

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2013/0005

BETWEEN:

BARRINGTON POND

Appellant

and

NETHERLAND ANTILLES GENERAL INSURANCE CORPORATION N.V

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mrs. Noelize Knight-Didier and Ms. Joelle Harris for the Appellant
Ms. Cara Shillingford for the Respondent

2019: October 1;
2020: October 14.

Re-issued: October 20.

Civil appeal — Motor vehicle insurance law — Whether a secretary of a company has the capacity to bind the company — Equitable estoppel — Revival of a policy of insurance — Whether paying the balance owing on a premium after the due date and after the policy of insurance is deemed cancelled can result in a revival of the policy of insurance — Whether it would be legitimate to infer an intention to retrospectively cover liability for a total loss by the acceptance of the balance owing on a premium which balance was paid after the total loss occurred and when the item insured effectively ceased to exist before the outstanding balance of the premium was paid — Whether the sending of a renewal notice after a policy has been deemed cancelled can operate as a representation that the policy is still valid — Motor Vehicles Insurance (Third-Party Risks) Act — Whether there is the need to send a notice of cancellation of a policy of insurance for the cancellation of a comprehensive policy of insurance to be valid

The appellant, Mr. Barrington Pond, was the owner of a truck which he insured with the respondent. In October 1991, the appellant renewed his policy of insurance with the respondent for the period 29th October 1991 to 29th October 1992. The appellant paid part of the premium but, as at April 13th 1992, there was an outstanding balance of \$1,326.00 which he gave a signed undertaking to pay by 31st May 1992, failing which "the policy will be automatically cancelled". On 13th May 1992, the appellant signed another undertaking, in more stringent terms, to pay the balance of \$1,326.00 by 31st May 1992, failing which "my insurance shall be deemed to be cancelled as from the date of breach of my promise and the Company shall not be liable for any loss or damage under the policy occurring thereafter". The appellant did not pay the balance of \$1,326.00 on 31st May 1992 as he had undertaken to do.

On 6th October 1992, the appellant's truck was involved in an accident and was a total loss. On 9th October 1992, he filled out a claim form, with the assistance of the secretary at the respondent's office, Ms. Merle Lawrence ("Ms. Lawrence"), claiming indemnification for the loss of, or damage to, his truck, and paid the sum of \$1,326.00, whereupon he was given a receipt which stated that the amount received was for premium in respect of his policy for the period 29th October 1991 to 29th October 1992. By letter dated 30th October 1992, the respondent denied liability to the appellant on his claim, indicating that his policy of insurance stood cancelled as of 31st May 1992 when he failed to pay the balance of the premium due by that date.

On 8th October 1998, the appellant filed a claim against the respondent for breach of contract. After a very protracted period, trial of the matter took place on 24th May 2012. In his witness statement filed on 14th February 2003, the appellant stated that on the day that he signed the undertaking, Ms. Lawrence informed him that should he be unable to complete the payment by 31st May 1992 he should let her know. He stated that before 31st May he called Ms. Lawrence to inform her that he was still unable to meet the payment by 31st May and she told him that that was alright. He further averred that on 31st May he went into the insurance company's office and told Ms. Lawrence that he was still unable to pay, and that Ms. Lawrence continued to assure him that he would remain covered. The appellant stated that since that conversation with Ms. Lawrence on 31st May 1992, he received several notices in terms of his insurance coverage for the following year, 29th October 1992 to 29th October 1993, and the notices indicated that his premium for that year was due on 29th October 1992 and was payable along with the outstanding balance due for the period October 29th 1991 to October 29th 1992.

The respondent had two witnesses, but Ms. Lawrence was clearly their primary witness. In her witness statement filed 12th February 2003, Ms Lawrence stated that she recalled dealing with the appellant in 1992 and recalled that on 13th May 1992 he signed an agreement to pay off the amount outstanding on his insurance premium by 31st May 1992, failing which his insurance policy would be cancelled. She stated that she did not, at any time, give the appellant any extension of the date by which his policy would expire and that, in any event, she had no authority to do such a thing. She also denied, in oral testimony under cross examination, that on 13th May 1992 she told the appellant that if he

had any difficulty meeting the deadline, he should call her; she said that she told him he should come to the office.

After a one-day trial on 24th May 2012, Cottle J delivered judgment in the matter on 18th December 2012, dismissing the appellant's claim.

The appellant appealed, arguing, essentially, that there was a valid policy of insurance existing at the time of the accident. The appellant submitted that due to assurances which he said he received from Ms. Lawrence, as well as the notices of renewal received from the respondent, he was led to believe that the policy of insurance was existing and acted on that belief to his detriment. He argued that, as a result, the respondent should be estopped from denying him coverage under the said policy.

The appellant also argued that the respondent failed to give notice to the Licensing Authority of the fact that they considered the policy of insurance to be cancelled and as such, by operation of the Motor Vehicles (Third Party Risks) Act, the policy was still in force.

Held: dismissing the appeal, and awarding cost to the respondent of two thirds of the amount awarded in the court below, that:

1. An appellate court in reviewing a trial judge's conclusion on the evidence should not vary his conclusion unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. The trial judge was entitled to make the finding of fact, on the evidence which was before him, that Ms. Lawrence was being truthful when she denied that she told the appellant that his signing of the undertaking was just a formality and that he didn't have to comply with it strictly. There was clearly evidence on which the trial judge could make this finding, and there was no error of law made by him in doing so.

Watt or Thomas v Thomas [1947] AC 484 applied.

2. A secretary has no general authority, by virtue of or in the ordinary course of her employment, to make communications to bind a company, and the secretary will only be able to bind the company if she has some general or special authority delegated to her for that purpose. Statements made by the secretary would only bind the company if the statements were within the ordinary domain of a secretary's duties. There was no evidence in this case of any general or special authority delegated to Ms. Lawrence to bind the company by any verbal communication to the appellant, neither was a waiver of the obligation of the insured to pay the premium due on his policy of insurance, whether by a particular date or at all, within the ordinary domain of a secretary's duties. Accordingly, Ms. Lawrence had no authority to bind the respondent company, and the trial judge was entitled to so find.

Sir John Rennie and George Remington v Sir William Wynn (1849) 154 ER 1392 applied; **H.L. Bolton (Engineering) Co. Ltd. v T.J. Graham & Sons Ltd.** [1957] 1 QB 159 applied; **Malhi v Abbey Life Insurance** [1996] LRLR 237 applied; **J.C. Houghton & Co. v Nothard Lowe & Wills Ltd.** [1928] A.C. 1 applied.

3. Whilst there may be a revival of a policy which has lapsed, either by agreement between the parties or by conduct of the insurers such as to estop one of the parties from denying that there is a subsisting policy, it must be clear from the evidence that this was the intention of the parties or the result of their actions. However, even if a revived policy is antedated to the expiration of the period previously covered, this does not necessarily mean that a loss which occurred before the date of the revival has to be paid for by the insurers; to achieve this there must be clear evidence of the parties having intended to make the revival retrospective so as to cover even interim losses. In the instant case, there was no revival of the policy by virtue of the respondent's acceptance of payment of the outstanding balance and the respondent providing the appellant with a receipt showing payment of the balance of the premium for the period 29th October 1991 to 29th October 1992, as there was no evidence that the parties intended the policy to be revived, or alternatively, for any such revival of the policy to be retrospective so as to cover losses occurring before payment of the balance due on the premium. Moreover, as the loss occurring in this case was a total loss, which would have the effect of obliterating the entirety of the appellant's insurable interest in the truck, it would not appear to be legitimate to infer an intention on the part of the respondent to retrospectively cover a total loss, where the item insured effectively ceased to exist before the outstanding balance of the premium was paid.

Halsbury's Laws of England (4th edn., 1994) vol. 25 applied.

4. A party may be estopped from insisting on its rights when it has made a representation to the other party which induced that other party to reasonably believe that the estopped party would not have insisted on its rights and the other party in reliance on that representation, acted to his detriment. A party cannot, however, claim such an estoppel by alleging detrimental reliance on a representation made after the event in respect of which the allegedly estopped party is insisting on its right. Taken at its highest, the appellant's argument is that the respondent sending him renewal notices reminding him to renew his policy and to pay the balance outstanding on the policy amounted to a representation that his policy would remain valid. In the circumstances, where renewal notices are sent out as a matter of course to persons holding policies of insurance which automatically expire as of a certain date, and which are renewable as of the day following the expiry date, the court was entitled to find that it would be unreasonable on the facts of this case for the appellant to believe, and the trial judge to find, that such a renewal notice was a

representation that the policy was still valid notwithstanding the non-payment of the premium and the fact that the balance of the premium was still not paid by the time the truck became a total loss.

Maclaine and others v Gatty and another [1921] 1 A.C. 376 applied.

5. Whether the respondent failed to give notice to the Licensing Authority of the cancellation of a policy of motor insurance as required by the **Motor Vehicles Insurance (Third-Party Risks) Act** is of no moment, as that Act relates to the protection of third-party rights and has nothing to do with the liability of insurance companies to their own insureds. The rights of the parties to the contract of insurance are determined by their contract, and any question as to whether coverage is extended or not extended to an insured by his insurer is an issue of contract law and not statute. In any event, there was no requirement for the appellant to be notified that a notice of cancellation was sent to the Licensing Authority and further there was no evidence that the respondent did not send such a notice. A party cannot seek to rely on the doctrine of estoppel where he was not aware of the facts which could have given rise to the estoppel. So, in the absence of any evidence that the appellant knew that the Licensing Authority had not been notified of the cancellation of his policy, if this be the case, the appellant could not rely on the lack of notification of the Licensing Authority to ground any estoppel disentitling the respondent from asserting its right to treat the policy as having been cancelled by the appellant's non-payment of the outstanding balance of the premium.

Motor Vehicles Insurance (Third-Party Risks) Act, Chapter 46:51, Laws of Dominica 1998 considered; **New West Indian Mutual and General Assurance Co. Ltd. v Colin McDonald and another** [2005] ECSCJ No. 35 applied.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against a judgment of Cottle J dated 18th December 2012, wherein the learned judge dismissed the claim of the appellant (the claimant in the court below) and awarded prescribed costs to the respondent (the defendant in the court below).

Background

- [2] The appellant, Mr. Barrington Pond, was the owner of a dump truck which he insured with the respondent, Netherland Antilles General Insurance Corporation

N.V, in October 1990 for the period 29th October 1990 to 29th October 1991. In October 1991, the appellant renewed his policy of insurance with the respondent for the period 29th October 1991 to 29th October 1992, paying the sum of \$3,000.00 towards the premium and leaving a balance due of another \$3,000.00. On 13th April 1992, the appellant made another part payment on the premium and signed an undertaking to pay the balance of \$1,326.00 by 31st May 1992, failing which “the policy will be automatically cancelled”. On 13th May 1992, the appellant signed another undertaking, in more stringent terms, to pay the balance of \$1,326.00 by 31st May 1992, failing which “my insurance shall be deemed to be cancelled as from the date of breach of my promise and the Company shall not be liable for any loss or damage under the policy occurring thereafter”. The appellant did not pay the balance of \$1,326.00 on 31st May 1992 as he had undertaken to do.

- [3] On 6th October 1992, the appellant’s dump truck was involved in an accident and became a total loss (or a write-off as it would more commonly be referred to). Three days later, on 9th October 1992, he attended at the office of the respondent’s agent where he filled out a claim form, with the assistance of the secretary at the respondent’s office, Ms. Merle Lawrence (“Ms. Lawrence”), claiming indemnification for the loss of or damage to his truck, and paid the sum of \$1,326.00, whereupon he was given a receipt which stated that the amount received was for the premium in respect of his policy for the period 29th October 1991 to 29th October 1992. On 30th October 1992, however, the respondent wrote to the appellant denying liability to him on his indemnity claim on the basis that his policy of insurance stood cancelled as of 31st May 1992 when he failed to pay the balance of the premium due by that date, despite his contractual obligation and written undertaking to do so.

The claim

- [4] On 8th October 1998, just one day before the sixth anniversary of the appellant's indemnity claim, when the claim would become statute barred, the appellant instituted legal proceedings against the respondent for breach of contract.
- [5] In his statement of claim filed on 28th October 1998, the appellant alleged that a policy of motor insurance issued to him by the respondent on a dump truck owned by him was renewed for the period 29th October 1991 to 29th October 1992. He alleged that the premium payable for renewal of the policy was \$6,000.00 and that, by 13th May 1992, he had paid approximately \$5,000.00 of the premium. He alleged that, at the request of the respondent, he gave a written undertaking on 13th May 1992 to pay off the outstanding amount of the premium, along with interest, by 31st May 1992, but that he was provided with the verbal assurance of Ms. Lawrence, an agent and/or servant of the respondent, that should he be unable to honour the undertaking he would be provided with an extension. He alleged too that on or about 31st May 1992, he informed Ms. Lawrence that he was unable to meet the undertaking and was assured by her that coverage would continue to be extended to him. The appellant alleged that, as the anniversary of the policy approached, he received renewal notices from the respondent which indicated that his premium for the period 29th October 1992 to 29th October 1993 was due on 29th October 1992 and that the premium of \$5,711.04, as well as the outstanding balance for the previous year, would be due and payable.
- [6] The appellant alleged that on 6th October 1992, his truck was involved in a vehicular accident and that he informed the respondent, whose representatives invited him to fill out the necessary claim forms and to pay off the balance outstanding on the premium. He alleged that he paid off the outstanding balance of the premium on 9th October 1992 and was issued with a receipt. He alleged too that the truck was assessed by someone appointed by the respondent and was declared a total loss. He further alleged that, by letter dated 30th October 1992, the respondent informed him that, in reliance on the undertaking signed by him on 13th May 1992, they considered the policy to have been cancelled on 31st May

1992. The appellant concluded his statement of claim with the averment that, as a result of the respondent's failure to honour the policy, he suffered loss and damage.

[7] In a defence filed on 13th November 1998, the respondent denied liability to the appellant and alleged that it was a term and/or condition of an agreement dated 13th May 1992 that the appellant must pay the premium on or before 31st May 1992, failing which the policy would be deemed cancelled as from the date of the breach. The respondent alleged that the appellant failed to pay the premium by the stipulated date and the policy lapsed. They denied that that the appellant was provided with an assurance by Ms. Lawrence that should he be unable to meet the undertaking he would be provided with an extension. They denied too that on or about 31st May 1992 the appellant informed Ms. Lawrence that he was unable to meet the undertaking and was assured by her that coverage would continue to be extended to him. The respondent alleged that, if the appellant was involved in a vehicular accident on 6th October 1992, then it was during the period when the policy had lapsed. The respondent admitted that on 9th October 1992, the appellant paid off the outstanding amount of the premium and was issued with a receipt, but they alleged that the appellant had failed to disclose to them the material fact that the truck was involved in a vehicular accident three days earlier, which fact was not known, or presumed to be known, to the respondent. The respondent concluded their defence with an averment that the appellant's policy was null and void.

[8] The appellant filed a reply on 23rd December 1998 in which he again alleged, in somewhat different terms than in his statement of claim, that the assurance given to him by Ms. Lawrence was that "he would be provided with additional time to meet the payment for the policy and that coverage would continue to be extended to him until such time". He alleged that it was never indicated to him that his insurance coverage would be or was at any time cancelled. He also alleged in his reply that, immediately following the accident on 6th October 1992, he reported the

matter to the respondent, whose representative invited him to fill out a claim form and to pay off the outstanding balance of the policy. He concluded his reply with the averment that the respondent was fully aware that the truck was involved in a vehicular accident three days prior to his payment of the outstanding balance of the premium.

[9] After an order on summons for directions made on 3rd March 1999, nothing happened in relation to the court proceedings for nearly four years; then in February 2003 lists of documents and witness statements were filed by the parties.

[10] A pre-trial memorandum was filed by the appellant on 11th September 2003, after which nothing happened in relation to the court proceedings for about nine more years, before the trial of the matter took place on 24th May 2012, nearly twenty years after the claim had arisen.

The trial

[11] In his witness statement filed on 14th February 2003, the appellant recounted his purchase of the truck, his taking out of a policy for comprehensive insurance with the respondent, his making payments to the respondent by way of premium, and his giving of the written undertaking on 13th May 1992 to pay the balance of the premium, with interest thereon, by 31st May 1992. (Although the witness statement carried the date of the promised payment as 13th May 1992, this was corrected to 31st May 1992). The appellant also stated that on the day that he signed the undertaking, Ms. Lawrence informed him that should he be unable to complete the payment by 31st May 1992 he should let her know. He stated that before 31st May he called Ms. Lawrence to inform her that he was still unable to meet the payment by 31st May and she told him that that was alright. He stated that she asked him when he would be able to pay and he indicated to her that he had some money coming in from a job and would pay as soon as he received it. He stated that on 31st May he went into the insurance company's office and told

Ms. Lawrence that he had not received 'the expected sums' and was therefore still unable to pay, and that Ms. Lawrence continued to assure him that he would remain covered. The appellant stated that since that conversation with Ms. Lawrence on 31st May 1992, he received several notices in terms of his insurance coverage for the following year, 29th October 1992 to 29th October 1993, and the notices indicated that his premium for that year was due on 29th October 1992 and was payable along with the outstanding balance due for the period 1991 to 1992.

[12] In his aforesaid witness statement, the appellant stated that on 6th October 1992 he was involved in a vehicular accident with the truck. He stated that he reported the accident to Ms. Lawrence that same day and she told him to come in the following day to fill out the claim form and that he should bring with him the balance of the premium. He stated that he did not go to the respondent's office the following day, because he was busy over the next two days removing the truck from the accident site and relocating it to his home, but he went there on 9th October, filled out the claim form handed to him by Ms. Lawrence, gave her the balance of the premium, and she gave him a receipt. He stated that Ms. Lawrence indicated to him that they would send someone to assess the damage to the truck, and that he was subsequently told that Mr. Adler Hamlet was the assessor who would 'determine the damage'. He stated that Mr. Hamlet later informed him that he had assessed the truck as a total loss. The appellant stated that he was aware that there were discussions between the respondent and Marigot Co-operative Credit Union Limited, which had granted him the loan to finance the purchase of the truck and held a mortgage on the truck, and that he was aware that the respondent had made an offer of \$48,000.00, but this offer was rejected by the Credit Union. The appellant stated that, by letter dated 30th October 1992, the respondent informed him that they considered his policy as having been cancelled from 31st May 1992 for non-payment of the balance of the premium by that date.

[13] The appellant's evidence was not improved by his oral testimony. Under cross examination he testified that, based on what Ms. Lawrence said to him at the time

that he signed the undertaking on 13th May 1992 to pay the balance of the premium by 31st May, and at the time that he telephoned her on a date between 13th May and 31st May to tell her that he would not be able to pay the balance of the premium on 31st May, and also when he visited the respondent's office on 31st May, he understood that his truck would remain covered under the policy whether or not he paid the balance of the premium.

- [14] Mr. Dwight Scotland, the General Manager of Marigot Co-operative Credit Union Limited, served as a witness for the appellant at the trial. In his witness statement filed on 14th February 2003, Mr. Scotland stated that the Credit Union had granted a loan to the appellant to purchase the dump truck and that the Credit Union became the mortgagee in respect of the truck and was beneficially entitled to the proceeds of the insurance policy. He stated that within a day of the accident, the appellant had reported that the truck had gotten into an accident on 6th October 1992 and was severely damaged, and that the appellant had told him that he had reported the matter to the respondent. Mr. Scotland stated that (on a date not given by him) he contacted the respondent's General Manager, Mr. James, who told him that the respondent had received the report and that the appellant was still owing on the premium for that year, and Mr. James raised some doubts as to whether payment would be made for the loss because of that issue. Mr. Scotland stated that normally when the insurance premium is outstanding, the insurance company informs the Credit Union and the Credit Union pays the premium, but that the Marigot Co-operative Credit Union was never informed that the appellant's premium had not been paid, so therefore, as far as the Credit Union was concerned, the policy was in effect. He stated that Mr. James subsequently informed him that the respondent was willing to pay about \$48,000.00, because of depreciation, but that the Credit Union indicated that the offer was not enough. He stated further that there was a subsequent discussion at Mr. James' office with officials of the Credit Union and that Mr. James never indicated during the course of the meeting that the insurance company did not consider themselves liable for the accident.

- [15] Mr. Scotland's witness statement was not challenged under cross examination and so there was nothing added to or deviated from his witness statement by his oral testimony.
- [16] Like was the case with the appellant, there were two witnesses for the respondent.
- [17] The principal witness for the respondent was Ms. Lawrence. In her witness statement filed on 12th February 2003, Ms. Lawrence stated that she had been associated with the respondent from 1990 when it started business in Dominica through Jeff's Services Limited, where she was employed as a secretary. She recalled dealing with the appellant in 1992 and recalled that on 13th May 1992 he signed an agreement to pay off the amount outstanding on his insurance premium by 31st May 1992, failing which his insurance policy would be cancelled. She stated that she did not, at any time, give the appellant any extension of the date by which his policy would expire and that, in any event, she had no authority to do such a thing. She also stated that the appellant made a payment to the cashier at the respondent's office on 9th October 1992 of the amount outstanding on the premium.
- [18] In her testimony in court, Ms. Lawrence denied that prior to the appellant signing the undertaking on 13th May 1992 to pay the balance of the outstanding premium by 31st May, she told him that his signing the undertaking was just a formality and that he didn't have to comply with it strictly. She testified that she was at the time a secretary and was not authorised to give approval of extensions of time to pay outstanding balances, and that this would have to be done by the manager himself. Ms. Lawrence denied that on 13th May 1992 she told the appellant that if he had any difficulty meeting the deadline, he should call her; she said that she told him he should come to the office.

- [19] The respondent's other witness was Mr. Vibert Williams, who was the General Manager of the respondent from 2001, that is, some nine years after the issues in contention between the parties had arisen. He gave a witness statement, filed on 12th February 2003, in which he stated that Ms. Lawrence was employed with the respondent in 1992 as a secretary and, to the best of his knowledge, she could not make a decision to extend insurance coverage to the appellant, since this decision would fall outside of the scope of her authority. He further stated that the only company official authorised to make a decision to extend insurance coverage is the manager.
- [20] Mr. Williams was not available at the date of the trial to give oral testimony, and the parties agreed and the court ruled that his witness statement will be treated as his evidence in chief and that there was no need for cross examination.
- [21] After a one-day trial on 24th May 2012, Cottle J delivered judgment in the matter on 18th December 2012, dismissing the appellant's claim and awarding prescribed costs against him.

The appeal

- [22] Being dissatisfied with Cottle J's judgment, the appellant filed a notice of appeal of the judgment on 7th February 2013 containing several grounds of appeal.
- [23] The appellant filed skeleton arguments in support of his appeal on 30th August 2017, while the respondent filed its skeleton arguments on 17th September 2019. On 30th September 2019, the appellant filed skeleton arguments in reply to the respondent's skeleton arguments.
- [24] The appeal was heard on 1st October 2019, whereupon oral submissions were made by Mrs. Noelize Knight-Didier and Ms. Joelle Harris for the appellant and Ms. Cara Shillingford for the respondent.

- [25] Stripped down to its essentials, this appeal engages the single question of whether the appellant had a valid and subsisting policy of motor insurance with the respondent providing comprehensive insurance coverage of his dump truck at the time when the truck was written off in a vehicular accident on 6th October 1992.
- [26] Several of the facts bearing on this question are not in dispute between the parties. The appellant did take out a policy of insurance with the respondent on his dump truck for the period from 29th October 1991 to 29th October 1992. The appellant made a part payment of the premium and was extended credit for the balance. After further payments were made by the appellant to the respondent towards the amount outstanding, there remained due and owing to the respondent as of 13th April 1992 the sum of \$1,326.00. On that date, the appellant signed a written undertaking to pay the balance due on the premium by 31st May 1992 “if not the Policy will be automatically cancelled”. On 13th May 1992, the appellant signed another undertaking at the request of the respondent to pay the balance of the premium on or before 31st May 1992, and declaring that – “I clearly understand that, if I fail to keep my promise to pay the aforesaid balance of my premium to the Company, then my insurance policy shall be deemed to be cancelled as from the date of breach of my promise and the Company shall not be liable for any loss or damage under the policy occurring thereafter”. The appellant did not pay the balance of the premium by 31st May 1992 as he had undertaken to do. Despite not having paid the amount outstanding on the premium, as the end of the policy year approached, the respondent sent renewal notices to the appellant reminding him that his policy for the ensuing policy year was due on 29th October 1992. The notices specified the net premium payable as of 29th October 1992, with the following note handwritten on the side of the net premium amount “+ balance”. The appellant’s truck became a total loss following a vehicular accident on 6th October 1992, by which time the appellant had still not paid the outstanding balance of the premium. Three days after the truck was written off, the appellant attended at the office of the respondent and filled out a claim form (with the assistance of Ms. Lawrence) for indemnification for the loss of or damage to his

truck, and he paid the sum of \$1,326.00 (to the secretary or cashier at the respondent's office) which was the outstanding balance on the premium. On 30th October 1992, the respondent denied liability to the appellant on the basis that his policy had cancelled because of the non-payment of the balance of the premium.

[27] There are two significant facts in dispute between the parties which bear on the issue for determination in this appeal. The first is that the appellant alleged and the respondent denied that Ms. Lawrence, who was at the material time employed as a secretary in the office of Jeff's Services Limited, which served as the insurance agent of NAGICO in Dominica, assured him that the undertaking signed by him on 13th May 1992 was a mere formality and that he would remain covered under the policy even though the balance due on the premium was not paid. The second is that the appellant alleged and the respondent denied that at the time that the appellant paid the amount outstanding on the premium and the respondent provided him with a receipt, the respondent had known of the write off of his truck.

[28] Of the facts in issue, the trial judge determined that he believed the evidence of Ms. Lawrence that she never gave any assurance to the appellant that his policy would remain in effect and his truck would remain covered under the policy even if he did not pay the balance of the premium in accordance with the written undertaking given by him on 13th May 1992. That the trial judge framed his finding as preferring the evidence of Ms. Lawrence that there was no oral amendment to the written contract is of no moment, because it is clear from the context that he was making a finding as to whose evidence was to be believed relative to the allegation made by the appellant and denied by Ms. Lawrence that she had assured him that his policy would remain in effect even if he did not honour the undertaking to pay the outstanding balance of the premium by 31st May 1992. Any other finding by the trial judge would in any event have been unreasonable. The trial judge would alternatively have had to find that the appellant was asked to come to the respondent's office to sign a document, that he was presented with

the document, and he read and signed the document in which he undertook to pay the outstanding balance of the premium by 31st May 1992, failing which his policy would be deemed to be cancelled and the respondent will not be liable for any loss or damage under the policy occurring thereafter, and at the same time that he was signing that undertaking, he was assured by a representative of the respondent that he would continue to have comprehensive insurance coverage of his vehicle even if he did not pay the amount outstanding on the premium by 31st May 1992, or apparently at any time at all.

[29] The trial judge also determined that he believed Ms. Lawrence when she stated, orally and in writing, that she could not and did not hold herself out as being able to bind the respondent when she was but a secretary at the firm which served as the agent of the respondent in Dominica.

[30] As findings of fact by the trial judge, there is no basis on which to overturn the judge's findings that Ms. Lawrence did not assure the appellant that his policy would remain valid even if he did not pay the amount outstanding on his premium, and that Ms. Lawrence could not and did not hold herself out as being able to bind the respondent in that regard. There was clearly evidence on the basis of which the trial judge could make these findings, and there was no error of law made by him in making the findings. The approach of a court of appeal to such findings of fact made by a trial judge was clearly enunciated by the English Court of Appeal in the well-known and often-cited case of **Watt or Thomas v Thomas**¹ and do not require repetition.

[31] In so far as the judge found as a matter of law that Ms. Lawrence, as an office secretary, could not bind the respondent to validate an otherwise invalidated policy of insurance, this finding is consistent with the case law on this issue dating back as far as cases such as **Sir John Rennie and George Remington v Sir William**

¹ [1947] AC 484.

Wynn² in 1849 and continuing through to cases like **H.L. Bolton (Engineering) Co. Ltd. v T.J. Graham & Sons Ltd.**³ in 1956 and **Malhi v Abbey Life Insurance**⁴ in 1994.

[32] In **Rennie v Wynn**, Patterson J stated that:

“It is quite clear that a secretary, as such, has no general authority whatever either to appoint any one to a situation, or to employ any one on behalf of the Company; neither has he the [697] power, by virtue of or in the ordinary course of his employment, to make communications to bind the Company. When the letters of the secretary become binding upon the Company, it must be by some general or special authority delegated to him by the Company for that purpose.”

The relevant take away from this dicta is that a secretary has no general authority whatever, by virtue of or in the ordinary course of her employment, to make communications to bind a company, and that the secretary will only be able to bind the company if she has some general or special authority delegated to her for that purpose. There was no evidence in this case of any general or special authority delegated to Ms. Lawrence to bind the company by any verbal communication to the appellant.

[33] In **H.L. Bolton (Engineering) Co. Ltd. v T.J. Graham & Sons Ltd.**, Lord Denning stated that:

“Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

The relevant take away is that it is the directors and managers of a company who represent the mind or will of the company and not, as in this case, the office secretary.

² (1849) 154 E.R. 1392 at p. 3.

³ [1957] 1 QB 159 at 172.

⁴ [1996] LRLR 237.

- [34] In **Malhi v Abbey**, Rose LJ quoted with approval the following dicta of Viscount Dunedin from the case of **J.C. Houghton & Co. v Nothard Lowe & Wills Ltd.**:⁵

“The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of Directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like a secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary’s duties.”

A necessary implication of this is that statements made by the secretary would only bind the company if the statements were within the ordinary domain of a secretary’s duties. The waiver of the obligation of an insured to pay premium due on his policy of insurance, whether by a particular date or at all, would not be within the ordinary domain of a secretary’s duties.

- [35] These and other cases on the issue of the secretary’s capacity to bind the company by whom she is employed, show that the trial judge was correct in so far as he determined as a matter of law that Ms. Lawrence, as the office secretary, did not have the authority to bind the respondent by statements allegedly made by her which would have the effect of altering by the spoken word a written contract entered into between the appellant and the respondent, and especially a written contract with such specificity and some formality.

Estoppel

- [36] The trial judge did not in clear terms determine whether he accepted or did not accept the evidence of the appellant that he had reported the accident to the respondent on 6th October 1992, or at any rate before he paid the outstanding balance of the premium, so that when the respondent accepted payment of the balance of the premium from him on 9th October 1992 and gave him a receipt showing that he had paid the balance of the premium for the period 29th October 1991 to 29th October 1992, the respondent was thereby affirming the validity of his

⁵ [1928] A.C. 1

policy. I take the view, though, that evidence of the payment of the balance of the premium by the appellant and its acceptance by the respondent on 9th October 1992 is not relevant to the question to be determined in this case as to whether the appellant's policy was valid on 6th October 1992 when the claim arose. I will address shortly the issue of any estoppel which may arise from the acceptance of payment by and the issue of a receipt to the appellant for the amount outstanding on the premium.

[37] In so far as the appellant seeks to rely not on estoppel but on an actual revival of his policy by virtue of the respondent's acceptance of payment of the outstanding balance and the respondent providing him with a receipt showing payment of the balance of the premium for the period 29th October 1991 to 29th October 1992, this could only be established by clear evidence that the parties so intended. This is what **Halsbury's Laws of England**⁶ had to say on the subject at paragraph 479 of volume 25:

"An insurance policy may lapse for a number of reasons, but the most usual ones are the assured's failure to pay the consideration due from him in the form of premium on the due date or within the period of grace allowed, or his failure to renew the policy. However, there may be a revival of a policy which has so lapsed, either by agreement between the parties or by conduct of the insurers such as to estop them from denying that there is a subsisting policy."

Then at paragraph 480 volume 25 continues:

"A revival of an insurance policy operates as a new contract, and the parties' rights and liabilities, according to ordinary principles, do not begin until the new contract has started to run. Even if the revived policy is antedated to the expiration of the period previously covered, this does not necessarily mean that a loss which has happened before the date of the revival has to be paid for by the insurers; to achieve this there must be clear evidence of the parties having intended to make the revival retrospective so as to cover even interim losses. There may therefore be a considerable difference in effect between a premium paid before the expiration of the period of grace, which the insurers may have to accept even if a loss has already occurred, and a premium paid after the expiration of that period, which will not commit the insurers to accepting a loss which has already occurred, unless it is clearly their intention,

⁶ (4th edn., 1994) vol. 25.

expressly or impliedly, to do so. However, they may make it plain that they are content to agree to a retrospective revival of the policy regardless of whether a loss has, in the meantime, occurred or not.”

In a note to paragraph 480 it is then stated that:

“It would not appear to be legitimate to infer such intent if the intervening loss was total so as to obliterate the entirety of the insurable interest.”

[38] On the facts of this case, there is no clear evidence, or any evidence for that matter, of the parties having intended to make any revival of the policy retrospective so as to cover losses occurring before payment of the balance due on the premium. The evidence which the appellant sought to rely on to assert an intention on the part of the respondent to keep the policy alive or to revive it once it had lapsed for non-payment of the balance of the premium by 31st May 1992, was primarily the assurance which he alleged was given to him by Ms. Lawrence that his policy would remain valid notwithstanding his non-payment of the balance of the premium. But this evidence was rejected by the court and could not therefore be used, either by itself or in conjunction with any other evidence, to establish such an intention. Any purported revival of the policy by the payment on 9th October 1992 of the balance of the premium would not, therefore, retrospectively render the respondent liable for a loss occurring before the date of the payment.

[39] Moreover, the loss occurring in this case was a total loss, which would have the effect of obliterating the entirety of the appellant’s insurable interest in the truck and so, as stated by the authors of the quoted volume of **Halsbury’s Laws of England**, it would not appear to be legitimate to infer an intention on the part of the respondent to retrospectively cover a total loss, such as occurred in this case, where the item insured effectively ceased to exist before the outstanding balance of the premium was paid. Indeed, what was insured on 29th October 1991 was a motor truck valued at approximately \$75,000.00 with which the appellant operated a trucking business, but this was no longer in existence when the balance of the premium was paid on 9th October 1992; what existed then was a wreck which had been assessed after the accident as having a value of \$10,000.00, and about

which the appellant said (when questioned in court) - "I try but I didn't get anything out of it, you know, so it stayed there and rotten up".

[40] Returning now to the issue of estoppel, which the appellant submitted arose from the respondent's acceptance of the balance of the premium from him and providing him with the receipt, I take the view that no such estoppel would arise in this case. A party may be estopped from insisting on its rights when it has made a representation to the other party which induced that other party to reasonably believe that the estopped party would not have insisted on its rights and the other party had relied on that representation to its detriment. A party cannot, however, claim such an estoppel by alleging detrimental reliance on a representation made subsequent to the event in respect of which the allegedly estopped party is insisting on its right. By the time that the claim had arisen in this case, there was no representation made or alleged to have been made to the appellant (which was capable of giving rise to an estoppel) by accepting payment of the outstanding balance of the premium from him and providing a receipt to him evidencing this payment. Estoppel does not open a door which is shut; it merely prevents an open door from being shut.

[41] The position is the same with respect to the assistance given by Ms. Lawrence to the appellant in filling out the claim form; this was after the accident which caused the truck to become a total loss and has no direct bearing on whether the policy was valid at the time that the truck became a total loss.

[42] Accepting then that Ms. Lawrence never gave any assurance to the appellant that his policy would remain valid even although he did not pay the outstanding balance of the premium by 31st May 1992, despite the undertaking given by him in writing and the very clear and strong language in the written undertaking that his policy would be cancelled if he did not pay the outstanding balance by that date. Accepting, though not required to, that Ms. Lawrence did not have the authority to override the unequivocal provision in the signed undertaking. Recognising that the

question of whether the appellant had informed the respondent on 6th October or 9th October 1992 of the accident in which his truck was written off is of no direct relevance in the determination of whether the policy was valid at the time that the truck was written off. Recognising also that the fact that the cashier at the respondent's office accepted payment from the appellant of the balance which had been outstanding on his premium and provided him with a receipt showing payment of the balance of the premium for the period 29th October 1991 to 29th October 1992, did not amount to a retrospective revival of the policy, nor create any estoppel disentitling the respondent from treating the policy as having been cancelled. Recognising too that the assistance given to the appellant by Ms. Lawrence after the accident could not possibly have led him to act to his detriment in not paying the balance of the premium before the accident. The appellant is, therefore, left with only a watered-down estoppel submission that, by virtue of the fact of the respondent sending him renewal notices which reminded him that the policy had to be renewed on 29th October 1992 and informing him of the premium payable by him by that date, and with the handwritten note "+ balance" added after the stated amount of the premium, the respondent had thereby represented to him that his policy would remain valid notwithstanding the non-payment of the balance of the premium which he was contractually bound to pay and which he gave a written undertaking to pay by 31st May 1992, and by virtue of the fact that he had acted on this representation to his detriment by not paying the premium which he was obligated to pay and undertook to pay, the respondent was thereby estopped from treating his policy as cancelled as of the date of the accident when he had still not paid the balance of the premium.

- [43] It is a notorious fact that renewal notices are sent out as a matter of course to persons holding policies of insurance which automatically expire as of a certain date and which are renewable as of the day following the expiry date; this would be typical of property, including motor, insurance policies. The proposition that the receipt of such a notice would cause an insurance policy deemed cancelled by non-payment of the premium to remain in force notwithstanding, or to be revived,

and to continue to provide coverage to a person fully cognisant and reminded of the consequences of non-payment of the outstanding balance on his premium by virtue of his having signed an undertaking which clearly stated that non-payment by a particular date will result in the policy being cancelled and no coverage being extended under the policy, is a rather preposterous one. I take the view therefore that, on the facts of this case, the receipt of such a notice or notices could not reasonably represent to the appellant that his cancelled policy remained valid or had been revived and would provide continued comprehensive coverage to him notwithstanding the non-fulfilment of his undertaking to pay the balance of the premium payable on his policy of motor insurance. Moreover, that continued non-payment of the balance of the premium which, but for the accident on 6th October, was likely to remain unpaid until the expiry of the term of the insurance on 29th October 1992, constitutes detrimental reliance inviting equitable relief, is an attempt to use equity in a most inequitable way.

- [44] Of note is the fact that the appellant never pleaded, in his statement of claim or in his reply, and never alleged, in his witness statement or in his evidence in court, whether in examination in chief, under cross examination or in re-examination, that he did not pay the outstanding balance due on his premium because he was led to believe that he did not have to pay the balance of the premium which he owed, until he had a claim under the policy or until the end of the term of the policy on 29th October 1992. There was absolutely no averment or allegation by the appellant that if he had not been led to believe that it was alright not to pay the balance of the premium by virtue of his receipt of the renewal notices (or otherwise) then he would have paid it by the due date or by some other date preceding the accident and thus kept his policy alive. Such an averment in the pleadings or allegation in the evidence would at least have been required to justify the bald claim of prejudice to the appellant.

[45] In terms of the case law on equitable estoppel, I find that the dictum of Lord Birkenhead in the case of **Maclaine and others v Gatty and another**⁷ is both apt and pithy. In delivering judgment in the House of Lords, he said:

“Where A has by his words and conduct justified B in believing that a certain state of fact exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.”

[46] On the facts of our case, the learned judge did not find, as I do not myself, that by sending a renewal notice to the appellant reminding him to renew his policy at the expiration of the term for which the policy was issued, the respondent had thereby justified the appellant in believing that his policy remained valid notwithstanding that he had undertaken to pay the outstanding balance of the premium by 31st May 1992, failing which his policy will be cancelled, and notwithstanding that he had not paid the balance of the premium either on 31st May 1992 or at any time before the insured vehicle became a total loss on 6th October 1992. The trial judge also did not find, as I do not myself, that the appellant continuing to default in the payment of the balance of the premium until the writing-off of his truck was acting to his prejudice. The appellant was simply continuing not to do what he was required under the policy to do. The contract of insurance required the respondent to insure the appellant's truck and required the appellant to pay the premium. The respondent issued a policy of insurance on the appellant's truck, but the appellant did not pay the premium in full, even after credit was extended to him to pay the outstanding balance by a specified date; he could not therefore be justified in believing that his truck would remain insured regardless.

[47] For the reasons just advanced, I do not accept that the appellant was entitled to the benefit of any equitable estoppel which would have the effect of disentitling the respondent from denying liability to him when his truck was written off over four months after the date by which he undertook to pay the balance due on his

⁷ [1921] 1 A.C. 376 p. 386.

premium on pain of cancellation of his policy, and when the balance of the premium was still not paid by the time the truck became a total loss.

Notice of cancellation

- [48] The trial judge did not address in the course of his judgment, nor have I addressed thus far in this judgment, the issue of the respondent not informing the appellant, the Credit Union and probably also the Licensing Authority about the cancellation of the appellant's policy of insurance on his motor truck consequent on his failure to pay the outstanding balance due under the policy as of 31st May 1992. The trial judge appeared not to consider the issue to be legally consequential on the material facts of this case, as I do not myself. I will, however, *ex-abundanti cautela*, address it briefly.
- [49] On 13th May 1992, the appellant was summoned to the respondent's office to sign an undertaking to pay the balance outstanding on his premium by 31st May 1992, failing which his policy of insurance with the respondent would be deemed to be cancelled after that date. Why would the respondent be required, just 18 days after the signing of the undertaking, to notify the appellant that his policy was cancelled because he had not fulfilled the written undertaking which he had just given to pay the balance of his premium on 31st May 1992 on pain of cancellation of his policy? The respondent was not obligated to give any such notice to the appellant and they understandably, in the circumstances, did not do so. The respondent was also not obligated to notify Marigot Co-operative Credit Union Limited of the non-payment by their borrower of the balance of the premium on his policy of insurance and of the consequence of his non-payment of the balance. The responsibility to ascertain this lay clearly with the Credit Union, and financial institutions which have given loans secured by insured property make it their business to ascertain from their borrowers the status of the insurance policies on properties used to secure loans, especially with respect to the payment of insurance premiums.

- [50] Pursuant to section 6 of the **Motor Vehicles Insurance (Third-Party Risks) Act**,⁸ the respondent is, however, required to notify the Licensing Authority of the cancellation of a policy of motor insurance held by it; the consequence of not doing so is that the policy remains valid until the Licensing Authority is notified of its invalidity. Notably, this provision is contained in an Act the short title of which is “**Motor Vehicles Insurance (Third-Party Risks) Act**”; and the long title of which reads – “AN ACT to make provision for the protection of third parties against risks arising out of the use of motor vehicles”; and the entire thrust of the Act is to protect the interests of third parties by ensuring that all motor vehicles licenced for use on public roads are the subject of third party insurance, so that an innocent third party who sustains loss and damage arising from any motor vehicle accident can be reasonably assured of compensation for the loss and damage sustained by him. This has nothing to do with the liability of insurance companies to their own insureds; such coverage, referred to as comprehensive, rather than third-party, insurance coverage, need not even exist; and, where it exists, it is certainly not protected under the **Motor Vehicles Insurance (Third-Party Risks) Act**.
- [51] An insurance policy is a contract between two parties, the insurer and the insured, and the validity and/or enforceability of the policy *inter se* is the validity and/or enforceability of the contract between them. The interests of third parties may be regulated by statute, but the rights of the parties to the contract of insurance are determined by their contract, so that any question as to whether coverage is extended or not extended to an insured by his insurer is an issue of contract law and not statute.
- [52] No issue of estoppel can arise in relation to the contract of insurance between the appellant and the respondent from the provisions of the **Motor Vehicles Insurance (Third-Party Risks) Act** which, as is clear from both the short and long titles of the Act, concern third parties, that is, parties other than the insured and the insurer. In any event, if it is that the respondent did not notify the Licensing

⁸ Chapter 46:51, Laws of Dominica 1998.

Authority of the cancellation of the appellant's policy, there is no evidence as to whether the appellant was aware that the respondent had sent or had not sent a notice of cancellation to the Licensing Authority and, indeed, there is no requirement that either the insurer or the Licensing Authority must notify the insured of any notice of cancellation to the Licensing Authority.

- [53] These facts call to mind the facts of the case of **New West Indian Mutual and General Assurance Co. Ltd. v Collin McDonald and another**,⁹ where Gordon JA, in giving judgment in this Court, took the view that no estoppel could arise where the party claiming the estoppel was not aware of the facts which could have given rise to the estoppel. So, in the absence of any evidence that the appellant knew that the Licensing Authority had not been notified of the cancellation of his policy, if this be the case, the appellant could not rely on the lack of notification of the Licensing Authority to ground any estoppel disentitling the respondent from asserting its right to treat the policy as having been cancelled by the appellant's non-payment of the outstanding balance of the premium.

Conclusion

- [54] A summary of the material findings (of fact and law) made or affirmed in this judgment include:
- (1) The appellant took out a policy of insurance with the respondent on his dump truck for the period 29th October 1991 to 29th October 1992.
 - (2) The appellant paid a portion of the premium payable for the policy and was extended credit for the remainder.
 - (3) On 13th May 1992, the appellant signed a written undertaking to pay the balance of the premium, amounting to \$1,326.00, on or before 31st May 1992, failing which his policy will be deemed to be cancelled as of 31st

⁹ [2005] ECSCJ No. 35 .

May 1992 and the respondent will not be liable for any loss or damage occurring under the policy thereafter.

- (4) The secretary at the respondent's agency office, Ms. Merle Lawrence, did not assure the appellant at the time that he signed the undertaking or at any time thereafter that his truck would continue to be covered under the policy even though he did not pay the balance of the premium due by him.
- (5) In any event, Ms. Lawrence, as a secretary at the respondent's agency office, would not have had the legal authority to bind the respondent to an assurance given by her to their insured that he did not have to comply with his contractual obligations and undertakings to pay the balance due on the insurance premium for him to continue to enjoy comprehensive insurance coverage of his truck.
- (6) The appellant did not pay the outstanding balance of the premium by 31st May 1992, or at any time before the truck became a total loss on 6th October 1992.
- (7) Renewal notices sent to the appellant by the respondent, as the anniversary of the policy neared, reminding him to renew his policy at the end of the policy year, and stating the amount of the premium to be paid for renewal, would not result in the policy remaining in force or being revived after it was cancelled on 31st May 1992 for non-payment of the outstanding balance of the premium.
- (8) Renewal notices are sent to policy holders as a matter of course by insurance companies, and the sending of such notices does not amount to a representation made by the insurance company which would estop them from asserting that the policy had previously been cancelled.

- (9) The adding of a note "+ balance" after the amount of the renewal premium did not alter the fact that the policy was not kept valid or revived by the renewal notice, and the respondent was not estopped by sending the renewal notice from denying liability to the appellant for the loss of his truck.
- (10) Payment of the outstanding balance of the premium after the truck became a total loss did not retrospectively revive the policy after its cancellation over four months prior, absent clear evidence of the parties having intended to effect a retrospective revival of the policy so as to cover loss or damage occurring between the date when the policy had become cancelled and the date of its supposed revival.
- (11) Provision by the respondent to the appellant of a receipt evidencing payment of the amount outstanding on the premium after the truck became a total loss would still not retrospectively revive the policy after its cancellation, especially where, as in the present case, the respondent denied having prior knowledge of the accident.
- (12) By the time the appellant paid the amount outstanding on the premium, the insured item, being a dump truck valued at approximately \$75,000.00 with which the appellant operated a trucking business, had ceased to exist and what existed then was a wreck, assessed as having a value of \$10,000.00, but which the appellant said he could get nothing out of and so it stayed there and rot.
- (13) Things said or done by the respondent after the appellant's truck had become a total loss could not constitute or form part of a representation to the appellant that his policy would be valid to cover loss which occurred before the things were said or done.

(14) This would apply both to the acceptance of payment by and the provision of a receipt to the appellant for the amount outstanding on the premium and to assistance rendered by the secretary to the appellant in filling out the claim form after the truck had become a total loss.

(15) Estoppel does not open a door which is shut, it merely prevents an open door from being shut.

[55] These findings of fact and law made or affirmed in this judgment, lead ineluctably to a single answer to the single question posed in paragraph 25 of this judgment, that the appellant did not have a valid and subsisting policy of motor insurance with the respondent providing comprehensive insurance coverage of his dump truck at the time when the truck was written off in a vehicular accident on 6th October 1992. The trial judge did not err therefore when he dismissed the appellant's claim in the court below and awarded costs to the respondent.

[56] The appeal is accordingly dismissed, and the respondent is awarded its costs of two-thirds of the amount awarded in the court below.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar