THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 5/2014

Reportable

In the matter between:

Regent Insurance Company Ltd **Appellant**

and

King's Property Development (Pty) Ltd t/a King's Prop **Respondent**

Neutral Citation: *Regent Insurance v King's Property* (5/2014) [2014] ZASCA (176) 21November 2014

Coram: Lewis, Wallis and Pillay JJA and Fourie and Meyer AJJA

Heard: 3 November 2014

Delivered: 21 November 2014

Summary: Failure to disclose that a building was occupied by a tenant which manufactured truck and trailer bodies using flammable materials when insurance cover was requested for the premises amounted to a material non-disclosure under s 51(1) of the Short-Term Insurance Act 53 of 1998: the non-disclosure induced the insurer to enter into the insurance contract: defence of estoppel raised on ground that insurer had led insured to believe that insurance was effective not established.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Hughes J sitting as court of first instance)

(a) The appeal is upheld with costs including those of two counsel.
(b) The order of the high court is set aside and replaced with:
'The plaintiff's claim is dismissed with costs, save for those occasioned by the defendant's applications for leave to amend its rejoinder.'

JUDGMENT

Lewis JA (Pillay JA and Fourie and Meyer AJJA concurring)

[1] This appeal turns on whether an insurance claim was properly rejected and the policy treated as void by the insurer because of the insured's failure to disclose the nature of a business carried on by a tenant in a building damaged by a fire. On 24 May 2010 premises at 8 Press Avenue, Crown Mines, Johannesburg (the premises) burned down. The owner, King's Property Development (Pty) Ltd (King's Property), the respondent in this matter, claimed the cost of repairs and payment in respect of rental income lost, from its insurer, Regent Insurance Company Ltd (Regent), the appellant.

[2] Regent rejected the claim, alleging a material non-disclosure by King's Property when applying for the insurance policy in respect of the premises. The non-disclosure lay in failing to advise Regent that the premises were occupied by a tenant, Elite Fibre Gauteng CC (Elite Fibre), which manufactured truck and trailer bodies using resin and fibreglass, highly flammable materials, a risk that Regent said it would not have undertaken had it known of the nature of the business. The fire was caused by employees of Elite Fibre in the course of manufacturing.

[3] King's Property accordingly instituted action in the North Gauteng High Court against Regent for R9 031 717 plus interest, as the reasonable cost of repairs, and R1 111 800 in respect of loss of rental. (These sums represent the quantum of the loss agreed by the parties.) The high court (Hughes J) found that Regent was liable to pay the sum claimed on the basis that it was estopped from relying on the defence of non-disclosure because, when the insurance broker for King's Property, Mr Stuart Riley, had requested the insurance, he had asked Regent's representative, Mr Guy Lewis, to do an urgent survey of the premises. Although Lewis had in turn requested an assessor at Regent to do the survey, it was in fact not done before the fire.

[4] The high court held that King's Property had been misled into believing that the survey had been done, and had accordingly paid the premiums on the assumption that the insurance covered the premises. Hughes J ordered Regent to pay the full amount claimed. Regent appeals against that order with the leave of the high court.

[5] On appeal the issues to be determined are, first, what was in fact disclosed to Regent about the premises; second, whether Regent established a material non-disclosure in terms of s 53(1) of the Short-Term Insurance Act 53 of 1998 which induced Regent to enter into the contract; and third, if there was a material non-disclosure, whether King's Park established either estoppel or waiver of reliance on non-disclosures.

[6] It was common cause on the pleadings that on 16 March 2010 the parties concluded a contract of insurance in respect of the premises, Regent insuring against risks set out in the policy, which included fire damage under the 'Buildings Combined' section of what was known as a Multimark policy. Regent also admitted that it was liable to indemnify King's Property for loss of rent should the premises become 'untenantable'. However, Regent alleged that it was not bound by the policy because it was not advised by King's Property that the premises were occupied by Elite Fibre.

[7] The failure to advise of Elite Fibre's tenancy and of the nature of its business (manufacturing truck and trailer bodies with material including resin and fibreglass

which are highly flammable), Regent pleaded, amounted to a material and wrongful non-disclosure, which affected the risk. Regent would not have assumed the risk, it pleaded, had it been aware of the material facts and the nature of Elite Fibre's business.

[8] King's Property replicated to this plea alleging both that there had been a disclosure of the existence of a warehouse on the premises, and that Riley had requested Lewis to arrange as a matter of urgency for a survey to be done on the premises to determine the relevant insurance risks. The disclosure was alleged to have been made in an email written by Riley and sent to Lewis on 9 February 2010 in which Riley asked for a quotation for insurance in respect of the premises, which were identified as 'offices/warehouse in Crown Mines'. On 10 March 2010, said King's Property, Lewis informed Riley orally that the premises would be insured at a rate of 0.1 per cent.

[9] On 16 March 2010 Riley requested Lewis to have a survey done in respect of the premises. The survey was admittedly not done. Thus, pleaded King's Property, Regent was aware when the policy was issued that the premises comprised offices and a warehouse and that the risks pertaining to a warehouse included that of having flammable material on the premises: there was thus no failure to disclose that risk. The survey requested would have revealed the precise nature of the risk. Despite not having done the survey the insurance policy in respect of the premises was issued unconditionally. The result, pleaded King's Property, was that Regent had waived its rights to rely on any non-disclosure; alternatively Regent had represented to King's Property that it had accepted the risk and, relying on this representation, the latter had paid the premiums, and had not made alternative arrangements to insure the premises – Regent was accordingly estopped from relying on any non-disclosure.

[10] Regent's rejoinder (amended after Lewis had given evidence, withdrawing an admission as to the subject of the discussion between Riley and Lewis on 10 March 2010) was that Lewis's response in quoting for the insurance of the premises was not related to the email of 9 February 2010; it was in response to a second email which Riley had sent on 16 March 2010 requesting the addition of the premises to

the policy with effect from 15 March. The terms of the emails are argued by King's Property to be important and I shall return to them. The gravamen of this defence was that Lewis had not related the emails to each other and had not realized that they both referred to the same premises. It was also denied that Lewis knew that the reason for the survey requested was to ascertain the risks in respect of the premises. In any event, the reason for the request, Riley testified, was to ensure that all the King's Property premises were surveyed. Regent also alleged that since the premises were believed to be offices only, such that the risk of fire was considerably less, the survey was regarded as unnecessary or, at the least, less urgent.

The background to the request for insurance for the premises

[11] It is useful to consider, in so far as relevant, the history of the insurance arrangements between King's Property and Regent. The Multimark policy was first issued by Regent to King's Property in April 2008. On 21 April 2008 Riley, representing his brokerage, Paradime Asset Management CC, wrote to Lewis requesting cover on a building, stating that 'Client does property development and supplies bedding covers etc'. He also asked for a quotation for insurance on a vehicle. Regent issued a policy with effect from 17 April 2008, reflecting the insured as 'King Prop' and describing its business as 'Property Developer/suppliers Of Bedding Goods'. The premises were listed under the 'Fire' section of the policy, and included plant, machinery and landlord's fixtures and fittings for which the insured was responsible.

[12] On 1 October 2008 Riley requested Lewis, by email, to remove the plant and machinery from the fire cover, and asked that additional properties and another vehicle be added to the policy. On 20 August 2008 Regent included the premises in the fire section but a value of R92 275 000 was ascribed to them. This value was incorrect: it related not to the premises, but to other property in the King's Property portfolio, Kings Square, also in Crown Mines. But on 9 September 2008 the fire insurance in respect of the premises was deleted. On 6 October 2008 the risk address was changed to Section 3 Kings Square, and erven 51 and 52 Prelude Avenue, Crown Mines. Stock to the value of R10 million was also added. And on 3 November 2008 Riley asked Lewis to add three residential properties in

Johannesburg to the policy under the 'combined' section (presumably the buildings combined section).

[13] On 27 February 2009 Riley requested Regent to amend the policy so as to cover the premises again, at a sum insured of R15 million. The amendment was effected on 25 March 2009. But the premises were again removed from the buildings combined cover on 15 October 2009, although the office contents of the premises remained insured. (This revision appeared only on the schedule dated 25 January 2010.)

[14] On 9 February 2010 Riley sent the first email in issue requesting cover for the premises. The email read:

'Hi Guy [Lewis]

I need a rate on the following buildings.

R165 000 000 Offices in Sandton

R255 000 000 Shopping center in Sandton

R15 000 000 Offices/warehouse in crown mines (we had this on the policy)

We had a rate of .150% but in view of the SI [sum insured] I think we need to review the rate bearing in mind Kings Square has a rate of .100% based on a SI of R214 000 000.'

[15] Lewis responded by email an hour later, saying that King's Property would 'have to go collective on the 2 larger accounts' based on 'eml' (the estimated maximum loss), 'as discussed telephonically'. He added: 'We will not be able to go on risk until both buildings are surveyed and the eml falls within our treaty limit', also as discussed telephonically. Regent was not able (or willing) to cover the sums insured on its own.

[16] There was no further correspondence in respect of the Sandton buildings. But there were other emails in respect of the policy, one written by Riley on 15 February which asked for cover for another vehicle, changed the risk address to the premises, deleted stock at Kings Square and asked for a reduction in the rates for three other vehicles. And then on 16 March Riley wrote another email to Lewis stating:

'Please add the following building to the policy wef [with effect from] 15/3/2010

Risk address to 8 Press Ave Crown Mines JHB. This is their offices.

R15 000 000
Rate .100%
Add Sasria'
The policy was revised to add the premises under the 'buildings combined' section of the policy at the rate requested, which was favourable to King's Property.

[17] As I have said, Hughes J held that Regent was estopped from relying on any defence of non-disclosure of the risk of fire in premises used for construction of trucks and trailers with flammable materials. She made no finding, however, as to whether there had been a material non-disclosure as to tenancy of the premises.

[18] On appeal, Regent argued that there was a material non-disclosure that entitled it to reject the claim and regard the insurance contract as void, and that the defence of estoppel had not been established as it was not shown that King's Property had been induced to act to its prejudice by Regent's failure to carry out the survey. The cause of prejudice, argued Regent on the other hand, was the failure to disclose that the premises were occupied by a tenant which manufactured goods using highly flammable materials such as fibreglass and resin.

[19] I shall deal first with the legal principles governing material non-disclosure and then turn to whether there was in fact a failure to disclose a fact material to the risk on the part of King's Property, represented by Riley, that induced Regent to conclude the contract of insurance.

The legal principles covering material non-disclosure

[20] It is trite that, at common law, an insured, when requesting insurance cover, must make a full and complete disclosure of all matters material to the insurer's assessment of the risk. Failure to do so will entitle the insured to reject a claim under a policy and to treat it as void. Legislation has been enacted, however, to preclude insurers from treating misrepresentations that are trivial, and more recently non-disclosures that are trivial, as grounds for avoiding insurance contracts and rejecting claims.

[21] Section 53(1) of the Short-Term Insurance Act provides:

'Misrepresentation and failure to disclose material information

(1)*(a)* Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) –

(i) the policy shall not be invalidated;

(ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and

(iii) the obligations of the policyholder shall not be increased,

on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.

(b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.'

[22] The section was preceded by s 63(3) of the Insurance Act 27 of 1943, but that was limited to representations and did not cover non-disclosures. That resulted in an inconsistency that was not rational. The history of the case law dealing with the distinction between material positive misrepresentations and material non-disclosures is set out with great clarity by Schutz JA in *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA). This court endorsed the view that the test for whether a non-disclosure is material to the assessment of the risk is objective. In this regard the court in *Clifford* confirmed the principles adopted in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 435G-I in finding that the test was whether the reasonable person would have considered that the risk should have been disclosed to the insurer. But, in interpreting s 63(1) of the former Insurance Act, this court held that the test for determining whether a misrepresentation was material was a subjective one: *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A). In *Clifford* Schutz JA (delivering the majority judgment) considered, but did not decide, that that aspect of *Qilingele* was wrongly decided. (The minority considered that it

was not necessary for the decision to pronounce on the correctness or otherwise of *Qilingele* and refrained from doing so.)

[23] It is clear now, however, that since the introduction of s 53(1) of the Short-Term Insurance Act (and pursuant to its amendment in 2003) the test in respect of both misrepresentations and non-disclosures is an objective one, thus bringing the legislation in line with the common law. Two principles enunciated in *Clifford* remain applicable. First, the onus rests on the insurer to prove materiality (at 155E-G), this in accordance with the decision in *Qilingele*; and second, the insurer must prove that the non-disclosure or representation induced it to conclude the contract. Thus the insurer must show that the representation or non-disclosure caused it to issue the policy and assume the risk. As Schutz JA pointed out (at 156E-I), however, once materiality has been proved it would be difficult for the insured to overcome the hurdle of showing no causation, a matter to which I shall return.

[24] In *Mahadeo v Direct Insurance Ltd* 2008 (4) SA 80 (W) paras 17 and 18 the court confirmed that the test in s 53(1) of the Short-Term Insurance Act is objective: whether information should have been disclosed is judged not from the point of view of the insurer but from that of the notional reasonable and prudent person. The question is thus whether the reasonable person would have considered the fact not disclosed as relevant to the risk and its assessment by an insurer.

[25] Regent argued on appeal that the test for inducement remains subjective (see *Clifford* at 157G-H), and that the court in *Mahadeo* failed to appreciate this. It relied in this regard on the judgment in this court in *Representative of Lloyds & others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 24. As I see it, no such finding was made by this court. It dealt not with the question of inducement but with whether an insured can waive the benefits conferred by the statute in s 53. And *Mahadeo* dealt only with the test for materiality, and not the question of inducement.

[26] There is, however, a dictum in *Mutual & Federal Insurance Co Ltd v Da Costa* 2008 (3) SA 439 (SCA) para 12, relied on by King's Property, that suggests that the test for whether an insurer was induced to issue a policy, or one at a lesser rate, is objective: would the reasonable insurer have refused to extend the cover had it

known the truth? But in fact this court in *Da Costa* was dealing with the question whether the misrepresentation was material and did not consider the question of inducement.

[27] I consider that the test for inducement remains subjective – was the particular insurer induced by the failure to disclose a material fact to issue the policy? In making the enquiry, 'evidence that the insurer had a particular approach to risks of the kind in question would be relevant and could be cogent' (Qilingele at 75C-D). But, as Schutz JA said in Clifford (at 156G-I), referring to *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL), 'once materiality has been established, the insured is likely to face an uphill struggle in trying to demonstrate that his non-disclosure or misrepresentation bearing this stamp had no effect'.

Was there a failure to disclose the nature of the risk?

[28] It is clear that Riley, representing King's Property, did not disclose the actual risk. He did not himself know who occupied the premises and what business was conducted there. He thus did not disclose that Elite Fibre occupied the premises and manufactured truck and trailer bodies using fibreglass and resin. The question that then arises is whether the argument that there was sufficient disclosure of a similar risk, advanced by King's Property, bears scrutiny. It argued that the many requests for quotations in respect of cover in respect of the premises over the period from April 2008 to March 2010, and the various revisions to the policy pursuant to those requests, were sufficient to disclose to Regent that the premises were occupied by a business using flammable materials.

[29] Regent argued that the only basis on which it could be said that the risk was in some way disclosed to it was if Lewis should have 'tied' the emails of 9 February 2010 and 16 March 2010 or that in the discussion between Lewis and Riley on 10 March 2010 the request for a quotation for the premises was considered. It should not be required of Lewis that he put all the pieces of the puzzle together and make sense of the respective requests, Regent argued.

[30] Lewis testified that he did not in fact realize that the second email, which referred only to the premises, and stated that the building was 'their offices', related

to the same premises as those in the earlier email. He claimed that on reading the first email, which referred to three buildings, he focused on the larger ones for which collective insurance would have been necessary. He conceded that if he had considered the request for cover for the premises he could have ascertained what the building was simply by looking at his own records.

[31] The premises, argued King's Property, had been covered for fire insurance on and off, on the same policy, since April 2008. Had Lewis looked at the schedules to the policy he would have realized that the premises had previously been described as being occupied by 'Property Developers/suppliers of Bedding Goods'. And had he looked at the email sent but five weeks earlier on 9 February he would have seen that it referred to the premises as offices/warehouse.

[32] Mr David Fry, called as an expert in the insurance industry by King's Property, testified that Regent, had it looked at its records, would have established that the premises referred to in the email of 16 March were the same as those previously on the schedules to the policy, and had been variously described as a warehouse, as the premises of a bedding supplier and as offices.

[33] Despite this, Regent argued that Riley was responsible for non-disclosure: he 'contented' himself with assuming that Lewis would recall his email of 9 February 2010 when the second email was received on 16 March 2010. King's Property on the other hand, argued that Riley did not content himself at all; he asked for an urgent survey to be done of the premises. The only purpose of that could have been so that Regent could ascertain the risk. I shall return to the question of the survey.

[34] In my view, while Lewis possibly could have ascertained information about the premises from the records available to him, what he would *not* have discovered was that the premises were occupied by a tenant which manufactured truck bodies and trailers, using flammable materials. The presence of Elite Fibre in the building, and the fact that it occupied a substantial portion of the building, made a material difference to the risk. I consider that the reasonable person would have regarded that fact as material and disclosed it to Regent.

The request for a survey

[35] King's Property contended, however, that Regent was able to ascertain the risk by doing the survey that was requested by Riley. The evidence established that within minutes after sending the email on 16 March 2010 requesting cover on the premises at a rate of 0.1 per cent, Riley phoned Lewis and asked him to conduct an urgent survey in respect of the premises. While there was some dispute as to the content of the discussion and the reason for the request, what cannot be disputed is that Lewis, only 20 minutes after receiving the email, gave instructions to his assistant, Mr Ziaad Kyriakidis, to arrange an urgent survey.

[36] The instruction was not followed up. Only on 26 April, when Lewis realized that the survey had not yet been done, did he give Kyriakidis Riley's contact number. Riley in turn referred Kyriakidis to the shareholder of King's Property, Mr D Zhang. On 30 April, Kyriakidis completed a request for a survey for the purpose of giving it to Regent's surveyor, Mr Shaun Harper.

[37] Harper had previously done a survey of the premises when working for another insurer. He knew that a supplier of bedding goods had previously been situated in the premises. Had he been told by Regent that a bedding supply concern was still in the premises and been asked to do the survey timeously, he said, he would have prioritized the work and gone to the premises when asked to do so. The survey request said that the premises were occupied by property developers, and was thus inaccurate in any event.

[38] Regent argued that the purpose of the survey was to ascertain how well run and managed the risk at the premises was. It should have been advised what the risk was in the first place: King's Property should have told Regent that Elite Fibre occupied the premises, and, if the risk had been accepted which, for the reasons that follow, was unlikely, the surveyor would then have determined how the risk was being managed. In the end, though, even if the purpose were to ascertain the risk, the survey was not requested before the policy was revised to include the premises, and the insurance was not made conditional on the survey being completed. The request for the survey did not relieve King's Property of the duty to make a full disclosure as to the use of the premises.

Did the failure to disclose the business of Elite Fibre induce Regent to insure the premises?

[39] If Riley had disclosed that Elite Fibre was a tenant in the premises, would Regent have declined to assume the risk or accepted it on different terms? Was disclosure of the presence of a warehouse sufficient in the circumstances? Regent argued that, on the assumption that Lewis knew, or at least should have known, that there was a warehouse at the premises, this would not have alerted him to the risk of flammable materials being used in the premises. That risk is quite different, it was argued, from the risk attendant on a warehouse where goods are stored, or even the risk attendant on a business supplying bed covers. Regent's assessment of the risk would have been different, it argued.

[40] Lewis referred in this regard to the Regent Rating Guideline which classified fibreglass goods manufacturers, retailers or wholesalers as a 'Z', which meant that the risk would not be accepted without the technical management's assessment and the decision of the general manager. The risk, he said, would have to be surveyed before insurance cover was issued. And even if those hurdles had been overcome, Regent would still not have insured the premises against fire under the building combined section of the policy. That section expressly precluded cover in respect of buildings used for manufacturing. The policy also stated that:

'A category has been introduced into the rating guide, known as 'Z' which means "Decline". Due to **high hazard** of this category, we, nor our treaty reinsurers wish to underwrite this business.'

Thus had Regent known that the premises were used for manufacturing it would have declined to extend insurance under the buildings combined section; and a fortiori, had it known that fibreglass was being used it would have declined to extend the cover at all. Lewis was not authorized to extend cover for this risk and would have jeopardized his job had he done so. His evidence that he did not know that there was any fire risk at the premises is supported by this factor.

[41] King's Property, on the other hand, argued that the risk in respect of premises occupied by fibreglass manufacturers was no greater than in respect of premises used for a warehouse where goods are stored or premises occupied by a supplier of bedding materials. This was the view of Fry and Harper. And it will be recalled that

Harper had previously surveyed the premises (when the bedding supply business was in occupation) and had considered the risk well-managed.

[42] Moreover, King's Property argued, Mr Paul Moremi, its first witness, had surveyed the premises for the purpose of insuring Elite Fibre's business, and considered that the risk was well-run. On the strength of that view, Mutual and Federal had issued a policy in October 2009 to Elite Fibre.

[43] In my view, that is of no consequence. As shown, Regent would not have extended cover under the buildings combined section had it known that there was a manufacturing business in occupation, and it would have declined the risk altogether had it been advised that Elite Fibre was manufacturing goods using fibreglass and resin. Regent was clearly induced to enter into the contract by the non-disclosure of the tenant's business. It would have accepted the risk only in special circumstances and after further investigation. Had Lewis known the facts that were not disclosed he would not have issued cover at all – or at least, not on the terms that he did.

Waiver

[44] King's Property, as indicated earlier, in response to Regent's plea of non-disclosure, replicated that it had requested an urgent survey as soon as it asked for insurance cover for the premises; Regent had issued the policy without stating that it was subject to a survey; and in so doing it had waived its right to rely on the non-disclosure. The argument was not pressed on appeal since it was clear that Regent had not knowingly abandoned its right to rely on something of which it was ignorant. Waiver of a right entails knowledge of it: where there has been a non-disclosure there clearly cannot be an intention to give up the right to rely on it.

Estoppel

[45] In the alternative, King's Property argued that when Regent issued the policy despite not having done the survey requested by Riley, and accepted payment of the premiums, Regent lulled it into a false sense of security. Had it known that the survey had not been done, and that cover would not have been issued, it would have attempted to obtain insurance from another company, instead of which it had been

misled and acted to its detriment. The high court found that Regent was estopped from relying on the non-disclosure in the circumstances.

[46] As Regent argued, however, what actually caused prejudice to King's Property was its failure to disclose Elite Fibre's tenancy and the nature of its business. Had it made a proper disclosure Regent would have given priority to the survey. Moreover, Riley had asked Lewis to extend the cover with effect from 15 March 2010, the day before he requested that the survey be done. The policy was revised to cover the premises before the survey was even requested. And when Kyriakidis contacted Riley on 26 April 2010 to ask for a contact number so that the survey could be done, Riley became aware that Regent had not complied with his request to do the survey urgently. No misrepresentation was proved and no estoppel was established.

[47] I conclude, therefore, that King's Property's non-disclosure of the fact that there was a manufacturing business that used highly flammable materials in the process of manufacturing to Regent was material, in that the reasonable, prudent person would consider that it should have been disclosed so that Regent could have formed its own view as to the effect of the information on the assessment of the risk (s 53(1)*(b)* of the Short-Term Insurance Act). The non-disclosure quite obviously induced Regent to extend the cover. And thus Regent was entitled to reject the claim and to regard the policy as void.

[48] In the result:

(a) The appeal is upheld with costs including those of two counsel.

(b) The order of the high court is set aside and replaced with:

'The plaintiff's claim is dismissed with costs, save for those occasioned by the defendant's applications for leave to amend its rejoinder.'

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C H Lewis

Judge of Appeal

Wallis JA (concurring)

[49] I arrive at the same conclusion as Lewis JA, but by a slightly different route. Regent repudiated liability under the policy on the grounds of a material non-disclosure inducing it to provide cover. It was not told that Elite Fibre, a tenant that was manufacturing vehicle bodies on the premises out of fibreglass and resin and associated chemicals, occupied the premises that burned down. Mr Riley, the broker representing King's Property, was unaware of that fact and could not disclose it. He said that had he known he would have informed Mr Lewis, the underwriter representing Regent, of that fact. Mr Fry, the expert witness called on behalf of King's Property, testified that a full disclosure of the nature of the business conducted at the premises must be made by the insured.

[50] King's Property sought to overcome this non-disclosure by invoking the principle that the insured need not disclose information in the possession of the insured (*Malcher & Malcolmess v Kingwilliamstown Fire & Marine Insurance & Trust Co* (1883) 3 EDC 271 at 288). It contended that if Regent had examined its records and prior correspondence it would have discovered that the business of King's Property had been described as 'Property Developer/suppliers Of Bedding Goods' and that, in one earlier email, the building on the property had been described as both offices and a warehouse. That, taken together with the request that the property be surveyed, albeit only so that all the properties in the portfolio had been surveyed, was alleged to have disclosed a risk at least equivalent in nature to the actual risk and accordingly there had been sufficient disclosure of the nature of the risk being underwritten. The contention was that Mr Lewis should have inferred that the premises were being used to manufacture bedding and that this was an equivalent fire risk to the risk posed by manufacturing fibreglass vehicle bodies in the premises. I disagree with both legs of this argument.

[51] As to the first leg King's Property sought to place a duty upon the insurer to make enquiries that it did not in law bear and that was inconsistent with its own duty of disclosure. It required that Mr Lewis fossick around Regent's records unearthing little bits of information that had been disclosed to it in the past and assemble them into a picture that would enable him to determine the nature of the risk and assess whether Regent wished to grant cover and, if so, on what terms. There may be some

uncertainty regarding the extent to which an insurer must consult its own records or search its own or some other data base in search of information before going on risk (12, Part 1 *LAWSA* 2 ed, para 217, fn2). But the suggestion that in this case Mr Lewis needed to read the entire file and put together a picture of the risk from an email written over a month earlier, read in the light of some previous schedules to the policy and a general description of the nature of the insured's business, in my view goes too far. He was being asked to provide cover in respect of a building described to him as offices. The cover was sought under the buildings combined section of the policy, which was not available to cover a manufacturing facility. He was entitled without more to accept that he was being asked to provide cover for that risk. He was not alerted to the fact that he needed to explore further.

[52] An underwriter such as Mr Lewis will in the course of a day receive many requests for cover or amendments to existing policies, either telephonically or by email. His evidence was that he received around 100 emails a day. King's Property suggests that he was obliged, before responding to Mr Riley's request for cover for an office building, under the buildings combined section of the policy, to go back to the file in respect of this client, and peruse its contents over a two year period. There he would have discovered a single email written in February referring to an unidentified property in Crown Mines, but saying that the property had previously been 'on the policy'. That email described the building on the property as 'Offices/warehouse'. Exploration would have revealed that the property had to be 8 Press Avenue, Crown Mines. Taking that together with the description of King's Property as a 'Property Developer/supplier Of Bedding Goods' it was argued that Mr Lewis would have realised that there was a manufacturing operation on the premises using flammable materials.

[53] That this argument involved a number of leaps of logic is plain. The following two are glaring. A supplier of bedding goods is not necessarily engaged in the manufacture of those goods and a warehouse is ordinarily used for storage not manufacturing purposes. And even had Mr Lewis followed this tortuous course he would not have known that a tenant was in occupation of 80 per cent of the premises and using it to manufacture bodies for vehicles out of fibreglass and resin and associated chemicals. Nor would he necessarily have equated the risk of flammable

bedding materials with the risk of working with fibreglass. That brings me to the fallacy underpinning the second leg of the argument.

[54] The contention that there was adequate disclosure of a comparable risk is incompatible with the basic principle stated in para 20 of Lewis JA's judgment, that the insured seeking cover is obliged to disclose to the insurer all matters material to an assessment of the risk. This, as King's Property's own witnesses accepted, necessarily included, in the present case, the occupancy of the premises and the nature of the manufacturing operations being conducted on the premises. That was not disclosed. The proposition that disclosure of some other risk, that was not in fact the risk in respect of which cover was being sought, discharged the insured's obligations, is utterly inconsistent with that basic principle. It is a proposition for which no authority in the long history of insurance was produced and I have found none. The reason why an insured must make a proper disclosure is to enable the insurer to make a proper assessment of the risk it is being asked to cover. It cannot do that if it is not told what that risk is. This is not a case of a slightly inaccurate or insufficient description of the actual risk being covered, which may raise issues of materiality. It is a case where there was no disclosure at all of the particular risk. It is hard to see how a complete non-disclosure of the risk could not be material.

[55] The evidence of Messrs Riley and Fry on behalf of King's Property that the nature of the manufacturing activities in the premises should have been disclosed as material is of itself decisive on the issue of materiality. In any event it is plain that had the risk been disclosed, in accordance with Regent's underwriting policy, it was not one that would have been covered under the buildings combined section of the policy. Indeed it would have been classed as a Z risk that could only be covered after a survey, reference to the Broker Division Technical and on the authority of the General Manager of Regent. There could hardly be a clearer case of the insurer's approach to risk being relevant and cogent on the issue of materiality.

[56] Regent was accordingly entitled to repudiate liability on the policy. The estoppel that found favour with the court below was based on the proposition that King's Property was lulled into a sense of false security and thought that it had insurance cover, with the result that it did not seek cover elsewhere. The answer is

that the only representation made to it was that cover had been extended on the terms of the policy and those terms included the right of the insurer to avoid liability if the insured was guilty of a material non-disclosure inducing the contract. There was no representation that the insurer would not rely on this right if such a non-disclosure came to light as it did when the premises were destroyed by fire and it discovered the true nature of the manufacturing activities being carried on in the premises.

[57] I accordingly concur in the order proposed by Lewis JA.

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M J D Wallis

Judge of Appeal

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