IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S.233/1990 AND C.L. S.211/1992

CONSOLIDATED

BETWEEN	ANTHONY EDWARD SHOUCAIR	
A N D	MARIANNE HUGVETTE SHOUCAIR (Executors of the Estate of Edward Shoucair t/a S.N. Shoucair, deceased)	PLAINTIFFS
A N D	AMERICAN HOME ASSURANCE COMPANY	1ST DEFENDANT
A N D	CARIBBEAN HOME N.C.B INSURANCE COMPANY (JAMAICA) LIMITED	2ND DEFENDANT
A N D	N.E.M. INSURANCE COMPANY (JAMAICA) LIMITED	3RD DEFENDANT
A N D	G. DESMOND MAIR (INSURANCE) COMPANY LIMITED	4TH DEFENDANT
A N D	BRITISH CARIBBEAN INSURANCE COMPANY LIMITED	5TH DEFENDANT
A N D	JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED	6TH DEFENDANT
A N D	INSURANCE COMPANY OF THE WEST INDIES LIMITED	7TH DEFENDANT
A N D	GENERAL ACCIDENT INSURANCE COMPANY LIMITED	8TH DEFENDANT
A N D	AMERICAN INTERNATIONAL UNDERWRITERS (JAMAICA) LIMITED	9TH DEFENDANT

Mr. Dennis Goffe Q.C., Mr. Stephen Shelton & Miss Haydee Gordon instructed by Myers, Fletcher & Gordon for the Plaintiffs.

Mr. Dennis Morrison Q.C. and Miss Mais instructed by Dunn Cox for the Defendants.

HEARD: **23rd, 24th , 25th & 30th April 2001; 1st & 2nd May 2001; 23rd, 24th, 25th, 26th, 27th & 28th July 2001; 1st & 2nd July 2002; 20th & 21st January 2004; 5th, 6th & 16th April 2004 & 7th October 2005.**

JAMES, J.

This action is brought against the Defendant Insurance Companies to recover for loss by fire and for consequential loss under two policies of insurance.

Edward Shoucair, the original Claimant instituted these actions. He died in June 1996. The Claimants are now Anthony Edward Shoucair and Marianne Hugvette Shoucair the Executors of the estate of Edward Shoucair (t/a S.N. Shoucair, deceased).

I should have already stated that up to the time of his death Edward Shoucair was a businessman trading as S.N. Shoucair in the dry goods trade at 151 Harbour Street, Kingston. He had restarted his business at 151 Harbour Street after two fires, one on the night of November 7, 1989 and the other on the morning of November 8, 1989 had destroyed his business premises at 40 Port Royal and King Street, Kingston. Edward Shoucair was able to restart his business in early December, 1989 as stock he had ordered before the fire had arrived in Jamaica and was on the wharf at the time of the fires.

The claims arise under a policy of insurance numbered AH-F5995196 (hereinafter called the Fire Policy) See Suit No. C.L. S.233/90 which was consolidated with the Consequential Loss Policy of insurance numbered AH- C.L. 5991308 in Suit No. C.L. S.211/92.

The 1st Defendant was the lead insurer in relation to both policies of insurance with its share of the liability for the sum insured being 22%. Each co-insurer agreed to be liable to a fixed percentage of the sum insured.

The action has been discontinued against all except the 1st and 2nd Defendants.

The Claim may be dealt with under the following heads as argued on behalf of the Claimants/Plaintiffs.

(1) (a) Breach of contract – by not making payment on account within a reasonable time -

(b) unreasonable delay

(c) When was a reasonable time to make interim payment

(d) Currency exchange loss

(e) Consequential loss – overdraft and interest thereon.

It is a well established fact that insurance companies make scrupulous inquiries concerning all claims submitted to them so as to satisfy themselves as to liability and quantum of claim. See **Hiddle & Company v National Fire of New Zealand** (1896) L.T. 204. What perhaps caused the Defendants or some of them to raise at least a fair amount of suspicion was that there were two fires occurring in close proximity to each other on premises of the same Claimant. I do not find this hard to understand.

In **Laurinda Pty Limited & Others v Capalaba Park Shopping Centre** (1988-89) 166 CLR 623 it was held that where a contract does not stipulate a time for performance of an obligation, the party must perform that obligation within a reasonable time. In **Worsley v Wood** (1795) 6 Term Rep. 710 at 718, where Lord Kenyon , C.J. recognized the fact that insurers are particularly exposed to unfounded or exaggerated

claims and it is therefore necessary for their protection that, whenever a claim under a policy is likely to arise, they should have the earliest opportunity of inquiring into the circumstances of the loss whilst the facts are recent and evidence can be more easily obtained.

> Under the heading (a Breach of contract – by not making payment within a reasonable time the Claimants say that the (18) eighteen months which elapsed between the occurrence of the fires in November 7, 1989 and the acceptance of liability by the insurers April 18, 1991 was unreasonable.

To buttress his argument, Counsel for the Claimants referred to what he termed provisions for interim payments on account upon the request of the insured. This provision is present in both the Fire Policy and the Consequential Loss Policy. On the other hand Counsel for the Defendants submitted that the Claimant failed to comply with requirements under Condition 11 of the Fire Policy and Condition 10 in the Consequential Loss Policy which are conditions precedent to the right of recovery.

Condition 11 of the Fire Policy provides:-

> On the happening of any loss or damage the insured shall forthwith give notice thereof to the insurers, and shall within 15 days after the loss or damage or such further time as the insurers may in writing allow in that behalf, deliver to the insurers
>
> (a) a claim in writing for loss or damage containing as particular an account as may be reasonably practicable of all the several articles of items of property damaged or destroyed and of the account of the loss or damage

thereto respectively, having regard to their value at the time of the loss or damage not including profit of any kind.

(b) particulars of all other insurance, if any. The insured shall also at all times at his own expense produce, procure and give to the insurers all such particulars, plans, specifications, books vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the insurers as may be reasonably required by or on behalf of the insurers together with a declaration on oath or other legal form of the truth of the claim and of any matter connected therewith.

No claim under this Policy shall be payable unless this condition has been complied with.

Counsel for the Defendants relied on **Yorkshire Insurance Company v Craine** (1922) 2 A.C. 541 a case which had a condition similar to Condition 11 in this case. In the Judgment delivered by Lord Atkinson he said:-

> "One would suppose that in such business matter as this insurance, if all the information thus required was furnished, the company would be able to make up their mind whether or not the claim was a valid one and represented a real and genuine loss, although they might dispute the amount claimed. The penalty inflicted upon the assured in case all the terms of Condition 11 be not complied with is that no amount should be payable to the assured under the policy of insurance. The company are thus free to take any objection to the non-performance of any of these terms and refuse to pay anything to the insured."

It should be noted that the case cited above was decided on another Condition (12) which gave the insurer power to take possession of premises and goods from the date of fire and with power to sell the goods.

That case was decided against the insurers as the Court held that they could not rely on Condition 11 after assuming the powers under Condition 12. The case cited below had a clause similar to this Condition 11.

In **Colonial Fire & General Insurance Company Limited v John Chung P.C.** Appeal No.59/99 (delivered 13th December, 2000) it was held that:-

> "As a matter of construction the clause is referred to a single claim and therefore a failure to provide documents and proof in respect of any head of claim constitutes a breach of the condition precedent contained in the final sentence of the clause and disentitles the insured from recovering any part of his loss from the insurance company. There is, moreover a sound commercial reason supporting this construction, in that if part of a claim is unjustified and cannot be supported by appropriate particulars and documentation, this failure may alert the insurance Company to the need to investigate more closely other parts of the claim."

From the evidence I have heard it appears that the Claimant failed to honour his obligations under Condition 11 of the Fire Policy as even up to June 1990 Attorneys for the Claimant informed the 1st Defendant that he had not yet made any claim in relation; to certain aspects of the building claim (see para.3 page 40 Bundle). Further evidence of this failure to fulfill his obligations under Condition 11 may be gleaned from a letter from one of his oversees suppliers (see page 37 Bundle).

There are other instances of the Claimants' failure to fulfill obligations under Condition 11. I refer to one other, the Proof of Loss Form was forwarded to Attorneys for the Defendant's by letter dated 3rd October, 1990 (see page 80 Agreed Bundle 1) .

Finally in the case of **Super Chem Products Limited v American Life & General Insurance Company Limited & Others** P.C. Appeal No.68/2002.

In this case the insurers advised the insured eighteen (18) months after the fire of their decision on liability. The Court was asked to consider a clause identical to the one in this case. The Privy Council decided the issue in favour of the Insurers as had been found in the Courts below. Liability in this case was accepted seventeen (17) months after the fire.

Having regard to the foregoing and the inherent difficulties faced by the insured to supply all information which he was obliged to give under Condition 11, I do not agree with Counsel for the Claimant that :

(a) The insurers breached the contract, in that they did not make payment on account within a reasonable time or

(b) That the delay was unreasonable

I may be wrong but my understanding of Condition 11, is that: "No claim under this policy shall be payable unless this condition is complied with".

My finding at (b) above has restricted any finding which may be contrary to it.

(c) When was a reasonable time to make interim payment.

The Claimants contended whether it was unreasonable for the 1st Defendant to delay interim payment for 2 months after admitting liability. This position is not fully supported by evidence. There is evidence that 1st and 9th Defendants made payments of just under $1M – under the Fire Policy by 20th April, 1991. That sum had been adjusted

and agreed to by the then Claimant. What remained to be settled were (i) the claim under the Consequential Loss Policy and (ii) the stock claim. One must appreciate that an acceptance of liability on the claim at (i) & (ii) above is not sufficient to settle such claims. It will be seen at paragraph 3 of a letter dated 1st August, 1991 from Shoucair to the 9th Defendant requested that you "settle the rest of my claim in respect of Stock and Consequential Loss," (see page 127 bundle 1). The reply to this letter is instructive (see page 128 of bundle 1).

In the **Colonial Fire & General Insurance Company Limited v John Chung** (supra) ... Dr. Ramsahoye submitted that:

> "the appellant was acting unreasonably in not accepting liability for those heads of claim in respect of which particulars had been supplied. Their Lordships in the Privy Council rejected these submissions and held that the appellant was entitled to require that the condition precedent contained in Clause 11 should be complied with before liability arose to make any payment under the policy and under the other policies which contained similar conditions"

What is clear is that the parties were far apart as to the amount for which the stock claim under the Fire Policy and the Consequential Loss Claim should be settled. The Defendants were advised on 14th May 1991 by **Matson, Driswell & Damcio (C.P.A.) Certified Public Accounts** that the stock loss was $5,117,548.00. Shoucair claimed $11,905,043.00.

It is for that very reason of the wide margin between the claim and the assessment by Matson, Driswell and Damcio that the parties went to arbitration in accordance with provisions under each policy. The arbitration was conducted by the Hon. Kenneth G. Smith (Retired CJ) and he made his award on 6th May, 1993. The award under the Fire Policy for Loss of Stock-in-trade - $10,000.000.00.

After giving credit for sums paid up to 3rd July, 1992 totalling $5,342,545.00 arrived at a balance of $4,657,455.00.

Under the Consequential Loss Policy the award for loss of gross profit (including increases in cost of working), $4,000,000.00. In addition interest at the rate of 50% p.a. was awarded on the balances as they became due after the payments by installments on the award of $10M under the Fire Policy. Interest at a similar rate was also awarded on the amount awarded under the Consequential Loss Policy.

In considering the Australian case of **Tropicus Orchids Flowers and Foliage Pty Limited v Territory Insurance Office** (1998) NICS May 1998) Darwin J said:-

> "What is a reasonable time for the insurer to pay the indemnity due under the policy is to be determined objectively and depends upon the circumstances, which must take account of the rights and obligations of both parties".

On the authorities – it is clear that an insurance company is entitled to investigate and satisfy itself in relation to liability and quantum at the same time and to negotiate about both at the same time, and often prudence will require them to do so. See Super Chem Products Limited (supra).

Reference has already been made to (para.3 page 40 bundle 1) where Shoucair Lawyers in their letter dated 20th June, 1990 to American Home Assurance Company said :

> 'You will note that a claim was not preferred in respect of architect's surveyor's and consultant's fees and we will in due course submit an estimate in respect of this item of claim'.

Further the Proof of Loss Form was not forwarded to the Attorneys for the Defendants until 3rd October, 1990.

I will now deal with the Claim Control Clause which appears to have caused some

amount of confusion. The clause provides:

> "Claims to be agreed by the American Home Assurance Company of New York [Agents A.I.U. (Ja) Limited] appointed hereby as Leading Office in accordance to the Policy terms, conditions and Co-Insurers are bound to follow."

This clause is similar in the Fire Policy and the Consequential Loss Policy. There are a number of cases cited in which it was demonstrated that in them are no claims control clause but a clause "follow the settlement". See **The Insurance Company of Africa v Scar (UR) Reinsurance Company Limited** [1985] 1 Lloyd's 312 and **Eagle Star Insurance Company Limited v J.N. Cresswell et al** [2003] EWHC 2224.

Learned Counsel for the Defendants submitted that the effect of the Claims Control Clause in this case was to bind co-insurers in respect of the amount of the claim payable, and not in respect of both the amount of the claim and liability. He further sought to buttress his argument by reference to a letter dated 19th October, 1991 from Mr. Matalon, one of the Claimants' witness in which he states that the Claims Control Clause

> "binds me to follow A.I.U. only in a case where payment of the claim is agreed by A.I.U. Under the policy in question, each co-insurer undertakes severally to indemnify the insured and it is no reference to the claim upon BCIC for BCIC to say
>
> "The lend insurer has not authorized us to pay"

The Learned Counsel for the Claimants submitted that the Claims Control Clause limits the power of the lead insurer by preventing a settlement without the approval of the reinsurers. He relied on **Gan Insuraance Company v Tai Ping Insurance Company RY** [2001] ALL ER (D). The Clause reads:

> "Notwithstanding anything contained in the Reinsurance Agreement and/or Policy wording to the contrary, it is a condition precedent to any liability under Insurance Policy that:

(a) The Reinsured shall upon knowledge of any circumstances which may give rise to a claim against them, advise the Reinsurers immediately and in any event not later than 30 days.

(b) The Reinsured shall cooperate with Reinsurers and/or their Appointed Representatives subscribing to the Policy in the investigation and assessment of any loss and/or circumstances giving rise to loss.

(c) No settlement and/or compromise shall be made and liability admitted without the prior approval of Reinsurers.

All other terms and conditions of the Policy remain unchanged."

It appears that Counsel for the Claimants has not stated in his note to the above case any understanding of (b) above. He stated that in the above case the word cooperation was substituted for "control" at the request of the reinsurer. That the basis for this is understandable as the clause goes further than normal claims control clauses by requiring the lead insurer to cooperate with the reinsurers and advise them of claims immediately. I understand (b) above to require reinsured to cooperate with reinsurers ....

He concluded that it is clear from the examples given that the Clause in American Home's Insurance contract is more closely akin to "follow the settlement" clause than a "claim control clause."

I am inclined to the submission of Counsel for the Defendants and so hold that the claim Control Clause in the instant case is in the nature of a co-insurance arrangement which bind the co-insurers in respect of the amount of the claim payable and not in respect of both amount of claim and liability.

The issue of Res judicata

In my judgment the issue of res judicata does not apply for the reason that the issues adjudicated on before Ellis J. are in the main different from these in the instant case.

In **American Homes Insurance & Others & Shoucair** 30 JLR 1. It was held that issues which the arbitrator and the Court were called upon to determine were altogether different.

The Foreseeable and Currency Exchange Loss

Counsel for the Claimants is correct in stating that currency exchange losses are special damage which may be awarded to the Claimants once they fall within the reasonable contemplation of the parties to the insurance contract at the time it was made or renewed.

In Tropicus Orchids Flowers case Darwin J said:

> "If an insurer fails to pay within a reasonable time the insurer is in breach and the insured may sue for indemnity under the policy and for damages for breach of contract".

He further stated that:

> The losses thus caused are recoverable either because the loss is necessarily within the contemplation of the parties and therefore reasonably foreseeable within the first limb in the rule in **Hadley v Banendale** or may fall within the second limb of the rule if the loss arises from special circumstances of which the Defendant had special knowledge."

The rule in **Hadley v Banendale** is over 150 years but is still good law. Counsel for the Claimants argued that the claim falls within the second limb i.e. the insusrers had knowledge of special circumstances affecting the Claimants.

I am yet to see any evidence which indicated that the insurers had knowledge of the Claimants' Special circumstanaces. I would think that the evidence is

overwhelmingly against the view of Counsel for the Claimants that the insurers had knowledge of such circumstances. In 1989 the Jamaican dollar was in the region of $5.50 to One U.S. dollar and had been so for some while. I do not think it was reasonable for the insurers to have foreseen the steady devaluation of the Jamaican dollar against the U.S. dollar having regard to the existing conditions at the time.

Double Recovery/Compensation

Counsel for the Claimants argues that Defendants pleadings that the Claimants have already been compensated for loss by the arbitration's award of interest at commercial rate is flawed. He states that this argument fails to appreciate the fundamental difference between the claim before the arbitrator and the claim for damages before the Court.

Counsel for the Defendants submitted that the Claimant was awarded the amount of the policy with interest at the rate of 50% per annum between the date of admission of liability and the date of the award. Interest was awarded simply because the Claimant was deprived of the use of money which was due to him. The award of the 50% interest rate took into account the devaluation of the Jamaican dollar.

See **BP Exploration Company (Libya) Limited v Hunt** (No.2) 1982 1 ALL E.R. 925 at 974.

See also **General Tire & Rubber Company v Firestone Tire & Rubber Company Limited** - [1975] 2 ALL ER 173 at 188. Lord Wilberforce said:

> "Where a wrong doer failed to pay money which he should have paid, justice in principle, requires that he should pay interest over the period for which he has withheld the money.

In the same judgment Lord Salmon in his speech said:-

> "Interest is not awarded as a punishment against a wrong doer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment."

It seems therefore to me that the Claimant has been compensated by the award of interest at the rate of 50% p.a. over the period for which he was deprived of it and is due no further amount.

The Claim fails -

I give judgment for the 1st & 9th Defendants with cost to be agreed or taxed.