IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 245A of 1983

BETWEEN	**HEADLEY FEANNY**	**PLAINTIFF**
AND	**GLOBE INSURANCE COMPANY OF THE WEST INDIES LIMITED**	**DEFENDANT**

Lord Gifford Q.C. and Maurice Manning for the Plaintiff

Dennis Goffe Q.C. and Minett Palmer for the Defendant

Heard on the 14th, 17th, 30th and 31st days of May 1996, 11th October, 1996 and 29th July, 1997.

JUDGMENT

COURTENAY ORR J.

This action was begun by originating summons dated 20th December, 1983, but on 25th May 1984, an order was made that the matter be proceeded with as if begun by writ. In his statement of claim the Plaintiff pleaded as follows:

1. "By a policy of Insurance dated the 24th day of March 1983, made by the Defendant, in consideration premiums paid and to be paid to it by the Plaintiff, the Defendant insured the Plaintiff against loss or damage by fire as follows namely, $400,000.00 on a dwelling house situated at Lot 12 Pigeon Vale, Stony Hill in the parish of St. Andrew.

2. At all material times the Plaintiff was interested in the said house and to the amount so insured therein.

3. On the 23rd day of June 1983, the said house was destroyed by fire by reason whereof the plaintiff has suffered loss and damage.

PARTICULARS

4. .....The Plaintiff duly notified the Defendant of the said loss and damage but the Defendant has not paid to the Plaintiff the said sum of $331,483.50 or any part thereof as covered by the indemnity insurance amounting to $400,000.00."

The pith of the defence is contained in paragraphs 5 & 6 of the defence which reads, in part:

5. .....The Defendant says that the Plaintiff is not entitled to the sum claimed, or to any other sum,.....for the reasons that, when the Plaintiff completed the Proposal Form for the issue of the said Policy, he warranted (a) that he had not withheld any material facts and (b) that the answers in the Proposal Form were true; but breached those warranties by (a) concealing certain material facts and (b) giving a false answer to a question in the Proposal Form."

PARTICULARS OF CONCEALMENT OF MATERIAL FACTS

The Plaintiff failed to disclose:

(a) That on 22nd January, 1983, he suffered a loss by fire in respect of premises at Temple Hall in the parish of Saint Andrew resulting in payment of his claim in the amount of $75,000.00 by the Insurance Company concerned.

(b) That on 12th December, 1982, he suffered a loss by burglary resulting in another Insurance claim (yet to be settled) in the amount of $19,000.00.

(c) That during the night of 25th to 26th February, 1983 he suffered a loss by flood in respect of premises owned by him and situated at 11 Melwood Drive in the parish of Saint Andrew, resulting in yet another claim against another Insurance Company in the amount of $75,000.00.

PARTICULARS OF FALSE ANSWER GIVEN

In response to Question 15 on the Proposal Form as to whether he had ever suffered loss from any of the insured perils (excluding hurricane, earthquake or flood) he falsely gave a negative answer."

In response the Plaintiff pleaded thus in his reply at paragraphs 7 to 10 inclusive.

7. "The Plaintiff asserts that contrary to what is stated in paragraph 5 of the Defence he is entitled to the sum claimed and denies that he at any time withheld any material fact from the Defendant nor did he give false answers to any questions in the Proposal Form.

8. That full disclosure of all three incidents outlined in the particulars to paragraph 5 of the Defence were made by the Plaintiff to the Atlas Insurance Agency who were at the time and still are agents of the Defendant.

9. That prior to the signing of the insurance contract between the Defendant and the Plaintiff and in the course of negotiations for the contract the Plaintiff visited the offices of the Atlas Insurance Agency on more than one occasion at 62a Hope Road in the parish of Saint Andrew and made full disclosure to Mrs. O'Connor an employee of the Atlas Insurance Agency. As a consequence, the allegations of non-disclosure and concealment are unfounded.

10. That the Plaintiff at no time gave false answers to question No. 15 in the Proposal Form. That is the duty and responsibility of this Honourable Court to construe the said question, and on a proper construction it will be shown that the plaintiff did not give a false answer to question 15 as stated in the Proposal Form."

The Plaintiff alone gave evidence on his behalf, and Mrs. O'Connor was the sole witness for the Defence. It is an important fact that the proposal form contained a clause warranting that the answers were true and making the proposal the "basis of the contract."

It reads as follows:

> "I do hereby declare that the above answers are true, and that I have withheld no material information regarding this Proposal. I agree that this Declaration and the answers given above, as well as any further Proposal or Declaration or Statement made in writing by me or anyone acting on my behalf shall form the basis of the contract...."

THE PLAINTIFF'S EVIDENCE

Mr. Feanny said he is a building contractor and has been so occupied for many years. In March 1983, he lived at Lot 6 Pigeon Vale, St. Andrew. On a day in that month he left from the Bank of Nova Scotia and went straight to the offices of Mrs. Jennifer Messado, attorney-at-law, who did all his legal work. He was accustomed to go to her office three or four times a week. Mrs. Messado's legal offices were on the same building as the Atlas Insurance Agency.

Mrs. Messado introduced Mrs. O'Connor as the Manager of the Atlas Insurance Agency, and told her to "look about the insurance." He then sat down with Mrs. O'Connor outside Mrs. Messado office, "more or less in the typing pool area." He was asked questions and the proposal form was filled out by Mrs. O'Connor who typed in the information. They "discussed previous mishaps and previous claims." He had known Mrs. O'Connor some years before when she was working at Crawfurd Fletcher Insurance Brokers.

He had difficulties with two questions in the proposal form - questions 14 and 15. These read as follows:

> "14. Have the Buildings and/or Contents suffered damage by hurricane, earthquake or flood during the past five years? If so, give particulars.....
>
> 15. Have you ever sustained loses from any of the perils (other than these referred to in question 14 above) to which the insurance is to apply. If so, please give particulars....."

He discussed these questions with Mrs. O'Connor. In particular he asked her "Do you remember we have and still have a claim for Melwood Avenue which was flooded?" She replied "Well then this does not apply to this" and she added "What happened previously did not apply to these premises because we were talking about 12 Pigeon Vale."

He had not given false answers when he answered "No" to questions 14 and 15 above in the proposal form. He could not remember if he had signed the proposal form the same day on which he was introduced to Mrs. O'Connor.

He had made a claim for flood damage to a house on Melwood Avenue in about January or February, 1983. That claim was handled by Crawfurd Fletcher Insurance Brokers. There were other claims, about 2 or 3 but he could not remember the dates on which they were made. Among those other claims was one concerning a motor vehicle. That was against Globe Insurance Company of the West Indies Limited - the Defendants hereafter called "Globe".

He suffered a complete destruction of the building at Lot 12 Pigeon Vale, Stony Hill, and made a claim pursuant to the loss - through Atlas Insurance Agency. But he received no "serious response." He contacted Globe, but the claims Manager refused to see him.

He had not received any correspondence from Globe denying liability, nor had he received any compensation.

When asked about his understanding of question 15, he replied that it related only to the property which he was insuring. Had he thought that it referred to property at any other location he would have answered "Yes". He was 99% sure that the form was filled out on his first visit. But he could not remember if he signed the proposal form on the same day.

The claim for the earlier flooding had not been paid. He thought he had abandoned it. He was almost sure the burglary claim had been paid.

THE EVIDENCE FOR THE DEFENDANT

Mrs. O'Connor deposed as follows:

She has been the Managing Director of O'Ryan Insurance Brokers since January, 1996, and holds the qualification of ACII. She began her career in the insurance industry as a renewal clerk, in 1978, with Crawford Beek and Amos, a firm which dealt with all classes of general insurance and group benefits. In 1982, she joined Samuel and Samuel Insurance Agency as Agency Manager and Company Secretary. This firm later changed

its name to Atlas Insurance Agency and was the agent of Globe Insurance Company, the Defendants.

Jennifer Messado was a principal of the Agency and had her law offices on the same building as the Agency, both when Mrs. O'Connor joined the Agency and later when it was moved to 62a Hope Road.

Atlas Insurance Agency did not have the power to accept proposals on behalf of "Globe". Once the proposal form had been signed Atlas Insurance Agency hereafter called "Atlas" would submit it to Globe for them to peruse it and decide whether they would accept the risk.

As regards house insurance, if Atlas was approached by a proposer, Atlas would take the basic information from him. Such information would include the construction and location of the building, the sum insured which the proposer would like to set and whether he had any previous losses. Atlas would then contact Globe and ask them to confirm the premium that should be charged, and to hold or bind cover pending the completed proposal form, that is, Globe would give temporary cover until they received the proposal form. When this was completed, Atlas would send it on Globe.

Whenever Mrs. Messado referred someone to her, Mrs. Messado would send her a note giving very basic information such as the value of the property to be insured, its location and the name of the proposer. She, Mrs. O'Connor, would then usually send the proposal form to the proposer in care of Mrs. Messado.

As regards the issue of the policy for 12 Pigeon Vale, to the Plaintiff, the matter had been referred to her by Mrs. Messado who had supplied the usual information. Cover was effected based on the information supplied but the proposal form was not completed immediately, and so a form was sent to the Plaintiff in care of Mrs. Messado. The form was returned, signed but none of the questions had been answered. She referred the matter to Miss Maxwell an employee of Atlas.

The writing "62a Hope Road" on page 1 of the Proposal Form Exhibit 1 and the writing "premium $2,000.00" on page 4 of the proposal form was that of Miss Maxwell. Miss Maxwell and another employee Miss Campbell did the typing in the office. She

herself never typed. She had her own office. She did not type the proposal form in this case.

Once a proposal form had been completed it would be sent to Globe under cover of a memorandum such as Exhibit 3. That exhibit reads in part:

"Atlas Insurance Agency Ltd. - MEMORANDUM

DATE: 28th March 1983 : TO: Globe - Attention Miss Dyche

RE: NEW POLICY - Houseowner's Comprehensive Policy

HEADLEY FEANNY - Lot 12 Pigeon Vale, Stony Hill, Saint Andrew

We refer to telephone interview with you on 24th March, and now attach Proposal for $400,000.00 Insurance Cover on building at the abovementioned address.

We confirm the rate is $5.00 per M and the Premium is $2,000.00. We await issue of Policy in due course.

ATLAS INSURANCE AGENCY LIMITED
D.E. Maxwell
for Agency Manager."

Looking at Exhibit 5 a letter from Atlas addressed to the Plaintiff and concerning insurance policies other than the one concerned in the instant case, Mrs. O'Connor noted that a complementary slip from Atlas was attached and on it was written:

"Mr. Feanny
c/o Mrs. J. Messado"

and said that the reason for the complementary slip to be so marked was that the letter was addressed to a P.O. Box, but in order to expedite the process, Atlas would send it through Mrs. Messado's office.

She also exhibited Exhibit 4 a handwritten memorandum dated 13th May, 1983 from Atlas to Globe and captioned:

"RE: Headley Feanny
1201 - 1616 - 83"

It then reads as follows:

"The insured has advised that wef inception the following should be specified, and included in the sum insured of $400,000.00."

Then three sets of items are listed. Mrs. O'Connor said she had sent that memorandum because the Plaintiff had come into the office and spoken about the items

listed and she had thought it best to have them specified in the policy so that if there were a claim the particular figures would not be the subject of debate.

Most of the letters to the Plaintiff were sent to him through Mrs. Messado's office.

THE SUBMISSIONS ON BEHALF OF THE DEFENDANT

Mr. Goffe's submissions for the Defendant were couched in the following terms:

(1) Where a proposer asks a person to complete the proposal form on his behalf, the proposer remains responsible in law for the answers in the form.

(2) The knowledge of the agent of the insurance company is not that of the insurers.

(3) Even if the Plaintiff told a representative of Atlas Insurance Brokers about his previous losses, that knowledge is not Globe's knowledge.

(4) The standard uberrimae fidei is only met when the proposer fully discloses all material information.

(5) The Plaintiff should not be believed in that important facts which he failed to put in his affidavits when he filed his originating summons, were being mentioned for the first time at the trial some twelve years later.

(6) Mrs. O'Connor's evidence was more credible having regard to the system outlined and certain written exhibits.

(7) There is no ambiguity in question 15. No reasonable interpretation of that question would justify non-disclosure. The Plaintiff has not said what he thought the question meant.

(8) The Court's responsibility is to find a fair and reasonable construction of both the question and the answer.

(9) Question 14 related to the history of the property whereas question 15 seeks to ascertain the personal "loss" history of the proposer in respect of perils other than those in question 14.

(10) Even if it be argued that question 15 refers to "loss other than those in question 14" and not to "perils other than those in question 14" the answer to question 15 is false.

THE SUBMISSIONS ON BEHALF OF THE PLAINTIFF

Lord Gifford presented the following arguments:

(1) As regards the construction of the Proposal Form

(a) On a proper construction of question 15 the answer given by the Plaintiff is true and accurate.

(b) Anyone seeking to discern from the form as a whole what are "the perils" to which the insurance was to apply, would necessarily refer to page 1 of the form and to the heading, "The Insured Perils". But it would require words of a special character to inform the proposer that he is being asked in question 15 about losses sustained by any of the categories of peril listed on page 1, whether or not they affected the insured premises.

The word "perils" in question 15 related to "perils affecting the building to be insured" - i.e. the perils shown in pages 1 and 4. Alternatively if question 15 can be read in two ways, it is ambiguous and therefore the Court should resolve the issue of its interpretation in favour of the Plaintiff.

(2) On the issue of Fact, the Court should accept the Plaintiff's evidence because:

(a) The proposal form bears the date 24th March 1983, which is the date from which the insurance was to commence.

(b) There is no evidence apart from that of the Plaintiff as to how the form was filled in.

(c) The previous losses were of recent occurrence so it is likely that he would have mentioned them - especially as one was known to Mrs. Messado.

(d) There is no point fairly to be taken against the Plaintiff regarding previous statements in his affidavits.

(3) On the question of law regarding the role of the person who filled out the form as possible agent:

(a) It is not an inflexible rule that an insurance agent is the agent of the proposer.

(b) Where the agent has misrepresented the meaning of a question in a proposal form and the proposer gives his answer in reliance on that misrepresentation that agent is the agent of the insurance company in explaining matters relating to the company's document which it is the business of the company to explain.

THE COURT'S RULING ON THE ISSUES OF LAW RAISED

(1) The Construction of the proposal Form and Especially Question 15

I agree with Lord Gifford that is a basic principle that a fair and reasonable construction must be placed on the questions and answers in the proposal form.

In Condogianis v Guardian Assurance Company [1921] Vol. vii Ll. L. Rep 155 at 156 Lord Shaw said:

> "In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered.
>
> Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by Courts of Law. Their Lordships accept that doctrine to the full and no question is made of the soundness of it as set forth in many authorities....."

Where a statement is questioned it must be considered as a whole, and if it is substantially accurate, a trivial mis-statement does not make it inaccurate - per Blackburn J in Fawkes v Manchester and London Assurance Association (1863) 3B and S917 at 924. So too, in the case of an omission of immaterial details - Morrison v Muspratt (1827 4 Bing 60 per Burrough J at 63.

Further in cases of policies of insurance the principle that the document must be construed contra pro ferentem strongly applies - In re Etherington and the Lancashire and Yorkshire Accident Insurance Company [1909] 1KB 591 per Vaughan Williams LJ at 596.

The onus of proving that the insured has made a misrepresentation or is guilty of non-disclosure or has broken a condition relating to disclosure lies upon the insurer Stebbing v Liverpool and London and Globe Insurance Company [1917] 2KB 433 per Lord Reading C.J. at p. 438.

The scope of any particular question is determined partly by the language in which it is framed - Connecticut Mutual Life Insurance Company of Hartford v Moore (1881), 6 App. Cas. 644 PC. and partly by the circumstances to which it is intended to relate - Thomson v Weems (1884) 9 App. Cas. 671 (per Lord Blackburn at p. 685) Ashford v Victoria Mutual Assurance Company (1870) 20 C.P. 434. Thus in the latter case insurance on stock was not avoided by the failure of the insured to mention incumbrances on the building containing it. On the other hand, where it was the building that was insured, the policy was avoided by the failure to disclose encumbrances on it. Phillips v Grand River Farmers' Mutual Fire Insurance Company (1881) 46 UCR 334 (Cited in Ivamy: General Principles of Insurance Law 3rd Edition P. 134 N. 13)

Where, as in the instance case, the truth of the statements in the proposal form are made the basis of the Contract, it is unnecessary to consider whether a fact inaccurately stated is material or not, or whether the assured knew or did not know the truth - Condogianis v Guardian Assurance Company, (supra).

The proposer must state the whole truth. Thus even if the answer is literally true, the proposer (insured) is not protected where the statement is nevertheless false when taken in relation to other relevant facts which are not stated. Condogianis v Guardian Assurance Company, (supra). Thus where a proposer is asked whether the risk is insured elsewhere, it is false to state only one when there are others - Dent v Blackmore (1927) 29 Ll. L Rep. 9. In other words, it is not enough for the answer to be literally true. It must be true in substance. Holts Motor Ltd. v South East Lancashire Insurance Co. Ltd. (1879) 11 ChD. 363.

The questions put by insurers in their proposal forms may enlarge or restrict the proposer's duty of disclosure: Roselodge Limited v Castle (1966) 2 Lloyd's Rep 113 at 131. But as a general rule the fact that particular questions relating to the risk are put to the proposer does not per se relieve him of his independent duty to disclose all material

facts - Joel v Law Union (1908) 2 KB 863 at 878, Lee v British Law Insurance Company (1972) 2 Ll. R. 49.

Thus in a case involving burglary insurance, the proposal form asked questions chiefly concerned with the nature of the proposer's premises and the business carried on there. It was held that this without more did not relieve him of his obligation to disclose material facts relating to his personal experience, such as the possession of a criminal record - Schoolman v Hall (1951) 1 Lloyd's Rep 139. Hence I do not agree with Lord Gifford's suggestion that to construe question 15 other than how he submitted would impose on the plaintiff the intolerable burden of going "through his whole life whether in Jamaica or elsewhere, and looking at all perils and whether or not he was an insured at the time, and so answer."

Questions requiring a proposer to "go through his whole life" are common in insurance cases. In Condogianis v Guardian Assurance Company, (supra), the question of which the insured fell foul in a fire policy read: "Has proponent ever been a claimant in respect of the property now proposed, or any other property? If so, state when and name of company."

The proposer answered "Yes" "1917" "Ocean". The answer was literally true for he had made a claim against the Ocean Insurance Company in respect of a burning car. But he had omitted to state that in 1912 he had claimed against the Liverpool and London and Globe Company in respect of the burning of another car. It was held that the answer was false and the policy was avoided.

The harshness of a clause making statements in a proposal "the basis of the contract" is shown by many cases. In Mackay v London General Insurance Company Limited (1935) 51 Ll. L Rep 201 in answer to a question in a proposal form for a motor car insurance policy, the proposer had said that he had never been convicted. Some years before he had been fined Ten Shillings for riding a motor bicycle with defective brakes. The answer which he had given was immaterial. It was held that since he had warranted the truth of his statements, he could not recover under the policy, for their accuracy had been made the basis of the contract.

Swift J was forthright in his criticism of the effect of the practice of making statements in proposals the basis of the contract.

He said at 202:

> "If he stated the truth in its full detail, this insurance company would have jumped at receiving his premium. They would never have dreamed of rejecting his application, but after they have given him the policy and after the accident has happened and the liability is incurred, they seize upon these inaccuracies in the proposal form in order to repudiate their liability. I am extremely sorry for the plaintiff in this case. I think he has been very badly treated, shockingly badly treated. They have taken his premium. They have not been in the least bit misled by the answers which he has made. They would never have refused to take his money, they would never have refused him his policy if they had known everything which they know now. But they have seized upon this opportunity in order to turn him down and leave him without any indemnity for the liability which he had incurred. But I cannot help the position. Sorry as I am for him there is nothing I can do to help him. The law is quite plain."

Lord Blackburn outlined the nature and scope of the principle of good faith in Brownlie v Campbell (1880) 5 App Cas 92 at 954 thus:

> "In policies of insurance whether marine insurance or life insurance, there is an understanding that the contract is uberimmae fides (sic) that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you whether you thought it material or not avoids the policy."

I bear in mind however that questions serve to define the limits of what is material so where an insurer requires information of a certain type, the answer thus relieves the proposer of the duty of disclosing facts which are not within the scope of the question; though, had he not asked the question the proposer would have been under an obligation to disclose such facts Schoolman v Hall, (supra). Thus Mackinnon J in Jesterbarnes v Licences and General Insurance Company Limited (1934) 49 Ll L Rep. 231 at 237 said that if an insurance company had asked a proposer "Have you or your driver during the past five years been convicted of any offence" and the proposer had replied "No" and that was true, he Mackinnon J, would have held that the company was not entitled in those circumstances to say that the proposer had failed to disclose that he had been convicted eight years ago and that that was material fact. But question 15 in the instant case does not fall into that category.

Lord Gifford emphasized that the first two pages of Exhibit 1, the prospectus portion speak repeatedly of "the building" (and contents) in relation to the insured perils. He then submitted that anyone seeking to discern from the form Exhibit 1, as a whole what are "the perils to which the insurance is to apply" would necessarily refer to page 1, the prospectus, and to the heading "The Insured Perils". He would then observe that the perils listed there are clearly perils which affect the buildings and contents. Moreover, in paragraphs 6,7,8,9, 10 and 11 of the prospectus are specific references to "the buildings" which are none other than the buildings referred to in the proposal form.

But this fact does not assist his argument. The first two pages of Exhibit 1 are clearly headed "PROSPECTUS". Whereas the latter two pages are headed "PROPOSAL FORM." The purpose of the former like any prospectus is to give advance notice of the chief features of what the proposer will receive if a contract is made. The subject matter of the contract is the buildings and contents, hence the prospectus speaks to those matters. Thereafter the proposal form seeks to obtain detailed information about the subject matter of the insurance and the proposer himself. In other words in the prospectus the company is saying "These are the benefits you can expect to receive if you take out a policy with us."

Thus after the usual heading the prospectus section reads:

> "The company provides insurance against the following perils, subject to the terms exception and conditions of the company's usual form of Policy, a specimen copy of which will be supplied on request."
>
> "Both the buildings and their contents are insured for the same perils, subject only to the variations mentioned below:"

Then are listed the insured perils in paragraphs 1 to 11. Next come "Additional Benefits" in paragraphs 12 to 20. Thereafter extensions are set out, and how they may be obtained - paragraphs 21-24. Finally there are exclusions in a paragraph of two sentences - giving such events as nuclear radiation and war.

The third page of Exhibit 1 is headed "PROPOSAL FORM", and the categories of information sought, through a series of questions, are given headings from time to time. The first four lines are headed "The Proposer" and merely seek his name, address, occupation and the address of the dwelling to be insured. Then follow a series of

questions, under headings. Questions 1 to 10 are headed "The Buildings and their Occupancy" and cover such matters as the material used to construct them, the number of tenants if any, whether a trade or profession will be carried on there.

Then comes the heading "PREVIOUS INSURANCE AND LOSSES" which embraces questions 11 to 15. For ease of reference I again note questions 14 and 15 and the answers to them. They read as follows:

> "14. Have the Buildings and/or Contents Suffered damage by hurricane, earthquake or flood during the past five years? If so give particulars .....(emphasis supplied)
>
> No
>
> 15. "Have you ever sustained loss from any of the perils (other than those referred to in question 14 above) to which the insurance is to apply? If so please give particulars .....(emphasis supplied)
>
> No."

The Plaintiff stated in his evidence that he had a problem with questions 14 and 15. But, to my mind, question 14 is straightforward and simple. I am of the opinion that any reasonable person even of fairly low intelligence, whom the plaintiff is not, would understand the question. There is no ambiguity in it. It merely asked whether the buildings and contents which he proposed to insure had suffered damage by (the natural disasters of) hurricane, earthquake or flood during the past five years. No need to search through his whole life there - as his attorney suggested regarding question 15. Question 14 is clearly confined to the particular property to be insured.

Question 15 is the last of four questions under the heading "PREVIOUS INSURANCE AND LOSSES." Question 11 asks:

"Have you any other policies in force covering any of the Perils to be Insured against?....."

This clearly deals with previous insurance or the Plaintiff's history.

Question 12 reads:

> "If this proposal is in lieu of any insurance with this company please give particulars."

Question 13 says:

"Has any company or Insurer in respect of any of the perils to which the proposal applies:

(a) Declined to Insure you?
(b) Required special terms to Insure you
(c) Cancelled or refused to renew your insurance?
(d) Increased your premium or renewal?

If so, give full particulars....
(emphasis supplied)

I have already dealt with the meaning of question 14.

It cannot be too strongly emphasized that a proposer's bona fides are irrelevant if the proposer applies an unduly limited interpretation. In Condogianis v Guardian Assurance Company Limited, (supra) Lord Shaw had this criticism of a portion of "The Judgment of Issacs J in the High Court of Australia at p. 157.

> "When he observes that:
>
> > 'All the Court can do in my opinion, is determine the limits of reasonable interpretation.'
>
> that may be readily assented to, but when he proceeds.
>
> > 'And if the proponent has bona fide understood the question within the limits and answered it accurately that is sufficient.'
>
> their Lordships feel that dangerous ground has been reached. However great the bona fides of the proponent may be if he has been led to impose limits upon the question to which it should not reasonably be subject, then the answer so restricted cannot be held to be the true answer." (emphasis mine)

I agree with Mr. Goffe that the reasonable interpretation of questions 14 and 15 is that Question 14 dealt with damage:

(a) to the particular property to be insured which
(b) resulted from hurricane, earthquake or flood, and
(c) occurred during the previous five years.

Question 14 seeks to ascertain the history of the property over the previous five years as regards natural disasters which affect Jamaica. Question 15 seeks to find out the proposer's loss history regarding other types of peril.

Question 15 when reasonably construed could be worded thus:

> "Have you the proposer, ever sustained loss from any of the perils, other than those referred to in question 14 above, (that is, other than hurricane, earthquake or flood), to which the insurance is to apply.

Such losses would therefore include fire which is the first disaster mentioned under item one on page 1, and burglary which appears in substance in item 7 in Exhibit 1 the proposal form.

I find that there is no ambiguity in question 15 and that the only fair and reasonable interpretation is the one I have given and that the Plaintiff should have so understood it. I therefore hold that the answer given by the Plaintiff is inaccurate.

But that is not an end of the matter. I must now consider the legal effect of an agent filling out a proposal form.

THE EFFECT OF THE COMPLETION OF THE PROPOSAL FORM BY AN EMPLOYEE OF ATLAS INSURANCE AGENCY

There is certainly one fact on which both sides are agreed; that is, that the proposal form was not completed by the Plaintiff. He says this was done by Mrs. O'Connor. She denies this, and asserts that she received the form signed in blank and passed it on to Miss Maxwell to have it completed. She later saw Miss Maxwell typing up the form as she Miss Maxwell spoke to someone on the telephone. From that evidence the Defence asks me to find that it was completed by Miss Maxwell at the dictation of the Plaintiff.

The completion of a proposal form by the agent of an insurance company raises interesting questions regarding the scope of the agent's authority. The appropriate starting point of any discussion of this issue is the decision of the English Court of Appeal in Newsholme Bros v Road Transport and General Insurance Company [1929] 2KB 356.

This was a case stated by an arbitrator for the opinion of the Court of Appeal. The Appellants, (the insured), made a proposal to the respondents (the insurance company) to insure their motor bus. The answers were filled in by the agent of the company and the proposal form was signed by a partner in the appellant's firm. The proposal form contained the usual clause, as in the instant case, that the answers were declared to be true and to be the basis of the contract. A policy was issued and the premium paid. An accident later occurred in which some passengers were injured and the motor bus was damaged. The insured brought a claim on the policy. On discovering that some of the answers in the proposal form were untrue, the respondent insurance company repudiated liability under the policy. The insured said that the agent had been told the truth, when the form was being filled up, and so the respondent company had no defence.

The findings of the arbitrator are important. He found:

(i) that the insured had told the agent the correct answers, and that it did not appear why he had written them incorrectly.

(ii) the duties of the agent were to canvas for insurances, to obtain duly completed and signed proposals, and to receive premiums but

(iii) that he had no authority to complete a proposal form himself.

Rowlatt J held that on these facts the breach of warranty discharged the respondent's liability. The Court of Appeal upheld this decision.

Scrutton L. J gave the main judgment. Geer L J agreed with his analysis, and Russell L J concurred briefly with both judgments. Scrutton L J reasoned thus:

(a) In writing down the answers the agent could only have been acting as the agent or amanuensis of the insured (b) He could not be the agent of the respondent company, because a man cannot contract with himself, and (c) therefore when someone fills up a proposal form he cannot be at the same time, the agent of the person to whom the proposal is made. Therefore any error in writing down the answers was not perpetrated by the agent in performance of any duty to the insurance company. If the error was committed willfully in order to earn his commission, there was an additional reason for refusing to impute his knowledge to the insurance company since he would have been defrauding his principals.

It is important to note that this was a case in which the agent's actual authority was limited, and the Court could find no reason in law to impute a greater authority. Also there was no clause in the form providing for the event of the agent making an error such as this.

The reasoning of Scrutton L J has been approved in Drum v Ocean Accident and Guarantee Corp, (1933) 47 Ll. LR 129 and Facer v Vehicle and General Insurance Company [1965] 1 Lloyd's Rep. 113 at 119 - both decisions of the English Court of Appeal; in Canada in LeBlanc v Co-operative Fire and Casualty Company (1964) 46 DLR (2d) 79 in Jamaica, in Suits C L 1769 of 1973 C L 156 of 1974 (unreported) Chez

Franchot vs Halifax Insurance Company Limited et al, and in British Guiana in Marks v First Federation Life Insurance Company 6 WIR 185.

Another development of the law, relevant to the instant case is the situation where the proposer signs the form in blank. In Paxman v Union Assurance Society (1923) 15 Ll L Rep. 206 it was held that where an applicant gives an agent the necessary information and at the agent's request signs the proposal form in blank and leaves it to the agent to complete it, the agent is exceeding his authority in the usual case. Therefore he is acting as the applicant's agent, and the applicant is responsible for any errors in the form. See also Parsons v Bignold (1846) 15 LJ CH 379.

Lord Gifford relied on the case of Stone v Reliance Mutual Insurance Society Limited [1972] 1 Lloyd's Rep. 469, a decision of the English Court of Appeal. In that case the Court of Appeal in reversing the decision of the Court below, held that in filling in the proposal form the representative of the insurance company was acting within the scope of his authority and therefore the company could not rely on Mrs. Stone's non-disclosures. That case is easily distinguishable from Newsholme's case (supra), in that Mrs. Stone was of little education, and the company's agent had said in evidence:

"It is company policy that I should put the questions, writing down the answers." In Newsholme's case, the agent had no such authority.

Moreover both Megaw and Stamp LJJ expressly said at 475, and 477 respectively that Stone's case was a decision on its special facts. This decision was made even though the proposal form contained a clause which read:

> "insofar as any part of this proposal form is not written by me the person who has written same has done so by my instructions and as my agent for that purpose."

When Mrs. O'Connor gave evidence there was little cross-examination as to the scope of her, and therefore of Atlas' authority vis a vis Globe.

Her evidence in chief on this point was that the main duties of Atlas were:

(i) "we are expected to obtain general insurance business on their behalf

(ii) we are expected to have proposal forms that they issue completed and returned to them

(iii) re motor insurance, to write motor insurance cover notes

(iv) to collect premiums on behalf of company and remit to them net of our commission.

Atlas did not have the power to accept proposals on behalf of Globe. Once the proposal form is signed we would have to submit it to the insurance company for them to peruse it, and decide whether they would accept the risk.

The system Re House Insurance at Atlas 1983:

If we approached by a proposer who is interested in insurance, we would take basic information from him. That basic information would include construction of building, location, sum insured he would like to set, and if he had any previous losses...

At that point we would contact Globe and ask them to confirm premium that should be charged and then we would ask them to hold or bind cover pending the completed proposal form...When proposal form is completed we would send it on the Globe Insurance"...

Initially the premium would be assessed by Globe on information we would give them - at the very outset."

I have outlined the evidence on the matter of Atlas' authority because in Newsholme and other cases which follow it, the authority of the insurance company's agent was restricted to obtaining completed forms and forwarding them to the insurance company. But Stone v Reliance Mutual Insurance Society (supra) is authority for the proposition that where the agent's authority is wider in fact, the significance of errors in completing the form may be greater. So too where the authority is deemed to be wider.

In the light of Mrs. O'Connor's unchallenged evidence on this point I hold that Atlas Insurance Agency and hence she and other employees of Atlas, had no authority to fill out proposal forms for proposers, hence any such act would be in excess of their authority. I also find that Atlas had the power to accept premiums but not proposals on behalf of Globe Insurance Company; therefore Atlas were not general agents of Globe, but had a limited authority. Was that authority increased by operation of law?

The general rule as noted earlier, is that the agent of the insurance company in filling in the proposal form, is merely the amanuensis of the proposer, that the knowledge of the true facts by the agent could not be imputed to the insurance company, and that once the proposal form contains false statements, the insurance company is entitled to repudiate the liability on the ground of the untrue statements in the proposal form. The raison d'etre of this rule was well stated in the judgment of the United States Supreme

Court in New York Life Assurance Co. vs Fletcher (1886) 117 US 519 at 529, cited by Gordon ACJ in Westside Construction Co. Ltd. v Sashatachewan Government Insurance Office 18 DLR (2d) 285 at 296:

> "It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representation to induce its execution, should be allowed to show, after it had obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made or business fairly conducted if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance."

He went on:

> "In the case of Laforest v Factories Ins. Co. (1916) 30 DLR 265 at 271, 53 SCR 296 at p. 304 Mr. Justice Anglin; later Chief Justice of Canada, stated, 'Notice to a mere soliciting agent - unlike a general agent - is not notice to the insurance company'" (emphasis supplied)

I find helpful the following propositions which appear at paragraphs 863 and 864 of the eighth edition of MacGillivray and Parkington on Insurance Law. The learned authors state as follows:

> "863 Authority of general agent. If the agent has actual authority to give a receipt for premiums and issue a policy or temporary cover note which binds the insurance company, then he has the authority to make a contract after considering all the facts material thereto, and in such a case any knowledge he may have of facts inconsistent with or contrary to those stated in the proposal form should be imputed to the insurers. This is the distinction taken in the Canadian authorities concerning imputation of knowledge, and in some American state jurisdictions."
>
> 864.Authority increased by law. In certain situations an agent whole authority is limited to obtaining completed proposal forms from an applicant may be held to have a wider authority which will in turn be relevant to the imputation of his knowledge to the insurance company where this is the issue. Thus a court would probably be prepared to hold that such an agent has either implied or ostensible authority to explain the meaning of questions in the proposal form in order that an applicant would know how to answer them and possibly to put the answers when received into proper shape. Consequently, if an agent, in explaining the meaning of a question, puts a wrong interpretation on it, the issue is whether the answer is true in relation to the question as explained. This applies more particularly to the case of questions put by a medical examiner who is directed to explain them, but it would seem to apply equally to agents.

The decision of the Quebec Court of Queen's Bench, Appeal Side in Compagnie Equitable d'Assurance Contre Le Feu v Gagne 58 DLR (2d) 56 is instructive. The headnote sufficiently indicates the issues involved and reads as follows:

> "Where the authorized agent of an automobile insurer who is aiding an applicant to complete the insurer's application form, represents in good faith that details of two previous accidents involving the applicant need

> not be disclosed in response to questions eliciting information concerning 'damage to property of third parties' and 'collisions' for the reason that in one of applicant's previous accidents no property of third persons was involved, and in the other he paid the third party claim out of his pocket without making a claim upon his insurer, there is not a knowing concealment of misrepresentation by the applicant.
>
> Whether the agent's authorization can be shown to be express or not, an applicant acting in good faith who finds an agent in possession of the insurer's forms and stationery, authorized to collect premiums, issue receipts and deliver policies, has reasonable cause to believe that the agent is at least authorized to the extent of being able to bind the insurer by an explanation of the scope and intent of a question on the application form."

Although the circumstances in the instant case are not as strongly in favour of an inference of ostensible authority as those in the case just cited, I am prepared to hold, and do find that someone in the plaintiff's position being assisted in filling in a proposal form by Mrs. O'Connor the Manager of Atlas, and acting in good faith, would have reasonable cause to believe that she was at least authorized to explain the scope and nature of a question in the proposal form, that is, that she had ostensible authority to do so, and would therefore be in a position to bind Globe.

This is so although as in Newsholme's case (supra) the proposal form contains a clause warranting the truth of the statements made in it, and making the proposal the basis of the contract.

THE MAIN ISSUE OF FACT: HOW WAS THE PROPQSAL FORM COMPLETED?

I found Mrs. O'Connor to be credible witness. I was impressed by her demeanor and find her story, and the inferences I have drawn therefrom a far more probably and credible narrative than that given by the Plaintiff.

I have therefore found the undermentioned facts for the reasons given thereafter:

Mrs. Messado gave Mrs. O'Connor basic information regarding the Plaintiff's desire to insure his premises at Lot 12 Pigeon Vale, Stony Hill, St. Andrew. Mrs. O'Connor in turn referred the matter to Miss Maxwell. In keeping with the practice of Atlas, temporary cover was effected on the premises. A proposal form was sent to the Plaintiff through his attorney-at-law Mrs. Messado. It was the practice in that office to send correspondence to the Plaintiff through Mrs. Messado as the address Mrs. O'Connor had for him was a post office box. I am bolstered in this finding by the state of Exhibit 5,

a letter to the Plaintiff from Atlas with a complementary card attached and marked "Mr. Feanny c/o Mrs. Messado." This exhibit deals with another insurance policy taken out by the Plaintiff.

The Plaintiff was a frequent visitor to Mrs. Messado's office. This made such a system very probably and convenient. I find on a balance of probabilities that Miss Maxwell was the person who contacted Globe and effected temporary cover on the plaintiff's premises. This finding is based on my acceptance of Mrs. O'Connor's evidence that she referred that matter to Miss Maxwell and my finding that Exhibit 3 is signed by Miss Maxwell, and that it refers to a telephone interview with Globe on 24th March, 1983. This terms of Exhibit 3 are consistent with temporary cover having been issued previously, most probably on 24th March 1983.

Exhibit 3 reads in part as follows:

> "Atlas Insurance Limited
>
> Date: 28th March, 1983
>
> To: Globe
> Attention: Miss Dyche
>
> "Re New Policy - Householders Comprehensive Policy
>
> Headley Feanny - Lot 12 Pigeon Vale, Stony Hill, St. Andrew
>
> We refer to telephone interview with you on 24th March 1983 and now attach Proposal for $400,000.00 Insurance Cover on Building at the abovementioned address.
>
> We confirm the rate is $5.00 per M and the Premium is $2,000.00. We await issue of Policy in due course.
>
> ATLAS INSURANCE AGENCY LIMITED
> D.E. Maxwell
> for Agency Manager

I must point out that this memorandum is typed. I accept Mrs. O'Connor's evidence that Miss Maxwell was one of the clerks in the office who did typing.

Mrs. O'Connor did not speak directly to the Plaintiff regarding this insurance until after the proposal had been submitted and the insurance effected and that on that occasion the conversation was about specifying certain items such as carpets. I find that Exhibit 4 a memorandum to Globe indicating that certain items should be specified is in Mrs.

O'Connor's handwriting, and from this fact and her demeanor I also find that she did not type.

Mrs. O'Connor did not type, that is, complete the proposal form, Exhibit 1.

The Plaintiff did not speak to her about question 14 and 15 on the proposal form and he did not disclose the previous losses indicated in the pleadings, to her, or to person who typed the form.

The proposal form was returned signed in blank to the offices of Atlas. The Plaintiff gave a false answer to question 15.

I have rejected the Plaintiff's testimony on the crucial points of misrepresentation and non-disclosure because I find Mrs. O'Connor to be the more reliable witness both from her demeanor for the reasons given earlier and for the following reasons:

(i) Although the Plaintiff was made aware by the letter dated 21 March 1983 from the attorneys for Globe, and by the affidavit of Mr. Baker, dated February 17, 1994, that Globe was repudiating liability under the policy, he made no mention in his affidavit, dated March 13, 1984, of being induced by Mrs. O'Connor to answer question 15 as he did. He merely said that he made disclosure to her; and this although this was in a further affidavit dated 13th March 1984 - just about a year after the event. Yet in evidence over twelve years later he says for the first time that she told him the previous losses "did not apply." This failure cannot be explained as a technique of pleading as the affidavits were intended to be used in the hearing of an originating summons. One would have thought that this would be in the forefront of his mind.

(ii) His explanation for the omission is weak and unconvincing.

He said:

> "At the time I did the affidavit I didn't put in Mrs. O'Connor's advice because at that time I didn't know it was relevant."

Further his evidence-in-chief gives a different impression from his further affidavit of 13th March, 1984, as regards the manner of his alleged disclosure. In his evidence-in-chief he clearly states it happened when the form was being filled out - on