EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2016/0651

BETWEEN:

1. Terrence Holder
2. Pelagia Phyliss Holder

Claimants

and

The Guyana and Trinidad Mutual Fire Insurance Company Limited

Defendant

Before:
Ms. Agnes Actie — Master

Appearances:
Mr. Victor Elliot-Hamilton for the claimant
Ms. Leandra Verneuil for the defendant

2017: May 31
2018: March 1

Insurance law- property partially damaged by fire- market value more than insured value- what is the method of evaluating loss?

JUDGMENT

1. **ACTIE, M.:** The claimants are the owners of a two storey building located in the town of Soufriere. On 22nd October 2015, the building was partially destroyed by a fire during the currency of a policy of insurance with the defendant valued at

$323,520.00. The Property Market Value at the time of the fire was $520,000.00, much more than the insured value.

2. The defendant offered the claimants the sum $220,000.00 in full and final settlement for the loss suffered. The claimants rejected the offer and filed a claim form with a statement of claim seeking compensation in the sum of $258,288.41 or in the alternative damages for breach of contract.

3. The claimants obtained summary judgment and the matter comes on to determine the measure of damages under the policy.

4. The claimants' avow that the cost of repairs should be the basis for the indemnity.

5. The defendant is of the contrary view and contends that indemnity should be determined by the market value of the property prior to or at the time of the fire, and not the cost of reinstating the building.

6. The issue to be determined is whether indemnity should be assessed on market value or the reinstatement value.

7. Brett LJ **Castellain –v- Preston (1883**)[1] sets out the basic concept and purpose of a Fire Policy of insurance as follows:- .

> "The Contract of Insurance contained in a Marine or Fire Policy is a contract of indemnity and of indemnity only and this contract means that the assured shall be fully indemnified but shall never be more than fully indemnified. This is a fundamental principle of insurance".

8. The Compensation Clause of the policy of insurance reads;

> **"14. Options to Reinstate**
> The Company may at its option reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or may join with any other

[1] 11 Q.B.D 380

Company or Insurers in so doing, but the Company shall not be bound to reinstate exactly or completely, but only as circumstances permit and in reasonably sufficient manner, and in no case shall the Company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, no more than the sum insured by the company thereon.

If the Company so elects to reinstate or replace any property the Insured shall, at it his own expense, furnish the Company with such plans, specifications, measurements, quantities, and such particulars as the Company may require, and no acts done, or caused to be done by the Company with a view to reinstatement or replacement shall be deemed an election by the Company to reinstate and replace.

If in any case the Company shall be unable to reinstate or repair the property herein insured, because of any municipal or other regulations….., the Company shall, in every such case only be liable to pay such sum as would be requisite to reinstate or repair such property if the same could lawfully be reinstated to its former condition".

9. The question as to the proper measure of indemnity is a matter of fact and degree to be decided in the circumstances of each case. The court finds guidance in the authority in **Reynolds v Phoenix Assurance Co Ltd**[2] which appears to be on all fours with the case at bar. The plaintiffs took out insurance in respect of some Maltings in Suffolk, which they had purchased for £16,000. They purchased insurance with a sum insured of £550,000 representing the cost of replacement. Under the insurance policy the Insurers agreed that:

> "...if the property insured ... or any part of such property be destroyed or damaged by fire the Insurers will pay to the insured **the value** of the

[2] **[1978] 2 Lloyd's Rep 440**

property at the time of the happening of the destruction or the amount of such damage or the insurers **at their option** will reinstate or replace such property or any part thereof."

A fire destroyed about 70% of the building. It was agreed between the insurers' adjusters and the insured's assessors that a figure of £243,320 would represent the cost of rebuilding less a figure for betterment. An issue then arose as to whether the plaintiffs would reinstate (it being their contention that that was the responsibility of the insurers if they so elected) and as to what was the measure of indemnity. The insurers claimed that the plaintiff's loss was to be measured by the value of the building (either market value or modern replacement) and not the cost of rebuilding an obsolete building, which was about £250,000, when a modern replacement was £55,000.

Forbes J held that the argument that the parties contracted on the basis that reinstatement was the appropriate method of giving an indemnity would be rejected. The words in the policy which were appropriate to reinstatement were there because the parties must be taken to have contemplated not the inevitability but the possibility that reinstatement might be the appropriate way of giving indemnity. Nevertheless, the cost of reinstatement still remained a possible means of measuring it even though prior agreement to that effect could not be found in the contract. The relevant test in a case where the owner was not inevitably to be dispossessed was "would the owner for any reason that would appeal to an ordinary man in his position rebuild it if he got replacement damages or was his claim of damages a mere pretence?" On the facts of that case the plaintiffs did have a genuine intention to reinstate if given the insurance money; this was not a "mere eccentricity" but arose from the fact that they would not be properly indemnified unless they were given the means to reinstate the building "substantially as it was before the fire". The fact that their intention was dependent on receipt of the insurance money did not mean that they were being eccentric in holding it. The test was not: what would the insured do if he was using his own money? Reinstatement was held to be the measure of indemnity.

10. In the course of his judgment Forbes J suggested three possible ways of evaluating the loss for the purpose of compensation namely: (i) Market Value- value which represents the value which the property would have fetched if sold on the open market immediately before the fire. (ii) Equivalent Modern Replacement (Cost of erecting a modern replacement building) - a method of arriving at a valuation of the premises in cases involving old buildings where no suitable method of valuation is available and (iii) The cost of reinstatement i.e. rebuilding the damaged part in its original form.

11. In **Leppard v Excess Insurance Co. Ltd**[3]**,** the insured had acquired a cottage from his relatives and insured it for a sum of 12,000. The cottage was destroyed in a fire and the insured claimed the cost of rebuilding (8600). However, it was evident that the insured never intended to live in a cottage and, in fact, was advertising the cottage at a sale price of 4500 at the time of the loss. In view of the insured's intention to sell (rather than to live in the cottage), the court held that market value (the first alternative outlined by in the judge in **Reynolds**) was the correct basis of indemnity. It was held that where there is evidence that the insured is a willing to sell the property at the time of loss, the market value less the site value is the measure of indemnity.

12. The decision in **Leppard** does not favour the defendant's argument that the market value is the basis for the indemnity. The decision in **Reynolds** establishes that the cost of reinstatement is the measure of indemnity where the insured has indicated a genuine intention to reinstate the property.

13. The measure of indemnity depends on whether the loss is a total loss or partial loss. In the case of a total loss, the assured is entitled to the full amount insured. In the case of a partial loss, the cost of restoration provides the basis of the measure of the indemnity[4].

[3] (**1979**) 1 W.L.R 512
[4] Lord Selboyrne in Westminister Fire v Glasgow Provident (1883) 13 App. cases.

14. It is not in dispute that the claimants have a genuine intention to reinstate the damaged property. Applying the principles espoused in **Reynolds,** the cost of reinstatement must be taken as the proper measure of indemnity and not the market value as proposed by the defendant.

15. The issue now turns on the evidence to be used in calculating the reinstatement cost. The claimants' presented three reports for the purpose of calculating the reinstatement value. The first report dated November 6, 2015, is a Structural Report from Adrian Dolcy, Consulting Civil & Structural Engineer, with an estimate replacement value of $400,000.00 at the rate of $150.00 per square feet. The second report dated November 8, 2015, is a valuation by Nevil Rice of New Horizon Project Management with a Pre-Fire estimate market value of $520,000.00. The third valuation report dated August 20, 2016, from A+ Quantity Surveyors, provides detailed work estimates in the sum of $416,152.50 including materials, plant and labour.

16. Not in dispute is the Pre-Fire Market value of the property in the sum of $520,000.00. The two amounts at variance are the structural assessment report by Adrian Dolcy which gives a replacement value of $400,000.00 and the valuation report from A+ Quantity Surveyors with an estimate of $416,152.50.

17. The court notes that there is not a wide disparity in the values presented by the respective experts. The terms of reference for the Dolcy's report were to examine the general building structure with a view to determining its structural integrity, to make specific recommendations, if necessary; for remedial actions required and to determine the cost of reinstating the building.

18. The valuation report from A+ Quantity Surveyors providing the cost estimate for the proposed renovations contains a comprehensive and itemized estimate of the building costs including materials, plant and labour.

19. The basis of compensation is to endeavour to put the aggrieved person, as far as money can do it, in the position he would have been had the contract been performed. The court accepts that the two reports are from persons qualified in their field of expertise. However, it is noted that Mr. Dolcy was required basically to determine the structural integrity of the building. His report gave a ballpark figure in the sum of $400,000.00 at the rate of $150.00 per square feet for reinstatement of the building without a detailed breakdown of the individual costs. On the other hand, the report from A_+ Quantity Surveyors provides a schedule of quantities with a detailed rate analysis for the proposed work and the expected costs of materials, plants and labour.

20. The claimants will not be properly indemnified unless they are given a fair estimate of the costs for the reinstatement of the building. Having compared the two reports, I am inclined to accept the estimate given by A_+ Quantity Surveyors' estimate of $416,152.50 as a more meticulous assessment to provide a fair indemnity under the policy.

21. Arising from the facts is the issue of "Average" as the Pre-Fire value of the building ($520,000.00) and cost of reinstatement ($416,152.50) exceed the expressed value ($323,520.00) of the insurance policy. Accordingly, the "Average Clause" of the policy is triggered. Clause 17 of the policy is instructive and provides:-

> "**17- Average**
>
> If the property hereby insured shall at the time of the loss or damage be collectively of greater value than insured then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable proportion of the loss accordingly."

22. The principle of "Average" is an insurance term used in calculating a payment against a claim where the policy value is less than the actual value of the property before or at the time of the damage. The insurer is liable only for the proportion of the loss and the insured shall be left with an under insurance shortfall.

23. Applying this principle to the facts, I am of the view that the claimants are entitled to the sum of $258,910.41 as the replacement value as claimed and I so award.
$323,520.00 (insured value) X $416,152.50 (cost of replacement)
$520,000.00 (pre-fire value) = $258,910.41 (Pay out amount)

Interest

24. The claimants seek interest at a commercial rate of 8% from the date of proof of loss, i.e. from 7th November 2015, pursuant to **Article 1009A of the Civil Code**[5].

25. Counsel for the defendant submits that having considered the defendant's conduct in attempting to settle the claim and the claimants' unreasonable delay, interest should not be awarded or in the alternative interest must be paid from the date of filing the claim.

26. The claimants did not provide any evidence to prove that the commercial rate of interest was at 8% at the time of the loss. I also acknowledge the defendant's efforts to settle the claim at the earliest. However, the defendants had the option to engage CPR Part 35 to make an offer to settle and make a payment into court (Part 36) which would have reduced its liability on interest. **Article 1009A** gives the court a wide discretion in awarding interest. In the circumstances, I will award interest at the rate 6% from the 7th November 2015 until payment in full.

Order

27. In summary, the defendant shall pay the claimants the sum of $258,910.41 with interest at the rate of 6% from the 7th November 2015 until payment in full together with Prescribed Costs in the sum of $23,310.94.

AGNES ACTIE
MASTER
BY THE COURT
REGISTRAR

[5] Chap. 4.01