GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE

Claim No. GDAHCV2004/0408

BETWEEN:

MOUNIR BOUAITA
SAMOR OTHAMAN
(Trading as MDS Superstore)

Claimant

and

LLOYD'S CORPORATION

Defendant

2008: October 2

DECISION

Appearances: Mr. Anselm Clouden for the Claimants
Mr. Bristol for the Defendant

[1] **HENRY J.:** The claimants commenced business as retailers of clothing and general household items under the name MDS Superstore in January 2000. The store was located on Hillsborough Street in Saint George. By a policy of insurance dated 21st May, 2001, the defendant agreed to insure and indemnify the claimants' business against loss or damage by fire and consequential loss of all stock. The policy was effected on behalf of the defendant by Grensure Fire and General Insurances Limited. The policy contained certain conditions. It provided that following any happening likely to give rise to a claim, the assured will immediately provide such information and assistance as underwriters may reasonably require. The policy also stated that if the assured makes any claim knowing the same to be false or fraudulent, as regards amount or otherwise, the insurance shall become void and all claims thereunder forfeited. Effective April 2001 coverage of the

stock in trade under the policy was increased by $200,000.00 from $300,000.00 to $500,000.00.

[2] On 1st October, 2001, there was a fire at the store which the claimants allege destroyed their entire stock. Claimants promptly notified defendant's agent of the fire and on 5th October, 2001, the defendant's claims adjuster, Mr. Peter Rees-Watkins visited the site and took photographs. He also met with the claimants. By letter dated 9th October, 2001, Mr. Rees-Watkins requested that the claimants carry out as detailed a physical inventory as feasible within the premises, listing items and providing approximate cost prices. He also requested that claimants assemble whatever documentation was available with regard to the stock position, such as the last tax return and whatever purchases/sales records could be located. Mr. Rees Watkins indicated in the letter that once this exercise was completed he would re-visit to verify the stock count and hold further discussions with claimants.

[3] In November 2001, the claimants submitted a report by Max Creavalle, Accountant. It comprised a list of items allegedly in the store at the time of the fire totaling $446,507.00. No further documentation was submitted until a second report was submitted dated 30th September, 2003 prepared by another Accountant, one W.R. Agostini and in November 2003 a bundle of invoices and receipts was also submitted to the agent. Mr. Agostini's report claimed losses of $422,388.54. When defendant failed to indemnify the claimants for the amount claimed, the instant action seeking damages for breach of the contract of insurance was commenced.

[4] The defendant claims that the claimants have breached two conditions of the policy namely: that they failed to provide such information and assistance as the defendant required. Secondly, that the claimants have made a claim knowing it to be false or fraudulent as regards the amount. Therefore the defendant denies that it is liable to the claimants under the policy as alleged or at all.

The following issues arise for the court's determination:

(1) Are the claimants in breach of the conditions alleged by the defendant?

(2) If so, what are the consequences?

ALLEGED BREACHES OF CONDITIONS

[5] There is no dispute between the parties that the claimants effected a fire policy with the defendant and that a fire occurred on 1st October, 2001. Defendant's position is that the policy is void for breach of conditions precedent and therefore the defendant is not liable to the claimants.

[6] Defendant asserts that claimants are in breach of both conditions 5 and 6 of the policy of insurance. Clause 5 of the policy provides in relevant part:

> "It is a condition precedent to the Liability of the Underwriters that following any happening likely to give rise to a claim the Assured will immediately:
>
> (a) give notification in writing to Underwriters;
>
> (b) provide such information and assistance as Underwriters may reasonably require."

[7] As to the claim submitted by the claimants, it is based on the premise that everything in the store was lost. The claimants attempted to establish their loss, that is, the quantity and value of the contents of the store at the time of the fire, by reference to the amount of goods purchased and the total amount of sales. They reasoned that the amount of their loss was the total amount purchased less the total amount of sales. The claimants' position is that at the time of the fire the store was well stocked since they had just stocked up the store in preparation for the Christmas sales. Purchase invoices seemed to be available.

[8] Mr. Rees-Watkins, the Adjuster retained by defendant, having viewed the premises and held discussions was doubtful that the claimants would be able to prove the losses they were claiming based on the available records. From his observations he noted that the fire had been set against the back wall of the shop using stock-in-trade. This stock was largely damaged beyond recognition. However, he also noted that the vast majority of stock within the shop was clearly recognizable. His initial assessment was that the shop was sparsely stocked with large gaps on shelves and racks. He therefore, by letter dated 9th October, 2001, requested a physical inventory be carried out, with the intention of verifying quantities on his next visit. He also requested copies of whatever documentation was

available with regard to the stock position such as last tax return and purchases/sales records.

[9] With regard to the request for a detailed physical inventory, defendant admitted in cross-examination that he never carried out a physical inventory after the fire. He prepared the inventory using whatever documents he could find. Two purported inventories were submitted: the first consisted of a hand written inventory delivered to Grensure on 8th November, 2001 prepared by an accountant, one Max Creavalle; the second was part of a report prepared by a different accountant, Mr. Agostini and sent to the Adjuster in September 2003. Sometime thereafter a bundle of receipts and bills was also forwarded to defendant's Adjuster. Even though Mr. Bouaita claims to have relied on his bank deposit books and bank statements in determining total stock sales, these documents were not forwarded to the Adjuster. The tax returns were also never submitted.

[10] Claimants submit that they "have complied in every material particular with the request of the Adjuster, as evidenced by the list supplied by Mr. Creavalle and subsequently by Mr. Rupert Agostini..."

[11] The learning in regard to the need on the part of an insured to provide particulars of poof when reasonably requested is succinctly set out in Halsbury's Laws of England, 4th Edition, Vol. 25, under the heading General Principles of Non-Marine Insurance. It provides that notwithstanding that some particulars have been given, insurers in the course of their investigations may wish to, and may reasonably require that additional information be supplied. There is often a condition that such further information when reasonably required must be given. If it is a condition precedent to recovery, failure to perform this condition will relieve the insurers from liability for a loss, however genuine. Halsbury's Laws of England, 4th Edition, Vol. 25.; **Welch v Royal Exchange Assurance** [1939] 1KB 294, [1938] 4 All ER 289, CA.

[12] This principle was applied in the case of **Hiddle and Another v National Fire and Marine Insurance Company of New Zealand** [1896] Appeal Cases 372. There the insured brought action against their insurers on a policy of fire insurance. One of the conditions indorsed on the policy provided that where loss or damage has been sustained, the

insured "...shall within 25 days after such fire deliver ...an account in detail of such loss or damage as the nature and circumstances of the case will admit;....and shall produce books, vouchers and such other information and evidence as the directors or agents of the company may reasonably require;...and unless such account...and such other information and evidence, if required, shall be produced in manner aforesaid, no part of such loss shall be payable." A fire took place in which the whole stock of the insured was destroyed. Thereafter the insured forwarded to the insurers a declaration of their loss including a statement purportedly setting out details of the loss. The insurers declined to accept this statement as sufficient compliance with the condition and therefore recognized no liability in the matter. An action was commenced by the insured. At trial the insured was non-suited on the ground of non-compliance with a condition. The non-suit was confirmed by the Supreme Court. On appeal to the Privy Council the appeal was dismissed. Their Lordships stated that they doubted whether the statement forwarded by the insured was an account at all within the meaning of the condition and that this was proved by the evidence that at the time of forwarding their statement, the insured had within their possession materials which enabled them to give a much fuller, more detailed and better account for the purpose of enabling the insurers to test the reality and extent of the loss.

[13] This approach was also taken in the case of **Super Chem Products Limited v American Life and General Insurance Company Limited and Others** from Trinidad and Tobago. On appeal to the Privy Council, their Lordships affirmed the findings of the trial judge and held that the judge and the Court of Appeal came to the correct conclusion on that aspect of the case (Privy Council Appeal No. 68 of 2002, para. 28-29, 32-35).

[14] The trial judge had followed the New Zealand Court of Appeal decision in **Challenge Finance Limited v State Insurance General Manager** [1982] 1 NZLR 762. At page 766-767 where Somers J stated:

> "It is not to be supposed that the condition in the policy required of the insured by way of information more than he had or could practically ascertain. Both parties accepted as applicable the statement in 25 Halsbury's Laws of England (4th Ed) para 505:
>
> '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 within which they have to be furnished. In any case, the assured has not performed his duty adequately unless he has furnished the best particulars which the circumstances permit.'

[15] In the case before the court, the claimants claimed the loss of the entire contents of the store. They sought to prove both the quantity and value of the content by proof of the amount of goods purchased less the total sales. As proof of their total sales, claimants averted to their bank statements. They appeared not to have maintained a stock book and it was Mr. Bouaita's evidence that he did not keep the machine generated daily sales total. In light of this, the request by the defendant's Adjuster for a "detailed physical inventory as is feasible within the premises" and for documentation with regard to the stock position, such as the last tax return and copies of purchase/sales records was a reasonable one.

[16] Was there compliance with the request? The record shows that there was not. The first response from claimants was through their Attorney who wrote on 31st October, 2001 to say that the inventory was completed but that it was with the police and a copy would be supplied to the insurers. The first inventory delivered to the insurer was the hand written inventory prepared by an accountant, Mr. Creavalle, in early November 2001. Mr. Bouaita in cross examination admitted two things about this inventory: (1) that he never carried out a physical inventory of the contents of the store after the fire; that he merely assembled whatever documents he could find and these he took to the accountant who then prepared the document headed 'inventory'; (2) that he no longer wished to rely on the Creavalle document since it contains errors and was not accurate.

[17] The second inventory sent to the defendant was not until September 2003, some two years after the fire. This inventory forms part of the Agostini report. It is headed "Listing if Stock lost in Fire" and contains a total of 11 pages of items along with the quantity and price. Mr. Bouaita again admitted in cross examination that this was not compiled from a physical inventory, but was compiled from documents delivered to Mr. Agostini. Furthermore, that the 'inventory' was in reality a list of items purchased by the claimants

and not necessarily items that were in the store at the time of the fire. Because claimants did not keep a record of individual sales, it would be difficult to prepare a list of items in the store at the time of the fire by reference only to purchase invoices and sales totals.

[18] With regard to the purchase/sales records, none were submitted to the claims adjuster until 2 years after the fire, even though they were available at the time that the first inventory was submitted. No adequate explanation was given for the delay.

[19] With regard to the tax returns, Mr. Bouiata's evidence is that he paid taxes for the year 2000. A document obtained in 2006 from Inland Revenue and tendered in evidence shows a record of such payment. Yet this document was not submitted to the insurers as requested. Nor were the tax returns submitted when requested. In cross-examination Mr. Boualta claims they were sent to the company "last year". The court notes that his claim was filed in August 2004.

[20] In the final analysis the court finds that the claimants had documents in their possession such as purchase/sales invoices that were not submitted as requested. Other documents such as the tax returns could have been obtained but were not. Furthermore, claimant failed to carry out a physical inventory of the store and provide the insurers of a list of the items. By the claimants own admittance the Creavalle inventory was not accurate and in any event was not the product of a physical count of the items in the store. Claimant had been notified that upon receipt of the inventory, the insurers intended to revisit the store to verify the stock count. Yet prior to the delivery of the first inventory, the evidence is that claimants cleaned out the store, sending everything to the dump. Undoubtedly, the material requested would have enabled the insurers to test the reality and extent of the loss. In the Court's view, claimants failed to provide the best particulars possible under the circumstances and therefore breached condition 5 of the policy.

[21] Claimants' Attorney seemed to make much of the fact that the Adjuster, in his report estimated the value of the stock-in-trade in the premises at the time of the fire to have been in the range of $50,000.00 to $75,000.00 and recommended to the underwriters that a reserve of $150,000.00 be set aside. The effect of condition 5 remains the same. It is a

condition precedent, violation of which relieves the insurers of liability under the policy, even if there was damage done to the stock in the store.

[22] In light of the Court's finding, it is not necessary to consider the defendant's other submissions.

[23] Accordingly, judgment is granted in favor of the defendant dismissing the claim with cost to the defendant of $20,000.00.

Clare Henry
HIGH COURT JUDGE