



1
2 IN CHAMBERS
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS
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6
7 BETWEEN:

8 THE PROPRIETORS OF STRATA PLAN 183
9 (A corporation formed under the laws of the Cayman Islands)
10 Plaintiff

11
12 AND:

13 ISLAND HERITAGE INSURANCE COMPANY LIMITED
14 Defendant

15
16 BEFORE: The Honourable Madam Justice Levers
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18 Appearances:

19 Mr. Stephen-Hall Jones for the plaintiff
20 Mr. Anthony Akiwumi for the defendant

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22 Heard: 14th June 2007
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JUDGMENT

Levers, J.

There are two Summons before me. It has been decided, in view of the contents of the relief requested, that the Defendant's Summons should be heard first and the Plaintiff's Summons for Directions heard after the outcome of the Defendant's Summons is known.

1 The Defendant represented by Mr. Akiwumi of Stuarts asks for the
2 following relief:

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- 4 (1) That Summary Judgment be entered against the Plaintiff;
 - 5 (2) Such further and other relief as Counsel may advise and that this
6 Honourable Court may deem just and appropriate ;and
 - 7 (3) That the costs of this application be provided for.
- 8

9 The factual background is as follows:

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11 The Defendant and the Plaintiff entered into an insurance policy, containing
12 a condition as to liability and the Defendant's case is that the policy
13 contained a clause mandating that a claim must be notified within 30 days.
14 Mr. Akiwumi submits that this was a condition precedent and is wholly
15 unambiguous from the wording of the policy. Ivan arrived and the Plaintiff
16 suffered considerable damages. In the event, the deadline was extended
17 by insurers from 30 days for another 7 days. It is alleged that the Plaintiff
18 still wholly failed to comply with the condition precedent by not giving notice
19 of the claim until January 2005. Mr. Akiwumi submits that it is settled law
20 that as a consequence the Plaintiff has lost its right to pursue its claim and

1 that Summary Judgment should therefore be granted to the Plaintiff. On
2 the other hand Mr. Stephen Hall-Jones on behalf of the Plaintiff submits
3 that this is an inappropriate procedure to take in the circumstance of this
4 case. That, in fact, it should be taken as a preliminary point of law at the
5 trial for the judge to decide. He also submits that on a careful reading of
6 the clause in question it is ambiguous and fails to satisfy the intention of the
7 Defendant who obviously wishes to say that the Plaintiff must lodge a
8 claim. But that in fact the insurance policy does not contain words to the
9 effect that it must be "a claim". Therefore, he submits that the clause is not
10 unambiguous as submitted by the Defendant.

11

12 The claims notification provision is set out in Clause 1 and 4 of the Policy.

13 The policy reads:

14

15 CONDITIONS WHICH APPLY TO THE WHOLE POLICY

16

17 1. YOUR DUTY TO COMPLY WITH POLICY TERMS

18

19 Without prejudice to our other rights, your
20 observance of the terms of this Policy is a condition
21 precedent to our liability to make payment under
22 this Policy.

23

24 4. CLAIMS

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26 Upon the happening of any event likely to give rise
27 to a claim under this Policy

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2 Mr. Akiwiumi submits that it is indeed a condition precedent and that it is
3 not unusual on a reading of any insurance law text to have a fixed or
4 reasonable time of the date of the loss within which to submit a claim. He
5 further submits that failure by the assured to comply with the condition
6 precedent prevents the assured from making a claim. He relies on the
7 case of *McAlpine v BAI* [1998] Lloyds Law Reports Vol. 2, page 694.
8 Affirmed by the Court of Appeal in *McAlpine v BAI* [2000] 1 Lloyds Law
9 Reports 437 where it was explained as follows:

10
11 "(iii) As observed in *MacGillivray and*
12 *Parkington*, par 10-10, where it is intended
13 that provisions requiring certain action by the
14 assured should be *conditions precedent* to
15 recovery under the policy it is now generally
16 the practice to insert a term which provides
17 that the due observance and fulfillment by the
18 assured of all the terms, provisions, conditions
19 and endorsements of the policy in so far as
20 they relate to anything to be done or complied
21 with by the assured is to be a condition
22 precedent to any liability of the insurers to
23 make payment under the policy. In *Farrell v*
24 *Federated Employers Insurance Association*
25 *Ltd.*, [1970] 2 Lloyd's Rep. 170; [1970] 1
26 W.L.R. 1400 such a provision was included in
27 a policy containing an occurrence notification
28 clause in the same
29 terms as cl. 1 (a).

30
31 (iv) In recent times the Courts have not
32 construed notice of claim or occurrence
33 clauses as imposing *conditions precedent* to
34 the insurers' liability unless either the clause
35 itself was expressed to be a condition
36 precedent or the policy contained a general

1 provision to the effect of that in Farrell v
2 Federated Employers, sup”.

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4 The distinction Mr. Akiwumi draws is in that case, the Clause did not
5 expressly state it was a condition precedent to the entire insurance policy,
6 whereas the case at hand, it does and therefore, he submits his case is
7 stronger. There is no doubt the Plaintiff did not report the matter until
8 January 2005 and there is equally no doubt that the insurers placed a
9 notification in the newspapers extending the notification of claim for an
10 extra seven days. Mr. Stephen Hall-Jones however says that on a reading
11 of the policy there is no requirement for a claim to be submitted and
12 therefore that in construing it one cannot import the word ‘claim’ into the
13 clause. That it is incumbent on this court to construe the clause contra
14 proferentem if there is any doubt as to its true meaning and effect. He
15 submits that the clause is poorly drafted and is therefore open to a number
16 of interpretations. In the United Kingdom of course there is legislation
17 which disallows unfair contractual terms.

18
19 Mr. Akiwumi also submits that in this case the Defendant will suffer
20 prejudice if a claim was allowed because the delay will affect his client’s
21 negotiations with their reinsures. Mr. Stephen Hall-Jones submits that the

1 notice can't expo facto change the terms of the contract. That his client
2 could only claim when and if he suffered a loss. The notification of the
3 happening of the event was an event that was universally known and there
4 was no need for his client to notify the insurer's of the happening of the
5 event as required by the clause in the Policy.

6
7 The Law

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9 The test for entering summary judgment is contained in Grand Court Rules,
10 Order 14, rule 12 (1)

11
12 (1) The Court may, upon the application of a party
13 or of its own motion, determine any question of law
14 or construction of any document arising in any
15 cause or matter at any stage of the proceedings
16 where it appears to the Court that –

17
18 (a) such question is suitable for
19 determination without a full trial of the
20 action; and

21
22 (b) such determination will finally
23 determine (subject only to any possible
24 appeal) the entire cause or matter or
25 any claim or issue therein.

26
27 (2) Upon such determination the Court may dismiss
28 the cause or matter or make such order or judgment
29 as it thinks just.

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31 (3) The Court shall not determine any question
32 under this Order unless the parties have either –
33

1 (a) had an opportunity of being heard on the
2 question; or

3
4 (b) consented to an order or judgment on such
5 determination.

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7 (4) Nothing in this Order shall limit the powers of
8 this Court under Order 18, rule 19 or any other
9 provision of these Rules.
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11 My tasks therefore, at this stage is not to go into the merits of the case but
12 to consider whether the claimant has no real prospect of succeeding on the
13 claim or issue. The burden of proof on an application for summary
14 judgment appears to be settled by *E.D. & F Man Liquid Products Ltd v*
15 *Patel* [2003] CPLR page 384. The burden rests on the applicant to prove
16 that the respondent's case has no real prospect of success which is to be
17 considered having regard to the overriding objective of dealing with the
18 case justly. The question whether there is a real prospect of success is not
19 approached by applying the usual balance of probabilities standard of
20 proof. (*See Royal Brompton Hospital NHS Trust v Hammond* [2001] BLR
21 297).

22
23 In *Swain v Hillman* [2001] 1 All ER at page 91, Lord Woolfe MR said that
24 the words 'no real prospects of succeeding' did not need any amplification
25 as they spoke for themselves. The word 'real' directed the court to the

1 need to see whether there was realistic, as opposed to a fanciful, prospect
2 of success. The phrase does not mean 'real substantial' prospect of
3 success. Nor does it mean that summary judgment will be granted only if
4 the claim or defence is 'bound to be dismissed at trial'. The Master of Rolls
5 went on to say that summary judgment applications have to be kept within
6 their proper role. They are not meant to dispense with the need for a trial
7 where there are issues which should be considered at trial.

8

9 The Plaintiff could have filed evidence to show cause as to why summary
10 judgment should not be granted but it has chosen not to do so and instead
11 depends on the very wording of the Policy.

12

13 It may well be that based on the law and the authorities quoted to me, if I
14 were the trial judge I would hold in favour of the Defendant. However that
15 is not my role and I remind myself the only question I have to answer on
16 this application is, does the Defendant have a real prospect of success?

17

18 This case will revolve around the construction of the clauses contained in
19 the insurance policy. Mr. Hall-Jones has quite rightly pointed out that the
20 question whether a clause is a condition precedent to the liability of the

1 insurer is one which has occupied the courts on frequent occasions and he
2 submits that the Plaintiff clearly has a triable issue on the question.

3

4 In view of the wording of the clause and in view of the fact that this is a
5 point of law or construction that must be argued prior to trial, I am of the
6 opinion that a summary judgment application in the circumstances must
7 fail. I therefore dismiss the application with costs to the Plaintiff to be
8 agreed or taxed. I also hold that this is a preliminary point of law that
9 should be argued prior to trial and that the subsequent directions that are
10 requested of the Court should be in accordance with my ruling.

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12 Dated this 22nd day of June 2007

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15 Judge of the Grand Court

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