

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2020] SCSC 209

CS 65/2016

In the matter of:

ERNESTA MARLETTE AND ANOR
(rep. by Ms Louise)

Plaintiffs

VERSUS

H SAVY INSURANCE COMPANY LIMITED
(rep. by Ms. Benoiton)

Defendant

Neutral Citation: *Ernesta & Anor v H Savy Insurance Company Limited* (CS 65/2016) [2020] SCSC 209 (27 March 2020).

Before: Andre J

Summary: Insurance policy – Interpretation/misrepresentations/misdirection or non-disclosure

Heard: 13 December 2019

Delivered: 27 March 2020

ORDER

The Court finds in favour of the Plaintiffs, and orders the Defendant to pay the plaintiffs Seychelles Rupees Two Million and Five Hundred S.R 2,500,000, with interest and costs.

JUDGMENT

ANDRE J

Introduction

[1] The plaintiff is the owner of a villa at La Passe on La Digue called Villa Hortensia situated on Title LD1541 ('the villa'). The villa was completely destroyed by a fire on 29 June 2015. The fire service and police concluded that the fire was caused by

arson. There were two insurance policies covering the property at the time, one from MUA (Exhibit D1, 'the MUA Policy') and the other from H Savy Insurance (Exhibit P1, 'the Savy Policy').

- [2] The present claim relates to the Savy Policy, under which the villa was insured to the value of SR2.5 million for the period from 5 May 2015 to 4 May 2016. By letter on 1 July 2015, the plaintiff filed a claim for the full amount of the Savy Policy. By letter of 25 September 2015, H Savy Insurance refused the claim. The plaintiffs thus brought the present claim seeking an order from the Court for the defendant to pay the full value of the plaintiffs' policy.

The plaintiff

- [3] As per complaint filed on 26 July 2016, the plaintiff seeks SR2,500,000 from the Defendant with interest and costs, representing the full value of their insurance policy with the defendants to cover the damage to the villa from the fire on 29 June 2015.
- [4] The pleadings further reveal by virtue of a request for further and better particulars that the plaintiffs had also insured their property with MUA insurance from 31 July 2014 until 30 July 2015.

The Defence

- [5] The defendant on its side by virtue of Defence filed on 21 December 2016, avers that the Savy Policy was breached as a result of a failure on the part of the plaintiffs to disclose material facts to the defendant. Firstly, the plaintiffs had already insured the premises in May 2014 to May 2015 with MUA, so the property was doubly insured. Secondly, a financial institution held a financial interest in the form of a security on the property. Neither of these facts were disclosed to the defendant. The defendant thus avers that the plaintiffs were in breach of their policy, rendering it null and void. Furthermore, the defendant avers that the plaintiffs failed to mitigate their loss and damage by failing to call the fire service upon discovery of the fire. The fire service also concluded that the fire was caused by a deliberate act and that there were indications of the use of accelerants. The defendant thus denies liability to the plaintiffs.

[6] If the defendant is found liable to the plaintiffs, the defendant avers that it would only be liable for a maximum sum of SR1,300,000 being the rateable proportion and/or excess not covered by the policy issued by MUA which was still valid at the material time when the fire occurred.

[7] The defence accordingly seeks that the claim be dismissed with costs.

Evidence

[8] The first plaintiff testified that she was the owner of the villa, which was insured by H Savy Insurance. She paid SR10,349 for the policy, which insured the property up to SR2.5 million. She explained that the property was completely destroyed by a fire on 29 June 2015. At the time, she was in the house next door with the second plaintiff. She testified that she heard ringing on the night of the fire which she initially thought was a phone ringing. After checking the phones, they thought that the alarm of a neighbour must have been triggered. When they looked outside, they saw the fire. She called her brother who told her to stop shouting. He then called the fire service. The neighbours came to try help. She says it took the fire service about 20-25 minutes to arrive at the house and that when they arrived, their tank was half-empty and that they could not save the building.

[9] After the fire, she phoned her broker, Fidelity, who followed the necessary procedures to file a claim with H Savy Insurance. She received a letter from Mr. Furneau from H Savy Insurance on 21 July 2015 (Exhibit P2) noting that the claim was being attended to. She received another letter on 25 September 2015 (Exhibit P3) which stated:

Reference is made to the above. As we are now in receipt of the Final Report of the Seychelles Police and in view that both the Seychelles Fire Rescue Service Agency, and the CID Department have confirmed that this fire is an ARSON. We have forwarded this case to our legal advisors for their legal advice. Please be note that we shall be informed on our final position regarding this case, as soon as we receive their reply. Thanking you for your understanding in this matter.

[10] A final letter dated 18 January 2016 (Exhibit P4) from Veronica Lalande from H Savy Insurance noted:

We acknowledge receipt of your letter from Attorney at Law Mr Bernard Georges dated 25 November 2015 in respect of Villa Hortensia. Kindly note that they have sent a copy of your file to our respective lawyer to represent H Savy Insurance for the Court case. Based on the above we will be waiting for the final Court decision, before we are able to proceed further with the claim. Thank you for your understanding and cooperation.

- [11] The first plaintiff explained that she previously lived at Villa Hortensia (before it had that name). During that time, the property was insured with MUA. The policy period was for 31 July 2014 to 30 July 2015 (Exhibit D1). She initially filed a claim under the MUA policy for the fire. (Exhibit D2) is the letter from MUA denying the claim due to a breach in the policy conditions. In particular, the letter notes:

Your contract of insurance is therefore null and void as from the date you converted your residence into a guest house, that is, Villa Hortensia. Further, we have been informed that you also contracted another insurance for the same property with H Savy Insurance in respect of the same risk for the same period.

- [12] Upon cross-examination, she explained that she was not living in the house at the time because it was being used for hospitality purposes. She testified that she had previously insured the house with MUA when it was used for residential purposes. She insured it as Villa Hortensia when it was converted to a guesthouse and moved next door.
- [13] She confirmed that when she entered into the agreement with MUA she did not properly read the terms and conditions. She testified that she did not know that she had an obligation to inform MUA about the change of use. She made a claim under the MUA policy on 21 July 2015. She then made a claim under H Savy Insurance on 1 July 2015. She denied any bad intentions in making both claims but rather noted she was just trying to cover the cost of the damage to the property.
- [14] She obtained the insurance policy with H Savy from Fidelity. She was questioned about the insurance policy form, in particular, regarding the question as to whether any financial institutions had any financial interest in the premises to be insured. She testified that she did not know what this meant. She then noted that she only received the form after the fire. She testified everything was done over the phone with her broker who did

not ask her for this information. The first plaintiff further testified that she did not initially receive the fire service report. When she did, she did not read it but just put it all in an envelope.

[15] Regarding the fire, the first plaintiff explained that her brother Lionel Waye-Hive called the fire station about the fire. Darren Waye-Hive, her other brother, also apparently reported the fire to the fire service, though she was not aware of this. Counsel pressed her as to why she did not call the fire service herself. She said that she was in a state of panic and called her brother first, who said he would report the fire.

[16] The first plaintiff testified that it took 20-25 minutes for the fire truck to arrive on the scene. She denied the contents of the fire service report which provides that it took less than one minute for the fire trucks to arrive. She testified it would take about 4 minutes for the fire-truck to have come from the station to her property. The report notes that she had said that she had forgotten that there was a fire station on La Digue. She denied saying this. She confirmed that the second plaintiff had been the last at the premises, about 10 minutes prior to discovering the fire.

[17] Upon re-examination, the first plaintiff confirmed that she took the MUA insurance because she got a loan from Barclays Bank. The bank organized the insurance and did all the necessary paperwork. Regarding the alleged arson, she said that she was unaware that anyone was under investigation for this. She confirmed that she gave a statement to police after the fire. This is attached to the report but she noted discrepancies with the facts therein. She was never forwarded a copy to confirm the contents of the statement despite her requests.

[18] The second plaintiff testified that he runs the guesthouse with his wife, the first plaintiff. The change of use of the property was admitted as (Exhibit P5). He acknowledged that it was him that checked the house on the night of the fire. He explained their reaction when they heard the alarm and saw the fire. He said that the alarm went off about 5 minutes after he returned home. He confirmed what his wife said about how long it took the fire service to arrive, that is, around 20-25 minutes. He said that when they arrived the whole house was already consumed by fire. The water truck was only half-full however, so the

firefighters needed to return to get more water. Mr. Ernesta said that the business is up and running again, but that they had to take a big bank loan in order to get it operational again.

- [19] Leonel Waye-Hive testified as witness for the Plaintiffs. He is the brother of the first plaintiff. He was watching television on the night of the fire when he heard shouts. He did not live far from the property, about 250 meters. As soon as he exited his house he could see the light from the fire. He went towards the house and took his phone to call 999. This took less than a minute. When he arrived on the scene, the second plaintiff was there with Jonathan Waye-Hive. They were trying to douse the flames with a hose but the fire was too strong. On arriving at the house, he called 999 again to see where they were. He says he called 999 because he did not know the phone number of the La Digue fire station. He was told that they would pass on the message. He said the firefighters came about 20 minutes later. He explained some of the difficulties the fire service experienced in attending to the fire. Firstly, the vehicle got stuck as it came around the corner to the house. Secondly, when this was resolved, the trucks had to stop about 30 meters away from the house. They installed the hose but after about 2-3 minutes the water ran out. They then tried to install the hose at a guesthouse down the road about 400-500 meters. But the water could not reach the house as there was not enough pressure. The firefighters then did several rounds of going to take water, about two or three rounds. It took them until about 1-2 am to put the fire out completely.

- [20] Peter Cherry as a witness for the defence testified that he is employed with the Seychelles Fire and Rescue Services Agency (SFRSA) and has been for 28 years. He has been involved with about 40-50 fires, from bush fires, to houses and cars. At the time of the incident, he was working on La Digue. He said that Joe Philoe informed them of the fire initially. They then received a call about the fire and a boy came on a bike and gave the message. He said that when they arrived on the scene there were problems with bystanders on the street and some bikes when they tried to round the corner. They tried to look for a source of water but could not find one so they could only use the water in their truck. This ran out quickly. They then reversed to fill up the tank from a hydrant down the road. They had to do this 6-7 times in order to be able to deal with the fire. He

confirmed that there were some issues getting to the house, but he did not consider the lateness to be notable. He says despite this it only took them 5 minutes or so to get to the house. He noted that the report even noted that it took two minutes. The report was dated 9 July 2015 and admitted as Exhibit D4. He had signed the report. He said that because of how quickly they got to the site, they had suspected that there were accelerants in the house.

[21] On cross-examination, he admitted the he did not write the whole report. He wrote it with his superior at the time, Antoine Souris, who was also on the scene on the day. Regarding the need to refill the truck, he says that the restaurant was only two or so minutes away and it would take only one minute to the fill the tank. He was not the one filling the tank however. Regarding the conclusion that the fire was caused by a deliberate act in the report, he said that he had not written that part of the report. He relied on what his superior told him about how fast the fire developed. He said that it was Mr. Souris who told him that the amount of time was too short for the fire to develop so quickly without accelerants. He confirmed that paint and varnish could also act as accelerants. He says they did take that into account but he agreed that they had omitted to put this into the report, which was a failure on their part. He was asked whether he was aware or had reason to believe that the plaintiffs caused the fire, which he did not.

[22] Upon re-examination, Mr. Cherry noted that he did not object at the time to the conclusion that the fire was caused by a deliberate act. He said he was not forced to sign the report, but 'in relation to the deliberate act, I just had to sign it. Because at the station automatically it is our superior that would go through our report and see if there is any mistakes.' He said that his superior told him it must have been deliberate because of how quickly it matured. He further said: 'I was conscious that this fire could have been through a natural cause, but it was already in the report that it was a deliberate act.' He confirmed that regardless as to whether there were accelerants involved, the fire must have been ignited by something.

[23] Mr Kevin Furneau testified on behalf of the Defendant as Assistant Claims Manager at H Savy Insurance. He confirmed that a claim was lodged by the plaintiffs with H Savy

Insurance but that it was not entertained because the nature of the incident was not covered by the policy. The policy covers fire. In this case, he said that the official report was that the fire was an arson and the policy does not cover arson. He explained what inquiries were made with the police. He read from the response from CID:

This is to confirm that the police responded and attended to the above incident, subsequently an investigation started in the case, adding to that in line with investigation the police received a report of the Seychelles Fire and Rescue Services Agency. The report has been noted and taken into consideration. The Seychelles Fire and Rescue Services Agency came to the conclusion that the fire is an arson. The police investigation is completed and supports the fire rescue service agency that this fire is an arson.

- [24] He confirmed that prior to the incident, H Savy Insurance was not aware that the property was also insured with MUA. He noted that financial institutions also had financial interests in the property, which was not disclosed. They were notified of this by the bank. This information was not included in the proposal form.
- [25] On cross-examination, Mr. Furneau confirmed that the policy does not state that it excludes arson. He took the view, however, that arson is not covered by the policy, though 'fire' is not defined in the policy. He also acknowledged that the issue of non-disclosure was not raised when the claim was rejected. He says H Savy did not need to go further because they had concluded that the fire was not covered because it was an arson. He was asked about clause 9 of the Savy Policy. He said he did not know if the MUA policy covered the same defined events. All he knew was that there was a policy for this property with MUA.
- [26] Mr. Furneau was asked about the CID investigation and whether they have identified anyone yet as the perpetrator. He replied in the negative.

Submissions

- [27] The plaintiffs submitted that the burden of proof is on the insurer to prove that the warranty has been broken, citing *Savy v Krishnamart Co SCA 19/199*. They also submitted that arson is not excluded by the policy. Even if it was, the evidence from the witness from the fire department indicated that the report did not disclose all the

reasons that may have caused the fire. The plaintiff's submissions do not address the failure to disclose all material facts.

- [28] The defendant also filed written submissions addressing the following issues, namely, (1) Was it arson or not? The defendant submits that it was, and that it was caused by the plaintiffs; (2) Was the plaintiffs' insurance with the defendant still valid? The defendant submits that it was not; and (3) If not, how much is the defendant liable to pay under the insurance policy? If the policy is found to be invalid, then the defendant is not liable to pay out anything. Alternatively, the defendant submitted that it is required to only pay the rateable proportion as per clause 9 of the Savy Policy. These issues are addressed in a modified form below.

Findings and legal analysis

(1) Was the fire an act of arson, and if so, was it caused by the plaintiffs?

- [29] The defendant submitted that the fire was an arson and that the plaintiffs were responsible for it. The plaintiffs do not necessarily reject that the fire was caused by arson, though they challenge the robustness of this finding by the SFRSA. Regardless, the plaintiffs reject that they were responsible for any arson.
- [30] The SFRSA Act 2010 provides that it is the duty of the SFRSA 'to protect life and property when a fire or other emergency occurs and to do all such things as may be necessary ...(h) to investigate fire and fire related emergencies.' The SFRSA Report dated 14 July 2015, signed by Mr. Andre Morel, notes that 'the course [sic] of the fire is considered as a deliberate act'. The police department confirmed by letter dated 1 September 2015 that the police were investigating the incident. By letter dated 9 October 2015, the police concluded that the SFRSA came to the conclusion that the fire was an arson and that: 'The Police investigation is completed and support the FRSA that this fire is an arson but the Police do not know who is that the person who put the fire.' There was no explanation provided as to how the police came to this conclusion, nor was any evidence provided as to what efforts, if any, were undertaken as part of the investigation. It would seem in the absence of any evidence that the police have simply accepted the

SFRSA's conclusion. The SFRSA's findings would usually be sufficient for the Court to make its own finding on a balance of probabilities. However, the evidence of Mr. Peter Cherry brings into question the robustness of the report in this regard. He admitted that he did not write the whole report, but rather wrote it with his superior, Antoine Souris. He said it was Mr. Souris who told him that the amount of time was too short for the fire to develop so quickly without accelerants. He confirmed that paint and varnish can act as accelerants, though this was not noted in the report. He agreed that they had failed in this respect. This leads the Court to suspect that there were other possible causes of the fire that were not adequately explored. In light of this, the Court is not in a position to find that the fire was an arson on the balance of probabilities.

[31] Nevertheless, even if the Court did find that the fire was caused by arson, there is insufficient evidence to conclude that the plaintiffs were responsible for the fire. There is nothing to suggest that they were responsible in either the SFRSA or the CID reports. Mr. Cherry confirmed that he had no reason to believe that the plaintiffs had caused the fire. The plaintiffs' failure to call the fire station must be considered in light of the Mr. Leonel Wayne-Hive's communication to his sister that he would call the fire station, which he did in fact do. The plaintiff was clearly in a state of shock and panic throughout the ordeal, as confirmed by the SFRSA Report which notes that: 'Mrs Marlette Ernesta was transported to Logan Hospital La Passe for treatment after sustain panic attack and shock'. The statement in *Leon Builders (Pty) Ltd & Anor v MUA (Seychelles) Insurance* CC 02/2017 [2018] SCSC 102 regarding allegations of fraud is noted. In that case, the insurance company refused to honour the claim on the basis of fraud. The Court referred to Article 1116 of the Civil Code which notes that fraud 'shall not be presumed and it must be proved'. The burden is thus on the defendant to discharge the burden of proof in respect of allegations of fraud, which appears to be what the defendant alleges in the present case.

[32] The defendant's submission that 'on a balance of probabilities, the fire was caused by the wilful act of the plaintiffs' is thus rejected by the Court.

Does the Savy Policy exclude arson?

[33] In light of the above finding that there is insufficient evidence to conclude that the fire was caused by arson, it is not strictly necessary for the Court to address this issue. Nevertheless, for the sake of completeness, the Court shall consider whether the Savy Policy excludes arson. H Savy Insurance denied the claim on the basis that the fire was a case of arson, which it purports is not covered by the policy. The Savy Policy provides:

The Company agrees (subject to the Conditions contained herein or endorsed or otherwise expressed hereon which Conditions shall so far as their nature will permit them or any of them to be deemed Conditions precedent to the right of the insured to recover hereunder) and if after payment of the premium the property insured described in the said Schedule or part of such property be destroyed or damaged by:-

- 1. Fire*
- 2. Lightning or thunderbolt*
- 3. Such additional perils as are stated in the Policy (unless otherwise excluded by endorsement.*

[34] Fire is not defined in the policy. The Savy Policy does however contain a general exclusions clause which stipulates that: ‘1. Loss or damage by (a) fire occasioned by or happening through the Insured property’s own spontaneous fermentation or heating or its undergoing any process involving the application of heat...’

[35] Arson clearly falls within the definition of ‘fire’. The definition of ‘fire’ in the Collins English Dictionary (12 ed, 2014) is: ‘1. The state of combustion in which inflammable material burns, producing heat, flames and often smoke’, and ‘3. a destructive conflagration as of a forest, building etc.’ None of the definitions define fire as excluding arson or deliberately lit fires. The question therefore is whether arson falls within the exclusion. The defendant did not assist the Court in explaining how arson fell within the exception. On the face of the exclusion, however, it is not clear that it would. Arson is not readily conceived of as a ‘process’. Moreover, the reference to ‘its undergoing’ with reference to the property suggests that the ‘process involving the application of heat’ would be inherent or intrinsic to the building. On the facts before it, the Court thus finds

that arson is not excluded by the insurance policy, though this is obiter given the above findings.

(2) Was the plaintiffs' insurance with H Savy still valid?

Is the policy void by virtue of the plaintiffs' misrepresentations, misdirection or non-disclosure?

[36] The defendant submits that the plaintiffs failed to notify H Savy that the property was also insured by MUA and that as a result the policy was void, the omission constituting a 'misrepresentation, misdirection and non-disclosure' on the part of the plaintiffs (clause 1, Savy Policy). The defendant further submits that the plaintiff failed to notify the defendant that various financial institutions held a financial interest in the form of a security on the property (see clause 5 (b)). This similarly is grounds to refuse the claim according to the defendant. These two submissions are addressed in turn.

[37] Firstly, the Court does not consider that the overlap in insurance cover constitutes grounds to nullify the policy in this case. The MUA policy was for 'private householders' with the policy cover for 'private' (see pp 1 and 2 of the MUA Policy). The period of cover was from 31 July 2014 to 30 July 2015. It is common knowledge that the plaintiffs used to live in the house on the property but subsequently turned it into a guesthouse called Villa Hortensia. The plaintiffs gave evidence that, when they decided to convert the house into a guesthouse, they moved out and lived next door. On 23 April 2015, the plaintiffs were granted a 'change of use' for the property. On 5 May 2015, the plaintiffs obtained an insurance policy from H Savy for the business (Exhibit P5). The Savy Policy (Exhibit P1) was for 'Villa Hortensia' and the transaction type was 'new business'. The registration of the business is attached to the proposal. Therefore, while there was an overlap in the two policies, it is clear that the plaintiffs obtained the new policy because of the change in the property's use. There is nothing suspicious about this. Moreover, because the property was no longer used as a private household, but rather for commercial purposes, the MUA Policy appears to have been of no effect at the time of the fire, as confirmed by MUA's letter dated 16 October 2015 (Exhibit D2). This would mean that the property was not in fact doubly insured at the relevant time.

- [38] Even if the villa was doubly insured, however, it is clear from the Savy Policy that double insurance is not necessarily a grounds for nullification. Whether the property was insured by another company is not expressly asked in the proposal. Clause 18 in the Proposal Form asks whether a proposal for a similar insurance been (a) declined; (b) cancelled; (c) discontinued; (d) agreed to continue only on special terms. The assured responded ‘no’ to each of these, which on the facts is correct insofar as the insurance with MUA had not been discontinued or agreed on special terms for continuance. Regardless, the nature of the questions appear to go towards ensuring that the insurer is made aware of any reasons why the property should *not* be insured (for instance, why another insurance company cancelled its insurance), which is not the case here.
- [39] Furthermore, the matter is expressly regulated by clause 9 of the Policy, which indicates how liability is to be apportioned in the instance of double insurance. There is ample foreign case law regarding such provisions and how liability is apportioned in such instances, indicating that the existence of insurance does not automatically render the policy void (See *Encyclopedia of Insurance Law* (2010, Sweet and Maxwell, Part 4) case law on ‘double insurance’, p. 4015). Furthermore, *The Law of Insurance*, (5th ed, Raoul Colinvaux, 1984), notes, compared with life or accident insurance, ‘other insurances against other risks, such as fire policies or other policies of indemnity, will not be material since their existence will tend to lessen the liability of the insurer on account of the principle of contribution.’ (p. 104, footnotes omitted). If the MUA Policy was valid, then it would have lessened the liability of H Savy Insurance.
- [40] This brings us to the issue raised by clause 5(b) of the Savy Proposal which concerns whether any bank or financial institution had any financial interest in the premises to be insured. In response to this question, the insured, through her broker, responded: ‘NA’. The defendant alleges that this was incorrect, however, as Barclays Bank had a financial interest in the property at the time.
- [41] It is noted at the outset that the written submissions of neither the plaintiff nor the defendant address this particular issue. Nor was this issue addressed in much detail during the proceedings.

[42] Clause 1 of the Savy Policy states:

1. *Misrepresentation, misdirection and non-disclosure in any material particular shall render voidable the particular item or section of the policy as the case may be affected by such misrepresentation, misdirection or non-disclosure.*

[43] It pays to recall the comment in ***Payet v State Assurance Corporation of Seychelles & Anor (CS 116/2001) [2008] SCSC 26 (24 March 2008)*** regarding the need for utmost good faith in insurance contracts:

It is truism that insurance contracts or policies are based on trust, uberrima fides. The insurer trusts the insured, the policyholder, to give precise and true details of the subject matter to be insured. This is called the principle of 'utmost good faith'. Indeed, care should always be taken to tell the whole truth so that insurance companies can make a fair assessment of the risk, they are underwriting. Particularly, a contract of marine insurance (as is the case on hand) is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may avoided by the other party.

[44] The question asked in that case was: ‘Is it a **material** fact in the given circumstance which, any reasonable insurer in the place of the plaintiff is expected to or would disclose in the normal course of events, unless the insurer specifically required that piece of information from the insured?’ Not all facts are material, there must be a probability that the insurers would attach some importance to it in assessing the premiums. See ***Insurance Law, supra, p.101.***

[45] The defendant argues that the question regarding financial interests in the property was a warranty and the plaintiff’s failure to respond correctly is grounds to invalidate the policy. They have referred to case law regarding warranties, in particular ***Cholarajan v MAU (Seychelles) Insurance (CA 15/2018) [2019] SCSC 296 (9 April 2019)***. This case stipulated that ‘a warranty is a policy term setting out an obligation that the insured must comply with, either to do something, or refrain from doing something, or stating the some condition will be fulfilled.’ As noted in ***Krishnamart*** case(***supra***): ‘The law is clear that the burden of proving that a warranty has been broken lies upon the insurers.’

- [46] The clause at issue here is not in the Savy Policy. Rather, it is a question in the Proposal. The Proposal warns assurers that: ‘You should fully and faithfully give all the facts you know or ought to know otherwise you may receive nothing from the Policy.’ While the contents of the Proposal may constitute warranties, this does not appear to be the case here. The facts here are distinguishable from those in *Cholarajan*. In that case, the requirement was to keep trade books in a fire resistance safe on the premises. This requirement was an essential requirement to claim under the insurance policy as the ‘trade books had to be provided to ascertain the value of what was lost’. That is not the case here. Moreover, the proposal expressly noted that ‘for insurance of contents and stocks, the following documents are essential...’.
- [47] In the present case, the relevance or importance of knowing whether a financial institution has an interest in the property was not made clear by the defendant. It is not even clear what ‘various financial institutions’ had a financial interest in the property
aside from Barclays, which the Court has very little evidence of aside from a reference by the first plaintiff in her testimonial evidence that she had a loan with Barclays which was the reason for obtaining insurance from MUA. It also necessary to point out that the response to the question was not ‘no’, but rather ‘NA’, i.e. not applicable. If the question constituted a warranty and/or was necessary to determine the nature of the premium (i.e. was a material fact), then H Savy Insurance should have gone back to the broker to clarify whether the answer was ‘yes’ or ‘no’.
- [48] In conclusion, the Court finds that the policy is not void by virtue of the overlap in the two insurance policies or for the plaintiffs having responded ‘NA’ to the question in the policy form regarding financial interests on the property.

Did the plaintiffs fail to mitigate their loss and damage?

- [49] The defendant raised this in its defence but it was not addressed in any detail in the proceedings. In any case, the Court finds that the plaintiffs did not fail to mitigate their loss and damage. As noted above, the plaintiffs did not call the fire service, but they were aware that the first plaintiff’s brother had done so. In fact, Mr. Wayne-Hive rang 999 twice to report the incident. The plaintiffs also tried to douse the flames with hoses, with the

help of neighbours. The plaintiffs therefore did not fail to mitigate their loss and damage arising from the fire.

**(3) If not void, how much is the defendant liable to pay under the insurance policy?
Damages**

[50] The defendants have submitted that even if they are liable, they are not liable to pay out the full value of the policy, i.e. SCR2.5 million, because the property was at the time also covered by a MUA Policy for the value of SCR1,200,000. The Savy Policy provides that the defendant 'shall be liable to make good only a rateable proportion of the amount payable by or to the [plaintiffs] in respect of such event.' The defendants have thus submitted that the plaintiffs are only required to pay the difference, being SCR1.3 million.

[51] In light of the finding above that the MUA Policy did not cover the accident, it follows that clause 9 ('other insurance') of the Savy Policy is not applicable. H Savy is therefore 'liable to cover the full amount (SCR2.5 million) under the Policy.

Conclusion

[52] The Court accordingly finds in favour of the plaintiffs, and orders the defendant to pay the plaintiffs Seychelles Rupees Two Million and Five Hundred Thousand SR2, 500,000, with interest and costs.

Signed, dated and delivered at Ile du Port on the 27th day of March 2020

ANDRE J

Judge of the Supreme Court