

BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 2380 of 2000

BETWEEN:

MATTHEW JOSEPH

(Applicant)

AND

CLICO INTERNATIONAL GENERAL

INSURANCE LIMITED

(Defendant)

Before the Honourable Madam Justice Elneth Kentish, Judge of the High Court.

2003: January 20, 22, 23, 28

Mr. Deighton Rawlins for the Plaintiff.

Mr. Larry Smith and Miss Shawn Belle for the Defendant.

REASONS FOR DECISION

[1] The decision in this action was given on the 28th day of January, 2003 and I now give the written reasons for the decision.

The Claim

[2] The plaintiff is claiming from the defendant the sum of \$55,300 for the loss by fire of the contents of his dwelling house under a policy of insurance No. CG/FR1/004408 (the policy) effected with the defendant on the 25th August, 1999.

[3] Liability under the policy is denied by the defendant first on the ground that in breach of the terms and conditions of the policy the plaintiff failed to disclose on the proposal form

(a) the prior existence of a mortgage affecting the dwelling house in favour of the Mutual Bank of the Caribbean Inc. (Mutual Bank) and

(b) the prior insurance on the dwelling house effected with British American Insurance Company Limited (British American) and

second on the ground that in claiming payment under the policy for the loss of contents the plaintiff made a false declaration that he had not claimed against any insurer in respect of the risks included in the policy, when in fact he had made such a claim.

[4] Two main issues arise for determination on the pleadings

1.

2.

[5] However a preliminary issue must first be determined as to whether the policy covered both the dwelling house and the contents as it is the plaintiff's case that he went to the defendant intending only to effect insurance on the contents of the dwelling house.

The Facts

[6] The plaintiff owned a dwelling house and the contents thereof located at 8th Avenue New Orleans in the parish of St. Michael. This dwelling house was insured with British American prior to 25th August 1999 on which date the plaintiff signed and submitted to the defendant a 'dwelling fire proposal form'.

[7] The proposal form contained a number of questions of which the following questions with the answers of the plaintiff are material:

7. Is the building or property mortgaged or the property therein under lien? If so, to whom and for what amount? Answer "No"

10. Are you at present insured with any other company or companies in respect of the same property as declared for insurance herein – if so state the name of such other company or companies, the amount of insurance, the policy numbers and their periods? Answer "No".

[8] At the foot of the proposal form the plaintiff signed a declaration that the statements made by him in the proposal form were true to the best of his knowledge and belief and agreed that this declaration formed the basis of the contract between the defendant and himself.

[9] The proposal form was accepted and the policy issued. Clauses 1, 3 and 13 of the policy provide as follows:

1. "If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any material fact to be known for estimating the risk or any omission to state such fact, the Company shall not be liable upon this Policy so far as it relates to property affected by any such misdescription, misrepresentation or omission."

3. "The Insured shall give notice to the Company of any insurance or insurances already effected, or which may subsequently be effected, covering any of the property hereby insured, and unless such notice be given and the particulars of such insurance or insurances be stated in or endorsed on this policy by or on behalf of the Company before the occurrence of any loss or damage, all benefit under this Policy shall be forfeited."

13. "If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the willful act, or with the connivance of the Insured; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this Policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited."

[10] Whilst the policy was in effect the dwelling house and the contents thereof were completely destroyed by a fire on the 16th January 2000 and the plaintiff on the 24th January, 2000 signed and submitted to the defendant a claim form for payment under the policy. This claim form also contained a number of questions of which the following together with the answers of the plaintiff are material:-

(a) Have you ever sustained a loss or claimed against any insurer for any of the risk included in the policy under which the claim is made? If so give particulars. "None"

(b) Was there at the time of the occurrence any other existing insurance, effected by you or by any other person, on the property for which this claim is made? If so please give details. "None"

[11] At the foot of the claim form the plaintiff also signed a declaration that the particulars given to the defendant on the form were true and complete.

[12] The defendant having disclaimed liability under the policy on the grounds set out above the plaintiff began these proceedings.

The Pleadings

[13] In his amended statement of claim, the plaintiff claims under the policy the sum of \$55,300 against the defendant for the contents destroyed by the fire, interest on the sum of \$55,300 and costs alleging that in breach of the policy the defendant wrongfully failed to pay the sum claimed.

In its amended defence, the defendant admits that policy was in force but contends that the plaintiff committed a breach of the conditions contained in clauses 1, 3, and 13 of the policy and this breach entitles it to repudiate the plaintiff's claim.

[14] The plaintiff sought and obtained further and better particulars of the defence, the effect of which was to expose the matters on which the defendant was relying to establish its defence.

[15] Interrogatories were served on the plaintiff by the defendant and in answer thereto the plaintiff made certain material denials and admissions. He denied that he had insured his dwelling house under the policy but admitted that he had insured the contents of the dwelling house under the policy. He denied that the total sum insured under the policy was \$90,300 explaining that \$35,000 was for the house already insured (with British American) and \$55,300 was for the contents to be insured (with the defendant). He asserted that he applied to the defendant for a policy of insurance for the contents of his dwelling house only and not the house as this was already insured by British American. He admitted that the policy with British American covered the period 1st April 1999 to 31st January 2000; that he had filed a writ of summons and statement of claim in High Court Suit No. 2379 of 2000 claiming the sum of \$40,000 from British American for his dwelling house which was destroyed by fire on the 16th January, 2000 and that he had received payment from British American in settlement of his said claim.

[16] The 9th, 10th, 11th and 12th interrogatories and the answers thereto are significant and these interrogatories and the answers are reproduced here in full:-

9. To the 9th interrogatory, namely, "Did the above-named Plaintiff, in response to the following question on the CLICO International General Insurance Company Limited Dwelling Fire Proposal Form – "Are you at present insured with any other Company or Companies in respect of the same property as declared for insurance herein – if so state the name of such other Company or Companies, the amount of Insurance, the Policy Numbers and their Periods-" answer "No"?" **I say No, it is in respect of the policy of insurance for the contents of the house situate at 8th Avenue, New Orleans, St. Michael and not the house of itself which was already insured.**

10. To the 10th interrogatory, namely, "Did the above-named Plaintiff sign his name on the 24th day of January, 2000, on a CLICO International General Insurance Limited Claim Form for Fire Theft Burglary Money and All Risk Policies? **I say I do not recall, but if so, it would be with reference to the claim for loss of contents of my house situate at 8th Avenue, New Orleans, St. Michael.**

11.

12. To the 12th interrogatory, namely, "Did the above-named Plaintiff in response to the question on the said Claim Form – "Was there at the time of the occurrence any other existing insurance, effected by you or any other person, on the property for which this claim is made? If so, please give details" – answer "None?" **I say Yes, for which this claim is made meaning the loss suffered in respect of contents of my house situate at 8th Avenue, New Orleans, St. Michael.**

Preliminary Issue:

[16] The plaintiff's testimony is that he owned the dwelling house at 8th Avenue New Orleans, St. Michael in which he lived. This house was insured for \$35,000 with Leroy Parris of Parris Insurance Agency, a broker of British American prior to the 28th August 1999.

[17] As an entertainment manager and calypsonian he had a complete band comprising a set of musical instruments purchased between 1998, 1999 and 2000 and, wishing to insure the musical instruments, he spoke with Leroy Parris with whom the house was insured asking him to insure the instruments. Mr. Parris, unable to attend to this matter directed him to one Mrs. Colleen Ashby at the defendant's offices, where he was referred to another agent or employee of the defendant.

[18] He was required to fill out a proposal form and was assisted in doing so by this agent. He testified that he asked the agent questions about how to answer the questions on the form and she advised him what to put and where to put it... When he completed the form he signed it and gave the agent the premium she requested.

[19] When referred by his Counsel to question 9(a) on the proposal form which requested information on the amount of insurance required on the building(s) the plaintiff explained that he put in the sum of \$35,000 in the column next to this question as it represented the amount for which the house was insured with British American.

[20] When referred by his Counsel to question 9(b) of the proposal form which requested information of the amount of insurance required on furniture and personal effects the plaintiff explained that the sum of \$55,300 represented the value of the musical instruments and furniture.

(the contents) of the house for which he was seeking insurance.

[21] Under cross-examination when asked what was meant by the heading on the proposal form "Particulars of Insurance Required" under which question 9 falls the plaintiff replied that it means [British American] is asking for information about things required to be insured. Further cross-examined about question 1 of the proposal form "Situation of building for property proposed for insurance....." under the heading "Particulars of Insurance Required" the plaintiff stated:

"I understand building to mean building same as that referred to above meaning the address where the instruments were kept [being the postal address of the plaintiff previously given on the form]. They were asking me where was the furniture and the equipment which I intended to insure. The agent told me put "same as above" ...this was a question asked of me about the furniture and musical equipment".

[22] Referred to his evidence in-chief about question 9(a) of the proposal form under the heading "Particulars of Insurance Required" the plaintiff in cross-examination further stated:

"I do not agree question 9(a) relates to the amount of insurance being sought [on the building]. This meant what was already effected on the building. I went to [the defendant] to seek insurance on the musical instruments."

[23] Nonetheless, the plaintiff in cross-examination agreed that:

(i) the schedule to the policy shown to him is the schedule attaching to the policy;

(ii) in his statement of claim he is claiming under that policy; and

(iii) the items referred to in the schedule as being insured are (a) one building only at 8th Avenue New Orleans, St. Michael for \$35,000 and (b) the contents in the said building for \$55,300.

[24] Counsel for the plaintiff submitted that it was very clear on the evidence that the plaintiff went to the defendant for the sole purpose of effecting insurance on the contents of his dwelling house; that the plaintiff was not sure how to answer all the questions on the proposal form and was assisted by an agent/employee of the defendant at the defendant's offices; and that if there were any mistakes in the completion of the proposal form, with the result that the dwelling house was included, those mistakes must be imputed to the defendant and not to the plaintiff.

[25] On the other hand Counsel for the defendant submitted that the dwelling house was insured under the policy and even if mistakes were made by the agent assisting the plaintiff in the completion of the proposal form those mistakes in law are deemed to be those of the plaintiff himself. In support of his submission Counsel cited the case *Newsholme Brothers v Road Transport General Insurance Co.* [1929] 2 K.B. 356 where it was held that the agent of the insurance company in filling in the proposal form was merely the amanuensis of the proposer and whether he mistook the instructions of the insured or whether he intentionally filled in something different from what he was told he was not acting as agent of the company but as agent of the insured.

[26] The principle enunciated in the *Newsholme Brothers'* case is all the more applicable to the facts of the present case where the plaintiff himself completed and signed the form and the agent of the defendant was merely assisting the plaintiff in the completion of the proposal form.

[27] I therefore reject the submission of Counsel for the plaintiff that the defendant is responsible for any mistakes in the completion of the proposal form.

[28] The plaintiff testified that he understood the heading on the proposal form "Particulars of Insurance Required" to mean that the (defendant) was asking for information about the things required to be insured. Having understood that, I have great difficulty in accepting the plaintiff's evidence that when he put \$35,000.00 in answer to question 9(a) of the proposal form, he meant the sum that the house was already insured for and that question 9(a) did not relate to the amount of insurance being sought.

[29] Moreover it is significant that the plaintiff fully appreciated the import of sub-questions (b) (c) and (d) of question 9.

[30] To accept the submission of Counsel for the plaintiff that the intention with which the plaintiff set out to effect the policy is relevant would in my view undermine the fundamental principle of *uberrimae fides* which governs policies of insurance and place an unacceptable onus on insurance companies for matters of which they can have no prior knowledge.

[31] I therefore reject the plaintiff's evidence on this issue and find that both the dwelling house and its contents were insured under the policy.

Statements in Proposal Form

[32] The defendant contends that the plaintiff did not disclose on the proposal form which he signed and submitted to the defendant either the prior insurance on the dwelling house with British American or the prior mortgage on the dwelling house in favour of the Mutual Bank and the failure to so disclose renders the policy null and void.

[33] That the dwelling house was insured with British American prior to the policy with the defendant being effected was readily admitted by the plaintiff. However the plaintiff maintains that he disclosed the policy with British American to the defendant's agent who assisted him in completing the proposal form. In cross-examination he stated:-

"I told the young lady at Clico that the house was already insured by British American. Mrs. Colleen Ashby already knew that. I did give notice to Clico of the policy with British American on the same day I paid the premium and I gave Clico a copy of that policy".

[34] But the issue before the Court is not whether the plaintiff disclosed the policy with British American to the agent of the defendant. The issue is whether the plaintiff disclosed the policy with British American on the proposal form which he signed and submitted to the defendant. Accordingly, even if I were to find that the plaintiff did disclose the policy with British American as he contends, that would be of little assistance to his cause since it is the proposal form, which formed the basis of the contract between the plaintiff and the defendant. Further to accept plaintiff's oral testimony in this regard would clearly contravene the well established rule that parole evidence cannot be relied on to add to, vary or contradict a written instrument. (See Sir Guenter Treitel "The Law of Contract" 10 edn (1999). p. 175 para 1; Rabin v Berger Association Ltd [1986] 1 WLR 526).

[35] This brings me to consider the proposal form and clause 3 of the policy. Contained in the proposal form are the following questions:

7. "Is the Building or Property mortgaged or the property therein under lien? If so, state to whom and for what amount?" (first question)

10. "Are you at present insured with any other company.... in respect of the same property as declared for insurance herein if so state the name of such other company the amount of Insurance, the Policy numbers and their periods." (second question)

To both of these questions the plaintiff responded "No". This response is clear and unambiguous and means that the plaintiff in fact failed to disclose on the proposal form either the mortgage on the dwelling house, to the Mutual Bank or the insurance policy with British American.

[36] However the plaintiff's explanation is that when he answered "No" to the first question, he was interpreting the word "property" to mean or refer to the contents of the building for which he was seeking insurance from the defendant and not to the dwelling house as this was already insured.

[37] I feel constrained to say that the use of the word "property" in the first question does not at first glance make for clarity. This word is used in two different senses, first, to mean property comprising land and building as distinct from building only in the phrase 'building or property'; and second, to mean the contents of the building in the phrase 'or the property therein'.

[38] Nonetheless, the use of the word "property" in these two different senses does not, in my view, render the question ambiguous as on a fair construction of the question, it clearly addresses three distinct matters (a) the building only; (b) the property comprising land and building; and (c) the contents of either (a) or (b) if it was intended to insure some or all of these.

[39] The plaintiff's explanation does not account for his answer to the question which on the facts of this case was addressing two separate matters namely the building and the contents.

[40] If, as the plaintiff contends, his response was in reference to the property meaning the contents of the building, then there was no response to the question as it related to the building and his answer "No" was therefore incomplete and inaccurate.

[41] The plaintiff's explanation for his answer to the second question is the same as that given to the first question. As I have already found at [31] that both the dwelling house and the contents were insured under the policy the phrase "the same property as declared for insurance" in the second question means or includes the dwelling house and the contents and it behoved the plaintiff to answer the question in respect of both the dwelling house and the contents. On the basis of the plaintiff's explanation, he answered the question as it related to the contents only. Accordingly, he did not answer the second question as it related to the building and his answer "No" was also incomplete and inaccurate.

[42] I therefore reject the plaintiff's explanation in relation to both questions. I find that the plaintiff did not disclose on the proposal form either the prior mortgage to Mutual Bank or the prior insurance on the dwelling house with British American.

[43] What then is the effect of the plaintiff's failure to answer the first and second questions fully and accurately?

[44] **London Assurance v Mansell (1879) Ch.D. 363** was an action to set aside a life insurance policy on the ground of concealment of a

material fact in effecting the insurance policy.

[45] In delivering the decision of the Court Jessel M.R. in answer to the question "What is the principle on which Courts act in setting aside contracts of assurance stated at 367:

"Whether it is life, or fire, or marine assurance, itake it good faith is required in all cases.."

He then referred to the case of *Lindenau v Desborough* 8B. & C. 591

an action on a policy of insurance where Lord Tenterden observed:

"Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material;" and concluded

"that passage shows that the non-answering of a specific question in Lord Tenterden's opinion would amount to concealment if the man knew the fact and was able to answer it."

[46] On the facts of the present case the plaintiff knew on the date on which he signed and submitted the proposal form to the defendant that he had already insured the dwelling house with British American and mortgaged it to the Mutual Bank.

[47] Following the decision in *London Assurance v Mansel*, the non-answering by the plaintiff of the first and second questions amounted to a concealment of these facts by the plaintiff.

[48] In turn this concealment rendered untrue the statements contained in the proposal form, the truth of which were warranted by the plaintiff. Counsel for the plaintiff cited the Privy Council case of **Condogianis v. Guardian Assurance Company Limited [1921] 2 A.C. 125**. This case concerned a policy issued on the basis of a proposal form which stated that it was the basis of the policy and that particulars given by the Appellant were to be express warranties. The policy contained a condition that if there was any misrepresentation as to material facts the respondents were not to be liable on the policy. The answer given by the Appellant to a question on the proposal form was untrue and it was held that there was a breach of the warranty and the appellant could not recover on the policy.

[49] Delivering the judgment of their Lordships, Lord Shaw of Dunfermline having referred to the declaration contained in the proposal form that the "proposal is the basis of the contract ..." observed at 129:-

"The case accordingly is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the truth might have arisen inadvertently and without any kind of fraud."

Although the declaration signed by the plaintiff in this case does not state that it is an express warranty, and is not as wide and encompassing as

the declaration in the Condogianis case, properly construed the declaration constitutes an express warranty. On the authority of the Condogianis case the concealment by the plaintiff of the prior insurance and prior mortgage by itself constituted a breach of the express warranty given by the plaintiff. This breach I hold entitled the defendant to reject the plaintiff's claim on the policy.

Breach of Conditions of the policy

[50] However Counsel for the defendant submitted that by his failure to disclose on the proposal form the existence of the prior mortgage and the prior insurance on the dwelling house, the plaintiff also breached conditions 1 and 3 of the policy set out above thereby relieving the defendant of all liability under the policy.

[51] In support of his submission Counsel relies on **Dalkian v Colonial Life Insurance Co. Ltd. [1965] 12 W.I.R. 133** a decision of the Court of Appeal of Trinidad and Tobago where it was held that the failure to disclose the existence of another policy of insurance was a breach of an express condition of the policy. At issue in that case was a fire insurance policy on a dwelling house in all respects similar if not identical to that before this court. The Appellant having failed to disclose that he had insured against similar loss with another company and in his declaration misrepresented the value of the dwelling house to the respondent, an action brought for payment under the policy was dismissed.

[52] In delivering the decision of the Court Phillips J.A. remarked at 136:

"I would immediately observe that the question of materiality is relevant only to cases of non-disclosure or misrepresentation of facts, and has no application to the determination of the question of breach of an express condition of insurance The present case is not merely one of non-disclosure or innocent misrepresentation of the facts, but one of the alleged breach of an express condition of the policy."

[53] In response to the arguments advanced by Counsel for the defendant Counsel for the plaintiff submitted that:

1. It is not in dispute either that

(a) Leroy Parris of Parris Insurance Agency was the agent of both the defendant and British American with whom the dwelling house was insured; or

(b) the plaintiff had first approached Leroy Parris to effect insurance on the contents as the dwelling house was already insured through Leroy Parris;

2. The fact that the plaintiff had so approached Leroy Parris demonstrates that the plaintiff had no intention to perpetrate a fraud;

3. The plaintiff is a simple man seeing the proposal form for the first time and based on information given by the plaintiff on the defendant's ambiguous form the defendant went ahead and insured the dwelling house and contents;

4. The plaintiff did not know that the defendant had gone ahead and insured the building together with the contents.

- [54] Counsel cited no legal authority relying on the absence of any intention on the part of the plaintiff to conceal either the prior mortgage or the prior insurance and on an alleged ambiguity in the proposal form which ambiguity I have already addressed.
- [55] There can be no doubt that under condition 1 of the policy the defendant is expressly relieved of any liability where an insured either makes a material representation or fails to disclose a material fact.
- [56] Equally there can be no doubt that under condition 3 of the policy an insured can derive no benefit unless an insured gives notice of any insurance effected either prior or subsequent to the policy and particulars of any such insurance are endorsed on the policy.
- [57] These conditions are stringent but must be strictly complied with by an insured in order to benefit under the policy. They are inserted into contracts of insurance for the protection and benefit of the insurance company: first, to allow the insurance company to vitiate the policy where it has been misled into issuing the policy by a misrepresentation of the insured as to a material fact, and second, to allow the insurance company, relying on the principle of indemnity, to reduce its own liability under the policy by invoking contribution from such other insurance company.
- [58] The reliance by Counsel for the plaintiff on the absence of an intention on the part of the plaintiff to conceal any material fact, even if this were in fact so, is of little avail to the plaintiff.
- [59] The plaintiff expressly agreed that the defendant would not be liable under the policy if he breached conditions 1 and 3 of the policy. In this case, as in the case of **Dalkian**, what is involved is a breach of express conditions of the policy and the intention of the plaintiff is wholly immaterial to the question of whether or not the express conditions of the policy were complied with.
- [60] It is therefore not sufficient, in my view, for an insured person whose claim is rejected by the insurer for breach of the express conditions under the policy to set up his integrity and honesty in answer to the insurer's rejection of liability.
- [61] I have already found that the plaintiff did not disclose the prior insurance to the defendant. But, even if, as the plaintiff contends he did disclose the prior insurance to the defendant the particulars of that insurance were not stated in or endorsed on the policy as required by condition 3 of the policy.
- [62] By his failure to disclose the prior mortgage and prior insurance the defendant breached both conditions 1 and 3 of the policy.
- [63] Accordingly I hold that the defendant is entitled to reject, as it did, the plaintiff's claim for loss of the contents of the dwelling house.

Claim for Payment

- [64] The foregoing finding is sufficient to dispose of this action. But Counsel for the defendant also attacked the plaintiff's claim for payment on the ground that the plaintiff made a false declaration on the claim form submitted to the defendant. In his amended defence Counsel for the defendant alleged that the plaintiff breached condition 13 of the policy, when in answer to the question on the claim form, "Have you ever sustained a loss or claimed against any insurer for any of the risks included in the policy under which the claim is made?" the plaintiff

responded "None" and the plaintiff had in fact made, such a claim against British American. If established, this allegation could also provide the defendant with a defence to the plaintiff's claim and therefore demands consideration.

[65] It is not in dispute that the claim form contained a declaration signed by the plaintiff that the particulars given on the form were true and complete.

[66] Now the claim form was not filled out by the plaintiff himself. He was adamant in both evidence-in-chief and cross-examination that it was filled out by Mr. Elvis Simpson, the claims Adjuster to whom the claim was referred by the defendant, in Mr. Simpson's office at D. C. Craig Associates and that he signed the claim form in the presence of Mr. Simpson. According to the plaintiff the claim form was not filled out by Mr. Weatherhead the defendant's Vice President of Claims.

[67] Mr. Simpson, to whose evidence on behalf of the defendant, I will return later, testified that the handwriting on the claim form is not his and that he never filled out any forms on behalf of the plaintiff.

[68] Mr. Weatherhead testified on behalf of the defendant that it was he who filled out the claim form and that he did so on the basis of information supplied by the plaintiff. I quote from his testimony:

"Mr. Joseph came to the office. He asked to speak to me. When I spoke to him he told me he came to report his fire loss. I first verified coverage, hence the note of building \$35,000 and contents \$55,300 (at top of page 1 of claim form). I put questions to Mr. Joseph and the response on claim form is what I was told There is an initial against the total amount claimed of \$90,300. It is mine."

[69] Mr. Weatherhead further testified that in completing the claim form he advised the plaintiff that they would need to appoint an adjuster to assist with establishing the loss and that the concern of the plaintiff at the time was that he had nowhere to live and that the plaintiff was claiming a total of \$90,300 for the building and contents.

[70] Mr. Simpson was accepted as an expert witness and testified that he was appointed by the defendant on the 24th January 2000 to conduct an independent inquiry into the circumstances surrounding the fire at a property owned by the plaintiff and that he met with the plaintiff on three occasions, the first being on the 26th January 2000 at the location of the property.

[71] It is significant that the claim form is dated 24th January 2000 two days before Mr. Simpson's first meeting with the plaintiff. This fact itself belies the plaintiff's testimony that it was Mr. Simpson who completed the claim form and that he signed it in Mr. Simpson's presence.

[72] I therefore find that the plaintiff was not being truthful when he testified that the claim form was completed by Mr. Simpson. I also find that the claim form was completed by Mr. Weatherhead in his office. Relying on the Newsholme Brothers Case (cited above) I am satisfied that in completing the claim form Mr. Weatherhead was the agent of the plaintiff and not of the defendant.

[73] Both Mr. Weatherhead and Mr. Simpson testified in a candid, forthright and objective manner and their evidence on the issue on the claim form and all matters relating to the plaintiff's claim is to be preferred to that of the plaintiff whenever there is a material conflict in the evidence lead on behalf of the plaintiff and the defendant.

[74] It is also not in dispute that the plaintiff answered "None" to the question "Have you ever sustained a loss or claimed against an insurer for any of the risks under which the claim is made? However, the plaintiff's testimony in evidence-in-chief is that when he answered "None" "we [Mr. Simpson and the plaintiff] were talking about contents of house, furniture and equipment. I answered "None" – not about the house".

[75] Is this explanation reasonable so as to make the plaintiff's answer accurate in relation to the question posed when the claim form is examined in its entirety?

[76] The first difficulty with this explanation resides in the fact that it is demonstrably untruthful since Mr. Simpson was in no way involved with the completion of the claim form.

[77] The second difficulty resides in the particulars given by the plaintiff under the heading "PARTICULARS OF THE CLAIM TO BE GIVEN IN DETAIL". Particulars are given of: one house completely burnt, the area of the house 32' x 40'; the number of rooms – 3 bedrooms, kitchen, dining room, living room; the owner of the land, a Mr. Todd who lives in the States; the fact that the plaintiff lived alone; the items in the house from 1987 and also of the value of the building \$35,000 and contents \$55,300 making a total of \$90,300.

[78] These particulars clearly demonstrate that a claim is being made in respect of (a) the house and (b) the contents of the house. Accordingly, the plaintiff must have concluded that these were risks included in the policy when the claim form was being filled out. If the plaintiff did not so conclude, on what basis I am compelled to ask could the claim for the house and contents be advanced? If the plaintiff did so conclude, then it must follow from the plaintiff's explanation that he was not answering and did not answer the question as it related to the other risk namely the house. Thus his answer "None" to the question was rendered inaccurate and untruthful since it did not deal with both risks included in the policy.

[79] Moreover, the evidence of Mr. Simpson given after refreshing his memory from his notes was very clear. His testimony was that after initial investigations, he was satisfied that the plaintiff's loss fell within the terms of the policy and set about settling the matter and that the risk insured under the policy was a building for \$35,000 and contents for \$55,300. According to him, he arranged to meet and met the plaintiff at St. Mary's Primary School in the evening of March 9 to negotiate a settlement of the claim. He started with the building claim and reviewed with the plaintiff claim details in respect of the building which based on the information the plaintiff had provided totalled in excess of \$60,000. He advised the plaintiff that based on his assessment the cost of rebuilding the structure similar to the one destroyed was approximately \$45,000 and that since the policy on the building was \$35,000 that was the most he could offer in settlement. He further testified that the plaintiff accepted this sum of \$35,000 on the building claim and he then turned his attention to the claim for contents.

[80] It is clear from Mr. Simpson's evidence that he and the plaintiff had gone a long way in negotiating the claim which was for the building and the contents. It is also clear that the plaintiff's claim began to founder at the precise moment that Mr. Simpson turned his attention to the claim for the contents. I quote from his testimony in chief:

"Given that [the plaintiff] had no receipts or other documents to establish the value of items, I advised him that I would have to make further inquiries before negotiations on the contents claim could be concluded. I then made a series of inquiries During the course of these additional inquiries it was brought to my attention that (the plaintiff) had another policy of insurance covering the building ... with British American. I contacted (the defendant) to ascertain whether they were aware of the existence of the British American Policy and..... (the plaintiff) and questioned him with regard to the other policy".

[81] The plaintiff in cross-examination denied in large measure the testimony of Mr. Simpson. However, he admitted in cross-examination that he

did write more than one letter to the defendant and that he stated in one of the letters that he did not include the estimate for labour for rebuilding the house because he did not know whether this was required. He testified that he gave this letter to Mr. Simpson and if it reached the defendant it did so through Mr. Simpson.

[82] He also denied in cross-examination that he gave Mr. Simpson information about labour costs for rebuilding the new house stating that he (Mr. Simpson)

“had asked how much it had cost to build the house that was destroyed because the defendant and British American were teaming up to pay his claim because it was the same agent responsible for both policies.”

[83] The plaintiff admitted in cross-examination that he discussed the claim for contents with Mr. Simpson but denied that he discussed the claim for the house at any meeting at St. Mary's Primary School. He further stated that

“Mr. Simpson and I discussed why I was paying insurance coverage for house and contents when the house was already insured with British American. Mr. Simpson made me realize that the house was also covered with the defendant.”

[84] I do not accept the evidence of the plaintiff that he supplied estimates as to how much it had cost him to build the house that was destroyed. I find that in processing the claim of the plaintiff, he supplied the defendant with estimates of materials and labour costs for rebuilding the house destroyed by the fire.

[85] The evidence of Mr. Weatherhead on the completion of the claim form and of Mr. Simpson on the processing of the plaintiff's claim is as I have said clear, straight forward and direct. That of the plaintiff on the completion of the claim form and the processing of the claim is convoluted, contradictory and wholly unreliable.

[86] I therefore find that the plaintiff's answer “None” was a false declaration and amounted to a breach by the plaintiff of condition 13 of the policy.

[87] Following the decision in **Dalkian v Colonial Life Insurance Co. Ltd.** cited earlier I hold that the defendant was also entitled to reject the plaintiff's claim for breach of condition 13 of the policy.

Divisibility of Policy

[88] The issue of divisibility of the policy did not arise on the pleadings. It was not raised by the plaintiff as his claim was presented and argued on the basis that he had effected a contents only policy with the defendant. It was raised by Counsel for the defendant in argument as another bar to the recovery of the plaintiff under his claim.

[89] Counsel for the defendant cited **MacGillivray & Parkington “On Insurance Law”** eighth edition para 1922 where the learned author states that

“Apart from special circumstances or conditions, misrepresentation or non-disclosure as to any part of the property insured will avoid the policy, for prima facie the contract is one and indivisible.”

[90] Counsel also cited the case of **The Gore District Mutual Fire Insurance Company v. James H. Samo and Thomas Johnston (1878) 2 Cen. S.C. 411** where the issue was whether an insurance policy issued by the Appellants to the Respondents for \$3,000 of which \$1,000 was for the building and \$2,000 was for stock in consideration of a single premium, was divisible. The policy contained a condition which rendered it void for any misrepresentation. It was held that the policy of insurance on the building and on the stock was entire and indivisible and the misrepresentation rendered the policy wholly void.

[91] In delivering the judgment of the Supreme Court Richie J. at p. 422 observed:

“It cannot be doubted, there may be separate insurances in the same policywhen questions such as have been suggested here arise, they will have to be decided on the language of the policy, having due regard to the subject matter.”

[92] It is therefore a matter of construction as to whether any given policy is divisible or not.

[93] When one looks at the policy in this case it becomes apparent that it was one policy covering two risks and in respect of which a single premium was payable. The policy was therefore indivisible and the plaintiff's claim for payment for the contents only cannot succeed.

Disposal

[94] I accept the evidence of the defendant that the plaintiff breached conditions 1, 3 and 13 of the policy by failing to disclose the prior mortgage and prior insurance effected by the plaintiff on the dwelling house and by submitting to the defendant a false claim for payment.

[95] The defendant is entitled to reject the plaintiff's claim for payment. This action is dismissed with costs to the defendant to be agreed or taxed.

Elneth Kentish

Judge of the High Court.