

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT**

Civil Division

[Unreported]

Suit No: CV 0361 of 2008

BETWEEN

APSARA RESTAURANTS (BARBADOS) LIMITED - PLAINTIFF

AND

GUARDIAN GENERAL INSURANCE LIMITED - DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.

Judge of the High Court

2011: October 26, 27

**Mr. Alair Shepherd, Q.C. in association with Miss. Genevieve Maynard for
the Plaintiff and Mr. Roger Forde, Q.C. in association with Mr. Anthony
Audain for the Defendant**

RULING ON PROCEDURAL OBJECTION

- [1] **Crane-Scott J:** By a Policy of Insurance Number BBFCP452842 dated the 5th day of April 2007, the Defendant, in consideration of premiums paid and to be paid, agreed to insure the Plaintiff against loss or damage by fire at the Plaintiff's place of business situate situate at "Morecambe House", Worthing in the parish of Christ Church as follows:

PARTICULARS OF INSURANCE

- 3.1 \$2,000,000.00 on the Plant, Machinery & Equipment
3.2 \$4,000,000.00 on the Improvements and Betterments
3.3 \$500,000.00 on the Stock
- [2] On or about the 27th day of August, 2007, whilst the policy was in force, the leasehold Improvements and/or Betterments, Plant, Machinery & Equipment and Stock in Trade, were destroyed by fire.
- [3] By letter dated 1st October, 2007, the Plaintiff delivered to the Defendant a written claim in respect of the loss sustained in the fire.
- [4] On or about the 6th day of March, 2008, following the Defendant's refusal to honour the claim, the Plaintiff issued a Writ and Statement of Claim in the sum of \$6,092,696.60 being the combined total of the Plaintiff's loss and damage under three heads of loss under the policy.
- [5] **The Pleadings:** At paragraph 5 of the Statement of Claim the Plaintiff made a claim for loss and damage allegedly suffered in the fire and particularized its claim under the three heads of insured loss in the following terms:

PARTICULARS OF LOSS

- 5.1 Improvements & Betterments Bds\$4,000,000.00

Restaurant Equipment, Furniture & Contents:

5.2	Purchases from Thailand	\$ 182,110.00
5.3	Purchases from India	\$ 354,992.00
5.4	Particulars of Furniture, Fittings, refrigeration	\$1,126,943.51
5.5	Purchases of Glassware	\$ 99,748.49
5.6	Procurement fee & fee for installation of furniture & restaurant	<u>\$ 210,000.00</u>
	Sub Total	\$1,973,793.00

Restaurant Stocks:

5.7	Table linen, wine stock, staff uniforms	\$ 71,698.01
5.8	Alcohol Stock (cellar)	\$ 8,101.62
5.9	Chemicals (cellar)	\$ 2,389.26
5.10	Deterioration of stock (Dumped from chillers 4/9/07)	\$ 19,731.47
5.11	Contents of Bar	<u>\$ 16,983.23</u>
	Sub Total	\$ 118,903.59
5.12	Combined total of the three heads of claim	\$6,092,696.60

- [6] The Defendant filed its initial Defence on April 17, 2008 and an Amended Defence on May 22nd, 2008. The Plaintiff filed its Reply to the Amended Defence on the 19th June, 2008 in keeping with the ‘old’ Rules of the Supreme Court, 1982.
- [7] Following the entry into force of the new Supreme Court (Civil Procedure) Rules on October 1st, 2009, the matter was referred for Case Management before the Master of the Supreme Court.
- [8] Both parties were ordered to file Witness Statements and the matter came on before this Court on2010 for Pre-Trial Review.
- [9] Pursuant to leave of the Court granted following an interlocutory application made during the course of the Pre-Trial Review, the Defendant filed a Further Amended Defence on April 8th, 2011.
- [10] At Paragraph 11 of its Further Amended Defence filed on April 8th, 2011, the Defendant, for the first time, specifically traversed the Plaintiff’s

allegations of loss and damage set out in paragraph 5 of the Statement of Claim. The Defendant also stated, *inter alia*, that the total loss and damage suffered by the Plaintiff did not exceed \$2,693,512.03 Barbados dollars.

[11] Following delivery of the Further Amended Defence, the Plaintiff neither filed nor sought leave to file a Further Reply and the matter proceeded to trial on the basis of the pleadings thus delivered.

[12] **The Pre-Trial Memorandum:** On June 1, 2011 in keeping with the Pre-Trial Procedure set out in the new Civil Procedure Rules, which came into force on the 1st October, 2010, a Joint Pre-Trial Memorandum signed by Counsel for both parties was filed in which Counsel for both parties identified the issues to be determined at the trial.

[10] Among the issues which both parties identified for the Court's determination at the trial were, *inter alia*,

“14. Whether having regard to the provisions of the policy of insurance number BBFCP452842 dated the 5th day of April 2007 referred to in the Statement of Claim, the Plaintiff is entitled to recover its loss as claimed in the Statement of Claim?;

20. What is the quantum of the Plaintiff's loss?

[11] **The Evidence:** The trial commenced on October 17th, 2011 and the Plaintiff duly called its 5 witnesses, Sharif Mohammed, Marie Kavanagh, Megan Hopkins-Rees, Franklyn Browne and Karan Ramlal. The Witness Statements were duly admitted in evidence and the witnesses tendered for cross-examination by Defence Counsel.

[12] During the course of his cross-examination by Defence Counsel, Mr. Sharif Mohammed testified as follows:

A. Yes, the two restaurants were a total area of 10,000 square feet

A. The kitchen, the offices etc were another 6,000 sq. feet

A. the total area was approximately 16,000 to 18,000 square feet

A. Yes. The 10,000 square feet restaurant area was a total loss.

A. I made a claim for \$4 million for the area which was damaged.

A. The kitchen was not covered by the policy.

[13] Later in his cross-examination, Mr. Mohammed gave the following testimony in answer to the following questions:

“Q. Your claim is for Improvements and Betterments of \$4 million?”

A. Yes.

Q. On what basis was the \$4 million claim made? How was it calculated?

A. I had given the adjuster a set of drawings when he questioned the area. The adjuster worked it out at an average of \$400.00 per square foot. 10,000 square feet times \$400.00. This was given to the adjuster. It was his job to check and see if my figures were correct.

Q. So the replacement cost was \$400.00 per square foot?

A. Yes. It cost the Plaintiff \$400.00 per square foot to build it.

Q. Do you have anything to support this allegation?

A. I did the construction myself. I spent 18 months doing it. I had several contractors. I had bank statements where I channeled money from Trinidad to build it. A lot of our documents to support this were destroyed in the fire.

Q. Did you provide any evidence of the square footage?

A. The adjuster had the drawings. The only plan I had was given to him.

Q. Did you take receipts from your contractors?

A. A lot of our records were destroyed in the fire.

Q. So the \$400.00 is an estimate?

A. Yes.

Q. You say the kitchen and the offices were not covered by the policy?

A. Yes, the kitchen and the offices were not covered by the policy.

Q. Can you direct me to any endorsement or statement in the policy which says that the kitchen and the offices were not covered by the policy?

A. I gave instructions to the broker...

Q. Can you direct me to any endorsement or statement in the policy which says that the kitchen and the offices were not covered by the policy?

A. No. The policy merely described the building, there was nothing in the policy....”

[14] There was no re-examination in relation to this aspect of Mr. Mohammed's testimony.

[15] Following the close of the Plaintiff's case in the mid-morning of October 18th, 2011, the Defence opened its case and started calling its witnesses.

[16] Mr. Nigel Adams's Witness Statement was entered into evidence and he was permitted to comment on evidence given by Mr. Sharif Mohammed for the Plaintiff. In answer to the following question by Counsel for the Defendant, Mr. Adams testified as follows:

Q. Mr. Mohammed has stated that the policy covered 10,000 square feet, what can you say about this?

A. There is no breakdown in the policy as to the square footage covered by the policy."

[17] Under cross-examination by Mr. Shepherd, Mr. Adams testified as follows:

"A. The broker provided a figure for leasehold improvements, plant, equipment and machinery and the policy was issued based on the information subsequently provided by the broker.

A. The request for information was not done completely, but was done to a sufficient extent to allow the policy to be issued.

Q. So, to some extent you are insuring items generally described as distinct from being specifically described.

A. Yes.

A. The first time I heard about the back office not being insured was during Mr. Mohamed's evidence."

[18] Patrick Zoe, Mark Sargeant then gave evidence and were cross-examined by Counsel for the Plaintiff. On October 20th, 2011, the Defence then called Elvis Simpson to the stand. His Witness Statement was duly admitted in evidence and he was deemed an expert in the field of insurance loss adjusting without objection. Leave was given to his giving evidence to amplify his witness statement.

[19] On October 26th, 2011, Mr. Simpson continued amplifying his evidence in relation to the manner in which he had gone about assessing the Plaintiff's claim vis-à-vis the provisions of the policy. He was referred to his Report of February 23rd, 2010 attached to his Witness Statement filed on February 23, 2011 and confirmed that the claim referred to in his Report was the claim dated October 1st, 2007 found at TAB 2 of the Agreed bundle which he had assessed in his Report.

[20] At the request of Counsel for the Defendant and without objection, Mr. Simpson read the following comment contained at page 15 of his Report under the heading Improvements and Betterments as follows:

***Item 2. Improvements & Betterment:** The insured claimed BDS\$ 4,000,000.00 in respect of this item of the claim which is consistent with the sum insured of BDS\$ 4,000,000.00. The insured has provided no elemental breakdown of the basis on which the claim has been calculated. Based on the floor area which was damaged and the cost of restoring that area using current market rates, we have assessed the loss under this item of the Policy in the amount of BDS\$1,800,000.00."*

[21] **The Objection:** The witness was then referred to the penultimate paragraph of the Plaintiff's claim dated October 1st, 2007 found at TAB 2 of the Agreed bundle and asked to comment on the approximate floor

area for both floors of Morecambe House which according to the letter was stated to be 10,000 square feet. At this point, Counsel for the Plaintiff, Mr. Shepherd, Q.C. objected to the witness being allowed to answer the question on the basis that the Defendant was attempting to advance a positive defence in support of a blanket denial.

[22] Mr. Shepherd submitted that the proceedings were now governed by the new Civil Procedure Rules and that accordingly, in delivering the Further Amended Defence filed after the commencement of the new Rules the Defendant was obliged to comply with CPR 10.5.

[23] He submitted further that in breach of CPR 10.5, paragraph 11 of the Further Amended Defence did not state the reasons for the denial, nor give a concise version of the events given by the Claimant. He submitted that the Claimant had been taken by surprise by Mr. Simpson's evidence to the effect that square footage of 10,000 square feet was in dispute since it had not been foreshadowed in the Further Amended Defence.

[24] He submitted in addition that in view of the reference which Mr. Simpson had made in his Report to the Risk Property having been expanded from 4,674 square feet in 2005 to 10,000 square feet, the Plaintiff had assumed that the area was not in dispute. He cited dicta from Jones J. the unreported Trinidad & Tobago case of *Andre Marchong v. Trinidad & Tobago Electricity Commission and anor CV 2008-04045* to the effect that a defendant cannot put a party to proof without complying with Part 10.5(3)(c) and further that a failure to comply with the rule entitles the Court to treat the allegations as undisputed.

[24] Mr. Shepherd cited an extract from the Annual Practice at paragraph 18/13/5 and submitted in the alternative that if even the Court were to find that if proceedings were still governed by the former Rules of the

Supreme Court, 1982 the Defendant could not put forward a positive defence on a simple denial. He also cited the case of *Warner v. Sampson and anor [1958] 1 Q.B. 297*.

[25] *Mr. Forde's Reply:* Mr. Forde submitted that it was not open to the Plaintiff to object to the evidence which Mr. Simpson was being called upon to give as Mr. Simpson's Witness Statement and Reports had already been admitted into evidence during the course of the trial and without objection. He sought to distinguish the *Marchong Case* cited by Mr. Shepherd on the basis that as clearly appears from paragraph 3 of the Judgment of Jone J., the objection in that case had been taken at the commencement of the trial and prior to the receipt of evidence. Furthermore, at paragraph 4 of the Judgment, Jones J. had expressly stated that the time for making such an objection is prior to the receipt of the evidence. This was not the case here as the evidence is already commenced.

[26] Mr. Forde further submitted that in accordance with CPR 29.9 a witness is permitted with leave of the Court, *inter alia*, to amplify his Witness Statement and comment on evidence given by other witnesses and this was all that Elvis Simpson was being asked to do. In particular he contended that Mr. Simpson was entitled to amplify the comments made his Report with respect to the Plaintiff's claim for Improvements and Betterment and to say what was the area which was damaged and the building cost rates used in arriving at his assessment of the claim at \$1,800,000.00.

[27] In relation to Mr. Shepherd's submission that the Plaintiff had been taken by surprise by the evidence of the Witness, Mr. Forde pointed out that the Defendant had equally been taken by surprise by the failure of the

Plaintiff to particularize in paragraph 5 of its Statement of Claim either the square footage or the building cost rate used in calculating its claim. In fact, he submitted, this had only been revealed during the course of Mr. Mohamed's cross-examination. The Defendant was entitled to have the loss adjuster comment on Mr. Mohamed's evidence in relation to this issue.

[28] In support of his contention that the Plaintiff could not have been taken by surprise, Mr. Forde cited the House of Lords case of *McPhilemy v. Times Newspapers Ltd and others* [1999] 3 All E.R. 775 and drew attention to the following dictum of Lord Woolf MR:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general case of the pleader. This is true under the old and the new rules...”

[29] Mr. Forde submitted that when the Witness Statement of Elvis Simpson was served on him, the Plaintiff would have had notice of the claim which he had to meet and in particular, would have been put on notice that its claim for Improvements and Betterment of \$4 million and that its claim for \$1, 973,793.00 under Plant, Machinery and Equipment had

been denied and that what was being proffered for the total loss suffered was a sum which did not exceed \$2,693,512.03.

[30] **Ruling:** The Court has considered the arguments for and against the objection, together with the pleadings and the evidence which has been adduced at the trial to date. The applicable rules of Court and the Joint Pre-Trial Memorandum have also been considered, together with the cases cited by counsel on both sides.

[31] The objection made by Counsel for the Plaintiff is over-ruled for the following reasons:

- a) The objection having been made after the Witness Statement and Report of the witness Elvis Simpson had been entered into evidence was made too late in time. See the *Marchong Case*;
- b) In accordance with CPR 29.9, the witness is entitled to amplify his witness statement and Report and further, may comment on the evidence given by other witnesses, including evidence given by Sharif Mohamed;
- c) With respect to Mr. Shepherd's submissions with respect to the Defendant's alleged non-compliance with CPR 10.5, the Court fully endorses the following dictum of Jones J, at paragraph 25 of the *Marchong Case*, that "Part 10 of the CPR does not obviate the need for a Claimant to prove by credible evidence those facts which the Claimant is required to prove in support of the damages claimed. In my view, with respect to damages the Claimant is required to satisfy me as to the validity of his claims despite the fact that the allegations made by him may be undisputed. Neither does it prevent the Defendants from addressing me on aspects of

the case which they are of the opinion the Claimant failed to prove.”

- d) Despite the absence from the Further Amended Defence of details indicating how the amount of \$2,693,512.03 which the Defendant says is the total loss suffered by the Plaintiff was calculated, the Plaintiff cannot to have been taken by surprise in view of the matters contained in the Report of February 23rd, 2010 attached to the Witness Statement of Elvis Simpson which was entered into evidence on October 20th, 2011 without objection.
- e) Furthermore, having regard to the Joint Pre-Trial Memorandum filed in these proceedings on June 1, 2011, both parties were aware at the start of the trial that among the issues which the Court will be required to determine at the trial were, *inter alia*,

“14. Whether having regard to the provisions of the policy of insurance number BBFCP452842 dated the 5th day of April 2007 referred to in the Statement of Claim, the Plaintiff is entitled to recover its loss as claimed in the Statement of Claim?;

20. What is the quantum of the Plaintiff’s loss?

- f) Accordingly, the Court is satisfied that even if the Defendant has not complied with CPR 10.5, this does not obviate the need for a Claimant to prove by credible evidence those facts which the Claimant is required to prove in support of the amount claimed for Improvements and Betterment;
- g) In any event, as the issue relating to the quantum of the Plaintiff’s loss has clearly been joined in the pleadings and identified in the joint Pre-Trial Memorandum for the Court’s determination, both

parties are, in the Court's view, put to proof of the matters set out in their respective pleadings;

[32] For the foregoing reasons, the objection is over-ruled and the witness Elvis Simpson may continue to amplify his evidence and comment on the evidence in accordance with CPR 29.5.

**Maureen Crane-Scott
Judge of the High Court**