GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 2003

BETWEEN:

BRYDEN & MINORS LIMITED

Appellant

and

COLGATE PALMOLIVE (JAMAICA) LIMITED

Respondent

Before:

The Hon. Mr. Adrian D. Saunders	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Joseph Archibald, QC	Justice of Appeal [Ag.]

Appearances:

Mr. James Bristol for the Appellant
Mrs. Celia Edwards with Ms. Nichola Byer for the Respondent

2004: June 29;
September 20.

JUDGMENT

[1] SAUNDERS, C.J. [AG.]: The Respondent, "Colgate", is a Jamaican company that was in the business of supplying goods to the Appellant, "Bryden", a Grenadian company. The practice the parties had established between themselves was that the suppliers would ship the goods free on board to Bryden. The onus was therefore always on Bryden to insure the goods shipped. In order for this to be done, Colgate had a contractual obligation to discharge. They were obliged to notify Bryden in a timely manner of the details of each shipment so that Bryden could effect the necessary insurance. What occurred in this case is that no insurance was taken out on a particular shipment of goods and, as fate would have it, these goods were damaged. The dispute between the parties is over who should bear the loss occasioned by the damaged goods. Each side alleges that

the other should do so. The matter eventually went to trial and the learned trial Judge held that Bryden should bear the loss. Bryden has appealed.

[2] The Court below and the parties to the appeal were all of the view that a single issue needed to be determined. Did the suppliers give to Bryden sufficient notification of the shipment to enable the latter to effect the necessary insurance coverage. This issue arose in a counterclaim filed by Bryden to a claim made by the suppliers. Bryden had paid in full for the shipment containing the damaged goods. After receiving those goods, Bryden had placed a repeat order with Colgate. Thinking that their suppliers, Colgate, were liable for the damaged goods of the first order, Bryden set off the payment made on the first order against the payment due on the repeat order. The parties then disputed the issue of who was liable for the damaged goods on the first shipment. Ultimately, Colgate brought proceedings for the monies owed on the repeat order. Bryden was constrained to admit that claim. Bryden counterclaimed however for the value of the damaged goods in the first shipment.

[3] It is important to set out clearly what was pleaded by each side on the counterclaim. Bryden pleaded that in breach of contract, the suppliers failed to notify them of the shipment details until it was too late for them to insure the goods. The suppliers denied this. They pleaded that Bryden was notified by a fax sent on 25th July, 1997.

[4] On the day of trial before the High Court Judge, Counsel for Colgate requested an adjournment because of the absence of one of their witnesses. The trial Judge refused the adjournment. The consequence of this adjournment was that the only witness who could speak to the vital issue of notification was Mr. Minors, the Managing Director of Bryden.

[5] The trial Judge regarded the matter of Mr. Minors' credibility as being of paramount importance. Mr. Minors stated in his witness statement that the goods

on the first invoice arrived in Grenada on 31st July, 1997. He received the invoice for those goods on the 1st August, 1997. At the time he received the invoice he did not know that the goods were actually already in Grenada. Mr. Minors denied receiving a faxed notification of the shipment as alleged by Colgate in their pleadings. He further stated that when he received the invoice, not only did he believe that the goods were not yet in Grenada, but also, he observed that the invoice disclosed that Colgate had paid an insurance premium. He said that noticing this, Bryden had assumed that, notwithstanding the established practice between the parties, Colgate had insured the goods. It however later transpired that this premium was not for marine insurance. It was a payment made by Colgate to the Jamaica Credit Insurance Company (JECIC).

[6] Mr. Minors was cross-examined by Counsel for Colgate. He maintained that he had not insured the goods because he had not been notified of the shipment. He was referred to the correspondence between the parties prior to the institution of the action. The correspondence discloses that for a considerable period of time Bryden laboured under the mistaken impression that Colgate had insured the damaged goods. In a letter dated 18th August, 1997 to Colgate, Mr. Minors said that "we did not insure the shipment since the invoice from Colgate Palmolive Jamaica clearly included an insurance premium amount of US$227.68". Another bit of correspondence, a fax from Mr. Minors dated 9th September, 1997, suggests that Bryden may well have neglected to insure previous shipments as well because they wrongly assumed that the insurance charge paid to the JECIC was in respect of marine insurance on the goods shipped. I pause here to remark that Bryden's belief that the insurance premium disclosed on their invoices might have been in respect of marine insurance is rather surprising considering the established course of dealing between the parties that the goods were being shipped f.o.b.

[7] In his evidence, Mr. Minors denied the allegation put to him that it was only after the commencement of these proceedings he introduced the issue of non-

notification as the reason for his not insuring the goods. He said that he had written to Colgate about their failure to notify but he had to concede that this letter was not disclosed nor proof given of its existence. Mr. Minors was shown a copy of a fax allegedly sent on 25th July, 1997 by Colgate to Bryden. He denied that Bryden had ever received that fax message. He ended his cross-examination by repeating that he did not intentionally neglect to insure the shipment. He reiterated that the goods were not insured because he was not notified.

[8] The trial Judge was not impressed with the evidence of Mr. Minors. Firstly, the Judge held that Bryden had only raised the issue of non-notification after the commencement of the present action. In this context, the Judge took a dim view of Mr. Minors' failure to produce a copy of the correspondence that Minors claimed had been sent to Colgate on the issue. Secondly, the Judge treated as an implicit admission of receipt of notification the repeated pre-trial assertions of Bryden that they had not insured because they assumed that Colgate had done so. Noting that the burden of proof to establish lack of notification was on Bryden, the counterclaimant, the Judge found that the burden had not been discharged. The Judge dismissed the counterclaim.

[9] This is an appeal against findings of fact and the Court is mindful of the dangers inherent in substituting its findings for those of a trial Judge who has seen and heard the witnesses. However, where a Judge's conclusions are inferences drawn from an examination of documentary evidence, it has been held that this Court is in almost as good a position as the trial Judge to determine the facts. See: Grenada Electricity Services Limited v Peters[1].

[10] Bryden had repeatedly asserted, before the action was brought, that they had not insured because they thought that Colgate had done so. The trial Judge regarded this as an implicit admission that Bryden had indeed received proper notification. If Bryden assumed that Colgate had insured the goods, it is natural to conclude that

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Bryden would not have concerned themselves at all with the issue of notification. The issue of notification would have been rendered entirely otiose if in fact Colgate had insured the goods. In this context it would therefore not have been unreasonable for Bryden's correspondence to concern itself, as it did, with misguided efforts to claim on the non-existent insurance rather than with the issue of timely notification.

[11] It was after the action commenced that Bryden addressed in their pleading the issue of notification. At the trial, Bryden was consistent on that issue and gave evidence in support of their pleaded case. It seems to me that, on this point, the evidential burden shifted to Colgate to provide positive evidence to support *their* pleaded case that Bryden had been duly notified. The only attempt to do so was in the exhibited copy of the fax of 25th July, 1997. Unfortunately, that fax does not assist Colgate. The exhibit indicates on its face that three pages of information were faxed to four recipients but crucially, the transmission report exhibited only establishes that the fax message was sent to a Barbadian recipient, not to Bryden in Grenada.

[12] At the close of the evidence therefore, the learned Judge had no evidence before him that Colgate had indeed notified Bryden as Colgate was contractually bound to do. On the contrary, there was evidence adduced, albeit by a witness whose testimony the Judge found unconvincing, that Bryden had received no timely notification.

[13] I would be reluctant to disturb the Judge's findings of fact in circumstances where the learned Judge was clearly in a better position than we are to assess whether the evidence of Mr. Minors could be relied upon at all. In the circumstances that arise here however, I would prefer to rest the decision in this case on another issue in this matter that has not at all been addressed by the parties. That is the matter of the damages suffered by Bryden.

[14] The issue is this. Even if Colgate had failed to give the desired notification can Bryden establish that it was that breach that *caused* their loss? Wasn't there a duty on Bryden to prove that their loss was occasioned by the breach? On the state of the evidence has that duty been discharged?

[15] In Galoo Ltd v Bright Grahame Murray[2] this issue of causation was explored by Glidewell LJ. The learned Lord Justice examined several cases and concluded at page 1374G that "if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an "effective" or "dominant" cause of his loss". The Court applies the standards of common sense in determining whether the breach caused the loss or merely provided the occasion for the loss.

[16] If we accept that there was a breach by Colgate in not notifying Bryden, the evidence in this case clearly points to the fact that Bryden never had any intention of insuring the shipment because they mistakenly thought that it had already been insured by Colgate. In my judgment therefore, Bryden have not established the necessary causal link between their loss and Colgate's breach and in these circumstances I would dismiss the appeal with costs to Colgate in the sum of $10,000.00.

Adrian D. Saunders
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[Sgd.]
I concur.

Joseph Archibald, QC
Justice of Appeal [Ag.]

[2] (1994) 1 W.L.R. 1360