

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY SAN FERNANDO

H.C.A. Cv S676 of 1996

IN THE MATTER OF
THE PROPERTY COMPRISED IN A DEED OF MORTGAGE
REGISTERED ON THE 28TH DAY OF FEBRUARY, 1984
AS NO. 4356 OF 1984 AND MADE BETWEEN
HAMID BAKSH (MORTGAGOR)
AND
TRINIDAD CO-OPERATIVE BANK TRUST COMPANY LIMITED
(MORTGAGEE)
AND
IN THE MATTER OF
THE CONVEYANCING AND LAW OF PROPERTY ORDINANCE
CHAPTER 27 NO. 12

BETWEEN

FIRST CITIZENS BANK MORTGAGE AND TRUST COMPANY LIMITED
PLAINTIFF

AND

HAMID BAKSH

DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE STOLLMAYER

Appearances:

Mr. P. Deonarine for the plaintiff

Mr. O. Ramischand for the defendant

J U D G M E N T

In these proceedings the plaintiff claimed from the defendant an amount of \$379,243.01 and interest due under a mortgage dated 23rd January, 1984 as well

as possession of the property at 8 George Street, Arouca. The defendant counterclaimed in negligence, alleging that he suffered loss as a consequence of the plaintiff under insuring a building forming part of the property and the building being subsequently damaged by fire.

The trial concerned the determination of the defendant's counterclaim, the plaintiff's claim having been the subject of a consent order entered on 25th June 1998 by which the parties agreed that the sum of \$350,372.50 was the amount due and owing by the defendant to the plaintiff as at 30th April, 1996, with interest at the rate of 13 1/2% per annum from 1st May 1996, and there being no contest as to the issue of possession.

The counterclaim raises primarily two issues for determination. The first is, as is set out at paragraph 7 of the defence and counterclaim, that the plaintiff negligently caused and or procured the under-insurance of the defendant's property with The Guyana and The Trinidad Mutual Fire Insurance Company Limited ("GTM") in February or March of 1992 in an amount of \$250,000.00. The defendant's evidence is that the value of the property at that date was between \$450,000.00 and \$500,000.00.

The second issue, as is set out at paragraph 8 of the defence and counterclaim, is that the plaintiff compromised and/or settled at \$65,000.00 a claim for damage caused to the building by a fire which took place on 20th July, 1992 without the knowledge, consent and/or approval of the defendant. The defendant's evidence is

that the repairs necessary as a result of the partial destruction of the building standing on the property were estimated to cost \$190,400.00.

There is also a plea of coercion as to the acceptance of the settlement by the defendant of this insurance claim but it is difficult to ascertain how exactly this plea itself constitutes an issue as to any liability on the part of the plaintiff unless it is regarded as an alternative to the plea that the plaintiff settled the claim without the knowledge, consent and/or approval of the defendant. I will treat this plea of coercion as such an alternative.

The defendant is the owner of a parcel of land at 8 George Street, Arouca together with building thereon. In 1984, the defendant borrowed from the then Trinidad Co-operative Bank Trust Company Limited \$240,000.00 for the purpose of putting up on house on this property. He created a mortgage of the property in favour of Trinidad Co-operative Bank Trust Company Limited as security for the borrowing. Apart from the loan of \$240,000.00, the defendant says he spent at least another \$200,000.00, which he got from his brother, his uncle and his savings to complete the building on the property. It is not in contention that the interest of Trinidad Co-operative Bank Trust Company Limited in the loan and the mortgage is now vested in the plaintiff.

In 1986 the defendant converted the upstairs portion of this house to seven bedrooms and used the building as a guest house and bar. The premises were insured at N.E.M. (West Indies) Insurance Limited (“NEMWIL”) but by letter of

January 29th 1992 addressed to the defendant NEMWIL cancelled this policy and subsequently paid to the defendant a pro rata refund of the insurance premium. Cancellation was said to be because of NEMWIL's inability to underwrite risks of premises containing bars or liquor shops.

On 10th February, 1992 the defendant went to the offices of plaintiff and filled out a proposal form for the purpose of obtaining from GTM insurance coverage on the building. He did so in the presence of one of the bank's officers, Beverly Capiatha. After he had filled out the proposal form, with the exception of details of the sum insured representing the full value of the property to be insured, Ms. Capiatha looked at the form to make sure everything was in order and inserted two specific items of information: first she crossed out "1984 to 1992" which the defendant had inserted as being the period for which the insurance cover was required and inserted the dates 13/2/92 to 13/2/93; second, she inserted the amount of \$250,000.00 as being the full value of the building to be insured. The defendant says that she did so over his protests saying, according to the defendant, "*..... she replied to me that she knows how much money I borrowed from the bank. Further she said the bank was in charge of the property*". Ms. Capiatha denies this, saying that the defendant never protested but given the events which followed I have come to the conclusion that the defendant did in fact voice unhappiness about this value even if he did not actually "protest" in strong terms.

On 11th February, 1992, the defendant retained the services of Maibrol Insurance Brokers Limited (“Maibrol”), through one Hollies Blackman who was employed there at the time, for the purpose of obtaining increased coverage on the building of \$450,000.00 to \$500,000.00, which the defendant says was the value of the property at that time. On 27th February, 1992, Maibrol wrote to the plaintiff enclosing a copy of their appointment as his brokers by the defendant and requesting information as to the insurers, the type of cover, “ *the total amount at risks*” and the bank’s interest. The plaintiff responded by letter of 13th February, 1992 saying that the defendant “..... *is already insured and has remitted his premium to our Company for payment to our Insurance Brokers.* *If any further information is required I would suggest that you contact*” the defendant. In the interim, that is, between 27th February and 13th March, Maibrol or, rather, Mr. Blackman had, - so says Mr. Blackman - contacted the plaintiff and in particular Ms. Capiatha in connection with the defendant’s insurance cover, and had been told that the plaintiff had a group insurance policy which did not permit the defendant to obtain any increased cover. Mr. Blackman, “ *after checking with the trade*” says that he spoke to the plaintiff again but was told that this increased cover could not be obtained. Although it is not clear from the evidence as to precisely when he did so, he closed Maibrol’s files in all probability after receiving the plaintiff’s letter of 13th February, 1992. He says that he did so because “*I could not place the risk*” and despite being of the view that

the building was worth \$450,000.00, he having inspected it himself, and that it was only insured for \$225,000.00 or \$250,000.00. He thought that the sum insured “ ... *was quite ridiculous...*” and that the sum insured was “ *very important* ...” to his client. But he did not write to the plaintiff about his findings as to what the market had said even though he “ *was seeking the client’s interest*” and had discovered what he called “ *a most serious discrepancy*”.

Ms. Capiatha’s evidence is that there was no group insurance policy, at least in so far as commercial premises were concerned. Such a policy did exist she said, but only in relation to residential premises. The defendant clearly did not qualify for coverage under such a policy he having said in response to question 9 of the proposal form that the building was being used as a guest house and bar. Having examined the evidence on this issue, I have come to the conclusion that no such group policy did in fact exist for commercial premises, particularly when regard is had to the insurance policy itself, certain details of which I will examine presently.

I think it necessary to make certain observations at this point. First, the defendant previously had cover of \$225,000.00 at NEMWIL but did nothing prior to February of 1992 to have this sum insured increased if indeed he thought is necessary to do so. Second, Mr. Blackman, as a person of some thirty-seven years experience of his type in the insurance industry should surely have known that a mortgagor is free to obtain whatever level of cover he considers appropriate, and can do so even if a mortgagee, or any other person with an insurable interest in the

property, already has cover of its own, and in whatever amount. Third, the premium for the insurance placed at GTM was paid by the defendant to the plaintiff on 14th February, 1992, after he had retained Maibrol's services but prior to Maibrol writing to the plaintiff. Fourth, the insurance policy issued by GTM on 13th May, 1992, policy number R72554, (exhibit "HB14") for the period 13th February, 1992 to 13th February, 1993, contains or bears a "mortgagee interest endorsement" or "mortgage clause" which specifically provides that "*further concurrent insurance permitted without notice until required*". Fifth, this insurance policy is an 'indemnity' policy; it does not contain a 'replacement' or 'reinstatement' provision and, consequently, any claim made under it will be paid based on the market value of the building at the time of the loss, and not on the cost of repairs at the time of actual reinstatement of the building.

The "mortgage clause" endorsement does not support the contention that there was a group policy under which the defendant's property was insured by GTM. The policy itself indicates to the contrary; that it is an individual policy issued to the defendant and that the proceeds of any claims for losses payable under the policy were to be paid to "*Trinidad Co-op Bank Trust Company Limited as mortgagees or assignees of mortgage interest to the extent of their interest*".

The premises were damaged by fire on 20th July, 1992 and thereafter followed a lapse of some twenty to twenty-two months before GTM finally settled the claim which had been made. An engineering report as to the damage to the building was

provided by Romain & Associates dated 12th August, 1992 (exhibit “HB 13”) and Hart & Leonard (1987) Ltd provided two estimates as to the cost of the repairs based upon that engineering report. The first such estimate is dated 7th July 1993 and estimates the “current construction replacement cost” at \$190,400.00 (exhibit “HB 10”). A subsequent report, of August 3, 1993 (exhibit “HB 11”) estimates that cost at \$169,900.00 based on costs *“before the floating of the TT dollar”*

GTM initially adopted a position of denying liability, then made an offer to settle the claim at \$31,625.00 and, finally, made an increased offer of \$65,000.00. The defendant approached Maibrol for assistance in having the claim settled but it does not appear that Maibrol were so engaged at the time of actual settlement. Indeed, by that time, Mr. Blackman had already left the employment of Maibrol. During the course of settlement, there were discussions. The defendant said in cross-examination that *“I was kept abreast of all the offers. Nothing. Then \$31,500.00 and then \$65,000.00 the \$31,500.00 was based on a compromise between the sum insured and the value of the building. I was fully aware of that I knew there was an offer of \$65,000.00 by GTM as in exhibit “HB 7” I agreed to accept \$65,000.00 after several correspondence and discussions”*.

On 4th January 1994 the defendant wrote to the plaintiff’s manager (exhibit “HB 12”) saying that he was willing to accept \$65,000.00 *“..... so you can rectify my*

arrears for eighteen months” (18). More revealing as to the state of affairs at that time is that this letter goes on to say at the final paragraph “Furthermore, I will be putting my property at Las Lomas for sale in order to repair my present building and continue to service my mortgage”.

Turning first to the defendant’s pleas that the claim was compromised or settled without his knowledge, consent and or approval or, alternatively, that he was coerced into accepting this offer, there is nothing on the evidence before me to indicate that this letter of 4th January 1994 was signed under duress or coercion, or that any pressure was brought to bear on the defendant to have him sign it. I have come to this conclusion despite the defendant saying that he was annoyed at the offer of \$31,625.00 and that on the evidence he must obviously have been suffering some unhappiness at the length of time that was being taken to resolve the claim. There is no evidence to show any change in these circumstances had taken place by the time he signed the receipt (exhibit “HB21”) and discharge (exhibit “HB 22”) both of which, on the evidence, I find that he did sign and that he did so on 9th May, 1994.

Further, and as to whether the issue of whether the plaintiff threatened to sell the property in question if the defendant did not sign these documents, it would appear to me that the events of 1990 and the steps taken by the plaintiff at that time to realise its security by selling the property could not have any great effect in 1994 either on the defendant’s mind or on the status of the settlement of the claim. Any

threat to him in 1994 was no different to any threat which might have befronted him in 1990. In 1994, as he had been in 1990, he was in arrears of his mortgage. In 1994 he was in arrears to an extent greater than the \$65,000.00 which he agreed to accept. He knew the consequences of being in arrears, from the events of 1990. A sale or threatened sale in 1994 was nothing new to him.

The defendant had already agreed to accept the \$65,000.00 and, as I have said, there is no evidence to show that he had any change of heart or mind so far as that decision was concerned. He may have been annoyed, as he says he was, about the offer of \$31,625.00, and he may have been querulous as to the length of time being taken to settle claim as can be seen from his letter of 4th January, 1994. And he may have been querying why mention was being made of avoiding the policy and why no reason was given and/or no misdescription specified.

But if any or all these factors weighed on his mind up to 4th January, 1994 there is no evidence to suggest that he resisted settling at \$65,000.00 then, nor that between that date and 9th May, 1994 he changed his mind, for whatever reason about accepting that settlement. And save for the threat of selling the property, about which I have already commented and need say no more, there is no evidence of pressure, whether new or renewed, or of coercion or duress.

I should add that I do not accept Mr. Deonarine's submission that if the defendant accepted this amount voluntarily then the question of him being owed any duty of care by the plaintiff is irrelevant because he would have suffered no loss as a

consequence of the plaintiff being in breach of that duty. The sum of \$65,000.00 is the amount which GTM agreed to pay and there is no evidence to suggest that it was liable to pay any increased amount. Acceptance of this amount therefore discharged GTM from its obligation to pay, but it did not relieve the plaintiff of any liability or obligation of the plaintiff to the defendant.

I turn now to the claim of negligence and a more detailed review of the evidence in this respect. Having checked the details which the defendant had inserted on the proposal form, Ms. Capiatha changed the period for which insurance coverage was required and inserted the figure of \$250,00.00 as the value of the building. The defendant then signed the proposal form. It is not in my view for the plaintiff to say that in those circumstances it was not under any duty to insure for an amount in excess of the amount owed under the mortgage. Clearly, and even if in its own interests so as to avoid the insurer applying “average” in the event of a partial loss, or not recovering the full value on a total loss the plaintiff must ensure that the amount of cover is proper and adequate.

As to the sum insured, Ms. Capiatha said that the value of \$250,000.00 was arrived at by her having looked at the Arthur Roach Associates valuation which had been carried out in 1989. She said that the plaintiff insured properties according to valuations and that the plaintiff did not insure for the amount of the loan or the amount of the mortgage. She also said in her evidence that it was not possible to insure for more than the value of the property. She, however, exercised her

discretion in this instance and inserted a figure higher than that in the Arthur Roach Associates valuation. The previous sum insured was \$225,000.00 at NEMWIL but she says that she increased the amount because of the time which had elapsed since the valuation was done in 1989. She did not “*think it necessary to ask him [the defendant] what was the value of the property*”. She denied that the defendant protested about the figure she was inserting. She also said that it was not the plaintiff’s duty to insure a property in excess of the amount actually owed to the plaintiff and if that the defendant wanted increased coverage he could go and arrange for it. But she also said that she knew the bank would not give a loan of more than a prescribed percentage of the value of a property, which percentage she thought was seventy per cent at the time. She also knew that the loan to the defendant was granted in an amount of \$240,000.00. Surely this would have been some indication to her that insurance cover of \$250,000.00 was inadequate, or that further information was required.

Ms. Capiatha then arranged for the fire insurance coverage. She negotiated a policy through M&M Insurance Services Ltd (“M&M”) for \$250,000.00 to cover the defendant’s property. In other words, she got M&M, who were then brokers to the plaintiff, to negotiate and place the risk. M&M did so at GTM in an amount of \$250,000.00.

I turn now to whether the plaintiff was under any duty of care to the defendant when arranging for insurance to the property. Ms. Capiatha said that a customer of the

plaintiff could either insure under their group policy (assuming, I presume, the use of property to be residential) or obtain its own insurance coverage provided he insurance was assigned to the plaintiff. The defendant's insurance coverage at NEMWIL had been obtained by the defendant. By acting as it did in February 1992 the plaintiff assumed or took upon itself the role or function of obtaining insurance coverage for the defendant. It may well have been that the plaintiff was also looking to preserve its own position as mortgagee but it could have done so without any reference or input from the defendant. The plaintiff, however, did not do so. The plaintiff inserted certain details on that proposal form. The plaintiff checked the information on that form. The plaintiff got the defendant to sign the proposal form. The plaintiff then arranged for its brokers to negotiate and place the coverage. I cannot see how the plaintiff can now say that it was not acting on behalf of the defendant and, further, it owed him no duty of care.

I am fortified in this view by the decision of Crane J in HCA 30 & 31 of 1990 *National Commercial Bank of Trinidad and Tobago Limited v Elton Pouchet & Lorraine Pouchet* and his interpretation there of the decision in *White v Jones* [1994] 2 WLR 187. In the instant case the plaintiff assumed the responsibility of obtaining insurance cover on the building and consequently owed a duty to the defendant.

I turn now to the question of whether the sum insured was in fact adequate. A history of the value the building over time is that in 1984 the defendant was required

to insure it for \$240,000.00 while under construction and after that for \$225,000.00. This is provided at Clause 4 (iii) of the Deed of Mortgage registered as No. 4356 of 1984 (exhibit "M"). A valuation done by G.R. Cook & Associates in 1983 placed a market value on the property of \$300,523.00 after completion of construction, with recommended fire insurance coverage of \$225,000.00. This valuation was done for Trinidad Co-operative Bank Trust Company Limited in relation to the defendant's application for the loan/mortgage facilities.

The valuation done by Arthur Roach Associates in 1989 was done at the request of the plaintiff for "Forced Sale purposes" (exhibit "D"). The market value set out in this valuation is \$205,000.00, with the value of the building placed at \$160,000.00. The Forced Sale value was said to be \$175,000.00 and the replacement cost of the building was said to be \$200,000.00. It is safe to say that it is well accepted that valuations for "Forced Sale purposes" tend to be conservative.

Quamina & Associates carried out a valuation in June 1998 (exhibit "HB 20"). This places the market value at \$475,000.00, with the building valued at \$415,000.00. No recommended fire insurance or replacement cost is given, but in his evidence. Mr. Quamina said that he would place the value of the property in 1992 at 5-10% under the 1998 value. That would place a value on the building of \$373,500.00 to \$394,250.00.

Finally, it should be noted that during the course of negotiating the settlement of the claim, GTM placed a value on the building of \$400,000.00 (see exhibit "HB 8").

In 1992 Ms. Capiatha had some five years experience in this area of the plaintiff's operations, including the two years of in-house training. It must have been apparent to her, although she would not of course had before her the valuation by Quamina & Associates, nor GTM's subsequent view of the value of the building, that an amount of \$225,000.00 was not an accurate figure or else she would not have not increased that amount to \$250,000.00. Obviously, she gave the matter some thought, even though she did not ask the defendant his views on the matter, if her evidence is accepted. But to increase this figure by a mere \$25,000.00 based on a three year old valuation which had been carried out for "forced sale purposes" and not think it necessary to ask the owner/mortgagor for his estimate of the value, and not to commission a formal valuation of the building or even make any enquiries of anyone else as to what the value might be, is not in my view a safe, careful, proper or appropriate approach to take.

I should add that I would have come to this conclusion on the basis of the defendant saying nothing to Ms. Capiatha by way of protest on 10th February, 1992 and of Mr. Blackman of Maibrol not contacting Ms. Capiatha by telephone, as she said in her evidence, and even if Maibrol had not written to the plaintiff on 27th February, 1992 as sit did.

The sum insured was clearly not adequate and the plaintiff was negligent in not obtaining a proper up to date valuation of the property and the building in particular. And if it be said that the obtaining of a formal valuation was not necessary in the circumstances then, at the very least, the plaintiff should have made enquiries even if only on an informal basis, starting with the defendant himself, to ensure that the coverage was in fact adequate.

Further, the plaintiff arranged for the policy to be issued by GTM, and the policy clearly states, as I have said, that further concurrent insurance was permitted without notice until required. Ms. Capiatha must have known this from inspecting the policy, as she would prudently do after receiving it, to make certain that it was in order. And if she did not actually inspect it then, her experience and knowledge of insurance policies of this nature generally would certainly have informed her of what the defendant was in a position to do. Indeed, in her evidence she said that the mortgagee could get extra cover but she did not say this either to the defendant or to Maibrol.

I turn now to the question of whether the defendant suffered any loss as a consequence of the negligence, but first I should say something about the allegation of GTM seeking to avoid the policy for misdescription. If this was in fact so, then the plaintiff played a role in completing the proposal form and acting on behalf of the defendant. So it would appear to me that the plaintiff would itself be at fault if there was a misdescription of whatever nature on the proposal form of which the

plaintiff knew or should reasonably be expected to have known. But there is no evidence before this court as to what constituted this misdescription, and no evidence to show that the plaintiff knew or should reasonably have known of it. The issue of misdescription can therefore go no further and, indeed, should not even have been raised in the first place.

As to the question of under-insurance and its effect on the defendant, GTM clearly invoked and applied the average provision in March 1993 when offering \$31,625.00 in settlement based on a “cost of repairs” of \$50,600.00. See exhibit “HB 8” which, incidentally, makes no mention of avoiding the policy and merely says that the offer is made “*without prejudice*”, an expression which has over the years come to represent a variety of meanings. This facsimile transmission follows the letter from Toplis and Harding (W.I.) Ltd (“Toplis & Harding”) dated 13th October, 1992 addressed to the defendant. In this facsimile transmission of March 15, 1993, GTM, as I have said, regards the building as being valued at \$400,000.00. In short, the consequence of the plaintiff’s negligence is that the defendant was prevented recovering from GTM the full amount which he would have been entitled to had the building been insured for a proper amount.

I turn now to the measure of that loss. No special damages are pleaded and there is no evidence of same. Any award must therefore be in general damages, but clearly it cannot be the \$450,000.00 as alleged by the defendant at paragraph 10 of his counterclaim of 19th February, 1998. The building was damaged and

subsequently repaired. It was not destroyed totally. There is no question of exemplary or punitive damages being awarded when regard is had to the evidence and to the principles set out in *Rookes v Barnard* [1964] 1 All E.R. 376 and the subsequent decisions in this jurisdiction.

There are two estimates of the cost of repair but there is no evidence of the actual amount or amounts expended by the defendant in carrying out those repairs.

There is no evidence before this court as to how the settlement figure of \$65,000.00 was arrived at and, in particular, as to whether there was any “adjustment” by GTM, or its adjusters, Toplis & Harding, of the amount which the defendant had claimed for repairs. In the circumstances, I must do the best I can with the evidence before me in attempting to arrive at an award in general damages and in doing so it is my view that consideration can be given, so far as it is possible and proper to do so, to what the defendant would have received from GTM had the building been insured in its proper value.

The defendant and Mr. Blackman say that the value of the building in 1992 was somewhere between \$450,000.00 and \$500,000.00. Quamina & Associates say, in effect, that the value at that time was somewhere between \$373,000.00 to \$394,000.00. GTM placed a value on the building of \$400,000.00. On balance I accept a figure of \$400,000.00 as the value of the building. It must be remembered that at that time GTM, or its adjusters, would have physically inspected the building, and that the building was insured on an indemnity basis.

A settlement figure of \$65,000.00, after application of the provisions relating to “average” would therefore have to be based on GTM accepting that the repairs or estimated repairs cost or would have cost \$120,000.00. Mr. Ramischand agreed that GTM had applied “average” when settling the claim but submitted that the estimated cost of repairs of \$190,400.00 should be accepted as what the defendant would have been entitled to receive. I do not agree. It is unlikely that an insurer will accept an estimate without question, and from the settlement offer of 15th March 1993, which gives the cost of repairs as \$50,000.00, it is obvious that GTM did not contemplate a repair cost any where near to \$190,400.00. In any event, it is the market value of the building at the date of the loss, and not the actual cost of reinstatement which is of paramount consideration.

This amount of \$120,000.00, less the settlement actually paid of \$65,000.00, leaves an amount of \$55,000.00 and that is in all probability, based on what is before, me the additional sum which the defendant would have got, or which would have been paid to the plaintiff under the “Mortgage Clause”, if the building had been insured in its proper value. In all the circumstances, and exercising my best judgment, I can do no better than come to a conclusion that the damages to be awarded should be \$60,000.00. I am also of the view that interest should be paid on this amount at a rate of interest which should be, given all the circumstances, the commercial rate.

There is no evidence before me as to what the commercial rate was at the time payment was received or what it is now but I would not think it unreasonable that interest be paid at the rate of 14% for this purpose and that it be payable from 24th March, 1994 which is as precise as I can be in fixing a date, on the evidence before me, as to when there was receipt of the cheque in settlement of the claim.

I turn now, finally, to the question of the role played by Maibrol, and whether that role in any way relieves the plaintiff of liability. I have given this matter very considerable thought and have come to the conclusion that, while at least initially, Maibrol's appointment as the defendant's insurance broker may be seen to have placed upon it an onus or responsibility which it did may not have properly discharged to its client, ultimately, whatever Maibrol did or did not do does not relieve the plaintiff of its liability. I have come to this conclusion for two principal reasons. Briefly, they are that first, the plaintiff has not pleaded to this effect in its defence to the counterclaim, thus affording the defendant the opportunity to meet this case. Further, to decide this issue would in effect have resulted in Maibrol being, to use an expression, tried *in absentia*, and that cannot be right. Second, the plaintiff's actions excluded Maibrol and amounted really to nothing less than a refusal to acknowledge Maibrol's claim to be the defendant's broker, at least in so far as the placing of this risk was concerned.

There was no response, or no proper response at the very least, to the written request of 27th February, 1992 made by the defendant's properly appointed

insurance brokers making a legitimate request for information. No copy of the policy was sent to Maibrol. No copy of the policy was sent to the defendant. The reply to Maibrol of 13th March, 1992 did not materialise until two weeks after the plaintiff received the request from Maibrol. Also, however, the defendant had paid the premium for the insurance coverage to the plaintiff on 14th February, 1992 and it would appear to me that in so doing the defendant accepted the plaintiff's role in the matter.

Finally, see the plaintiff's letter to Mr. Blackman of March 13, 1992 (exhibit "BC 2") where it says "*..... please be advised that the customer at caption is already insured and has remitted his premium to our Company for payment to our Insurance Brokers*".

That letter, in my view, seals the issue. The plaintiff acknowledges as having acted on behalf of the defendant in the placing of this insurance. The plaintiff assumed a duty of care. That duty was owed to the defendant. The plaintiff insured the building at an under-value and was negligent in doing so. The defendant suffered losses as a consequence of that negligence.

In the circumstances there will be judgment for the defendant on his counterclaim. The plaintiff will pay to the defendant the sum of \$60,000.00 together with interest at the rate of 14% from 24th March, 1994 to the date of judgment, such sum or sums to be set off against and deducted from the amount due by the defendant to the plaintiff on the plaintiff's claim.

As to the relief sought by the plaintiff, the quantum of the defendant's indebtedness as at 30th April, 1996 was the subject of the consent order entered herein on 25th June, 1998. The amount of \$350,372.50 included an element of interest and I enquired of Mr. Deonarine for the plaintiff as to whether interest on that same amount as from 1st May, 1996 would not constitute "interest on interest" and thus a penalty which would not be enforceable. He may not have agreed that this was so but in my view the charging of interest on interest in these circumstances would be a penalty. Paragraph 7 of the statement of claim sets out that the principal outstanding on the loan as at 30th April, 1996 was \$174,599.65 and, in the absence of any indication to the contrary, I accept that figure.

No evidence was led on the issue of the plaintiff being granted an order for possession and it was not addressed in the course of arguments. Consequently, this issue, if it be an issue at all, must be decided on the basis of whether the quantum of the plaintiff's judgment exceeds that of the defendant's judgment, in which case the plaintiff should be granted possession, or vice versa in which event the defendant should remain in possession. The former position obviously obtains.

There will therefore be judgment for the plaintiff on its claim against the defendant in the sum of \$350,372.50 together with interest on the amount of \$174,599.654 at the rate of 13 1/2% per annum from 1st May, 1996 to the date of judgment.

There will be an order for possession of the subject premises in favour of the plaintiff.

The defendant not having defended the plaintiff's claim at the trial, I order the defendant to pay one half of the plaintiff's costs of the claim . The plaintiff will pay the defendant's costs of the counterclaim.

There will be a stay of execution for 28 days.

Writ of possession not to issue before 30th September, 1998.

Dated this 29th day of July, 1998.

C.V.H. Stollmeyer,
Judge.