IN THE KWAZULU-NATAL HIGH COURT, DURBAN **REPORTABLE**

REPUBLIC OF SOUTH AFRICA

CASE NO. 2489/05

In the matter between:

MARTIN JOHNSON PROPERTIES CC **PLAINTIFF**

and

MUTUAL & FEDERAL INSURANCE CO LTD **DEFENDANT**

J U D G M E N T

NDLOVU J

[1] In its particulars of claim the plaintiff sought, firstly, rectification of the contract of insurance concluded between it and the defendant; secondly, payment of the sum of R4 092 706,23 being for cost of reinstating its business premises which had been destroyed by fire and, thirdly, payment of R120 000,00 being for loss of rental occasioned by the interruption of the plaintiff's business. At the time of the said destruction and interruption the plaintiff was insured with the defendant.

[2] The plaintiff, a close corporation, was the registered owner of a piece of land described as Lot 1635 Pietermaritzburg, physically situate at 7 Birmingham Road in Pietermaritzburg (hereinafter referred to as "the premises"). The plaintiff carried on business as a landlord by letting the premises on a rental basis ("the business") to its sister corporate entity, a

company known as Martin Johnson (Pty) Ltd which in turn carried on the business of shoe manufacturing on the premises. However, Martin Johnson (Pty) Ltd ("the operating company") was not involved in the current litigation, albeit for reasons that will become apparent in due course, frequent reference to the operating company in this judgment was unavoidable.

[3] During or about early July 2004 the plaintiff and defendant concluded a written contract of insurance, in terms of which the defendant, with effect from 1 July 2004, insured the premises and the business against the risks defined in the insurance policy ("the policy"). The material terms of the contract were, among other things, that the defendant was to insure the premises and the business in the sum of R8 million in respect of damage by fire to the premises and R120 000,00 in respect of consequential loss arising from interruption of the business.

[4] Under the heading "*Fire Section*" in the schedule to the policy appeared a list of what was described as "Warranties" numbered from "W0001 to W0010" whereby the plaintiff was stated to have undertaken that:

> "W0001. Not more than 50 litres of flammable liquid flashing under 38 degrees Celsius and/or 210 litres of flammable liquids over 38 degrees Celsius (would be) used or stored.
> W0002. Not more than 5 woodworking machines are used.
> W0003. No buffing, grinding or similar process is carried out.
> W0004. No plastics are used or stored.
> W0005. No artificial heating or drying other than by steam is done.
> W0006. No boiler in communication with the factory.
> W0007. No painting or varnishing is done.
> W0008. All waste is swept up and removed from the building daily.
> W0009. No storage of raw materials or finished goods in the building.
> W0010. Not more than sufficient packing and wrapping materials for one day's use are brought into the building."

[5] As it will be shown hereafter, the conclusion of the insurance contract in July 2004 aforesaid was in the form of an insurance renewal in respect of the insurance cover which the plaintiff had held, initially with Protea Insurance Company and which was subsequently taken over by the defendant. It was

therefore important at the outset to understand the policy in that context. More on this aspect will be dealt with shortly.

[6] On or about 13 October 2004 a fire broke out in the premises causing considerable damage to the premises and which resulted in severe interruption to the plaintiff's business. An insurance claim was lodged by the plaintiff with the defendant. However, the defendant repudiated liability thereof on the grounds as set out in its plea referred to hereunder. That was basically the subject matter of dispute between the parties.

[7] On the pleadings the plaintiff alleged, in relation to its claim for rectification of the policy, as follows:

> "7. The policy does not record the common intention of the parties correctly in that it erroneously included a set of warranties numbered W0001 to W0010 which appear in the schedule headed THE SCHEDULE FIRE SECTION ("the warranties").
> 8. The warranties were included as a result of a bona fide mutual error of the parties and were not intended by them to be part of the policy.
> 9. In the premises the policy stands to be rectified by the deletion of the warranties."

[8] The computation of the plaintiff's claims, namely R4 092 706,23 and R120 000,00 was shown in a document marked "Annexure B" which accompanied the plaintiff's particulars of claim.

[9] The defendant disputed the plaintiff's averments. In particular, the defendant, in its plea, alleged that the plaintiff had failed to comply with the warranties, particularly W0001, W0004 and W0008 and that the plaintiff was consequently in material breach of the contract. Alternatively, the plaintiff failed to disclose that it would store or use on the premises the products referred to in the warranties. The plaintiff was only prepared to admit and avoid in relation to its non-compliance with warranties W0001 and W0004. It maintained its denial that the said warranties were included in, and formed part of, the policy and further reiterated its claim that the policy fell to be rectified accordingly. According to the plaintiff W0008 dealt with the issue

which the plaintiff, after all, always ensured was being taken care of. In other words, the waste was being swept up and removed from the building on a daily basis even before this warranty came into effect. Therefore, non-compliance with this warranty was denied.

[10] A further allegation by the defendant was that the plaintiff had materially breached the contract by failing to take all reasonable steps and precautions to prevent accidents or losses, in that the plaintiff, among other things, used or stored flammable products and/or plastic on the premises, alternatively failed to use or store flammable products and/or plastic on the premises in a safe manner or outside of harms way.

[11] The defendant further alleged that the fire which broke out on the premises on 13 October 2004 was deliberately started by plaintiff, alternatively, a person or persons acting on plaintiff's behalf with plaintiff's knowledge or consent to obtain a benefit under the policy, or was occasioned by the connivance of plaintiff, as contemplated in terms of the policy.

[12] On that basis the defendant submitted that it had cancelled the policy with effect from 14 October 2004 and had tendered the return of all premiums received from that date.

[13] In its replication the plaintiff joined issue and pleaded that the defendant was at all material times aware of the nature of the plaintiff's business conducted on the premises and the methods used in the conduct of the business (which, as already indicated, was a shoe manufacturing operation), and that the defendant insured the premises in full acceptance of such risks and on the basis that such risks were covered by it.

[14] According to the plaintiff, the defendant had this awareness from the time the defendant took over the policy from Protea Insurance ("Protea") in 1997. In particular, the defendant was aware of the use and storage of flammable liquid on the premises and also the use and storage of plastic on the premises. On or about 14 April 1999 and 23 October 2001, among

others, the defendant, in its own right, conducted comprehensive surveys of the premises, the business conducted therein and the risks insured by the defendant. When the defendant did so it acquired knowledge of the nature of the insured premises, the business conducted therein and the risks insured by the defendant, including knowledge of the fact that the warranties now relied upon by the defendant were not and could not be complied with in the nature of the business conducted on the premises. The defendant, notwithstanding such knowledge and without demur, renewed the insurance on each occasion when the policy came up for renewal thereafter, namely in 2000, 2001, 2002, 2003 and 2004 respectively. By its conduct the defendant represented to the plaintiff that the plaintiff was conducting its business not contrary to the terms of the policy and that the defendant did not, or would not, rely on the warranties. As a result the defendant acted on the presumed correctness of the said representations to the plaintiff's detriment by, for example, renewing the insurance with the defendant year after year and not obtaining additional or replacement insurance to cover the specific risks referred to in the warranties. The said representations were made negligently.

[15] Accordingly, the plaintiff pleaded, in the alternative, that the defendant should be estopped from relying on the alleged plaintiff's failure to comply with the said warranties.

[16] The defendant joined issue on the plaintiff's replication by way of a rejoinder. In particular, the defendant reiterated that the warranties formed part of the policy as evident from Annexure "A" to the plaintiff's particulars of claim. Therefore, according to the defendant, if it was held that the warranties were not agreed to by the plaintiff, then, in that event, there was no agreement between the parties. Accordingly, the defendant was not liable for the claim and tendered to return all the premiums paid under the policy with effect from 14 October 2004. Alternatively, the plaintiff should be estopped from denying that the warranties were part of the policy. Further, the plaintiff failed to object to the inclusion of the warranties at any stage from February 1998 to the time when the fire broke out on 13 October 2004. Plaintiff had paid the premiums on each and every month from February 1998 to October

2004. This conduct of the plaintiff represented to the defendant that over the period February 1998 to October 2004 the plaintiff was aware of the presence of the warranties in the policy and that the plaintiff had agreed and consented to their inclusion in the policy. Hence the defendant acted on the plaintiff's presentations aforesaid, to the defendant's prejudice, by indemnifying the risk of the insurance policy subject to the said warranties. The plaintiff's representations were made negligently.

[17] The historical overview relating to the insurance contractual relationship between the parties was outlined by the plaintiff, including the events starting from about 1981 (when the plaintiff first took out the insurance with Protea) to 1 January 1997 (when the defendant took over the policy from Protea), to 16 February 1998 (when the warranties appeared for the first time in a mid-term policy endorsement) up until when the fire broke out on 13 October 2004 causing extensive damage to the premises. These matters were dealt with in more detail in the evidence adduced on behalf of the plaintiff by its three witnesses, namely, Dennis Graham (the plaintiff's co-owner), Gokul Adimulam Naidoo (administrative manager) and Gordon George Hestermann (insurance broker), on the one hand; and on behalf of the defendant by Tracy Duckham (commercial underwriting clerk), Craig Graham McLaurin (head of the underwriting department) and Neil Russell Taylor (assistant manager) on the other.

[18] At the commencement of the trial the Court granted an order, by consent between the parties, in the following terms:

> "1.1 The separation of the issue set out in paragraph 2 hereof in terms of Rule 33 (4) to be heard and determined as a first issue before all other issues in the action;
>
> 1.2 a direction that all other issues are to stand over for later determination. (Such other issues will include any breach of the warranties not admitted by Plaintiff in paragraph 3 hereof).
>
> 2.1 The first issue concerns the set of warranties numbered W0001 to W0010 which appear as part of the policy of insurance in the Schedule headed 'The Schedule Fire Section' which are referred to herein as 'the warranties'.
>
> 2.2 The first issue is:

2.2.1 whether Plaintiff is entitled to and should be granted an order of rectification of the said policy to exclude the warranties as pleaded in paragraphs 7, 8 and 9 of the Particulars of Claim;
2.2.2 If not, whether the said warranties were avoided as averred in Plaintiff's Replication."

[19] The plaintiff's first witness, Dennis Graham Wilkens was the co-owner of both the defendant and the operating company. He co-owned the two entities with his brother George Wilkens. He told the Court that they came from a family in the United Kingdom which was involved in the shoe manufacturing industry. His brother George was the first to emigrate to South Africa in 1959 and was followed by the witness in 1963. They started the shoe manufacturing business in Pietermaritzburg in 1981 after acquiring some land there for this purpose. The land was registered in the name of the defendant which in turn leased it to the operating company for the purpose of operating the shoe manufacturing business aforesaid.

[20] Mr Wilkens testified that two insurance policies were taken out in respect of both the defendant and the operating company at about the time when the business started operating in 1981. During the same year two persons, who subsequently became prominent in the defendant's business, were employed, namely Gokul Naidoo and Dan Naidoo. Gokul Naidoo was initially employed as a wage clerk but he subsequently became Mr Wilkens' right hand man and ultimately took over as the administrative manager of the business in 1990. Dan Naidoo was in charge of the "floor production" which was the actual manufacturing section. Due to the nature and apparent complimentary co-existence of these entities, it was not clearly indicated during the evidence whether the Naidoos were employed by the defendant or the operating company. Nor did it appear they were themselves aware of their status in that regard. However, nothing turned on this uncertainty.

[21] On or about 15 March 1997 the first fire (which however this case was not concerned about) broke out causing extensive damage to the premises and disruption to the business. At the time, both Naidoos were already in the employ of the defendant. One Jim Butterworth held the position of managing

director. Mr Wilkens pointed out that at no stage whilst the plaintiff was insured under Protea (Policy No. MSPBM0095630) were warranties, such as the ones now in dispute, ever imposed. When the first fire broke out Mr Wilkens was in the UK and he had to return to South Africa to put in the two insurance claims, being in respect of the plaintiff and the operating company respectively. A settlement agreement was reached in that case and payment made accordingly, although, according to Mr Wilkens, the payment did not compensate for the actual loss suffered. At that stage there was no insurance broker serving as intermediary between the defendant and Protea.

[22] Mr Wilkens proceeded: On 4 November 1997 Protea wrote a letter to the plaintiff advising of Protea's takeover by the defendant. Mr Wilkens was still in the UK when this happened. Subsequent to the take-over the defendant pointed out to the plaintiff that a broker would have to be introduced to serve as intermediary between the parties. Hence, the insurance broker Gordon Hestermann was duly appointed and introduced into the equation. In his administration of the plaintiff's affairs, Mr Hestermann generally communicated with Gokul Naidoo, the latter representing the plaintiff.

[23] The Protea take-over was notified to the plaintiff by the defendant's letter dated 4 November 1997 which read as follows:

> "Dear Insured
> RE : YOUR COMMERCIAL POLICY NUMBER MS PMB 1830969
> We refer to the above subject and wish to advise that your Insurer is now the Mutual and Federal Insurance Company Limited and your policy number is amended from MS PBM 0830969 to 138NO76723,
> In addition, this Policy is changed from an annual contract paid monthly to a monthly contract renewable and paid monthly. In view of this, the attached Endorsement applies. The anniversary date of the Policy is 1 July 1998.
> We trust you find the above in order. Should you have any queries please do not hesitate to contact your Insurance Advisor.
> Yours faithfully
> COMMERCIAL LINES
> THIS LETTER TAKES THE FORM OF A POLICY ENDORSEMENT AND SHOULD BE FILED WITH YOUR POLICY PAPERS."

[24] By the defendant's letter dated 16 February 1998 a mid-term policy endorsement was issued by the defendant whereby the warranties were introduced for the first time in the policy. Mr Wilkens told the Court that he

was not aware of these warranties. In any event, he said, it would have been impossible for the plaintiff to comply with some of them, particularly the first warranty which prohibited the storage of flammable liquids. This was the case because there were many flammables used in the factory, most of which came in 210 litre drums. They were used for cleaning and preparing shoe soles so that glue would adhere. They were also used for cleaning the finished product. These flammable liquids included methelen, athelen, ketone and benzene. The plaintiff used significant amounts of these products. For instance, in a week (that is, five working days) there would be about 2000 litres supply of flammable stock on the shop floor. It was therefore absolutely impossible to comply with the first warranty, Mr Wilkens emphasised .

[25] Mr Wilkens further stated that the second warranty was not applicable to the functioning of the plaintiff; the third warranty could also not be complied with because buffing (that is, polishing) was the essential ingredient of the plaintiff's business. The fourth warranty was also absolutely impossible to comply with since most of the shoe soles were made of plastic. There was therefore no way that plastic could not be used and/or stored on the premises. The fifth, seventh, ninth and tenth warranties were also impossible to comply with. The sixth warranty was not applicable because the plaintiff had no boiler. The eighth warranty was also not applicable because it was the plaintiff's normal practice, after all, to sweep up all the waste and remove it from the building daily, even before the warranty was introduced.

[26] Mr WIlkens told the Court that if the plaintiff was aware of the presence of the warranties in the policy or if the defendant had approached the plaintiff about the plaintiff's non-compliance with the warranties then the plaintiff would indeed have considered looking for another insurance because, by virtue of the plaintiff's nature of business, it was utterly impossible for the plaintiff to comply with the warranties.

[27] He further testified that when the fire broke out on 13 October 2004 he was in Spain. When he returned to South Africa he found that extensive damage had been caused by the fire which had destroyed equipment

including machines and computers. However, the plaintiff managed to borrow equipment from other sources and within a month the business was up and running again. He then put in two insurance claims, one in respect of the plaintiff and the other in respect of the operating company. Indeed, there was a separate action instituted by the operating company against the defendant arising from the same cause of action. When the plaintiff was notified by the defendant that the insurance claim would not be met, the plaintiff's business had to shut down, which was the current position.

[28] Under cross-examination Mr Wilkens stated that any flammable liquid under 50 litres would not have been enough for the purpose of the operation of the defendant's business. He suggested that it was not proper of the defendant to have simply inserted the warranties in the policy by way of a letter dated 16 February 1998. According to Mr Wilkens it was incumbent upon the defendant to have discussed the matter with the plaintiff before the warranties were introduced into the policy.

[29] *Mr Dickson,* for the defendant, referred Mr Wilkens to the letter dated 16 February 1998 accompanying the policy endorsement which included the warranties for the first time. The first paragraph of the letter read as follows:

> "In accordance with your instructions we have endorsed your policy and have pleasure in enclosing the relevant document. Please read it carefully to ensure that it correctly states your requirements."

[30] *Mr Dickson* put it to Mr Wilkens that if the policy endorsement had been read carefully as was required of the plaintiff to do in terms of the letter, it would have been noticed that the warranties had been introduced. However, Mr Wilkens insisted that he never saw the letter dated 16 February 1998 together with its enclosure until after the fire on 13 October 2004. In any event, he reiterated that, from his previous practice, anything new to the policy would first be discussed with the plaintiff's insurance brokers and then with the plaintiff. Mr Wilkens then referred to the survey reports which were compiled by certain inspectors who, acting at the instance and behest of the defendant, occasionally visited the premises to inspect and ascertain whether there was compliance with the defendant's insurance requirements. He

pointed out that the reports indicated the presence of the flammable liquid and other stuff prohibited in terms of the warranties but that at no stage did the defendant ever approach the plaintiff about the matter. However, *Mr Dickson* put to the witness that the plaintiff was not entitled to rely on the surveyor's reports because at all times the plaintiff did not have access to and was not aware of such reports.

[31] *Mr Dickson* also put to Mr Wilkens that since the plaintiff was, in terms of the defendant's handbook ("the Blue Book"), the relevant extracts of which appeared at pages 1, 2 and 3 of Bundle "A", the plaintiff was classified as a "Leather Trader and Tannery" by virtue of the defendant's nature of business. The warranties were therefore not included in the policy by mistake but that was done in terms of the warranty provision appearing in paragraph 7 under the heading "Leather Traders and Tanneries" appearing at page 2 of Bundle "A". Mr Wilken's comment to this was simply that he had never heard about the Blue Book.

[30] Under re-examination, Mr Wilkens stated that the flammable stuff was all the time kept on the premises, even during the subsistence of the Protea Insurance policy, during the period when the first fire broke out, and thereafter. There had never been a change in the plaintiff's mode of business operation. Indeed, he said, when the defendant's inspectors visited the premises they would surely have seen the plastics, solvents, packaging, buffing and grinding, heating and everything which the defendant purported to prohibit in terms of the warranties. The plaintiff had never received any letter or communication from the defendant to the effect that the inspector or surveyor had picked up some problem during the inspection or that the plaintiff was allegedly breaching any warranty. All the time the plaintiff was paying its premiums in accordance with the policy.

[31] The next witness was Gokul Adimulam Naidoo who told the Court that he joined the employ of both the plaintiff and the operating company during 1981 as a wage clerk. He confirmed that when Mr Wilkens departed for the United Kingdom Jim Butterworth became the managing director and the

witness assumed the responsibility of the administration of the plaintiff. Dan Naidoo took the responsibility of production. Mr G. Naidoo testified that prior to 1997 he was not aware of the insurance arrangements relating to the plaintiff. That was the responsibility of Mr Butterworth at the time. When the first fire broke out during the morning of 15 March 1997 (a Saturday) he arrived on the premises when the fire was still burning. There was extensive damage to the building and the goods inside. As a result, the plaintiff operated on a temporary basis from a building that was situated just behind the premises of the plaintiff. The insurance claim was submitted but, according to him, the defendant did not meet the claim having repudiated its liability on the policy. Mr Butterworth left the employ of the plaintiff in or about the end of the year 2000. The witness then took over his duties.

[32] Mr Naidoo further told the Court that as from the year 2000 surveyors or inspectors were sent by the defendant to come and conduct inspection in the factory (the premises).

[33] He was shown the letter dated 23 February 1998 appearing at page 1 of Bundle "B" (IB) written by Hestermann and addressed to the witness. The letter purported to forward documentation related to the policy endorsement under cover of the defendant's letter dated 16 February 1998 referred to above. Mr Naidoo disputed ever receiving Mr Hestermann's letter aforesaid including the policy endorsement concerned. He said if he had received Mr Hestermann's letter he surely would have read it, but not the endorsement. He stated that normally he did not read the policy schedules but only looked at the letters addressed to the plaintiff by Mr Hestermann. He had never seen the ten warranties appearing at page 99 of Bundle "A" (99A). He also stated that in his view if anyone were to have approached him about the plaintiff's non-compliance with the alleged warranties, the plaintiff would have had the option of attempting to renegotiate the insurance policy with the defendant or if that failed, then the plaintiff would be left with no other option but to look for an alternative suitable insurance elsewhere. However, nobody ever approached the plaintiff about the warranties. The inspector who came to

conduct the inspection of the premises never took up the matter with him or anyone from the plaintiff.

[34] Mr Naidoo confirmed that the business of the plaintiff continued to operate until it was eventually shut down on 31 March 2005. This was due to insufficient funds to keep the business operating.

[35] It was pointed out to Mr Naidoo, under cross-examination, that from July 1998 to July 2004 when the policy was renewed annually, all these warranties except the 9th one were included in the policy. Mr Naidoo responded that he never noticed that because he did not read the policy.

[36] The next witness for the plaintiff, Gordon George Hestermann, began his career in the insurance industry in 1959 at the age of 16 when he was employed by Norwich Union Insurance Company as a clerk in the United Kingdom where he worked until 1978. He joined Protea Insurance Company in Durban in 1980 as an inspector. In 1982 he joined Price Forbes Insurance Brokers and was later transferred to their Pietermaritzburg branch at the end of 1986. As from 1991 he started his own business of insurance brokering under the name and style of Hestermann Insurance Brokers CC.

[37] Mr Hestermann testified that when the defendant took over the Protea business he was asked to get involved as a broker. He was appointed as such with effect from 1 July 1997. There were Protea policies in place already including those of the plaintiff and the operating company. He assisted in the assessment of the plaintiff's insurance claim in respect of the 1997 fire incident and the defendant made an offer which was accepted by the plaintiff and the matter was settled. He confirmed the settlement agreement document appearing at page 26A which was duly accepted on behalf of the plaintiff by Mr Butterworth. His signature appeared as the first witness thereon which he confirmed.

[38] He told the Court that he had then started acting on behalf of the plaintiff, as his client. He had a previous working relationship with the

defendant and was aware that the defendant had taken over the business of Protea as a going concern. After notifying the defendant of his involvement with the plaintiff he had then received the insurance documentation from the defendant pertaining to the plaintiff's business as appearing from page 27A. From that time all the correspondence from the defendant to the plaintiff was transmitted through his office. Indeed, the policy schedule dated 18 June 1997 for the period 1 July 1997 to 30 June 1998 (Policy No. MSPBM0830969) pertaining to the plaintiff as the insured was delivered to him by the defendant. He pointed out that in terms of this insurance schedule there were no warranties included, such as the ones in dispute.

[39] The witness then referred particularly to the renewal preamble which appeared at page 33A which, in part, read as follows:

> "Renewal terms for the forthcoming period of insurance are as stated below: Where not indicated, all existing policy terms, conditions and excesses remain unaltered.
> Further, we reserve the right to amend terms and conditions in the event of adverse claims occurring from the date hereof to expiry of existing period of insurance."

He explained that this document was issued at the time when the incident of the first fire had already occurred and according to the witness the first fire claim had also been settled at that stage. According to the policy schedule (at page 33A aforesaid) the sum insured for the buildings of the plaintiff was R2,002 million and the rate for premium calculation was .35% of that amount, which was R7 007,00.

[40] Mr Hestermann further sought to explain, based on his own experience, how the surveyors employed by insurance companies to inspect the premises or property insured generally worked. He stated that if an entity sought to insure a risk with an insurance company, that insurance company would normally request one of their surveyors to survey the risk and verify whether it was viable to insure that risk in the first place. The appointed surveyor would visit the premises and then report back to the insurance company on the risk involved. The insurance company would then make a decision as to whether to insure the risk and, if so, at what rate. According to

Mr Hestermann in terms of the normal principles of insurance, once the insurance company's surveyor had surveyed the risk the insurance company concerned was deemed to be aware of all the risks in that entity. He pointed out that the document appearing at page 34A represented the standard surveyor's report which was used by the defendant for this purpose. This particular report related to the temporary premises occupied by the plaintiff at No. 6A Coventry Place, Willowton, Pietermaritzburg. The report was dated 17 July 1997 and compiled by surveyor/inspector T van den Berg (signed at page 40).

[41] Mr van den Berg was the surveyor appointed by the defendant to inspect and compile reports on the premises of the plaintiff. Another van den Berg's report of the same date (that is, 17 July 1997) in respect of the premises at 13 Birmingham Road (also marked as 'temporary occupation') was filed at page 42A.

[42 According to Mr Hestermann it was clear from the two van den Berg's reports that the risks enumerated therein were acceptable to the defendant and that the defendant thereby became well aware of the operation of the plaintiff's business and the risks involved therewith.

[43] At page 86A was the policy endorsement schedule dated 16 October 1997 which reflected the increase of the sum insured from R2.5 million (see endorsement dated 3 July 1997 at page 57A) to R4 million (see page 88A). The policy number was still MSPBM0830969. Mr Hestermann stated that as at that time the restoration of the building from the damage caused by the first fire had already been completed. Again he pointed out that in terms of the endorsement dated 16 October 1997 there were still no warranties included.

[44] Mr Hestermann further testified that the plaintiff never received survey reports from the defendant. As a result he acknowledged that he and the other staff from the plaintiff never saw these reports at all. (Note : at the bottom of each report appeared the following words: "*confidential – this report should be made available to authorised persons only*".) At page 90A (that is,

the endorsement schedule dated 16 October 1997) appeared the renewal preamble which contained, among other things, the same sentence as the one previously referred to, namely "*where not indicated, all existing policy terms, conditions and excesses remain unaltered*". The rate of the premium calculation in respect of fire damage to the buildings was still .35% of the sum insured (namely R4 million) which was in this case R14 000,00.

[45] The witness then turned to van den Berg's report dated 16 October 1997 in respect of the premises. Like the other reports, Mr Hestermann stated that the plaintiff never received this report. *Mr Marnewick* then brought to the attention of the witness the inscription in the middle of the report at page 69A which read as follows:

> "The purpose of this report is to provide underwriters within Mutual and Federal Group with underwriting information and to assist the insured in minimising the possibility of loss from fire and other insured perils. It does not imply that no other hazardous conditions exist."

Nevertheless, despite the surveyor's report purporting to serve the purpose of among other things, assisting the insured, Mr Hestermann reiterated that no such report was ever shown to the plaintiff in order "*to assist the insured in minimising the possibility of loss from fire and other insured perils*".

[46] As far as Mr Hestermann understood, the normal practice was that if there was any issue which the insurance company (the defendant in this case) was not happy about concerning the insured (the plaintiff in this case) such matter would be brought to the attention of the insurance broker (himself in this case) by the insurance company. As an example, Mr Hestermann referred to the letter dated 31 October 2001 addressed by the defendant to him in connection with the plaintiff (at page 163A). It read as follows:

> "Our surveyor has recently carried out an inspection of the premises insured situate as mentioned above (ie 7 Birmingham Road, Willowton), and has requested that the following be implemented.
> RAW MATERIAL LEATHER STOCKS ACCUMULATION, AT THE FIRE EXTINGISHER IN THE CAGE LEATHER STORE, MUST BE MOVED IMMEDIATELY AND THE FIRE EXTINGUISHER TO BE KEPT CLEAR AND FREELY ACCESSIBLE AT ALL TIMES.
> Please note that the continuance of cover in terms of this policy is conditional on the above-mentioned requirements being implemented within 60 days from the date of this letter failing which we shall be reluctantly obliged to

> implement the following restrictions/first amount payable (excess) until such time as our requirements have been complied with and written confirmation is received.
> 1 AN EXCESS OF 10% OF C LAIM MINIMUM R50 000 FOR WILL APPLY TO ALL FIRE RELATED CLAIMS.
> Fire/Safety requirements put forward by no means substitute any requirements made by Fire Brigade Personnel and should be seen as supplementary thereto.
> We trust the above is in order and look forward to hearing from you.
> YOURS FAITHFULLY
> (SIGNED) Margie Mahagun
> COMMERICAL UNDERWRITING"

[47] He further referred to another incident when one of the defendant's assistant managers, Mr Neil Taylor, visited his (Mr Hestermann's) office to discuss the unsatisfactory security standard with regard to the payment of weekly wages. Unbeknown to him at the time it turned out that this matter was also reported in Mr van den Berg's report dated 16 October 1997 (see page 81A).

[48] Mr Hestermann further testified that reacting to the defendant's letter dated 31 October 2001 (appearing at page 163A) he discussed the matter with the plaintiff and after proper arrangements were put in place in accordance with the defendant's requirements, Mr Hestermann had then written the defendant a letter dated 14 November 2001, which appeared at page 165A. This letter read as follows:

> "MARTIN JOHNSON : 1692135
> Your letter 31/10/01 (risk improvements) refers.
> I confirm that the insured has attended to your requirement and the leather stocks have been removed. The fire extinguisher will be kept clear and accessible at all times.
> Regards
> Gordon"

[49] Mr Hestermann insisted that the normal procedure whenever there was to be a proposed change in the policy the proposal would be communicated by the defendant, either in writing or telephonically, to him which he would in turn discuss with his client, the plaintiff. After such discussion a decision would then be made whether to re-negotiate the insurance contract with the defendant or to look for another insurance company. As further example, he referred to the defendant's letters dated 18 June 1998 and 23 July 1998

appearing at pages 112A and 113A, respectively, both of which dealt with the issue of the apparent security problem with the payment of wages. The letters read as follows:

> (Dated 18 June 1998)
> "RE : MARTIN JOHNSON (PTY) LTD – POLICY NO. 138N07631 RENEWAL DATE 1 JULY 1998
> We refer to our Meeting at your offices on the 17 June 1998 and confirm that with the exception of the money cover we are inviting renewal at their existing terms and conditions.
> In respect of the money section, although the rating will remain unaltered we explained that we could not continue to provide our mutual Client either with the high major limit or the very high seasonal limit. We requested you please to investigate any alternative which would result in the money limits being reduced.
> If wages on a limited basis continue to be paid out on a cash basis we further suggest that arrangements are made that the armed cash carrier remain on the premises until after the wages have been paid out.
> We look forward to receiving your further advices in this regard.
> Thank you
> Neil"

> (Dated 23 July 1998)
> "RE : MARTIN JOHNSON (PTY) LTD POLICY NO. 138N076731 MONEY/WAGES COVER
> We have discussed the precautions taken by our mutual Client in respect of the delivery of wages by the armed cash carriers with our Branch Surveyor, Tjaard van den Berg. Consequently we do not see the need to arrange another survey following our comprehensive survey including the money aspect in October 1997. After studying his report and having discussions with Tjaard put the following thoughts forward for you and your Client's further consideration.
> In order to reduce the amount of money exposed thought could be given to splitting the wage payout on two separate days and arranging for the cash carriers to make a separate trip on each of the two days.
> Should the above not be considered for the usual wage payouts then ideally we would like to see the year end bonus payout at least split into two separate pay days."

[50] Mr Hestermann was then shown the extracts from the defendant's handbook ("The Blue Book") appearing at pages 2A and 3A of: "*Classification of Fire & Burglary Risks & Special Underwriting Requirements for Fire Classes*" and "*Leather Traders and Tanneries*". In particular, paragraph 7 thereof dealt with the warranties listed under sub-paragraphs 7.1 to 7.10. In a column on the right hand side appeared against each warranty a percentage figure which, according to Mr Hestermann's understanding, represented the extent to which the premium would be decreased or increased, as the case

might be, in the event of the warranty either being deleted or added. He pointed out, however, that it would appear that in terms of the policy endorsement effective 13 January 1998 which was delivered under cover of the defendant's letter dated 16 February 1998, at page 94A (which introduced the warranties for the first time) the premium was slightly increased instead of being decreased, given the fact that the warranties had been added. In this regard Mr Hestermann referred particularly to the information contained at page 102A, which appeared to show that the rate of premium calculation had indeed been increased to .352% from the previous rate of .35% (see page 33A).

[51] The next survey was carried out by Mr van den Berg on 14 April 1999 and the report compiled in that regard appeared from page 123A. At that stage the warranties were already in place and, according to Mr Hestermann, the surveyor was expected to have checked whether, among other things, the warranties were being complied with. Indeed, under paragraph 20.6 of the report (appearing at page 130A) it was clearly stated that warranty numbers 7.3, 7.5, 7.7 and 7.9 were "*Warranties which cannot be complied with*". However, despite this information having been brought to the attention of the defendant, Mr Hestermann and the plaintiff were never advised about it.

[52] The next survey was conducted on the premises on 23 October 2001 and again it was reported that warranty numbers 7.3, 7.5, 7.7 and 7.9 (see page 153A) could not be complied with. Again Mr Hestermann told the Court that he was not informed about that situation. Indeed, if he had been informed he would have called a meeting with the plaintiff to discuss the issue of the presence of the warranties, the inability of the plaintiff to comply with them and what the plaintiff's way forward should be. According to Mr Hestermann, the plaintiff had only two options, given the nature of the plaintiff's business, which was either to increase the premium and have the warranties deleted, or to look for another insurance company.

[53] The policy endorsement that was issued effective 13 January 1998 under cover of the defendant's letter dated 16 February 1998 (appearing at

page 94A) was of course to expire at the end of June 1998. Mr Hestermann noted that the renewed policy effective 1 July 1998 (as he saw it in Court) came without warranty 9 which had also disappeared without prior discussion on it.

[54] In further confirmation of the defendant's normal procedure with regard to prior discussion and negotiation between the parties on any proposed change to the terms of the insurance policy, Mr Hestermann referred to the defendant's letter dated 21 May 1998 addressed to the plaintiff (appearing at page 223A") which read, among things, as follows:

> "Dear Policyholder,
> Your policy reaches its anniversary on the date shown above.
> It is our custom to review our Commercial portfolio and revise terms annually where experience had dictated it appropriate to do so. In assessing the overall situation at present we find it unnecessary to apply any overall general revisions. In isolated instances where the branch that handles your insurances thinks a revision of the terms of a policy or section of policy is necessary you will be contacted to discuss the matter.
> To assist in keeping pace with the eroding effects of inflation and other cost increases we have taken the opportunity of adjusting the sums insured on some items. The new figures are shown above and we encourage you to carefully review these, as policy conditions can penalize one in the event of a loss if the sum insured in inadequate. Any change in premium resulting from the adjustment has been incorporated into the new monthly debit.
> If you require further details or wish to amend the new figures or need any other assistance, please contact us or your insurance advisor.
> Yours faithfully,
> H Appleby
> ASSISTANT GENERAL MANAGER
> COMMERCIAL DIVISION"

[55] On the basis of this letter, Mr Hestermann stated that he would have expected that if there was to be any change in the policy the defendant would have contacted him with a view to discussing and negotiating the proposed change. He testified that the defendant never approached him in this regard which was then also a violation of the defendant's own undertaking in terms of the letter referred to above.

[56] Mr Hestermann further testified that as a result of the damage to the premises and the disruption to the business of the plaintiff caused by the fire on 13 October 2004 he submitted the insurance claim to the defendant on

behalf of both the plaintiff and the operating company. (However, it was common cause that this case was about the claim submitted in respect of the plaintiff only.) On 22 October 2004 Mr Hestermann sent a fax to the defendant which he confirmed to be the one appearing at page 167A. It read as follows:

> "Dear Andrew
> We refer to the meeting held in your offices on the 21 October 2004 with yourself and Derrick Manning.
> The discussion centered around the application of the warranties which were introduced into the policy wording at renewal, 1 July 1998, when the policy was converted from Protea to Mutual & Federal.
> The warranties concerned seem to have been added to the policy in error for the following reasons:
> 1. A comprehensive survey was carried out by Tjaard van Den Berg during October 1997 and there were no special requests other than the money aspect of the policy.
> 2. On the 18 June 1998, Neil Taylor invited renewal at existing terms and conditions and no mention was made for any warranties to be imposed.
> 3. The warranties concerned cannot possibly apply to our client, as for example,
> (a) They have a flammable liquids store which has been in existence more than 20 years which you were aware of.
> (b) They do not have woodworking machines.
> (c) They use plastic bags for packaging of shoes.
> (d) They do not have a boiler.
> We suspect that these warranties may have been carried forward in error from another policy during the reissue process.
> Tjaard has also confirmed to us telephonically that he was aware of the existence of the flammable liquids store and that if there were any warranties, they were certainly not intended to apply to the flammable liquids store.
> We would appreciate you clarifying the situation as a matter of extreme urgency as the Loss Adjusters seem to be investigating on the basis that these warranties apply.
> It is critical that liability is accepted (as) quickly as possible as the Gross profit Loss is escalating to a rate of approximately R300 000.00 per week (R1.2 million per month).
> We await to hear from you.
> Yours faithfully
> Gordon Hestermann
> HESTERMANN INSURANCE BROKERS"

[57] Mr Hestermann told the Court that on 15 December 2004 the defendant repudiated liability on the claim. The defendant's repudiation letter was not originally included in the papers until afterwards. I will refer to it shortly.

[58] On 6 January 2005 Mr Hestermann wrote another letter (in a memorandum form) to the defendant which he confirmed to be the one appearing at page 168"A which read as follows:

> "MARTIN JOHNSON (PTY) LTD/MARTIN JOHNSON PROPERTIES CC
> FIRE : 13 OCTOBER 2004
> When we spoke during November 2004, I voiced my concerns about the manner in which this claim of a longstanding client has been handled and I made it quite clear to you that it seemed to be Mutual & Federal's intention to try and find a way of not paying this claim. You assured me that Mutual & Federal preferred to find ways to pay claims rather than not to pay claims.
> I am not sure you are aware of the current status of this claim but for your information, I enclose herewith a letter of repudiation dated 15 December and when Ernest & Young asked for more detail on the reasons for the repudiation, all they got was the attached response dated the 5 January 2005.
> You asked me to liaise with Keith Kennedy which I have been doing and even as early as November, I asked Keith to please attend a meeting with the client in Pietermaritzburg to explain what Mutual & Federal were doing. Keith told me that he did not see any purpose in meeting with the client at that stage and he undertook to meet with the client once the investigation had been completed. I spoke to Keith recently and asked him to attend such a meeting which he said he was now unable to do. I thought that insurance was a matter of "Utmost Good Faith" from both sides.
> The actions of Mutual & Federal will no doubt push this company into liquidation which will result in the loss of jobs for approximately 80 to 100 people. It is very difficult from my prospective (sic) to try and explain to a client that an Insurer has failed to meet its obligations and it won't give any reasons either. Quite clearly Mutual & Federal is using its financial strength to force the matter into litigation knowing full well that the Insured probably won't survive and therefore the claim will die a natural death.
> I think that it is an extremely poor show on the part of Mutual & Federal to treat a client that has been with it for some 24 years the way it has done. My concerns that Mutual & Federal were on a fishing expedition in order to find reasons not to pay the claim and have proved to be 100% true.
> I am also particularly concerned about Mutual & Federal relying on warranties on the policy that quite clearly were put there in error by Mutual & Federal and unfortunately they went unnoticed for a number of years. Your Pietermaritzburg surveyor confirmed to me verbally that these warranties could not possibly apply and even he had no knowledge that they were on the policy. At a meeting in Durban with your Andrew Strauss he mentioned that as far as he was concerned the warranties would not be removed from the policy as they would be needed as a "Back UP" – this was said in front of Stanley Lief and Ken Cox. At the time we said it was a "Dirty Move" on the part of Mutual & Federal as it was obvious that Andrew Strauss was looking for any technicality to avoid paying the claim. The issue of the warranties is an underwriting matter and has obviously nothing to do with the insurance claim. Your reliance on these warranties as a means to avoid paying the claim puts me in a difficult predicament as I could well be sued by our mutual client.
> If our mutual client is guilty of fraud I would be the first one to back you in rejecting the claim but to repudiate without giving any reasons just does not fill me with confidence. I would assume that as you are alleging fraud that you will be pressing criminal charges against our client or whoever is responsible for the fraud.

I need to report back to the shareholders who reside in the UK and Australia respectively and I would therefore appreciate a response from you personally as I don't believe that Mutual & Federal normally do business in this matter (sic).
Yours faithfully
GORDON HESTERMANN"

[59] The defendant's letters dated 15 December 2004 and 5 January 2005 (both of which were referred to in Mr Hestermann's letter of 5 January 2005 referred to above) were originally not attached to the said letter. However, by consent between the parties, they were subsequently included in Bundle "A" and paginated as 168(a) and 168(b) for the letter dated 15 December 2004 and 168(c) for the letter dated 5 January 2005.

The letters read as follows:

(Dated 15 December 2004)
The Managing Director
Martin Johnson (Pty) Limited and
Martin Johnson Properties CC
7 Birmingham Road
Willowton
PIETERMARITZBURG
3201
Dear Sirs
POLICY NO. 1692135 : MARTIN JOHNSON (PTY) LIMITED
CLAIM NO. 44831870
POLICY NO. 1692119 MARTIN JOHNSON PROPERTIES CC
CLAIM NO. 44831722
Date of Loss : 13 October 2004
Risk Address : Factory Situate 7 Birmingham Road, WIllowton, Pietermaritzburg (herein referred to as The Factory)
We hereby give you notice that your above numbered claims to an indemnity under the above policies arising from the fire that allegedly occurred on 13 October 2003 and the resultant damage to The Factory and its contents are rejected.
Our rejection is based inter alia, on your contravention of General Conditions 5 and 8 and Warranties of the policy which read.
GENERAL CONDITIONS
5. Prevention of loss.
The insured shall take all reasonable steps and precautions to prevent accidents or losses.
8. Fraud
If any claim under this policy is in any respect fraudulent or if any fraudulent means or devices are used by the insured or anyone acting on their behalf or with their knowledge or consent to obtain any benefit under this policy or if any event is occasioned by the wilful act or with

the connivance of the insured the benefit afforded under this policy in respect of any such claim shall be ……..

WARRANTIES

W0001

Not more than 50 litres of flammable liquids flashing under 38 degrees Celsius and/or 210 litres of flammable liquids over 38 degrees Celsius used or stored.

W0004

No plastics are used or stored.

W0005

No artificial heating or drying other than by steam is done.

W0007

No painting or varnishing is done.

W0008

All waste is swept up and removed from the building daily.

All our rights are reserved and we specifically reserve the right to avoid your policy from renewal should our investigation reveal that you contravened the policy warranties prior to renewal or there has been any other material non-disclosure or representation.

We make no admissions regarding your alleged claims.

We hereby cancel your policy with effect 14 October 2004, the date of the lodging of the fraudulent claims.

We tender return of all premiums received from 14 October 2004.

We hold you liable for all expenses we were obliged to incur to investigate these claims. We will apply set-off between the premiums owed to yourselves and the amount of our expenses to investigate this matter.

Yours faithfully
AT BOUWER
GROUP MANAGER LEGAL"

(Dated 5 January 2005)

To :	MR KEN COX
Company Name :	ERNST & YOUNG
Fax No. :	(031) 576 8300
From :	AT BOUWER
Email address :	abouwer@mf.co.za
Date :	5 January 2005

Dear Sirs

POLICY NO. 1692135 : MARTIN JOHNSON (PTY) LIMITED
CLAIM NO. 44831870
POLICY NO. 1692119 : MARTIN JOHNSON PROPERTIES CC
CLAIM NO. 44831722
OUR REF. A16989

We are in receipt of your telefaxes dated 20 December 2004 and 4 January 2004, the latter which we believe should read 2005.

There is no Section 7.4 of the Short Term Insurance Act to which you referred us.

Our letter of rejection of the claim complies with all our obligations in terms of the policy and no further correspondence will be entered into by us. Under the circumstances we refer the insured to General Condition 6(c) which reads as follows:

"**6 Claims**

(c) No claim shall be payable unless the insured claims payment by serving legal process on the Company within 6 months of the rejection of the claim in writing and pursues such proceedings to finality."

Yours faithfully
AT BOUWER
GROUP MANAGER LEGAL"

[60] Mr Hestermann was also referred to the email appearing at page 222A. He confirmed that the information contained in the email related to the insurance claim history submitted to the defendant in respect of the claims made on behalf of the operating company and not the plaintiff. This was confirmed by policy number 1692135 which related to the operating company. However, reference to this aspect was made in order to prove inconsistency on the part of the defendant. It was clear in terms of this email that claims under the "*Fire Section*" were submitted to the defendant on 15 January 2002, 22 January 2003, 18 March 2003, 21 February 2004 and 13 October 2004, the last-mentioned being the one which culminated in the present litigation. Mr Hestermann explained to the Court that, notwithstanding the fact that these claims were made after the warranties had already been introduced into the policy, not a single occasion was he or the operating company (for which he also acted as broker) ever approached about the existence of the warranties and/or such warranties having been violated. He pointed out that it was a matter of course that the warranties were included in both policies for the plaintiff and the operating company.

[61] Under cross-examination, Mr Hestermann stated that he had been involved with the insurance brokering since 1991 when he started his own business of insurance broker. He admitted that his duties included warning his clients of any risks or any problems in the assessment of cover and so on. If a prospective client wanted a cover of a certain nature, it was his duty to go to the insurer and get the cover required by the client at a premium the insurer was prepared to give it to him for, and then he would go back to the client and discuss the matter. He also admitted that whilst he could have a cordial relationship with an insurance company, he was mainly responsible to the insured with whom he had a contractual relationship. He also stated that he did not deal directly with the underwriting department of an insurance

company, but rather with the broker consultant who, he believed, in turn dealt with the underwriting department. A broker consultant would give him quotations setting out aspects such as the rates and he believed that the broker consultant would have obtained such information from the underwriting department. In this case his broker consultant was one Ms Bev Walther who was employed by the defendant. Mr Hestermann confirmed the document appearing at page 92A dated 13 January 1998 as having been one of those instances when he communicated with Ms Walther. On that occasion he was acting on behalf of the plaintiff and requesting the increase of the sum assured from R4 to R6.5 million in respect of the building and from R4.48 million to R6.98 million in respect of the SASRIA policy (commonly referred to as the "Riot Policy").

[62] Mr Hestermann was then referred to the second paragraph under the heading "Renewal Preamble" in the premium calculation document appearing at page 33 of Bundle "A" which read:

> "Further, we reserve the right to amend terms and conditions in the event of adverse claims occurring from the date hereof to expiry of the existing period of insurance."

And also to the first paragraph of the defendant's letter dated 16 February 1998 (at page 94A), which read:

> "Please read it carefully to ensure that it correctly states your requirements".

[63] In this regard *Mr Dickson* requested Mr Hestermann to explain how both he and the plaintiff's officials could have failed to read the renewal documents carefully, as requested. Mr Hestermann's response was that in his experience 80% to 90% of clients did not read insurance documents and that as with regards to him, he had not expected that there would be warranties inserted in the mid-term policy endorsement effective 13 January 1998 but that, according to his understanding, the word "*instructions*" in the first paragraph of the letter dated 16 February 1998 could have referred only to the instruction that he had given to the defendant in terms of his letter dated 13 January 1998 (at page 92A) and which related only to the increase of the

sum assured and nothing else. He said that in his experience insurance companies had to give up to 60 days notice to their clients in the event of the insurance company seeking to propose a change in the policy and to ask the clients whether the proposal was accepted or not. In the event of the client not willing to accept then the negotiation process would be undertaken. He stated that he had himself also worked for an insurance company and he knew that to be the normal procedure.

[64] Mr Hestermann further stated that mistakes occasionally occurred with insurance companies, such as the inclusion of anything in the policy which was unintended and realised only when the claim was made. In such event, the insurance company, including the defendant, would accept the mistake as genuine and pay the claim, nevertheless. However, he noted that this apparently happened in smaller claims and that in bigger claims such as the present one, the insurance company repudiated liability and averred that the erroneous inclusion was actually not a mistake. He reiterated that even though the warranties had apparently been included in the renewals over a period of some seven and a half years every time the policy was renewed, the fact of the matter was that this inclusion was never brought to his attention by the defendant at any stage.

[65] He also admitted that he had a professional indemnity insurance cover. He had already notified his insurance people about this matter but he had not yet lodged any claim. He also confirmed his letter to the defendant dated 6 January 2005 in which he stated, amongst other things, the following:

> "Your (the defendant's) reliance on these warranties as a means to avoid paying the claim puts me in a difficult predicament as I could well be sued by our mutual client (referring to the plaintiff)."

[66] It was also pointed out to Mr Hestermann that the defendant's letter dated 18 June 1998 (appearing at page 112A) which the plaintiff also appeared to rely on, was in fact in respect not of the applicant but rather of the operating company, as evidenced in the heading "Martin Johnson (Pty) Ltd Policy No. 138NO76731". *Mr Dickson* put to the witness that, on that basis, reference in that letter to the words "*Renewal at their existing terms and*

conditions" related, therefore, to the operating company and not the plaintiff. Mr Hestermann responded that he believed that during the meeting of 17 June 1998 referred to in the said letter, they would have discussed both policies, for the operating company and the plaintiff. It was put to him that the meeting was clearly in respect of the problem related to the payment of wages which was a business operational issue and had nothing to do with the plaintiff. It was further pointed out to him that the policy number for the operating company was 138NO76731 whereas the one for the plaintiff (the CC) was 138NO76723. Mr Hestermann stated that after his meeting with the defendant's Mr Taylor on 17 June 1998 (as per letter dated 18 June 1998 at page 112A) he had then on 29 June 1998 written another letter to the defendant (which appeared at page 103A) which clearly related to the issues pertaining to the plaintiff. It was pointed out to the witness that according to the plaintiff's pleadings (at paragraph 3(f) of its replication) the plaintiff's reliance on its allegation that the policy renewal/amendment was to be "*on the existing terms and conditions*" was based on the defendant's letter dated 18 June 1998 appearing at page 112A which, it had since turned out, was in fact a letter issued in respect of the operating company and not the plaintiff. Mr Hestermann replied that it was the normal practice that Mr Taylor, when communicating to him in writing, would generally use or refer to one policy and not necessarily to both, and that in this instance the policy number of the operating company was used because the money (wages) issue related to that company and that otherwise everything else in respect of both policies was to have remained unaltered. That was why he had then followed by up writing the letter dated 29 June 1998 (at page 103A) which clearly reflected the plaintiff's policy number.

[67] Mr Hestermann further reiterated that it was clear that, notwithstanding the warranties having been included, the premium calculation rate had not been reduced but had virtually remained the same, or slightly increased.

[68] *Mr Dickson* put to the witness that the defendant's version was that the warranties were not included in the policy by mistake, but that they were included simply because the plaintiff's business fell within a certain category

or classification in terms of the defendant's Blue Book, namely "*Leather Goods Manufacturers*" in respect of which the warranties were applicable. It was further put to Mr Hestermann that the specific warranties which were violated by the plaintiff and which resulted in the repudiation of the claim, were warranties 7.1 and 7.4 and these related to the storage of flammable liquids and plastics respectively.

[69] In his endeavour to demonstrate yet again that it was the defendant's normal practice not just to impose changes on the policy without consulting with the client, Mr Hestermann recalled the defendant's letter dated 21 May 1998 addressed to the plaintiff (at page 223A) in which the defendant was advising the plaintiff about the fact that the policy was approaching its anniversary date, namely 1 July 1998. In part, this letter read as follows:

> "In isolated instances where the branch that handles your insurance thinks a revision of the terms of a policy or section of policy is necessary you will be contacted to discuss the matter."

[70] However, it was put to Mr Hestermann that the letter he had referred to dated 21 May 1998 was in fact not found in Mr Hestermann's file nor was it discovered by the plaintiff. The copy that had been put up was taken from the defendant's file and that, on this basis, that letter should be regarded as having not been received by either Mr Hestermann or the plaintiff. Mr Hestermann pointed out that, after all, that was a standard letter which he normally received from the defendant even in respect of other cases.

[71] That concluded the case for the plaintiff.

[72] At this stage *Mr Dickson*, on behalf of the defendant, applied that the defendant be absolved from the instance with costs on the basis that the plaintiff had failed to make out a *prima facie* case against the defendant. I duly considered the application.

[73] In order to succeed in an application of this nature the plaintiff must prove that it had a *prima facie* case. The test applicable is well known. In the

old decision of *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173 the Court held:

> "After the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the Court would then be, 'Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?"

[74] This approach was cited with approval in many subsequent decisions. In particular, the Appellate Division in *Mazibuko v Santam Insurance and Another* 1982 (3) SA 125 (A) at 126G-H the Court further clarified that:

> "… the test to be applied is not whether the evidence led by plaintiff established what would finally be required to be established but whether there is evidence upon which a Court applying its mind reasonably to such evidence *could* or *might* (not *should* or *ought*) find for the plaintiff."

Recently in *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-J, the Supreme Court of Appeal held:

> "[27] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:
> '…(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).)'
> This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit)*) – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather b e concerned with its own judgment and not that of another 'reasonable' person or court."

[75] In determining this application the Court would be mindful of the fact that the *onus* on the plaintiff was much lighter as compared to the stage when the defendant's case was concluded. (*De Klerk v Absa Ltd & Others 2003(4) SA 315 (SCA)* at 334D.) Further, that in the ordinary course of events the order for absolution would be granted sparingly and only if the Court was satisfied that granting the order was in the interests of justice. (*Gordon Lloyd Page & Associates v Rivera & Another, supra,* at 92I-93A.) In my assessment I found that the overall evidence tendered on behalf of the plaintiff did make out a *prima facie* case sufficient to call for a reply.

[76] The application for absolution was accordingly dismissed and the costs of the application were reserved for determination at the conclusion of the trial.

[77] The first witness for the defendant was Tracey Duckham who told the Court that during 1998 she was employed by the defendant as a commercial underwriting clerk. She had however left the employ of the defendant at the end of March 1998. Whilst employed by the defendant, her immediate supervisor or superior was Mr Craig McLaurin. The head of the underwriting department was Mr Nick Taylor. Ms Duckham told the Court that she was one of the many underwriting clerks employed by the defendant at the time. Her qualifications for the job included the attainment of a Certificate of Proficiency in Insurance which dealt with basic principles in underwriting.

[78] She testified that her function as an underwriting clerk was basically that of processors which simply meant that they would get the mail from the management and process it. The processing involved dealing with changes or amendments in the insurance policies. She further confirmed the defendant's handbook which was shown to her titled "Mutual and Federal Insurance Commercial Division Rating Guide" as having been the guide which was used at the defendant and which was commonly known as the Blue Book. She also confirmed that the first three pages of Bundle "A" were indeed the extracts from the Blue Book. Ms Duckham was shown the letter dated 16

February 1998 (page 94A) which she confirmed to have been signed by her and as such she claimed authorship of the letter on behalf of the defendant. She told the Court that these were the type of letters that they would issue whenever there had been a change in an insurance policy. The letters would be attached to the policy schedules and forwarded to the client.

[79] Ms Duckham was then shown Mr Hestermann's letter dated 13 January 1998 (at page 92A) whereby an increase in the sum assured was requested from R4 to R6.5 million in respect of the building and from R4,48 million to R6,98 million in respect of the SASRIA policy. In particular, the witness confirmed her initials "TDU" appearing towards the bottom right of the letter dated 29 January 1998.

[80] She confirmed that what appeared in Bundle "A" behind the letter dated 16 February 1998 (that is from pages 95 to 102) was the renewed policy schedule in respect of the plaintiff. Her signature also appeared at page 96 where she signed for the insurer. She further explained that when a policy schedule was sent out, it would be accompanied with what they termed a policy wording which was normally in the form of a booklet. The policy wording incorporated the standard terms and conditions of the type of insurance concerned.

[81] The witness was then referred to the ten warranties appearing at page 99A which were part of the policy schedules dated 16 February 1998. She confirmed that these warranties were in line with the classification of the defendant's business as "*Leather Goods Manufacturers: Leather Trades and Tanneries*" as shown at pages 1, 2 and 3 of Bundle "A. She said that the warranties were a business risk in relation to the plaintiff's business or type of business. She acknowledged that the warranties were not included in the Protea policies and only on 16 January 1998 (albeit effective on 13 January 1998). She explained that as an underwriting clerk she would not have simply included the warranties or made such changes to the policy without having first obtained approval from the management to do so. She would not have known why the warranties were included. It was in terms of the

management's instruction that they were included. However, she noted that these were standard warranties in terms of the defendant's handbook under the sub-class "*Leather Traders and Tanneries*" of the main classification "*Leather Goods Manufacturers excluding Clothing*" which was in respect of the "*Fire and Burglary Risks*" (see pages 1, 2 and 3 of Bundle "A"). Given the nature of the plaintiff's business, she was therefore of the view that the changes in the plaintiff's policy were in accordance with the classification of that business. She further stated that the policy risk changed because the plaintiff had increased the sum insured. In other words, the higher the sum insured was raised the higher the risk potentiality would rise as well.

[82] Ms Duckham further testified that they classified insurance brokers into credit agents and direct agents, this being determined by the manner they corresponded with each other. In respect of the former, the policy document would be sent to the broker (the agent) who would then check the document whereafter send a copy to his or her client. In respect of the latter, the insurance company would send separate copies to the broker and to the agent. In other words, in that instance, the policy document would be sent direct to the client. The witness stated that from the documentation in the present case she could determine that Mr Hestermann was a credit agent since there was a letter "C" next to his name (see page 95A). Therefore, in this case the policy schedule dated 16 February 1998 would have been sent to Mr Hestermann who in turn would have been expected to transmit it to the plaintiff.

[83] The witness further confirmed that according to the first paragraph of her letter dated 16 February 1998 it was required of the plaintiff to read the document carefully "to ensure that it correctly states (their) requirements". In this regard she did not recall ever receiving any query from Mr Hestermann although, of course, she left the employ of the defendant about a month thereafter.

[84] She further reiterated that the ten warranties at page 99A would never have been included by mistake. She insisted that they (that is, she and other

underwriting clerks) would never have put in such warranties without the management's prior approval or instruction.

[85] Under cross-examination the witness stated that as at February 1998 she had worked as an underwriting clerk for about three years at the defendant. She was aware during the first two years of her employment with the defendant that there was a competitor in the market place by the name of Protea Insurance. She was also aware that in 1997 the defendant took over the business of Protea. The process of take-over involved every facet of the defendant's business to synchronise the old Protea businesses, employees, staff members and policies in order to integrate them with the defendant's business. She considered that this was indeed a major operation. She said there was a Protea office in Pietermaritzburg which was incorporated into the defendant and for quite a while they operated separately. The ladies from Protea continued to do the policies for Protea until they were converted onto the defendant's system. In this regard the defendant was playing a leading role. She agreed that the date of the Protea take-over was 1 January 1997. She also agreed that a number of circulars went around to the defendant's staff in order to assist them in integrating the Protea business into the defendant's systems.

[86] Ms Duckham further stated that she was not involved in the evaluation of risks but was only involved with the processing which, as explained earlier, was done on the basis of instruction from management. She agreed that she merely followed the orders which were given to her by management, which would either be from Mr McLaurin or Mr Taylor. These instructions would be communicated to her either verbally or in writing. She assumed that all the correct processes and procedures had been followed once she got such instructions. As regards her letter dated 16 February 1998 (at page 94A), she would not be in a position to recall who had given her the instruction to issue the letter, between Mr McLaurin and Mr Taylor, after such a long time. However she denied any possibility that it could have been somebody else other than Mr McLaurin or Mr Taylor as the instructions were normally given to her and other underwriting clerks direct from management. They were at

least ten underwriting clerks occupying an open-plan office. Each clerk would deal with at least twenty matters a day. From there the work would be passed on to the typing pool for typing and thereafter be brought back to the clerk concerned who would then check and if satisfied with the correctness, sign the letter.

[87] Ms Duckham further stated that at the relevant time there was a mail backlog to the extent that it was not possible to attend to the work the day of its receipt, even the next day. On this basis, she conceded that the management instruction that led to her writing the letter dated 16 February 1998 could possibly have been placed on her desk, together with as many as some twenty other instructions, a few days prior to the day she actually attended to the matter. So the work kept spilling over to subsequent days, hence the backlog. She further agreed that since there was no written instruction pertaining to the letter dated 16 February 1998 to be found, it followed that the instruction was a verbal one. When she received this instruction she would have assumed that Mr McLaurin or Mr Taylor, as the case might be, would have followed the proper procedure in relation to the insured. In other words, in the event that there was a requirement to notify the insured with regard to changes in the risk or in the risk profile she assumed that such notifications would have been communicated with the insured. That aspect was not within her line function.

[88] *Mr Marnewick* then put to the witness that, with regard to the warranties which found themselves included in the policy schedule attached to her letter dated 16 February 1998, she would have in her own mind assumed that the plaintiff's business was actually capable of complying with those warranties. In response she said she would just have processed the warranties and put them onto the policy in terms of the instruction because it was not part of her duty or domain even to think whether the business concerned could comply with the warranties or not.

[89] She also confirmed that her letter dated 16 February 1998 was a standard format letter every client in similar circumstances would have been

sent. However, she conceded that there was no particular consideration given of the individual case before the letter was drafted.

[90] Absent any other written instruction that could be found leading to her letter dated 16 February 1998, Ms Duckham admitted that the only instruction that was available was the one appearing on page 92A which was the instruction from Mr Hestermann to the defendant marked for attention of "Bev Walther" who, according to the witness, was the liaison officer between the insurance broker and the defendant. Ms Walther was therefore the right person for Mr Hestermann to have communicated with.

[91] Ms Duckham also conceded that in terms of Mr Hestermann's letter dated 13 January 1998 (at page 92A) there were only two instructions or requests by Mr Hestermann, namely, the first being for an increase of the sum assured in respect of the building from R4 million to R6.5 million and the increase in the SASRIA policy from R4.48 million to R6.98 million. She also noted that on 16 February 1998 Mr Hestermann had sent a reminder to the defendant requesting the defendant to forward the policy and endorsements as requested (in respect of the building) as this had not yet been received by that time. A reminder appeared at page 93A which also indicated that the SASRIA policy had been received on 29 January 1998. Ms Duckham was then asked why there was such a delay which had necessitated Mr Hestermann to issue the reminder aforesaid. Her reply was that it was due to the mail backlog as explained already. She stated that the endorsement was sent out to the plaintiff on 17 February 1998 and this was endorsed accordingly at the bottom of Mr Hestermann's letter dated 16 February 1998. This was the endorsement that she sent out under cover of her letter dated 16 February 1998. Mr Hestermann's instruction letter (dated 13 January 1998) was received by the defendant on 14 January 1998 as shown by the defendant's date stamp on the letter (at page 92A). The witness said she processed Mr Hestermann's request on 29 January and duly endorsed the letter to this effect, and initialled the endorsement accordingly, as appearing on the same page of the letter. She would then thereafter have received a verbal instruction from either Mr McLaurin or Mr Taylor as to how to deal with

the matter. In the implementation of that instruction she would then have eventually written the letter dated 16 February which accompanied the policy endorsement.

[92] The witness further noted that her letter dated 16 February 1998 opened with the words "*In accordance with your instructions …* " and explained that this phrase indicated to the reader that she was implementing the particular instruction referred to. She agreed that she did not intend to indicate anything more than that. She further conceded that as the sentence in the letter proceeded to read "*We have endorsed your policy and have pleasure in enclosing the relevant document*", she thereby would have meant having executed the instruction in terms of Mr Hestermann's letter dated 13 January. She was then referred to the next sentence which read "*Please read it carefully to ensure that it correctly states your requirements*" and in this regard she was asked whether it was correct that the only requirements that could be traced which pertained to the plaintiff were only those two that appeared at page 92A in Mr Hestermann's letter, to which the witness said that was correct.

[93] She further stated that the old Protea policy would have been kept on the file. However, at that stage it would obviously have been converted to the defendant's policy in accordance with the instruction which they (the underwriting clerks) would have received from management. She said policy number 138N076723 appearing in her letter dated 16 February 1998 was the defendant's policy number. She was then shown the policy endorsement schedule dated 24 October 1997 appearing at page 62A where the policy number was reflected as MS PBM 0830969. She said that was the Protea policy number, which also appeared at page 55A.

[94] *Mr Marnewick* then referred the witness to page 99A which contained the ten warranties and, in particular, to the portion of the heading which read "*Memo 1 : Leather Traders and Tanneries Warranty*" and the witness was asked to confirm if this heading appeared in the defendant's Blue Book to which the witness confirmed that it was so. Thereupon *Mr Marnewick* took up

the copy of the Blue Book and showed to the witness that on the top right hand corner of the front cover of the book appeared the words "*Strictly Confidential*" which the witness confirmed. On this basis she (Ms Duckham) further confirmed that such a document (the Blue Book) would not have been allowed by the defendant to fall into the hands of a competitor like Protea and further that someone like Mr Hestermann would not have had access thereto. She therefore agreed that Mr Hestermann would not have understood what could have been meant by the words "*Leather Traders and Tanneries*" insofar as that was relevant to the defendant's rating guide.

[95] The witness noted that amongst the policy documentation under cover of her letter dated 16 February 1998 the plaintiff was described as "*a shoe manufacturers*" (see page 98A). She said she did not know that the plaintiff had been in the shoe manufacturing business in Pietermaritzburg for a period in excess of fifteen years. She conceded, however, that in common parlance a shoe manufacturer would be referred to simply just as that, namely the shoe manufacturer. In other words, one would not ordinarily expect that the shoe manufacturer would be called either a tannery or a leather trader. She agreed that the other proper English terms for a shoe manufacturer would either be a shoemaker or a cobbler.

[96] She further said she assumed that the warranties were put onto the policy due to the fact that the risk had changed with the increase of the sum insured or the warranties might as well have been part of the process when the defendant's insurance terms were being imposed on the old Protea policy. However, this was only speculative as she was not sure of what actually happened in this case.

[97] The policy endorsements appearing at pages 55A and 62A dated 3 July 1997 and 24 October 1997, respectively, were issued by the defendant although still using Protea policy number. In respect of both endorsements the reason therefor was the increase in the sum assured as appearing at pages 57A and 64A respectively. She was then referred to pages 61A and

68A under the heading "*Premium Calculation and Renewal Preamble*" where the first paragraph read:

> "Renewal terms for the forthcoming period of insurance are as stated below. Where not indicated, all existing policy terms, conditions and excesses remain unaltered."

It was common cause that in both policy endorsements the warranties were not included. In the circumstances the witness acknowledged that, notwithstanding the fact that the defendant might at the time still have regarded this as a Protea policy, the defendant had not seen fit at that time to impose the warranties on the policy.

[98] Ms Duckham further conceded that when she stated in her evidence-in-chief that the warranties could not have been put in the policy by mistake, she had only been making an assumption. All she could say was that she was merely executing instructions given to her, although in this particular instance she could not recall what the specific instruction was. She could also not tell how long it took her from the time she received the instruction to the time that she implemented it. Nor could she tell whether the instruction came from Mr Taylor or Mr McLaurin. As a matter of fact she could not even tell what it was that either Mr McLaurin or Mr Taylor had first considered before they gave the instruction, or if they considered anything at all.

[99] The next witness for the defendant was Craig Graham McLaurin who had been in the employ of the defendant for over eighteen years. He was employed in 1990 at the defendant's Pietermaritzburg branch as an underwriting clerk in the commercial division. In 1992 he was promoted to section head and eventually in 1995 to superintendent. He was currently based at the defendant's head office in Johannesburg. He told the Court that during March 1998 he was, by virtue of being superintendent for the commercial area, the supervisor in the commercial underwriting section. He said his supervisor would have been Mr Neil Taylor. He recalled the witness Ms Duckham whom he said was one of the commercial underwriting clerks in his department.

[100] Mr McLaurin was then referred to page 94A which he acknowledged was the beginning of the policy endorsement to an existing policy and extending through to page 102A and further that the endorsement included at page 99 what was termed "*Leather Traders and Tanneries Warranty*" under which was listed ten warranties. Mr McLaurin stated that (as he stood in the witness stand) he could not recall about that specific transaction. He was then referred to page 92A, which was Hestermann's instruction dated 13 January 1998. He acknowledged that this instruction related to a request to increase the building sum insured from R4 million to R6.5 million and also to increase the SASRIA cover from R4.48 million to R6.98 million. The witness added that the words appearing just below Mr Hestermann's instruction *"copy given to SASRIA*" were written and initialled by him. He was then asked what he would have done, in the ordinary course of business, upon his receipt of the memo at page 92A (that is, Mr Hestermann's instruction dated 13 January 1998). He said it was part of his job description to check all the incoming mail and to give instructions thereon as to how the underwriting clerks would attend to the various matters. In respect of Mr Hestermann's letter of 13 January 1998 it was clear to him that he had noted the words "*copy given to SASRIA*" as a notification or reminder to the underwriting section that a copy of the memo had been sent through for processing by the SASRIA staff. Thereafter the memo would have been passed on to the underwriting clerks for processing, that is, to attend to the request to increase the sum insured from R4 million to R6.5 million.

[101] He further testified that the underwriting clerks, including Ms Duckham, would take instructions from either himself or his managers. With regards to Mr Hestermann's letter dated 13 January 1998 he could not recall what specifically happened with regard to that transaction. However, when he was shown Ms Duckham's letter dated 16 February 1998, he acknowledged that this was a standard form letter in respect of which certain specific information would be captured onto it, such as the client details, the premium details and the date from which the policy endorsement would start to apply. Those would be captured with the endorsement that would be processed by the underwriting clerks. He confirmed that the sentence in the opening paragraph

"*Please read it carefully to ensure that it correctly states your requirements*" was part of the standard form letter which the defendant sent out to clients with policy endorsements or renewals. He stated that from time to time clients would come back and query that the endorsement was not in accordance with their instructions. Such queries had been referred to him.

[102] As to who would have given an instruction to Ms Duckham to process Mr Hestermann's letter in the manner that she did, Mr McLaurin stated that such would have been a standing instruction from head office because that was the way they dealt with the business at the time. According to the witness when joining the department Ms Duckham would have had some training in terms of how to process the work, how to structure a policy, the type of things that required to be captured onto the format.

[103] On the ten warranties appearing at page 99A, Mr McLaurin stated that it would have been standing practice of the defendant to include the warranties to the kind of business such as that of the plaintiff. With regard to fire risks, different warranties would be applied to different policies, depending on the type of business industry involved. He then stated that in this particular instance being a leather trader, a shoe manufacturer, these warranties would have been the standard warranties which would have been applied to this policy and to the fire section. He reiterated that this would have been standard practice and that it was something that emanated from head office, those being the people who set the rules and guidelines with regard to the structuring of insurance policies, endorsements and warranties. In his view that was how the matter would have been approached by the defendant. He further confirmed that they were using what was referred to as the Blue Book which contained the underwriting guidelines and from which he reckoned that the warranties appearing at page 99A would have been extracted. He acknowledged that pages 1 to 3 of Bundle "A" were indeed extracts from the Blue Book that he was talking about. In terms of the classification "*Fire and Burglary Risks*" in the Blue Book a shoe manufacturer would have been classified under "*Leather Goods Manufacturers Excluding Clothing: Leather Traders and Tanneries*". It was noted that the warranties appearing at pages

2 to 3 (warranties 7.1 to 7.10) were exactly the same as those appearing at page 99A.

[104] In the event of an insurance broker or an insured objecting against the inclusion of the warranties, the matter would have been brought to his attention by the underwriting clerks and he would in turn discuss it with his management team. The defendant's surveyor at the time would also have been requested for his or her input in the matter. Thereafter a decision would be made by the management. He stated that there were options available to look at with a view to removing a warranty in the policy. The first and the simple one was that if its removal would not impact on the risk and exposure on the part of the defendant as the insurer, the warranty complained against would simply be removed. The second option was to remove the warranty on payment of a price, namely the increase in the premium. Thirdly, if the issue created an impasse between the parties which they could not resolve through the first two-mentioned options, then the insured would be allowed to consider moving its policy elsewhere to another insurance company.

[105] Mr McLaurin further testified that it was very unlikely that the warranties would have been introduced into the policy endorsement by mistake. In fact, according to him, that would be almost impossible to have happened. He was saying this on the basis that the underwriting clerks would, from their first days of employment in the underwriting department, have been trained in this in terms of the standard policy of the defendant to impose certain warranties according to the industry concerned onto the fire section of the policy. In his view therefore it was not likely that the warranties would have been put in by mistake. As far as he could recall Ms Duckham was one of his better and more trustworthy underwriting clerks.

[106] When it was pointed out to the witness that in terms of the policy renewal effective 1 July 1998, warranty No. 9 no longer appeared, he could not explain what the cause of its removal was. He did mention however that it was highly improbable that this warranty could have been removed by accident. According to him the removal could only have been in compliance

with a certain instruction from the management, as a result, perhaps, of a recommendation from the defendant's surveyor team or a request from a broker or a client. Whatever the situation was, there would have been an instruction given for the removal of warranty No. 9.

[107] The witness then dealt with the issue of the take-over of the Protea business by the defendant to the extent that it was relevant to this case. He was referred to the Comspec circular dated 14 April 1997 (at page 22B) which he said its main purpose was to address issues of converting the Protea business into the defendant's system. At paragraph 11 the circular provided the following:

> "11. M & F PROCEDURES & PROTEA BUSINESS
> It is imperative that Protea staff familiarise themselves with the M & F underwriting guidelines (blue book / all underwriting guidelines / COMPSPEC, SAD & COMDIV circulars) and from renewal of the respective policies renewal terms / retentions etc. should be based on M & F philosophies (difficulty may be experienced in some cases in correcting rating as a one-off attempt. A pragmatic but purposeful approach in correcting the situation in the shortest possible time should be adopted.)"

According to the witness this was essentially an instruction that the same underwriting philosophy and standard practices that applied to the defendant's policies would be equally applied to the Protea policies from the date of integration, that is, the date when the Protea policies were taken over by the defendant. This meant that the rating guidelines, for instance, would be based on the dictates of the Blue Book. He further explained that the term "Backfilling" referred to at paragraph 10 (page 25B) in the sentence "*in respect of the existing M & F policies a substantial amount of backfilling information will be required*" essentially meant the conversion of information from a typed format to computerised form. Mr McLaurin testified that the document at page 27B (similarly page 62A) was in fact a Protea policy printed on the defendant's letterhead. His explanation for this was that the document would have been printed off a system with the defendant's letterhead inside the pages of the cartridge of the printer. That would have been the practice until such time that the backfilling process was completed in terms of the COMSPEC circular.

[108] Mr McLaurin also confirmed that the defendant had a survey department and that it main surveyor for the Pietermaritzburg branch was Mr Tjaard van den Berg. He said there was a fairly close relationship between the survey department and the underwriting department in that the surveyor would be like the eyes of the underwriters. The surveyor would have first hand knowledge of the risk by having physically seen the situation and then passing on the information as he saw it to the underwriting department. The surveyor would then compile the reports which would ultimately come to his (Mr McLaurin's) attention. As a result of the survey report, changes would be made, where necessary, if the risk as appearing from the survey report was found to be otherwise than was originally expected. The necessary instruction would then be passed on to the underwriting clerks to process the changes. Where he deemed it necessary he would discuss the issue with the underwriters himself in terms of guiding them of how to go about processing a particular transaction. He further mentioned that from time to time there would also be interaction between the marketing staff and the insurance broker, depending on what was required to be done.

[109] He confirmed that Ms Bev Walther was the defendant's broker consultant at the time. He was also aware that in the present instance the defendant repudiated liability on the ground of the plaintiff's alleged failure to comply with two of the ten (and later nine) warranties, namely warranty Nos. 1 and 4. He said that Ms Walther would not have been involved in the issue of warranties. Her duty, as the broker consultant, was to liaise with the broker on behalf of the defendant. Any request or instructions from the broker would be channelled and processed through her.

[110] He reiterated that any decision concerning a risk would come from management. In this regard he meant either himself, the assistant branch manager at the time Neil Taylor or the manager in charge of the broker consultants, whose name he could not recall.

[111] With regard to Ms Duckham's letter dated 16 February 1998 (at page 94A) Mr McLaurin disagreed with the proposition or suggestion (by Mr

Hestermann) that there was an obligation on the part of the defendant to specifically draw attention to the fact that ten warranties had been introduced in terms of the policy endorsement forwarded under cover of the said letter, either in the letter itself or orally as between the witness or Neil Taylor and Mr Hestermann personally. He said he would have expected that Mr Hestermann, as a broker, had the duty to check each and every policy schedule and any letters of correspondence that he received from the insurance company and that if he disagreed with anything, he would refer it back to the company. According to the witness there was nothing outside of the ordinary which he found contained in the policy endorsement under cover of Ms Duckham's letter dated 16 February 1998. To him, the contents were merely methods of standard practice and not something that the defendant would have referred to the broker for some kind of consultation. Consultation with the broker would only be engaged in where something unusual to the way that they worked came up, for example, where there was a survey requirement in the survey report, which was different to the norm applicable to the defendant's standard practice. The consultation would be done before the policy was amended in accordance with the survey requirements.

[112] Under cross-examination, Mr McLaurin restated the fact that after the integration (that is, the take-over of Protea by the defendant) a process was put in place whereby the Protea computer system known as "I90" (abbreviated for "Indigo 90") to the defendant's computer system known as "Comsure". In their computer system Protea had had its own standard policies and their standard endorsements of particular risks.

[113] The defendant had originally operated on a typed format system which they referred to as a "paper system" where a physical file would be opened for each policy and all the documentation related to that policy would be placed in the file, including the schedules and endorsements. The process of computerising the defendant's system commenced shortly after the Protea take-over. Protea had operated its business on a computer system (the "I90" system) even before the take-over.

[114] Mr McLaurin conceded that the process of conversion of the defendant's operation from the paper system to the computer system took some time and that it was not without glitches along the way. At this stage the cross-examination proceeded as follows:

> "Over time you would have imported into your computer system, that is now Mutual and Federal system, the standard instructions emanating from the blue book, so that when a new policy was issued it would be in accordance with Mutual and Federal instructions and philosophy? --- That's correct.
> And in relation to the Protea policies that were taken over, that same process would have been implemented with regard to those policies in due course? --- The M and F standard practise would have been applied to Protea policies as they came over." (Page 52 lines 16-24 of the record, Vol I Sept. 2008.)

[115] On that basis, the policies in respect of the plaintiff and the operating company which were originally Protea policies would over time have been integrated into the defendant's system. The changeover would have been effected by initially issuing paper policies and subsequently the computer-generated policies.

[116] The next witness for the defendant was Neil Russell Taylor who was employed by the defendant since 1979 and was currently based in Cape Town. He started as a clerk in the claims department. He went up the promotion ladder until he was eventually transferred to Pietermaritzburg in or about June 1997 where he held the designation of assistant manager and head of both the commercial and personal underwriting departments. Under him were two officials who held the position of superintendents, one of whom was Craig McLaurin and the other a lady by the name of Rochelle. Currently Mr Taylor held the position marketing manager.

[117] Mr Taylor told the Court that when he arrived in Pietermaritzburg the staff of Protea and the defendant were just as one entity operating from the same building. He said he was not involved in the assessment and payment of the plaintiff's claim in respect of the first fire when the plaintiff was still insured by Protea. The matter was being attended to by the then branch manager Mr Ralph Jamieson. The witness was also not involved in the defendant's decision to insist that the plaintiff should have a broker as an intermediary between the defendant as the insurer and the plaintiff as the

insured. What he knew was that the Protea manager at the time, Mr Arthur Beaton was the person who was very keen to look after his clients (that is, the insured) a situation which did not necessitate the involvement of a broker. The decision to involve the broker would probably have come from Mr Jamieson but the witness would not be able to comment on the reason behind the decision.

[118] The witness confirmed that the Comspec circular (at page 22B) was the example of circulars which were issued from time to time by the defendant's head office as guidelines to all the defendant's branches. This particular circular dealt specifically with issues related to the takeover of Protea by the defendant.

[119] Mr Taylor was referred particularly to paragraph 10 of the Comspec circular under the sub-heading "I90/Comsure Conversion" and he was requested to explain how the two systems of these two companies (Protea and the defendant) had operated. He told the Court that Protea had managed their insurance business on a computer system which was very different in its design, its capabilities and its reports to the manner the defendant operated its business. As a result, a decision had to be taken by the defendant whether it would follow the Protea system or something else, which would then be the common computer system in respect of the entire policy base of the defendant. At the end of the day the defendant preferred the Comsure system. Therefore all the Protea policies were to be converted into the Comsure system. According to Mr Taylor, the Comsure system worked like any other computer system in that it managed the renewal dates and the premiums raised to the various classes, whether it be fire, motor vehicles or anything.

[120] Mr Taylor further confirmed that in terms of paragraph 11 of the Comspec circular it was directed that the Protea staff should familiarise themselves with the defendant's underwriting guidelines, in particular the Blue Book. He added that this instruction was directed specifically to the Protea staff because the defendant's staff were already familiar with those guidelines.

He said one would look up in an index of the Blue Book to obtain any particular industry and that would take one to a rating guide or an actual rate which head office had determined was suitable for the various risks associated with that type of industry. In this regard he was asked to explain to the Court how the underwriting guideline (the Blue Book) would work in respect of an insured which was a shoe manufacturing entity, with regard particularly to fire and burglary risk. Mr Taylor then referred to pages 1, 2 and 3 of Bundle "A" which were the relevant extracts from the Blue Book and stated that the shoe manufacturing industry would fall under the general classification "*Leather Goods Manufacturers Excluding Clothing = Leather Traders and Tanneries*". In that case it meant the list of risk classifications would be found under the heading "*Leather Traders and Tanneries*" to be found elsewhere in the Blue Book. For convenience, that list appeared at pages 2 and 3 of Bundle "A". According to the witness the plaintiff's business was correctly classified in terms of the Blue Book. This would have been done by having to choose from one of the six categories (appearing at page 2A) the one which was closest to the plaintiff's type of business. Although he could not recollect precisely what the actual list classification was offered to the plaintiff, he felt that the plaintiff's type of business would probably have fallen under category 2 "*Goods and Shoe Manufacturers (Leather and Synthetic Materials)*" with the fire risk code of L2201 which would then have been used for data capture in the computer system.

[121] Mr Taylor was then referred to Ms Duckham's letter dated 16 February 1998 at page 94A and the policy endorsement documents that followed thereafter from pages 95 to 102. He confirmed that the ten warranties appearing at page 99 corresponded with warranties numbered 7.1 to 7.10 under the sub-classification "*Leather Traders and Tanneries*" in the Blue Book (appearing at pages 2A and 3A). Therefore, according to the witness, the ten warranties at page 99A were not put there by mistake but were included in terms of the underwriting process that was applicable at the time. In other words, they were in line with the standard procedure of the day.

[122] Mr Taylor further testified that the endorsement dated 16 February 1998 (starting from page 95A) was done at the time when the plaintiff's policy had already been converted into the defendant's system, hence it had been allocated the defendant's policy reference number. He further stated that it was the defendant's standard procedure that once a loss classification was chosen, the warranties that applied to that particular loss classification, in terms of the Blue Book, were then included in the policy document concerned. Therefore as far as he was concerned, the plaintiff's policy and endorsement dated 16 February 1998 incorporating the warranties was no different from any other policy issued by the defendant at the time. If there was any suggestion that they were put in there by mistake then the same suggestion would have to be applicable to every other policy that the defendant issued at the time. He further stated that Ms Duckham's letter of 16 February 1998 was a standard covering letter which was issued with all the policy endorsements and it was part and parcel of the endorsements. Indeed, he noted, the letter required of the insured to read it carefully and to ensure that it correctly stated the insured's requirements. In this particular case he could not recall ever receiving a call from Mr Hestermann or the plaintiff's principal, complaining about any content in the policy endorsement.

[123] According to Mr Taylor the first person who would have put the warranties in the policy would have been Ms Duckham as the person who did the endorsement. She could have done this either upon instructions from her section head or she could simply have done it on her own initiative in terms of the standard procedure which required her to apply the warranties whenever the risk classification was taken. Alternatively, there could have been an instruction from Mr McLaurin directed to the underwriting department to the effect that whenever a policy was issued then it must contain the applicable warranties. He further recalled that at the time of this incident he had just arrived in Pietermaritzburg from a previous branch where he had been involved in a different field of insurance and that he was therefore not quite familiar with the applicability of warranties but the people working in the underwriting area had been doing this for months and months before he arrived and it was therefore a procedure they were quite clear about.

[124] Mr Taylor further told the Court that in the absence of any objection or debate about the warranties having been received from Mr Hestermann or the plaintiff, the defendant would have assumed that the policy endorsement (containing the warranties) had been accepted and the warranties would be complied with by the plaintiff. According to him, the policy was a binding contract which was renewed year after year with those clauses containing the warranties. On that basis, the defendant would have assumed that the warranties had been complied with. Therefore, the plaintiff would not be allowed to ask that the warranties be dropped in order for the plaintiff to be paid for the claim because the defendant might possibly not have accepted the risk in the first place without those warranties being included in the policy. If there was to be a query from an insured or the insurance broker about the warranties, then the defendant, as the insurer, could have decided either not to take on the risk or allow the insured to increase the premium. Of coursehe said, the other option would have been for the insured to look for another insurance company.

[125] He further testified that in order to remove any of the warranties the additional premium would be payable in accordance with the calculation guideline appearing on the right hand side column next to warranties at pages 2A and 3A. For example, if warranty 7.1 were to be removed, the premium payable would be increased by 0,035% as reflected in the guideline. For warranty 7.2 to be deleted "*each and every machine including the first five*" which were permitted, the premium would also be increased by 0,035% and in respect of warranty 7.3 the increase would be 0,025% of the applicable premium, and so on. This was done on the basis that the removal of any warranty meant the increase in the risk in respect of which that particular warranty applied.

[126] Mr Taylor noted that the policy endorsement dated 16 February 1998 (which was mid-term effective 13 January 1998) contained ten warranties (see page 99A) whereas the subsequent policy renewal effective 1 July 1998 was issued with only 9 warranties with warranty W0009 having been removed

(see page 107A). It was brought to his attention that this particular warranty No. 9 did not appear in all subsequent policy renewals. His comment was that he did not know, as a matter of fact, why this warranty had been removed. He stated, in general terms, that the procedure as at the time was that a warranty would be removed when there was an objection to it made by the broker in which event the matter would be referred to the manager of the department for a decision. However, since Mr Hestermann had denied knowledge of the existence of the warranties, it followed that the possibility of the broker's objection would not apply in this case. Mr Taylor was therefore not aware of any other possibility.

[127] He further stated that although the surveyor's report could reveal the fact that certain warranties could not be complied with, the defendant's system which was in use at the time, relied on the client's reaction in relation to compliance or non-compliance with the warranties.

[128] Since, in terms of the underwriting guildeline, an additional 0,035% of the applicable premium would have been payable by the removal of warranty No. 9, the witness was asked if that was done in this case. This particular warranty referred to "*no storage of raw materials or finished goods in the building*". Mr Taylor's response was that it could possibly have been established by the underwriters that the plaintiff's business was of the type where the storage of raw materials, for example, could not be avoided but the defendant could nevertheless have decided that no additional premium would be charged to remove the warranty. He said this was only a possibility, he was not certain of what the reason was behind the removal of the warranty. When further asked whether, in the light of his comment, the requirement for additional premium in the event of a warranty removal was not an absolute one, his response was that "there was a point of negotiation or a point of agreement made by the underwriter to whether they would actually apply the load on the rate or not. It wasn't cast in concrete". In other words, the application of the load percentages reflected on the right hand side column next to the warranties as appearing at pages 2 and 3 of Bundle "A" was a matter for discretion to be exercised by him or Mr McLaurin.

[129] Mr Taylor further testified that Mr van den Berg, the surveyor, performed a specialist function which was separate from the commercialised department where the underwriting was done and he (Mr van den Berg) even had separate reporting lines to the management. The underwriting department received copies of the surveyor's reports which included the recommendations made by the surveyor. The reports were read carefully with a view to understanding whether, in particular, the housekeeping of the risk complied with the standard which the company required. The recommendations by the surveyor in terms of the risk improvement or something that would lessen the risk whether it be from a fire point of view or from a burglar point of view, depending also on the severity requirements which were communicated to the broker, would be followed up to ascertain to what extent the risk could be improved or had been improved by the insured in the light of the surveyor's insight and recommendations. The surveyor's visit to the premises was very seldom linked to the renewal of the policy. It would generally arise where the risk incepted with the company. It would also arise where there was a sudden or substantial increase in the sum assured. It would also arise on a frequency period, depending on the severity of the risk. It was not usual practice to give the surveyor a copy of the insurance. In general practice there was a surveyor's request form to which, in some cases, a copy of the previous survey might be given. The form would set out the broker's contact details and the client's address and, more specifically, the sums insured relevant to the risk. Where the surveyor's report referred to "warranties which could not be complied with", the surveyor would have made those references from the Blue Book rating.

[130] As to Mr Hestermann's evidence to the effect that his understanding of the word "instructions" appearing in the first paragraph of Ms Duckham's letter of 16 February 1998 (at page 94A), he (Mr Hestermann) understood that to have referred only to his own instructions dated 13 January 1998 (at page 92A) which related only to the request for the increase of the sum insured and that he had not expected that there would be warranties included in the policy

renewal, Mr Taylor said although he could not comment on Mr Hestermann's expectations, as far as the defendant was concerned, Mr Hestermann was presented with the entire document which included the warranties. Indeed, this was not the only policy issued to the insured through Mr Hestermann which had warranties. Other similar policies which came to mind included the ones issued to Super Quick Tyres and Power Conversion. If he recalled correctly, in one of those cases the warranties were added as far back as 1995. That was just the way that the defendant operated its business at the time with regard to issuing the so-called fire policies.

[131] Under cross-examination by *Mr Marnewick*, Mr Taylor said it was correct that the presence of the warranties in the fire section of the plaintiff's policy meant that if there was a breach of any one of them the defendant did not have to pay any claims on the fire section. Hr also said he was not aware that from day one, that is from February 1998, the plaintiff had actually breached at least two of the warranties. He conceded that if that was indeed the case, it would mean that from that time onwards, the plaintiff could never have brought a valid claim under the fire section.

[132] Mr Taylor agreed with the proposition that the defendant held two parallel policies in respect of the two sister entities, one for the property owning close corporation (the plaintiff) and the other for the operating company. He further agreed that since he arrived in Pietermaritzburg the two policies, although being separate policies on the basis of them representing different insurable interests, they were dealt with together in the discussions between the defendant's representatives and the plaintiff's broker, Mr Hestermann. Hence, the two entities submitted separate claims under their respective policies. The two policies were taken over by the defendant from Protea at the same time and in the same manner. The policies were allocated different policy numbers which would be generated by the computer system when the details of the Protea policies were inserted into the defendant's computer system. The allocation of a policy number was automatically done by the computer. It was put to the witness that there was documentation to the effect that the same warranties which were the subject of the dispute in

this case also appeared in the policy of the operating company, to which Mr Taylor said that he indeed believed that to be the case.

[133] Having laid this background, *Mr Marnewick* then referred Mr Taylor to page 222A which was a summary of the claims which had been made on the policy of the operating company. He referred particularly to the first four claims dated 15 January 2002 (R8 644), 22 January 2003 (R18 975), 18 March 2003 (R1 900) and 21 February 2004 (R4 597). Besides these, there was a fire claim dated 18 December 1998 for the amount of R4 521,24, a copy of which, according to *Mr Marnewick*, was handed to the defendant's legal team. He put to the witness that all these five claims were fire claims yet they were paid out by the defendant despite there being the warranties in the policy. Mr Taylor pointed out that the first four claims referred to on page 222A were in fact in respect of loss caused by lightning, not the actual fire and that this fact was indicated by the acronym "WLN" which appeared under the heading "Class" next to the claims and that it was the fifth claim that related to the actual fire, which was indicated by the acronym "FFR" under the same heading. However, Mr Taylor conceded that since all these claims were under the fire section to which the warranties were attached, the defendant did not, as a matter of law, have to pay the claims if the warranties had been breached. This was despite the fact that the warranties in question might have had no bearing on the type of loss suffered. The witness added, however, that the warranties would not be regarded as material to the insured perils other than where the damage was caused by fire or explosion. In other words, he conceded that although the warranties would have been applicable in such instances on the basis of the policy, the defendant would nevertheless not apply the warranties.

[134] The policy which was in force at the time the fire broke out (on 13 October 2004) was the one attached to the plaintiff's pleading and marked "A" which had taken effect on 1 July 2004 and appearing from page 10 of the pleadings bundle. Mr Taylor confirmed that this policy, like any other one, was a standard document printed in a booklet and containing particular wording known as Multimark wording. In the present instance it was known

as Multimark III, 1997 version. It was a document of general application. The schedule, to be attached to the insurance document, would then specify which particular sections or provisions of the insurance document were applicable to the policy concerned. The schedule would also be used to include special terms of the insurance in relation to the particular insured and policy. Further documents could also be added to form part of the policy, for instance, in the nature of endorsements. In other words, the policy would consist of a layer of documents with the foundational document being the booklet containing the general terms and the schedule, which was issued at the inception or commencement of the insurance contract, followed by endorsements to be included in the policy from time to time. Mr Taylor also confirmed that the warranties did not appear in the Multimark document but were included in the policy as special terms which, however, were not necessarily included by agreement between the parties. The underwriting department only applied the warranties without necessarily having to know whether these were agreed to or not between the parties.

[135] Mr Taylor further confirmed (and, in this regard, agreed with *Mr Marnewick's* proposition) that by October 1997 the defendant had made sufficient progress with the process of transferring the Protea policies into its own system. In this regard reference was particularly made to Van den Berg's survey report dated 16 October 1997 appearing from page 97A which already made reference to warranties that could not be complied with (at page 74A) and further made reference to the defendant's policy number (at page 69A). The policy number was generated automatically by computer in accordance with the classification of businesses in the Blue Book and then captured on the data system. The computer programme would then allocate the risk classification/designation to the policy which, according to Mr Taylor, in this case was risk classification code L2101 (see also page 74A) which in turn carried with it ten warranties appearing on pages 2A and 3A. He said it was however possible that the risk classification would not immediately appear on the computer once the policy number was issued but only after the survey report had been received.

[136] *Mr Marnewick* put it to Mr Taylor that since the capturing of the type of the insured business in the computer would automatically trigger the same risk classification L2101 the risk classification would have appeared in the computer system at the same time as when the defendant issued the policy number. Mr Taylor said he did not know that to be the case and further that, after all, he was not personally involved with the actual issuing of the policies and would not know at what time or what stage the warranties and/or the loss code would be put into the policy. He never worked personally with the defendant's computer system. However, he agreed with the suggestion that once the risk classification was allocated to the policy, the warranties would have followed as a matter of implementing the guidelines in the Blue Book and that from that time onwards if one were to issue an endorsement or printout the whole policy or the schedules, the warranties would automatically be reproduced by the computer programme onto those schedules. *Mr Marnewick* suggested to the witness that in the present instance that would be the case from about November 1997 onwards. In other words, it was further put to Mr Taylor, that when Mr Hestermann made the request for the increase in the sum assured by his letter dated 13 January 1998 (at page 92A) the risk classification of L2101 would have been already allocated to this particular policy number 138N076723 and the warranties that went together with that risk classification in terms of the Blue Book already included automatically by the computer.

[137] Mr Taylor then sought to explain how a policy number was constituted in terms of the defendant's system. For example, in respect of the plaintiff's policy number 138N076723 he stated that the first digit "1" represented the fact that this was a monthly paid policy as opposed to an "0" representing an annually paid policy. The next digit "38" indicated the policy class which in this case 38 meant that this was a multi-peril or Multimark policy, that is, a policy which consisted of a number of documents as explained above in relation to the Multimark policy documents. The letter "N" indicated the defendant's branch where the policy emanated from. The rest of the numbers which in this case was 076723 were generated by the computer with the check digit.

[138] He confirmed that the warranties in the policy were applied to all policies with the same risk classification. The computer would automatically impose the warranties to the schedules in all those cases. Indeed, in terms of the Blue Book (pages 2A and 3A) it was possible that the warranties could be deleted by agreement between the insurer and the insured. In this case the plaintiff was given the option to have the warranties deleted through Ms Duckham's letter dated 16 February 1998 (at page 94A) and that this was the only way that the plaintiff was advised about his option in this regard. Mr Taylor confirmed Mr McLaurin's evidence that the Blue Book was a confidential booklet to which neither the insured nor the brokers had access. It was then suggested to him that since that was the case, the plaintiff would not have known that by offering to increase the premium the loadings (the warranties) would be deleted. In response Mr Taylor stated that the plaintiff would nevertheless still have been entitled to challenge the warranties that were included in the policy issued to him. He confirmed that at no stage did the defendant consider, prior to implementing the warranties on the computer system or imposing them on the policies, whether a particular insured could actually comply with the warranties in their business operations. He further conceded that by not notifying the plaintiff in advance that the defendant would be imposing the warranties on the policy, the plaintiff was thereby not accorded the opportunity to discuss the matter with the defendant. He knew that the defendant's system had warranties built into the Blue Book instructions and which would necessarily be included in the Protea policies once those policies were taken over by the defendant. However, notwithstanding this awareness on the part of the defendant's officials, it was not deemed necessary to advise the affected insured in advance that the warranties were going to be imposed. According to Mr Taylor that was how the defendant operated its business at the time (page 148 line 18 of the record, Vol. 2, September 2008). The warranties were imposed at the time when the defendant's computer system accommodated all the Protea policies, which was during 1997. On this basis Mr Taylor conceded that in January and February 1998 the warranties were already embedded in the defendant's system and that up to that time the plaintiff and Mr Hestermann would have

had no reason of knowing about the existence of the warranties in the defendant's computer system.

[139] Mr Taylor further confirmed that the plaintiff and Mr Hestermann could only have known about the existence of the warranties by the letter dated 16 February 1998 (at page 94A) which accompanied the endorsement incorporating the warranties (at page 99A). Otherwise up to that point they would have been completely ignorant about the existence of the warranties.

[140] A specific question was then put to Mr Taylor: "Does Mutual and Federal when it wants to change a term of a policy where it perceives that the risk has changed or increased, give notice to an insured and invite the insured to a discussion before cancelling the policy?" His answer was "Yes" (page 150 lines 21-24, *ibid*). He confirmed that in the simple example of a household policy, the defendant would invite the insured to install a burglar guard and alarm system within a specified time failing which the policy would be cancelled. However, he conceded that the defendant had not thought it necessary to hold a similar discussion with the plaintiff before imposing the warranties (page 151 lines 2-12, *ibid)*.

[141] Mr Taylor further pointed out that the defendant operated its computer system on a nationwide basis. It was not the case of each branch operating its own system.

[142] The witness reiterated his earlier evidence that it was not the practice of the defendant to discuss the imposition of the warranties with the insured or the broker. He conceded that in practice the defendant was thereby making two assumptions, the first being that the insured or the broker would notice the inclusion of the warranties in the documentation and, the second being that the insured or the broker would realise the significance of the warranties and, if necessary, object to its inclusion. He said he would agree that a considerable problem could arise if the defendant happened to be mistaken in either respect in those assumptions, especially in the case of the insured or the broker not having noticed the inclusion of the warranties. Be that as it

might, Mr Taylor insisted that there was an onus on the insured to read the policy and that in this regard he meant the entire document, not just part of it.

[143] He also agreed that these particular warranties (whether they were nine or ten, according to him, it did not matter) would have had a significant effect and impact on the way that the plaintiff, as a shoe manufacturer, was going to be able to conduct its business. He further agreed that the reason the defendant wanted to impose these warranties was because they were common components of a shoe manufacturer's methodology in terms of actually running their business which would increase the fire risk. He agreed that there were no warranties of a similar nature on the Protea policies.

[144] Mr Taylor confirmed his letter dated 18 June 1998 (page 112A). He further confirmed that this letter referred to the meeting which he had held on 17 June 1998 with Mr Hestermann at the latter's offices at which they held discussions on the impending renewal of the operating company's policy which was due on 1 July 1998. He further agreed that the meeting and the letter aforesaid were a follow-up on the defendant's letter dated 21 May 1998 written by the assistant general manager, commercial division, one H. Appleby, the first paragraph of which, among other things, advised the plaintiff that in the event of the branch handling the plaintiff's insurance thought it was necessary to revise the terms and conditions section of the policy, the company would be contacted to discuss the matter. So, the holding of the meeting on 17 June 1998 was a fulfilment by the defendant of its undertaking on 21 May 1998 in the letter which clearly bore the plaintiff's policy number 138NO76723.

[145] It was further pointed out to Mr Taylor that although the endorsement which included the warranties for the first time was dated 16 February 1998, the effective dated thereof appeared to be 13 January 1998, to which Mr Taylor agreed was indeed the case. On this basis he conceded that the warranties which were included in the endorsement were therefore imposed on the policy retroactively and, to that extent, more than a month even before the plaintiff and Mr Hestermann were advised of their existence. Similarly, the

plaintiff was in breach of the warranties without knowing that such warranties existed. Mr Taylor agreed. It was put to him that no insurer of repute would conduct its business in that fashion.

[146] Mr Taylor then sought to explain that in a situation where the Protea policy was taken over on a date prior to 1 July then the period between these two dates (that is, the "prior" date and the 1st July) would be insured on the basis of either the Protea policy or the defendant's policy, depending on which one between the two policies would be more beneficial to the client. On this basis, according to Mr Taylor, even though the endorsement dated 16 February 1998 took effect on 13 January 1998 the Protea policy wording would continue to apply until the next renewal date, which was 1 July 1998, also being the date when the warranties would have started to apply. He said that it was so because the Protea policy was still the wider of the two policies and would therefore be applicable during the window period.

[147] Mr Taylor also confirmed that they dealt with the two policies of the plaintiff and the operating company at the same time because their renewal date was the same, they had the same broker, and were in respect of the same premises. They were just two separate policies covering basically the same operation. Therefore, he agreed that on 18 June 1998 when he held a meeting with Mr Hestermann, they had the opportunity of discussing both the policy of the operating company as well as that of the plaintiff. Further, that on the day following upon that meeting he had written to Mr Hestermann inviting him for renewal "*at the existing terms and conditions*". He further confirmed that at that time the existing terms and conditions in relation to the plaintiff's policy were the ones in terms of the Protea policy wording and that, accordingly, his indication to Mr Hestermann was on that basis. He also agreed that Mr Hestermann would have then requested the renewal of both policies on that understanding. He also conceded that the renewal issued to the plaintiff on 1 July 1998 was in no way a cover "at the existing terms and conditions" in the context alluded to. He further agreed that there was nothing at the meeting of 17 June nor in his conduct, nor in what he told Mr Hestermann, which would have alerted Mr Hestermann to the effect that he

(Mr Taylor) was going to issue a policy other than the one granting cover on the existing terms and conditions. However, he would have assumed that Mr Hestermann would see the warranties in the document and would contact the witness and object to the inclusion of the warranties if he wanted to. Otherwise if Mr Hestermann or the plaintiff did not object, then the defendant would assume that the warranties were accepted.

[148] It was put to Mr Taylor that there were several events and opportunities which would have alerted and reminded the defendant to bring to the attention of the plaintiff through Mr Hestermann the existence of the warranties in the policy, and the fact that some of these warranties were not being complied with by the plaintiff. He listed these events and opportunities. Mr Taylor agreed. I will refer to this aspect during my evaluation.

[149] Mr Taylor confirmed that Mr van den Berg, when conducting inspection of the insured's premises on behalf of the defendant, was not given the policy and its schedules. He would only deal with the matter on the basis of the type of business of the insured and the underwriting guidelines contained in the Blue Book. In that way Mr van den Berg would know what risk classification was attached to that category of business and what warranties accompanied it. However, he would not know whether those warranties were actually applicable to the particular case because that information would only appear in the policy schedule to which the surveyor did not have access. It was put to Mr Taylor that such procedure alone was a recipe for disaster as the methodology left room for an error. In response, Mr Taylor said in practice no errors had resulted, according to his knowledge.

[150] The witness was then referred to the email dated 22 October 2004 written by Mr Hestermann to the defendant's Andrew Errington. Mr Taylor stated that Mr Errington was the defendant's branch manager at the time and that he had succeeded Mr Jamieson in that post. This email was written by Mr Hestermann shortly after the fire had broken out and a day after Mr Hestermann had had a meeting with Mr Errington and one Mr Derrick

Manning. In the email Mr Hestermann had stated, among other things, the following:

> "We suspect that these warranties may have been carried forward in error from another policy during the re-issue process.
> Tjaard (Van den Berg) had also confirmed to us telephonically that he was aware of the existence of the flammable liquids store and that if there were any warranties, they were certainly not intended to apply to the flammable liquids store." (at 167A)

[151] Mr Taylor conceded that this email was the first ever document available which served as correspondence between the plaintiff and the defendant in which express mention was made about the warranties. Significantly, this first correspondence came from the side of the plaintiff and nothing at that stage had come from the defendant's side.

[152] The witness was then referred to Mr Hestermann's letter dated 6 January 2005 (particularly at page 169A) where Mr Hestermann stated as follows:

> "Your Pietermaritzburg surveyor confirmed to me verbally that these warranties could not possible (sic) apply and even he had no knowledge that they were on the policy. At a meeting in Durban with your Andrew Strauss he mentioned that as far as he was concerned the warranties would not be removed from the policy as they would be needed as a 'back-up' – this was said in front of Stanley Lief and Ken Cox. At the time we said it was a 'dirty move' on the part of Mutual & Federal as it was obvious that Andrew Strauss was looking for any technicality to avoid paying the claim. …"

[153] Mr Taylor said that it was correct that the surveyor (Mr Van den Berg) would not have known about the existence of the warranties on the policy because he did not have access to the policy. In any event, the warranties were an underwriting matter and not one concerning the surveyor. Mr Taylor was also quick to point out that as to what submissions Mr Hestermann made to the defendant about the claim and what defences were raised by the defendant in order to avoid liability on the claim were matters not within his (Mr Taylor's) responsibility and therefore he did not have much knowledge and insight therein.

[154] *Mr Marnewick* then suggested to Mr Taylor that these warranties found their way into the policy document by mistake on the part of the defendant

and that the mistake could have taken various forms, including the defendant's incorrect assumption that the documents would be read and then reacted upon by the plaintiff or Mr Hestermann on behalf of the plaintiff. In response Mr Taylor stated that the warranties were something of general application to all clients alike and not only to the plaintiff and that they were applied purposely in terms of the defendant's underwriting guidelines as provided in the Blue Book. Therefore Mr Taylor did not agree with the proposition that the warranties were included in the policy by mistake. However, he was at pains to concede that, on the basis of his earlier evidence, the endorsement dated 16 February 1998 in which the ten warranties appeared for the first time reflecting that the endorsement was effective from 13 January 1998, that was in fact a mistake on the part of the defendant in not reflecting in the documents that in actual fact the warranties would only apply at the renewal date, being 1 July 1998. Further, it was a mistake for the defendant not to indicate in the said endorsement that during the period 13 January 1998 to 30 June 1998 the Protea policy would continue to run, having to be preferred because it was more beneficial to the client (the plaintiff) in comparison to the new policy under the defendant's system.

[155] It was further put to Mr Taylor that the defendant misled both Mr Hestermann and the plaintiff by persuading them to think that they were going to get, with effect from 1 July 1998, insurance cover of the same nature and effect as that which the plaintiff had obtained under the Protea policy. Accordingly, the defendant was the party to blame for having misled the plaintiff in that fashion as it was clear that the defendant was the primary party responsible for the misunderstanding and the error that followed. Further, the defendant was the party that had the knowledge, the means and the opportunity to avoid any misunderstanding because all the time it knew about the existence of the warranties whereas Mr Hestermann and the plaintiff did not. Mr Taylor had no comment save to say that there was a measure of responsibility on the part of the broker (Mr Hestermann) to read the contract of insurance that was in place. However, he conceded that such a responsibility had followed upon the errors which had been made by the defendant in advance of that.

[156] *Mr Marnewick* further suggested to Mr Taylor that it was plain from the defendant's conduct from 1998 onwards right up to the time of the fire on 13 October 2004, that the defendant did not actually apply the warranties, or implement them, or take them seriously when the surveyor's reports were received, when communications with the insured occurred or when claims were made on the operating company's policy. He further suggested to Mr Taylor that it was only when the big fire broke out (on 13 October 2004) that the defendant stumbled upon the fact that there was this defence of the warranties available and then it grasped at it.

[157] *Mr Marnewick* then referred to the four claims appearing in the claims history document at page 222A submitted on behalf of the operating company and which, according to *Mr Marnewick's* instructions, were all paid by the defendant despite the fact that the same warranties had been imposed on the operating company's policy as well and the warranties had not been complied with by the operating company. Mr Taylor did not have information to respond and was therefore given the opportunity to go to the office to try and trace these files from the archives. On his return Mr Taylor stated that only two claims could be traced from the defendant's archives and the other two could not be retrieved. The two claims which he found had indeed been paid. He pointed out (under re-examination later) that the likelihood was that the other two were also paid.

[158] Mr Taylor reiterated that when he arrived in Pietermaritzburg from Port Elizabeth during 1997 the defendant was in the process of getting into the new computer system and programme which it had acquired (the Comsure system). This was also when the Protea business was being taken over by the defendant and integrated with the defendant's business, during which process all the Protea policies were transferred into the defendant's computer system. He further stated that in that process of transferring the policy procedures and documents onto the defendant's computer system, the Blue Book and the circulars received from head office were part of the fundamental documents driving that process or underlying it. He pointed out, however, that

prior to the defendant acquiring the new computer system, there was already a certain other computer system in operation. In other words at the time of the Protea takeover the defendant was not operating on a manual system.

[159] *Mr Marnewick* reminded Mr Taylor that after the defendant's letter of 21 May 1998 (at 223A) aforesaid he (Mr Taylor) held a meeting with Mr Hestermann on 17 June 1998 during which the "money section" in relation to the operating company's policy was discussed and that a day thereafter (18 June 1998) Mr Taylor had written a letter to Mr Hestermann referring to their meeting of the previous day and then inviting Mr Hestermann to apply for renewal of the plaintiff's policy "*at the existing terms and conditions*". Mr Taylor could not remember whether at that stage he was already aware or not of the warranties to be imposed onto the policy effective 1 July 1998. However, when the following question was asked:

> "But if you had known that these new warranties were going to be imposed at the renewal date when the documents were issued, I am sure you would have said to Mr Hestermann, 'Listen, we have got to talk about warranties, because remember Mr Appleby's letter says if we want to impose new terms we must discuss them as …… (incomplete)'"

Mr Taylor's answer: "Ja, agreed." (Page 187 line 24, page 188 lines 1-3 of the record, Volume II September 2008.)

[160] During his re-examination by *Mr Dickson,* Mr Taylor confirmed that the first six claims included in the claims history at page 222A were all fire claims and that the first four were in respect of lightning by virtue of the class code "WLM" and only the fifth and sixth were in respect of the actual fire by virtue of the class code "FFR" and these were both dated 13 October 2004 which was the date of the fire which culminated in the disputed claim and this litigation. These two fire claims were for the amounts of R8 043 747 and R3 115 000 respectively.

[161] Mr Taylor further confirmed that two of the first four lightning claims were paid and that he was unable to establish what happened to the other two but he said it was likely they were also paid. He further told the Court that he

had never worked on the computer system. It was Mr McLaurin and Ms Duckham who worked with the computer. For his part, he had no dealings with capturing data, issuing policies or changing policies. In the event he needed to look up for information in the computer, he would ask someone to look it up for him or create a printed document (a hard copy) for him. He said his knowledge of the computer system was based on what he had been told by other people and not from what he had actually physically done on the system himself. Amongst these was the information that when a client went in and chose a loss classification the warranties were part and parcel of that loss classification at that time. However, he was not able to say whether, as a matter of fact, that was the position from October 1997. In other words, he was not in a position to say whether or not the attachment of the warranties was included in the loss classification. He also did not have personal knowledge about whether from October 1997 the warranties would have been printed out automatically from the computer as he did not know when exactly the new system started to operate. His knowledge was only based on what he was told by people from the commercial underwriting area.

[162] Mr Taylor was again referred to the policy documentation appearing from pages 10 to 51 of the pleadings bundle, which included the standard Multimark III policy format starting at page 28. Mr Taylor stated that the Multimark III documentation would be attached only when the policy was issued for the first time and that at subsequent renewals only the schedules would be issued which would still be read with the original wording of the contract. The endorsement took the form of a schedule of papers which then determined the position which was applicable to the specific client. Therefore, in the present instance the standard documentation from page 28 through to 51 (the Multimark III documentation) would not have been included in the renewal documents that were sent to Mr Hestermann year after year after 1998 but, in terms of the defendant's normal practice, only the schedules. Therefore, as far as Mr Taylor was concerned, the 2004 policy renewal sent to Mr Hestermann would only have included the documentation from page 10 through to 27.

[163] The witness further stated that, after all, there was nothing in the 2004 renewal which was brought to the attention of Mr Hestermann or the plaintiff in a separate letter or otherwise, but everything was simply put in the schedule. He quoted the examples on the front page of the schedule (at page 11 of the pleadings bundle) towards the bottom under the heading "*Revised terrorism and new computer losses general exceptions*" and at the next page under the heading "*General Endorsement Attaching to and forming part of the policy*" with the sub-heading "*Effective Date*". None of the issues provided under those headings were discussed with Mr Hestermann or the plaintiff in any other way than through inclusion in the schedule. Similarly, certain amendments and adjustments to the original policy were introduced and included as part of the schedule (appearing at pages 13 and 14 of the pleadings bundle).

[165] Mr Taylor further confirmed that in a situation where there was a mid-term policy change (that is, from one policy to another) the normal practice was that the clients interim cover from the date of the change to the next renewal date would be based on the wider of the two policies until the next renewal. He said this practice was in terms of an instruction contained in a letter received from head office dealing with the issue.

[166] That concluded the case for the defendant.

[167] The issue for the Court to determine was the one set out in the "consent order" made in terms of Rule 33(4) at the commencement of this trial, based on the parties' agreement at the Rule 37 conference, namely:

1. Whether the plaintiff was entitled to and should be granted an order of rectification of the said policy to exclude the warranties as pleaded in the plaintiff's particulars of claim;

2. If not, whether the said warranties were avoided by way of estoppel or waiver as averred in the plaintiff's replication.

[168] The learned author *Christie* has the following to say on rectification:

> "If the remedies for common mistake were confined to a declaration of nullity or rescission and a defence against any claim based on the contract there would be a danger of injustice in those cases (which are not uncommon) where a written contract records a version of the contract that is not in accordance with what was actually agreed and one of the parties wishes to enforce the true version. The appropriate remedy in such a case is an order for the rectification of the written contract, the applicable principle being neatly expressed by Farlam AJA in *Tesven CC v South African Bank of Athens* [1999] 4 All SA 396 (A) 401 para [16]:
>
> > 'To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result.'
>
> As has been seen above, rectification may be granted when the misrecording is due to the *dolus* of one party, but a much more common application of the remedy is to the case of misrecording due to the common mistake of both parties. It is necessary that mistake be both pleaded and proved…"*Christie – The Law of Contract,* 5th Ed, at 329 -330)

According to *LAWSA*:

> 211 "…Where a policy as interpreted in accordance with the parol evidence rule fails to express the mutual intention of the parties, rectification may be invoked so as to bring the document in line with the intention of the parties. It is open to the parties to a contract to include a provision in it that excludes any possible claim for rectification…
> 212 …In order to obtain rectification of a document such as an insurance policy, the party claiming rectification must prove that the document fails to express the sustained common intention of the parties because of an error or mistake. The burden of proof rests on the party claiming rectification to establish on a preponderance of probabilities that the policy is incorrect.
> There is no room for a requirement that the mistake must *"iustus"* to found a claim for rectification as has been suggested in the insurance context.
> If a policy does not express the true intention of the parties, rectification may be claimed in spite of any delay that may have occurred in claiming the appropriate relief. Such a delay will hardly ever prejudice either party since *ex confesso* they never intended to be bound to terms other than those agreed upon…" (Vol. 12, p. 161, paras 211-212)

[169] A warranty in the context of an insurance contract may mean a term which, if breached, gave the insurer a right "to elect to avoid the policy and repudiate liability" (*Christie, supra* at 156). In certain instances a warranty has been described as a condition precedent to liability (See *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Company of SA Ltd* 1961 (1) SA 103 (A); *Heslop v General Accident, Fire & Life Assurance Corporation*

Ltd 1962 (3) SA 511 (A); *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A).)

[170] In *Lewis Ltd v Norwich union Fire Insurance Co Ltd* 1916 AD 509 the Appellate Division (as it was then known) stated: "*Now a warranty, in the sense in which it is used in insurance transaction, is a statement or stipulation upon the exact truth of which, or the exact performance of which, as the case may be, the validity of the contract depends*" (at 514-515). Again recently in *Parsons Transport (Pty) Ltd v Global Insurance Company Ltd* 2006 (1) SA 488 (SAC) at para [7], the Court (*per* Mpati DP as he then was) stated, in effect, that a warranty was not a warranty just because it was merely referred to as such in a contract and that in an appropriate case it would be understood as a material term of the contract. Indeed, it would appear to me that the nature of the warranties complained of in the present instance were such as to render them, if incorporated in any insurance contract, part of the material terms of that contract to the extent that their breach by the insured would entitle the insurer to cancel the contract and avoid liability. However, the plaintiff's claim had nothing to do with the materiality or otherwise of the warranties as such, but on the main averment that such warranties were not part of the contract and that they were only included in the policy through a mistake common to both parties. Hence the plaintiff's claim for rectification of the policy to exclude the warranties, alternatively for their avoidance.

[171] Counsel for the defendant submitted that the general rule was that a person who signed and accepted a contractual document and thereby signified his assent to the contents was bound thereby and if the terms turned out not to be to his liking he had no-one to blame but himself. (*Burger v Central SAR* 1903 TS 571.) Further that "[w]hen a man is asked to put his signature to a document he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature" (*George v Fairmead (Pty) Ltd* 1958 (2) SA 645 (A) at 472A.)

According to *Gordon & Getz*;

> "Once the contract has been concluded, neither party can resile from the terms agreed, or introduce others. It is the insurer's duty to issue a policy which expresses the agreed terms.
> The policy is the exclusive memorial of the contract. It may not ordinarily be contradicted, altered, added to, or varied, by 'parol evidence'.
> The insured must read the policy as soon as it is delivered to him and inform the insurer as soon as possible of any objection he may have to its terms. Some policies contain a notice requesting the insured immediately to return the policy to the insurer if any corrections are necessary. The insured is presumed to know what the provisions of the policy are.
> If the policy does not reflect the agreed terms, the insured should refuse to accept it until the wording has been changed, or, if he has already accepted it, and the insurer is unwilling to correct it, institute an action for its rectification.
> The policy can be rectified if, through mutual mistake, it does not correctly reflect the terms upon which the parties intended to contract." (*Gordon & Getz – The South African Law of Insurance* – 4th Ed at 143-144.)

Counsel further relied on the dictum in *Bushby v Guardian Assurance Co* 1915 WLD 65 where the Court (*per* Bristowe J) stated:

> "But there is another point on which I am against the plaintiff. He knew when he received the policy that it would or might contain clauses of which he was not aware. It was, therefore, his duty to make himself acquainted with the terms of the policy in order to ascertain whether there was anything in it of which he disapproved, so that the company might be informed at the earliest possible moment of any objection he might entertain. The company were entitled to assume that he had discharged 'this duty, and when a reasonable time elapsed without objection on his part, they were entitled to assume that he was satisfied and had accepted the policy as a sufficient compliance with the contract into which they had entered. *Mr van Hoytema* argued that the onus of proving *justus error*, which unquestionably is on the plaintiff, included negativing subsequent negligence of such a nature that if it had not occurred the plaintiff would have ascertained the true facts in time to have had the matter set right. I do not think this is the true way of putting the matter. It seems to me that the *Justus error* necessary to found a right of rectification stops short of common mistake prior to the completion of the document complained of and for which the plaintiff is not blameable. If that is proved then the right of the relief *prima facie* exists; and anything that subsequently occurs whether indicating acquiescence, acceptance, estoppel or any other answer to the plaintiff's claim is a matter of defence which the defendant must plead if he wishes to set it up. Here, however, acceptance is pleaded, so that that question is open for the decision of the Court. Now the case seems to me to be very analogous to a sale of unascertained goods. There, it is for the vendor to deliver such goods as he considers to be a fulfilment of the contract and it is for the purchaser when he receives them to say whether he accepts them as such. He is allowed a proper time for inspection, but if he does nothing he is taken to have accepted them. So here. The defendants had undertaken to deliver a policy in accordance with the terms agreed upon. They delivered one which in their view was in accordance with those terms. It was then for the plaintiff to say whether he concurred in that. He could have read and if necessary taken advice upon the policy within a few days or at all events a week or two after he received it. But he did nothing. He put it aside assuming that it was unobjectionable; and not until a fire had actually

> occurred some eight months later did he raise any question as to the validity of the warranty clause." (at 73-74)

[172] He also contended that if, in any event, it was to be held that the warranties were not part of the policy, it would therefore mean, given the fact that the warranties were part and parcel of the policy documentation forwarded to the plaintiff's broker on 16 February 1998, that the parties were not *ad idem* and therefore the contract was *void ab initio*. However, it has been said that it was not just the meeting of the contracting parties' minds but, more importantly, also the external manifestation of their minds, which was the basis for the creation and existence of a contract. (See *South African Railways & Harbours v National Bank of SA Ltd* 1924 (AD) 704 at 715.) In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D), the Court (per Howard J as he then was) stated:

> "Numerous cases were cited, and counsel debated at length on the question whether the true basis of contract in our law is subjective (the theory of 'consensuality') or objective (the 'reliance' theory). I accept that our law follows a *generally* objective approach to the creation or existence of contracts (see *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board, supra loc. cit.*), but I cannot accept that this approach is so uncompromising that it precludes the plaintiff from advancing the cause of action which he has pleaded. In *Trollip v Jordaan, supra* at pp. 247H-249A, Steyn CJ considered a series of decisions relevant to this question, including the *Potato Board* case *supra* and *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704, and held, in effect, that the objective approach to contracts did not exclude the operation, according to the established principles of our law, of mistake as a ground for avoiding contractual liability. I do not think that the majority judgment in *Trollip v Jordaan* reveals any disagreement with the conclusion of Steyn CJ on this point." (at 172)

[173] As in every instance and whatever legal principle was applicable, at the end of the day the traditional approach was that each case was to be treated and determined on the basis of its own facts and merits. The present case was no exception.

[174] It seems to me the principle that a person who put his signature on a document thereby signifying his or her assent to whatever words which appeared above the signature (*George v Fairmead supra*) did not apply here. In the first place, neither Mr Hestermann nor any person nominated thereto by the plaintiff put their signature on any of the policy endorsements or renewals

complained about in this case. Although each renewal could be treated as a new and separate contract between the parties it was, in my view, inescapable in an insurance contract to have to refer to the original policy, in order to determine whether the renewal still reflected the true agreement between the parties. In *Bushby v Guardian Assurance Co* 1916 AD 488, the Court stated, among other things: *"[T]he plaintiff must prove the existence of an antecedent contract to which the policy does not conform, and that the departure from the contract has been the result of the mutual mistake*." (at 492). In my view, the same principle should apply with regard to common mistake. The fact that it was "*the insurer's duty to issue a policy which expresses the agreed terms*" (*Gordon and Getz supra*) meant that the insurer had the responsibility to ensure that the policy reflected the terms agreed upon with the insured, particularly in a situation, as in the present, where the policy (the renewal) was based, or reasonably believed (by the insured) to be based, on the original terms of the contract reflected in the original policy, being the Protea policy. I think it would be inappropriate to compare this case with the situation in *Bushby v Guardian Assurance Co, supra* where the Court stated, as shown above, that the plaintiff "*knew when he received the policy that it would or might contain clauses of which he was not aware* (and that) [it] *was therefore, his duty to make himself acquainted with the terms of the policy in order to ascertain whether there was anything in it of which he disapproved, so that the company might be informed at the earliest possible moment of any objection he might entertain.*" According to the plaintiff's case, which was indeed corroborated by the defendant's witnesses, neither the plaintiff nor Mr Hestermann knew, or was reasonably expected to know when he received the policy, that it would or might contain clauses of which he was not aware. Instead, on the defendant's own version, both the plaintiff and Mr Hestermann did not know and therefore were not aware that the warranties had been included (for the first time) in the endorsement dated 16 February 1998. This was a mid-term endorsement which, in the light of the evidence, was presumably in accordance with the terms of the Protea policy which was taken over by the defendant. It was common cause that the last policy prior to 16 February 1998 did not include the warranties.

[175] It seemed to me, on the evidence, that the fact of the warranties having been included in the endorsement dated 16 February 1998 and in subsequent yearly renewals for the next seven and a half years did not justify diversion from the consideration of the historical circumstances surrounding their first inclusion in the policy. In other words, if their first inclusion in the policy was a mistake on the part of the defendant it would only mean the mistake was perpetuated for the next seven and a half years. But that it was a mistake, would not change. On the defendant's own evidence, notwithstanding the witnesses' insistence that the inclusion of the warranties was no mistake, none of the witnesses seemed to have the slightest idea of how and why, given the known real reason which had triggered the issuance of the endorsement dated 16 February 1998 - being Mr Hestermann's request dated 13 January 1998 - anything more than the implementation of the proposal in terms of that request was included in the endorsement in the first place. Ms Duckham (the writer of the defendant's letter dated 16 February 1998) was adamant that she would only have included the warranties in the policy endorsement upon specific instructions from her superiors, being either Mr McLaurin or Mr Taylor. This was how she put it when she was examined-in-chief by *Mr Dickson*:

> "DICKSON - Okay. So are you able to enlighten the Court as to whether why you put them (the warranties) in? Perhaps you should give His Lordship the various options as to how it got in there.
> DUCKHAM - Well in our working ten years ago at Mutual and Federal as processors, really, as clerks, we weren't allowed to put warranties like this into the policies without management having agreed it. We weren't allowed to change – to do major changes like this with – obviously because it is going to affect the risk without it having been approved. So for me to have done this it really would have come from management who would have instructed obviously the changes to be made and the warranties to be put in.
> NDLOVU J – So do I understand you to say that you wouldn't know the reason why they were put in? All that you can say is that they had been approved by the management and you were only instructed to put them in? --- Yes." *(Transcript Vol I, September 2008, page 14 lines 8-20)*

[176] To my mind, this piece of evidence (as to how the warranties found or possibly found their way into the policy) was important, given the plaintiff's pleaded case that they were included by mistake. It was however significant to note that Ms Duckham's evidence in this regard was materially contradicted

by that of Mr McLaurin and Mr Taylor who respectively testified on this point as follows (both responding to *Mr Dickson's* questions):

> Excerpt from Mr McLaurin's evidence:
> "DICKSON – Okay, now as far as the content of this schedule (dated 16/2/1998) is concerned and the letter that's sent out, where does this come from? Does it come from Tracy Duckham on her own initiative or does it come from someone else?
> McLAURIN - This particular document would have been initially put together – the instruction to process and type it would have been put together by Tracy and actioned (?) by one of our typists. The document would have come back from the typist to Tracy after she had put it through. It would have been her responsibility to check it, once she's happy with it to initial it or sign it and then send it on to the broker.
> DICKSON - And the initial instruction for Tracy to do it in this form, who would that have come from?
> McLAURIN - That would have been a standing instruction from my head office, that would have been the way that we dealt with business at the time." *(Transcript Vol I, September 1998, page 37 line 15 to page 38 line 1)*

> Excerpt from Mr Taylor's evidence:
> DICKSON – Now as you can imagine, it's ten years is, you can imagine both of those witnesses do not have any clear, firm recollection of who told them or how they (the warranties) actually got into the document. Do you have any recollection as to the endorsement of this policy that you see here, page 94, cover letter, with the documents attached to it, in relation to the addition of those warranties?
> TAYLOR - At the time that this endorsement was done the policy had already been converted to a Mutual and Federal document. In other words, it had been allocated a Mutual and Federal number. So this was a subsequent endorsement prior to – subsequent to the conversion of the policy. And my only thought is that Tracy put in the loss classification which automated the process of applying the warranties." *(Transcript – Vol. II September 1998 page 107 line 20 to page 108 lines 1-5)*
>
> DICKSON – So now do you have any explanation as to how it got in – how they got in?
> TAYLOR – As far as I'm aware the process in underwriting was to insert the warranties on each and every policy they issued. So this policy is not different to any other policy, it was Mutual and Federal's standard procedure that where a loss classification was chosen the warranties that applied to that loss classification were included in the policy document." *(Ibid, page 108 lines 14-20)*
>
> DICKSON – Would you like to tell His Lordship who would have in fact put these warranties in? Can you just give the possibilities? If you don't have a specific recollection, if you could give His Lordship all the possibilities of how they got in, and name the people's names so that we know what you're talking about.
> TAYLOR – The first person that put them in would have been Tracy. She would have done the endorsement and therefore she would have put the warranties on the policy. She reported into a section head and the section

> head might have told her to put the warranties in. Or alternatively, there might not have been any firm instruction to put the warranty in because – warranties on this specific policy, because what Tracy could have done was in terms of the standard procedure, and that was to apply the warranties whenever the risk classification was taken. The other person was Craig (McLaurin). Craig could have either said specifically, or alternatively – and there's nothing to – no correspondence to indicate that, so he could have had an instruction to the department on the basis that if the policy is issued then it must contain the warranties applicable. I had just arrived from a previous branch in a different field of insurance so at that stage I wasn't aware of the document that was issued, or aware of the warranties that were applicable. So this was in – within the underwriting area that this – and they were obviously been doing it for months and months before I arrived there, that was their procedure." *(Ibid, p 109 lines 11-25 to p 110 lines 1-7)*

[177] In the light of the contradiction between the evidence of the defendant's three witnesses on the issue of who issued the instruction to include the warranties in the policy – one tending to shift responsibility therefore to the other – the question which would naturally arise was whether such an instruction ever existed. Clearly if it existed it would have been a verbal instruction, absent any written proof to the contrary. One would reasonably expect an instruction of that nature – the implementation of which should bring about a substantial and substantive alteration in the terms of a written contract – to be in writing (check non-alteration clause). However, that issue was besides the point I was making. If it was part of the defendant's procedure for management to issue oral instructions in such matters, that did not concern me. What concerned me, however, was the fact that the three witnesses contradicted one another on this particular issue. Therefore the only evidence on this aspect which was unchallenged, clear and definitive was Mr Hestermann's letter of 13 January 1998 (at 92A) and indeed the one to which Ms Duckham was responding when she issued the defendant's letter of 16 February 1998 (at 94A).

[178] It was common cause that the warranties were not included in the Protea policy. Indeed, even after the Protea take-over which was notified to the plaintiff by letter of 4 November 1997 the contractual relationship between the parties remained on the basis that there were no warranties.

[179] In terms of the defendant's letter dated 15 December 2004 the plaintiff was alleged to have violated warranties numbered 1, 4, 5, 7 and 8. However, during the evidence the defendant relied on the alleged violation of warranties 1 and 4 only. It would therefore appear in the circumstances that the defendant abandoned its claim of the plaintiff having breached the terms of warranty numbers 5, 7 and 8.

[180] There was no dispute about the fact that during the Protea era the plaintiff kept in its stores the items referred to in warranty numbers 1 and 4 and that the Protea Insurance Company had nevertheless granted or allowed to the plaintiff the insurance cover. Indeed the Protea surveyor's report dated 7 August 1989 reflected that the surveyor found, among other things, the following, stored or kept on the premises:

> "B2 DETAILS AND QUANTITIES OF INFLAMMABLE LIQUIDS AND/OR COMMODITIES:
> 300 litres inflammables on factory floor
> 2000 litres in Inflammable Store
> B3 DETAIL DOMESTIC HEAING AND HEAT PROCESS (eg welding)
> Drying units on factory floor (4) -
> (Enclosed)"
> FIRE – MANUFACTURING & INDUSTRIAL RISKS
> 1. Describe fully process of manufacture – from raw materials used to packing and despatch of end product.
> Full shoe manufacturing concern with production lines (4 operating – mostly leather content – Rubber/Compound heels/soles brought in – Adhesives and Spray finish used (3 spray booths – extracted) –
> Drying units on production lines – Modern Construction fully enclosed." (at 16A)

[181] Therefore when the defendant took over the plaintiff's policy from Protea the defendant did so being fully aware of the plaintiff's nature of business operation and what products and/or substances were stored or kept in the building. Indeed, from the date of take-over (that is, 1 January 1997) through to 16 February 1998, despite the Protea policy having already been taken over as aforesaid, the plaintiff continued to hold the cover without the warranties. It was not in dispute that the introduction of the warranties on 16 February 1998 was triggered by Mr Hestermann's letter of 13 January 1998 in which he requested, on behalf of the plaintiff, the increase in the sum assured in respect of the building as well as the SASRIA policy. There was nothing else in Mr Hestermann's letter which indicated that something else had

changed or would change in the mode of the plaintiff's business operation. It remained a shoe manufacturing business which, as a necessity for the purpose of its operational requirements, was supposed, and indeed reasonably expected, to keep in its stores the items referred to in warranty numbers 1 and 4. It appears to me, in the circumstances, that the defendant would not, in its right mind, ever have thought that the imposition of the warranties, particularly warranty numbers 1 and 4, into the policy, could possibly have been complied with by the plaintiff, without necessarily having to have the plaintiff closing down the business. That would have been the inevitable result which, doubtlessly, would not have been in the interest of both the plaintiff and the defendant at the time. In other words, the defendant itself would not have intended that result to come about. Therefore, it seems to me, on the probabilities, that the defendant would never have proposed to the plaintiff the introduction of warranties of that kind which, in the circumstances, the defendant knew, or ought reasonably to have known, that the plaintiff would not by any chance have accepted.

[182] The defendant stated that the plaintiff had an option, if it sought the removal of the warranties, to have its premium increased and recalculated on the basis of the formula contained in the Blue Book, the relevant extracts of which appeared at pages 2A and 3A. As I understand the plaintiff's evidence, that was the option which the plaintiff would have been prepared and willing to negotiate on. It was logically clear, for the reasons already stated, that any other option whereby the warranties would still be retained, was simply out of the question. It was common cause that the Blue Book was a document strictly confidential to the defendant and its staff, and that no outsiders, including the insurance brokers (of whom Mr Hestermann was one), had access to it. That being the position, it was accepted that the plaintiff did not know, and would not reasonably have known, about the fact that the plaintiff had the option to increase the premium in order to have the warranties removed.

[183] The evidence established that the defendant's normal practice and procedure on this issue was that, in the event of a contemplated revision or

amendment to a policy, the necessary discussion and consultation process would be set in motion, thus affording a client, the plaintiff in this case, to make its views and decision known to the defendant on the matter. It seems to me therefore, on the assumption that the defendant was dealing with the plaintiff on an "in good faith" basis, that the only scenario when the defendant would not invite the plaintiff's input in the matter was if the defendant itself was not aware of the existence of the warranties in the policy. Indeed, there were many events and ample opportunity at the disposal of the defendant during which the defendant could easily have brought the existence of the warranties to the attention of the plaintiff. The events and opportunities set out hereunder served as examples.

1. On 16 October 1997 Mr Van den Berg conducted a comprehensive survey of the premises and in his report of the same date he indicated that warranty numbers 7.3, 7.5, 7.7 and 7.9 "*cannot be complied with*" by the plaintiff (page 69A, at 74A). It was significant to note that the report did not say that the warranties were not being complied with but only that they could not be complied with. All subsequent survey reports followed the same wording in this regard and in all the reports the same four warranties were reflected as ones which "*cannot be complied with*". (See Survey Reports dated 14/4/1999 at 130A and 23/102001 at 153A.) The reason why Mr van den Berg reported as he did on the warranties seemed to be clear: He did not have access to the plaintiff's policy but only worked on the basis of the nature of the business or industry of the insured concerned which gave him the clue as to what loss classification it fell under in terms of the defendant's Blue Book. Following on this guidance Mr van den Berg would have then had the idea (from the Blue Book) that the plaintiff's insurance cover required to have the warranties concerned. Given the nature of the plaintiff's business operation Mr van den Berg reported to the defendant, more than once, that the four warranties could not be complied with by the plaintiff. By the way, as a matter of

recollection, the four warranties (referred to in the survey reports) represented the following risks:

"7.3 No buffing, grinding or similar process is carried out
7.5 No artificial heating or drying other than by steam is done
7.7 No painting or varnishing is done
7.9 No storage of raw materials or finished goods in the building."

2. On 4 November 1997 a letter was addressed to the plaintiff on the Protea letterhead advising the plaintiff of the take-over of the plaintiff's Protea policy by the defendant and of the change of the policy number from MS PBM 0830969 to 138N076723. The plaintiff was further advised that the policy was also being changed from an annual contract paid monthly to a monthly contract renewable and paid monthly, and further that the anniversary date of the policy was 1 July 1998 (page 91A). There was no mention in the said letter that the policy after the Protea take-over would carry the warranties.

3. On 16 February 1998 the defendant (through Ms Duckham) addressed a letter to the plaintiff under cover of which the policy endorsement was attached in which the ten warranties appeared for the first time. The opening sentence of this letter indicated that it was in response to the plaintiff's instructions. It was not in dispute that the only instructions which the plaintiff had given to the defendant were those conveyed in the letter dated 13 January 1998 written by Mr Hestermann in terms of which he requested only the increase in the sum assured from R4 million to R6.5 million in respect of the building and from R4.48 million to R6.98 million in respect of the Sasria policy. No mention in the letter dated 16 February 1998 about the existence or inclusion of the warranties in the endorsement.

4. On 17 June 1998 Mr Taylor had a meeting with Mr Hestermann at the latter's offices during which the parties had the opportunity to discuss both these parallel policies, the one being of the

operating company and the other of the plaintiff, and that being the convenient time when Mr Taylor could have brought to the attention of Mr Hestermann the existence of the warranties and the fact that some of them were not being complied with by the plaintiff. Instead, Mr Taylor only raised an issue concerning the "money section" which related to the operating company, which was of concern to the defendant. Nothing was mentioned by Mr Taylor about the warranties in relation to the plaintiff's policy. On the following day (18 June 1998) Mr Taylor addressed a letter to Mr Hestermann referring to the meeting of the previous day and inviting (through Mr Hestermann) the plaintiff for the renewal of the policy at its "*existing terms and conditions*" (page 112A).

5. Subsequent policy renewals were issued to the plaintiff, all of which incorporated the warranties (albeit having been mysteriously reduced from 10 to 9), but none of those renewals were accompanied by a letter or otherwise indicating to, and alerting, the plaintiff about the existence of the warranties and the plaintiff's non-compliance with some of them. In this regard I refer to the renewals effective on the dates mentioned below and which were filed in the bundle as indicated:
   * 1 July 1999 (at 143A)
   * 1 July 2000 (at 171A)
   * 1 July 2001 (at 180A)
   * 1 July 2002 (at 191A)
   * 1 July 2004 (in the pleadings bundle at page 20).

[184] Over and above Mr van den Berg's remark about the four warranties which could not be complied with, he (Mr van den Berg) further reported on what, in his reports of 1997 and 1999, he termed as "*Overall Opinion of Risk*" (at 74A and 130A) and in the report of 2001 as "*Opinion of Fire Business Interruption Risk*" (at 153A). In this regard the following was reported:

Survey Report dated 16/10/1997
Overall Opinion of Risk

	N/A	Sub-standard	Acceptable	Good
C General Security/Fire Breaks			X	
D Processes and Products Produced			X	
H Housekeeping				X
J Flammable Liquid Control				X
Gas Cylinder Control				X
M Space & Process Heating Controls				
P Smoking Controls			X	

Survey Report dated 14/4/1999
Overall Opinion of Risk

	N/A	Inadequate	Adequate	Good	Outstanding
C General Security/Fire Breaks			X		
D Processes and products Produced				X	
H Housekeeping					X
L Flammable Liquid Control				X	
M Gas Cylinder Control				X	
O Space & Process Heating Controls			X		
R Smoking Controls				X	

Survey Report dated 23/10/2001
Opinion of Fire/Business Interruption Risk

	N/A	Inadequate	Acceptable	Good	Outstanding
General Security / Fire Breaks			X		
Processes & Products Produced				X	
Housekeeping				X	
Flammable Liquid Controls			X		
Gas Cylinder Control			X		
Space & Process Heating Controls			X		
Smoking Controls				X	

The impression gained from these “additional” reports was that the risk condition in the plaintiff’s business operation was found by Mr van den Berg to be generally favourable. If the defendant was not entirely satisfied with these reports, there was ample opportunity for the defendant to bring the matter to the attention of the plaintiff through Mr Hestermann.

[185] Mr Taylor conceded, under cross-examination, that by not notifying the plaintiff in advance that the defendant would be imposing the warranties on the policy, the plaintiff thereby deprived the plaintiff of the opportunity to discuss the matter with the defendant. This was, of course, the case if the Court accepted that the defendant was aware of the presence of the warranties in the policy which the defendant claimed to be the case.

[186] It was also clear that the introduction of the new computer system did not come without glitches and problems, sometimes short of explanation by the employees who operated the system. The quick example was about the mysterious deletion of warranty number 9 with effect from 1 July 1998 henceforth. None of the defendant's witnesses was able to explain this deletion. It could not have been at the instance of the plaintiff, as the plaintiff claimed not to be aware of the presence of the warranties in the first place.

[187] Another glaring administrative mistake on the part of the defendant, which again was conceded to by Mr Taylor, was the fact that the mid-term endorsement of 16 February 1998 (which introduced the warranties for the first time) was in fact taking retroactive effect from 13 January 1998. In other words, the warranties became operative even before the defendant sent the endorsement to the plaintiff – in fact even before the endorsement was printed out by Ms Duckham, which was done only on 16 February 1998. In my view, this state of affairs was both unfortunate and absurd. However it was not uncommon in the insurance industry to encounter administrative errors. For instance, in the unreported decision of *Remant Alton Land transport (Pty) Ltd v SA Eagle Insurance Company Ltd*, D&CLD, Case No. 5932/06 at para 14, the Court (*per* Hurt J) remarked: "*In the first place I think that the insurance contract should be rectified. The omission to record the endorsement was plainly the result of an administrative error, whereas at all times Inbrocon and the Plaintiff were* ***ad idem*** *as to the terms and, more importantly, as to the fact that the risk was insured on a 'first loss' basis and not subject to average.*"

[188] The defendant's evidence also established that the policy number in each case was generated from the computer automatically once the

particulars about a client's business type were captured on the data base. Similarly, the warranties would be included automatically in a policy schedule once the client's business was allocated a loss classification code in terms of the defendant's Blue Book. The warranties would naturally vary from one loss classification code to another. In the present instance, it seems to me, whilst the plaintiff's business (a shoe manufacturer) could be properly classified as "*Leather Goods Manufacturers, excluding Clothing"* one failed to comprehend how such industry could be further sub-classified under "*Leather Trades and Tanneries*". It did not seem that this sub-classification had anything to do with the plaintiff's business, namely the shoe manufacturing. That may as well have probably been the beginning of the mistake, administrative or otherwise, on the part of the defendant.

[189] According to the plaintiff the mistake of including the warranties was common to both parties. Of course, the defendant denied that there was any such mistake on its part. However, whether or not there was indeed a common mistake between the parties, the Court was not simply to take the "say so" of the defendant. The circumstances of the case, based on the evidence, the conduct of the parties in relation to the matter complained of and the inherent probabilities, would be considered in the light of the applicable law. The defendant's insistence that the warranties were not put in by mistake was, in my view, understandable. It was merely a self-serving effort to avoid its liability under the policy at all costs.

[190] What the defendant alleged, namely, that the warranties were not included in the policy by mistake, was unfortunately not supported by the defendant's own prior conduct and was in substantial conflict with Mr Taylor's concessions. Hence, in my view, a comparison was not necessary as to which of the two versions by the parties was reasonable. That being the case, the doctrine of *quasi* mutual assent did not apply in this case. (Compare : *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 SCA.) I am satisfied, on the evidence and the probabilities, that both the plaintiff and the defendant were not aware of the presence of the warranties in the policy. The warranties simply found their way onto the policy

through a mistake common to both parties. The mistake started most probably through the defendant's computer error and this error continued unnoticed by both the plaintiff and the defendant until a period of some seven and a half years passed by. In my view, that the mistake was only detected after such a long time did not in any way detract from the fact that this was a mistake and it remained a mistake. As Sharrock points out: "*The purpose of rectification is simply to ensure that the document which purports to set out the actual agreement of the parties is, in fact, a correct reflection of its terms. It follows that a party seeking rectification need not show that his failure to notice the error in the writing was reasonable; he has to show merely that there* ***is*** *an error in the writing.*" (R Sharrock : *Business Transactions Law* 5th Ed. At 159.) Accordingly, I come to the conclusion that the plaintiff made out its case for rectification of the policy. In the light of this finding, it is not necessary to deal with the plaintiff's alternative claims. There was no evidence presented on behalf of the defendant to support any of the alternative defences raised by the defendant in its plea. Concerning the costs, there appeared to be no reason why they should not follow the cause. In my view, the draft order prayed in the plaintiff's heads of argument was appropriate.

[191] In the result, the following order is made:

1. The policy attached to the plaintiff's particulars of claim as annexure "A" be and is hereby rectified by the deletion of the warranties numbered W0001 to W0010.

2. The action is adjourned *sine die* for continuation on a later date on the remaining issues.

3. The defendant is to pay the costs of the action incurred in consequence of the defendant's reliance on the said warranties, such costs to include, but not being limited to:

    3.1 The costs of the prior hearing on 15, 16 and 17 November 2006;

3.2 The wasted costs arising from the prior hearing scheduled for 27 and 29 February 2008;

3.3 The costs of the hearing on 15, 16 and 17 September and 30 October 2008, together with the costs of the preparation of written argument.

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Instructed by:	Hamilton Attorneys
Counsel for the defendant:	Mr A J Dickson SC
Instructed by:	Mason Incorporated
Judgment handed down:	3 November 2009