IN THE SUPREME COURT OF BELIZE, A.D. 1994

ACTION NO. 342

	(EMELIO ZABANEH	**Plaintiff**
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BETWEEN	**(AND**	
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	(	
	(N.E.M. (WEST INDIES) INSURANCE	
	(LIMITED	**Defendant**

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BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Vernon Harrison Courtenay S.C. with Mr. Derek Courtenay S.C. for the Plaintiff.
Mr. Dean Barrow S.C. for the Defendant.

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JUDGMENT

On 22nd August, 1988, Mr. Emilio Zabaneh, the plaintiff in these proceedings, executed a policy of fire insurance with the defendant, to cover his properties in Canada Hill in the Stann Creek District. The policy was executed through Mr. Philip Garbutt, an employee of Victor L. Bryant Co. Ltd., the Belizean agent and representative of the defendant. N.E.M. (West Indies) Insurance Ltd. (NEMWIL).

2. As is customary in the insurance business, a Proposal Form was completed in effecting Mr. Zabaneh's policy with the defendant. The annual premium for the policy was stated then to be for the sum of $4,112.07 for the assured sum of $260,000.00 on Mr. Zabaneh's properties. The policy was renewed annually on the same terms and conditions until 22nd August 1990 when the annual premium on the same properties, was increased to $7,093.73 for a cover value of $510,800.00 on the properties. Evidently, no other

Proposal Form was executed between the parties other than the original one submitted in August 1988.

3. The policy was thereafter, renewed annually on 22nd August each year, for 1991, 1992 and 1993 on the same terms and conditions and based on the premium and cover value agreed on in 1990. That is, annual premium of $7,093.73 for cover value on the properties in the sum of $510,800.00. Thus, the basis of the policy between the parties was the Proposal Form executed in August 1988 to effect the policy.

4. In the course of the trial, this was tendered in evidence and marked as **Exhibit EZ 1**.

5. Disaster however, struck on 2nd October 1993, (some two months after the annual renewal of Mr. Zabaneh's policy in August of that year), when fire burnt down the insured premises.

6. Mr. Zabaneh duly notified the defendant of his loss, and after securing estimates of the replacement value of his properties, submitted a claim in this regard in the sum of $500,584.00 to the defendant.

7. The defendant has however, refused to honour Mr. Zabaneh's claim, hence this action in which Mr. Zabaneh claims in the alternative, the return of the premiums he had paid to the defendant in the total amount of $36,599.06 less the premium refunded in May 1994 in the sum of $7,093.73. Mr. Zabaneh therefore claims the replacement value of his properties or in the alternative, a refund of $29,505.33, as representing premiums he had paid to the defendant together with interest thereon.

8. One curious feature of this case is that from both Mr. Zabaneh's Amended Statement of Claim and his testimony during the trial, it

would appear that even though the insured properties were destroyed by fire in October 1993, premium was paid in 1994. But nothing however turns on this, as the defendant refunded the sum of $7,093.73 as premium for the period August 1993 to August 1994.

The basis of the Defendant's rejection of Mr. Zabaneh's claim

9. The defendant, NEMWIL, for its part, has rejected Mr. Zabaneh's claim and stoutly defends its position and reasons for doing so. The reason for this, according to the defendant, is that Mr. Zabaneh failed to disclose to it before the conclusion of the policy of insurance, a material fact which was known to him or ought to have been known to him but which fact was not known to or presumed to be known to it, the defendant.

10. In particular, the defendant rejects Mr. Zabaneh's claim because it says Question 5 on the Proposal Form completed and signed by him in effecting the policy asked him:

"Have you ever suffered a loss by fire? If so, give details."

And that the answer given by Mr. Zabaneh was 'NO'; whereas Mr. Zabaneh had in fact, the defendants avers, sustained a previous loss by fire in July 1984 when a dwelling house and hotel he owned in Dangriga Town in the Stann Creek District, was destroyed by fire.

11. The Proposal Form as mentioned already is in evidence as **Exhibit EZ 1**.

12. The defendant in effect, claims that it is entitled to avoid the policy with Mr. Zabaneh because of his answer to Question 5, which it says was wrong and untrue and, was therefore, a failure by him, to

disclose a material fact relating to the policy, and it accordingly, declined to honour his claim under the policy.

Mr. Zabaneh's position

13. Mr. Zabaneh's position for his part, is that the defendant knew of his previous insurance claim for losses by fire, and that the defendant had therefore waived away its right to object to his claim on the ground of non-disclosure of his previous insurance claims for losses by fire. Moreover, it was contended for Mr. Zabaneh by his learned attorneys, Mr. Harrison Courtenay S.C. and Mr. Derek Courtenay S.C., that even if his answer *'NO'*, to Question 5 on the Proposal Form was untrue, the defendant knew the correct position and that in fact that incorrect answer was put in by Mr. Philip Garbutt, an employee of Victor L. Bryant, the agent of the defendant, for the purposes of the policy. And that the defendant had, therefore, waived its right to avoid the policy by the receipt pf the cheque for the premium by Mr. Garbutt from Mr. Zabaneh in August 1988 at Canada Hill in the Stann Creek District, when the policy was originally effected.

14. I now turn to the evidence and applicable principles for a determination of the issues in contention between the parties.

The Evidence

Mr. Emilio Zabaneh testified on his own behalf as did Mr. Philip Garbutt, who was at the time the policy was effected, an employee of Victor L. Bryant & Co. Ltd, the defendant's agent.

15. Mr. Zabaneh testified that he was some time in 1988 visited by Mr. Philip Garbutt at his residence in Canada Hill in the Stann Creek District. He said Mr. Garbutt was soliciting insurance business and was also desirous to secure the insurance business of other

members of the Zabaneh family. He testified further that Mr. Garbutt visited his farm properties (the subject matter of the policy in contention between the parties) together with a relative of his, that is, Mr. Garbutt's, and took photographs and measurements. Some time later Mr. Zabaneh also testified, Mr. Garbutt handed him a form which was already filled in and told him to sign it, and where to sign it. Mr. Zabaneh testified as well that he signed the form at the bottom and that apart from his signature at the bottom of the form, his handwriting is nowhere on the form. He produced the form and tendered it as **Exhibit EZ 1**. Mr. Zabaneh further testified that he signed the form because he was asked to and that he did not pay Garbutt any attention as he presumed that he Garbutt had filled out the form. And that he Zabaneh did not read it as Garbutt just told him to sign it, and that he signed it because he trusted Garbutt. He also testified that the form contained the question: *"Have you ever suffered from fire?"* but that he did not write *"NO"* on the form – this was done by Garbutt, he Zabaneh only signed it. Mr. Zabaneh also testified that he paid Mr. Garbutt the premium and he gave him a receipt for it. Mr. Zabaneh further testified that he guessed Garbutt knew that he had had previous fire from his past record.

16. It is worthwhile to state that at the start of his evidence-in-chief, Mr. Zabaneh had recounted, what it is, I believe, fair to describe as his history of fires: 1) a night club and restaurant business he owned in Orange Walk Town was burnt down in 1968; 2) a hotel, restaurant and disco he owned in Dangriga Town also burnt down in 1984; 3) he suffered yet another fire at a place called Little Orange Walk (although the date of this incident was not clear from the testimony).

17. Under cross-examination by Mr. Dean Barrow S.C. for the defendant, Mr. Zabaneh stated that he had sustained four fires, including the one that is the subject of these proceedings. Still under cross-examination, Mr. Zabaneh further testified that he just signed forms when he took out policies and never read them. He said and I quote, *"They just fill out forms, and ask me to sign"*. He said he just signed all forms put before him for insurance and paid his premiums. He candidly admitted, again under cross-examination, that he was not conscious that **Exhibit EZ 1** (the proposed form that is the subject of this action) contained untrue answer as to previous fires when he signed it in 1988.

18. Mr. Philip Garbutt who at the time the policy in these proceedings was effected, worked for Victor L. Bryant, the defendant's agent, testified for Mr. Zabaneh. From the evidence, his role in securing Mr. Zabaneh's custom was critical. He visited him at Canada Hill and examined the properties that were insured and the subject of Mr. Zabaneh's claim. He testified that he took **Exhibit EZ 1** (the Proposal Form) down to Mr. Zabaneh in Dangriga where he signed it in his presence and that he Garbutt filled out all the particulars on the form and that they were entered before Mr. Zabaneh signed the form as he had filled them in Belize City before he left for Dangriga. Mr. Garbutt however, stated in evidence in chief that not all the information on the Proposal Form **(Exhibit EZ 1)** was accurate and that he had put *"NO"* in answer to question 5 on the form by an oversight. He further said that the misstatement in relation to question 5 on the Form was discussed between him and the late Mark Gallaty and Phillip Gallaty (the managing director of the defendant's agent, Victor L. Bryant) and that that discussion was before Mr. Zabaneh's policy was issued. The burden of Mr. Garbutt's testimony was that Mr. Zabaneh's history of fire was

known to the defendant through discussions he, Garbutt, had with Phillip Gallaty and others in the office of Victor L. Bryant in Belize City.

19. A strange feature of this case, I find, is that Mr. Garbutt who was at the time of effecting the policy in issue here, working for Victor L. Bryant, the defendant's agent, and was instrumental in securing the policy from Zabaneh, testified for him. The purpose of Mr. Garbutt's testimony was to show that NEMWIL, the defendant, through its agent Victor L. Bryant, knew of Mr. Zabaneh's history of fire and therefore accepted the Proposal Form with the wrong answer as it had been decided to accept Mr. Zabaneh's business anyhow.

20. This testimony if true, would certainly fortify the contention of Mr. Zabaneh's attorneys that NEMWIL notwithstanding the untruth of the answer to Question 5 on the Proposal Form, nonetheless accepted to issue the policy to Mr. Zabaneh with knowledge of that untruth and it thereby waived any right it might have had to avoid the policy as a result of that untrue answer.

21. But under withering cross-examination by Mr. Barrow S.C. for the defendant, Mr. Garbutt's story at the end of the day left me with a distinct feeling of unease from which I got the impression that he was less than truthful. In the witness box, Mr. Garbutt appeared uncomfortable, hesitant and vacillatory.

22. At the end of Mr. Garbutt's cross-examination, I was left in no doubt that his testimony about the discussion concerning Mr. Zabaneh's fire history and the knowledge of the defendant of this, was pure fiction and his own invention. The reason for this became clear when he had to admit under unremitting cross-examination that he had been fired from the employ of Victor L. Bryant after he had

been accused of stealing from them. Having watched his demeanour in the witness box and listening to his vacillatory answers, I was left with the clear impression that the purpose of his testimony about the knowledge of the fire history of Mr. Zabaneh and the untrue answer to Question 5 on the Proposal Form, was more to get even with Victor L. Bryant then to tell the truth. Even Mr. Derek Courtenay's S.C. careful and skilful re-examination of Mr. Garbutt could not rehabilitate him. I was left singularly unimpressed by Mr. Garbutt's testimony regarding the discussion of and knowledge of Mr. Zabaneh's history of fire by Victor L. Bryant and therefore, the defendant, NEMWIL.

23. Mr. Phillip Gallaty Jr., the managing director of Victor L. Bryant, was the only witness to testify for the defendant. He said that Victor L. Bryant is a family owned enterprise in the business of wholesale supplies and insurance. In the latter business he testified that Victor L. Bryant represented the defendant, NEMWIL, in 1988, in the insurance transaction with Mr. Zabaneh, that is the subject of these proceedings. He also stated that NEMWIL, the defendant, only started operating in Belize in January 1987. Mr. Gallaty testified that Victor L. Bryant had no record of Mr. Zabaneh's claim for fire loss in 1968 and that he was then only 11 years old. He recalled that Mr. Philip Garbutt was trying to get the insurance business of Mr. Zabaneh and how Mr. Garbutt brought photographs and measurements of the latter's properties. He said that he and Mr. Garbutt rated Mr. Zabaneh's risk according to a chart they had. He further stated that Mr. Garbutt could not effect coverage without his authorization. And that before he effected a policy he needed a signed proposal form. He recalled Mr. Garbutt giving him the cheque for the premium of Mr. Zabaneh's policy; and shortly after, he received the Proposal Form and in due course, the policy was issued.

Mr. Gallaty denied ever having any discussion about misstatement on the Proposal Form. He denied ever hearing of Mr. Zabaneh's fire in 1984. He said that in the underwriting of fire risks, the incident of one fire in the last five years before a proposal to insure would require investigation; and incidents of two or more fires would require an underwriter to stay away from that kind of risk. He further stated that if he had known of all the three previous fires Mr. Zabaneh had sustained, he would have definitely avoided the risk of insuring him, and that if he had known only of Mr. Zabaneh's 1984 fire, he would have had to formally investigate and the result of the investigation could have made them decline insuring him.

24. Mr. Gallaty stated that he did not know that the answer to **question 5** on the Proposal Form was untrue. He testified that it was only after Mr. Zabaneh's 1993 fire (the object of the policy in **Exhibit EZ 1**) that a loss adjuster was hired to examine Mr. Zabaneh's claim. He further stated that it was in fact the loss adjuster, a Mr. Richard Dunning, who in the course of his investigation, discovered the evidence of Mr. Zabaneh's other losses by fire.

25. Mr. Gallaty denied knowledge of Mr. Zabaneh's other losses by fire and asserted that he considered his fire history as extremely important and that if he had known of the three previous fire losses Mr. Zabaneh had sustained, he would have definitely avoided insuring him.

26. Mr. Derek Courtenay S.C. tried gallantly to shake Mr. Gallaty's testimony. The most he succeeded however, in eliciting from him was to have him admit that Mr. Garbutt received Mr. Zabaneh's premium before he, Gallaty, saw the completed Proposal Form in this case. Mr. Gallaty also admitted under cross-examination that no inquiry was made about Mr. Zabaneh when the policy was

effected with him, as they accepted his declarations on the Proposal Form to be true; and they had no reason to investigate him.

27. This was substantially the material evidence in this case. And from it the learned attorneys, Messrs. Vernon Harrison Courtenay S.C. and Derek Courtenay S.C. for Mr. Zabaneh and Mr. Dean Barrow S.C. for NEMWIL, have spiritedly argued for their respective clients.

Legal Arguments and Submissions by Counsel

28. It has been vigorously contended for Mr. Zabaneh that because of the sequence of events the legal consequences should be different in this case. Mr. Derek Courtenay S.C. argued that it was the defendant (through Philip Garbutt) who solicited Mr. Zabaneh's business and he never visited NEMWIL's office and never sent in the Proposal form to it. It was, Mr. Courtenay further argued, the defendant through Mr. Garbutt, who filled in the Proposal Form, in effect, setting out the terms on which it was prepared to insure Mr. Zabaneh; therefore, Mr. Courtenay continued, all the terms of the policy had been settled before Mr. Zabaneh could sign the Proposal Form. Therefore, Mr. Courtenay submitted, NEMWIL did not treat Mr. Zabaneh's history of losses by fire as material and in any case it chose to waive it with knowledge of it. Mr. Courtenay further submitted that in any event, in the circumstances of this case, NEMWIL was not induced by the non-disclosure or misrepresentation by Mr. Zabaneh to enter into the contract of the policy of insurance, as it had itself, settled the terms as stated in **Exhibit EZ 1**, before Mr. Zabaneh signed on it or before any question of representation by him. He finally submitted that in any event, NEMWIL had waived the previous fire history of Mr. Zabaneh as material.

29. Mr. Barrow S.C. for NEMWIL on the other hand, contends that it was always entitled to avoid the policy because of the wrongful concealment and non-disclosure of a material fact, that is to say, the history of losses by fire Mr. Zabaneh had sustained. Mr. Barrow S.C. instead, submitted that the failure to disclose Mr. Zabaneh's fire history induced the defendant to take the policy and that NEMWIL could not have waived knowledge of this history as it did not know of Mr. Zabaneh's three previous fire losses.

Mr. Barrow S.C. further submitted that Mr. Philip Garbutt was, in any event, Mr. Zabaneh's agent when he filled the Proposal Form, and therefore the untrue answer on it could not be attributed to the defendant and so it is entitled to avoid the policy.

Determination of the issues

30. I now turn to a determination of the issues in this case.

It is generally accepted that **insurance** is one of a small class of contracts based on the principle of utmost good faith – **uberrimae fide** : This principle of utmost good faith creates duties owed by an assured under a policy of insurance and his agent in effecting the insurance to disclose material facts to the insurer and to refrain from making untrue statements when negotiating the contract of insurance – See generally **MacGillivary on Insurance** (Tenth edition, Sweet & Maxwell, 2003) at Chapter 17 at pp. 409 et seq.

31. The general principles on which this duty of disclosure owed by an assured was enunciated over 200 years ago by Lord Mansfield in this classic formulation in **Carter v Boehm (1766) 3 Burr. 1905** as follows at pp. 1909 – 1910:

"*Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the* risqué *run is really different from the risqué understood and intended to be run at the time of the agreement…The policy would be equally void against the underwriter if he concealed…Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact and his believing the contrary."*

32. In my view, on the facts of this case, the principal issues that fall to be determined may be stated thus: **i) The materiality or otherwise of Mr. Zabaneh's history of fire; ii) Whether NEMWIL, the defendant, had knowledge of this history either, a) because on the evidence, Mr. Philip Garbutt filled the Proposal Form with the untrue answer to Question 5 thereon and/or b) because of the alleged discussion of that history by Phillip Gallaty and others in Victor L. Bryant; and iii) Whether NEMWIL waived away the materiality of Mr. Zabaneh's history or with knowledge of it nonetheless, insured his properties by issuing him the policy which was successively renewed until the fire in 1993, that is to say, did**

NEMWIL waive the non-disclosure of Mr. Zabaneh's fire history?

33. I now consider these issues in turn.

i) <u>First, the materiality or otherwise of Mr. Zabaneh's fire history</u>.

The **<u>common law</u>** test for materiality is stated in section 18(2) of the United Kingdom Marine Insurance Act 1906, which provides: *"Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk"*. In my estimation and, I dare say, this must be common ground between the parties as it elicited no argument between them otherwise, it is to be expected that in a policy of fire insurance, the history, if any, of the assured, with fire must be a **<u>material fact</u>**. In any event, the opinion of a particular assured is not generally controlling as to the materiality of a fact for the purposes of the insurance, because the accepted test of materiality is whether a prudent insurer would have considered that any particular circumstance was a material fact and not whether the assured believed it to be so – **<u>Brownlie v Campbell</u> (1880) 5 App. Cas. 925** at 954; **<u>Roselodge Ltd. v Castle</u> (1966) 2 Lloyds Rep. 113** at 131.

34. I therefore find and hold that Mr. Zabaneh's history with fires was a material fact that the defendant ought to know about or was entitled to have it disclosed to it: this was a fire policy – it must be relevant and material for the insurer to know if the assured has had a previous fire.

35. **<u>Secondly</u>, did NEMWIL have knowledge of this history either because a) Mr. Philip Garbutt filled the Proposal**

Form or b) the history was allegedly discussed by Mr. Phillip Gallaty and others in the office of Victor L. Bryant, the agent for NEMWIL?

a) <u>That Mr. Philip Garbutt filled the Proposal Form</u>

From the evidence, Mr. Garbutt who worked for Victor L. Bryant, NEMWIL's agent, admittedly filled the Proposal Form which was found later to contain the untrue answer to Question 5. The fact of Mr. Garbutt filling the form before its signature by Mr. Zabaneh has not been contested and I had nothing before me to say otherwise, whatever else my opinion as to the rest of Mr. Garbutt's testimony. The question therefore arises: whose agent was Mr. Garbutt when he filled in the answers on the Proposal Form?

36. I am persuaded that in principle and on authority, when Garbutt filled the Proposal Form, he did so **<u>not</u>** as agent of Victor L. Bryant and hence NEMWIL, albeit, he was employed with the former, but rather as the agent of Mr. Zabaneh – see **<u>Biggar (claimant) v Rock Life Assurance Co.</u> (1902) 1 KB 516; Vol. 18 The Times Law Rep. (1901)** at p. 119. In this case the agent of an insurance company soliciting the custom of the assured (Biggar) had filled wrong answers to questions on the Proposal Form. Mr. Justice Wright in delivering the judgment on a case stated by an arbitrator when the claim under the policy was rejected stated:

> *"If a person like the claimant chose to sign the declaration without taking the trouble to look at it, he was bound by it. Business could not be carried on if that were not the law. Upon that ground the claimant could not recover. But, further, it would be wrong to treat Cooper as agent to suggest the answers. He was agent to receive them,*

although he might also have been agent to put them into proper form. But he could not be agent to invent the answers. If he did that, the agent was the agent of the proposer and not of the insurance company."

37. **Biggar supra** was applied in what is generally regarded as the leading modern authority on this point by the English Court of Appeal in **Newsholme Bros. v Road Transport and General Insurance Co. (1929) 2 KB 356**. It was held that *"…the agent of the insurance company in filling in the proposal form was 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 therefore that the insurance company was entitled to repudiate liability on the ground of the untrue statement in the proposal form."* (Headnote of the Judgment).

38. Scrutton LJ stated on this point in his judgment at pp. 375 – 376:

"If the answers (which the agent fills on the form) *are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any event I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."*

39. I therefore hold that when Mr. Garbutt filled the Proposal Form, he did so as the agent of Mr. Zabaneh. Admittedly, there is no evidence in this case that Mr. Zabaneh in fact asked Mr. Garbutt to fill in the Proposal Form. But, I do not think, in principle, this should make any difference, for Mr. Zabaneh **did sign** the completed form. And the declaration on the form, **Exhibit EZ 1**, which he signed, states, among other things, *"I (Emilio Zabaneh) request NEMWIL, to insure me in the terms, conditions and exceptions of the Policy to be issued by the Company and do hereby declare that the above statements are true; that I have withheld no information whatever material to be known for estimating the risk…I agree that this Proposal shall be the basis of the contract to be made between me and NEMWIL…"*

40. I also, with respect, like Scrutton L.J. in **Newsholme supra**, therefore, have great difficulty in understanding how a man who has signed, without reading it (as Mr. Zabaneh stated in evidence) a document which he knows to be a proposal for insurance and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying, as was contended for Mr. Zabaneh, that Mr. Garbutt, when he filled the Proposal form in this case was the agent of NEMWIL, to whom the proposal was addressed.

41. It does not make any difference that Garbutt had filled the proposal form in Belize City before taking it to Canada Hill for Mr. Zabaneh to sign: when Mr. Zabaneh signed the form he accordingly represented and warranted that all the statements thereon, in particular, that answer to Question 5, were true and correct.

42. I am, consequently, unable to accept that Mr. Garbutt was, for the purposes of filling the Proposal Form, the agent of NEMWIL, the defendant, when the form is clearly addressed to NEMWIL and clearly signed by Mr. Zabaneh who promised that the statements in the form were true. I find Mr. Zabaneh's signature on the form in this case of vital importance. A signature it should be remembered, serves a number of purposes. The primary function, I think, is to provide reliable and admissible evidence that the signatory is aware of, approves and adopts the contents of the document to which he appends his signature. In doing so, he the signatory, agrees that the contents of the document are true and that the contents of the document shall be binding upon him and shall have legal effect. The signatory is also reminded of the significance of the act and the several averments in the document. Therefore, absent fraud or duress, a man who consciously signs a document promising, among other things, that its contents are true, cannot in all fairness be heard to say that that is not the case, otherwise he would be glibly resiling from his promise and rendering his signature of no effect. Business cannot be allowed to be conducted this way.

43. Therefore, in addition to the unsatisfactory testimony of Mr. Garbutt (as I have indicated in paragraph 22 above), I find that Mr. Zabaneh by signing the Proposal Form in this case **(Exhibit EZ 1)**), reasonably represented that he had no history of fire or previous loss by fire. A representation which, on the clear evidence in this case, especially Mr. Zabaneh's own testimony (at paragraph 16 above) was evidently not in accord with the facts which were clearly known to him.

44. I turn now to the **second** limb of issue ii) in this case, b) that is, the alleged discussion and knowledge of Mr. Zabaneh's history with fires by Victor L. Bryant. Mr. Garbutt testified that in the office of

Victor L. Bryant, he, together with Mark Gallaty (a now deceased brother of Mr. Phillip Gallaty), Mr. Phillip Gallaty and Yolanda Gallaty discussed Mr. Zabaneh's experiences with fire. Mr. Garbutt stated that it was public knowledge that the Gateway Hotel supposedly owned by Mr. Zabaneh, was burnt down and that in the discussion in the office of Victor L. Bryant, he Garbutt was cautioned about insuring Mr. Zabaneh as "the Zabanehs were fire people." The implication of this of course, is to show that NEMWIL, through its agent, Victor L. Bryant, had prior knowledge of Mr. Zabaneh's previous loss by fire and nonetheless, proceeded to insure him; therefore, the answer to Question 5 on the Proposal form was not relevant as NEMWIL had consciously waived its truthfulness.

45. I do not, however, accept this for apart from the unsatisfactory and unreliable evidence of Mr. Garbutt on this point, Mr. Zabaneh made a positive promise that he had not suffered any previous loss by fire. I do not see how NEMWIL could be said to have waived the veracity of this promise because a policy was issued to Mr. Zabaneh. The evidence of this waiver by the alleged discussion of, and therefore knowledge of Mr. Zabaneh's previous fire history, is so tenuous as to be unreliable.

46. **Thirdly**, on the issue of *waiver*.

Mr. Derek Courtenay S.C. for Mr. Zabaneh has argued, with some cogency it must be said, that even if I were to find that the Proposal Form **(Exhibit EZ 1)** should have disclosed the previous fires suffered by Mr. Zabaneh, I should on the facts of this case, hold that there were circumstances which constituted a waiver of any breach of Mr. Zabaneh's obligation to disclose his history of fires.

This is so, Mr. Courtenay S.C. submitted, because:

a) Philip Garbutt who acted for NEMWIL vis-à-vis Mr. Zabaneh in effecting the policy, had knowledge of Mr. Zabaneh's record of fires.

b) Philip Garbutt said in evidence that Yolanda Gallaty, the mother of both Mark and Phillip Gallaty, of Victor L. Bryant, NEMWIL's agent, had warned of the Zabanehs' record of fires.

c) Philip Garbutt also said in evidence that after Mr. Zabaneh had issued his cheque in payment of the premium, but before the policy was issued, the untruth or misstatement in relation to Question 5 on the Proposal Form **(Exhibit EZ 1)** was noticed by the Gallatys and discussed, yet the policy was issued and insurance cover continued for some years until the fire in 1993,

47. Because of all this, it has been contended for Mr. Zabaneh that notwithstanding the untruth in **Exhibit EZ 1** in relation to Question 5 thereon, NEMWIL had waived its right to avoid the policy on grounds of non-disclosure of the fire history of Mr. Zabaneh.

48. The flipside of the duty of disclosure in insurance is, it is fair to say, waiver: a fact which is known to either party need not be disclosed. The situations in which facts need not to be disclosed were first adumbrated some two hundred years ago, again by Lord Mansfield in **Carter v Boehm, supra** at p. 1911, when he stated:

> *"There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows: what way so ever he came to the knowledge. The insured need not mentioned what the underwriter ought to know: what he takes upon himself the knowledge of: or what he waives being informed of. The underwriter need not*

be told what lessens the risqué agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation, and either party may be innocently silent as to the grounds open to both to exercise their judgment upon."

49. Mr. Barrow S.C. has instead contended that on the facts of this case, there was no waiver by NEMWIL of the materiality of Mr. Zabaneh's fire history which, if not disclosed or found to be untrue, would engage the right of NEMWIL to avoid the policy. He correctly submitted that whether there is in fact waiver or not, it is for the assured who so claims, to prove on a balance of probabilities – See the decision of Judge Brian Knight Q.C. in **Stowers v GA Bonus PLC and Helm Insurance Brokers, C.L.C.C.** 18th January 2002.

50. Of course, if the insurers have waived disclosure by the assured of a particular matter prior to the commencement of the policy, it is obvious that they cannot later raise the non-disclosure of the fact in answer to a claim under the policy – See **McGillivary** op cit at para. 17-83 and the cases cited there.

But waiver of information as to facts material to the risk is not to be inferred too readily or else it might subvert the assured's duty to disclose them in good faith – **Greenhill v Federal Insurance Co. (1927) 1 KB 65** at p. 89; and **Container Transport International Inc. v Oceanus Mutual Underwriting Assoc. (Bermuda) Ltd. (1984) 1 Lloyds Rep. 476** at p. 511.

51. The test to determine waiver is stated to be as follows: The assured must perform his duty of disclosure properly by making a fair presentation of the risk proposed for insurance. If the insurers

thereby receive information from the assured or his agent which, taken on its own or in conjunction with other facts known to them or which they are presumed to know, would naturally prompt a reasonably careful insurer to make further inquiries, then, if they omit to make the appropriate check or inquiry, assuming it can be made simply, they will be held to have waived disclosure of the material fact which that inquiry would necessarily have revealed – See **McGillivary op. cit.** para. 17-83 and the cases cited.

52. Waiver is not established by showing merely that the insurers were aware of the possibility of the existence of other material facts; they must be put fairly on inquiry about them – **ibid**.

53. Applying these considerations to the facts of this case, I am unable to find or hold that NEMWIL had waived the materiality of the fire history of Mr. Zabaneh and insured him regardless, and therefore the non-disclosure of this history precluded the insurer from avoiding the policy.

54. The plain facts of this case which concerns a fire policy are that the fire history of an assured, such as Mr. Zabaneh who has had the misfortune of a number of fires, must be material and therefore warranted disclosure. Here, there was no disclosure just a blunt *"NO"* to a question asking for previous losses by fire. I am unable to read this blunt categorical answer to a material question as a fair presentation of the true state of facts personally and almost exclusively known to Mr. Zabaneh. On the evidence, Mr. Zabaneh clearly knew that he had experienced fires before. Therefore, simply to say *'no'* to a question aimed at eliciting an answer as to the true situation, could not have put NEMWIL on notice or inquiry. The blunt negative answer was clear and categorical, when the true situation was otherwise. I cannot therefore find or hold that there was a waiver by NEMWIL, for the insurer did not even know there

were previous fires relating to Mr. Zabaneh: there can be no waiver of a class of information that the insurer does not even know exists – **Glencove v Portman (1977) Lloyds Rep. 225** at p. 234.

55. Moreover, the only evidence in this case at establishing waiver, or rather attempting to do so, is the rather weak and implausible testimony of Philip Garbutt. He struck me as the fly in the ointment in this case. He was, in my view, trying to make bricks without straw; and for the reasons already stated in paragraph 22 of this judgment, I am unable to believe him.

56. I am therefore not persuaded that the sequence of events attendant on the execution of the policy in this case constituted a waiver by NEMWIL to demand and expect a full and correct disclosure from Mr. Zabaneh, in particular of his previous history of fires.

Conclusion

57. It is for all these reasons that I am unable to find for Mr. Zabaneh and conclude that on the evidence and applicable principles, NEMWIL, the defendant, can properly avoid Mr. Zabaneh's claim under the policy.

On the premium

Mr. Derek Courtenay S.C. had commendably conceded, during the hearing, the point on the return of premium. NEMWIL had in any event returned the premium in the sum of $7,093.73 paid by Mr. Zabaneh for August 1993 to 1994. As stated in **Halsbury's Laws of England 4th Ed. Vol. 25** at para. 467:

> *"…in the case of a renewable insurance each renewal is a new contract and the premium returnable is limited to that paid for the last renewal, as the risk has, in fact, been fully borne by the insurers throughout all the earlier years."*

58. I accordingly dismiss the plaintiff's claim in these proceedings.

I award the costs of these proceedings in the sum of $5,000.00 to the Defendant.

A. O. CONTEH
Chief Justice

DATED: 15th July, 2004.