JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 90 OF 2006

BEFORE: THE HON. MR.JUSTICE PANTON, P.
THE HON. MR.JUSTICE HARRISON, J.A.
THE HON. MR.JUSTICE DUKHARAN J.A. (Ag.)

BETWEEN INSURANCE CO. OF THE WEST INDIES APPELLANT

AND ABDULHADI ELKHALILI RESPONDENT

Mrs. Symone Mayhew and Miss Camille Wignall instructed by Nunes Scholefield DeLeon and Co. for the Appellant.

Jalil Dabdoub instructed by Dabdoub, Dabdoub & Co. for the Respondent.

6th & 7th October, 21st November and 19th December, 2008

PANTON, P:

I have read in draft the judgment of Harrison, J.A. I agree with his reasoning and conclusion, there is nothing further I wish to add.

HARRISON, J.A:

Introduction

1. This appeal raises issues of some general importance: what constitutes material facts which ought to be disclosed in a proposal form for motor vehicle insurance and what is the legal effect of the warranty clause in this form?

2. Mr. Abdulhadi Elkhali (the respondent) is a businessman and owner of a 1991 Mitsubishi Lancer Evolution motor car with registration number 0365 DR. The said motor vehicle was comprehensively insured with Insurance Company of the West Indies (the appellant) for the sum of $1,900,000.00 from November 1, 2002 to October 31, 2003. The respondent had applied for and obtained this coverage on November 1, 2001 by submitting a proposal form on which particulars of accidents or losses were requested by the appellant. The vehicle was involved in an accident on the 7th day of April 2003 and he reported same to the appellant.

3. On or about the 6th day of May 2003, the respondent by an "Insured's Discharge for Total Loss" agreed to accept the sum of $870,000.00 from the appellant in respect of his claim. It was discovered before payment was made that a vehicle owned by the respondent which was involved in an accident, had not been disclosed in the proposal form. By letter dated May 14, 2003, the appellant advised the respondent that no indemnity would be granted to him under the policy because of his failure to disclose material facts.

4. In the ensuing litigation, Beswick J., found and accepted as true, the respondent's evidence that he understood the question as to previous accidents and losses as concerning/being concerned with his driving and not the driving of others. In the circumstances, she found he was not guilty of non-disclosure. The learned judge also found that the appellant could not unilaterally refuse to honour the agreement and since the respondent had acted to his detriment by disposing of the salvage, the

appellant had to honour the agreement. Accordingly, the judge awarded judgment to the respondent in the sum of $950,000.00 with interest thereon.

5. Issues arise in this appeal concerning the legal status and effect of an application for insurance and the kind of conduct or statements which will entitle an insurer to resist and avoid a claim for payment under an insurance policy.

The Appellate Court's Powers to Interfere with the Trial Judge's Findings.

6. The major area of dispute in this case concerns the judge's finding in relation to item (f) of the proposal form for insurance. I have said before that she accepted as true that the respondent understood that the reference to any accident or losses in that clause concerned the respondent's driving and not the driving of others. In the circumstances, she concluded that the respondent was not "guilty of non-disclosure". In order therefore for this Court to disturb or interfere with this finding it would have to be shown by the appellant that the learned trial judge misdirected herself on the facts or on the applicable principles of the law.

7. The basic principle which guides a Court of Appeal is that:

> "...the Appellate Court will only interfere if the trial judge had been guilty of some error of law or misapplied some principle of law, or so misdirected himself on facts as would entitle this Court to say that it would be manifestly unjust to allow the verdict of the judge to stand..." See **Edwin Clarke v Colin Edwards** (1970) 12 JLR 133 at 134 B.

8. In **Ward v James** [1965] 1 All ER 563 Lord Denning M.R said:

> "This Court can and will, interfere if it is satisfied that the Judge was wrong. Thus it will interfere if it can see that the Judge has given no weight (or no sufficient weight) to those

> considerations which ought to have weighed with him....Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him..."

The Facts

9. The proposal form goes to the root of this contract. At the foot of the proposal form and above the respondent's signature is a declaration which states, inter alia:-

> "I/WE HEREBY DECLARE that all the above statements and Particulars are true" and... "I agree that this Proposal and declaration shall be the basis of and be considered as incorporated in the policy issued hereunder which is in the ordinary form used by the INSURANCE COMPANY OF THE WEST INDIES LIMITED for this class of Insurance and which I/WE agree to accept".

10. At the trial, and under cross-examination, the respondent said he had not read over the proposal form when it had been completed. He also said that in other applications, he would sign the form but he would not complete it. All he had done was to insert his name and address on the form. He said that one of his clerks had assisted him with this particular proposal form as he really did not understand "much English". The clerk had asked him the questions and he had answered "yes" or "no" where it was relevant. The clerk had also inserted a tick in the respective columns.

11. On page 2 of the proposal form are various questions to which he is required to give answers. He signed this form on November 1, 2001. There is a heading which states: "THE DRIVERS (INCLUDING THE PROPOSER)". The respondent's name was inserted. There is a statement worded as follows: "If the response to any of the questions below is yes, please provide details in the space provided:

"(a) Will the use of the motor vehicle be restricted solely to the drivers named above?

(b) To the best of your knowledge has any intended driver of the motor vehicle not driven for any consecutive six (6) month period in the past five (5) years?

(c) To the best of your knowledge will any person who will drive the motor vehicle be the holder of a provisional licence?

(d) To the best of your knowledge does any person who will drive the motor vehicle suffer from a physical infirmity or from a defective vision or hearing?

(e) To the best of your knowledge in the past five (5) years has any person who will drive the motor vehicle: (1) been fined, (2) had their licence endorsed/revoked, (3) prosecuted for a motoring offence?

(f) Give particulars of all accidents or losses during the past three years (whether insured or not) in respect of all vehicles owned, used or driven by you?"

The answers to questions (a) – (f) inclusive were answered in the negative.

Applicable Legal Principles

12. Before examining the several grounds of appeal, I think it convenient at this stage to set out the legal principles which apply to proposal forms and to the conditions of an insurance policy vitiated by fraud or misrepresentation.

13. A contract of insurance is one of utmost good faith (uberrimae fidei) and, as such, the requirement of good faith must be observed by both the insured and the insurer throughout the existence of the contract. In practice, the requirement of uberrima fides means simply that an applicant for insurance has a duty to disclose to the insurer

all material facts within the applicant's knowledge which the insurer does not know. There is a duty of disclosure and a duty not to misrepresent facts.

14. The test of materiality has been settled by the House of Lords in **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd** [1994] 3 All ER 581, [1995] 1 AC 501 on a 3:2 majority. The majority held that, for the purposes of marine and non-marine insurance, a circumstance is material if it would have had an effect on the mind of a prudent insurer in weighing up the risk. The House also held that, for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure, the alleged misrepresentation or non-disclosure must be material and must have induced the making of the policy. Recently, the English Court of Appeal held in **Drake Insurance v Provident Insurance** [2003] EWCA Civ 1834 that inducement must be proved by the insurer.

15. The proposal form which precedes the issuance of the policy of insurance is the document which helps the insurer to make an informed decision as to whether he will indeed insure the proposer's risk. In order therefore, to ensure the utmost good faith on the part of the insured, it is commonplace among insurers to require that the proposal form be filled up accurately and to have the proposer for insurance warrant the accuracy of the answers and statements made on the form. Thus, as in this appeal, the proposer (Mr. Elkhalili) was required to sign and did sign the declaration (reproduced at (9), above). The critical element in the declaration is the phrase which states that "this proposal and declaration shall be the basis of and be considered as incorporated in the policy...." This declaration, in my view, forms the basis of the contract, so that, the

declaration at the foot of the proposal form that the statements are true, and that the declaration shall be considered as part of the policy of insurance, makes the truth of the statements a condition precedent to the liability of the insurer. A proposer, by signing it, signifies his agreement to it.

16. **Condogianis v Guardian Assurance Co** [1921] 2 AC 125 illustrates that where the truth of the statements is made the basis of the contract, it is unnecessary to consider whether the fact inaccurately stated is material or not, or whether the applicant knew or did not know the truth.

17. In **Condogianis** (supra) an appeal to the Judicial Committee of the Privy Council from Australia, the appellant sued the respondent insurers on a policy issued by them insuring a laundry against fire. The proposal form contained this question:

> 'Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed, or any other property? If so, state when and name of company.'

The appellant answered this question, 'Yes. 1917, Ocean.' That answer was true to the extent that in 1917 he had made a claim against Ocean Insurance Company in respect of the loss of a motor car by fire. However, in 1912 he had made a claim against another company in respect of a similar loss. The proposal form contained a 'basis clause' and a statement that the particulars given by the appellant were to be express warranties. In the policy was a condition that if there was any misrepresentation as to any material fact to be known in estimating the risk, the insurer was not to be liable under the policy. The Privy Council held that the applicant's answer was untrue and that

there was a breach of warranty, whether or not the misrepresentation was as to a material fact. The applicant was not allowed to recover under the policy.

18. Lord Shaw said ([1921] 2 AC 125 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 untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves-by making the fact the basis of the contract, and giving a warranty-that as between them their agreement on that subject precluded all inquiry into the issue of materiality.'

19. Commenting on the status and effect of a 'basis clause', the authors of MacGillivray on Insurance Law (10th edn, 2003) para 10-32 put the matter thus:

> '[It] has been held that the all-important element in such a declaration is the phrase which makes the declaration the "basis of the contract". These words alone show that the proposer is warranting the truth of his statements, so that in the event of a breach of this warranty, the insurer can repudiate liability on the policy irrespective of materiality.'

20. Of similar effect is the case of **Dawsons Ltd v Bonnin** [1922] 2 AC 413. Viscount Haldane, approving an earlier passage of Lord Blackburn in **Thomson v Weems** (1884) 9 App Cas 671, held that the basis clause made the truth of the statements contained in the proposal a condition precedent to the liability of the insurers quite apart from the question of materiality.

21. The law does not require that the word 'warranty' be used in the declaration. Viscount Finlay explained in **Dawsons** (supra) at 428-429 that-

> 'any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty. If there is such a warranty the materiality of the facts in themselves is irrelevant; by contract their existence is made a condition of the contract'.

22. Breach of warranty then entitles the insurer to terminate the contract of insurance and avoid the policy. In the instant case, the policy of insurance was apparently not admitted in evidence so it does not form a part of the record of appeal.

23. Against the background of the material facts and the legal principles relevant to a proposal form, I will now examine the grounds of appeal. The appellant filed several grounds of appeal. I shall discuss the grounds which were grouped and argued together for convenience.

The Grounds of Appeal

Grounds 3(b), (e), (i) and (ii)

24. These grounds of Appeal seek to challenge the learned trial judge's interpretation of the request at item (f) of the proposal form and her conclusion that:

> a. it was not sufficiently explicit;
>
> b. it did not require particulars of all accidents or losses owned by the Respondent whether or not he was the driver;
>
> c. the average person would understand it to refer to the particulars of accidents and losses had by the person applying for coverage only.

25. The learned judge was of the view that: (i) the pertinent question posed at (f) supra, was not sufficiently explicit; (ii) the question is not an example of clear and

accurate drafting and; (iii) if the appellant requires precise and accurate answers then it is only reasonable that the questions posed be clear, precise and unambiguous. She found that the average person would understand the question to refer to the particulars of accidents and losses the person applying for insurance had. She did accept the respondent's evidence that he had understood the question to refer to any accidents and losses as they concerned **his driving** and not the driving of others (emphasis supplied). In the final analysis, she concluded that he was not guilty of non-disclosure and that the appellant was obliged to settle the insurance claim.

26. Mrs. Mayhew for the appellant, submitted that the particulars required by the request would have included the accident of October 2001, which had occurred just one month prior to the completion of the proposal form. This accident involved the respondent's vehicle while it was being driven by his son. She submitted that the proposal form, as any other insurance policy document, should be construed according to the principles of construction applicable to commercial contracts generally. She argued in her written submissions that the underlying objective is for the Court to put on it the true meaning, which is "*the meaning which the party to whom same was handed or who is relying on it would put on it as an ordinary intelligent person construing the words in the proper way in the light of the relevant circumstances.... Questions in the proposal form must receive such an interpretation as would be placed upon them by ordinary men of normal intelligence and average knowledge of the world.*" (per **MacGillvray on Insurance Law**, Fourth Edition, paras. 707 and 804 and 10th Edition paras. 11-1 and 16-27).

27. Mrs. Mayhew submitted that no justification was shown in the judgment of the court below, for the conclusion that the request at item (f) supra, was unclear. She argued that there was no ambiguity in the request. At paragraph 36 of her written submissions she said:

> "36 It is therefore not inconceivable that a prudent insurer would require information involving persons other than the insured if those persons have driven the vehicle insured. Likewise it is not inconceivable that a prudent insurer would have required information of accidents involving vehicles owned by the insured although he may not have been the driver at the material time. The fact is that an insured may suffer a loss as did the Respondent in this case which would still fall to be covered by his policy even in instances where he was not the person driving at the material time. As such particulars of the previous accidents involving vehicles owned by the insured even if not driven by him at the material time was, as appears on the Appellant's evidence, and in the context of the questions immediately preceding item (f) on the Proposal Form a material fact by which an insurer would be guided on an application for coverage".

28. In the circumstances, Mrs. Mayhew submitted that the learned judge's interpretation of item (f) of the proposal form was wrong in law based on both the ordinary and contextual meanings, and ought to be set aside accordingly.

29. Mr. Dabdoub submitted that given the evidence presented to the Court, the conclusions to be drawn therefrom, both as to fact and as to law, are inescapable. The pertinent question posed in proposal form (f) he said, must be examined in the context in which it was asked. At paragraph 10 of his written submissions he stated as follows:

> "10. The context within which the question was asked is as follows:

(i) the question came under the rubric on the form entitled "THE DRIVERS (INCLUDING THE PROPOSER)".

(ii) The pertinent question (f) was preceded by a series of questions posed under the heading "THE DRIVERS (INCLUDING THE PROPOSER)". Each one of those questions (a) to (e) spoke to and clearly addressed any intended driver.

(iii) This pertinent question (f) does not speak to an "intended driver" or "any person who will drive the motor vehicle". It speaks to "you".

30. At paragraph 12 of his submissions Mr. Dabdoub continued:

> "12 The learned judge concluded that the lumping together of the words "owned, used or driven by you" is at best unclear and that the average person would understand the question to refer to the particulars of accidents and losses had by the person applying for insurance coverage as it concerned their driving, and not the driving of others.
>
> The use of the pronoun "you" clearly indicates that the "question" is personal to the Proposer; this is in contrast to the preceding questions. It is submitted that it is quite reasonable for a person of ordinary intelligence to understand that the "question" (f) refers to the person applying for insurance coverage as it concerned their driving, and not the driving of others."

31. Mr. Dabdoub submitted that the learned judge was correct in concluding that the respondent answered the question as he understood it and was not guilty of a material non-disclosure. He further submitted that the judge was correct in finding that the "question" in the proposal form was ambiguous and that she was obliged to construe the ambiguity against the appellant, the drafters of the form. He referred to McGilvary and Parkington on Insurance Law, 6th Ed. at para. 1173 where the learned authors state:

> "A party who proffers an instrument cannot be permitted to use ambiguous words in the hope that the other side will understand them in a particular sense and that the court which has to construe them will give them a different sense".

32. Mr. Dabdoub also relied on the authority of **Sweeney v Kennedy** (1949) 82 LR 294 where Kingsmill Moore J stated:

> "In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer 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."

Kingsmill Moore J continued:

> "The wording of the proposal form and the policy was chosen by the underwriters, who knew, or must be deemed to have known, what matters were material to the risk and what information they desired to obtain. They were at liberty to adopt any phraseology which they desired."
>
> "A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it."

33. The learned judge in finding that clause (f) of the proposal form did not produce clarity and was in fact ambiguous said at page 9 of her written judgment:

> "Question (f) is not an example of clear and accurate drafting. It asks for particulars without posing a question, yet

> puts boxes for "yes" or "no" responses. It lumps together "owned, used or driven by you" which, at best, is unclear.
>
> It is my view that the average person would understand the question to refer to the particulars of accidents and losses had by the person applying for insurance coverage.
>
> I accept as true Mr. Elkhalili's evidence that he understood the question to refer to any accident and losses as they concerned his driving, not the driving of others. He is not guilty of non-disclosure."

34. In my opinion item (f) in the proposal form itself is clear, and admits of no ambiguity. An ambiguity, is defined in the Concise Oxford Dictionary, 10th Edition, as 'an expression capable of more than one meaning'. I disagree with Mr. Dabdoub that the use of the pronoun "you" clearly indicates that the question is personal to the proposer. The learned judge did accept the respondent's evidence that he had understood the question to refer to any accidents and losses as they concerned **his driving** and not the driving of others. It is my view however, that she did not apply a fair and reasonable construction to the words and fell into serious error when she concluded as she did. I am unable to discern any ambiguity in the simple straightforward words "Give particulars of all accidents or losses during the past three years (whether insured or not) in respect of all vehicles owned, used or driven by you". To my mind there is no ambiguity in the language used by the appellant. The words are clear and precise and meant what any reasonable person would understand them to mean. It seems clear to me that it admits only of one meaning namely, that the respondent was required to give information about persons other than himself if those persons had driven the vehicle that was insured. The respondent ought to have known that a prudent insurer would

have required information of accidents involving vehicles owned by him although he may not have been the driver at the material time.

35. It is my view, that these grounds of appeal should succeed.

Grounds 3 (d), (e) (v) and (vi)

36. These grounds seek to challenge the judgment of the Court below on the basis that the learned judge failed to consider and apply the fundamental principle of law that an insurance contract is one *"uberrimae fidei"* – of utmost good faith and a breach of the insured's duty to disclose all material facts would therefore entitle the appellant as the insurer to avoid the contract of insurance *ab initio.*

37. In **Carter v. Boehm** [1774] AER 183, the principle of *"uberrimae fidei"* was laid down and explained as follows:

> "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 the 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 such circumstances 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.... 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".

38. At the foot of the proposal form and above the respondent's signature there is a declaration. Mrs. Mayhew has submitted that since the policy contains a recital that the

proposal shall be the basis of the contract, the truth of the statements contained in the proposal is made a condition of the liability of the insurers. She argued that any inaccurate answer will entitle the insurers to repudiate liability apart from any question of materiality. She further submitted that the respondent as an applicant for insurance coverage was under a duty to disclose all material facts to the Appellant, and the declaration in the proposal form ought to have alerted him as to that duty. Having signed it, she said he warranted the truth and completeness of the responses given in the proposal, and accepted that same would form the basis of and be incorporated in any contract of insurance issued to him.

39. Mrs. Mayhew submitted that in the circumstances of the case, the response given by the respondent to the request at item (f) of the proposal form was clearly untrue and accordingly constituted a misrepresentation and non-disclosure of material facts. This non-disclosure she said, entitled the appellant to avoid the policy issued on the strength of same.

40. Mr. Dabdoub submitted on the other hand, that no evidence was adduced at the trial to establish that a prudent insurer would regard the accident in which the respondent's son was driving the respondent's vehicle as material. Furthermore, he submitted that proof of materiality should have been properly done through expert evidence. He referred to and relied on Chitty on Contracts, 26th Edition Vol. 2 Para. 4228 where the learned authors state:

> "Materiality is a question of fact, but it has long been the practice to adduce expert evidence on the point from insurers."

41. He submitted that the evidence of the appellant's representative, Mooreen Marks, that the appellant was induced by the respondent to accept the risk of insuring his vehicle on the terms and conditions of the policy as issued, was self-serving.

42. In **Dawsons** (supra) the words used in the declaration section of the policy, are analogous to those in the present policy. The House of Lords held inter alia, that those words are words apt to convert answers to questions into conditions of the policy. The question asked in the proposal form said: "state full address at which the vehicle will usually be garaged." By pure inadvertence a wrong address was given. Neither at the inception of the policy period, nor at any subsequent date, nor at the time of the loss had the vehicle been garaged at that address. It was held by the House of Lords that the assured could not recover because the assured had broken the condition in the policy as to the usual place where the car was garaged. It was held that the incorporation of the answer into the contract as its basis constituted a condition: it was not relevant to consider whether the matter of question and answer was or was not material.

43. There is no dispute in the instant case that the respondent's son was involved in an accident whilst he was driving the respondent's Mitsubishi Lancer Evolution motor car registered DM 0017, on October 9, 2001. On or about the 7th day of April 2003 the respondent's 1999 Mitsubishi Lancer Evolution V1 motor car, bearing registration number 0365 DR was involved in another accident. The latter motor car was comprehensively insured with the appellant by way of policy #33337942/1 from the 1st November 2002 to the 31st October 2003. It was not until after the Release was

executed that investigations revealed that the respondent had losses within the three (3) years prior to his submission of the proposal form.

44. It is without doubt that the contract of insurance was subject to the requirement of utmost good faith, to be observed by both the insured and the insurer throughout the existence of the contract. The respondent therefore had a duty to disclose to the appellant all material facts within his knowledge which were not known to the insurer. He also had a duty not to misrepresent facts.

45. It is further my judgment that the declaration at the foot of the proposal form which made it clear that the statements were true, and that the declaration formed "the basis of and is considered as incorporated in the policy, made the truth of the statements a condition precedent to the liability of the insurer. The respondent, by signing the proposal form, signified his agreement to it. It is also abundantly clear that where the truth of the statements was made the basis of the contract, it was unnecessary to consider whether the fact inaccurately stated was material or not, or whether the applicant knew or did not know the truth. See **Condogianis v Guardian Assurance Co** [1921] 2 AC 125..

46. I hold that the respondent's answer to the question at item (f), above) was false. At the time of submission of his claim, he had failed to disclose the fact that his son was involved in a motor vehicle accident and that the car had belonged to him. This was a false representation on material matters and it was a breach of the express condition of the insurance policy. When he signed the application form, the act of signing did authenticate the statements contained in the form. He had asserted to the insurance

company that the statement was true. He had also warranted that the answer was true and that the warranty thereby given should be held to be promissory and should be the basis of the contract between the parties.

Was the Appellant Entitled to Avoid the Policy of Insurance?

47. The issue now for consideration is whether the respondent would be estopped from avoiding the contract in light of the executed Discharge for Total Loss, and the payment and acceptance of further premiums of insurance. Mr. Dabdoub submitted that the principle of promissory estoppel would be applicable. He argued that a separate contract had arisen between the respondent and appellant having regard to the form entitled "Insured's Discharge for Total Loss".

48. I respectfully disagree with Mr. Dabdoub. It is my opinion that the appellant was at liberty to avoid the policy of insurance for breach of the warranty.

49. In **Kosmar Villa Holidays plc v. Trustees of Syndicate 1243** [2008] EWCA Civ. 147 the English Court of Appeal held inter alia:

> "....in a case where the handling of a claim by an insurer constituted an unequivocal representation that it accepted liability and/or would not rely on breach of some condition precedent as affording a defence, and there was detrimental reliance by the insured such as would make it inequitable for the insurer to go back on that representation, the doctrine of estoppel afforded sufficient protection; that, **therefore, subject to any waiver by estoppel, breach by the insured of a procedural condition precedent, like breach of a promissory warranty in an insurance contract, automatically discharged the insurer from liability**; and that, in any event, by initially dealing with the claim the insurer had not waived, either by election or by estoppel, its

> right to rely on the claimant's breach of condition precedent." (emphasis supplied)

50. It is further my judgment that the appellant in the instant case would also be entitled to forfeit all benefits under the policy. The requirement of utmost good faith continued after the policy had been issued and was still operative even after the discharge was executed.

Disposal

51. Accordingly, I would allow the appeal and set aside the judgment of the court below. There should be costs of the appeal and in the court below to the appellant to be taxed if not agreed.

DUKHARAN, J.A.

I agree.

PANTON, P.:

ORDER:

The appeal is allowed and the judgment of the court below set aside. Judgment entered in favour of the appellant. Costs of the appeal and in the court below to the appellant, to be taxed if not agreed.