* With respect to the effect of questions in the proposal form, the general rule is that the particular questions relating to the risk do not without more, relieve the insured of his duty to disclose all of the material facts. See ***Joel v. Law Union*** [1908] 2 K.B. 863 at 878 and 892.

[101] An insured need not disclose facts which although they are material:

(i) diminish the risk;

(ii) are presumed to be known to the insurer or are matters of common knowledge; or

(iii) the insurer has waived disclosure.

It may however be inferred that where questions are asked on a particular subject and the answers to them are warranted, the insurer has either waived his right to information outside of the scope of the questions or matters which are related to the subject matter of the questions.

[102] In ***Glicksman v. Lancashire & General Assurance Co.*** [1927] A.C. 139, two partners, the appellant and another, completed a proposal form prior to the conclusion of an insurance contract in respect of loss by burglary in the premises on which they carried on business. Among the questions on the form was whether "…any company declined to accept, or refused to renew your burglary insurance? If so, state name of company." Their answer was Yorkshire accepted, but the proposers refused. They also signed a declaration at the foot of the form that the answers to the questions were true.

[103] In that case it was argued that the insured had not withheld any information that might tend to increase the company's risk. The parties also agreed that the declaration and answers should be the basis of the contract between them. The policy which was issued contained a proviso that the statements made by the assured in the proposal and declaration were true. It was also stated that if the policy were obtained through any misrepresentation, suppression, concealment, or untrue averment whatsoever by the assured, then the policy should be void. The basis of the dispute was the fact that whilst the appellant was carrying on the same business in his name only, on the same premises, another company had refused a proposal for burglary insurance.

[104] A claim was subsequently made by the appellant in respect of a burglary. At the time he was once more the sole operator of the business and the benefit

of the policy had been assigned to him.

The insurance company resisted the claim. The matter was referred to arbitration and the arbitrator found that a false answer had been given to the question and that the policy had been obtained by suppression or concealment of a material fact.

On appeal, the findings of the arbitrator were upheld.

WAS THERE A SHED ON THE PREMISES?

[105] This is a question of fact the resolution of which is dependent on my assessment of the evidence of the witnesses. The claimant has denied that there was either a shed or a third building on the premises. Mr. Harding said in his witness statement that the building at the back of the premises was connected to an area used for the manufacturing of furniture. In cross-examination he denied having made such a statement.

[106] On further cross-examination, he indicated that there was an area between the two buildings that was used for spraying furniture. That area according to his evidence was covered by a zinc roof which was supported by his neighbour's wall and the back building. There were also electrical plugs and outlets as well as a breaker panel in that area. This electrical work was done some time after the construction of the two buildings.

[107] Mr. Palmer also gave evidence that there was an area between the two buildings that was covered by a roof.

[108] The ***Concise Oxford Dictionary*** defines a shed as *"a simple building used for storage or to shelter animals"*. The term may also be used to refer to a large building with one or more sides open.

[109] Based on the description of this area given by the claimant and Mr. Palmer, it is clear that the covered area between the two buildings was not a part

of the original structures which were erected on the property. That seems to be the same area used by the claimant for the manufacture of furniture. It also appears that at least one side was open. Whilst not falling squarely within the definition of a shed it seems to be an informal structure with at least one side which was open.

[110] In the circumstances it is my finding that there was a third structure or shed on the premises.

WERE THE PREMISES PROPERLY WIRED FOR THE TYPE OF ACTIVITY BEING UNDERTAKEN BY THE CLAIMANT?

[111] The claimant maintained that the premises were adequately wired to support both residential and commercial purposes. His evidence is that the residence consisted of six bedrooms and housed five (5) occupants. The claimant also stated that there were three (3) mini split air conditioning units, three or four televisions, one(1) refrigerator, one (1) wood lathe, one (1) band saw, three (3) circular saws, two (2) jig saws, two (2) drills, two (2) sanding machines and two (2) air compressors at the premises. He described the items which were used in his business as light manufacturing machines. A standby generator was also at the premises.

[112] Mr. Harding in his evidence in chief stated that it was he who started using the premises for the purpose of business. In 2002 he applied to the J.P.S. Co. for the meter/ account to be in his name and the premises were rewired as part of a refurbishing exercise. Four breaker panels were installed during that process. At the time the premises was being used for residential purposes only. In cross examination he stated that he did not recall if he was operating the business at the time when he applied for the meter. He did however state that prior to the application, the electricity supply to the premises was for residential purposes and he was operating a business at the time. He also said that in 2002 he did know that the electricity supply was for residential purposes and did not address his mind to that issue.

[113] He also stated that prior to the fire a second meter was installed at the premises but was incomplete. There were also two pot heads to the premises but only one of them was connected.

[114] He also gave evidence that in 2008 he had ten (10) employees and supplied furniture to large companies such as Courts Jamaica Limited and Bargain Furniture. He also had individual clients.

[115] Mr. Palmer's evidence is that he visited the premises on the 4th May 2009 which was approximately fourteen days after the fire. The claimant's evidence is that he was present and observed Mr. Palmer taking photographs of the property.

[116] Mr. Palmer also stated that he observed that the PVC insulated wires that entered the Main Distribution Panel at the premises had no bushing. This he said was a fire hazard. He explained that bushings are used where wires enter the panel to prevent short circuiting. He stated that the regulations contained in the Jamaica Standard 21 Manual provide for double insulation where the wires enter the panel and that the bushings would have served as a second layer between the wire and the panel.

[117] The witness also stated that there was a second meter socket at the premises but that the wiring was incomplete. This he said meant that the workshop and the residence were being served by one meter. He also expressed the view that the wiring was untidy as they were not running in the manner prescribed by the manual.

[118] Mr. Palmer's evidence is that more stringent conditions are imposed where a premises is being upgraded from residential to one used for commercial purposes. He stated that in such circumstances the Government Electrical Inspector would have to certify that the wiring is suitable for commercial purposes

and a new certificate would be issued to the J.P.S. Co.

[119] He also stated that he observed that some of the wires at the premises were running along the wall. Mr. Palmer indicated that whilst this was permissible for a residence, the wires at commercial premises must either be encased in conduits or placed in the wall. The witness also stated that the wires entering the pothead measured 6 mm sq and were insufficient to meet the possible demand.

[120] It is clear even on the claimant's evidence that he did not apply to the J.P.S. Co for a commercial supply of electricity. It also appears that the claimant did not address his mind to the possible requirements of his business when the premises were being rewired. In addition to this, the evidence of Mr. Palmer of the state of the wiring was largely unchallenged. The only matter that raised any doubt as to the accuracy of his evidence was that relating to the absence of bushings which he admitted could have been destroyed by the heat of the fire.

[121] In the circumstances, I accept the evidence of Mr. Palmer and find that the premises were not properly wired for commercial purposes.

WAS THERE AN AUTHORIZED SUPPLY OF ELECTRICITY AT THE PREMISES?

[122] In this matter the claimant has stated that there were no questions on the form regarding the legality of supply of electricity or if the premises were wired for commercial or residential purposes. He has also stated that he was never asked whether the electricity supply had ever been disconnected.

[123] Mr. Harding has also indicated that since 2002 when he established an account in his name the bill was always in arrears with the exception of March 2005. He acknowledged that in July 2009 he owed approximately three hundred and thirty three thousand dollars ($333,000.00). He also indicated that up to the date of trial he had not paid the final bill in the sum of three hundred and thirty

three thousand five hundred and forty one dollars and nine cents ($333,541.09).

[124] In cross-examination he said that when the agents of the J.P.S. Co. came to his premises to disconnect the electricity supply he would ask for leniency. He could not recall how many times this occurred but simply said “I ask and they leave”.

[125] Mr. Harding also stated that he did not know whether there was a red tag on the meter at the time of the fire and did not know what the presence of a red tag meant. With respect to whether the generator may have been in use he said that he could not recall.

[126] Mr. Palmer in his evidence indicates that when he inspected the premises he observed that meter # 771147 had a red seal which indicates that it had been disconnected by the J.P.S. Co. Exhibit 9 D which is a photograph of the said meter also shows that a red seal was attached to it.

[127] Counsel for the claimant directed Miss Williams’ attention to Exhibits 2A, 2B and 2C in an effort to establish that the claimant’s electricity supply had not been disconnected. These are the electricity bills for the premises issued on the 25th April, 23rd May and the 20th July 2009 which show that the claimant’s account was active. The witness explained that the claimant’s account was still active as it had not been closed by the J.P.S. Co. She also indicated that a disconnection does not operate to close a customer’s account and as such a bill will still be generated. Miss Williams also stated that if the meter shows usage after a disconnection the J.P.S. Co. will disconnect again and bill the customer.

[128] In cross examination she stated that disconnections are effected by independent contractors and a red seal is then placed on the respective meter. She also indicated that although the claimant was in “chronic” arrears he had made payments on the account up to February 2009.

[129] Having assessed the evidence of the claimant on this issue, I am of the view that he is not a credible witness. The evidence of the defendant's witnesses has not been effectively challenged. There has also been no challenge of the photographs that were taken by Mr. Palmer which clearly shows a red tag attached to the meter at the claimant's premises. I reject the claimant's evidence that the contractors who visited his premises to disconnect the electricity supply declined to do so at his request. I accept the evidence of Miss Williams that the electricity supply was disconnected on eight (8) occasions between October 2, 2006 and March 19, 2009 and had not been reconnected by the J.P.S. Co.

[130] I therefore find on a balance of probabilities that the electricity supply at the premises was disconnected at the time when the claimant entered into the contract with the defendant and had not been reconnected by the J.P.S. Co. In light of the claimant's assertion that he had electricity at that time I also find that at the date of contract, the claimant's supply of electricity was not authorized. I also find that at the date of the fire there was an unauthorized supply of electricity at the premises.

WERE THE FACTS CONCERNING THE CONDITION OF THE WIRING, THE ELECTRICITY SUPPLY AND THE PRESENCE OF THE SHED MATERIAL TO THE CONTRACT?

[131] The test of materiality as stated in section 23 of the ***Marine Insurance Act*** requires the court to make an assessment as to whether the judgment of a prudent insurer would have been influenced by knowledge of those facts. It is also important to note that the opinion of the particular insured or the insurer does not determine the materiality of a particular fact. However, where an insured who appreciates that his insurer may regard that fact as important, fails to disclose that fact he would not in my view, have acted in good faith.

[132] In this matter the claimant admitted that the state of the wiring would be an important consideration where fire is on the perils covered by the insurance contract. This was a matter within his knowledge. The legality of the electricity supply and the presence of the shed would also have been matters that were

within the claimant's knowledge. In ***Bates v. Hewitt***, (supra) Cockburn, C.J. said:

> *"The rule we find established is this: that the person who proposes an insurance should communicate every fact which he is not entitled to assume to be in the knowledge of the other party; and the assured is bound to communicate every fact to enable the insurer to ascertain the extent of the risk against which he undertakes to protect the assured. True, if it can be established that the insurer did know the fact, it will not lie in his mouth to say, the fact of which he had previous knowledge was not communicated; if it can be established that the underwriter had knowledge of the fact, the assured would be protected against the fraud of the underwriter in seeking, under such circumstances, to avoid the insurance".*

[133] Similar sentiments were expressed by Fletcher Moulton L.J. in ***Joel v. Law Union and Crown Insurance Company*** (supra) at 883-884. The learned Judge said:

> *"The contract of life insurance is one uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord Blackburn in Brownlie v. Campbell (1): "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrima fides (2), that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy." There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact*

realize to be so".

[134] In this matter the defendant has sought to establish through Miss Jarrett that had it known that the claimant's electricity supply was not legal, it would have considered him to be a moral hazard and would have declined to accept the risk. She also gave evidence that the state of the wiring and information as to prior disconnections were material considerations.

[135] In ***Woolcott v. Sun Alliance Insurance Ltd.*** (supra) the insurer refused to indemnify the plaintiff on the basis that he had failed to disclose prior convictions for robbery. It is important to note that the plaintiff was not asked any questions relating to his moral character. Caulfield, J. was of the view that the plaintiff's failure to disclose his criminal record amounted to a material non-disclosure. The basis of that decision was that the seriousness of the offence could affect the moral hazard which the insurer had to assess. He also said that the absence of a proposal form did not modify the plaintiff's duty of disclosure.

[136] In ***Locker and Woolf Limited v. Western Australian Insurance Company Limited*** (supra) the defendant refused to honour a claim under a fire insurance policy on the basis that the claimant failed to disclose a previous refusal of motor insurance. It was later discovered that the claimant had been refused coverage on the basis of misrepresentation and non-disclosure of certain facts. This was in circumstances where the claimant had also indicated on the proposal form that he had suffered loss by fire on a previous occasion. Counsel for the claimant argued that the refusal of motor insurance was not a material fact and that disclosure should be limited to matters affecting a proposal for fire insurance. Slesser, L.J. in his summation of the law in this area said:-

> *"It is elementary that one of the matters to be considered by an insurance company in entering into contractual relations with a proposed insurer is the question of the moral integrity of the proposer - what has been called the moral hazard. In the present case it is quite impossible to say that the non-disclosure by those proposing to take out a policy against fire risks that they have had*

> *an insurance on motors declined on the ground of untrue answers in the proposal form is not the non-disclosure of a fact very material for the insurance company to know - a fact which if known to the company might lead them to take the view that the proposers were undesirable persons with whom to have contractual relations".*

[137] Whilst it is accepted that materiality does not depend on the opinion of a particular insurer that opinion is relevant where it is asserted that, had the particular facts been disclosed he would not have entered into the contract at all or on the same terms. In ***Pan Atlantic Insurance Co. Ltd. And another v. Pine Top Insurance Co. Ltd.*** (supra) it was held that a "material circumstance" is one *"…that would have an effect on the mind of the prudent insurer in estimating the risk and it was not necessary that it should have a decisive effect on his acceptance of the risk or on the amount of premium demanded".*

[138] The question to be decided is whether the presence of the shed, the state of the wiring, the prior disconnections and the illegal supply of electricity would have had an effect on the mind of a prudent insurer. I accept the evidence of Miss Williams that the disclosure of the facts relating to these matters could have had an effect on the defendant's assessment of the risk. Where the shed is concerned, Miss Williams said that she would have had to determine whether it was insurable.

[139] With respect to the electricity supply, when one considers that fire is one of the perils covered by this policy, such information would in my view, have an effect on the mind of a prudent insurer. In this regard I recall the evidence of Mr. Palmer that certain aspects of the wiring of the premises may have increased the risk of fire. It is immaterial that the cause of the fire at the claimant's premises has not been ascertained. The test is whether the information may have influenced a prudent insurer in coming to a decision to insure or not to insure or the terms on which to insure. In the circumstances, I find that these facts were also material to the contract.

WAS THE PRESENCE OF THE SHED, THE CONDITION OF THE WIRING AND THE ILLEGAL ELECTRICITY SUPPLY DISCLOSED TO THE DEFENDANT?

[140] It is settled law that the assured's duty of disclosure extends only to facts which he knows or is deemed to know. More importantly, those facts must be outside of the knowledge of the insurer. This is a question of fact. In ***Joel v. Law Union and Crown Insurance Company*** (supra) at 884, Fletcher Moulton L.J. also stated:

> *"…there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is, was the knowledge you possessed such that you ought to have disclosed it?"*

[141] The evidence of the claimant is that he did not address his mind as to whether the wiring was adequate for commercial purposes. He also stated that he did not disclose the fact that the wiring was incomplete because the defendant did not ask any questions pertaining to that matter. With respect to the adequacy of the wiring, Mr. Harding appears to have been indifferent. This according to Cockburn, C.J. in ***Bates v. Hewitt*** (supra) does not excuse Mr. Harding's failure to disclose that fact. The incomplete nature of the wiring and the fact that the premises was wired for residential and not commercial purposes are facts that were within his knowledge. In the absence of disclosure, the defendant in my view, would not know or be deemed to have knowledge of those matters.

[142] Where the disconnections and the illegal supply are concerned, these are also matters that would have been known to the claimant and ought to have been disclosed. In addition, no evidence has been presented that the defendant had knowledge of any of the matters concerning the electricity supply at the premises.

DID THE CONDITION OF THE WIRING INCREASE THE RISK OF DAMAGE TO THE PROPERTY?

[143] Mr. Palmer, a licensed electrician gave evidence that the electrical installation at the claimant's premises was unsafe as it did not meet the minimum standards set out in the Jamaica Standard 21 manual. He also stated that this could pose a danger to the property. No evidence was presented by the claimant to challenge this assertion.

[144] I accept the evidence of Mr. Palmer.

WAS THE DEFENDANT INDUCED TO ENTER INTO THE CONTRACT AS A RESULT OF THE NON-DISCLOSURE OF MATERIAL FACTS?

[145] As stated previously the burden of proof is on the defendant. Miss Jarrett has stated that had the presence of the shed been disclosed, she would have made arrangements to inspect the premises. She also stated that information regarding the disconnections would have been relevant. In addition she indicated that if she had known that the supply of electricity was illegal she would have declined to accept the risk.

[146] Having heard her evidence and observed her demeanour I am of the view that Miss Jarrett is a credible witness. I accept her evidence in relation to this issue and find that the defendant was induced to enter into the contract as a result of the non-disclosure of material facts.

[147] Having found that the claimant failed to disclose material facts to the defendant and that the defendant was induced to enter into the contract as a result of this omission, judgment is entered for the defendant on the claim and counterclaim. Costs to the defendant to be taxed if not agreed.