Neutral Citation Number: [2008] IEHC 174

THE HIGH COURT

2004 No. 1119 P

BETWEEN

MANOR PARK HOMEBUILDERS LIMITED

PLAINTIFFS

AND

AIG EUROPE (IRELAND) LIMITED

DEFENDANT

Judgment of Mr. Justice Bryan McMahon delivered the 13th day of June, 2008

Background

1. Ongar Stud Farm, Clonee, County Dublin was purchased by the plaintiff company for the purposes of development. There were some hundred and sixty-five acres in the farm and it was proposed to build several hundred houses of varying sizes on the land. Ongar House (hereinafter "the House"), was a period house, located in the centre of the farm and was a listed building and a protected structure under the Planning Acts. As such, any changes to its structure or use were subject to strict restrictions. The developer's plan was that Ongar House would be the focal point of this new "village", and that it might eventually be run as a restaurant or public house.

2. When the plaintiff company took over the property in 2000, the former owners still resided in the house, but when they eventually moved out, the plaintiff set up the site office for the development in the House. The plaintiff caused a burglar alarm to be installed in the House in August, 2000. In April 2001, the plaintiffs ceased to use the House as their site office and relocated these offices in porta-cabins near the work in progress. This meant that Ongar House was vacant from that time on. To secure the property and to discourage intruders, the plaintiff, with the consent of Fingal County Council, the planning authority, contracted to have steel shutters placed on all the outside doors and windows of the House. This work was done by Sitetex Security Services Ltd. in around March, 2001. Some time later, one of these shutters was interfered with in an attempt to force an entry and it was decided at that time, again with the consent of the planning authority, that to make the House more secure, all the ground floor shutters would be replaced and these openings would be "bricked up" with concrete blocks from the outside. This work was completed on the 9th of November, 2001.

3. Until the 30th of April, 2002, the House was insured under an "All Risks" policy with the Royal and SunAlliance but as the property was vacant from 2001, the insurers showed some reluctance in renewing the policy and the plaintiff's brokers, Coyle Hamilton, sought other quotes in the market. Because the house was unoccupied, getting appropriate insurance became somewhat more difficult. Eventually, a contract for "Fire Only" cover was signed with AIG, the defendant, on the 3rd of May, 2002.

4. The House was extensively damaged by fire on the night of the 14th/15th of September, 2002. The insurer repudiated the contract on the 28th of November 2002, and the plaintiff issued these proceedings claiming various declaratory reliefs as well as damages for breach of contract.

The Insurance Contract

5. It is common case that a contract of insurance was entered into between the plaintiff and the defendant insurer on the 3rd of May, 2002. To establish what the terms of the contract were, however, it is necessary to outline the history of the negotiations that took place from about the middle of April 2002, to the date when agreement was finally reached on the 3rd of May, 2002.

6. As already mentioned, the existing insurer was Royal and SunAlliance and Paul Colgan, broker, from Coyle Hamilton, acting for the plaintiff, contacted them, as the existing insurer, in the middle of April 2002, regarding renewal. Because the House was now vacant, Royal and SunAlliance suspended renewal terms and carried out a survey of the property on the 25th of April, 2002, and wrote to Mr. Colgan enclosing part of the survey. Copies of these documents are reproduced here:-

"Confidential

Insured: Manor Park Home Builders

Location: Ongar House, Ongar Stud, Clonsilla, Co. Dublin.

Policy No: SA13549675

Date of Visit: 25 April 2002

Loss Prevention Programme

The Loss Prevention Programme is a component of the Royal & SunAlliance survey service which is provided free of charge to policyholders. You are invited to make use of the service to minimise potential losses.

The purpose of this Loss Prevention Programme is to assist in minimising the possibility of loss from the risks referred to herein and it does not imply that no other hazardous conditions exist. The implementation of any measures is the responsibility of the Proposer or Insured and Royal & SunAlliance accepts no liability howsoever arising out of the Programme.

The liability of Royal & SunAlliance is limited to the cover it provides under the policies effected on the property or risk concerned.

Please contact us if further information is required or if you feel we help in any way.

The Programme

Requirements

These requirements are fundamental to the cover under the policy and failure to comply with these may affect the policy cover, terms and conditions.

02.01 Security

The building is well secured with the exception of the 'garage/boiler room'. To prevent access to these areas it is a requirement that;

(a) the garage door be replaced/repaired as necessary.

(b) the light timber door leading to the boiler room be replaced with steel door/surround or alternatively the gap to be bricked up.

(c) double leaf timber gates (to rear leading into yard area) be secured using good quality bolt/close shackle padlock.

In addition the combustible material in the 'garage' must be removed.

Action by; 4 weeks

Clive Groarke

Underwriter Surveyor"

Royal and SunAlliance also communicated its new terms to Mr. Colgan by e-mail on the 30th April, 2002. It is necessary also to produce this e-mail in full:-

"From: adrienne.o'carroll@notes.royalsun.com

Sent: 30 April 2002 17:32

Subject: Manor Park Home Builders - SA13549675

Paul,

Cover confirmed as follows at premium €10,660 plus levy;

Fire only cover on building declared value sum insured €1,015,000 and contents declared value sum insured €20,000.

Unoccupancy Warranties as follows to apply;

It is warranted in the unoccupied building insured by this policy;

(1) All gas, water, and electricity mains supplies are to be kept disconnected until the buildings are once again occupied.

(2) All outside doors are to be securely locked to prevent unauthorised entry.

(3) All windows are to be firmly secured at all times.

(4) Regular visits shall be carried out by the Insured to physically check the premises and to carry out any work necessary to maintain the security arrangements.

(5) All trade waste and combustible materials must be removed from the premises

Cover is subject to completion of RCP dated 25/4/02 the date of completion being 25/5/02.

Regards,

Adrienne."

7. The reference to RCP was an abbreviation for "Risk Completion Programme", which referred to a part of the Royal and SunAlliances' survey of the property made on the 25th of April, 2002.

8. Both of these documents, the excerpt from the survey and the e-mail from Royal and SunAlliance, were faxed on the 1st of May, 2002, by Coyle Hamilton to Mr. Paul Kelly for the insured. Mr. Kelly set about addressing the concerns of the Royal and SunAlliance immediately since they were the existing insurer and no other willing insurer had quoted at that time. Mr. Kelly still thought that Royal and SunAlliance would be the relevant insurers for the following year.

9. The position, therefore, was that when the cover was given by AIG on the 3rd of May, 2002, the client was by then implementing a programme set by Royal and SunAlliance which included, *inter alia*, the disconnecting of the electricity supply to the House. This was carried out by the ESB on the 24th of May, 2002, with the result that the alarm was rendered inoperable on that day. Mr. Kelly said in evidence he had commenced implementing the Royal and SunAlliance programme before the contract was entered into with AIG and he did not countermand his instructions as he thought he was making the property safer from an insurance point of view and

because, in truth, he did not advert to the fact that when the electricity was disconnected it would have the effect of disarming the alarm system. The result was that there was no burglar alarm in operation after the 24th of May, 2002, or specifically when the fire occurred on the 14th/15th of September, 2002. Although the defendant made other complaints in its defence, the question of the alarm turned out to be their main contention as the case was run.

10. As already mentioned, in around the middle of April, 2002, Paul Colgan of Coyle Hamilton, noting Royal and SunAlliances' reluctance to renew on the same terms, and to ensure that there would be no break in the cover, sought quotes from four other insurance companies. From his soundings there was no great enthusiasm to underwrite the risk since the House remained vacant and was considered an unattractive risk in the market for this reason. Of those insurers approached, it was clear that Allianze did not want the business and Eagle Star and ACE would not quote, although the latter did intimate that the premium might be in the region of €10,000. AIG appeared to be interested. As already mentioned, Royal and SunAlliance had, in contemplation of renewing the policy, carried out on the 25th of April, 2002, a survey, and part of it, the Loss Prevention Programme (also known as the Risk Completion Programme), was sent to the brokers, together with a quote of a new premium of €10,660 plus government levy. The Loss Prevention Programme is set out above and does not have to be reproduced. The following sentence was also inserted by Royal and SunAlliance:-

> "These requirements are fundamental to the cover on the policy and failure to comply with these may affect the policy cover, terms and conditions."

11. A copy of this part of the survey was sent by fax on the 30th of April, 2002, to Mr. Russell of AIG as he was still considering the application. As negotiations were continuing Mr. Colgan sent a fax to Mr. Russell on the 24th of April, 2002, in the following terms:-

"Facsimile Message

> To: Simon Russell From: Paul Colgan
>
> Company: AIG Europe Date: 24/4/02
>
> Fax No: 283 7775 No Pages: 3
>
> **Re: Property Damage Insurance - Manor Park Homebuilders Ltd**.
>
> Dear Simon,
>
> Our telephone conversation earlier today refers.
>
> Enclosed is a copy of our Submission dated 18th April 2002.
>
> As advised the client has a period residence known as Ongar House which is located near Clonee/ Clonsilla. This building is on a site which is currently being developed by our client as an (sic) housing estate.
>
> Up to recently the building has been used by our client as offices. Because it is now vacant and is a listed building the client has installed steel shuttering on all windows and doors. An alarm system is in place but is not linked to a central station. In the event of the alarm going off the 24 hour security service on the building site would by (sic) alerted. The security service would carry out period checks on the building during the night.
>
> The sums insured are as follows:
>
> Buildings - €1,015,000
>
> Contents - € 20,000
>
> It would be appreciated if you would let us have a quotation for this risk which is due for renewal on 29th April next.
>
> Regards.
>
> PAUL COLGAN
>
> FOR THE COMPANY ."

12. These negotiations culminated in an exchange of e-mails which I now produce:-

> "From: Paul Colgan
>
> Sent: 03 May 2002 10:09
>
> To: 'simon.p.russell@aig.com'
>
> Subject: Property Damage Insurance - Manor Park Homebuilders Ltd.
>
> Simon,
>
> Our telephone conversation today refers.
>
> It is noted that you are holding covered fro (sic) the above for Fire, Aircraft and Explosion risks subject to an excess of EUR 5,000.
>
> The premium agreed is EUR 6210.00 plus 2% Govt. Levy.

Regards.

Paul Colgan."

"From: Russell Simon P

Sent: 03 May 2002 12:42

To: 'Paul Colgan'

Subject:Re: Property Damage Insurance – Manor Park Homebuilders Ltd.

CONFIRMED."

13. In addition to these documents, reference was made also during the hearing to various attendance notes of phone conversations which Paul Colgan had with his client, Mr. Kelly, and to a lesser extent with Simon Russell of AIG and other insurers canvassed at the relevant time. Insofar as these are relevant to these proceedings, reference will be made specifically to them hereafter. For the most part, however, they refer to matters not really in issue between the parties, or to matters which were later repeated in writing.

14. It is not contested that a contract was entered into between the parties on the 3rd of May, 2002, at the latest. That is evidenced by the exchange of e-mails between Paul Colgan of Coyle Hamilton for the plaintiff and Mr. Simon Russell for the defendants. What the exact terms of the contract were, however, is more problematic. This was because of the minimum enquires made and the paucity of documentation issued by the broker or by the defendant insurance company. No proposal form was completed, no "slip" was sent by the broker to the insurer, no confirmation note or memorandum was sent to the plaintiff after the 3rd of May, 2002, and no policy ever issued to the plaintiff. The communications between Mr. Colgan and Mr. Russell of AIG already referred to, identified that the policy was Fire, Aircraft and Explosion only, that the property insured was the House, that the premium was to be € 6,210 plus 2 % Government levy, that the sum insured was €1,015,000 for the building and €20,000 in respect of contents. Apart from an excess of €5,000 there were no additional conditions or warranties specified.

15. These were set out in an e-mail from Mr. Colgan to Mr. Russell on the 3rd of May, 2002, and acceptance was made on the same day by Mr. Russell in a one word e-mail: "Confirmed".

16. It was indicated in Mr. Colgan's fax, sent to the insurers on the 24th of April, 2002, that an alarm system was in place but was not linked to a central station, that the premises were vacant, had steel shuttering on the ground and upper floors, and that there was a security firm on the building site which would be alerted if the alarm went off and that the security service would carry out periodic checks on the building during the night. The status of these representations were central to the dispute before the court. In particular, the defendants focused especially on the statements that there was "steel shuttering on all windows and doors" and that "there was an alarm system in place".

17. The defendant argued that in addition to the agreed terms, few as there were, the defendant's Standard Fire Only Policy applied to the contract. This, according to the defendant, was the background against which the negotiations took place. The "Standard Policy" covered other matters of a more or less general nature relating to insurance contracts of this nature and also had Condition Clauses which, it was argued, should also apply to the agreement. Where the standard form of contract is universally recognised in the sector, or a specific form is frequently used between the insurer and the broker, the court may admit such a form as providing the general terms to which the specific terms negotiated are added, to give the full contract governing the agreement.

18. Mr. Colgan, of Coyle Hamilton, denied that this was the case here, however, and said that, to his knowledge, there was no such thing as a model "Fire Only" policy used by insurers generally throughout the industry in Ireland, and that he (Mr. Colgan), was not familiar with the so-called AIG Standard Fire Policy. Mr. Austen Buckley, an expert on insurance practice and insurance law, gave similar evidence as did Mr. John Barry of Coyle Hamilton. There was no reference in the negotiations that preceded the e-mails of the 3rd of May, 2002, to any particular policy conditions. Moreover, as already stated, no policy document ever issued to the plaintiff, and the plaintiff only got sight of the so-called "Standard Policy" when, in the course of these proceedings, one was furnished in the defendant's reply to particulars, on the 12th July, 2005. Even at the trial, where two different forms were produced by the defendant, there was a dispute as to whether the "long form" or the "short form" of the policy applied. Moreover, the policy which the defendants finally produced was a Property Perils policy limited to Fire, Lightning and Explosions whereas the e-mails of the 3rd of May, 2002, referred to Fire, Aircraft and Explosion. There was no compelling evidence offered to the Court to justify the conclusion that any standard policy of AIG applied to the agreement.

17. It is also clear from the evidence that there were no special conditions or limitations applied by the defendant. Mr. John Barry, of Coyle Hamilton, described this as a "*very clean quote*". He stated that if there were any warranties they would have to have been communicated at the quotation stage because warranties have serious consequences for a policy holder.

18. Simon Russell, the underwriter who negotiated the contract on behalf of AIG, accepted that he did not put an alarm warranty on the policy. He accepted he did not make any reference to any policy terms and conditions in his communications with Paul Colgan.

19. In any event, because the defendant purported to avoid the policy on the 28th of November, 2002, it is not now open to them to rely on any of the terms or conditions in such policy. In *Superwood Holdings v. Sun Alliance & London Insurance Plc* [1995] 3 I.R. 303, the Supreme Court held that a party who repudiates an insurance contract on the basis of fraud cannot thereafter rely on the repudiated provisions. On this issue, Denham J. said at p.345:-

> "I am satisfied that the defendants, having elected to repudiate the contract and thus refused to the plaintiffs the benefit of the contract, and further, the fact that the ground of the repudiation was fraud and that this claim in this way denied the plaintiffs the right to arbitration on the issue, it would be, and was, entirely unfair to the plaintiffs to enable the defendants at the same time to rely on the agreement"

20. In the same case, Blaney J. reviewed the authorities on the issue and in particular considered the decisions of Pim J. in *Ballasty v. Army, Navy and General Assurance Association Ltd* (1916) 50 I.L.T.R. 114 and *Furey v. Eagle Star and British Dominions Insurance Co. Ltd* (1922) 56 I.L.T.R. 23, both of which involved insurance companies seeking to rely on an arbitration clause in a policy after they had repudiated or avoided it. In each case, the court refused to grant a stay on the proceedings. Blaney J. quoted with approval the comments of Pim J. in *Ballasty* in which the judge held at p.116:-

> "Where one party says that the contract is gone and the premium forfeited, he cannot insist on going to arbitration under a contract which he says does not exist."

21. Both of these cases were followed by Budd J. in *Coen v. Employer's Liability Assurance Corporation Ltd* [1962] IR 314 from whose decision at p.336, Blaney J. quoted with approval:-

> "…. The repudiating party cannot be allowed to approbate and reprobate. He cannot thus be allowed to say:- " I deny the existence of the contract which you say exists between us, but I also rely on a term of that contract which contains a provision which bars you from bringing proceedings on foot of any claim not arbitrated upon within 12 months of the date of disclaimer""

22. I have no difficulty, however, in accepting that some general terms can be implied in such an insurance contract, negotiated, as this contract was, between the broker for the insured and the underwriter. The evidence was that such contracts are frequently negotiated by phone and by fax or e-mail nowadays. I have no problem accepting that a contract can come into being in such circumstances where all the essential terms are known and agreed. Further, although not explicitly adverted to, some well known terms on occasion may be inferred in these agreements. Where, however, the terms are not reduced to writing in a note or confirmatory memorandum and no policy ever issues to the insured, only the most general conditions should be implied as being so well known as to form part of every insurance contract unless specifically excluded. There was no evidence given to the Court on this, but I venture to suggest that recognised terms relating to good faith, average insurable interest and subrogation, to mention but a few, would clearly be implied into every insurance contract unless specifically excluded.

Was the alarm operational when the contract was concluded on the 3rd of May, 2002?
23. One central issue for determination was whether the alarm was operational when the contract was concluded on the 3rd of May, 2002. This is a question of fact and because of its significance I now propose to look at the evidence and determine this issue at this early juncture as my finding in this regard will have a bearing on my subsequent analysis. As already noted, the steel shuttering on the ground floor of the house was replaced on the 9th of November, 2001. It was removed and the windows and doors on the ground floor were bricked up with concrete blocks instead. The defendants formed the view that such work inevitably meant that the alarm system would have been rendered inoperative by this work. To some extent, this view was based initially on an erroneous assumption that the alarm system was one which had contacts on the window sashes and that the alarm would be triggered when the window was interfered with. At the trial this was shown not to be the case. The defendant, nevertheless, maintained that the blocking up process that occurred in November, 2001, would have had the effect of disarming the alarm system that was in place.

24. I am satisfied from the evidence given by Mr. Martin Kavanagh who was the site manager and from a close scrutiny of the many photographs (taken immediately after the fire) presented to the Court and noting especially the construction of the window and door openings and the depth of the reveals in particular, that there was no structural reason why the door and window openings could not be blocked up by men working solely from the outside, without triggering or disarming the alarm. That this was the way the work was carried out was supported by the many photographs which show the rough finish of the block laying from the inside, where the mortar between the blocks drips untidily (in a "snot") and is not cleaned off evenly. The defendant drew the Court's attention to only one photograph which was taken from the inside after the fire, which they said suggests that the block layers worked from inside the house because of its smooth finish. I am not satisfied that one can come to this conclusion from this one picture. First, the photograph was not taken for the purpose of showing the finish in the block work. It was taken for a different purpose and the smoothness of the finish is not clear. Second, the picture only shows a small portion of the lower inside of the window and only shows a little more than one row of concrete blocks scarcely three feet from the ground. It may look as if there was a somewhat smoother finish, but even if this is so, this could have been done by the block layer leaning over the partly built wall from the outside without entering the building. Further, the block laying job was done by several men over two days and it might indicate different block layers' approaches to their craft or trade or simply a neatness of finish which one block layer thought was required at the commencement of the job, but which he soon learned was not required and quickly abandoned. I am not prepared to conclude from this one picture, as against the many pictures which clearly show uneven finish, that the block layers entered the premises to block up the openings in November, 2001. Neither am I prepared to conclude that the execution of this block work at that time inevitably suggests, as the defendants urged on me, that the alarm was not operating after that time.

25. On the balance of probability I find that the block work was done from the outside and did not require the workmen to enter the premises and the alarm system could have remained operational after this work was completed.

26. The evidence of Mr. Kavanagh, the site manager, is strong and unequivocal on this issue: all the block work carried out in and around the 9th November, 2001, was done by block layers who were instructed to work from the outside and he himself remained and supervised the work and ensured that no one entered the building to do this work at the time. Mr. Kavanagh's evidence was not shaken in cross-examination and there was no other evidence to contradict what he said. The evidence of Mr. MacGibney, a consultant engineer called by the plaintiffs, confirmed the view that there was no reason why the block work, as he saw it, after the fire, could not have been done from the outside. He also gave evidence that the plaintiff would not have been allowed, in the blocking up operation, to interfere or damage in any way the architraves or the wooden surrounds of the windows and if they had done so they would have been "hammered by the planners".

27. It should be noted that at an early stage the defendants were under the impression that the alarm system in question was one based on contacts on the windows. If this were the case, the defendant's interest in the block workers' activities was clearly justified as it would be likely to trigger the alarm if such contacts were in place. It subsequently transpired, however, that the alarm to the house was a P.I.R. system which was activated, not by interference with the window sashes, but by an increase in the room temperature caused by a human presence.

Warranties, Terms and Representations
28. Having determined that the alarm was operating on the 3rd May, 2002, when the contract was entered into, I must now address what were the nature of the statements made by Mr. Colgan, of Coyle Hamilton, in his fax on the 24th April, 2002, relating to this steel shuttering being on all windows and doors, and the alarm being in place. Were they warranties? Were they terms of the contract? Were they misrepresentations? Were they material? Were they fraudulent?

Warranties
29. Section 33 of the Marine Insurance Act 1906 states as follows:-

> "(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

30. Section 35 of the Act states as follows:-

"(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith."

31. For there to be a warranty it must be a term of the contract. It will usually be an express warranty. It can be incorporated into the policy by reference. So, for instance, a proposal form may expressly state that the statements or representations by the insured are to be regarded as warranties and the proposal form may be stated to be the basis of the contract of insurance.

32. In *Keating v. New Ireland Insurance Company* [1990] 2 I.R. 383, McCarthy J., in commenting upon a 'basis of contract' clause stated at p.393:-

"The contention is that their effect in law is that all answers in the proposal form are incorporated into the contract as warranties and that, if any one of them is inaccurate, the insurer may repudiate the contract for breach of warranty without regard to the materiality of the particular answer to the risk; *Thomson v. Weems* (1884) 9 App. Cas. 671 at page 689. The corollary is that the fact that the insured may have answered the questions in good faith and to the best of his knowledge and belief is irrelevant if the answers are in fact inaccurate. It is not difficult to think of instances where a serious symptomless condition exists affecting the life expectancy of a proposer for insurance and is unknown and unknowable; yet if he were to die and it be discovered that such condition had existed at the time of the creation of the contract of insurance, the contract, it is said, is vitiated."

33. McCarthy J. continued at pp. 394 to 395:-

"In *Zurich General Insurance Company v. Morrison* [1942] 2 K.B. 53 Lord Greene M.R. at p. 58 described such clauses as being traps for the insured. In *Anderson v. Fitzgerald* (1853) 4 H.L.C. 484 Lord St. Leonards (the dual Lord Chancellor) was of opinion that to give effect to such a clause would render the policy not worth the paper upon which it was written and liable to produce a result whereby:

'No prudent man (would) effect a policy of insurance with any company without having an attorney at his elbow to tell him what the true construction of the document is.

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 cut, or by which, on the other, the company can be cheated shall be found upon the fact (sic) of it. Nothing ought to be wanting in it, the absence of which may lead to such results.'

Whilst acknowledging that parties are free, subject to legislative interference, to make such lawful contracts as they may wish, in my view there are certain clear principles that must be applied construing a contract of insurance of the kind with which the court is presently concerned. Some of these may be stated as follows:

1. Parties of full age and competence are, subject to any statutory impediment, entitled to contract as they wish.

2. Whilst acknowledging the right of parties to express the pre-contract representations as being the basis of the contract, same must be read in the light of the actual terms of the contract subsequently executed. The contract, so to speak, takes over from the proposal.

3. If insurers desire to found the contract upon any particular warranty, it must be expressed in clear terms without any ambiguity.

4. If there is any ambiguity, it must be read against the persons who prepared it (see *Anderson v. Fitzgerald* (1853) 4 H.L.C 484 at 503, 507, 514 and *Thompson v. Weems* (1884) 9 App. Cas. 671 at 682, 687.

5. Like any commercial contract, such a policy must be given a reasonable interpretation."

34. It is clear from McCarthy J.'s judgment that a warranty cannot arise from representations made prior to the contract without the insurers making the situation entirely clear that same is to form the basis of the contract.

35. Clarke, *The Law of Insurance Contracts*, 5th Ed.,(London, 2006), at paragraph 20-2B states:-

"Not all terms that form part of the insurance contract are warranties. A term of the contract should not be construed as a warranty 'except on very clear indications that it was the intention of the contracting parties that it should have that effect…The effect of each contract must be determined by the instrument itself". (Per Bramwell B. in *Wheelton v. Hardisty* (1857) 8 El & Bl 232 at 300). Before a term 'is held to have the effect of a warranty it is necessary to see that the language is such as to shew that the assured as well as the insurer meant it and…The language in the policy being that of the insurers, if there is any ambiguity, it must be construed most strongly against them'. (Per Lord Blackburn in *Thomson v. Weems* (1884) 9 App. Cas. 671 at 682)."

36. There is a reluctance to construe warranties as applying to circumstances arising during the currency of the contract of insurance or to construe them as continuing or promissory warranties.

37. The court's reluctance to construe a warranty as being continuing or applying to events into the future can be seen in the case of in *In re Sweeney and Kennedy's Arbitration* [1950] I.R. 85. In that case, a proposal form for a motor insurance policy in respect of motor lorries, asked whether or not any of the drivers of the proprietor were under 21 years of age or had less than twelve months driving experience. This was answered in the negative. During the currency of the policy the proprietor occasionally employed his son who was under the age of 21. The son was involved in driving one of the lorries when a fatal accident occurred and the insurer refused to accept liability on the grounds that the terms of the policy had been broken. The proposal form also contained the following statement:-

> "I declare that the above statements and particulars are true, that the vehicles described are my property and in good condition, and I hereby agree that this declaration shall be held to be promissory, and so form the basis of the contract between me and the underwriters of the 'Eclipse' policy, and I am willing to accept a Policy subject to the terms exceptions and conditions prescribed by the underwriters therein and to pay a premium thereon".

38. It was held by Kingsmill Moore J. that the expression *'this declaration shall be held to be promissory'* was referable to the facts existing at the time the proposal form was completed and did not refer to any time thereafter.

39. In *Hussain v. Brown* [1996] 1 Lloyd's Rep. 627, the plaintiff had completed a proposal form for a fire policy in respect of his commercial premises in Bury, Lancashire. One of the questions on the proposal form had asked whether the premises were fitted with any system of intruder alarm and, if so, for details of the installing company and a copy of the specification. The plaintiff had answered in the affirmative to the said question and had attached a specification of the alarm. The proposal form contained the following declaration:-

> "I/We the Proposer warrant that the above statements are true and that they shall be the basis of the contract between me/us and the Underwriters and will be incorporated into such contract."

40. The insurers accepted the proposal and the insurance commenced on the 14th July, 1992. The insurance certificate provided that the proposal and declaration were to be the basis of, and form part of, the certificate. On the 24th November,1992, a fire occurred in the plaintiff's premises and the plaintiff claimed under the insurance. The insurers claimed that the answer to question 9 on the proposal form amounted to a continuing warranty that the premises were fitted with an intruder alarm and that the alarm was operational and would be habitually set by the plaintiff when the premises were unattended. The insurers claimed that the plaintiff was in breach of this warranty. The Court of Appeal upheld the decision of the High Court that the answer to the question on the proposal form related to the state of affairs when the proposal form was signed and did not import any warranty as to the future.

41. At p. 629 Lord Justice Saville stated:-

> "…there is no special principle of insurance law requiring answers in proposal forms to be read, prima facie or otherwise, as importing promises as to the future. Whether or not they do depends upon ordinary rules of construction, namely, consideration of the words the parties have used in the light of the context in which they have used them and (where the words admit of more than one meaning) selection of that meaning which seems most closely to correspond with the presumed intention of the parties."

42. Lord Justice Saville subsequently held at p.630:-

> "In the present case, the question posed for the potential insured was in the present tense. In addition, it did not seek on its face any information as to the practice of the proposer with regard to the alarm, for example, whether it was set when the premises were left unoccupied. The construction contended for by Mr. Brodie involves not only reading the present tense as referring to the future, but also as importing into the question an inquiry whether the alarm would be kept operational, and/or (to use the words in Mr. Brodie's skeleton argument) 'habitually set by the Plaintiff' when the premises were left unattended. I can see nothing in the words of the simple question posed, or to be gleaned from the context, which begins to suggest that what an affirmative answer entails is an undertaking as to the future along these lines.…[i]t must be remembered that a continuing warranty is a draconian term. As I have noted, the breach of such a warranty produces an automatic cancellation of the cover, and the fact that a loss may have no connection at all with that breach is simply irrelevant. In my view, if underwriters want such protection, then it is up to them to stipulate for it in clear terms."

43. It is clear to me that the statements made by Mr. Colgan in his fax of the 24th of April, 2002, relating to the alarm and the shutters were not warranties as the word is used in relation to insurance contracts. In the absence of any written contract or other documentary evidence, the onus is on the insurer to prove that any representations made or terms used amount to warranties in the strictest sense. There is no mention of breach of warranty in the letter of repudiation of the 28th November, 2002, although it is pleaded in the defence. The word "warranty" was never used at any stage during the negotiations leading up to this contract, and although this is not determinative it is indicative. It is clear from the evidence of Mr. Russell that he did not seek to impose an alarm warranty or indeed any warranty in his negotiations. At no stage was the plaintiff or its brokers told that any of the representations made to the insurer would constitute a warranty. There was no proposal form and consequently the usual term inserted by insurers in these forms which elevate the insured's responses to warranties did not arise. It is true that a representation can amount to a warranty even if the word warranty is not used but this will only occur in very clear cases and this case, in my view, is not one of them. Given that I am of the view that the representation as to the alarm was not a warranty, there could then be no question that it had the status of a continuing warranty. In order for there to be a continuing warranty in relation to the maintenance of an alarm, an alarm warranty would need to have been required by the insurers and it is accepted by the underwriter that this did not happen. In addition, in the representations made, the broker states that if the alarm went off it *would* be heard by the security people. The wording is important: the broker did not say that the alarm *will* be heard. Furthermore, applying the *ratio* in *Hussain*, already referred to, it is submitted that if in a case where there was a proposal form with specific questions posed by the insurance company, the answers to which were warranted to be true and were to be the basis of the contract, does not amount to a continuing warranty, how much stronger must the case be in respect of a simple representation which does not use the word "warranty" and which is not incorporated into the contract of insurance and which was not made the basis of the contract?

Terms

44. Moreover for similar reasons, I do not think that the relevant statements in the fax of the 24th April, 2002, can be considered to be terms of the contract. There was no attempt made by Mr. Russell, for the defendant, to elevate the relevant representations in the fax to that status in his one word e-mail of acceptance: "confirmed". This is to be contrasted with the words used in the Royal and SunAlliance survey where in it's Loss Prevention Programme it explicitly stated:-

> "These requirements are fundamental to the cover under the policy and failure to comply with these may affect the policy cover, terms and conditions."

45. Mr. Russell was furnished with this document. He did not see fit to insert any such comments in his e-mail of acceptance which he could have easily done. In the absence of such explicit words, and for reasons relating to good faith which I will refer to later, I am not prepared to elevate these statements to the status of terms of the contract in these circumstances.

Representations
46. In the fax of the 24th April, from Mr. Colgan to Mr. Russell, it is indicated that "an alarm system is in place but is not linked to a central station". The same fax also indicates that "the client has installed steel shuttering on all windows and doors." I will deal with each of these statements in turn.

47. The representation that there was an alarm system in place was accurate. I have already found that the blocking up operation carried out in November, 2001 did not interfere with its operation. Since I have found as a fact that the alarm was operating on the 3rd May, 2002, there clearly could not have been any misrepresentation in that regard. Furthermore, I have also dealt with the defendant's suggestion that there was a continuing warranty that the alarm was to remain operational after the contract was entered into. The *ratio* in the *Hussain* case clearly shows that such continuing warranties are not lightly inferred. For these reasons, I would reject any suggestion that there was a continuing warranty in this case in respect of the alarm.

48. The fax of the 24th April also stated:-

> "In the event of the alarm going off the twenty-four hour security service on the building site would be alerted."

49. Such a statement is not a statement of present or past fact but at the most a statement of expectation or belief. Section 20(5) of the Marine Insurance Act 1906 is therefore relevant:-

> "A representation as to a matter of expectation or belief is true if it be made in good faith."

50. The statement made by Paul Kelly to Paul Colgan in Coyle Hamilton and repeated by Paul Colgan to the defendant insurer was made in good faith. Paul Kelly had good grounds, as did the other witnesses from Manor Park, to believe that the alarm in Ongar House continued to remain on after the downstairs windows and doors were blocked up in November, 2001 and remained turned on at the time of the discussions with Paul Colgan in April, 2002. He had an expectation and belief that if the alarm went off, the twenty-four hour security service on the building site would be alerted. After he received details of the unoccupancy warranty required by Royal SunAlliance, he took steps to arrange for the electricity to Ongar House to be discontinued, which was not done until the 24th May, 2002.

51. As he indicated in evidence, however, he did not make any association at the time between disconnecting the electricity and the alarm. He acted in good faith. There is no evidence before the Court that the insured did not intend to continue to operate the alarm system when he made the contract on the 3rd of May. The system became non-operational unintentionally when the mains electricity supply was disconnected. In any event no undertaking was given that the alarm would remain operational as an effective system throughout the period of the insurance. If this had been required by the insurers they could have insisted on an alarm warranty, but they did not do so. It will be seen from the above analysis that, in my view, there has been no misrepresentation in relation to the alarm for the reasons stated.

Materiality
52. Even if the evidence was otherwise and one concluded that the alarm was not in operation at the time the contract was made on the 3rd May, 2002, I hold that it is not material to the risk on that day. It is clichéd law that the insured must disclose all material facts to the insurer when entering the contract. A fact is material if it would influence a prudent underwriter when he is considering the risk and the premium. Whether a fact is material or not, however, depends on the particular circumstances of the case and accordingly, it must be determined from the particular factual matrix in question. It is true that Mr. Niall O'Keeffe, an experienced broker, Mr. Martin Barry, an experienced property underwriter and Mr. Seamus O'Hare, an independent insurance consultant and a member of the Chartered Insurance Institute, all witnesses called by the defendants, gave evidence that a prudent insurer would regard the existence of a burglar alarm on the building as being a material fact. For reasons I am about to explain I am not persuaded by the evidence in this regard.

53. In the present case, the alarm in question was a burglar alarm only, a fact that was not specified to the insurer. Mr. Russell who negotiated the contract said he did not know what type of alarm was on the property at the time: "I just knew it was alarmed. I took it was a burglar alarm actually." This would suggest that the alarm was not a significant factor for him when he was assessing the risk. It was not a fire alarm which, if the insurer was concerned with alarms, it might have insisted on. Even when the alarm was disconnected, the alarm box remained visible on the outside of the building and continued to act as a visual deterrent for intruders who were looking for soft targets. Moreover, the survey by Royal and SunAlliance made when considering renewal, concluded that the house was " well secured" at the end of April, 2002, and this report was furnished to and relied on by AIG before the contract was concluded. Further, all the downstairs openings were blocked with concrete blocks, and all the upstairs openings were secured with steel shutters. A burglar alarm in these circumstances was well nigh superfluous. This is especially so when one considers the other security measures in place at the time: the insured had a security contract with a proven security firm under which there was a continuous security presence on the site, with the security hut located approximately five hundred yards from the house. Two security men were on duty during the day and three at night at the relevant time, with patrols of the site taking place every two to three hours. In determining what a prudent insurer would have done, the relevant time to assess prudence is the time the contract was made, not subsequently with the benefit of hindsight.

54. Mr. Buckley, the expert retained on behalf of the plaintiff, gave evidence that in his fifty years experience he never saw an underwriter in a Fire Only policy for unoccupied premises, require that an insured should install a burglar alarm. Mr. Barry, the expert called by the defendants, on the other hand, maintained that he had seen such a requirement in force "on several occasions". Although it may be understandable that, when pressed, he could not give any specific example, the fact remained that "several occasions" would suggest that it was not done in the majority of cases. In this "battle of the experts", it is appropriate to note that Royal and SunAlliance, the existing insurer, which had surveyed the property at the relevant time, by insisting on an unoccupancy warranty, which required that all services including the electricity supply to the building be disconnected, was clearly of the view that this option reduced the risk of fire even though it rendered the alarm ineffective. The Royal and SunAlliance in not insisting on the continued use of the burglar alarm, obviously formed the view that the greater danger from fire in the circumstances, came from the electricity supply. Of course, it can be argued as Mr. Barry did, that both approaches are reasonable and the preference made by Royal and SunAlliance, does not mean that the viewpoint followed by AIG was unreasonable. This argument has more force when

advanced as an abstract proposition. When one examines it in the context of the facts of this case, however, because the requirement that the burglar alarm be operational, on the one hand, and the unoccupancy warranty (requiring the electricity supply to be discontinued) on the other, are mutually exclusive, one must conclude that the reasonably prudent insurer would in this case insist on an unoccupancy warranty. Mr. Buckley's evidence indicates that, even if the insurer knew that the burglar alarm was out of commission, the underwriter would still have written the policy on the same terms. In his experience, the danger of fire in an unoccupied building was greater from the electricity supply than from unlawful intruders. The weakness of Mr. Barry's attempt to establish the contrary by producing statistics entitled 'Causes of Fires Attended by Fire Brigades in 2002', from the Dublin Fire Authority was exposed in cross-examination and he was forced to admit this in his evidence.

55. Finally, I accept the evidence of Mr. Buckley that it is highly unusual for an underwriter in such a case not to insert an unoccupancy warranty, in preference to a burglar alarm warranty. The Court was fortunate in this case to have evidence of what the existing insurer *did*, not what it would have done, when it learned that the house was unoccupied: it carried out a survey; it assessed the security position; it insisted on an unoccupancy warranty in preference to an alarm warranty and it trebled the premium. Clearly, it did not consider that the alarm was important. In taking this position one would have to conclude that it not only acted prudently, but its actions in assessing the risk give the Court a truer indicator as to what any prudent insurer fully familiar with all the facts would have done in the circumstances.

Failure to disclose that the ground floor windows and doors had been blocked up

56. Mr. Paul Conlon did not indicate to Mr. Russell of AIG that the ground floor windows and doors had been blocked up. In his letter of the 24th April, he indicated that there was steel shuttering on all windows and doors in the building. On the face of it, it is difficult to see how the bricking up or blocking up of the doors and windows would increase it as a fire risk or make the building less secure. It was for this reason that the plaintiffs altered the steel shuttering on the ground floor where there had been an attempt to force an entry. Mr. Russell accepted that bricking up might make access more difficult but he felt it might compromise the alarm and for this reason he felt it was significant. Mr. O'Hare, another expert of the defendants, also accepted that the bricking up afforded an additional level of security, but he felt that there was a potential problem with the single storey extension to the house.

57. I am clear from the evidence that the blocking up of the doors and windows on the ground floor improved the security of the building and cannot for that reason be considered to be a material non-disclosure. Furthermore, I am satisfied that the non-disclosure was an innocent one. Paul Kelly of Manor Park thought he conveyed the information to the brokers but he could not be certain. Mr. Colgan, on the other hand, was of the view that he faithfully recorded the information given to him by Mr. Kelly. Mr. Russell's suggestion that the blocking up might increase the risk was based on the assumption that the alarm could not be operational which as I have already found was erroneous.

58. Finally, when Mr. Russell was making notes of a phone conversation he had with Mr. Colgan, on the 30th of April, 2002, and when completing an internal document entitled 'Underwriters Risk Classification Form', on the same day, he noted that the house was "Fully Boarded up" and "Boarded up". From this it can be deduced that, for him, the material used in securing the property was not as important and certainly not as relevant as the fact that the house was secure.

Reinstatement

59. Mr. Martin Barry, the defendant's expert, gave evidence that reinstatement would be abnormal and would only be given if specifically sought by the broker. The standard policy, however, put forward by the insurers as containing normal conditions that prevail in such contracts generally, does not support that. The relevant clause states:-

> "… the Insurer will pay to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof provided that the liability of the Insurer shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured hereby."

60. This clearly gives the insurer the option in normal circumstances to opt for indemnity or reinstatement. There is nothing in the defendant's standard policy that suggests that reinstatement is abnormal. If the standard form applied, the insurer presumably would have had to assess the situation and make its choice. Where a basis of indemnity is not specifically agreed and no annual policy issues, in the absence of compelling customer practice, one must look to the intention of the parties at the time the contract was made.

61. Two other points are significant. Paragraph 32 of the defence says:-

> "Further, or in the alternative, Ongar House has since been demolished by the plaintiff and, in the circumstances, the plaintiff is not entitled to reinstatement costs or costs of repairs as claimed, but is limited to the cost of demolition and all associated costs."

62. It would seem from this that the defendants were denying reinstatement or indemnity and were suggesting that its obligation was confined to a third basis for liability: the cost of demolition only. Of significance too is the fire report sent on the 24th September, 2002, to the New York office of AIG, wherein it was clearly stated that the basis of cover was "reinstatement". This was a document emanating from the Claims Department of AIG in Ireland and was copied to ten other people in the organisation. No one in the organisation ever contradicted that description of the basis of liability.

63. The evidence of Mr. Russell, for the defendants, on this issue was that the Claims Department used this terminology in error and they would not be *au fait* with the underwriting practices which were controlled by the Underwriting Department. At the very least this shows that there was no unanimity within the organisation as to what the basis of cover was in this policy. Given that there was a cap of €1,015,000 on the happening of the insured event, I do not believe that the insurers paid much attention to the basis of recovery at the time of entering the contract, as it was clear from the evidence that the basis for calculating the premium was the maximum payout, not anything else.

64. Mr. John Barry, Mr. Colgan's superior in Coyle Hamilton, also gave evidence as did Mr. Colgan himself, that because it was a listed building, the basis for liability would have to be reinstatement. Any other basis, such as market value, insofar as it would not provide indemnity, would have to be brought to Mr. Barry's attention, and to the attention of the client if it was to apply. This was not done and was never even contemplated by the personnel in Coyle Hamilton.

65. I conclude from this that even if the standard policy does not form the basis of the contract in this case, as I have found, it does indicate that Mr. Barry's (the expert brought forward by the defendants) understanding on this issue does not conform to the position prevailing at AIG in its "standard fire policy" at that time.

66. Taken with the fact that it was a listed building which would have to be reinstated if destroyed, a fact fully appreciated by the insurer, and that the maximum exposure for the insurer in any event was €1,015,000, I have little hesitation in concluding that the basis of indemnity in this case was indeed reinstatement.

Uberrimae Fidei

67. The principle of *uberrimae fidei*, which applies to all insurance contracts, imposes a heavy onus of disclosure on the insured. Without this obligation to divulge information frequently available only to the insured, the insurer would have great difficulty in assessing the risk or in calculating the premium. This does not, however, mean that the insurer can cover its eyes or abstain from making normal inquiries or investigations, in the expectation that, in the event of the risk materialising, it can point to the insured's omission and repudiate the contract. The insured's duty is balanced by a reciprocal duty on the insurer to make its own reasonable inquiries, to carry out all prudent investigations and to act at all times in a professional manner. In fact the onus to do this, because of its experience and expertise, lies primarily on the insurer. The law is willing to assist this process by obliging the insured to volunteer information not easily available to the underwriter and which is material to the risk. The *uberrimae fidei* principle applies with the greatest force to situations where the relevant facts are peculiarly within the knowledge of the insured and are not easily available to the underwriter. Where, however, the full extent of the risk can readily be defined without the insured's participation, the law does not insist on full disclosure. That is why the authorities do not recognise any responsibility in this regard in over- the-counter or slot-machine policies such as travel policies sold at airports. Where the insurer has full access to the property to be insured, as in this case, so that it can easily measure the risk for itself, it cannot refrain from such reasonable inquiries as a prudent insurer would make to assess the risk and calculate the premium and hope to profit from the insured's lack of skill or his honest mistake. Properly understood, the principle contains an equitable element which will be informed by the facts of each case. In taking this position, the law is not being harsh and unreasonable on the insurer, who at the end of the day can easily secure its legal and commercial position by drafting appropriate conditions and warranties and inserting them into the contract if it so desires. If it chooses not to do so, however, it cannot expect too much sympathy from the courts for not adhering to prudent and professional business practices in assessing the risk for itself. In this connection it has been well said, in Eggers, Picken and Foss, *Good Faith and Insurance Contracts*, 2nd Ed.,(London, 2004) at p.291, that :-

> "Neither party is obliged to make such enquiries for the purposes of their respective duty of disclosure to the other, other than those enquiries which are required in the ordinary course of business. In this respect, the insurer should not use the duty of the utmost good faith as a crutch or an excuse not to carry out his own investigations which form part and parcel of the profession"

68. It would be strange indeed if the Court placed such a heavy onus on the insured without also insisting on the insurer to look out for its own interests. *Uberrimae fidei* is not a charter for indolent insurers.

69. To briefly recall the insurer's knowledge and belief when it entered the contract in this case on the 3rd May, 2002, is instructive. The broker had sent on his description of the risk by fax on the 24th April, 2002. This reads as follows:-

> "As advised the client has a period residence known as Ongar House which is located near Clonee/Clonsilla. This building is on a site which is currently being developed by our client as an (sic) housing estate.
>
> Up to recently the building has been used by our client as offices. Because it is now vacant and is a listed building, the client has installed steel shuttering on all windows and doors. An alarm system is in place but is not linked to a central station. In the event of the alarm going off the twenty four hour security service on the building site would by (sic) alerted. The security service would carry out periodic checks on the building during the night.
>
> The sums insured are as follows:
>
> Buildings: €1,015,000
>
> Contents: €20,000"

70. The broker sent the insurer the "survey" from the Royal and SunAlliance on the 30th April, 2002. The insurer also knew that the insured was by this time shopping around, that the risk was not an attractive one in the market, that several other insurers were not willing to cover the risk and that renewal with Royal and SunAlliance was not inevitable. On these mere facts the insurer quoted for the risk at a premium 40% less than the renewal premium quoted by Royal and SunAlliance, the existing insurers.

71. Moreover, it did so without imposing any specific conditions or warranties and wrote the cover by virtue of a one word e-mail dated the 3rd May, 2002. It did not subsequently confirm cover in writing, nor did it issue any cover note. No policy was ever issued to the plaintiff. It did all of this without bothering to carry out its own survey of the property. This procedure was criticised by Mr. Buckley, the expert called by the plaintiffs, who described the insurer's casual approach as being "very unusual" and "totally abnormal". In Mr. Buckley's opinion the insurer should have sought much more information about the property and about the alarm system in place if he thought it was relevant.

72. Even the defendant's own expert, Mr. Martin Barry, with some restraint, conceded that the follow up documentation issued by the insurer, in his opinion, "probably left something to be desired".

73. In my view, the insurer did not act as a reasonably prudent insurer should have done in inquiring into the risk, in assessing the facts on the ground and in quoting the premium. The absence of the normal follow up documentation meant that the insured's reasonable expectations conflicted with what the insurer subsequently alleged were its requirements. The defendant's careless approach is to be contrasted with the approach of Royal and SunAlliance, the existing insurers, when it learned that the building was vacant at renewal time. It had the property surveyed again, it introduced a non-occupation warranty and it increased the premium to €10,000. This clearly was a more careful response and what one might expect of a reasonably prudent insurer in the same circumstances. The conduct of the defendant by contrast falls well short of that standard in this case.

74. The real reason for this casual approach is to be found in the motivation of Mr. Russell, the underwriter for the defendant at that time. In a document recording the transaction for internal use discovered by the defendants, Mr. Russell noted that the reason for underwriting the risk was done "as a favour" for the broker. This notation was made on the morning when Mr. Russell got notice of the fire. It was not prompted by any enquiry and it was made for the benefit of the Claims Department. It read as follows:-

> "Account written as a favour to Coyle Hamilton due to good support".

75. When pressed in cross-examination on why he wrote this, Mr. Russell's explanation was unconvincing. Since AIG would not normally write a stand-alone policy for vacant buildings, Mr. Russell was anticipating that he would be asked by his Claims Department why he had written this policy. He denied that his assessment of the risk was less demanding because he was writing the cover as a favour to the brokers. He also denied that the note of explanation was written because he anticipated criticism from within his own organisation. In answer to the Court, Mr. Russell confirmed that if it had not been Coyle Hamilton, he would not have written the business. And when the following question was put to him by the Court:-

> "Therefore, your primary consideration was to ingratiate yourself. I don't mean that in a pejorative sense, but to maintain good relations with a broker?" ; he replied to the Court:-
>
> > "That's correct, your honour."

76. It is worth considering what this means in the case before the Court. Clearly, if the broker was not Coyle Hamilton, AIG would not have quoted for the risk. Four other insurers refused to quote in these circumstances and Royal and SunAlliance did so only after surveying the property and even then it specified conditions and raised the premium. If Mr. Russell did not quote for the business then the plaintiff would have been obliged to accept the offer of Royal and SunAlliance since it was the only offer available. There would be no question then of repudiation. It is important to appreciate that the plaintiff had an offer when the defendants decided to "do a favour" for the broker. Whatever benefit it hoped would arise from doing business with Coyle Hamilton, there can be little doubt that in offering cover the defendant was not doing any favour to the plaintiff to whom it owed a duty of good faith.

77. It may also be true that the plaintiff was not well served by his broker in these negotiations, but this is not something which this Court is concerned with. Moreover, there is no evidence before the Court that the brokers were privy to the ulterior motive which was behind the defendant's decision to do business. One must remember also that in this transaction the broker, as the agent of the insured had also fiduciary duties to his principal and, in adopting the approach it did, the insurer was perhaps compromising the broker in this regard also.

78. I find as a fact that Mr. Russell's dominant, if not sole, purpose in offering cover to Mr. Paul Colgan, of Coyle Hamilton, for the House at such a favourable rate, was to acknowledge a business interest and to cultivate the relationship between a substantial brokering house and the underwriters which would, hopefully, result in more business for the insurer in the future. Scant consideration was given by the insurer to the interests of the insured or the effect that the casual procedures adopted would have on the insured's interest. The insured is entitled to expect that proper business-like procedures would be adopted by the insurer in considering his application. Had the insurer adhered to more orthodox and regular procedures and standards when he decided to quote, it would surely have caused Ongar House to be inspected and surveyed; it would have noticed the blocking up measures and the steel shutters; it would have inquired about the alarm system in place if it considered it important and would have established that it was operational; it would have considered including an appropriate warranty: an "un-occupancy warranty", if it deemed that it was appropriate to disconnect all the services, or an alarm warranty if it thought that the maintenance of the alarm in operational mode was relevant and important. It did not do what a reasonable prudent insurer should have done. It departed from this standard for its own business advantage, which at the end of the day, meant a betrayal of its duty of good faith and fair dealing with the insured. The actions of the Royal and SunAlliance more approximated to what the circumstances required in that event. In failing to inspect or establish these facts, the insurer was unfairly leading the insured into a false sense of security. In the vacuum it was not surprising that the insured concluded, reasonably in my view, that the requirements being imposed by the Royal and SunAlliance for renewal were making the property safer and were in no way increasing the risk. It is understandable too, that the insured did not advert to the consequences that disconnecting the electrical supply would have on the alarm system. This uncertainty could readily have been cleared up if the defendant followed up by issuing the normal documentation, specifying the conditions and warranties and issuing the policy documents in a timely fashion. On receipt of such documentation, the insured would be on full notice of what the insurer required of it, and in particular, what was the insurer's requirement in relation to the alarm. In the normal course of events, the insured would then have full appreciation of his contractual obligations long before the fire occurred in September, 2002, and would have had a full opportunity of considering his position and discussing it with his broker. Failure to issue any sort of documentation robbed him of this chance.

79. In these circumstances I hold that the insurer departed from good business practices and was in breach of its duty of *uberrimae fidei* in failing to adequately inform itself of the facts and in failing, for improper reasons, to deal fairly with the insured or consider his interests.

80. In *Kreglinger and Fernau Ltd v. Irish National Insurance Co., Ltd* [1956] I.R. 116 at pp. 151 to 152, Davitt P., made the following statement of general relevance to our case:-

> "While the duty to make full disclosure of all matters material to the risk rests upon the insured, and it does not fall to the insurer to relieve him of that duty by making inquiries, the converse is to this extent true, that the insured does not have to conduct the insurer's business for him. Where the contract, the performance of which the insurer is asked to cover, contains a clear intimation that a matter, which is specifically referred to but not fully set out, is of importance, and full information is to be had for the asking, it would seem quite unreasonable and unjust to allow the insurer to repudiate liability on the grounds that he did not know and was not told the details of something which he was in fact told about. What Mr O'Callaghan was told by the terms of the contract was, in my opinion, clearly sufficient to put him upon inquiry. His attention was called in a very definite and specific way to the undertaking which Swifts had given; and if he wished to know the price which they were paying, or any other detail concerning the matter, he should have asked for it."

81. I adopt this as being very apt for the facts in this case.

82. In *AMP Financial Planning PTY Ltd v. CGU Insurance Ltd* [2005] FCAFC 185, the Federal Court of Australia held at paras. 89 to 91:-

> "The precise content of the concept of utmost good faith depends on the legal context in which it is used. In the context of insurance, the phrase encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. While dishonest conduct will constitute a breach of the duty of utmost good faith, so will capricious or unreasonable conduct. While an essential element of honesty may be at the head of the concept of utmost good faith, dishonesty is not a prerequisite for a breach of the duty.
>
> …
>
> Putting it another way, acting with utmost good faith involves more than merely acting honestly: Otherwise, the word utmost would have no effect. Failure to make a timely decision to accept or reject a claim by an insured for indemnity

> under a policy can amount to a failure to act towards the insured with the utmost good faith, even if the failure results not from an attempt to achieve an ulterior purpose but results merely from a failure to proceed reasonably promptly when all relevant material is at hand, sufficient to enable a decision on the claim to be made and communicated to the insured"

83. Although the obligation of utmost good faith was enshrined in Article 13 of the Insurance Contracts Act 1994, in that jurisdiction, the interpretation is based on the common law and, for that reason, is not irrelevant for this Court.

Conclusion

84. For the above reasons I find for the plaintiff and order that the defendant pay the plaintiffs the sum of €1,015,000 on foot of the policy.