IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2313 OF 1994

BETWEEN:

SAFARI CLOTHING COMPANY Ltd ..... PLAINTIFF

- and -

PEARL ASSURANCE COMPANY ..... DEFENDANT

CORAM: **Tembo, J**
Chirwa, of Counsel for the Plaintiff
Chisambiro, of Counsel for the Defendant
Nkhoma, Official Interpreter

J U D G M E N T

By originating summons, the plaintiff has applied to the Court seeking the Court's interpretation of a watchman warranty in a policy of insurance against theft, under which policy the plaintiff is the insured and the defendant is the insurer. The application has been made under, or in accordance with, order 14A of the Rules of the Supreme Court.

The Court is, therefore, asked to interpret the following condition of the parties' insurance policy -

"It is a condition of this Policy that -

(a) the insured shall employ a watchman who shall be given instructions that when the premises are closed against customers and callers the whole of the premises shall be patrolled by him at intervals.

(b) in the event of the services of such Watchman being temporarily or permanently discontinued or unavailable the insurance shall be deemed to be suspended until the Company shall have been advised and their assent in writing to the continuance of the insurance obtained.".

The application is supported by an affidavit of the plaintiff. Let me note, here, the fact that there were also two other affidavits for the defendant. In accordance with the requirement of Order 14A, to the effect, that the object of the defendant's affidavit evidence should be to confirm or adopt or supplement the material facts deposed to by, and on behalf of, the plaintiff but not to traverse or challenge or contradict such facts, the parties agreed that the Court should ignore the affidavits of the defendant to the extent that they are inconsistent with that of

the plaintif and, therefore, record that there was no dispute between the parties as to the necessary material facts about the case before the Court. Consequently, I will mainly, but not only, make reference to the affidavit evidence of the plaintiff in the construction of the policy provision put before me. In addition to the foregoing, let me also note that, in terms of rule 1 (1) (a) of Order 14A I find that the question put before the Court is suitable for determination without a full trial of the action affecting the parties. The facts surrounding the question for the determination of the Court, namely, the interpretation of the Watchman Warranty set out above, emerge clearly from the affidavit of the plaintiff, as follows: The plaintiff took out a policy of insurance in respect of its premises at Ginnery Corner in the City of Blantyre; in particular against loss or damage to be caused by theft involving entry to or exit from those premises. The policy is dated 30th November, 1993. For the purposes of the watchman warranty, in that insurance policy, the plaintiff had a contract with Securicor (Malawi) Limited for the provision of guard services for the period of 18:00 hours to 06:00 hours everyday, from Monday to Friday and for 24 hours on Saturdays and Sundays. During the period of the policy, a theft occurred at the plaintiff's premises. Consequent thereupon, a claim was lodged by the plaintiff for compensation under the policy. The defendant has declined to pay the plaintiff's claim contending that the plaintiff was in breach of the watchman warranty, in that there was no guard on duty at the time the theft occurred. There was, however, still in existence then the contract between the plaintiff and securicor (Malawi) Limited for guard services, except that no guard was provided for the plaintiff's premises because the staff of Securicor were on strike of which the plaintiff had no notice whatsoever. On his part, the plaintiff, therefore, maintains the view that the defendant is liable to compensate the plaintiff for the loss occasioned by the theft, hence this application.

I have heard both counsel on the construction of the watchman warranty put before me. Again, the warranty is expressed as follows:-

"It is a condition of this policy that-

(a) the insured shall employ a watchman who shall be given instructions that when the premises are closed against customers and callers the whole of the premises shall be patrolled by him at intervals.

(b) in the event of services of such watchman being temporarily or permanently discontinued or unavailable the insurance shall be deemed to be suspended until the Company shall have been advised and their assent in writing to the continuance of the insurance obtained.".

On his part, Mr. Chirwa, Counsel for the plaintiff had submitted that in interpreting the policy condition set out above the Court should have regard to the maxim **noscitur a sociis,** that a word in itself does not have an absolute meaning, and that its meaning can, therefore, be gathered from the context. Counsel further submitted that such was also the case in respect of statutory interpretaton, as was noted by Viscount Simonds in the case of Attorney General - v- Prince Ernest Augustus of Hanover (1957) A.C. at page 463, that "It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiquous.". Consequently, Mr Chirwa invited the Court to read the policy of insurance in its entirety in order to better understand the words to be construed. Mr Chirwa also submitted that should the Court find the policy provision in question to be ambiguous, it must be construed against the defendant, who prepared it. For that proposition, he relied on the following passage from Cheshire and Fifoot's Law of Contract, 9th Edition, pages 12 to 13-

> "If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.".

In that respect, Scrutton L. J, in the case of **Szymonowski and Company - v - Beck and Company** (1923) 1 K.B. at page 466, stated the principle as follows-

> "Now I approach the consideration of that clause applying the principle repeatedly acted upon by the House of Lords and this Court - that if a party wishes to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms... an ambiguous clause is no protection.".

On the watchman warranty set out above Mr Chirwa invited the Court to, in particular, focus its attention on paragraph (b) thereof in order to ascertain the meaning of the expression "in the event of the services of such watchman being temporarily or permanently discontinued or unavailable...". In that regard, Mr Chirwa submitted that the expression referred to a positive act of the plaintiff, of discovering that such services had so been discontinued or that they were unavailable. It was further his submission that such expression could not have meant that the parties had intended to subject the insured to circumstances which were out of his control. If the parties by that provision should be taken to have intended to refer to an act over which the plaintiff, as the insured, had no control, then, the Court

should find the provision to be ambiguous and, therefore, to be construed against the defendant. Mr Chirwa thereby concluded his submissions.

On his part, Mr Chisambiro, Counsel for the defendant, submitted that the Court should interpret the watchman warranty in its entirety and not only part (b) thereof. He maintained the view that the warranty was not ambiguous in that its framers had only used ordinary English words. In that respect, Mr Chisambiro further submitted that, the warranty should therefore be construed in the ordinary and popular sense in which the parties must have intended to use the words constituting the expression of the watchman warranty. He further submitted that if the Court does not find the words used to have meanings ascribed to them as ordinary English words, then it should find that the expression in question consists of words used in their technical sense and trade usage, and that it should therefore, be presumed that the parties had intended that such words should receive and have their technical and trade usage meaning. For these propositions, Mr Chisambiro cited the case of **Starfire Diamond Rings Limited - v - Angel** (1962) 2 Lloyds' Report 217, in particular the comments of Upjohn L.J that: " I deprecate any attempt to expound the meaning or further to define words such as these which are common words in everyday use, having a perfectly ordinary and clear meaning.". In that case, the Court had to determine the scope of an exclusion's clause in a jeweller's Block Policy excepting liability for theft when the assured's car was "left unattended". The driver had gone thirty - seven yards from the car in order to relieve himself and a suitcase containing jewellery was stolen by a thief in that short period of time. The Court had held that in the circumstances the car had been "left unattended". Besides that, in the case of **Robertson - v - French** (1803) 4 East 130, 135, Lord Ellenborough C.J., made the following comments on the rules of construction applicable to the terms of a policy of insurance.

> "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases. It is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, **Viz.** that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.".

Mr Chisambiro further submitted that the provision for the discovery by the insured of the fact that the services of the watchman had temporarily or permanently been discontinued or that they were unavailable, did not relate to acts which were outside the control of the insured, it being clearly understood that under paragraph (a) of the warranty it is stipulated that the insured shall employ a watchman and issue to him instructions respecting the patrol of the premises of the insured. It was further submitted that granted such a situation, the plaintiff ought to have known when guard services had temporarily or permanently been discontinued or indeed were unavailable, and thereupon to report that fact to the defendant. In that connection it was also submitted that much as the plaintiff could not have had prior knowledge or notice respecting any strike by the watchman, he could nonetheless have known that the services had been temporarily or permanently discontinued or that the services were unavailable and then report of that fact to the defendant, as he was under an obligation so to do. Mention should also be made of what Scruton L.J. referred to as a "rougher test," in the construction of an exemption clause, see the case of **Rutter - v- Palmer** (1922) 2 K.B. 92. That appeal case involved a question upon the true construction of an owner's risk clause in a garage proprietors contract, in respect of which Scrutton L.J. expressed the following -

> "In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liabiity for negligence, the clause will more readily operate to exempt him.".

As I have already pointed out in this judgment, the plaintiff had taken out a policy of insurance against loss or damage by theft involving entry to or exit from the insured's premises. The defendant, as the insurer, undertook to indentify the plaintiff, as the insured, against such risk subject to the terms, exceptions and conditions contained in the policy. The watchman warranty, the subject matter of the application under consideration, was one of the conditions of the policy subject to which the defendant had assumed his obligation to indemnity the plaintiff, in the event of loss or damage due to theft. I find the watchman warranty to be a condition of the policy notwithstanding the use of the expression warranty in the headnote to that provision. If it were not for the watchman warranty, the defendant's liability would not have been indispute at all, it being admitted by both parties that indeed a theft has occurred at the plaintiff's premises and that the plaintiff has sufferred loss and damage against which he is insured.

Applying the rules of construction outlined above, do I say that

the defendant should succeed in denying liability by reason of the operation of the watchman warranty? Or do I hold the defendant liable to compensate the plaintiff notwithstanding the watchman warranty? Paragraph (a) of the watchman warranty establishes the obligation of the insured, namely, that the insured must employ a watchman to whom the insured must thereupon issue instructions concerning the patrol of the premises of the insured. Thus, the insured was under a duty to employ a watchman and to instruct him on the patrol of the insured premises as stipulated under paragraph (a) of the watchman warranty. If the insured does not do so, he would be in breach of the watchman warranty. It is not contended by the defendant that the insured was in breach of the watchman waranty in respect of paragraph (a) thereof. As a matter of fact, instead of directly recruiting a watchaman, the insured had entered into a contract with Securicor (Malawi) Limited for the provision of guard services at the premises of the insured. Let me note that the obligation of the insured to instruct the watchman, so engaged, in accordance with the provision of paragraph (a) of the watchman warranty, was in no way diminished or indeed altogether taken away thereby. However, there is no contention by the defendant that the plaintiff was in breach of this part of the watchman warranty. That leaves me with the construction of paragraph (b) of the warranty, which is as follows -

> "in the event of the services of such watchman being temporarily or permanently discontinued or unavailable the insurance shall be deemed to be suspended until the Company shall have been advised and their assent in writing to the continuance of the insurance obtained.".

What do I say, if any at all, is the plain, ordinary and popular meaning of this provision, and in particular the expression thereof "in the event of the services of such watchman being temporarily or permanently discontinued or unavailable"? The word "discontinued" is the opposite of the word "continued". In its plain, ordinary and popular sense, the word "continue" means-

(a) (to) "remain, keep in existence, carry on, last, go on, prolong" as defined by **Collins Gem English Dictionary 1987 Ed;** or

(b) (to) " maintain, keep up, not stop (action etc), take up, resume, prolong... still be in existence, stay, not cease." as defined by **The Concise Oxford Dictionary of Current English** 7th Ed. by J B Sykes.

The word "discontinued" therfore has meanings which are opposite to those ascribed to the word "continue" or "continued". similarly, the word "unavailable" is the opposite of the word "available". In its plain, ordinary and popular sense the word "available" means -

(a) "Obtainable, accessible" as defined by Collins Gem English Dictionary 1987 Ed; or

(b) "capable of being used, at one's disposal, within one's reach" as defined by **The Concise Oxfon Dictionary of Current English** 7th Ed. by J B Sykes.

Subject to what I have just done and to some further explaination I have offered hereinbelow, I would view the interpretation or meaning of paragraph (b) of the watchman warranty in the light of the expression of UpJohn L J quoted above, namely, that I, too, deprecate any attempt to expound the meaning or further to define words such as these which are common words in everyday use, having a perfectly ordinary and clear meaning. In that sense, I also adopt the rule of construction which was succinctly laid down by Lord Ellenborough in the **Robertson** case, cited above, to the effect that -

> "the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.".

Upon a proper construction of paragraph (b) of the watchman warranty, it cannot be reasonably contended and maintained that, in the light of its context, the paragraph has words or any expressions which ought to be understood by their known trade usage or in any other peculiar and special sense. I am, therefore, content to merely ascribe to paragraph (b) of the watchman warranty such a meaning as would be consistent with the plain, ordinary and popular sense thereof. The paragraph, therefore, ought to mean, and it means, that the parties had agreed and, thereby mutually, intended that should the services of the watchman temporarily or permanently cease to exist or indeed should such services thus not be obtainable or be inaccessible, the contract of insurance between them shall automatically be suspended upon the occurence of such a thing. This ought to be understood to be the intention of the parties in the light of the insured's obligations under paragraph (a) of the watchman warranty. In my judgment, it did not matter who caused the discontinuance or the unavailability of the services, as between the insured and the watchman. Either of them could give rise thereto, but what was crucial for the relations of the parties, was that upon such event occurring, or indeed upon such circumstances arising, the contract of insurance should automatically, thereupon, be suspended until the insured shall have informed the Company of Insurance, the defendant, of those circumstances and the Company thereafter shall have assented in

writing to the subsequent continuance of the contract of insurance. If, during the period when the contract of insurance was suspended the insured remains silent without notifying the Company of the occurrence of the circumstances for the suspension of the policy, and also without seeking the Company's assent in writing for the policy to continue to be effective, the policy would remain so suspended indefinitely.

Any loss or damage due to theft to be suffered by the insured during the period when the policy is so suspended cannot be construed to be the liability of the Company. In such a case, the insured cannot be allowed to successfully claim compensation from the Company. In the instant case, the theft occurred at the insured's premises when in fact the services of the watchman had temporarily been discontinued by the watchman and such services were, therefore, unavailable for the insured. Consequently, interms of paragraph (b) of the watchman warranty, the theft occurred during the suspension of the insurance policy. Like in the **Starfire Diamond Rings Limited** Case, the suspension need not be of any substantial duration. It was the intention of the parties that any discontinuance of the services of the watchman should operate to suspend the insurance policy - hence the qualification "temporarily or permanetly discontinued.". Costs are for the defendant.

MADE in Chambers this 8th day of August, 1995, at Blantyre.

A K Tembo
JUDGE