IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 024 OF 1988

BETWEEN	DELBERT PERRIER	PLAINTIFF
A N D	BRITISH CARIBBEAN INSURANCE COMPANY LIMITED	DEFENDANT

Dr. Lloyd Barnett and Mr. Rudolph Francis for Plaintiff.

Mr. Dennis Goffe Q.C. instructed by Myers Fletcher & Gordon for Defendant.

Heard: March 14, 15, 16; July 25, 26, 27, 28 & October 14, 1994

LANGRIN, J.

By a policy of insurance dated the 2nd day of October, 1986 made by the defendant in consideration of premiums paid and to be paid upon terms agreed, the defendant agreed to insure the plaintiff against loss or damage by fire of several items of goods. Of relevance to this action are four Diesel Generators insured for some $2,450,000.00. On the 2nd day of March, 1987 while the policy was in force the four generators were destroyed beyond repair by fire while being stored on the plaintiff's property. The plaintiff subsequently notified the defendant of the loss and damage suffered as a result of the fire and sought to claim $3,356,000.00, the alleged replacement cost of the standby generators.

The defendant at first accepted liability and requested information regarding the price of the generators at the time they were purchased pursuant to clause 11 of the conditions of the policy. The plaintiff refused to do so on the basis that since the defendant was concerned only with the replacement cost then the price at which the units were purchased was irrelevant to the replacement process. The defendant then without obtaining the price which the plaintiff paid for the generators made an independent assessment and arrived at a figure as settlement of some $300,000.00 which was rejected by the plaintiff. The defendant then changed its

position and denied liability of any breach under the policy. This is on the basis that the plaintiff had breached condition 11 of the policy in filing his claim out of time and in not providing the information as required by the defendant. To this latter part of the defendant's contention the plaintiff claimed that if there was indeed a breach of clause 11 of the policy the defendant had waived the breach and was therefore estopped from relying on any alleged breach.

The dominant issues which I have to resolve are as follows:

(i) Whether the refusal to give the information requested by the defendant was a breach sufficient to invalidate the Insurance Policy.

(ii) Whether the agreement by the defendant to settle for some $300,000.00 amounted to a waiver if there was in fact a breach of condition of the Insurance Policy.

(iii) How was the Insurance Policy condition to be construed in terms of the value of the Units. Was it indemnity or replacement value?

(iv) Whether the plaintiff is bound to elect option for possible compensation and what are the consequences of choice?

Dr. Barnett, Learned Counsel for the plaintiff submitted that it was agreed by all the parties that the Insurance Policy was in force at the date of the fire and therefore there are just two issues to be resolved. Firstly, whether the plaintiff did breach the condition of the insurance policy by failing to supply information reasonably required and secondly, the question of damages. He argued that all matters that were reasonably required were supplied by a firm of engineers who had assessed the condition of the generators.

Mr. Goffe, Learned Queens Counsel submitted that the failure to provide information reasonably required will suffice to entitle the defendant to judgment. This is on the basis of the plaintiff's refusal to provide the defendant with the price for which the generators were purchased. The case of Welch v. Royal Exchange Assurance (1939) 1 KB 294 was relied on. It has a similar wording

to Condition 11 of the instant policy and in that case it was held that the insured was not entitled to recover any sum in respect of his claim. Mr. Goffe argued that Condition 11 of the instant policy was a condition precedent to recovery. The information regarding price could have been easily obtained and the time for determining whether the information was reasonably required is the time when the request for it was made. He further argued that the effect of the indorsement is to give the insured an option on an indemnity basis, which means that the Insurance Company pays the value of the units as they were on the day of the loss in their state and condition. This indorsement gives option that the insured can replace the units with property of the same type but not superior to the damaged units when they were new. However, to avail himself of the option the insured must carry out the re-instatement or replacement within 12 months after the loss. Moreover within 6 months after loss he must indicate to the Insurance Company his intention to replace the units. Even after he has done that until he has incurred expenditure in connection with replacement of item the claim will be dealt with on the indemnity basis. The special provision in the insurance contract does not remain in effect indefinitely and since no notice was given, the option no longer existed. The absence of notice as to the exercise of the option was not a valid reason for refusal to state purchase price.

In his submission, Mr. Goffe for the defendant cited the case of Hiddle & Co. v. National Fire of N.Z. (1896) 74 CT 204 for the following principles. Firstly that the Insurance Company is entitled to be supplied with information for the purpose of enabling the Insurance Company to test the reality of the loss on the basis that the Insurance Company has to guard against fraud. Secondly, where a policy contains a condition requiring the insured to provide information containing the nature of his loss, that condition must be strictly complied with.

Mr. Goffe further submitted that the plaintiff's loss showed only an amount of $350,000.00 which is based on evidence from the

Insurance Company valuators. He asked the Court to accept the evidence of Mr. Rutland as opposed to Messrs Goodison, Mitchell and Tomlinson since Mr. Rutland was the only valuator who took into account lack of maintenance and use. Furthermore only Mr. Rutland knew the history of the generators.

Dr. Barnett, Learned Counsel for the plaintiff submitted that the essential question for determination involves the interpretation of the policy contract and the answer to the question as to whether the effect of the provisions of the agreement under the contract is a re-instatement value policy or an oral policy with an option to re-instate. The answer to this question affects the issue as to whether the information requested was reasonably required as well as the question of the proper method of establishing the value applicable. The plaintiff's interpretation of the Insurance contract is necessarily at great variance with that of the defendant since the defendant had not implemented the special provisions of the insurance contract which in effect allow for re-instatement or replacement. Reference was made to paragraph 3 of the special provision of the Schedule attaching to and forming part of the Collective Policy. Dr. Barnett, submitted that when paragraph 3 of the Schedule applies and costs of re-instating exceeds sum insured i.e. $2.45M, then the insured bears the excess and a reasonable proportion of loss accordingly. That clause may or may not apply in situations for replacement. Unless insured elects to reinstate then conditions don't apply. Dr. Barnett cited two cases which deal with options given to insurance company. See Anderson v. The Commercial Union Assurance Co. (1886) 55 QBD 146 and Brown v. The Royal Insurance Company 120 ER 1131. In the latter case it was stated that the defendant was bound by its election. He further submitted that since the policy impose an obligation on company to pay cost of replacing or re-instating up to cost of new equipment the only relevant question was the replacement.

With reference to the much debated condition 11, it was submitted by Dr. Barnett that condition 11 requires information in respect of claim. The claim is for cost of replacing or re-instat-

ing equipment, therefore the price paid by the plaintiff is irrelevant to that determination.

Turning to the question of breach of the policy by the non-compliance of Condition 11 as advanced by the defendant, Counsel for plaintiff submitted that even if there was a breach it had been waived, since the defendant by correspondence proceeded to accept a settlement. The cases of Toronto Railway Company and others v. National British & Irish Millers Insurance Co. Ltd. (1914 - 15) 3 LTR 555 was relied on as authority that request for further information can be treated as waiver.

The Law:

Insurance policies almost universally list a number of terms of the contract under the heading Conditions. Some of these terms do not relate directly to the risk covered but are in the nature of collateral promises or stipulations while some are in the nature of warranties, breach of which will entitle the insurer to repudiate the contract even if loss is not occasioned by breach. See Tour v. Westminster Motor Insurance Association (1966) Lloyds Rep. 407. The clause may however be a condition lacking some of the characteristics of the warranty and compliance by an insured with a condition may be dispensed with if it is unnecessary. For example, if the insured obtained the information from another source as in Luckiss v. Milestone Motor Policies at Lloyds (1966) 2 ALL ER 972.

If a term, or the terms of the policy can be said to be a condition precedent it means that any breach would necessarily invalidate the insurance policy. See the case of Welch v. Royal Exchange Assurance (1938) 1 KB 757 in which the defendant's counsel placed great reliance. In that case it was held that a particular condition (Condition 11) was a condition precedent to the liability of the insurers and that the failure of the assured to give the information required within a reasonable time constituted a breach of that condition and a final bar to his claim. This decision was later approved by the English Court of Appeal at (1939) KB 294.

In the instant case the defendant company claimed that a failure to give information regarding the price paid for the generators

was a breach of condition 11, a condition precedent, which the plaintiff had breached and as a consequence invalidated the insurance contract. Can this argument withstand any reasonable objective analysis? The defendant without so much as obtaining the information pertaining to the price went ahead and made its assessment, which suggest that the information sought was not strictly required. In the circumstances Condition 11 which was relied on cannot avail the defendant by allowing it to repudiate the insurance contract on the basis that there was a breach of a condition precedent. This argument therefore fails.

A breach by the insured of a condition precedent can invalidate the insurance contract as the insurers think fit. The insurer can, however, waive the breach and therefore affirm the policy. Waiver, however, cannot be said to occur unless the insurer's are firstly aware of the facts which constituted the breach. See Locker & Woolf v. Western Australia Insurance Co. Ltd. (1936) 1 K.B. 408. The Treatise General Principles of Insurance Law by E.R. Hardy Ivamy (2nd ed.) at page 252 stated as follows:

> "There may be a waiver by conduct if the insurers do an act which can be justified only upon the footing that the policy is in force then they are precluded from contending that the policy is avoided by the breach of condition. There must be some positive act done by then which is inconsistent with the avoidance of the policy."

In the case of Toronto Railway Co. v. National British & Irish Millers Insurance Co. Ltd. (1914 - 1915) 2 LTR 555 there was a condition of a pre-insurance policy that loss should not become payable until some 60 days after notice, ascertainment, estimate and satisfactory proof of the loss had been received by the company. And that a magistrate or notary public should, if the company required it, certify that he had examined the circumstances and believed the insurers had honestly sustained the loss as appraised. A full report of the loss had been sent to the company, a long correspondence ensued and subsequently the company requested further information and further said if that information in their opinion was insufficient

they would require the loss to be ascertained by disinterested appraisers. The defendant refused to pay the claim. In an action brought by the plaintiffs to recover their losses it was held that the defendant company had by their conduct waved their right to insist on the above stipulations in the policy as a condition precedent to the plaintiff's right of action. Buckley L.J. stated at p.557 the reason:

> "Upon the above statement of dates and facts it seems to me that not only had the defendants waved the sixty days (No.2) and the certificate of the magistrate or notary (No.4) as Pickford J. thought, but had also waived all the other provisions of the policy as to the means of ascertaining the amount of the loss and had adopted a different procedure." (Underlining mine)

And at page 563 Scrutton J. said:-

> "But in my view the same result is arrived at in another way. Conditions precedent may be waived by a course of conduct inconsistent with their continued validity, even though the contracting party does not intend his conduct to have that result. This is especially so if the course of conduct leads the other party to spend time and incur expense in a proceeding which he would not have undertaken had he not been led by the actions of the other party to think that he was relieved, by concurring in those proceedings from the other course of conduct and conditions prescribed by the policy."

How does the instant case fits in with this authority? A series of correspondence ensued between the plaintiff and the Insurance Company with the latter indicating that it accepted liability. In a letter dated September 23rd 1987 written on behalf of the defendant by Thomas Howell Kiewit (Jamaica) Limited - International Loss Adjusters, the penultimate paragraph stated:-

> "Under all the circumstances I believe that the present offer of $350,000.00 for standby generators is fair and I think that the scrap value remaining in the generators shall offset the cost of removal of debris."

Therefore if there was a breach of condition 11 as alleged by the defendant, by the latters conduct it is clear that any breach

was waived by the defendant and it cannot now claim that a breach of condition invalidated the contract. Again, the arguments advanced by the defendant fail on this issue.

The Court must now direct its attention to the assessment of the loss. It may however be necessary to consider the question of the insurer's option claim before the final question of assessment. The plaintiff has contended that the incorporation of the special provision of the insurance policy leaves the insurers with replacement or re-instatement of the sum representing the cost of the damaged generators. The defendant has maintained the defence of indemnity instead. These two cases cited on behalf of the plaintiff are very instructive. In Anderson v. The Commercial Union Assurance Company (1886) 55 Q BD 1216. Lord Esher MR at p.148 had this to say:-

> "We have come to the conclusion that the words "reinstate or replace" should be thus applied: If the property is wholly destroyed the company may if they think fit, replace it by other things which are equivalent to the property destroyed instead of paying in money the amount of the loss, or of the goods insured and damaged and not destroyed by fire, the company may exercise their option and reinstate them, or in other words may repair them and put them in the state in which they were before the fire".

It is therefore now necessary to look at the condition of the policy.

Firstly, Condition 14 of the Policy on perusal indicates that the Insurers may at their option reinstate or replace the property damaged or destroyed or any part thereof, instead of paying the amount of the loss or damage. Secondly, the special provisions of the policy indicate also reinstatement or replacement value sum. In effect the Insured has one of two options. He could either replace or reinstate or pay the loss of damage. By offering sums of money for settlement i.e. some $300,000.00, the Insurer has definitely elected to pay the loss and as Crompton J. noted in Brown v. The Royal Insurance Company 120 ER. 1133:-

> "The defendants are bound by their election and if the performance has become impossible, or (which is all they have shown) more expensive than they had anticipated, still they must either perform their contract or pay damages for not performing it."

I now turn to the question of assessment which indirectly ties in with the election question since the defendant had argued that they have a right to indemnify the plaintiff, hence the need for the purchase price of the generators and the plaintiff had argued that since it was replacement or reinstatement then the prices are not necessary. Of the method of arriving at a proper assessment much was said by both parties. Mr. Rutland, the main witness for the defendant submitted a report upon which the defendant's indemnity settlement was based. The method adopted in the report by Mr. Rutland made several assumptions and apparently used a type of 'book value' method in arriving at the final figures at some $300,000.00.

The expert witnesses for the plaintiff, needless to say used a completely different methodology in arriving at the price. The common trend in the methodology as indicated by Mr. Goodison for the plaintiff was to take the value of each standby generator when new, the new generator's approximate price when averaged as 1100 KVA being $4,495,000.00 each. A depreciated value of 80% was taken into consideration for the age of the units and a final figure of $839,000.00 each, making a grand total of $3,356,000.00 for the four generators. I prefer this method of assessment to that of Mr. Rutland.

Before turning to the law it must be noted that Mr. Goffe for the defendant conceded that the value of each unit "is the market value of those actual units on May 2, 1987, of their history and condition prior to the fire". Of significance also is the unchallenged evidence of the witness Mr. Robert Smith who under cross-examination by Dr. Barnett stated that the premium presumably for the generators is based on their value.

The reasonable conclusion to be drawn is that the defendant had some idea as to the value of units. If this were not so the

Insurance Company would have arrived at the premium in quite an arbitrary fashion. It is however, doubtful that even generally an Insurance Company would arrive at premiums in any arbitrary manner.

In the treatise, Mac Gillivamy & Parkington on Insurance Law (7th edition) at page 643 paragraph 1564 reads as follows:-

> "1564. Value of property before the loss. The undamaged value before the loss to be taken at the market value immediately before the loss occurred. Leppard v. Excess Insurance Co. Ltd. (1979) 2 Lloyds Report 91 ..... The assured is not entitled to take the cost price or the cost of construction or manufacture as conclusive evidence of the value of the property at the time of the fire. It may be prima facie evidence but it must be remembered that (1) the assured may have paid more than its value (2) the market value may since fallen since the time of purchase (3) wear and tear or damage different from that insured against may have depreciated the value of the particular property. Conversely the property may have risen in value but the assured is entitled to the benefit of the use subject however to any express or implied condition that the property is insured only for the value as declared by the assured either in the proposal or elsewhere."

The law as it pertains to amount of loss payable is clear. It is the market value of the damaged goods immediately before the loss was sustained. To this sum should be adjusted a depreciated value for storage and lack of use etc. Accordingly, the Court accepts the plaintiff's contention that the price paid for the standby generators were not necessary to arrive at the settlement figure. Putting it simply, the method of arriving at the value of each unit should be what the particular unit would cost if the Insurers had decided to replace the unit, minus the depreciated value. The final figure of course being affected by the average clause as stated by the Insurance contract. In my judgment having regard to all the circumstances of this case including the condition of the units at the time of the loss the plaintiff is entitled to the sum for which the generators were insured with interest.

In terms of the rate of interest, Mr. Francis, on behalf of the plaintiff made reference to Section 23(f)(i) & (ii) of the Bank

of Jamaica Act. Additionally, reference was also made to section 23(d)(i) & (ii) of the said Act. This was to set up the plaintiff's request for a rate of interest based on Bank of Jamaica, Statistical Digest which the plaintiff arrived at by taking the average rate of interest for the past six years and arriving at some 52.5% with figures available for the years 1989 to 1991 a final average of 47.13% was arrived at and it was on these basic rates of interest that the plaintiff asked the Court to use as a guideline in arriving at a reasonable rate of interest.

Mr. Goffe on behalf of defendant argued that this claim for a rate of interest falls under Section 3 of the Law Reform Miscellaneous Provisions Act which deals with interest on debt or damages. Mr. Goffe submitted that this is a claim for contract debt and not for damages. Further the aim of damages is to put the plaintiff in the same position he would have been in but for the breach. The purpose of interest under the Law Reform (Miscellaneous Provisions) Act is different. That purpose is to reflect the fact which a person is entitled to under the judgment. The interest, he submitted can also be claimed as Special Damages which must be proved by evidence. He cited as authority Headly Brown & Jacqueline Brown v. Lurret Tyrel No. 52/90 and concluded that the rate of interest awarded by the Court should be 15%.

The Law Reform (Miscellaneous Provisions) Act Section 3 states as follows:-

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or part of the period between the date where the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section -
>
> (a) shall authorize the giving of interest upon interest or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange."

Section 3 of the Law Reform (Miscellaneous Provisions) Act clearly indicates that the rate of interest, to be awarded by the Court is at the Court's discretion whether to award interest on whole or in part and for what period.

It is abundantly clear that on both sides the argument springs from a misunderstanding of the law. The decided cases demonstrate a clear principle that it is all part of an attempt to achieve restitutio in integrum.

The guide to interest in commercial cases, is therefore the rate at which a plaintiff could have borrowed the money wrongfully withheld, and not the earning capacity of the money if the plaintiff had invested it during the time he was kept out of it.

Since there was no evidence from the plaintiff as to what rate of interest he would have borrowed the sum of which he was wrongfully deprived. I am not persuaded by the arguments advanced by Mr. Francis.

The award of interest in these cases is a discretionary matter and in determining what rate of interest to award I am inclined to adopt a broad approach. In the result I make an award of 25% as the rate of interest from September 1987 to the date of judgment.

Accordingly, there is judgment for the plaintiff in the sum of Two million four hundred and fifty thousand dollars ($2.45M) with interest at 25% from September, 1987 to date of judgment. Costs granted to the plaintiff to be agreed or taxed.