

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

**CLAIM NO: ANUHCV2017/0557
ANUHCV2021/0327**

BETWEEN:

ABI INSURANCE CO. LIMITED

Claimant

-and-

SOUTHWEST TRADING COMPANY LIMITED

Defendant

Appearances: Mr. Dane Hamilton Jr with Ms. Judith Dublin for the Claimant
Mr. Leslie Thomas KC with Ms. Michelle Sterling for the Defendant

2022: July 26; 22
November 2.

JUDGMENT

INTRODUCTION/BACKGROUND

[1] **BYER J.:** This matter concerns two duly incorporated companies under the laws of Antigua and Barbuda in which the claimant company provided insurance policies namely FCA200/03/01186 (policy one), FCA2006/03/01187 (policy two) and PL2006/03/ABI195 (policy three) to the defendant company.

[2] By way of the claim form filed 14th day of November 2017 the claimant claimed from the defendant among other things, the sum of EC\$288,135.29 for unpaid Insurance premiums held by the defendant owing to the Claimant, for policies

one and two for the period 21st March 2012 to 21st March 2013 and policy three for the period April 2010 to April 2012.

- [3] In acknowledgement, the defendant's defence as amended April 16th, 2021, pleaded that by payment made on May 16th, 2012, in the sum of EC\$192,863.38 was in full payment of any monies duly owed to the claimant for the period March 2012 to March 2013 and that further, the monies claimed to be due for policy three were unrecoverable, the claim now being statute barred.
- [4] The defendant then further counterclaimed for the payment of the sum of \$202,500.00 as proceeds of a policy of insurance they alleged had been effected by them on the 11th of December 2014 in respect of the vessel "Exile Antigua" together with damages for breach of contract.
- [5] The claimant filed its Amended Reply and Defence on the 7th day of July 2021 denying the defendant's claim in its entirety.

The Claimant's Arguments

- [6] It is the claimant's case that the defendant's payment by cheque made on the 16th of May 2012 was not a payment towards the premiums charged for the then-current period 2012 to 2013 but rather maintained, that the said payment was towards the defendant's indebtedness for sums due in arrears with the claimant. These sums were therefore credited towards sums then owing for the said policies of insurance.
- [7] In that vein, the claimant submitted that the history of payments by the defendant was that all payments were made pursuant to an ongoing credit facility that was extended to the defendant. The claimant further submitted that the claim relating to policy three could not have been statute barred as it formed part of the defendant's total indebtedness to the claimant as reflected in the claimant's periodic Customer Statements which they say were issued to the defendant. A sum that continued to roll over as the defendants

continued to do business with the claimants and continued to incur charges on valid policies.

[8] In response to the counterclaim, the claimant asserted that no policy of insurance was entered into between itself and the defendant on the 11th day of December 2014 in respect to the vessel "Exile Antigua". The claimant's submissions posit that there was no subsisting policy of insurance and the defendant only attempted to tender payment by cheque on the 15th day of December 2014 after the alleged loss of the vessel which the claimant argued, it did not accept. The claimant submitted that for there to be a binding contract of insurance there must have been:

- i. A valid offer by one party
- ii. An acceptance by the other party
- iii. Agreement on all material terms of the contract.;

Therefore, in the instant case, the claimant submitted that at no time was there a contract concluded with the defendant to extend insurance coverage for the vessel Exile Antigua. That all that had occurred was that the claimant had given the defendant possible terms of coverage to which a cost of a premium attached, but that such proposal was clearly dependent on the defendant producing information on the following conditions:

- i. That the premium of EC\$9,620.00 was paid to the claimant or credited to the Claimant's Accounts before the close of business on the 11th day of December 2014;
- ii. That the defendant provide to the claimant a recent marine survey with respect to the said motor vessel "Exile Antigua"; and
- iii. The defendant confirm the navigational limits with respect to "Exile Antigua" in writing.¹

¹ Page 44 TB A Volume 1 Amended Reply and Defence to Counter Claim filed 07/07/2021

The Defendant's Arguments

[9] The defendant relied on the duty that is clearly established, that the onus is on the Claimant to prove their case on a balance of probabilities. That being said, the nub of the defendant's defence was that there were no monies due and owing and that the claimant had failed to establish any such claim.

[10] The defendant submitted and admitted that indeed there had been sums due to the claimant which were for policies of insurance in favour of the said defendant. However, the defendant categorically refuted that any such sums are still due and owing. The defendant relied on the payment that was admittedly received by the claimant via cheque dated 16th of May 2012 in the sum of XCD\$ 192,863.38 and stated that this sum was in full and final settlement of the sums that were due and owing. The fact that the defendant had remitted the exact sum due to the Claimant as had been requested at that time, in the submission of the defendant, clearly showed that all monies were fully paid. However, regarding policy No. 3 the defendant went on to submit that there were no monies due on this as the said claim had now become statute barred. Further, as encapsulated in the defendant's Counterclaim, the defendant contended that an urgent contract for marine insurance in connection with the vessel "Exile Antigua" had been entered into on the 11th day of December 2014. Consequently, the defendant stated that the said vessel, which was lost at sea, on or about December 12th, 2014, was covered by a policy of insurance which the claimant was bound to honour. The defendant further submitted that any attempt by the claimant that the material terms of the contract of insurance had not been met in relation to the vessel "Exile Antigua" had not been proven by the claimant on their case and that in that regard, the defendant was entitled to claim under the policy as entered into with the claimants.

[11] The issues identified therefore when this court considers the evidence that was elicited and the pleadings as they stood before the court are as follows:

1. Did the claimant have a valid claim against the defendant for outstanding monies on policies of insurance one and two issued by the claimant in favour of the defendant?
2. Is the claim in relation to policy 3 statute barred?

3. Was there a binding contract for marine insurance for the vessel “Exile Antigua” between the parties? If so, did the claimant breach that contract? If there was a breach of contract, to what remedy is the defendant entitled?

Court’s findings and analysis

Issue 1: Did the Claimant have a valid claim against the Defendant for outstanding monies on policies of insurance one and two issued by the Claimant in favour of the Defendant?

[12] When the court considers the evidence that was led in this regard, the court had to be simply satisfied on a balance of probabilities whether the defendant was aware of the outstanding sums and that he failed to make the payments.

[13] Attached to the statement of claim of the claimant were two documents entitled “Fire Renewal Endorsement” which were clearly stated to have been issued in relation to policy one and policy two for the period 2012 -2013 ² It is therefore clear in this court’s mind that the claimant had in fact issued valid insurance for the defendant which was accepted.

[14] Where however the issue arose, was in the disparate contentions of both sides. The claimant’s contention was that the manner in which the defendant made payments for insurance coverage was by way of installments or in arrears towards the end of the period of insurance ³ Indeed the claimants contended that the defendant operated a credit facility with them for the payment of installments for insurance coverage.

[15] When the court examined in some detail the customer statement dated the 19th of April 2013 ⁴the court was able to trace that on some occasions the defendant made partial payments towards the insurance payments and then sometimes they paid off the sums

² Exhibit “RA1” attached to the statement of claim filed 14/11/2017

³ Paragraph 2 Witness statement of Simone Benjamin Bradshaw filed 10/11/2021

⁴ Page 26 TBB Volume 3 filed 11/5/2022

due in total. What was however clear to the court, was that there was no established consistency upon which this court could draw the inference that there was either a credit facility or a consistent arrangement by which the defendant was enabled to pay in installments. What is, however, clear on that statement, is that there was a clear indication that payments were received by the claimant in May 2012 which they then attributed to the period for policies one and two for the period 2011 to 2012, without more.

[16] By correspondence dated the 11th May 2012, the defendant was informed by his financial institution that they had not paid the policy of insurance due on the **21st March 2012**. Thereafter it is not disputed that payment was made by the defendant in the entire sum that was stated to have been due **as of that date**. The defendant therefore submitted, that that payment placed the defendant current in their accounts with the claimant while the claimant categorically maintains that that payment was for the previous year and that the sum due on the 21st March 2012 is still outstanding.

[17] When this court considers the totality of the evidence on this issue and the failure of the claimant to lead any credible substantive evidence,⁵ as to the nature of the arrangement that in fact existed, this court is satisfied that the claimant has not, on a balance of probability made out its claim against the claimant for the sums purportedly due under policies one and two. This court considers that this finding is substantiated when the following are considered : a) the fact that a payment was made in full and admittedly received by the claimant for the “annual premium due on the 21st March 2012” ,⁶ b) that the sole witness who spoke of this indebtedness admitted under cross examination that there was nothing before the court to show that the defendant was aware of any arrears due up to the actual date of payment; and c) that there is no evidence that the payment made on the 17th May was in fact knowingly made towards clearance of arrears. Indeed, this position was even fortified more when the court considered the dearth of pertinent information presented to the court and especially when the witness Mrs.

⁵ Leslie Ellis WS filed 9/10/2020

⁶ Pages 20 - 23 of TB B Volume 3 filed 11/5/2022

Benjamin- Bradshaw could tell the court that the figures that she relied upon for the claim came from documents that were never brought to the court.

[18] The court therefore finds that the claimant has not made out its claim in relation to policies one and two and the claim in that regard stands dismissed.

Issue 2: Is the claim in relation to policy 3 statute barred?

[19] The claim of the claimant in relation to policy three in answer to the pleading by the defendant that the claim was statute barred was simply two- fold. One that the defendant operated a credit facility and that the Defendant received regular statements itemizing the indebtedness and two that the defendant had made partial payment on policy three in May 2012 which prevented time from running against the claimant when the claim was issued in October 2017.

[20] The court has a fundamental issue with both of these claims, by the claimant in relation to policy three.

[21] Firstly, the court has not had sight of any documentation that could establish that the defendant had any arrangement with regard to policy three and indeed the only customer statement that was produced by the claimant ⁷ clearly showed no activity in relation to policy three from the renewal notations in May 2011 and April 2011. The court is therefore unable to infer from this sole document that any previous correspondence had been sent to the defendant as pleaded.

[22] Secondly, the pleading which seemed to suggest that partial payments had been made on the account and in fact had been made in May 2012 was also not substantiated by the evidence presented by the claimant. In fact, from the sole customer service statement that was produced, it was clear that the premium for both the period 2010 – 2011 and 2011 – 2012 were stated on the statement with no indication of any actual payment. Additionally, the sum that was admittedly accepted by the claimant in May 2012 from the defendant was in the very specific sum of \$192,863.38 which **only**

⁷ Page 20 TB B Volume 3 filed 11/5/2022

covered policies one and two. The sum of \$95,271.75 as being owed for Policy three nowhere appears as having been paid or even partially paid. Thus, indeed the six years that would have attached as the period of limitation by way of the Limitation Act 1997, the claim having been filed in 2017, this court finds applies, and the claim in relation to policy three is statute barred and cannot be enforced for nonpayment against the defendant.

[23] Just for clarity, the defendant sought to rely on section 6 of the Limitation Act 1997, however from a reading of that section it is clear to the court that the provisions that arise in that section are referable to time limits where an item is stolen (larceny) and action is to be taken. Therefore, under section 20 of the Eastern Caribbean Supreme Court Act Cap 143, the court is mandated to grant "...such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim" to completely and finally determine all matters in controversy.

[24] That being said, therefore this court finds that the provisions of section 7⁸ of the Limitations Act apply and that the six years is applicable which the claimant has run afoul.

Issue 3: Was there a binding contract for marine insurance for the vessel "Exile Antigua" between the parties? If so, did the Claimant breach that contract? If there was a breach of contract, to what remedy is the Defendant entitled?

[25] By way of Amended Defence and counterclaim filed by the defendant,⁹ the defendant raised a claim that they had entered into a contract of insurance with the Claimant for the vessel "Exile Antigua" on the 11th of December 2014. Having so allegedly entered the agreement, when the vessel was lost at sea, the defendant made a claim to the claimant which claim was denied on the basis that there had been no effective contract

⁸ An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

⁹ Filed 16/4/2021

of insurance at the time of the loss and that the defendant was therefore not entitled to make a claim.

[26] In this court's mind, the determination of this issue is heavily fact-based. The court must be satisfied that "*...the parties have agreed upon every material term of the contract they wish to make. The material terms of a contract of insurance are: the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. As to all these there must be a **consensus ad idem**, that is to say, there must either be an express agreement, or the circumstance must be such as to admit of a reasonable inference that the parties were tacitly agreed. Without such agreement, it would be impossible for the courts to give effect to the parties' contract except by virtually writing the contract for them, which it is not the function of the courts to do*"¹⁰.

[27] The evidence relied upon to substantiate this claim was contained in the evidence of the sole witness for the defendant Mr. Carlo Falcone. His evidence was, in summary¹¹, that on the 11th of December 2014 he called the office of the Claimant and spoke to one Alicia Parker seeking insurance on the vessel "Exile Antigua" for the next day as it was about to undertake a voyage to St Maarten. Mr. Falcone went on to say that Ms. Parker emailed him the *quote* and that later that afternoon he went and made the payment on the said quotation but received no receipt as he was informed that the system was down and none could be issued at that time but that he was assured that the boat was covered. While on that voyage the vessel was lost at sea and the defendant by Mr. Falcone made a claim to the claimant pursuant to the insurance contract only to be told that there had not been any contract in place for the voyage of the vessel as he had not provided all the necessary information to complete the contractual arrangement, namely the marine survey of the vessel and the navigational limits of where the vessel was to venture. On cross-examination the witness maintained his position and insisted that he had done all that he needed to do and was assured that the boat had in fact been covered by insurance.

¹⁰ MacGillivray on Insurance 9th ed

¹¹ Witness statement filed 27/11/2020

[28] In direct contradiction to this sequence of events the claimant relied on the evidence of Ms. Alicia Parker and Mr. Leslie Ellis.

[29] Ms. Parker was of utmost importance as she was the person who is said to have dealt with Mr. Falcone and accepted his cheque. In her evidence, Ms. Parker admitted that she had had a discussion with Mr. Falcone upon his inquiry to insure "Exile Antigua". Ms. Parker remained unshakeable on cross-examination in her recollection of events when she said that she sought a copy of a recent marine survey and an indication of the navigational limits of the vessel's proposed voyage. Ms. Parker reiterated to the court that she was sure that she had asked for this information as they were both essential to prepare a formal proposal of insurance. However, on the verbal assurance of Mr. Falcone Ms. Parker told the court that she was still able to prepare a quotation for the premium of insurance based on a previous value of \$202,500.00. Ms. Parker vehemently denied that Mr. Falcone made any purported payment to her based on the quotation she provided and stated clearly that it was a fallacy that if payment had been made by Mr. Falcone, he would not have been issued a receipt as it was their policy that once monies were received a receipt would be issued, even if it was a handwritten one. Indeed, Ms. Parker indicated it was not until the vessel had been lost, that Mr. Falcone then attempted to send the cheque for the premium without providing the necessary information, which resulted in the cheque never being accepted.

[30] The other witness was Leslie Ellis. Mr. Ellis was very familiar with Mr. Falcone, as he was a client of the claimant for many years while Mr. Ellis was the General Manager of the claimant. In 2014 he was not the manager but told the court that the claimant would not have issued insurance to Mr. Falcone for the vessel without first knowing the market value of the vessel, the age and general condition of the vessel and the general area where the boat was to be used.¹² Mr. Ellis not having been present that day of the alleged interaction between Mr. Falcone and Ms. Parker was unable to offer little assistance to the court on this issue.

¹² Paragraph 4 of WS of Leslie Ellis filed 9/10/2020

[31] It is from this factual matrix that the court must therefore make a determination as whether there was a binding contract as between these two parties. One further document relied on by the claimant to refute any such contractual arrangement was email correspondence as between Ms. Parker and the accountant of the defendant, an individual called Jackie Apparicio¹³, an individual who admittedly still resides in Antigua but who was not brought to court to assist the defendant.

[32] In this email, it is clearly stated by Ms. Parker that she was providing a quotation for an insurance premium for “Exile Antigua” there was no policy number ¹⁴ and it was clearly stated that the Navigational limits for the vessel were required.

[33] It is almost at the level of trite law that in order for there to be a binding contract between parties there is a need to be a clear meeting of the minds. Insurance contracts are primarily heavily risk associated and as such irrespective of any stated urgency by a party, the insurer has a duty to ensure that material facts are disclosed to them leaving no room for fault. In fact, a contract of insurance is denominated a contract uberrimae fidei¹⁵ meaning that utmost good faith must be always exercised.

[34] Furthermore, for there to be a contract there must be a concluded bargain which is one that settles everything that is necessary to be settled and leaves nothing further to be settled by negotiation between the parties.¹⁶

[35] When this court considers the evidence laid before it, and on the basis that on the counterclaim the burden lies on the defendant to prove his claim on a balance of probabilities, this court accepts that the evidence of the defendant does not support his contention and I find that the defendant has not made out his case on a balance of probabilities. Indeed, even if the court accepts that the defendant attempted to make a payment on the day before the voyage, this court accepts that the payment alone would not have constituted the requirements of a binding contract as all the material terms had not been settled between the parties. The defendant’s reliance on an unsigned

¹³ Email dated 11/12/2014 at page 45 of TB B Volume 3 filed 11/5/2022

¹⁴ Invoice at page 46 of TB B Volume 3 filed 11/5/2022

¹⁵ Viscount Dunedin **Glicksman (Pauper) v Lancashire and General Assurance Company** [1927] A.C 139

¹⁶ Halsbury’s Laws of England (4th edition.) Vol 9 para 203 and 261

invoice, uncashed cheque in which a receipt has not been produced for proof of payment and what the court deems to be a conversation entering negotiations with the claimant is insufficient to substantiate its claim. The court is also mindful that though the navigational limits were discussed orally, the email dated December 11th, 2014, requested further confirmation.

[36] Therefore this court finds on a balance of probabilities that the Defendant has not made out his claim for the payment of the value of the vessel “Exile Antigua”, there has been no contractual arrangement between the parties. The claimant therefore is not in breach of any contract and the defendant is not entitled to any damages as claimed. The counterclaim therefore stands dismissed in its entirety.

Order of the court

On the claim

1. The claim stands dismissed in its entirety with prescribed costs to the Defendant calculated on the sum claimed of \$288,135.29 pursuant to Part 65.5 Appendix B CPR 2000

On the counterclaim

1. The counterclaim stands dismissed in its entirety with prescribed costs to the Claimant calculated on the sum claimed of \$202,500.00 pursuant to Part 65.5 Appendix B CPR 2000

The court wishes to apologize for the delay in the delivery of this judgment due to unforeseen circumstances.

P. Nicola Byer

High Court Judge

By the Court

Registrar