SHERIFF APPEAL COURT

[2018] SAC (Civ) 23
ABE-CA28-15

Sheriff Principal C D Turnbull
Appeal Sheriff N C Stewart
Appeal Sheriff N McFadyen CBE

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

T & G GRAMPIAN LIMITED

Pursuer and Appellant

against

ALLIANZ INSURANCE PLC

Defender and Respondent

Pursuer & Appellant: R W Dunlop QC; Russells Gibson McCaffery
Defender & Respondent: Stephenson QC; DAC Beachcroft

28 August 2018

Introduction

[1] The appellant supplies specialist car parts for performance and rally cars. They leased premises at Kintore in Aberdeenshire ("the Kintore premises") for the storage of vehicles and specialist motoring stock. From 4 August 2013, for a period of one year, the appellant was insured by the respondent for material damage to machinery, plant and tools, stock, vehicles and business interruption in relation to the Kintore premises ("the policy").

[2] On 12 October 2013 there was a fire at the Kintore premises. That fire caused severe damage to the premises and to the contents and stock stored there by the appellant. The

appellant intimated a claim to the respondent for indemnity under the policy in respect of the losses they had incurred as a result of the fire. The respondent investigated the claim. On 7 August 2014, the respondent advised the appellant that they would not provide indemnity.

The Proceedings

[3] The appellant commenced proceedings against the respondent in Aberdeen Sheriff Court, seeking declarator that the respondent was obliged to indemnify the appellant for all relevant losses sustained by them in terms of the policy; and for decree against the respondent for payment of £579,146, the sum of the appellant's losses.

[4] After sundry commercial procedure, the court allowed, and thereafter heard, a proof restricted to the crave for declarator.

The Sheriff's Judgment

[5] The sheriff held that the appellant, through their director, Graham Clark, had used fraudulent devices to seek a benefit under the policy and that, in terms of general condition 11 thereof, the policy was void. The sheriff, having held that the respondent was not contractually obliged to make payment to the appellant, granted decree of absolvitor in favour of the respondent and, subsequently, found the respondent entitled to their expenses.

[6] In the course of the hearing of the appeal, the appellant drew particular attention to three findings in fact made by the sheriff. These are set out in full below:

> 39. No evidence of credible accidental causes for the fire originating at either the first seat of fire, the second seat of fire or the third seat of fire was found. It is likely that all three fires were started deliberately.
> 40. The fire did not start and develop in the way described by Graham Clark. It is likely that either (a) the fire was set by, or on behalf

> of, or with the knowledge and concurrence of Mr Clark, or (b) that the cause of the fire was an act or omission of Mr Clark which he has chosen not to disclose.
> 41. In either event, the circumstances of the fire as reported by Mr Clark to the (respondent) and their investigators during the course of their investigation, is deliberately untruthful.

The first finding in fact and law made by the sheriff is also of relevance and is in the following terms:

> "1. The (appellant) through their Director Mr Graham Clark having used fraudulent devices to seek a benefit under the policy of insurance and in terms of general condition 11 of the policy, the policy is void."

Arguments for the Parties

[7] The appellant's motion was to recall the sheriff's interlocutors of 11 and 28 September 2017, dealing with the merits of the cause and expenses respectively; to sustain their relevant pleas in law and to grant declarator as first craved; and thereafter to remit the cause to the sheriff to proceed as accords. Senior counsel for the appellant invited the court to recall findings in fact 39 and 40 and both findings in fact and law. By reference to finding in fact 40, the appellant submitted that the sheriff assoilzied the respondents on the basis that either the fire was deliberately set by or on behalf of a director of the pursuers (Mr Clark) or that the cause of the fire was an act or omission of Mr Clark which he had failed to disclose to the respondents. The appellant contends that each of the alternative bases which founded the sheriff's rejection of the pursuers' claim is flawed.

[8] The appellant's argument in relation to the first alternative set out in finding in fact 40 (that the fire was deliberately set by or on behalf of Mr Clark) is predicated upon the sheriff's treatment of the evidence of an expert fire investigator, Mr Mortimore. The sheriff accepted the evidence of that witness, subject to one particular matter. The evidence

indicated that there were three seats to the fire. The appellant argued that for the suggestion that Mr Clark was responsible for the fire to hold, he needed to have been responsible for all three seats. The sheriff noted that Mr Mortimore's evidence was that one of the seats (the fire at the Evo vehicle – referred to in the sheriff's judgment as the "second seat") had only been burning for 15 minutes. The sheriff noted that if that was so, Mr Clark could not have set the fire (as he had exited the *locus* long before that). The sheriff discounted Mr Mortimore's evidence in this regard. The appellant argued that the only reason given by the sheriff for doing so was that the evidence in question could not be correct if Mr Clark had set the fire. It was argued on behalf of the appellant that this involved erroneous and circular reasoning. The evidence of the duration of the fire at the Evo was considered by the sheriff as part of his assessment as to whether or not Mr Clark had set the fire. The appellant argued that it was circular, and thus illegitimate, to exclude that evidence on the basis that it could not be correct if Mr Clark had set the fire. That assessment assumed what it sought to prove and was thus erroneous. The appellant also contended that the reasons given by the sheriff for rejecting the evidence of Mr Mortimore in this crucial respect were wholly unsatisfactory and inadequate given the gravity of the charge, as it was described, of arson (more properly wilful fire raising) that was effectively being levelled against Mr Clark (cf. *English* v *Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409).

[9] The respondent's position is that the sheriff did not assoilzie the appellant on the basis of finding in fact 40, he assoilzied the respondent because he held that the pursuer, through their director, Mr. Clark, had used a fraudulent device to seek a benefit under the policy, and that in terms of general condition 11 of the policy, the policy was thereby void. The respondents argued that finding in fact 40 was only one of a series of findings in fact which supported the sheriff's conclusion.

[10] The appellant's argument in relation to the second alternative set out in finding in fact 40 (that is, assuming Mr Clark did *not* deliberately set the fire, the cause of the fire was a non-deliberate act or omission by Mr Clark which he failed to disclose) is that the sheriff erred in concluding that there had been the use of a "fraudulent device" in furtherance of the appellant's claim which would, in itself, defeat that claim. The appellant argued that the fraudulent device was not one in which either the insured peril or the consequences thereof was the subject of a lie, but rather was no more than a collateral lie used to embellish a justified claim. The appellant's position was that that was immaterial to the validity of the claim and to the appellant's right to recover under the policy. In this regard, the appellant relied upon the decision in *Versloot Dredging BV and another* v *HDI Gerling Industrie Versicherung AG and others* [2017] AC 1, a decision to which the sheriff's attention had not been drawn. The appellant also founded upon the alleged failure of the sheriff to identify the lie which he contemplated. As a consequence, it was argued that there is no finding of materiality, which in turn meant that, even if *Versloot Dredging BV* does not apply, the second alternative would not warrant dismissal of the claim.

[11] The respondent's argued that *Versloot Dredging BV* has no application, it being a decision on the common law and not in respect of an express policy provision; and, in any event, the ratio of *Versloot Dredging BV* is that the common law fraudulent claims rule does not apply to a lie which the true facts, once admitted or ascertained, show to have been immaterial to the insured's right to recover. The respondent maintained that the lies in this case were relevant to recoverability.

Discussion

[12] Whilst attractively presented, we have concluded that the appellant's arguments approach the case from the wrong direction. The preliminary proof was restricted to the appellant's crave for declarator that the respondent was obliged to indemnify them under the policy. The starting point is, therefore, the policy and, in particular, the relevant terms of it. Cover in terms of the policy is expressed in the following terms:

> "We (i.e. the respondent) will pay You (i.e. the appellant) for Damage to Property Insured at The Premises shown in the Schedule by any cause not excluded occurring during the Period of Insurance …"

The term "Damage" is defined as "Accidental loss, destruction or damage, to Property Insured".

[13] The court's attention was drawn to paragraph 21-010 of *MacGillivray on Insurance Law* (13th ed.), which, having first considered the consequences of an insured failing to prove that the property was lost by a peril insured against, contains the following passage:

> "If, however, there is no doubt that the peril insured against has operated to cause the loss, the burden of proof will be different. Thus, if the insured sets fire to his own property insured under a fire policy, the insured can easily establish that there has been a loss by fire and the onus will then shift to the insurer to plead and prove that the fire was caused by the wilful act of the insured."

[14] The authority cited in support of this proposition is *Slattery* v *Mance* [1962] 1 QB 676, in which the plaintiff brought an action against an underwriter on a policy of marine insurance for the loss of his yacht by fire. The underwriter asserted that the loss of the yacht was not accidental but was caused by the plaintiff's wilful misconduct in causing or conniving at the destruction of the vessel by fire. Salmon J directed the jury that it was for the underwriter to prove on a balance of probabilities that the yacht was destroyed by the plaintiff or that he had connived at its destruction; and that there was no principle that when

the facts as to a loss by fire were peculiarly within the knowledge of a person against whom an assertion of arson was made, that person must assume the burden of proving that the loss was not caused or connived at by him. The onus of proving that the loss was not accidental remained constantly on the party who so asserted and, accordingly, the jury were directed that it was for the underwriter to prove on a balance of probabilities that the yacht was destroyed by the plaintiff or that he had connived at its destruction.

[15] In this case, the respondent does not go so far as to plead that the fire was caused by the wilful act of the appellant. Their averments are more nuanced. They made the following averments:

> "It is likely that either (a) the fire was set by, or on behalf of, or with the knowledge and concurrence of, Mr Clark, the (appellant's) director, or (b) that the cause of the fire was an act or omission of Mr Clark which he has chosen not to disclose. In either event the circumstances of the fire as reported by Mr Clark to the (respondent) and their investigators during the course of their investigation being deliberately untruthful, the (appellant), through their director, has used fraudulent devices to seek a benefit under the Policy and in terms of General Condition 11 of the Policy the policy is void."

[16] As will be seen from the respondent's averments read against finding in fact 40 and finding in fact and law 1 in the sheriff's judgment, the sheriff has accepted the position of the respondent. Properly construed, the respondent's averments do not amount to an allegation that the fire was caused by a wilful act of the appellant. The sheriff accepted the case advanced by the respondent. They have discharged any onus incumbent upon them. Whilst it is true that the sheriff did not go so far as to find as a fact that the fires were started deliberately, that does not assist the appellant. The causes of the fires could not be determined (finding in fact 38). For the appellant to be entitled to the declarator sought, it would have been necessary for the sheriff to have found that the cause of the fire fell within the definition of "Damage". That requires the loss, destruction or damage to the property to

be accidental. There is no such finding. On the contrary, as set out in findings in fact 37 and 39, no evidence of credible accidental causes for the fire was found. The sheriff did not accept that the fires were caused by accident. No challenge was made in respect of finding in fact 37. Whilst the court was invited to recall finding in fact 39, no argument was presented to support such a course of action. Accordingly, we conclude that, on the facts found by the sheriff, there was not a justified claim under the policy. We now address the arguments advanced on behalf of the appellant.

The First Alternative

[17] It is well understood, and the appellant properly accepted, that an appellate court can have no basis to overturn findings in fact made by a sheriff unless the notes of evidence demonstrate that the sheriff was plainly wrong in making the findings he did (see *Thomas* v *Thomas* 1947 SC (HL) 45; *McGraddie* v *McGraddie* 2014 SC (UKSC) 12; and *Royal Bank of Scotland plc* v *Carlyle* 2015 SC (UKSC) 93). Here, the appellant argues that there has been an identifiable error, of the type envisaged by Lord Reed in *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at paragraph [67], which warrants appellate interference.

[18] The appellant's criticism stems entirely from what was said by the sheriff at paragraph [98] of his judgment. Having indicated that he preferred the evidence of Mr Mortimore (and another skilled witness, Mr Colquhoun) to that of Mr Clark and a witness from the fire service, the sheriff said this:

> [98] In submissions, it was accepted that Mr Mortimore was a skilled witness. There was no meaningful criticism of his evidence. There is one matter I should deal with emerging from Mr Mortimore's evidence. He was asked a number of times to express a view as to how long the fire in the Evo had been burning. That assessment to be based on the nature and extent of the damage sustained by the car. Mr Mortimore was reluctant to express a view in relation to that but ultimately expressed a view that it

> might have been slightly over 15 minutes. That simply cannot be correct if Mr Clark had set the fire. He telephoned the fire brigade at 14:40. The fire at the Evo was not extinguished until sometime well after 3 pm. It seems to me that Mr Mortimore was mistaken in his assessment of how long the fire in the Evo had been burning. That does not detract from my assessment of him.

[19] As submitted by the respondent, in determining whether the sheriff was entitled to reach the conclusion he did in finding in fact 40 or whether his conclusion was plainly wrong, it is necessary to have regard to a number of findings in fact made by the sheriff.

[20] Mr Clark was alone at the premises when the fire started (finding in fact 18). Accordingly, his is the only eye witness account of events and timings prior to the fire service being called. There were three separate seats of fire (finding in fact 26). It was highly improbable that the fire could have spread from the first seat of fire to the second seat of fire beneath the bonnet of the Evo in the circumstances described by Mr Clark (finding in fact 26). It was highly improbable that the first seat of fire (on some cardboard laid on top of a stack of pallets Mr Clark said he had been working at) spread to the third seat of fire (immediately at the exit door of the premises) (finding in fact 29). It was more improbable that the first seat of fire spread to the third seat of fire so as to involve the alarm panel in the short space of time indicated by the evidence (finding in fact 29). The forensic investigations failed to identify any credible non-accidental cause for the fire (finding in fact 37). There was no electrical cause for the fire (finding in fact 38). The cause of the fire could not be determined (finding in fact 38). No credible accidental cause of the fire at any of the three seats could be found (finding in fact 39). It was likely that all three fires were started deliberately (finding in fact 39). The fire did not start and develop in the way described by Mr Clark (finding in fact 40). It is likely that either (a) the fire was set by, or on behalf of, or with the knowledge and concurrence of, Mr Clark, or (b) that the cause of the fire was an act

of omission of Mr Clark which he has chosen not to disclose (finding in fact 40). In either event, the circumstances of the fire as reported by Mr Clark to the respondent and their investigators were deliberately untruthful (finding in fact 41).

[21] In making the findings in fact he did, the sheriff rejected the evidence of a fire officer (Williams) in relation to the cause of the fire and, in particular, to the cause of the second seat of fire, beneath the bonnet of the Evo. Officer Williams's evidence was that this particular fire was caused by radiant heat from an adjacent source. Mr Mortimore and Mr Colquhoun (an electrical engineer who gave evidence for the respondent) rejected that theory. The sheriff resolved this issue against the interests of the appellant. He was entitled to do so. Moreover, having identified the conflict in Mr Mortimore's evidence, he was entitled to accept part of Mr Mortimore's evidence and reject the part which is central to the appellant's first line of argument. When consideration is given to the totality of the findings in fact made by the sheriff, and in particular those set out in paragraph [19] above, we cannot say that the sheriff was wrong. The reasons given by the sheriff for rejecting this aspect of Mr Mortimore's evidence could, perhaps, have been expressed more fully, however, when one considers the sheriff's judgment as a whole, they cannot be fairly described as unsatisfactory or inadequate. Finding in fact 40, insofar as it relates to the first alternative, was one the sheriff was perfectly entitled to make and is wholly consistent with the remaining findings in fact he made.

The Second Alternative

[22] As properly conceded by senior counsel for the appellant, if the fire was not the result of an accident, it is unnecessary to consider General Condition 11, which founds the basis for the appellant's second alternative line of argument. General Condition 11 provides:

> "11. If You or anyone acting on Your behalf makes any false or fraudulent claim or supports a claim by false or fraudulent document, device or statement, this policy shall be void and You will forfeit all rights under the policy…."

[23] This alternative is predicated upon the cause of the fire being an act or omission of Mr Clark which he had chosen not to disclose; and that the circumstances of the fire as reported by Mr Clark to the respondent and their investigators were deliberately untruthful (see findings in fact 40 and 41 at paragraph [6] above). The circumstances of the fire as reported by Mr Clark are to be found in findings in fact 24, 25, 27 and 30, which are in the following terms:

> 24. During the course of investigation into the circumstances surrounding the fire, Graham Clark told two separate fire investigators that whilst he was working in the premises he discovered a fire ("the first seat of fire") on some cardboard that had been laid flat on top of a stack of wooden pallets that was situated some fifteen metres from the exit door of the premises.
>
> 25. Mr Clark told investigators that he did not attempt to tackle the first seat of fire despite there being several fire extinguishers at the premises. Mr Clark stated that he immediately left the premises and called the fire brigade.
>
> 27. Another seat of fire was immediately at the exit door ("the third seat of fire"). Mr Clark had to pass through that door as he left the premises. Mr Clark told investigators that other than the first seat of fire at the cardboard sitting on top of the pallets there was no fire burning anywhere else as he left the premises.
>
> 30. Graham Clark told investigators that he was the last person in the premises when the fire started. He told investigators that no other person was present. He stated that he did not smoke and that no hot works or works involving a naked flame had been undertaken by him within the premises on the day of the fire.

[24] It is also noteworthy that the sheriff found, as a fact, that the fire did not start and develop in the way described by Graham Clark (see finding in fact 40); and that the sheriff did not accept Mr Clark's evidence (see paragraph [97] of the sheriff's judgment). Having

regard to the sheriff's findings and assessment, the appellant's contention that the sheriff failed to identify the lie which he contemplated is misconceived.

[25] The essence of the appellant's submission in support of the second alternative is that the account given by Mr Clark amounts to no more than a collateral lie used to embellish an entirely justified claim. The three possible situations postulated in *Versloot Dredging BV* are described thus by Lord Sumption (at paragraph [1]):

> "Three possible situations may be relevant. First, the whole claim may have been fabricated. In principle the rule would apply in this situation but would add nothing to the insurer's rights. He would not in any event be liable to pay the claim. Secondly, there may be a genuine claim, the amount of which has been dishonestly exaggerated. This is the paradigm case for the application of the rule. The insurer is not liable, even for that part of the claim which was justified. Third, the entire claim may be justified, but the information given in support of it may have been dishonestly embellished, either because the insured was unaware of the strength of his case or else with a view to obtaining payment faster and with less hassle. The present appeal is concerned with embellishments of this kind. They are generally called "fraudulent devices". The expression is borrowed from a standard clause avoiding contracts of fire insurance which was widely used in the 19th and early 20th centuries. But it is archaic and hardly describes the problem. I shall use the expression collateral lies, by which I mean a lie which turns out when the facts are found to have no relevance to the insured's right to recover. The question is whether the insurer is entitled to repudiate a claim supported by a false statement, if the statement was irrelevant, in the sense that the claim would have been equally recoverable whether it was true or false."

[26] The appellant's contention is that the present case falls within the same class as that considered by the Supreme Court in *Versloot Dredging BV*, namely, the third situation contemplated by Lord Sumption, The first question to address is whether the appellant's entire claim was justified but the information given in support of it was dishonestly embellished. In light of the conclusion we have reached as to the entitlement of the appellant to indemnity under the policy, the appellant's claim was not justified and therefore *Versloot Dredging BV* is of no application.

Disposal

[27] Having regard to the facts found, no question of the use of fraudulent device properly arises. To that extent, the sheriff was in error in making finding in fact and law 1. Counsel for the respondent candidly accepted this. We were not addressed on appropriate substitute terms. Subject to any submissions parties wish to make on this issue, we would propose to recall finding in fact and law 1 and substituting therefor the following:

> "1. The Property Insured at The Premises not having suffered Damage as defined by the policy, the damage to the premises, contents and stock not having been caused by accident, the defender is not obliged to indemnify the pursuer under the policy."

Beyond that, we shall refuse the appeal and adhere to the decisions of the sheriff that were the subject of the appeal.

Expenses

[28] In light of the disposal above, the appellant will be found liable to the respondent in the expenses of the appeal. We shall sanction the appeal as suitable for the employment of senior counsel.