[SUPREME COURT]

Freetown
Dec. 7,
1962

Betts Ag.C.J.

JAMIL KARRIT . . . . . *Plaintiff*

v.

ROYAL EXCHANGE ASSURANCE . . . . . *Defendants*

[C.C. 115/62]

Contract—Insurance—Arbitration clause—Whether dispute within arbitration clause—Repudiation of liability for non-fulfilment of conditions of policy—Whether defendants entitled to disclaim liability.

Plaintiff's shop was insured against fire under a policy issued by defendants for a total value of £13,000—£2,000 for the premises consisting of the house and shop, £1,000 for the furniture and £10,000 for the stock.

Paragraph 18 of the policy provided: "If any difference arise as to the amount of any loss or damage such difference shall, independently of all other questions, be referred to the decision of an arbitrator."

Paragraph 11 provided: ". . . The insured shall . . . at all times at his own expense . . . give to the corporation all such further particulars . . . documents, proofs and information with respect to . . . the amount of liability of the corporation as may be reasonably required by . . . the corporation. . . ."

On February 9, 1962, the shop and its contents were completely destroyed by fire. Plaintiff reported the loss to defendants, whose local manager inspected the premises. In an attempt to ascertain the value of the stock which had been destroyed, a Mr. Ashley, of the accounting firm of Pawnell, Crewdson and Hardy, acting on behalf of defendants, asked the plaintiff to sign a document giving the accounting firm authority to examine his bank and income tax statements. Plaintiff, who was illiterate, asked to be allowed to take the letter so he could have it read to him by an independent person. When Ashley refused to permit this, plaintiff refused to sign the letter. As a result of this incident, negotiations beween the parties broke down and plaintiff brought suit for £13,000. The defence was, first, that plaintiff was bound to submit the dispute to arbitration before going to court and, second, that plaintiff had failed to comply with paragraph 11 of the policy.

Held, for the plaintiff (1) since the arbitration clause covered only disputes "as to the amount of any loss or damage," plaintiff was not bound to submit to arbitration the question of whether he had complied with paragraph 11 of the policy.

(2) In view of the conduct of defendants and their agents, they were not entitled to disclaim liability on the ground of non-compliance with paragraph 11.

The court ordered the master and registrar of the Supreme Court to hold an inquiry to determine (a) "the details which would form a basis of the award with regard to the claim for £10,000" and (b) "the amount constituting an indemnity of the actual loss in stock to the claimant."

Cases referred to: *Stebbing* v. *Liverpool and London and Globe Insurance Company Ltd.* [1917] 2 K.B. 433; *Stevens & Sons* v. *Timber & General Mutual Accident Insurance Association Ltd.* (1933) 102 L.J.K.B. 337; *Ballantine* v. *Employers' Insurance Co. of Great Britain* (1893) 21 R. 305.

Zinenool L. Khan for the plaintiff.
Samuel Beccles-Davies for the defendant.

BETTS AG.J. On October 29, 1961, the plaintiff, Jamil Karrit, renewed his insurance against fire, riot and strike with the defendant company under policy numbered 11976892, at a premium of £74 15s. 0d., for a total value of £13,000. The separate items and values against which the risks were provided were: (a) Premises—consisting of house and shop—£2,000; (b) Furniture —£1,000; (c) Stock in shop—£10,000.

On February 9, 1962, at 1 a.m., whilst the plaintiff was in Freetown, the premises and contents were completely destroyed by fire. Early on that morning the plaintiff was informed and he returned to Kangahun, Moyamba District, where the fire took place. He confirmed the report and later referred the matter to the police station, Moyamba. Plaintiff then sent a telegram to Mr. Halloway, an agent of the Royal Exchange Assurance, with whom the plaintiff was insured. He followed up his telegram himself and came to Freetown to report to Halloway. In his presence Halloway rang through to the Royal Exchange and reported. Two days later, the local manager, Mr. Hunt, and the plaintiff, left Freetown for Kangahun on inspection. Hunt was satisfied that the premises were completely destroyed but they managed to retrieve a safe. Two or three days later, at the suggestion of Hunt, the safe was prised open by a smith. The original policy of insurance and other business papers and documents were locked in the safe. All these were scorched and, from the point of view of assessment of the claimant's stock, were valueless. Before Hunt and the claimant went to Kangahun, the claimant was supplied by Hunt with two claim forms. Both were filled in. One of these, in the absence of the original, has been put in evidence by consent of both parties and it is marked "B." This exhibit contains a list and values of the stock claimed to be destroyed by fire. After the inspection of the site and submission of the forms, Hunt promised to communicate with the insured. From about the middle of February to the early part of March no decision appeared to have been arrived at by the insurers. The insured came down regularly to find out from Halloway what progress had been made but telephone communication with the headquarters only revealed that instructions were being awaited from Lagos. Eventually the plaintiff saw Hunt and he was informed that the insurers were repudiating liability because the plaintiff had not paid the insurance premium. This, in fact, formed the core of the original defence statement and it certainly did not improve the future relationship between the parties. Subsequently, however, in their amended pleadings, the defendant company admitted that the plaintiff had paid the premium but rejected liability on the ground that certain conditions of the policy had not been fulfilled.

The plaintiff, in the effort to repudiate the allegation that he had not observed the conditions set out in paragraph 11 of Exhibit "D"—the policy—admitted that there were some negotiations between Pawnell, Crewdson and Hardy and himself as to the valuation of his stock. He gave them the names of those with whom he did business but he said that he refused to subscribe his name to a document giving the accounts firm authority to examine his bank and income tax statements with the respective bodies. *The reason for his objection was that the firm refused to supply him the document for consultation.* The firm insisted that his signature and assent be given there and then. Halloway, an agent for the defendant company, confirmed that the company were unwilling to pay because they wanted more particulars. As a result of the circumstances outlined, the plaintiff referred the matter to his solicitor and he is now asking the court to order payment of the £13,000.

The defence of the defendant company is that which was granted on an application for amendment several months after the original defence had been filed. In the latter defence the defendant company purport to disclaim liability because they maintain that, under paragraph 11 of the policy (Exhibit " D "), which was put in by consent of both parties, the claim has not yet been submitted in accordance with the terms provided. Further, they say, that as there is no dispute or difference between the parties, there is nothing, at this stage, on which to arbitrate. They also appear to be saying that if any dispute or difference were to arise, such difference should first be submitted to arbitration.

It becomes necessary, therefore, to determine what matters under this policy should go to arbitration, as it appears from the defence pleadings that the " dispute " referred to therein is used in a somewhat general way. Paragraph 18 of the policy reads: " If any difference arise as to the amount of any loss or damage such difference shall, independently of all other questions, be referred to the decision of an arbitrator." In *Stebbing* v. *Liverpool and London and Globe Insurance Company Ltd.* [1917] 2 K.B. 433 a policy of insurance contained a clause referring to the decision of an arbitrator " all difference arising out of this policy." As a result of this provision a statement contained in the claim under the policy was referred to arbitration for determination whether the statement was " true or not." In this case the wording seems to me to be specific and that is borne out clearly by that part which says " such difference shall independently of all other questions be referred to the decision of an arbitrator." In my opinion, this does not mean that other questions, not being any difference " as to the amount of any loss or damage," could be so referred to arbitration. When read with the words which precede them, these words mean that any difference as to the amount or damage is the only difference to be submitted to arbitration. The fact that paragraph 18 goes on to say " And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained " does not alter the position. This interpretation, therefore, rules out the question of submitting to arbitration paragraph 11 of the policy as a condition precedent or at all. Under this policy this is a matter, in my opinion, which is for the court to determine. The distinction could also be observed in the case of *Stevens & Sons* v. *Timber & General Mutual Accident Insurance Association Ltd.* (1933) 102 L.J.K.B. 337, in which clause 10 of the conditions states: " If any dispute, question or difference shall arise between the association and the assured, his executors, administrators or assigns, relative to this policy, or the construction thereof or the amount to be paid thereunder, or the rights, duties or liabilities of either party hereto, the same shall, subject as hereinafter mentioned, be referred to two arbitrators. . . ." The difference ought now to be abundantly clear. In the case where a submission is limited to the assessment of loss, MacGillivray on Insurance Law (4th ed.), para. 1769, states the rule as " where the amount of the loss or damages is the only matter which the parties refer to arbitration, then if the insurers repudiate any liability on the policy there is no obligation on the assured to arbitrate as to the amount before commencing action on the policy."

It has been held that section 18 of the policy (Exhibit " D ") referred only to any difference as to the amount of any loss or damage. Section 11 has also

been held as being outside the contemplation of section 18. What then are the provisions of section 11 of Exhibit " D "? Condition 11 reads:

" On the happening of any loss or damage the insured shall forthwith give notice thereof to the corporation, and shall within 15 days after the loss or damage, or such further time as the corporation may in writing allow in that behalf, deliver to the corporation

(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

(b) Particulars of all other insurances, if any.

" The insured shall also at all times at his own expense produce, procure and give to the corporation all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of liability of the corporation as may be reasonably required by or on behalf of the corporation together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

" No claim under this policy shall be payable unless the terms of this condition have been complied with."

The substance of paragraph 11 can be divided into three separate heads: (a) matters connected with the substance of the claim itself; (b) matters connected with any other insurance policy, and (c) a general provision regarding substantiation of matters under the claim and a statement, on oath or otherwise, dealing with the truth of the claim and any matter incidental thereto. Conditions (a) and (b) have been outlined in detail as to requirements which the policy makes it obligatory for the insured to supply, but condition (c) should be given at the *request* of the insurers when that request is *reasonable*. In a Scottish case, *Ballantine* v. *Employers' Insurance Co.* (1893) 21 R. 305, the judges of the Inner House differed in opinion on the question whether a request for a post-mortem examination was reasonable. This case is reported in MacGillivray on Insurance Law (4th ed.) para. 1529. It indicates that the testing of reasonableness of the request is a matter for the court. It seems to me that in substance the requirements of condition (a) have been supplied. In the claim form tendered a formidable list of stock destroyed was submitted; both Mr. Hunt and the representative of Pawnell, Crewdson and Hardy confirmed that, on application, the insured supplied the names of his creditors and people with whom he did business. With regard to (b), particulars of all other insurances are to be supplied, if there are any. If no particulars are supplied it is to be assumed that there are no other insurances and, further, it has not been made an issue in this action. As far as these two conditions are concerned it can be safely said that they do not raise any difficulty.

In the case of *Ballantine* v. *Employers' Insurance Co.* already referred to, it would appear that in the defence there was a cognisable point around which the determination of the case revolved. That point was one of post-mortem. In this case the defendants in their statement of defence averred " that the plaintiff

has not yet submitted his claim, in accordance with condition 11 of the said policy," nor have they in their evidence led clear information of the matters complained about. An examination of the evidence reveals that the plaintiff was interrogated by one, Mr. Ashley, on behalf of the accounting firm. These are plaintiff's answers to questions put by defence counsel in connection with that interview. "A Mr. Ashley called on me in Freetown. He was sent by the Royal Exchange. He asked me for details of my business and information about the fire. I explained I was not present for the fire. He also asked about my income tax and he invited me to his office. I went to his office and he asked me to sign a letter in connection with my income tax and bank account. I told him I was not literate but I asked him to hand me the letter so I could get an independent person to see it. He refused to give me the letter and insisted I should sign it. I did not sign the letter." Although, under cross-examination, Hunt, for the insurers, said: "He refused permission to search his income tax returns and his bank statement," it could, however, be easily concluded that in view of the fact that the plaintiff was illiterate in English, his application for the "letter" was both reasonable and normal and one which ought in ordinary circumstances to have been acceded to. If a person who is not literate in English applies, under the circumstances in which plaintiff found himself, for the document to enable him to have independent consultation and that application is refused, I cannot see how it could be said by the person who wants the performance of the act that the person asked refused in toto. This is more significant when even at the hearing the "letter" was not produced by the defendants so that the plaintiff could be faced with it; and it also denies the court the opportunity of deciding in fact that the purported contents of the "letter" are what they are said to be.

To demonstrate further the cloud in the case for the defendants I will refer to the evidence of the second defence witness—Terrence Arthur Granville Dendy. He said: "One of my staff went up to look at the scene of the fire, and to make further investigations. He reported to me. As a result of the report we prepared a draft questionnaire. He forwarded this questionnaire to Royal Exchange to be forwarded to the plaintiff because it was impossible for us to substantiate the claim in the absence of the answers to the questionnaire."

From the evidence this questionnaire was never given to the plaintiff on the ground that before it could be handed over negotiations had broken down between the parties. But it should be remembered that the plaintiff had informed the defendants that he had referred the matter to his solicitors and I cannot see any reason why either the letter or the questionnaire could not have been forwarded to the solicitors by the defendants.

Reasonableness is not to be determined in isolation; it is to be determined with reference to its context. If it is assumed that under (c) of condition 11 of the policy the substantial request made was for permission to examine the bank account and the insurance returns of the plaintiff, then the request has to be considered in the light of the surrounding circumstances. One would have thought that the defendants must realise that in the local setting a solicitor would be about the best source for consultation in a matter of this nature. Their refusal to supply the letter, or even a copy, to enable an illiterate man to obtain independent consultation does not indicate to me that impartiality and that disinterested searching for the truth which one would associate with a reasonable request. Further, the evidence discloses that apart from the fulfilment of (a) of the condition and the waiving of (b), (c) had, at least, partially

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been acceded to. We have the evidence of Dendy, who said: "We approached the various suppliers to the plaintiff to try to substantiate the stock movements." It should be borne in mind that a request had been made for the plaintiff to supply a statement of accounts and he had promised to supply the names of his creditors and debtors.

In spite of the averment in the statement of defence that the defendants have no case to answer, Mr. Hunt, the manager of the Royal Exchange, said in evidence, "We are not disputing the cost at £2,000 for the building. We are disputing the amount of the stock at the time of the fire. I heard the evidence of Halloway. We are not disputing the cost of the furniture." This means that the defendants are willing to accept liability with regard to £3,000, i.e., the cost of the premises and furniture. As far as I understand their case it is that there is so far no sufficient substantiation of the claim of £10,000. I should like to make it clear that the dispute referred to by the defendants arose as a result of this action being brought and not in connection with the negotiations which could have led to arbitration.

In the circumstances already described, I find it impossible to agree with the defendants that they are entitled to disclaim liability because of the grounds stated. I hold that the defendants have not done enough to avail themselves of the provision of condition 11 and that there is sufficient substance submitted by the plaintiff to have this issue determined. I am of opinion to refer this matter to the master and registrar of the Supreme Court to determine: (a) the details which would form a basis of the award with regard to the claim for £10,000; (b) the amount constituting an indemnity of the actual loss in stock to the claimant.

I order accordingly and allow 10 days as from the date of this order for completion of the inquiry. I am to be informed on completion of the findings to enable me to come to a final judgment.

Freetown
Dec. 7,
1962

Bankole Jones J.

[SUPREME COURT]

JOSIAH ELIJAPHAN HARRIS . . . . . *Petitioner*
AND ABIGAIL COLE . . . . . *Party cited*

v.

FANNY VICTORIA HARRIS . . . . . *Respondent*
AND JOHN WILLIAMS . . . . . *Co-respondent*

[Div. C. 20/62]

Husband and Wife—Divorce—Cruelty—Desertion—Adultery—Exercise of discretion by judge—Matrimonial Causes Act (*Cap.* 102, *Laws of Sierra Leone,* 1960), *s.* 7.

Josiah E. Harris (the husband) petitioned for the dissolution of his marriage to Fanny V. Harris (the wife) on the grounds of cruelty, desertion and adultery. The wife in her answer denied the allegations of cruelty and desertion but confessed adultery with the co-respondent. She cross-petitioned for the dissolution of the marriage on the grounds of the husband's cruelty, desertion and adultery with the party cited, asking the court to exercise its discretion in her favour notwithstanding her adultery. The co-respondent did not defend the suit, while the party cited denied having committed adultery.