SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2005/045

BETWEEN:

[1] NELISTA RAMBALLY
[2] RUDOLF RAMBALLY
[3] SIEANA RAMBALLY

Appellants

and

BARBADOS FIRE & GENERAL INSURANCE CO. LTD.

Respondent

Before:

The Hon. Sir Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Clarence Rambally and Mr. Vandyke Jude for the Appellant
Dr. Richard Cheltenham, QC and Mr. Mario Michel for the Respondent

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2008: February 26;
April 22.

Contract Law – insurance contract – conditions – duty of good faith

The second and third appellants made a claim under a policy of insurance when the insured bakery, in which they had an equitable interest, was destroyed by fire in May 1997. The respondent insurer rejected the claim in February 1998 on the ground that the second appellant was not entitled to any monies due under the policy being a stranger to the insurance contract which had been effected in the name of the legal owner of the premises, Hezekiah Rambally, who died after the policy was effected but before the fire. The appellants commenced proceedings for breach of contract against the respondent insurer in December 2000. The claim was dismissed, it being held that the second and third respondents were not parties to the insurance contract and that condition 13, which limited the time for bringing a claim, operated to bar the appellants, including the first appellant (the administratrix of the estate of Hezekiah Rambally) from claiming any sum

under the policy. The appellants appealed, arguing that the terms of condition 13 were ambiguous and the ambiguity was to be resolved by an interpretation in favour of the appellants.

Held, dismissing the appeal and awarding costs to the respondent:

(1) Condition 13 was clear and unambiguous and provided for one result, that was, forfeiture of all benefits under the insurance policy. It was not necessary for the respondent insurer to prove that the breach was serious and caused them prejudice before placing reliance on the forfeiture provision in condition 13.

(2) There was no legal or factual basis for a finding that the respondent insurer was in breach of their duty of good faith. Condition 13 was not hidden in the "fine print" as its provisions enjoyed no lesser prominence than any of the other nineteen conditions of the policy.

Nasser Diab v Regent Insurance Company Ltd. [2006] UKPC 29 applied. **Alfred McAlpine Plc v BAI (Run-off) Ltd.** (2000) 1 Lloyd's Re 437 distinguished.

JUDGMENT

[1] **BARROW, J.A.:** This is an appeal against the decision of Edwards J. dismissing a claim by the appellants for damages for breach of a contract of insurance to indemnify them against loss by fire. The insured building, which housed a bakery at Bexon, Castries, was destroyed by fire on 24th May, 1997.

Background Facts

[2] Hezekiah and Nelista Rambally, who were joint owners of the property (the bakery), mortgaged the property to the Royal Bank of Canada ("the Bank") to secure a loan of $200,000 sometime prior to 27th May, 1994. On the 8th June, 1995, they sold the premises including the bakery and its contents to their nephew, Rudolf Rambally (referred to in the court below as RR), for the sum of $600,000.00. A deposit of $300,000.00 was paid by Rudolf Rambally, who agreed to assume responsibility for the loan repayments to the Bank which amounted to some $5,500.00 per month.

[3] Sometime prior to July 1996, Rudolf and Hezekiah Rambally held discussions with Thomas Jean, an insurance broker, who was authorized to act as broker by

various insurance companies, including the respondent company. Mr. Jean advised Rudolf Rambally to effect the insurance policy he was proposing to obtain using Hezekiah Rambally as the proposer in view of the fact that both the title to the premises and the mortgage stood in the latter's name. The policy was so effected on 21st July, 1996. It insured the bakery against fire and other perils until 22nd July, 1997. The insurance premiums were thereafter paid by Rudolf Rambally.

[4] On 25th November, 1996 the respondent paid in the name of Rudolf Rambally the sum of $11,774.92 on a flood loss claim made under the policy. The appellants contended that this shows that the respondent insurers knew that Rudolf Rambally was really the insured and accepted him as such. The respondent however contended that this payment was made to Rudolf Rambally in error.

[5] Following the fire in May, 1997, Rudolf Rambally and his wife, Sieana Rambally, made a claim under the policy on 28th May, 1997. After eight months of delay in deciding on the claim, the respondent rejected the claim on 12th February, 1998 on the basis that Rudolf Rambally was a "stranger" to the insurance contract concluded by Hezekiah Rambally (who died in January, 1997) and that the respondent was under no legal obligation to pay any monies due under the policy to Rudolf Rambally. Notably, during this period, an investigation was conducted and a Forensic Scientist's report dated 11th June, 1997 concluded that "the fire was deliberately started."[1] The respondent did not rely on the allegation of arson in the proceedings and, apparently, took no action in relation to the allegation.

[6] The proceedings, which culminated in this appeal, were commenced by Nelista Rambally, Rudolf Rambally and Sieana Rambally against Barbados Fire & General Insurance Company Limited on 4th December, 2000.[2] Thomas Jean and Thomas M. Jean Insurance Brokerage Limited were later joined as defendants. Judgment was entered against those two defendants without a trial. The claim

[1] Flood Claim File, page 00036
[2] It appears that other claims were made and discontinued.

against the insurers proceeded to trial and the main issues to be resolved were stated by the trial judge to be as follows:

> "(1) Were the Insurance Brokers Agents of the Insurers in procuring the policy commissioned by RR?
> (2) Did Hezekiah Rambally through RR disclose to the insurers that the real property and items covered by the Insurance Policy had been sold in 1995 by Hezekiah Rambally to RR?
> (3) What insurable interests were covered by policy No. SLJC 0098?
> (4) What legal effect did the death of Hezekiah Rambally have on the said insurance policy?
> (5) Are the Insurers entitled to avoid the policy for non-disclosure and misrepresentation material to the risk and lack of pre-contract good faith or rely on the Conditions pleaded?
> (6) What measure of damages and other remedies, if any, are available to the Claimants in the circumstances"[3]

[7] As stated at paragraph [6] above, Nelista Rambally was included as a claimant in the action. The inclusion of Nelista Rambally was significant in two respects. Firstly, the death of Hezekiah Rambally would have had the effect of vesting any rights under the policy in his estate so that Nelista Rambally as his personal representative would (arguably) be the only person with a clear legal right to claim under the policy. Secondly, Nelista Rambally was said to be trustee of the insured property for the benefit of Rudolf Rambally, Sieana Rambally and the Bank (as mortgagee).

[8] In the course of argument before this court, counsel for the appellant accepted that Nelista Rambally had not made a claim in writing upon the insurers under the policy. Counsel accepted that Nelista Rambally became a party to the action on the apparent premise that she had notionally made a claim. Assuming that it can be said that Nelista Rambally joined in the claim in writing that Rudolf Rambally had made on the insurer, counsel accepted that Nelista Rambally was subject to the same defences under the policy as those to which Rudolf Rambally was subject.

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[3] Nelista Rambally et al v Barbados Fire & General Insurance et al SLUHCV 1179 of 2000 (delivered on 31 October, 2005), paragraph 22

[9] One of the defences was condition 13 of the policy. Condition 13 states:

> "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 anyone on his behalf to obtain any benefit under this Policy; or if the loss or damage occasioned by the wilful act, or with the connivance of the Insured; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in the case of 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."

Among the other defences on which the respondent relied in the court below was the contention that the insurer was entitled to avoid the policy on account of Hezekiah Rambally's non-disclosure, misrepresentation and lack of pre-contract good faith.

[10] The trial judge decided against the appellants on the principal bases that: Mr Jean was not the agent or ostensible agent of the respondent; the policy limited coverage to the legal insurable interest of Hezekiah Rambally and the mortgagee; Rudolf and Sieana Rambally were not covered by the policy for the respondent had not been informed that Hezekiah Rambally was acting as the agent or the trustee for the beneficial rights of Rudolf and Sieana Rambally; the equitable principles of waiver and estoppel were not available to Rudolf and Sieana Rambally who were not parties to the insurance contract; and condition 13, which was both reasonable and unambiguous, was a condition precedent, the breach of which disentitled Nelista Rambally from recovering any sum relating to the fire claim under the policy. The appellants challenged each of these decisions.

Condition 13

[11] It was apparent from the outset of the appeal that the limitation defence, provided by condition 13, on which the respondent relied, and which the judge had upheld as a basis for dismissing the claim, was a make or break issue. The court therefore invited counsel to argue this ground first and did not hear argument on

the other grounds. The court had previously drawn to counsel's attention the decision of the Privy Council in **Nasser Diab v Regent Insurance Company Ltd.**[4]

[12] In **Nasser Diab**, the appellant owned commercial premises in Belize City from which he conducted his business. The premises and their contents were insured against fire damage under a policy issued by the respondent insurer. The premises and their contents were destroyed by fire on 26/27 April, 1997. By a letter from the appellant's attorney of 2nd June, 1997, it was intimated that the appellant's claim had been made orally and rejected at a meeting on the 7th May, 1997. The respondents, by letter of 12th June, 1997, denied that there had been any such claim or rejection and relied on condition 11 which provided that a claim had to be made in writing within 15 days of loss or damage occurring and as far as practicable particularise the items and articles damaged or destroyed and the amount of such loss or damage.

[13] The appellant instituted proceedings, not for damages for repudiatory breach of the policy, but for a claim under the policy. At first instance it was held, and the Court of Appeal upheld the decision, that the appellant had failed to comply with the condition 11 requirements and his claim accordingly failed.

[14] On appeal to the Privy Council, counsel for the appellant argued that the repudiation by the respondent insurer had relieved the appellant of the obligation to comply with the condition 11 requirements, or alternatively, that the respondent insurer was in breach of the obligation of good faith by failing to warn the appellant of the time bar and was accordingly estopped from relying on condition 11. It was further argued that the condition 11 requirements and their character as a condition precedent operated as a forfeiture provision depriving the appellant of the benefit of the contract of insurance so that equity should grant the appellant relief from forfeiture.

[4] [2006] UKPC 29

[15] While the Privy Council was prepared to treat the respondent insurer's actions as clearly conveying to the appellant that if he were to make a claim it would be rejected and the insurer's actions may have amounted to repudiation, their Lordships stated that the appellant did not accept the repudiation.[5] The breach not having been accepted as terminating the contract, the appellant was still bound to comply with the policy conditions as to making a claim and supplying particulars. The failure to do so was fatal and the insurers had no duty to warn the appellant that time for compliance was running out.[6] Their Lordships further held that condition 11 was not a forfeiture clause.

[16] In the instant appeal, counsel for the appellants did not argue the relief from forfeiture point that arose in the **Nasser Diab** case and no point would be served by addressing it. Counsel instead argued that, in contrast to the **Nasser Diab** case, the terms of condition 13 were ambiguous and the ambiguity was to be resolved by an interpretation in favour of the appellants. The ambiguity, counsel submitted, was that the three month limitation period could be construed, on one view, as applicable only when a fraudulent claim was made and rejected. The trial judge rejected the argument that there was any ambiguity in the wording of condition 13 and, in my respectful view, she was quite right.

[17] Condition 13 provides that all benefits under the policy shall be forfeited if any one of five events occurs. These are:

(i) if the claim is in any respect fraudulent; or

(ii) if fraudulent means are used by the insured to obtain any benefit under the policy; or

(iii) if the loss is caused by the wilful act of the insured; or

(iv) if the claim is made and rejected and no action or suit is commenced within three months after such rejection; or

(v) if the claim has gone to arbitration, if no action or suit is commenced within three months after an arbitration award has been made.

[5] At paragraph 20 of the judgment
[6] At paragraph 28 of the judgment

[18] That examination of Condition 13 discloses no ambiguity, in my view. Condition 13 provides for one result. That result is forfeiture of all benefits under the policy. That result may be produced by two classes of conduct; one class is comprehended in the first three alternative events mentioned above, which are all instances of fraudulent conduct. The other class of conduct is the inaction identified in the last two alternative events mentioned above, that is, failure to commence litigation within three months of either a claim being rejected or an arbitration award being made.

[19] Counsel for the appellants also argued that the insurer hid the limitation period contained in condition 13 in "fine print" and this was in breach of their duty of good faith. Counsel relied on a number of cases from the United States of America which seem to establish that proposition. No similar principle was found in English or Saint Lucian law, counsel admitted, and he conceded this may mean that such a principle did not exist. For my part, the starting point to the introduction of any similar principle into Saint Lucian law would have to be a finding that condition 13 or a limb of condition 13 was hidden by the insurer, with the purpose of evading attention, among the fine print. In my view, no such finding is permissible because the condition and its provisions enjoy no lesser prominence than any of the other nineteen conditions that form the "conditions and stipulations on which this policy is granted".

[20] The remaining argument of counsel was that on the authority of **Alfred McAlpine Plc v BAI (Run-off) Ltd.**,[7] the insurer can only rely on a condition subsequent such as condition 13, where the breach is serious and it causes prejudice to the insurer.

[21] The **McAlpine** case concerned the interpretation of a clause which provided as follows:

> "In the event of any occurrence which may give rise to a claim under this Policy, the insured shall, as soon as possible, give notice thereof to the Company, in writing, with full details and as far as practicable there shall

[7] (2000) 1 Lloyd's Rep 437, CA

not be any alteration or repair until the Company have had an opportunity of inspecting."

[22] In my view, such a clause differs materially from the present condition 13 in that the clause in the **McAlpine** case did not stipulate the effect of non-compliance whereas condition 13 provides, in clear language, that the effect of non-compliance with the stated conditions is forfeiture of all benefit under the policy. Similarly, the notification clause in the **Nasser Diab** case was also clear that in the event of non-compliance, "no claim under this policy shall be payable".

[23] Their Lordships in the **McAlpine** case were concerned with determining the effect of non-compliance with the notification clause (which they found to be an innominate term) and held that where there was no serious breach of the clause or no serious consequences for the insurer, the insurer would not be entitled to reject the claim but would be limited to a claim in damages.[8] The explicit statement of the effect of non-compliance in condition 13 makes unavailable a similar consequence upon the non-compliance with the condition.

[24] In my view the appeal fails. I would therefore dismiss the appeal and award prescribed costs of $53,333.33 to the respondent.

Denys Barrow, SC
Justice of Appeal

Sir Brian Alleyne, SC
Chief Justice [Ag.]

Hugh Rawlins
Justice Appeal

[8] At paragraphs 34 and 37 of the judgment