

EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2008/0140

CLAIM NO. DOMHCV2008/0150



BETWEEN:

[1] FIRST DOMESTIC INSURANCE CO. LTD

Claimant

And

[1] INDUSTRIAL ENTERPRISES LTD

[2] J. ASTAPHANS & CO. LTD

Defendants

Appearances:

Mr. Ian Benjamin with Ms. Colleen Felix-Grant for the Insurers

Mr. Anthony Astaphan SC, Mr. Alick Lawrence SC and Mrs. Heather Felix-Evans for the Insureds

2011: August 3rd, 4th

2014: August 15th

JUDGMENT

[1] COTTLE, J: First Domestic (The insurers) are a general insurance company operating in the Commonwealth of Dominica. Industrial Enterprises Ltd (Industrial) and J. Astaphans & Co Ltd (Astaphans) - together referred to as the insured - are companies which conducted business in Dominica. Over a period of years, the insured obtained insurance cover from

the Insurers. The present claim is concerned with the integrity of three claims advanced by the Insured following losses incurred after a fire and the passage of Hurricane Dean a few days later.

The Policies

- [2] The fire policy, No. F(IC) 10, 072 was issued by the insurers to Industrial in respect to premises at Canefield. The insurance cover for stock was increased to \$9,794,544.29. The insurers also issued policies No. L.P (IC) 10, 008 and LP (IC) 10, 008 in respect of loss of profits for Astaphans and Industrial respectively.
- [3] On 4th August 2007 a fire broke out at Industrial's premises at Canefield. As a result of that fire, a claim was made for loss of stock and damage to the building. On 17th August 2007 Hurricane Dean struck Dominica. The insured suffered loss from the effects of the hurricane and filed a claim. They also claimed for loss of profits.
- [4] By letter dated 20th March 2008 the insurers rejected all claims. The fire claim _ was rejected for breach of duty to provide claims co-operation. The allegation of the insurers is that the insured refused to provide certain requested financial statements. They also say that the claim was being rejected as having been deliberately exaggerated. The exaggeration had to do with the value of spare parts said to have been lost. The insurers say that the insureds claimed for more parts than could have possibly been present at the premises and the parts were over-valued given that the accounting provisions for obsolescence of those parts was said to be only 5%, given that financial statements revealed a higher provision for obsolescence.
- [5] The hurricane and loss of profits claims were also rejected for failure to provide the financial statements requested in the fire claims. The insurers also say that there was failure to provide particulars, that is, a list of items not damaged by the storm.

[6] Several issues fall for determination in this matter. Among them is the question of insurable interest. There are two insureds "Industrial" the first Insured and "Astaphans" the second insured. Concerning the fire claim, the buildings were owned by Industrial. The spare parts which form the bulk of the claim were owned by Astaphans. It appears that the Insurers position is that, in making a claim it is incumbent upon the Insured to clearly identify the items for which they claim loss as well as the basis upon which they claim whether as owner or bailee.

[7] This argument was not pursued with much vigor by the Insurers. They were right to adopt that posture. Policy F (IC) 10, 072 at Item No.3 expressly extends cover to "Stock in trade the property of the Insureds or held by them in trust or on commission or for which they are responsible whilst in the building."

[8] In addition to this clear express provision, the parties had a history of a long course of dealing. The Insurers well knew that both Industrial and Astaphans conducted business in the insured building. The position is well put by the learned authors of **MacGillivray on Insurance Law**¹.

"Further, as there is no obligation to insert in the policy the name or names of all the persons on whose behalf the insurance is made, the nominal assured can insure not only on his own behalf but either wholly or partially on behalf of other persons interested in the goods"

[9] Counsel for the insureds also cites the case of **Waters v Monarch** per Campbell C.J at p.870

"What is meant in those policies by the words "goods in trust?" I think that means goods with which the assured were entrusted; not goods held in trust in the strict technical sense, so held that there was only an equitable obligation on the assured enforceable by a subpoena in Chancery, but goods with which they were entrusted in the ordinary sense of the word

[10] Similarly I conclude that the insureds have shown an insurable interest in the goods in this case.

¹19th Ed. at para 1-161

Claims Co-Operation

[11] Condition 11 of the policy provides as follows

"On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company

- a. A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles of items or property damaged or destroyed, and of the amount of 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 insurances, if any.

The insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicated or copies thereof, documents, proofs and information with respect to the claim and the origin and cause 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 Company as may be reasonably required by or on behalf of the Company together with declaration on oath or in other legal form of the truth of the claim and or any matters connected therewith

No claim under this Policy shall be payable unless the terms of this condition have been complied with.

(12) The condition required the insureds to provide the insurers with the best particulars that they are able to provide. The rationale is that the insurers must get the relevant information in good time to enable them to make appropriate decisions and act on them. Mr. Astaphans SC for the insured argues that there must first be a request or demand by the Insurers and the information demanded must be reasonably required.

(13) Under the fire loss policy, the position of the insurers is that the insureds did not provide a list of items thought to have been lost in the fire. Witness for the claimant Mr. Bateau testified that it was not possible to compile a list of the destroyed auto spare parts. He did not explain why it was not possible. Instead the insureds provided an inventory or stock listing. This stock listing was a 700 page print out. The stock items were not organized or sorted. There were entries for the same kind of item at different pages. To ascertain the quantity of any item in stock required a close perusal of the entire document and an

addition of the various quantities of the stock item listed throughout the document. An electronic searchable version of this stock listing was eventually supplied to the insurers in December 2007, when the inventory listing is examined it contains many listings of items with zero quantities or zero values. It includes spare parts for Lada and Skoda vehicles. These parts have dubious value in Dominica as there are very few if any Lada or Skoda vehicles on local roads.

- [14]** The inventory also contained items which were not in fact housed at the insured building and could not have been affected by the fire.
- [15]** The insurers argue that the stock list is thus an unreliable guide to the items lost in the fire and its provision as such a guide by the insured is aimed at frustrating the insurers' efforts to ascertain the extent of the stock loss or to deceive the insurers as to what was lost in the fire. The Insurers say this is in breach of condition 11. The adjuster for the Insurers, with the help of three men, walked through the fire debris and compiled a listing of items they found damaged. Mr. Bateau for the insureds was present. He did not assist or record what the adjuster listed as having been found in the debris.
- [16]** Concerning the claim for losses due to Hurricane Dean, the insurers say the insured did not provide a list of damaged items removed from the damaged building. By letter of 15th September 2007 these listings were requested. There is no evidence before the court that such listings were ever provided. It is to be noted that the insurers had given permission to move undamaged items from Canefield to 3 locations. The insured provided a list of items moved to Roseau, only.
- [17]** The other item of information requested and not supplied to the insurers relates to both the fire and hurricane claims. The insurers requested audited financial statements for Astaphans and Industrial for the years 2005-2007. These have yet to be provided. The insurers say these statements are needed to see how the insureds valued the stock in trade in the auto spare department. By comparing the inventory figure in the financial statements one can determine and analyze the extent of the write down provision.

[18] Mr. Astaphan SC accepts that the financial statements were not provided. He says however that these were not reasonably required. The reasons pleaded by the insurers for needing the financial statements were to:

1. "verify the accuracy of the stock list inventory in light of the fact that no itemized list was provided; and
2. Assess how the stock which necessitated the increase in coverage was affected by the fire, if at all."

[19] Mr. Astaphan SC says the financial statements were totally irrelevant to these purpose. He submits that the Insurers were acting capriciously unreasonably or unjustly when they denied the claims on that basis.

[20] It is clear that the insured did not provide requested financial information. The evidence reveals that the financial information is now available and has in fact been made available to the insured since January or February 2008. It is unclear why they were never given to the insurers or led in evidence at the trial

[21] What should be the effect of this failure by the insured? The insurers say that the result is provided in the policy itself. No claim is payable unless the terms of condition 11 have been complied with. But it is not every failure to provide information that will be fatal to the claim. The requested information must be relevant and reasonably required. Many cases exemplify this. The Judicial Committee of the Privy Council in **Super Chem products Ltd v American Life and General Insurance Co**² from Trinidad accepted that the correct approach to dealing with the claims co operation clause is as set out at **25 Halbury's Laws of England**³

"Particulars required. The particulars required necessarily vary according to the nature of the insurance. They must be furnished with such details as are reasonably practicable whether the details given are sufficient or not is a question of degree, depending partly upon the materials available which, particularly in the case of a fire, may be scanty, and partly upon the time they have to be furnished.

² PC Appeal No. 68 OF 2002

³ ~~4~~ ed para 505

In any case the assured has not performed his duty adequately unless he has furnished the best particulars which the circumstances permit."

[22] Clause 11 required the insured to provide a list of items lost in the fire. They provided a stock list, computer generated, of the entire inventory. While this was admittedly not ideal, given the time constraints under which the insured had to operate I find this to have been a reasonable effort to provide particulars. Certainly this shortcoming is not sufficient in my view to reject the claim by itself.

[23] The insured also failed to provide a listing of goods, said to be undamaged which were, moved from the building affected by the hurricane. Goods were taken to three locations. A listing was only provided for only one of the three locations. This failure to provide a listing of goods taken to the other two locations was admitted by Ms. Astaphan in cross-examination. She appeared to consider the stock listing supplied to have been adequate for the purposes of the insurers. What the insurers did through Ms. Astaphan was to provide two inventory lists and advise that the value of the stock moved was \$1,545,283.10.

[24] Counsel for the insurer's points out that at the time of the storm the policy sum insured was \$1,156,476.77. Under condition 17 of the policy states:

"If the property hereby insured shall, at the breaking out of any fire, be collectively of greater value than the sum insured thereon, then the Insured shall be considered as being his own insurer for the difference, and shall bear a ratable proportion of the loss accordingly. Every item, if more than one, of the Policy shall be separately subject to this condition."

Counsel says that this required that under insurance and average must now applied to this item

[25] Among items of loss claimed by the insureds is a claim for the loss of profits. The Insurers requested audited financial statements for both Astaphans and Industrial for the years 2005, 2006 and 2007. None were provided. Ms Astaphans says that the insured received these in 2008. Up to the date of trial they had not been supplied to the Insurers. The claim for loss of profits is resisted by the insurers because they say that loss of profits can only be known and quantified after 6 months, the indemnity period of the policy. No such period

having expired and no quantification of such loss of profits having been made no loss of profits are recoverable.

[26] In the case of Industrial, Ms. Astaphan testified that this company ceased to trade on the night of the fire and could thus have incurred no loss of profits for 6 months after the blaze.. The insurers add that in any event, no actual claim was ever presented for loss of profits at the end of the indemnity period and no proof was adduced of actual loss.

[27] The Insureds suggest that the policies covered not loss of profits but loss of gross revenues and specific standing charges. This, according to Mr. Astaphan SC, would have been known from the previous year and the policy itself fixed the standing charges. The business of Industrial had stopped as it was completely destroyed. Immediate notice of the loss was given along with an estimate of the quantum. The policy expresses itself to cover, *inter alia*, "gross revenues and standing charges"

[28] General condition 2 requires the insured to render proof of loss within 60 days after the occurrence of the loss. The insureds contend that there was no need to await the expiry of the indemnity period to determine whether gross revenue would be affected. The business having been totally destroyed, the gross revenue was completely interrupted say the insured. Mr. Astaphan submits that the insured ought not to be penalized for providing early information to the Insurers. Although the Insured had said that their estimates were subject to change, they were never in fact changed and the Insurers have not pleaded that the estimates did not reflect the actual loss of the insureds.

[29] To my mind, it is difficult to say that an estimate, provided early and expressly said that it may be subject to change, is to be equated with proof of loss. The policy required "a signed and sworn proof of loss." No such signed and sworn proof was provided by the Insureds.

[30] The major claim for loss for auto spares said to have been destroyed in the fire is resisted by the insurers because they say it has been fraudulently exaggerated. This is said to have been the case on 4 bases:

- I. A claim was made for goods which were not physically in the warehouse at the time of the fire
- II. The value stated for the items destroyed was greater than the actual value
- III. The quantity of items said to have been in the warehouse would not have been physically accommodated thereun, having regard to the size of the structure
- IV. The insured knowingly or recklessly claimed for auto spare parts which had not been sold for an extended period of time without making adequate accounting provision for the obsolescence of the parts. The value was consequently overstated.

[31] Counsel for the insured cites the case of **Agapitos v Agnew**⁴ where Lord Mance said

"A fraudulent claim exists where the insured claims, knowing that he has suffered no loss, or only a lesser loss than which he claims (or is reckless as to whether this is the case). A fraudulent device is used if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie. There may be however be intermediate factual situations, where the lies become so significant that they may be viewed as changing the nature of the claim being advanced"

[32] Condition 13 of the policy reads:

"if the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy, or, if the loss or damage be occasioned by the willful act, or with the connivance of the Insured; or, if the claim be made and rejected or an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited."

[33] A lot of time and attention was spent on this issue at trial. As far as the claim was made for items which were riot in the warehouse at the time of the fire goes, the insureds admit that

⁴ (The Aegeon) 2003 QB 556, 569 para. 30 Mance LJ .

initially they did claim for some items which had been removed from the warehouse before the fire. This they say was an honest error and only amounted to 2.91% of the spare parts said to have been lost and 8.53% of the stock of the Bargain Center. Once the error was detected, the items were removed from the claim. No intent to deceive can be shown.

[34] Having regard to the claim made and the minimal overstatement because of the claim for parts removed before the fire, I am not prepared to say that this by itself offers the insurers good grounds to reject the claim under condition 13. I do not consider the difference to be substantial and in any event the insureds have abandoned the claim for items which they found out had been moved before the fire.

[35] The insurers argue that Ms. Astaphan and the witness Mr. Bateau knew that their books of accounts reveal that the physical inventory was written down from cost price by a minimum of 45%. I find it difficult to follow this argument. The Insurers issued claim forms to be used by the Insureds in the event of a loss. The form instructs the insureds that if the claim is for stock in trade, then the correct amount to be submitted as a claim must be the cost price after deductions of all discounts and trade allowances for cash payment. As I understand it, when claiming for stock in trade the insureds are required to state the actual cost price they paid for the stock and give the Insurers the benefit of all discounts received for trade allowances for having bought the stock for cash.

[36] Counsel for the Insureds submits that those express instructions or requirements from the insurers should be taken to mean that the cost price is the only applicable price to be claimed for loss stock in trade.

[37] The insurers submitted that the spare parts claimed to have been lost in the fire simply could not fit in the available space.

[38] Dr Saunders testified about the dimensions of the storeroom and the space needed for some items of stock. He was commenting on Mr. Zoe's testimony who in his witness statement says at paragraph 74 that the

items listed in the stock inventory could not fit into the spare parts area. The state of the evidence left me unsure whether the space could physically accommodate the spare parts alleged to have been destroyed in the fire. I therefore decline to assign this as a basis to say that the insureds have fraudulently exaggerated their losses.

[39] The insurers also aver that the insured have understated their provision for obsolescence of the spare parts lost and have thereby greatly overstated the value of these parts. As noted above counsel for the insured submits that no issue of obsolescence arises because the value to be claimed for the losses is the cost price. This is based on the premise that the policy covers the cost price of stock in trade. If this argument is correct it means that an item purchased as stock in trade which remained unsold for many years would retain the same value for reimbursement by the insurers as if it had been lost in a covered peril on the very day it was purchased. This cannot be correct. As I understand it the purpose of the indemnity provided by an insurance contract is to put the insured in the position he would have been had the insured loss not occurred.

[40] Mr. Gordon Moreau was instructed by the insurers. He prepared an expert report reviewing the accounting and inventory information of the insureds. At paragraphs 16 & 17 of his report he said as follows:

"16- By January 2008 I had completed my review analysis of the inventory, my findings are set out and I noted that according to the statements and other documents that I analyzed that for the years 2005 and 2006 the company made provisions for obsolescence on the following basis: 5 plus years a hundred percent; 4 plus years 85 per cent; 3 plus years 75 and 50 60 percent respectively; two plus years 45 and 30 per cent respectively and for the current year 15 and 10 percent respectively. In 2006 the total of all inventories was some \$22,364,241.00. For the same year total inventory of all spares for upstairs and downstairs were some \$4,025,973 or 18% of the total. For the following year those figures were 23,144,039 and \$4,065,087 respectively. I then conclude by way of an aged analysis of the company's total inventory as at June 30, 2006 what percentage was or what age and assuming that the spares were aged on the same basis I estimated corporate spares were aged on the same basis I estimated corporate spares as at June 30, 2007 to be aged as follows five plus years \$873,994; four plus years \$524,396; three plus years \$991,881; two years \$991,881; one year \$682,935. For the year June 30, 2007 I applied the company's provision for obsolescence as at June 30, 2006 and the total estimate came up to \$22,330,312.

17- Further assuming that every spare part downstairs in the total sum of \$913,516.00 was obsolete and that left a balance on the 2006 basis of an obsolete amount of \$1,416,796.00 subtracting that the amount of obsolescence from the inventory upstairs as of June 30, 2007 in the sum of \$3,151,57.100 less that obsolescence figure of \$1,416,796 (or 45%) left a balance of \$1,734,775. Upon that basis I formed the view that obsolescence was in the approximate percentage of 45% and that the insured's provision for obsolescence was very materially flawed. I attach a copy of my review analysis prepared as of 17 January 2008 as Appendix C

- [41] If it is true that the insured, in their internal accounting practices, made provisions for obsolescence of stock in trade based on the period of time the stock remained unsold, then that is an indication of the value they expected to recover on sale of the item in question. To reimburse the initial cost price seems to me to be putting the insured in a better position than they would have been if the fire had not occurred.
- [42] Mr. Keiron Pinard-Byrne, the auditor of the insured gave evidence. He took issue with Mr. Moreau's conclusion that there ought to be a 45% allowance for obsolescence. He defined obsolescence as including slow moving stock, obsolesces and obsolete stock. He was of the view that the nature of the provision for obsolescence was a financial provision and not a physical identification. Mr. Pinard Byrne testified that at most the provision for obsolescence should be no more than 5% as far as the spare parts are concerned.
- [43] Having carefully considered the competing contentions, I conclude that the dispute about the level of obsolescence is a matter over which reasonable professional accountants can differ. I do not consider this to amount to a deliberate or reckless exaggeration of the insurance claim so as to void recovery under the policies. That said, I do not accept Mr. Pinard Byrne's position that the insured's accounting provisions should be ignored. The figures reflect what they considered, as reasonable business persons, they would be able to recover on the sale of the slow moving stock. I am content to fix this at 45%. This will reduce the value of the claim for auto spare parts from \$3.15 million to \$1,734,000.
- [44] I have therefore arrived at the conclusion that the claims of the insured ought not to be rejected in toto. I will consider the losses claimed.

Buildings

- [45] The evidence is that buildings P & C were valued at \$999,000. Insurance cover to a maximum of that sum was purchased by the insured. The case of **Lucss v New Zealand Insurance**⁵ makes it clear that the amount recoverable on a policy of fire insurance is the amount which represents the value that the fire has taken away from the property. At the trial, Ms Astaphan testified that work on repairing the buildings had commenced. She admitted that certain tax concessions were received. The amount saved was not revealed to the court, nor was the cost of repairs actually paid. The claims adjuster, Mr. Zoe concluded that \$499,500.00 was a fair value for building C and \$799,920.00 was a fair value for building P. In the absence of other evidence I accept these values.

Machinery and equipment

- [46] Industrial has ceased trading. There is no evidence that they intend to replace the furniture and foam making equipment. No invoices were supplied to the insurers. It is unclear whether the equipment could be repaired. No evidence was led as to the existence or otherwise of a market at which second hand equipment could be bought. The insured claimed \$641,458.58 for loss of machinery and equipment. Mr. Zoe adjusted this amount to \$168,740.92. The court was not advised as to the basis on which Mr. Zoe arrived at his figure. In this unsatisfactory state of evidence I will allow \$400,000.00 under this head of claim. This figure is somewhat arbitrary but represents a compromise between the competing claims and is the best that can be done without the level of evidential assistance which should have been available.

Bargain center stocks

- [47] The claim for bargain centre stocks was \$272,709.73. The adjuster was minded to allow \$162,778.96. I am content to accept the adjuster's figure for this item.

Other items and components

⁵ [1983] VR 698 at p700

[48] The insured claimed \$192,625.97 and \$92,161.08 respectively. Mr. Zoe adjusted these to \$50,097.13 and \$33,673.10 respectively. I see no reason why these should not be treated in the same way as the claim for spare parts was treated. Subtracting 45% of the amount claimed brings me to a total of \$105,944.28 and \$50,688.59 respectively. I allow these amounts.

Furniture

[49] The amount claimed for furniture was \$165,646.05. The adjuster was prepared to allow only \$57,306.90. Again the approach of Mr. Zoe strikes me as too draconian. I did not have the benefit of an explanation of his rationale. I constrain myself to adopt a middle course as more likely to be reasonable. I award \$100,000.00 for this item.

[50] A sum of \$18,558.37 was claimed for expenses. This was not contested. This figure is allowed by the court.

Stock losses

[51] I have considered these earlier under the question of exaggeration of claim and concluded that I will apply the book provision of 45% to the amount claimed for auto spare parts. Mr. Zoe would have allowed \$600,000.00 of the 2,899,097.31 claimed. I consider the proper figure to be \$1, 734, 000.00.

Loss of profit and loss

[52] On a proper construction of the policy, it applies to cover gross revenues and standing charges. The position of the insurers that no profit losses are covered stems from a flawed appreciation of this part of the policy. Questions of profit or loss incurred by Industrial are thus immaterial. The insured are entitled to recover the gross revenues lost by the fire.

Hurricane claims

Building repair costs

(53) The insureds claimed \$411,600.00. Mr. Zoe adjusted this to \$195,861.95. I have earlier alluded to the paucity of evidence as to the repair costs of the buildings and the absence of any explanation as to how Mr. Zoe arrived at his adjusted figure. Again I will adopt a middle course and award \$300,000.00 for this item.

(54) Greenhouses and irrigation system. The insurers were content to allow this claim in its entirety. The \$46,000.00 claimed is allowed.

[55] The insurers sought to avoid the policy on the basis that the Insureds failed to supply a list of undamaged items taken to two locations. Instead two itemized lists were given to the insurers. I do not view this technical failure as sufficient to warrant the avoidance of the policy. The sum claimed for stock lost was \$766,512.84. Counsel for the insured submitted that the documentary evidence showed underinsurance. Mr. Zoe arrived at an adjusted figure of \$230,476.32. It is unclear that this was a result of the application of the average loss clause. I find that there should be a reduction of the amount claimed. Hampered as I am by the lack of clear evidence on this point I once more feel compelled to award a figure about midway between the two positions advanced. I would fix \$490,000.00 in this regard. Each party will bear its own costs having regard to the conclusion at which I have come.

[56] This judgment is long overdue. A series of calamitous coincidences has delayed it. This court's failure to properly back up the electronic version of this document and the unfortunate crash of my laptop computer with all its data was a serious setback. Then the files in this matter which are quite voluminous, could not all be located. With the assistance

Brian Cottle

High Court