Easter Term
[2017] UKPC 10
Privy Council Appeal No 0092 of 2015

JUDGMENT

Sun Alliance (Bahamas) Limited and another (Appellants) *v* Scandi Enterprises Limited (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Mance
Lord Kerr
Lord Clarke
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

8 May 2017

Heard on 10 November 2016

Appellants	*Respondent*
Gail Lockhart Charles Rhyan Elliott (Instructed by Harcus Sinclair)	(Not participating)

LORD SUMPTION:

1. In about 1990 the Respondent, Scandi Enterprises, acquired a dilapidated two-storey building with 12 apartments on King's Road, Freeport, Grand Bahama with a view to improving and re-letting it. The planned improvements involved putting the building and the individual units into good repair, refurbishing the interiors and adding an extra storey. In July 1992, Mr Risse, a Vice-President and part-owner of the company, approached Mr Donald Ward of Insurance Management (Bahamas) Ltd which acted as local agents of the Appellant insurers. Mr Ward's evidence, which the trial judge accepted, was that Mr Risse wanted to insure the building against the usual physical risks, but Mr Ward refused to insure the building because it was by then unoccupied. Instead, he suggested that Scandi should insure the proposed works under a Contractors All Risks ("CAR") policy. Mr Risse accepted that advice and a CAR policy was duly issued to Scandi on 31 July 1992 for a period of a year from 27 July 1992 for an insured value of B$700,000. On 3 December 1992, the building was extensively damaged by fire.

2. In February 1997, more than four years after the fire, this action was begun in support of a claim for B$700,000 on the policy. The basis of the claim was that the policy insured Scandi against all risks of loss or damage to the building, that the policy was a valued policy at B$700,000 and that the building had become a total loss. There are two subsisting issues before the Board. The first is whether the building (as opposed to the works) was insured. The trial judge (Evans J) held that it was not. The second issue was whether the policy was a valued policy. The judge held that it was not, so that the insured were required to prove their actual loss. Since they had not sought to do so, the claim would have failed even if the buildings had been insured. The Court of Appeal (John, Conteh and Adderley JJA) reversed him on both points.

3. The policy is unusual in one respect. Scandi was the sole insured, there being in effect no contractor since Scandi proposed to carry out the works by employing small firms and individual workmen under their direct control. That apart, the terms are characteristic of standard forms of CAR policy. The "contract" is described as "Renovations to a 12 unit apartment building constructed of concrete blocks with cement tile roof." The property insured was then defined as follows:

> "**Property Insured**
>
> **Item 1**
> The Contract Works (which term shall include Temporary Works) and all materials belonging to the insured or for which they are

responsible, all situate on the Contract Site in connection with the performance of the contract, but excluding Constructional Plant Equipment and Temporary Buildings.

Item 2
Constructional Plant Equipment and Temporary Buildings (all in accordance with an inventory submitted to and agreed with the Insurers) belonging to the Insured or for which they are responsible, whilst on the Contract Site in connection with the performance of the Contract.

Item 3
Costs and Expenses necessarily incurred by the Insured with the consent of the Insurers in removing debris of the portion or portions of the Property Insured under Items 1 and 2 above destroyed or damaged by any peril hereby insured against."

The "sum insured" was expressed to be B$700,000, all of it attributable to Item 1. Against Items 2 and 3, the sum insured was stated to be "NIL". Exception 9 excluded:

"9. Loss of or damage to the permanent works or any part thereof

a) which has been taken into use or occupation by the employer;

b) in respect of which a Certificate of Completion has been issued unless such loss or damage be occasioned

i) during the period of maintenance arising from a cause occurring prior to the commencement of the Period of Maintenance;

ii) by the contractor in the course of any operations carried out by him for the purpose of complying with his obligations under the Maintenance Clause(s) of the Contract."

Finally, it is necessary to draw attention to clause 5 of the general conditions:

> "5. On the happening of any loss or damage, the Insured shall forthwith give notice thereof to the Insurers and shall as soon as possible thereafter deliver to the Insurers;
>
> > a) a claim in writing for the loss and damage, setting forth all the several articles or items of property damaged or destroyed and of the amount of the loss and damage thereto respectively not including profit of any kind;"

4. The property insured under this policy was the "Contract Works". This meant the works described in the preamble to the insuring clause under the heading "Contract". The policy distinguishes between contract works according to whether they are permanent or temporary. The Permanent Works are the structures to be created under the building contract. They are insured up to the point when they are taken into use or occupation by the employer or (subject to certain provisos) when a certificate of completion is issued: see Exception 9. The temporary works are those works which are required in order to carry out the permanent works, but do not form part of them. A pre-existing building which is not being rebuilt does not form part of the works, whether permanent or temporary. It is the structure upon or in relation to which the works are being carried out. Thus in *Rowlinson Construction Ltd v Insurance Company of North America (UK) Ltd* [1981] 1 Lloyd's Rep 332, 336, Lloyd J, construing a very similar policy declined to allow a claim for damage to a retaining wall which was part of the original structure but not part of the works:

> "In order to determine whether the retaining wall was included in the permanent works one has have regard to what the plaintiffs were actually going to do under the contract. If they had been going to rebuild the retaining wall, then the retaining wall would have been part of the permanent works. But they were not. At the moment when the wall collapsed they had no intention of doing anything to the wall other than to improve its appearance. In those circumstances it seems to me that it would be a misuse of language to describe the wall as part of the works. To take an analogy which was mentioned in the course of argument: suppose a contractor agrees to build a wing on to an existing mansion. It seems to me that the works would consist of the new wing but would not include the mansion-house. It is to my mind essentially the same position here. Nor do I think that the answer would be any different if the contractor had agreed to give the existing mansion-house a coat of paint."

5. In the present case, the judge found that no works had been carried out by the time of the fire, apart from some renovations to two of the 12 units, and some minor

work on the building done by a plumber and an electrician. These were worth less than B$5,000 and no claim has been made for them. The damage claimed relates entirely to the pre-existing building, which was not part of the insured property.

6. The Court of Appeal set out the main parts of the insuring clause but made no attempt to construe them. They proceeded entirely by reference to the extrinsic evidence. They considered that because there was no contractor in this case, the ordinary principles on which CAR policies work could be ignored. They decided that because of the discussions which preceded the contract, the "Contract Works" could not be limited to the renovations which were described as being the subject of the contract. Essentially, this was because the figure of B$700,000 for the sum insured was too large to have represented the value of the works and must therefore have represented the value of the buildings. In particular, they thought it significant that the insurers quoted the same premium on the same insured values for the following year, 1992/3 when the works would have been completed. The Board reiterates that where the express terms of a contract are clear, they must be applied. The Board has the strongest reservations about the admissibility of this material for any purpose of interpretation, let alone for the purpose of contradicting the express language of the insuring clause. But they are satisfied that it would be irrelevant even if admissible. In the first place, the value of the contract works was the difference between the value of the building with and without the renovations. The sum insured against Item 1 represented the maximum amount of that difference. It could be expected to increase as the works progressed. It would also be affected by movements in the value of property generally. There was no evidence as to what the maximum difference might be once the works were approaching completion, and no reason to believe that it could not amount to B$700,000, especially when it is borne in mind that the works included the addition of a third story. Secondly, the reference to the premium for the following year is derived from a "Confirmation Advice" dated 28 July 1992, which was not a contractual document and did not commit Scandi to renew at the premium stated if the terms failed to meet their commercial requirements. Thirdly, if material of this kind is to be admitted, it must be admitted in its entirety. In the evidence about the placing of the insurance the cardinal fact is that Mr Ward expressly refused to insure the buildings.

7. In those circumstances, the question whether this was a valued policy does not strictly speaking arise. But the Board considers it important to deal with it in order to avoid misconceptions on the point in future cases. A contract of insurance is a contract of indemnity. In the ordinary course, the insured must prove the amount of his loss. By way of exception, a valued policy may be agreed, ie a policy in which the parties have agreed in advance the value of the property insured irrespective of its actual value. An agreed value is not the same thing as the sum insured, which merely serves as a maximum. The difference is pointed out by the editors of *MacGillivray on Insurance Law*, 13th ed (2015), at para 21-013 in terms which the Board regards as beyond controversy:

> "The policy may state an amount for which the object is insured, but if it is not an agreed value policy this cannot bind the insurer, the only effect of such a statement is to fix the maximum amount for which the insurer can be held liable, and the insured will still have to prove the extent of his loss."

An agreed value is unlikely to be a practical proposition in a CAR policy where the property is contract works whose value will necessarily increase over time, and where the values at risk will depend on how far the works have advanced when the casualty occurs. But practical or not, it is clear that the figure of B$700,000 in this policy was not an agreed value, but merely the maximum sum insured. It follows that the insured was required to prove what he had lost. This is confirmed, so far as confirmation is required, by clause 5 of the general conditions, which requires the insured to specify the amount of loss attributable to each item damaged or lost.

8. The Board would not wish to part with this case without expressing its surprise at the length of these proceedings. The writ was issued in February 1997 but the action did not come on for trial until March 2010. The Board is not fully informed about the reasons for this delay, but considers that an interval of thirteen years before an action comes on for trial cannot be consistent with the interests of justice. The Board understands that there are procedures which enable the Court to manage cases actively with a view to avoiding unnecessary delay. If such procedures exist, they should be used.

9. The Board will humbly advise Her Majesty that this appeal should be allowed and the order of Evans J restored.