C.A. Civil Practice and Procedure — Ex parte application — duty to make full disclosure
Third Party Notice — Leave granted ex parte by Master to issue — Order subsequently set aside on ground that appellant failed to make full disclosure of salient and relevant information which was highly material at ex parte hearing — whether Master justified in setting aside order — whether in any event appellant's application to issue Third Party Notice premature

JAMAICA

APPEAL **IN THE COURT OF APPEAL** DISMISSED — Downer J dissenting

[Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies et al followed]

SUPREME COURT CIVIL APPEAL NO. 7/92

Cases referred to — See p46 — end

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	SUPERIOR SECURITY CO. LTD.	DEFENDANT/APPELLANT
A N D	GENERAL ACCIDENT INSURANCE CO. (JAMAICA) LTD.	THIRD PARTY/RESPONDENT

Miss B. Veronica Warren for Appellant

Charles Piper for Respondent

July 20 - 22 and November 4, 1992

ROWE P.:

David Logan and his wife Vivienne, brought an action against the appellant alleging negligence and breach of contract by virtue of which jewellery valued at $414,000.00 was stolen from their home. In its defence, the appellant denied liability.

On November 13, 1991, the Master on hearing an ex parte summons supported by an affidavit of Barrington Thomas, granted leave to the appellant to issue a Third Party Notice to the respondent. That same day, the Third Party Notice was issued and it maintained that:

> "The Defendant claims to be entitled to be indemnified by you to the full extent of any sum which the Plaintiff may recover against it and the costs of this action on the ground that you have contracted with the Defendant your policyholder, to indemnify it against loss of property in its custody and control to a limit of $500,000.00 for any one incident of loss, and $2,000,000.00 for loss arising from a series of incidents."

Barrington Thomas the Managing Director of the appellant company averred in his affidavit sworn to on October 15, 1991 that for the period June 1989 to June 1990 the appellant was insured by the respondent "against loss of property under its custody and control up to the limit of Five Hundred Thousand Dollars ($500,000.00) for any one incident and Two Million Dollars ($2,000,000.00) for any series of incidents, on payment by the defendant of a premium of $1,500.00." He exhibited two documents both bearing date 8th June 1989 from the respondent showing the limit of indemnity to be:

"Any one Accident - $500,000.00

Any one Period - $2,000,000.00."

In paragraph 4 of the affidavit Thomas referred to the contract period June 1990 to June 1991 when the premium was increased to $10,000.00 per annum. This is what he said in part:

> "General Accident Ins. Co. stated on the Schedule which it issued for the said period that the defendant was insured for Fifty Thousand Dollars ($50,000.00) against loss arising from any one incident. The defendant pointed out to General Accident Ins. Co. that this was an error because it wanted to be insured against theft of property under its custody or control to the extent of Five Hundred Thousand Dollars for any one incident. The error was later corrected by General Accident Ins. Co. and the correct figure of $500,000.00 was recorded and sent to the defendant."

Exhibited in support were:

(i) a document headed 'Renewal Notice 050594' dated 10/5/90 which provided in the Schedule for:

"Any one Accident - $50,000.

Any one Period - $2,000,000";

(ii) an Endorsement Invoice dated 8/6/91 in which the figure $50,000 was struck out and the figure $500,000, substituted; and

(iii) An Endorsement Invoice also dated 8/6/91 which stated inter alia:

> "It is hereby noted that the Schedule in the within policy is amended to read as follows:
>
> Limit any one accident - $500,000.
>
> Limit any one period - $2,000,000."

Thomas in paragraph 5 of his affidavit swore that the appellant renewed its coverage with the respondent for the period June 1991 to June 1992 on the same terms as the previous two years and exhibited two documents both of which show in the Schedule that coverage was limited to $500,000 for any one accident and $2,000,000 for any one period.

In paragraph 9 of the affidavit Thomas said that the respondent was insisting that the appellant company was insured for the sum of $50,000.00 only for any one incident of loss. No reference was made to the Insurance Policy itself nor to any extension thereof.

When the respondent became aware of the ex parte order of November 13, 1991 it applied by summons to have the ex parte order set aside. Exhibited to the Affidavit of Sharon McDaniel which was filed in support of the respondent's summons was a copy of the Policy of Insurance, the Indemnity Clause of which reads:

> "The Company will indemnify the Policyholder in respect of all sums which the Policyholder shall become legally liable to pay within the Geographical Area as compensation for:
>
> (a) Accidental bodily injury (fatal or non-fatal) to or disease contracted by any person.

"(b) Accidental loss of or damage to property, occurring in connection with the business at the place or places mentioned in the Schedule."

There followed a series of Exceptions of which Exception (g)(i) is relevant. It states:

The Company shall not be liable in respect of:

"(a) ...

(g) Loss of or damage to property:

(i) belonging to or in the custody or control of the Policyholder or of his employees other than employees' clothing and personal effects and buildings temporarily occupied for the purposes of repair or alteration thereof."

Correspondence flowing from the respondent's attorneys-at-law to the appellant's attorneys made it clear that the respondent was relying upon the Exception Clause (g)(i) and to an Extension of the Policy which re-introduced liability for loss of or damage to property belonging to or under the control of the appellant. The copy of the Extension Clause with which we were provided during the argument provided as follows:

"PROPERTY IN THE INSURED'S CUSTODY AND CONTROL

This Policy extends to include the Insured liability for loss or damage to property in the Insured's Custody or Control - the limit of liability being $50,000.00 any one claim and in the aggregate but the indemnity does not apply in respect of damage to:

(a) property belonging to the Insured or any member of the Insured's family;

(b) property upon which the Insured or any member of the Insured's family or any person in the service of the Insured is working;

(c) the building of the premises or to any property hired or rented by or loaned to the Insured."

On these bases, the respondent contended that the appellant knew or ought to have known that by the terms of his Policy the limit of the respondent's liability in the circumstances which arose was $50,000.00 and further that the respondent's error surrounding the coverage for accidental loss or damage to property was totally irrelevant.

The learned Master found that the appellant failed to make full disclosure of salient and relevant information which were highly material at the hearing of the ex parte application. She found too, that the Policy clearly established a limitation to the Third Party's liability which was fixed at $50,000.00 to cover loss of property in the defendant's Control or Custody, consequently there was no issue by virtue of which the respondent ought to be joined as a Third Party to the appellant's action. She discharged her earlier ex parte order.

The first ground of appeal argued by Miss Warren complained that the Master did not find that the non-disclosure had caused the Court to make the ex parte order under a misapprehension, or that such failure had misled the Court, or was an attempt on the part of the appellant to suppress facts or to deceive the Court, and consequently the Master did not apply the correct principles when she set aside the ex parte order. Counsel referred to numerous decided cases in support of this submission. Ellinger v. Guinness, Mahon & Co., Frankfurter Bank A.-G., and Metall Gesellschaft A.-G. [1939] 4 All E.R. 16 concerned a motion to set aside an order for service out of the jurisdiction. There had been non-disclosure of material facts at the time of the application for that ex parte order, but this had been put right by the time the motion to have it set aside was heard in that all the relevant facts were then before the Court. Morton J. in agreement with Counsel said:

> "... that the ex parte application under Order 11 is one upon which the utmost good faith must be observed by an applicant."

And when he was in possession of all the material facts, Morton J. was able to say:

> "In these circumstances, I do not think that the order giving such leave ought to be set aside unless that order was obtained by something which amounts to an attempt to deceive the court."

This case is authority for the proposition that not every non-disclosure on an ex parte application will lead inexorably to the setting aside of that order. If on an application to set aside the ex parte order the Court is in possession of such facts as satisfies it that the ex parte application would in any event succeed then it would be wasteful to set aside that order only for the applicant to renew its application successfully, the next day.

In Lazard Brothers and Co. v. Midland Bank [1933; A.C. 289, the plaintiffs obtained leave to issue a writ against a defendant out of the jurisdiction and to serve notice of the writ by registered post. The supporting affidavit was held to be misleading. Lord Wright at p. 306-307 of the Report said:

> "No doubt the professional advisers who prepared the affidavit were influenced by the decisions of the Courts that Russian banks had not been dissolved and perhaps were following precedents used in other cases, but even so, in my judgment, the whole position ought to have been more candidly and fully explained; in particular the phrase that the bank was a company registered in Russia is singularly infelicitous. <u>There is not the slightest suggestion of bad faith made</u>, but I cannot acquit those concerned of falling short in regard to the obligations which rest on persons seeking the order of the Court for service out of the jurisdiction. That such an order is a serious matter is obvious, and it is one which only a judge of the High Court can make. <u>The Court has discretion to set aside an order made ex-parte when the applicant has failed to make sufficient or candid disclosure</u>."
>
> [Emphasis mine]

Bloomfield v. Serenyi [1945] 2 All E.R. 646 arose out of an ex parte order for service of a summons out of the jurisdiction under R.S.C. Ord. 11 r. 1(g). It was held by the Court of Appeal that in order to enable the Court to decide an application under that order it was necessary for the party making the application to supply all the material facts within his knowledge. The Court would then, without trying to determine the merits of the action, consider all the relevant documents, even though that might involve some investigation, and make an order accordingly.

The facts in that case did not disclose any joint contract nor any contract by the plaintiff with the two defendants as entitled the plaintiff's solicitor to describe it as joint contract between them of the one part and the plaintiff of the other. This factor was enough to move the Court of Appeal to set aside the ex parte order for service out of the jurisdiction, but before doing so, Scott L.J. commented pointedly thus:

> "I feel bound to say that the plaintiff's solicitors' clerk in the original affidavit upon which leave was asked did not put before the court anything like full disclosure. I cannot help thinking that the deponent must have been erroneously instructed, perhaps quite innocently, by the plaintiff as to what the position was. But I want to say definitely that it is the duty of a solicitor, asked to obtain leave under R.S.C., Ord. 11, to examine with care the material put before him for the purpose of so acting and to make sure that he does know the real case that his client has before he makes, or allows a clerk to make, an affidavit upon which the court must necessarily rely. The solicitor should remember also that he is an officer of the court."

McKinnon L.J. was somewhat troubled by the intensive investigation that had been made into the documentary evidence both in the Court of Appeal and in the Court below, but he made it clear that it is inevitable in such cases for the Court to make some investigation into the facts although not qualified at that stage to decide disputed facts. This is how he put it:

> "It has been rightly said in some of these cases that on such an application as this the court cannot try the merits of the action. That is quite true, but I think that means trying and determining disputed facts. Where on such an application the court considers the admittedly relevant documents without the necessity of deciding disputed matters, I do not think that is trying the merits of the action within the meaning of the warning not to do so. The complication of the business in this case has involved us in a somewhat lengthy investigation which gives the appearance of something like trying the merits of the action, in deciding whether it is a proper case for the application of R.S.C., Ord. 11, r. 1 (g). But in essence I do not think it is so. The ascertainment of the facts involves some investigation but I do not think it involves the resolution of disputed facts."

Lord Denning M.R. issued a Practice Note after the decision in Becker v. Noel et al [1971] 1 W.L.R. 803, a case which concerned a vexatious litigant, and in which an order had been made ex parte to emphasize the inherent power of the Court to set aside an ex parte order. That Practice Note provided in part:

> "Not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention."

This case was cited with approval by the Privy Council in Minister of Trade and Industry v. Vehicles and Supplies Ltd. et al - Privy Council Appeal 2/91.

Three other cases need to be mentioned. The first is the well-known case of Rex v. Kensington Income Tax Commissioners ex parte Princess de Polignac [1917] K.B. 486. The Divisional Court held that Princess de Polignac had suppressed or misrepresented material facts as to her residence. When the case went to the Court of Appeal, Warrington L.J. said at p. 509:

> "It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

The second case is that of Jamculture Ltd. vs. Black River Upper Morass Development Co. Ltd. et al S.C.C.A. 78/80 (unreported) judgment delivered on June 22, 1989. There the appellant had obtained an ex parte injunction which was later set aside on the ground of material non-disclosure of facts. On appeal this Court applied the principles laid down in R. v. Kensington Income Tax Commissioners case (supra). After quoting from the judgment of Lord Cozens-Hardy M.R., at p. 505 of the Report, Wright J.A. said:

> "It is important, therefore, to determine whether the appellant had made a full and frank disclosure of all material facts or whether any deception was practised on the Court such as disentitled the appellant to the relief which he sought by way of injunction.
>
> The application was supported by the affidavit of Orrett Hutchinson, a director of the appellant company. This affidavit contains twelve paragraphs and is very selective in what it chooses to disclose."

After reviewing the contents of the affidavits and giving consideration to an argument that exhibits should be given equal weight to the affidavit as if those documents had been copied in the affidavit, continued:

> "But even if buried somewhere in those sixty pages or exhibit there was some admission by the appellant that rent was due, why should it be the task of the learned judge to wade through those pages to unearth such an admission? What is required of the applicant is a full and frank disclosure of 'facts which the Court thinks are most material to enable it to form its judgment.' "

Finally, Lord Donaldson M.R. expressed the principle in similarly wide terms in WEA Records Ltd v. Visions Channel 4 Ltd and Others [1983] 2 All E.R. 589 at 593:

> "As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order."

In my opinion the authorities make it plain that an ex parte order may be set aside if:

(a) a deliberate attempt had been made by the applicant to mislead or deceive the Court;

(b) if material facts were mis-represented or omitted which had the effect of misleading the Court;

(c) if new facts have come to light which clearly show that the ex parte order ought not to have been made.

I entirely agree with Mr. Piper that the affidavit in support of the ex parte order was silent as to a part of the history of the relationship between the appellant and the respondent which part of the history would have revealed that prior to 1989 the respondent had

afforded coverage to the appellant in respect of "goods in trust or under its control" by an extension to the Policy limited to $50,000.00; the affidavit was silent as to the general terms and conditions on which coverage was afforded and the affidavit was silent as to the extensions or exceptions of the Policy.

In my opinion the affidavit was misleading in that it presented a picture that coverage was afforded to the appellant to a limit of $500,000.00 for any one INCIDENT and $2m. for any series of INCIDENTS.

The true facts gleaned from the Policy (which was in the hands of the appellant's attorney on October 15, 1991) was that coverage was afforded to the appellant for accidental bodily injury fatal or non-fatal or disease contracted by any person or accidental loss of or damage to property as to $500,000.00 for any one accident and as to $2m. for any one period. There is in my view the world of difference between an "incident" however occurring and an "accident" of a specific nature limited to specified circumstances. The first is open-ended and general, the second specific and limited.

Mr. Piper correctly submitted that the appellant had a duty to disclose the portions of the Policy which did not support his claim and which favoured the respondent and in particular Exception (g)(1) that there was no liability for property in the custody or control of the policyholder and also the Extension Clause which gave coverage for such property, limited to $50,000.00. See WEA Records case (supra) and Ex parte re a Debtor v. N.W. Bank plc et al [1983] 3 All E.R. 546, where Warner J. said at p. 551:

> "The Rule in Ex parte Princess de Polignac exists because, by definition, on an ex parte application the person against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the court of any facts which he knows which might tell in that person's favour."

It is for the Court to determine the materiality of the facts not disclosed and then to go on to determine the effect of that non-disclosure, that is to say, whether the applicant should be deprived of any advantage obtained under the original order, without a hearing on the merits or to allow the order to stand notwithstanding the material non-disclosure. As Ralph-Gibson L.J. put it in Brinks Ltd. v. Elcombe (C.A.) [1988] 1 W.L.R. 1351 at 1356:

> "The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers."

I am of the view that the Master was entitled to hold that the appellant failed to make full disclosure of salient and relevant information which were highly material at the hearing of the original application and consequently the appellant's contentions to the contrary are unmeritorious.

Section 126(1)(a) of the Judicature (Civil Procedure Code) Act provides that where a defendant claims as against a person not already a party to the action, that he is entitled to contribution or indemnity the Court or Judge may give him leave to issue and serve a Third Party Notice. Mr. Piper submitted that the appellant's application for the issue of a Third Party Notice was pre-mature as under the Policy, indemnity only arose after the appellant's liability was legally determined and he relied upon Post Office v. Norwich Union Fire Insurance Society, Ltd. [1967] 1 All E.R. 577.

The Indemnity Clause in the Policy of Insurance in the instant case states that the company will indemnify the policyholder in respect of all sums which the policyholder shall become legally liable to pay in certain given circumstances. The phrase "which the policyholder shall become legally liable to pay" was judicially

determined in Post Office v. Norwich Union Ins. Ltd. (supra). In that case a contractor carried out street works and damaged a cable of the Post Office, for which the Post Office claimed damages. The contractor denied liability and later went into liquidation. The Post Office sued the contractor's Insurance Company for the damages it suffered, claiming as statutory assignees of the Insured by virtue of Section 1(1) of the Third Parties (Rights Against Insurers) Act, 1930. The Court of Appeal held that until the contractor's liability was established and the amount ascertained, whether by litigation, arbitration or agreement, the Post Office could not sue the Insurance Company. This is how Lord Denning M.R. explained the principle:

> "Under that section the injured person steps into the shoes of the wrongdoer. There is transferred to him the wrongdoer's 'rights against the insurer under the contract'. What are those rights? When do they arise? So far as the 'liability' of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide; but the 'rights' of the insured against the insurers do not arise at that time.
>
> The policy in the present case provides that:
>
> > 'the [defendants] will indemnify the insured against all sums which the insured shall, become legally liable to pay as compensation in respect of loss of or damage to property'.
>
> It seems to me that A.J.G. Potter and Sons, Ltd., acquire only a right to sue for the money when their liability to the injured person has been established so as to give rise to a right of indemnity. Their liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in an arbitration or by agreement. Until

"that is done, the right to an indemnity does not arise. I agree with the statement by Devlin J., in West Wake Price Co. v. Ching [1956] 3 All ER. 821 at 825 that:

> 'The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until the assured have been found liable and so sustained a loss'."

All three Justices of Appeal based their decision on the interpretation of the contract of insurance and not upon the provisions of the statute. Each admitted that there could be a measure of inconvenience to an Insured in the two stage procedure but as Salmon L.J. lucidly explained Insurance Companies could have their business reputations unjustifiably ruined if policyholders could sue them at will claiming indemnity whether or not those policyholders were liable to pay damages to the claimants.

The Record shows that the appellant is denying liability in the action. Consequently, in agreement with the submissions made by Mr. Piper I am of the opinion that the appellant was not entitled to leave to issue the Third Party Notice as at that date there was no cause of action giving the appellant the right to commence proceedings against the respondent for the relief claimed.

In my opinion the new material presented to the Master exposed the serious material non-disclosures in the affidavit upon which the appellant relied to obtain the ex parte order and showed that there was no cause of action at the date of the grant of such leave. Further, the Master was entitled under the provisions of Section 129(3) of the Judicature (Civil Procedure Code) Act and in keeping with the decision of the Privy Council in Ministry of Foreign Affairs Trade and Industry v. Vehicles and Supplies Ltd. et al (supra) on the material before her to set aside the order for leave to issue the Third Party Notice.

I would dismiss the appeal with costs to the respondent to be agreed or taxed.

FORTE, J.A.

The defendant/appellant by writ dated 7th August, 1991 was sued by the plaintiffs David and Vivienne Logan for damages for negligence and/or breach of contract in that the defendant assigned their servant and/or agent to perform the duties of a security guard at the plaintiffs' home, having full knowledge that its said servant and/or agent had a criminal record. They alleged that the said servant and/or agent unlawfully removed or negligently allowed the unlawful removal of certain household effects and jewellery from the plaintiffs' home causing loss to the plaintiffs. In the statement of claim, the plaintiffs averred that the cause of action arose out of a service contract entered into with the defendant under which the defendant agreed to provide [illegible] security services on a regular basis for the plaintiffs' home. In pursuance thereof the defendant assigned one Cordell Green to perform the duties of security guard, and that he Cordell Green, unlawfully removed a large quantity of household effects and jewellery from within the plaintiffs' home and/or negligently allowed the unlawful removal of the said household effects etc.

In a defence dated 6th September, 1991, while admitting the existence of the contract, the defendant disputed that the plaintiffs had suffered the loss and damages alleged, and in the alternative denied that any loss suffered by the plaintiffs was due to negligence or breach of contract by the defendant. The defendant thereafter applied by ex parte summons for leave to issue Third Party Notice to General Accident Insurance Co (Ja.) Ltd. In an affidavit in support, the defendant alleged that it was entitled to be indemnified by the General Accident Insurance Co (Ja.) Ltd to the full extent of any sum which the plaintiffs may recover under their claim, by reason of a contract into which the

defendant had entered with the said Insurance Company for coverage against public liability. As a result, by Order of the Master, Third Party Notice was issued to the Respondents on the 13th November, 1991. It reads -

> "TAKE NOTICE THAT this action has been brought by the Plaintiffs against the Defendant for damages for negligence and/or breach of contract as appears from the Writ of Summons, a copy whereof is served herewith together with a copy of the Statement of Claim. The Defendant claims to be entitled to be indemnified by you to the full extent of any sum which the Plaintiff may recover against it and the costs of this action on the ground that you have contracted with the Defendant your policyholder, to indemnify it against loss of property in its custody and control to a limit of $500,000.00 for any one incident of loss, and $2,000,000.00 for loss arising from a series of incidents."

The respondents duly entered a conditional appearance on the 16th November 1991, and on the 19th December, 1991 issued a summons to set aside the ex parte order made on the 13th November, 1991 on the following grounds:

> "...
>
> a) the Defendant/Applicant for the Ex Parte Order of the 13th November, 1991 failed to make a full and fair disclosure to the Court of all the relevant facts of which it knew; and
>
> b) there are additional matters concerning the relationship between the Defendant and the Third Party upon which the Third Party ought reasonably to be heard in respect of the Defendant's application to issue Third Party Proceedings."

It appears that a Summons for Third Party Directions came up for hearing on the same day (i.e. 14th January, 1992) as the summons to set aside the ex parte order. On that day an Order was made by the Master, setting aside the ex parte order, and dismissing the summons for Third Party Directions.

It is from the order setting aside the ex parte order that the defendant/appellant now appeals. In setting aside the order the Learned Master found that the defendant failed to exhibit the policy of insurance with relevant extensions thereto, which contained information material to the ex parte application. She found that the affidavit in support of the ex parte application did not disclose that there had been communication between the defendant's attorney-at-law and the attorney-at-law for the third party, touching the third party's position in respect of all matters raised in the application. She concluded that these acts weigh heavily against the defendant and supported her conclusion that at the inception of the ex parte proceedings the defendant was fully aware of the terms of insurance and the extent of the third party's liability. The Learned Master therefore exercised her discretion to set aside the ex parte order on the basis that there was not full disclosure made in the application. The appellant contends that on the evidence this was an incorrect conclusion.

On what basis then was the allegation of non-disclosure founded? In its affidavit in support of the ex parte summons the defendant through its Managing Director Mr. Barrington Thomas stated that he (the Managing Director), in June 1989 went to the General Accident Insurance Co (the Third Party) and explained that the defendant wanted Insurance coverage from the company against the possibility of thefts and breaking in by its employees at the places they were assigned to work. He thereafter deponed as follows:

> "That I was told that the appropriate policy for this kind of coverage was termed 'public liability policy with goods in custody and control' and I agreed with the said General Accident Ins. Co., on behalf of the defendant

> "that it would insure the defendant for the period June 1989 to June 1990 against loss of property under its custody and control up to the limit of Five Hundred Thousand Dollars ($500,000.00) for any one incident and Two Million Dollars ($2,000,000.00) for any series of incidents, on payment by the defendant of a premium of $1,500.00"

Attached to the affidavit was a copy of a letter from the third party addressed to the defendant stating in the relevant section the following:

> "We thank you for your recent instructions, and confirm holding covered From 6/6/89 to 6/6/90 on the following basis.
>
> | | |
> |---|---|
> | Any One Accident | $500,000.00 |
> | Any One Period | $200,000,000.00 |

This letter carried an enclosure which was a copy of a schedule which repeated the Limit of indemnity.

The defendant through Mr. Thomas' affidavit also contended that the coverage on the same terms was renewed in June 1990 for the period June 1990 to June 1991 with an increased premium of $10,000. Mr. Thomas then referred to the schedule issued by the third party for that period in which he alleged that it was incorrectly stated that the defendant was insured for that period for $50,000 against loss arising from any one incident. The defendant pointed out the error to the Insurance Company as it wanted to be insured against theft of property under its custody and control to the extent of $500,000 for any one incident. As a result, the error was corrected to effect the defendant's wishes, and the correct figure "was corrected and sent to the defendant." The defendant exhibited the "Endorsement/Invoice from the Insurance Company showing the amendment of $50,000 to $500,000" for "any one accident." The defendant in summary of the above then alleged:

> "That as stated in these premises the defendant company has paid premiums to General Accident Ins. Co. since June 1989 for public liability insurance coverage against theft by employees to a limit of $500,000.00 for any one incident of loss, and $2,000,000.00 for loss arising from a series of incidents, and this has always been the agreement between the defendant and its insurer General Accident Insurance Co. Jamaica Ltd."

Mr. Thomas, however, maintained in paragraph 9 of his affidavit:

> "That General Accident Ins. Co. insists that the defendant is insured for the sum of $50,000.00 only for any one incident of loss, and the defendant understands that General Accident Ins. Co. has offered this sum to the Plaintiffs herein."

The defendant therefore disclosed that there was in fact a dispute with the third party as to the extent of its indemnity under the Contract of Insurance. Nevertheless, in its summons to set aside the ex parte order, the third party alleged that the defendant did not make a full and fair disclosure to the Court of all the relevant facts of which it knew. In support, the affidavit of its Legal Officer Mrs. Sharon McDaniel alleged the following:

> "(1) ... that the Defendant was insured by the third party prior to June, 1989 under a Public Liability policy issued by Caribbean International Insurance Brokers Limited on behalf of the Third Party, and that by an extension to the said policy the Defendant was insured, inter alia, for goods in its custody and control up to a limit of $50,000.00."

A copy of the cover note was exhibited showing under the heading:

> "Extensions to Basic cover"
>
> Goods in trust - $50,000

"(2) That on the expiry of that policy and because CIIB had ceased operations, the Defendant had requested the Third Party to continue to extend coverage to it as it would be dealing directly with the Third Party.

(3) That on the renewal date, as the Third Party's file for the Defendant could not be located, it was the Managing Director of the Defendant's Company who produced the policy which was previously issued to the Defendant and requested ~~that~~ a new policy in the same terms and conditions be issued. As a result the policy was issued affording coverage in respect of all sums which the policyholder would become liable to pay as compensation for:

(a) Accidental bodily injury (fatal or non-fatal) to or disease contracted by any person; and
(b) Accidental loss or damage to property,

occurring in connection with the business at the place or places mentioned in the schedule to the said policy."

The third party exhibited the Policy which has an ... Exception clause which so far as is applicable reads:

" The Company shall not be liable in respect of -

(g) Loss of or damage to property

(i) belonging to or in the custody or control of the Policyholder or his employees other than employees' clothing and personal effects and buildings temporarily occupied for the purposes of repair or alteration thereof."

The Exhibited Schedule indicates that in so far as the exception in paragraph g (i) (supra) is concerned there was an extension to cover property in the Insured's custody and control, as follows:

> "This policy extends to include the insured liability's for loss or damage to property in the insured's custody or control - the limit of liability being $50,000.00 any one claim and in the aggregate but the indemnity does not apply in respect of damage to:
>
> (a) property belonging to the Insured or any member of the Insured's family
>
> (b) property upon which the Insured or any member of the Insured's family or any person in the service of the Insured is working
>
> (c) the building of the premises or to any property hired or rented by or loaned to the Insured."

The evidence offered by the third party therefore set out to demonstrate that the policy of insurance referred to but not exhibited by the Defendant in the ex parte application, on the face of it, did not cover, in its general terms, the defendant for the particular loss, but in an extension to the policy did so to the limit of $50,000. The third party also contended in paragraph 11 of its affidavit that at the time Mr. Thomas executed his affidavit, the defendant was aware of the terms and conditions of the policy or ought reasonably to have been aware of same. This contention was based on (a) a letter addressed to the third party by the defendant's Attorney-at-law and (b) a reply thereto by the Attorneys for the third party.

In (a) The Attorney wrote the following:

> "To date your insured has not heard from you about its indemnity under its policy of insurance. You told me in our conversation that the insured is indemnified to a limit of $50,000.00 but your insured has informed me that the limit is $500,000.00. Could you advise me please how you intend to approach this suit against your insured and your position regarding the matter of indemnification."

In reply (b) the Attorney for the third party wrote:

> "Our instructions are that the maximum limit of our client's liability for any one accident under the policy is in fact $500,000.00 but that the applicable limit in the circumstances of this case is $50,000.00 being the limit of the indemnity offered in respect of the loss of property when in the custody and control of your client. In this regard we direct your attention to the indemnity clause on page 1 of the policy and ask that you note that by its terms indemnity is afforded therein only in the cases of 'accidental injury and accidental loss or damage to property'. Indeed Exception (g) (i) excludes liability for property in the custody and control of your client or its employees and would have been applicable had it not been for the extension to the policy providing indemnity for property in your client's custody and control. That extension clearly fixes the limit of our client's liability for such losses at $50,000.00 and we can see no basis for your client maintaining that the applicable limit is $500,000.00.
> We enclose a copy of the policy and extension thereto and advise that our client does not propose to participate in the defence of the action to which you refer."

The defendant, through its attorney, was thereby clearly informed of the position that the third party was taking in the matter.

Was there a failure to make a full and fair disclosure?

It is conceded on both sides that the Court has an inherent jurisdiction to set aside an ex parte order, if it had been obtained in circumstances where material facts have not been revealed and in such a manner as to deceive the Court.

In the case of **Rex v. Kensington Income Tax Commissioners ex parte Princess Edmond De Polignac** [1917] K.B. 486, Viscount Reading C.J. before discharging a rule nisi obtained ex parte by Princess De Polignac for a prohibition to the General Commissioner for the purposes of the Income Tax Act to prohibit them from further proceeding upon an assessment made upon her, stated thus at page 495:

> "Before I proceed to deal with the facts I desire to say this: Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

On the hearing of the appeal Lord Cozens-Hardy M.R. expressed similar views as follows:

> "That is merely one and perhaps rather a weighty authority in favour of the General proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say 'We will not listen to your application because of what you have done."

In **Ellinger v. Guiness, Mahon & Co., Frankfurter Bank A.G. and Metall Gesellschaft A.G.** [1939] 4 All E.R. 16 it was held that:

> "... non-disclosure of a material fact on the ex parte application is not in itself sufficient ground for setting the order aside. There must be an attempt to deceive the court."

The underlying factor therefore in determining whether an ex parte order should be set aside on the basis of non-disclosure, must be whether there was an attempt by the beneficiary of that order, to deceive the Court.

The applicant, however has a duty to inform the Court of any facts which he knows which might tell in favour of the person against whom the order is sought (**See Re a debtor (No 75n of 1982, Warrington), ex parte the debtor v. National Westminster Bank plc and another** [1983] 3 All E.R. 545)

In the instant case, the alleged non-disclosure relates to the terms of the Insurance Policy, and the interpretation thereof contended for by the third party. Mr. Piper for the respondent contends that the terms of that policy are clear, and leave no room for any dispute as to the extent of the indemnity for which the Insurance Company is liable. On the other hand Ms. Warren for the defendant/appellant maintains that the policy provides for an indemnity of $500,000 for any one incident, and not $50,000 as the respondent maintains. This area of disagreement was however alluded to by the defendant in the affidavit of Mr. Thomas in support of the ex parte application. Paragraph 9 of that affidavit reads as follows:

> "That General Accident Ins. Co. insists that the defendant is insured for the sum of $50,000.00 only for any one incident of loss, and the defendant understands that General Accident Ins. Co. has offered this sum to the plaintiffs herein."

In my view this is sufficient to come to a conclusion that there was no attempt on the part of the defendant to deceive the Court on the ex parte application, having expressly stated that there was a dispute as to the extent of indemnity. It cannot be

the case, that at an ex parte application the applicant must set out in detail, all the factors which call for determination in ascertaining the question of liability of the third party - for that will not be the purpose of the application. He must, of course, set out any matter which, from his knowledge, is in favour of the absent party, but he is not required to put forward the case for the third party, who will have that opportunity when he has been served with the third party notice.

In **Carshore v. North Eastern Railway Company** [1885] 24 Ch. D. 344 it was held in giving leave to a defendant to serve notice of a claim for contribution or indemnity on a third party that the Court will not consider whether the claim is a valid one but only whether the claim is bona fide and whether if established it will result in contribution or indemnity.

Were this appeal only to be decided on this point, I would find that in all the circumstances, the third party order should be affirmed. However, the question arises whether the Insurance Company can be made a third party to this action, having regard to the term of the policy which reads:

> "The company will indemnify the Policyholder in respect of all sums which the Policyholder shall become legally liable to pay etc. [Emphasis added]

When then, does the liability to indemnify the insured arise? It is sufficient to refer to the dicta of Lord Denning M.R. in **Post Office v. Norwich Union Fire Insurance Society, Ltd** [1967] 1 All E.R. 577 without alluding to its particular facts, to determine that question. At page 579 he stated thus:

> "... So far as the 'liability' of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide; but the 'rights' of the insured against the insurers do not arise at that time. The policy in the present case provides that -

> 'the [defendants] will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property.'
> It seems to me that A.J.G. Potter & Sons, Ltd., acquire only a right to sue for the money when their liability to the injured person has been established so as to give rise to a right of indemnity. Their liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in an arbitration or by agreement. Until that is done, the right to an indemnity does not arise. I agree with the statement by Devlin, J., in West Wake Price & Co. v. Ching [1956] 3 All E.R. 821; [1957] 1 W.L.R. 45; 29 Digest (Repl.) 554, 3762.
> 'The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until the assured have been found liable and so sustained a loss.'"

Solomon L.J. at page 582 expressed a similar opinion thus:

> "The case really resolves itself into this simple question: could Potters on June 17, 1965, have successfully sued their insurers for the sum of £839.10s. 3d. which they were denying that they were under any obligation to pay to the Post Office? Stated in that way, I should have thought that the question admits of only one answer. Obviously Potters could not have claimed that money from their insurers. It is quite true that if Potters in the end are shown to have been legally liable for the damage resulting from the accident to the cable, their liability in law dates from the moment when the accident occurred and the damage was suffered. Whether or not there is any legal liability, however, and, if so, the amount due from Potters to the Post Office can, in my view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for any insured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action, and there is nothing in law that makes such an action possible. I agree with the statement of Devlin, J., in West Wake Price & Co. v Ching [1956] 3 All E.R. at p. 825 to which Lord Denning, M.R., has already referred."

These opinions which are in keeping with my own conclude that the insured must establish his legal liability before he can bring an action against his Insurers. In the instant case the defendants have filed a defence to the action and could possibly succeed in establishing that it is not legally liable for the loss suffered by the plaintiff. In addition, even if it fails to do so, the Court may determine that the extent of liability is within the limitation contended for by the third party, especially given the fact that some of the goods have been recovered.

I would therefore find that in the circumstances and for the reasons expressed in terms of the ratio in the case of **Post Office v. Norwich Union Fire Insurance Society Ltd** (supra) the Learned Master's decision to set aside the ex parte order, should not be disturbed. In my view the appeal should be dismissed.

DOWNER, J.A.

Superior Security Co. Ltd., the appellant in this interlocutory appeal, seeks to have a third party notice issued against the respondent General Accident Insurance Co. (Jamaica) Ltd., (the insurer). This appeal has been instituted because Master Harris refused leave to issue a third party notice and awarded costs against the appellant.

In the substantive action, the appellant has been sued by David and Vivienne Logan for breach of contract or in the alternative, for negligence. The allegations are that on the 13th of July, 1990, Cordel Green, a Security Guard, being the servant or agent of the appellant either stole or negligently permitted household goods and jewellery valued at just over $400,000, to be removed from the household of the Logans. In those circumstances, the appellant sought and obtained ex parte, leave to issue a third party notice against the insurer. The issues at the heart of this dispute concern the terms of the insurance and in particular, firstly whether the terms could be decided in an interlocutory appeal and secondly whether the ex parte notice initially granted to the appellant, was wrongly obtained because there was not a full and fair disclosure as required by law.

Was there full disclosure as required by law?

The cardinal feature concerning the insurer in the appellant's affidavit at the ex parte hearing to issue the third party notice, was that there was disclosure of the insurer's defence. That defence was that on the insurer's interpretation the terms of the public liability policy was limited to $50,000 and further, that that sum was offered to the Logans. This fact was stated in paragraph 9 of the appellant's affidavit thus:

> "9. That General Accident Ins. Co. insists that the defendant is insured for the sum of $50,000 only for any one incident of loss, and the defendant understands that General Accident Ins. Co. has offered this sum to the plaintiffs herein."

Then the appellant stated his contention as to the force and effect of the policy and its extensions in paragraph 10 which reads:

> "10. That as stated in these premises the defendant company has paid premiums to General Accident Ins. Co. since June 1989 for public liability insurance coverage against theft by employees to a limit of $500,000 for any one incident of loss, and $2,000,000.00 for loss arising from a series of accidents, and this has always been the agreement between the defendant and its insurer General Accident Insurance Co. Jamaica Ltd."

Further, the appellant went on to state the issue which it proposed to aver and prove against the insurer and it is set out fully in paragraph 11 of the affidavit. It reads thus:

> "11. That the defendant herein claims that it is entitled to be indemnified by General Accident Ins. Co. Ja. Ltd. to the full extent of any sum which the plaintiffs may recover under their claim in this action, by reason of the defendant's contract with the said insurance company for coverage against public liability to the limits already stated herein, and the defendant says that any denial by General Accident Ins. Co. of the said limits of coverage amounts to a breach of contract."

Additionally, the appellant recalled the course of dealings with the insurer from June 1989 to June 1991.

In examining the affidavit, the correspondence, the cover notes and the relevant invoices, the onus on the appellant at the ex parte hearing before the Master, was to disclose the relevant material facts which pertained to the dispute. This was recognized by the appellant and it is appropriate to state a crucial paragraph

which is the basis of its case. It reads:

> "5. That in June 1991 the defendant herein renewed its coverage against public liability with General Accident Ins. Co. for the period June 1991 to June 1992 for a premium payment of $10,000.00 on the same terms as the previous two years, that is, coverage was limited to $500,000.00 for any one incident and $2,000,000.00 for any series of accidents. Attached hereto and marked 'C' for identification is a copy of the 'Renewal Notice 050451' sent to the defendant, and also attached and marked 'C2" for identification is a copy of the 'Endorsement/Invoice' numbered T03179 sent to the defendant."

As for the renewal notice and the endorsement invoice exhibited, the material part reads:

> "Schedule:
>
> ANY ONE ACCIDENT - $500,000."

and there is an endorsement on the renewal notice which states:

> "FOR COMPLETE DETAILS ON TERMS AND CONDITIONS OF COVER PLEASE REFER TO OUR POLICY DOCUMENT."

To emphasise that it was aware of the requirement to disclose fairly and fully, the appellant exhibited the previous cover notes and invoices. It was against this background that the learned Master on 13th November granted a third party notice to join the insurer as requested.

The hearing of the inter party summons before the Master was the next step in these proceedings. The insurer sought and succeeded in setting aside the ex parte order granting the appellant a third party notice. The first averment by the insurer reads:

> "a) the Defendant/Applicant for the Ex Parte Order of the 13th November, 1991 failed to make a full and fair disclosure to the Court of all the relevant facts of which it knew;"

On the summons to set aside the third party notice, the insurer concentrated on its interpretation of the force and effect of the policy, instead of establishing that there was a failure to disclose fully and fairly by the appellant. Be it noted that, the insurer,

in the affidavit of Sharon McDaniel, the in-house attorney-at-law, does not deny the endorsement on the relevant invoices which state the limit for any one accident is $500,000. What they do allege is that the limit is $50,000, a fact which the appellant disclosed in its affidavit. Here is how the insurer sets out its case in paragraphs 5 and 6 of the affidavit:

> "5. That in or about June, 1989 pursuant to the request of the said Mr. Barrington Thomas, the Third Party issued a Public Liability Policy to the Defendant on the same terms and conditions as were contained in the previous policy affording coverage in respect of all sums which the policyholder would become liable to pay as compensation for:
>
> (a) Accidental bodily injury (fatal or non-fatal) to or disease contracted by any person; and
>
> (b) Accidental loss of or damage to property.
>
> Occurring in connection with the business at the place or places mentioned in the schedule to the said policy.
>
> 6. That inter alia, by an extension to the said Policy indemnity was also afforded in respect of the following risk in the following terms namely:
>
> Property in the Insured's Custody & Control This Policy extends to include the insured liability's for loss or damage to property in the insured's custody or control - the limit of liability being $50,000.00 any one claim and in the aggregate but the indemnity does not apply in respect of damage to:-
>
> (c) property belonging to the Insured or any member of the Insured's family;
>
> (d) property upon which the Insured or any member of the Insured's family or any person in the service of the Insured's is working;
>
> (e) the building of the premises or to any property hired or rented by or loaned to the Insured."

It is important to note that this extension clause on which the insurer relies must be interpreted by a court of construction, and that court must be a Supreme Court judge sitting in open court. In interpreting this clause, it must also be juxtaposed with the main indemnity clause which reads:

> " INDEMNITY
>
> The Company will indemnify the Policyholder in respect of all sums which the Policyholder shall become legally liable to pay within the Geographical Area as compensation for:
>
> (a) Accidental bodily injury (fatal or non-fatal)to or disease contracted by any person
>
> (b) Accidental loss of or damage to property
>
> occurring in connection with the business at the place or places mentioned in the Schedule."

Also, the schedules on the invoice **state the limitation** to be $500,000 on which the appellant relies. That the insurer recognized that this was a triable issue is evidenced by paragraphs 7 and 8 of its affidavit:

> "7. That had it not been for the extension relating to property in the Insured's custody or control the Defendant would not have been entitled to claim upon the third Party for the loss allegedly suffered in the Statement of Claim herein as exception (g) of the general exceptions of the said Policy specifically excludes the liability of the Third Party in respect of loss of or damage to property belonging to or in the custody or control of the Policyholder or of its employees.
>
> 8. That by the schedule to the said Policy and the extensions thereto the applicable limits of liability of the Third Party to the Defendant are as follows:

(i)	Accidental bodily injury and accidental loss or damage to property	$500,000 for -any one Accident $2,000,000 for any one period of Insurance
(ii)	Liability for food poisoning etc.-	$100,000.00
(iii)	Property in the Insured's custody and control -	$50,000.00

> "I exhibit herewith Marked 'S.M.2' for identity a copy of the Third Party's specimen of the Policy issued to the Insured, together with the relevant Schedule and Extensions."

Perhaps it is appropriate to cite three clauses from the specimen policy to illustrate the important and difficult points of fact and law which must be explored by oral evidence and pleadings in a trial court. It is of significance because the interpretation of the main indemnity clause, the schedule and the exception clauses in a standard form insurance contract is of importance to the commercial community and the public at large. Here are the clauses relied on by the insurers to establish that there was a failure to disclose fully:

> " EXCEPTION
>
> The Company shall not be liable in respect of:
>
> (g) Loss of or damage to property
>
> (i) belonging to or in the custody or control of the Policyholder or of his employees other than employees' clothing and personal effects and buildings temporarily occupied for the purposes of repair or alteration thereof
>
> (ii) being that part of any property or building upon which the Policy-holder or his employees are or have been operating."

It will be a matter for a court of construction to decide whether a security guard, in the employ of the appellant on the facts on this case, had the household effect and jewellery under his custody and control. Clauses 3, 4 & 5 which the insurer relies on to establish that the appellant did not disclose fully and fairly are under the heading CONDITIONS. They read as follows:

> "3. No admission after promise payment or indemnity shall be made or given by or on behalf of the Policyholder without the written consent of the Company which shall be entitled if it so desires to take over and conduct

"in the name of the Policyholder the defence or settlement of any claim or to prosecute in the name of the Policyholder for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Policyholder shall give all such information and assistance as the Company may require.

4. In connection with any claim or claims against the Policyholder arising out of one occurrence or all occurrences of a series consequent on or attributable to one source or original cause the Company may at any time pay to the Policyholder the amount of the Limit of indemnity (after deduction of any sum or sums already paid as compensation) or any lesser amount for which any such claim or claims can be settled and upon such payment the Company shall relinquish conduct and control of and be under no further liability under this Policy in connection with such claim or claims except for costs and expenses of litigations recoverable or incurred in respect of matters prior to the date of such payment.

5. The Policyholder shall at all times take reasonable and proper care in the selection and employment of steady, sober and competent employees and also take reasonable and proper precautions to prevent accidents in the conduct of his business. The Policyholder shall given to the Company immediate notice of all or any substantial alterations which materially affect the risk covered by this Policy in the conduct of his said business or the premises ways, works, machinery or plant of the Policyholder in connection therewith and on the happening of any event that may give rise to any claim under this Policy will remain unaltered and unrepaired any machinery plant, appliances or things in any way causing or connected with such event for such time as the Company may reasonably require."

The net result of the insurer's case before the Master is to confirm the appellant's claim that there is a triable issue in respect of an indemnity which the appellant states may be up to $500,000, while the insurer claims the limit is $50,000. That this is a fair interpretation of the issue, is illustrated by

extracts from Mr. Charles Piper's letter to Miss Brenda Warren. Here is how learned counsel puts the matter:

> "Our instructions are that the maximum limit of our client's liability for any one accident under the policy is in fact $500,000.00 but that the applicable limit in the circumstances of this case is $50,000.00 being the limit of the indemnity offered in respect of the loss of property when in the custody and control of your client." [Emphasis supplied]

Further he states:

> "That extension clearly fixes the limit of our client's liability for such losses at $50,000.00 and we can see no basis for your client maintaining that the applicable limit is $500,000.00."

It does not appear that the Master took into account that from the very inception in paragraph 3 of the affidavit on behalf of the appellant, it was averred that the policy was one of public liability. Here is how it stated the initial transaction:

> "3) That I was told that the appropriate policy for this kind of coverage was termed 'public liability policy with goods in custody and control' and I agreed with the said General Accident Ins. Co., on behalf of the defendant that it would insure the defendant for the period June 1989 to June 1990 against loss of property under its custody and control up to the limit of Five Hundred Thousand Dollars ($500,000.00) for any one incident and Two Million Dollars ($2,000,000.00) for any series of incidents, on payment by the defendant of a premium of $1,560.00. Attached hereto and marked 'A1' for identification is a copy of a letter dated 8th June 1989 from General Accident Ins. Co. to the defendant confirming its coverage against public liability. Also attached hereto and marked 'A2' for identification is a copy of the Schedule of the policy document which was issued to the defendant some weeks after the said letter."

Here, it must be noted that the schedule exhibited has the following subscription "For any one accident $500,000". Further, the judgment below makes no mention of paragraph 9 of the appellant's affidavit which is reiterated for emphasis:

> "9. That General Accident Ins. Co. insists that the defendant is insured for the sum of $50,000.00 only for any one incident of loss, and the defendant understands that General Accidents Ins. Co. has offered this sum to the plaintiffs herein."

Here the appellant has summarised the effect of the policy, and the extension as the insurers would have stated it. So it ought not to be successfully contended that a summary such as this, could not satisfy the law as laid down by the authorities. Another error was to presume that it was incumbent on the appellant to disclose that there were discussions between its attorney-at-law, and the attorney-at-law for the insurers. All that it was necessary to do, was to summarise the insurer's case insofar as it was known to the appellant.

It is now apposite to cite the authorities deployed by Miss Warren to support her submission that there was full and fair disclosure as required by law.

The first statement of principle in an instance where the applicant concealed the fact of residence in connection with her income tax runs thus:

> "... Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then

> "it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

per Viscount Reading, C.J. in **Kensington Income Tax Commissioner ex parte Princess Edmond De Polignac** [1917] K.B.486 at p. 495.

In the Court of Appeal, Lord Cozens-Hardy, M.R. at p. 502 said:

> "... A rule nisi was applied for and obtained for a prohibition. It was supported by and founded on an affidavit. That affidavit contained statements which I quite agree with the Lord Chief Justice were inaccurate to the knowledge of the lady, the deponent, and I think almost manifestly intended to conceal from the Court certain facts which were not only relevant, but I will go further and say essential, to the decision of the matter which came before them."

The House of Lords approved this approach in **Lazard Brothers & Co. v. Midland Bank Ltd.** [1933] A.C. 289. At 307 Lord Wright said:

> "... The Court has discretion to set aside an order made ex parte when the applicant has failed to make sufficient or candid disclosure. I think in this case there was sufficient ground to call in play the discretion of the Court to set aside the order for service and justify the Court in refusing in the exercise of its discretion to treat the judgment as a sufficient foundation for a garnishee order as in the case suggested by Viscount Cave, L.C. in the **Sedgwick, Collins** case [1927] A.C. 95, 102. In particular the words 'the intended defendants are domiciled in Russia' may be most misleading, even if no intention existed to mislead. What is suggested is a 'domicil' —an address where but for other difficulties personal service could be effected, and a suggestion is implied that the method of service might fairly be expected to bring to the proposed defendants the notice of the writ. Even if the Bank existed, it must have been known that it existed as a mere shell, incapable of action or of being affected with notice."

That the Court may set aside an order made ex parte under a misapprehension, or new matters drawn to its attention has made evident in **Becker v. Noel & Anor.** [1971] 1 W.L.R. 803. Lord Denning

made the following statement:

> " Not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention."

Nowhere in her reasons did the Master state either expressly or impliedly, that she was under a misapprehension when she granted the ex parte order.

In Re a debtor [1983] 3 All E.R. 545. At 551 Warner, J., in a Divisional Court of the Chancery Division made a statement which is applicable to this case. It states:

> "... The rule in Ex p Princess de Polignac exists because, by definition, on an ex parte application the person against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the court of any facts which he knows which might tell in that person's favour. But the applicant is under no obligation to place before the court every fact that might reinforce his own case."

The fact is that the insurer was relying on an exemption clause of the insurance contract to limit the appellant's claim to $50,000. This clause at a trial must be construed contra proferentem. The meaning the insurer attributed to this clause was stated on the ex parte application and is clear evidence that the appellant had disclosed to the court the insurer's case. It is in the light of this, and the law as cited in the authorities above, that the Master's order must be set aside and third party notice issued ex parte be reinstated.

Should Third Party Direction be granted on appeal?

Although the Master set aside the third party order, she anticipated that she might have been in error and with commendable prudence, she adjudicated on the issue of whether third party directions ought to have been given. Here is how she stated the issue:

> " Although the defendant omitted to disclose salient and relevant pieces of information that were highly material at the hearing of the application in assisting the court in the making of its decision at the issue of the third party proceedings, it is necessary to determine whether the order should stand and third party directions granted. In order to succeed, the defendant must show that he is entitled to relief by virtue of the provisions of the Judicature Civil Procedure Code S. 126 which reads:
>
> 'Where in any action a defendant claims as against any other person not already a party to the action (in this title called the third party) (a) that he is entitled to contribution or indemnity.'...

With respect, the Master tried the issue of the meaning of the insurance policy when all she or this Court was entitled to do was to grant or refuse directions. Her reasoning was as follows:

> " The relief sought by the defendant against the third party is one of indemnification under a contract of insurance. There is no evidence that there is any issue in respect of the indemnity of the defendant by the third party. The policy clearly established a limitation to the third party's liability to the defendant to the extent of Fifty Thousand dollars ($50,000.00) to cover loss of property in the defendant's control or custody."

Liability was admitted by the insurer. What is in issue is quantum, and that must be based on the true construction of the insurance contract. There was no jurisdiction in the Master to interpret the policy at that stage. Such a decision deprived the appellant of a fair hearing in open court which is entrenched in section 20 (2) & (3) of the Constitution. The appellant has been denied a fair hearing in open court because such a matter must be tried on pleadings and oral evidence.

The reasonable interpretation of section 126 (1) of the Civil Procedure Code, supports the allegations that the insurer is a third party against whom the appellant is entitled to claim an indemnity of up to $500,000. So considered the appellant is entitled to have the directions sought. For ease of reference

the directions sought were:

> "That the defendant serve a Statement of its Claim on the Third Party within 21 days.
>
> That the Third Party plead thereto within 21 days after service thereof on it, inclusive of the day of service.
>
> That the defendant and the Third Party do respectively exchange list of documents within days after these pleadings are closed.
>
> That there be inspection of documents within days thereafter.
>
> That the Third Party be at liberty to appear at the trial of this action, and take such part as the Judge shall direct, and be bound by the result of the trial.
>
> That the question of the liability of the Third Party to indemnify the defendant be tried at the trial of this action.
>
> That the costs of this application be costs in the cause and in the Third Party proceedings."

Do the authorities support the appellant's claim that the third party directions ought to be granted in this case?

This is the way Cotton, L.J. stated the rule as regards the basis for third party directions in **Carshore v. North Eastern Railway Company** Vol. XXIX Ch. 344 at p. 346:

> " The right to serve notice on a third party is confined by Order XVI., rule 48, to a third party against whom a defendant claims to be entitled to contribution or indemnity. It would be wrong for us on this application to decide whether the Defendants in this case have any right to be indemnified by the person whom they have served, and I do not decide anything on that point. The only question before us is, whether they claim indemnity within the meaning of the rule."

Then Fry, L.J. in concurring, said at p. 347:

> "... If I had thought that in the present case the Defendants' claim against Farlow was frivolous I might have come to a different conclusion, but I do not think that it is."

Bacon, V.C. in **Edison & Swan United Electric Light Company v. Holland** Vol. XXXIII Ch. 497 at p. 498 expressed the policy on a summons for third party directions rule in graphic form. He said:

> " The policy of the law expressed in the rule is plain. If A is suing B, and B denies his right to sue, but says, 'even if he is entitled to sue, C has indemnified me; let him come here and fight his own battle, or help me to fight mine,' the object of the rule of procedure is that there should be a discussion and a decision, once for all, of the real substance of the dispute."

This is exactly what the appellant is saying to his insurer. "Help me in my contest with the Logans, for you are in law, obliged to, on the true construction of the indemnity.

That the appellant was right to seek directions when it was sought to set aside the third party notice, is supported in the passage from **Baxter v. France & Ors.** [1895] 1 Q.B. 455 at p. 457. Lord Esher, M.R. said:

> " The rule applicable to the case is Order XVI., r. 52. The third party has appeared pursuant to the notice, which is exactly the case provided for by the rule. The rule further provides that the defendant giving the notice may apply to the Court or a judge for directions. On that summons for directions, the first thing to be considered under the rule, is whether the Court or a judge is 'satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part.' If satisfied of this, the Court or a judge 'may order the question of liability to be tried.' In this case there must be a summons for directions and I have not the least doubt of the meaning of the rule being that if, in considering the application, the judge is of opinion that there cannot be any question of contribution or indemnity, he will direct that no such question is to be tried."

Then in Baxter v. France No. 2 [1895] 1 Q.B. 391 at p. 596 Rigby, L.J. said:

> "... Secondly, there may be a case where there is clearly 'a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed,' by which I take to be contemplated, a case where the whole matter can be disposed of as between the defendant and the third party. If the judge is satisfied that there is such a question, and that it can properly be tried in the action, he will give directions as to the trial of it."

This is precisely the appellant's position in the instant case.

It is clear that the Master's approach in refusing to give directions was based on the following passage in her judgment:

> " As between plaintiff and defendant there are no facts arising in the defence which in any way implicates the third party in relation to the contract between the plaintiff and defendant. The pleadings do not in any way seek to attach any negligence to the third party, as the remedy sought, is one arising from the alleged non-performance of a contract of the defendant giving rise to the plaintiff's claim. There are no circumstances save except for the indemnity of Fifty Thousand Dollars ($50,000.00) which would permit the defendant to look to the third party for any relief."

But it is the acknowledgment of a indemnity of $50,000 by the insurer which gives rise to the triable issue because the appellant is claiming that on the true construction of the contract, the indemnity may amount to $500,000. The correct approach was enunciated by Romer, L.J. in McCheane v. Gyles [1902] 1 Ch. 287 at p. 300 thus:

> "... In considering that question one must have regard to the parties, that is, not to the claim of the plaintiff in the action, but to the claim of the defendant against the third party. You must treat the claim of the defendant against the third party as if it were a claim on a writ of summons,..."

That it was permissible to institute proceedings ex parte, is demonstrated by the following statement by Joyce, J., in

Furness, Withy & Co., Ltd. v. Pickering [1908] 2 Ch. 224 at p. 226:

> "My opinion is that an order in such a case as this may be made ex parte, although it is always competent to the Master or judge to require the plaintiff or any other person to be served. But as a general rule I think that the application ought to be made ex parte."

Even in personal injuries cases, the insurer may be joined in a case tried by judge alone: see Zurich General Accident and Liability Insurance Company Limited Third Parties [1943] 1 K.B. 168. That the Master or this Court had no jurisdiction to decide the disputed law and fact that the maximum indemnity is $500,000 and the insurer's insistence that it is $50,000, is supported by the following statement by MacKinon, L.J. in Bloomfield v. Serenyi [1945] 2 All E.R. 646 at p. 649. That was a case of service out of the jurisdiction but the principle enunciated applies to this case:

> "I agree. It has been rightly said in some of these cases that on such an application as this the court cannot try the merits of the action. That is quite true, but I think that means trying and determining disputed facts."

Against this range of appropriate authorities, Mr. Piper cited Post Office v. Norwich Union Fire Insurance Society Ltd. [1967] 1 All E.R. 577. That was a case dealing with the construction of section 1 of the Third Parties (Rights against Insurers) Act 1930 against the policy in issue. Third party proceedings could not be contemplated as the Act governs a situation where the insured is bankrupt or if the insured is a company it is in liquidation. It is important to show how the preliminary point arose. At page 578 of the judgment the following passage appears:

> "By order dated Dec. 15, 1965 an issue was ordered to be tried as a preliminary point of law. This issue was as follows -
>
> > 'The plaintiffs contend that on the true construction of the Third Parties (Rights against Insurers) Act, 1930, and of the policy of

> " 'insurance ... liability of the defendants to the plaintiffs is in the events which have happened established by proof that [Potters] became liable to pay unliquidated damages to the plaintiffs.
>
> It is contended on behalf of the defendants that on the true construction of the Act of 1930 and of the policy of insurance, in default of agreement judgment against [Potters] is a condition precedent to liability of the defendants under the policy; and that in the premises no sum of money having been ascertained whether by judgment or agreement to be payable by [Potters] (as is admitted) the present action must fail.' "

It was an appeal on a preliminary point of law and it has no relevance to the issue of whether it was appropriate to affirm the third party notice and to give third party directions on the summons in this case.

The Court in that case decided that the phrase "will indemnify P. Ltd. against all sums which (P. Ltd.) **shall become** liable to pay as compensation in respect of loss or damage to property," meant that the loss suffered by the insured must first be ascertained before the insurer could be sued by the Post Office as assignee. Here the issue is as to the directions to be given as to how the trial ought to proceed to determine the issue of liability between the appellant and the Logans as well as the validity of the claim for an indemnity of up to $500,000 against the third party insurer. In this context the sage words of Goddard, L.J. (as he was then) in Harman v. Crilly [1943] 1 K.B. 168 at p. 173 are apt. They read:

> "It seems to me that the question whether or not there is a contract of indemnity should be tried in the same proceedings as the action in which the liability of the defendants will be determined. There is no ground for saying this third-party notice is in any way embarrassing or would lead to anything but a fair trial of the action."

In the light of the foregoing, it is clear that the order of the Master must be set aside. The third party notice ought to be restored. Further, the directions sought, ought to be granted with liberty to apply to the Master. As for costs, the third party insurer ought to pay the taxed or agreed costs both here and below.

ADDENDUM

Since preparing this judgment, Rowe, P. has kindly brought to my attention **Brink's Mat Ltd. v. Elcombe & Ors.** [1988] 1 W.L.R. 1350. On non-disclosure the following statement of principle at p. 1357 by Ralph Gibson, L.J. is most useful and it runs thus:

> "(7) Finally, it is 'not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:' per Lord Denning M.R. in **Bank Mellat v. Nikpour** [1985] F.S.R. 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.
>
> > ' when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:'
>
> per Glidewell L.J. in **Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.**, ante, pp. 1343H—1344A."

This earlier judgment reported in the same volume at p. 1337 correctly states what has been decided on this judgment. It is that once there is a decision in favour of a third party notice, as it seems the majority in this case has decided, then the

court ought to exercise its discretion in favour of giving directions for trial on the arguable issues which have emerged from the third party notice and the affidavit in support of it. At p. 1341 Glidewell, L.J. said:

> " Following the grant of the Mareva injunction, third party directions were given on 30 November 1984. Thereafter, the third party filed a defence to the third party notice."

Cases referred to

(1) Ellinger v Guinness, Mahon & Co, Frankfurter Bank A.G and Metall Gesellschaft A.G. (1939) 4 All ER 16

(2) Lazard Brothers v Midland Bank (1933) A C 289

(3) Bloomfield v Serenyi (1945) 2 All ER 646

(4) Becker v Noel et al (1971) 1 W.L.R 803

(5) Ministry of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd et all Privy Council Appeal 2/91

(6) Rex v Kensington Income Tax Commissioners ex parte Princess de Polignac (1917) KB 486

(7) Jamaal Tyre Ltd v Black River Upper Morass Development Co. Ltd et al (SCCA 78/88 (unreported) 22/1/89)

(8) WEA Records Ltd v Visions Channel 4 Ltd and Others (1983) All ER 589

(9) Ex parte re a Debtor v N.W. Bank plc et al (1983) 3 All ER 546

(10) Brinks Ltd v Elcombe (C.A) (1988) 1 W.L.R 1351

(11) Post Office v Norwich Union Fire Insurance Society Ltd (1967) 1 All ER 577

(12) Re a debtor (No 75 ... of 1982, Warrington) ex parte the debtor v National Westminster Bank plc and another (1983) 3 All ER 525

(13) Carshore v North Eastern Railway Company (1885) 29 Ch.D 344.

(14) Edison and Swan United Electric Light Company v Holland Vol XXXIII Ch 497

(15) Baxter v France & Ors (1895) 1 Q.B. 455

(16) Baxter v France No 2 (1895) 1 Q B 591

(17) Mc Cheane v Gyles (1902) 1 Ch 287.

(18) Furness, Withy & Co Ltd v Pickering (1908) 2 Ch 224

(19) Zurich General Accident and Liability Insurance Company Limited Third Parties (1943) 1 K.B 168

(20) Harman v Crilly (1943) 1 K.B 168