On these considerations we dismissed the appeal with costs assessed at Le40.

AMES, P. and DOVE-EDWIN, J.A. concurred.

Appeal dismissed.

NEW INDIA ASSURANCE COMPANY LIMITED *v.* ZABIAN

COURT OF APPEAL (Ames, Ag. P., Dove-Edwin, J.A. and Cole, J.): November 16th, 1964
(Civil App. No. 8/64)

[1] Agency—insurance agent—non-disclosure—imputation to principal of agent's knowledge: Where an agent of an insurance company becomes aware of material facts concerning a proposal, which ought to be disclosed, the policy is not invalidated by the non-disclosure of these material facts in the proposal form: the knowledge of the agent is the knowledge of the company (page 184, lines 29–35; page 185, lines 13–33).

[2] Estoppel — representation — insurance — insurer's approval of policyholder's accounting system—estoppel from relying on book-keeping endorsement to policy: Approval by an insurer of the way in which a policyholder of the insurer conducts his accounting system estops the insurer from relying on a book-keeping endorsement in the policy requiring the policyholder to maintain certain standards as a condition precedent to the right to recover anything under the policy (page 185, lines 13–39).

[3] Insurance — conditions of policy—condition precedent—book-keeping duties of policyholder—estoppel: See [2] above.

[4] Insurance — conditions of policy—condition precedent—book-keeping duties of policyholder—request for further information: If a book-keeping endorsement in an insurance policy not only requires a policyholder to maintain certain standards as a condition precedent to the right to recover under the policy, but also enables the insurer to request further necessary information in the event of a claim, this information must be limited to what is reasonable in the circumstances (page 185, lines 13–18; page 185, line 40—page 186, line 3).

[5] Insurance — non-disclosure—agent's knowledge of non-disclosure—imputation to principal of agent's knowledge: See [1] above.

[6] Insurance—property insurance—book-keeping duties—condition precedent—estoppel: See [2] above.

The respondent brought an action against the appellant insurance company in the Supreme Court to recover damages for breach of a contract of insurance.

The respondent, a shop owner, changed from one insurance company to the appellant insurance company, and arranged a policy against burglary and housebreaking at an unusually low premium with their agent. Following upon an alleged burglary, the respondent claimed under the policy, but the appellants refused to pay and the respondent brought the present action.

The respondent contended that the appellants' agent called at his shop to discuss the proposed policy and the respondent informed him that his previous insurers would not renew his policy. In addition, the respondent explained his mode of accounting and that another shop of his had previously been burgled. The proposal form was completed by the agent in answer to questions put to the respondent, who could only read sufficient English to make out figures and write his own name. The respondent alleged that the form was not read over to him but he signed it and paid the premium. Subsequently, his shop was broken into and goods stolen. He reported to the police and gave the appellants a list of articles stolen.

The appellants' agent, however, contended that the respondent had only told him the name of his previous insurers, but not of their refusal to renew his old policy. The agent also claimed to have read the completed proposal form to the respondent and denied being told of the respondent's other premises being burgled, in spite of a relevant question in the proposal form.

The appellants sought to avoid the policy on the following grounds: (a) there had been no proof of burglary; (b) they were induced to accept the insurance proposal by the respondent's fraud in not disclosing a material fact, *i.e.*, the refusal of his old insurance company to renew his policy; (c) the respondent's claim was fraudulent; and (d) the respondent failed to keep proper books of account as he was obliged to do under the terms of the policy, so that the appellants were unable to verify the respondent's claim.

The Supreme Court of Sierra Leone (Jones, C.J.) gave judgment for the respondent. The proceedings in the Supreme Court are reported in 1964–66 ALR S.L. 88, 1964 (1) ALR Comm. 4.

The appellant made the following main contentions on appeal. First, the judge misdirected himself as to the facts and the law when he held that the proposal form was wrongly filled in by the agent and that the agent knew that the respondent was illiterate. Secondly, the judge erred in law by not applying the law relating to non-disclosure of a material fact in an insurance contract. Thirdly, the judge erred in law by holding that, because the respondent lived among his stock, his failure to keep records of purchases and sales, even though it was a policy condition precedent that he should, was not a breach of the condition precedent. Fourthly, the judge misdirected himself as to the facts by holding that the respondent's claim had been proved, thereby disregarding the evidence of the chartered accountant. Finally, the judge erred in law by refusing to admit in evidence part of the police report.

Cases referred to:

(1) *Ayrey* v. *British Legal & United Provident Assur. Co., Ltd.*, [1918] 1 K.B. 136; (1918), 118 L.T. 255.

(2) *Bawden* v. *London, Edinburgh, & Glasgow Assur. Co.*, [1892] 2 Q.B. 534; (1892), 8 T.L.R. 566, followed.

Gelaga-King for the appellants;
Basma for the respondent.

AMES, Ag. P.:

The respondent is a merchant with a shop in Westmoreland Street, Freetown. The appellants were the insurers of his "stock-in-trade of general merchandise, furniture, fixtures and fittings, property of the insured whilst contained in his shop" against fire under one policy, and against "damage . . . following upon . . . an actual forcible and violent entry of the premises . . ." under another policy. The amount involved in each policy was £12,000. The proposal form, in each case, was dated May 14th, 1962, and each policy was also dated the same May 14th, and was for the period from that date until May 13th, 1963.

On November 17th, 1962, the shop was broken into and a large quantity of merchandise was stolen. The respondent made a claim under the burglary and theft policy. On December 5th, 1963, neither his claim, nor any part of it, having been met, the respondent took this action against the appellants, claiming £4,290 damages for breach of the contract of insurance. The appellants admitted

that they had repudiated liability under the contract and averred, *inter alia,* that the respondent had obtained the contract by the fraudulent concealment of a material fact, that some conditions precedent to the right to recover under the policy had not been fulfilled, that the declaration of loss was fraudulent or fraudulently exaggerated, and that there was no forcible and violent entry, and no proof of burglary at all. The action ended on July 28th, 1964, when judgment was given for the respondent for £3,905. 17s. 9d. with costs. This is an appeal against that judgment.

Twelve grounds, counting sub-divisions of two grounds, were filed with the notice of appeal. These were withdrawn at the outset of the hearing and replaced by six amended grounds, one being sub-divided into two, making seven. One raises a question of the refusal to admit a document in evidence. The others turn on questions of fact. It will save some repetition to make a general comment here about the facts. The learned Chief Justice, in a long, considered judgment, went into the evidence about the matters in dispute at length and set out his findings of fact. Civil appeals are by way of rehearing. Examination of the evidence, oral and documentary, and consideration of the comments of both counsel has not made me, speaking for myself, see any reason whatever to question any of the findings of fact. Having said that, I will now consider the grounds of appeal.

Ground 1 is this:

> "The learned trial judge misdirected himself both as to the facts and the law when he held (a) that the proposal form (Exhibit U) was wrongly filled in by a defence witness, Mr. Writer; and (b) that the aforesaid Mr. Writer knew that the plaintiff could neither read nor write except to sign his name."

The learned Chief Justice found the fact to be that the respondent is illiterate in English, except that he can sign his name and read figures. There is the clearest evidence of this. He is Lebanese and is literate in Arabic, but not in English. He said so himself. His writing clerk said that he used to read and write letters for him, as he had done for his, the respondent's, father before him. When this clerk went to the shop to make a list of the stolen things, he found that the respondent had prepared one in Arabic. The respondent interpreted it to him and he wrote it in English. After this he typed it out. One of the documentary exhibits is a long list in Arabic. So Mr. Gelaga-King's argument, for the appellants, that if a man can sign his name the law will presume that he is

literate unless he shows the contrary is of no moment. The contrary was shown.

As to the other part of this ground, it follows that the respondent could not have filled in the proposal form. His evidence was that Mr. Writer did, and that was found to be the fact. There was no suggestion that the respondent's clerk, or any one else, did so.

It will be convenient here to consider the position of Mr. Writer. Was he the agent of the appellants? There is the clearest evidence that he was. He arranged the insurance from start to finish, and he accepted both proposal forms and issued both policies, all on the same day.

Ground 2 is:

"That by so holding as aforesaid, the learned trial judge erred in law by not applying the law relating to non-disclosure of a material fact in an insurance contract, to wit that the Royal Exchange Assurance Co. had refused to renew the plaintiff's policy."

The finding of fact (1964–66 ALR S.L. at 96; 1964 ALR Comm. at 12) was—"that the plaintiff told Mr. Writer the truth about his previous insurance history," although it did not find its way into the two proposal forms. That finding was based on the evidence of the respondent and Mr. Writer and the manager of the Royal Exchange Assurance Company. The policy which was not renewed was in respect of fire, and the manager told Mr. Writer that he had refused to renew it, adding that it was the usual practice to inform another insurance company about previous experiences with a client. There was no evidence that the respondent had had an insurance against burglary with the Royal Exchange or that its renewal had been refused. The respondent had had a Lloyd's insurance policy against burglary and theft in respect of another shop of his. This had been effected by Barclays Bank, as agents for Lloyd's. There had been a burglary and theft in that shop. This was disclosed to Mr. Writer by the respondent. Indeed, it was the manager of Barclays Bank who had sent him to the respondent. Disclosure to the agent is disclosure to the principal: see *Bawden* v. *London, Edinburgh, & Glasgow Assur. Co. Ltd.*, (2) and *Ayrey* v. *British Legal & United Provident Assur. Co. Ltd.*, (1).

Grounds 3 and 4 can be considered together. They are:

"3. The learned trial judge erred in law by holding that, because the plaintiff lived among his stock, his failure to keep records of purchases and sales, even though it was a policy

condition precedent that he should, was not a breach of the said policy condition precedent.

"4. The learned trial judge misdirected himself as to the facts by holding that the plaintiff's claim had been proved, thereby disregarding the evidence of defence witness Mr. Brian Trevor Beck, chartered accountant and manager of Castleton Elliot Company—a company of long standing and repute—who had testified that 'it would have been absolutely impossible for the plaintiff to have produced a list of goods stolen without the documents we required' and had reported that 'no part of the plaintiff's claim in my opinion has been proved'."

There was attached to the policy what is called a book-keeping endorsement, which required the respondent to keep three accounting records, as a condition precedent to the right to recover anything under the policy. These provisions were not to debar the appellants "from asking for any further information which [they] may consider necessary in the event of a claim being made."

It was found as a fact that the respondent explained to Mr. Writer the way he ran his business before he agreed to insure his goods. The evidence showed what he did in the way of accounts. (No doubt it would not have been considered satisfactory in Bombay business houses or those in London or some of those in Freetown. But I doubt if it would be much different from those of other Lebanese merchants in Kissy Street, East Street, Westmoreland Street or elsewhere in Sierra Leone who are illiterate in English). However that may be, Mr. Writer was shown how the respondent ran the business. He could have refused to insure, or insured at an added premium, or agreed to insure notwithstanding the manner of accounting. He did the last of these, and not only did the last, but did it at a premium which was less than the usual in Freetown (£36 as against £60) which was paid and accepted.

Here also Mr. Writer's knowledge was the appellants' knowledge. How then can the latter now say that this condition precedent has not been complied with, especially as there is no evidence that the respondent was ever told that there was to be this condition precedent? Having accepted the proposal and having accepted the premium, the appellants issued the policy with this endorsement attached to it.

Quite apart from the foregoing, I think that a further matter should be considered. It is in connection with the last part of the

book-keeping endorsement, about requiring "any further information . . . considered necessary." The law will interpret that as limited to what is reasonable in the circumstances. Casselton Elliott (as the firm continues to be commonly called) as agents for the appellants required a large amount of detailed information, in respect of 52 & 54 Westmoreland Street and the respondent's previous shop, all for the previous two years. This information included "bill-rolls," "breakdowns" and "make-ups" in accountants' jargon, meaningful no doubt in business houses with properly conducted systems of accounting, but what meaning can it have in the context of the respondent's business? Having agreed to insure the stock with their eyes open to his system, I doubt if it is reasonable to require all these documents.

Of course, when there is a 100% efficient system of accounting, Casselton Elliott could no doubt assess a loss with absolute accuracy to the last penny (or nowadays to the last cent). But their method of assessment was not possible here, and the learned Chief Justice had to give judgment, one way or the other, on the evidence and the probabilities. This brings me to the sixth ground of appeal, which is, that the judgment was "unreasonable or cannot be supported having regard to the facts." That was not the case. In my view, the evidence supported the judgment amply.

There remains the fifth ground of appeal, which is:

> "The learned trial judge erred in law in refusing to admit in evidence an extract of the report of the witness Freeman, when it had been shown that the original was lost, and in so refusing the learned trial judge misdirected himself as to the facts."

After the burglary, the police were called in and a sub-inspector made an investigation and wrote a report which was put in the case file; he had no doubt that there had been a burglary. He was cross-examined as to what had been stated in the report, agreeing with one suggestion put to him, and denying another. Later in the trial an assistant superintendent of police was called as a witness by the defence. He said that the report was missing from the file, and that he had no copy of it, and that, "on the strength of the report," he had replied to a letter from Mr. Writer. A copy of the letter was kept in the police file. This was tendered in evidence, objected to, and after argument, rejected by the learned Chief Justice, who said:

> "I rule against accepting the document in evidence. The contents appear to be the recollection by the witness of a

written report of another police officer who had given evidence and has himself been cross-examined on some of these very contents."

In my opinion the copy of the letter was not admissible. If the original was despatched to Mr. Writer, he should have produced it or explained why he could not. Had that been done, I think that I would have allowed the original, or copy, to be put in as secondary evidence of the contents of the missing report or some of them. But that was not done. Anyhow, the point seems to me unimportant. There was evidence that the premises were broken into and that is what the report had said.

I would dismiss the appeal.

DOVE-EDWIN, J.A. and COLE, J. concurred.

Appeal dismissed.

DAVIES *v.* DAVIES

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): November 18th, 1964
(Civil App. No. 12/64)

[1] **Family Law — divorce — cruelty—test of cruelty—grave and weighty cruelty to be judged subjectively:** Cruelty as a ground for divorce must be grave and weighty as between the parties themselves and should not be judged objectively (page 188, lines 16–20).

The appellant petitioned for divorce in the Supreme Court.

The petition was brought on the ground of cruelty; although the court considered that this was a marriage which ought to be dissolved, it refused to grant a decree because the evidence of legal cruelty did not come up to the required standard. The proceedings in the Supreme Court are reported at 1964–66 ALR S.L. 83.

The appellant contended that the lower court was wrong in applying an objective test in ascertaining the degree of cruelty required.

During for the appellant;
Miss Wright for the respondent.