COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

1997/CLE/GEN/FP30

BETWEEN

SCANDIA ENTERPRISES LIMITED

Plaintiff

AND

(1) SUN ALLIANCE (BAHAMAS) LIMITED
(2) ASSICURAZIONI GENERAL SPA

Defendants

BEFORE: The Honourable Mrs Justice Estelle Evans

APPEARANCES: Mr R. Rawle Maynard and Miss Sheanda Cooper for the plaintiffs

Miss Paula Adderley for the defendants

2010: 22- 24 March; 31 May; 29 October

JUDGMENT

Gray Evans, J.

The Pleadings

1. The plaintiff seeks an indemnity from the defendants under a contractor's all risk (CAR) policy of insurance No. 92010910 in relation to the destruction by fire of the plaintiff's building situated on Kings Road, Freeport, Grand Bahama.

The facts

2. The plaintiff is a company incorporated in The Bahamas and owner of property situated on Kings Road, Freeport, Grand Bahama. The defendants are in the business of general insurance carrying on business within the Commonwealth of The Bahamas.

3. In July 1992, the plaintiff purchased a CAR policy No. 92010910, the subject of this action, from the defendants.

4. By the said policy the defendants agreed, but subject to the conditions contained therein or endorsed or otherwise expressed thereon to indemnify the plaintiff "in respect of any amount the Insured is entitled to recover under the provisions of the attached Specification...Provided that the liability of the Insured shall in no case exceed, in respect of each item, the sum expressed in the Schedule to be insured thereon and in the whole the Total Sum Insured hereby or such other sum or sums as may be substituted therefor, by memorandum hereon or attached hereto, signed by or on behalf of the Insurers."

5. The Specification attaching to and forming part of the policy is as follows:

> In the name of the Employers and Contractors mentioned in the Schedule and their sub-contractors for their respective rights and interests, hereinafter referred to as "the insured" which policy is a contract of indemnity whereby and under the provisions of which the insured is entitled to recover in respect of loss, damage or liability as undernoted.
>
> All risks cover
> All loss of or damage to the property insured described in the schedule from whatsoever cause arising subject to the general exceptions of the policy and the exceptions mentioned below:
>
> a) In the case of contract works from the time of erection at the site and thereafter until the completion of the contract or the expiry date mentioned in the schedule whichever is the sooner provided always that the contractor is liable to make good such loss or damage under the terms of the contract.
>
> b) In the case of plant and machinery and all other materials for incorporation in the works (not being the contractor's own) from the time of delivery at the site until completion of the contract or the expiry date mentioned in the schedule whichever is sooner
>
> up to the amount not exceeding the aggregate of the sum mentioned in the Schedule.

Exceptions
No liability shall attach hereunder for:
...

3. Loss of or damage to any item of Constructional Plant.

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.

6. Other relevant provisions of the CAR policy were as follows:

(a)	Insured:	Scandi (sic) Enterprises Limited
(b)	Contract:	Renovations to a 12 unit apartment building constructed of concrete blocks with cement tile roof
(c)	Contract site:	#45 Kings Road, Freeport, Grand Bahama
(d)	Period of Insurance:	From 27 July 1992 to 26 July 1993
(e)	Premium:	$2,017.00
(g)	Sum Insured:	B$700,000.00

(f) Property Insured"
The contract works (which 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 building".

Public Liability: Limit of Indemnity – N/A

Excess clauses: Contract works:

For each and every loss caused by storm tempest water damage flood subsidence collapse or earthquake..... the first B$1,000.00

For each and every loss caused by any other peril..... the first B$500.00

Constructional Plant Equipment and Temporary Buildings ..... Nil

Debris removal ..... Nil

7. (I note here that although no issue was taken with it, "#45" in the description of the "contract site" must be an error. The report by Mr W. Carver Grant describes same as being "Lot #6..."; the application form signed by Mr Risse with respect to the first policy indicates the mailing address as "Kings Road, #4, 5 and 6..."; the copy conveyance included in the bundle of documents is with respect to Lots 4 and 6..." and the certificate from The Foreign Investments Board to Irene von Anhalt, presumably relating to the same property, shows "Lots 4, 5 and 6...")

8. On or about 3 December 1992, the building situated on the contract site was extensively damaged by fire and by letter dated 21 December 1992 from its attorney to the defendants, the plaintiff submitted a formal claim under the policy for "reimbursement of all expenses and outgoings in connection with the repair, replacement and reinstatement as necessary" of the said building "together with incidental expenses such as debris removal and architect's fees, etc."

9. The adjusters determined that the insurers had no liability under the aforesaid policy and by letter dated 21 January 1993, Mr Lawrence Palmer, Assistant Manager of Insurance Management Limited, responded to the plaintiff's claim as follows:

> "We have been advised by insurers that their inquiries have revealed that no contract or preliminaries for the renovation of the above building was in existence at the inception date of the policy, nor prior to the loss. They have therefore advised that as a result there is no liability for the loss under the terms of the above policy. They have further declared the above policy void from inception and attached is a cheque in the amount of $2,017.00 representing a full refund of the premium paid."

10. The plaintiff's attorneys responded on 22 April 1993 in the following terms:

> "Considering that your company accepted the risk and the premium in respect of this policy in July 1992, we are amazed at your statement that the policy was void from inception. Your tender of a refund of the premium is rejected and your cheque for $2,017.00 is returned herewith.
>
> We have advised our clients that they have a valid policy and claim and we must therefore ask you to reconsider the position which you express in your letter of 21 January.
>
> Please therefore confirm no later than 30 April that you will process the claim, otherwise we hold instructions to initiate all

necessary legal proceedings against you to protect our clients' position."

11. To which the insurers responded by letter dated 3 May 1993:

> "Insurers have confirmed that their position remains unchanged at this point. However, we would be grateful for your advices as to the basis of your assertion that your client has a valid claim under the policy."

12. It is unclear what, if anything happened with the matter between 3 May 1993 and 20 February 1997 when the plaintiff commenced this action by a generally indorsed writ of summons, followed more than three years later with its statement of claim filed 18 October 2000, in which it alleges at paragraphs 4, 5, 6 and 7 that:

> 4. By a policy of insurance No. 91011805 dated the 15th November, 1991 made between the plaintiff and the defendants in consideration of premium paid and to be paid upon the terms mentioned therein the defendants agreed to insure the Plaintiff against all risks during the period 15th November, 1991 to 30th June, 1992.
>
> 5. By another policy of insurance No. 92010910 dated the 27th July, 1992 made between the plaintiff and the defendants (the said policy) in consideration of the premium paid the defendants agreed to further insure the plaintiff against all risks including all loss or damage to the property insured from whatsoever cause arising subject to certain exceptions mentioned in the policy during the period 27th July, 1992 to 26th July, 1993.
>
> 6. The insured property was extensively damaged by fire on the 3rd December, 1992.
>
> 7. The plaintiff made a claim under the said policy to be indemnified for the loss suffered and the defendants refused to pay contending that no contract or preliminaries for the renovation of the building was in existence at the inception of date of the policy nor prior to the loss and that there was therefore no liability for the loss.

13. Further, in compliance with an order of the Registrar to provide further and better particulars under paragraph 7 of the statement of claim to:

> "Please state the amount of the loss suffered for which the plaintiff seeks to be indemnified as well as how the said loss is alleged to be made up"

the plaintiff responded:

"The property was insured for the sum of $700,000.00 and the loss suffered was total destruction of the Building."

14. In their defence filed on 28 February 2001 the defendants contend as follows:

> 3. Save that it is denied that the defendants agreed to insure the plaintiff against "all risks", paragraph 4 of the statement of claim is admitted.
>
> 4. The defendant further states that prior to the inception of the said policy, Mr. Gunther Risse on behalf of the plaintiff, orally represented to Mr. Ward, an agent of the defendant, that he required a policy of insurance to cover against risks in respect of renovations and refurbishing of the twelve-unit apartment building situate at Kings Road, Freeport, Grand Bahama. Mr. Ward suggested to Mr. Risse that since construction was involved, construction or contractors all-risks insurance was recommended until the renovations were complete.
>
> 5. Paragraph 5 of the statement of claim is admitted. The defendant further states that prior to the inception of the said policy, in or about the month of July, 1992, Mr. Risse represented to Mr. Ward that actual renovations were due to commence at the property in the month of July, 1992.
>
> 6. The defendant further states that both prior to the inception of the policy and at the time the plaintiff's property was damaged by fire on or about the 3rd December, 1992 there was no contract in force, no plans were in existence and no material had been purchased in respect of renovations to the property. Accordingly, the defendant states that no liability accrues under the terms of the policy for the damage to the property and that the policy was void from its inception. The defendants will rely on the said policy at trial for its full terms and effect.
>
> 7. Paragraph 7 of the statement of claim is admitted.

15. At the trial, which occurred eighteen years after the fire and thirteen years after the commencement of this action, each of the parties called three witnesses. Messrs Gunther Risse, Clifford Pinder and Wendal Carver Grant gave evidence on behalf of the plaintiff and Messrs Donald Ward, Colin Jones and Peter Muscroft gave evidence on behalf of the defendants. Each of the defendants' witnesses also provided witness statements prior to trial.

16. Mr Risse, Vice President of the plaintiff company which, he says, is owned by him and Irene von Anhalt, testified that they purchased the said building in 1990 or 1991 and paid therefor the sum $400,000.00. It was in "not-so-bad" condition but needed renovating. He wanted to insure the said building against storm and fire so he met with Mr Donald Ward of Insurance Management with whom he had insured another building and told Mr Ward what he wished to do. He and Mr Ward visited the King's Road property and Mr Ward eventually recommended the

CAR policy. The building was initially insured for a period of six (6) months ending June 1992 for the sum of $400,000.00 because he had told Mr Ward that was the amount he had paid for it. That first policy lapsed before the renovations had begun.

17. Mr Risse said he eventually evicted all of the non-paying tenants from the building and was ready to start the renovations so he went back to see Mr Ward. He took a friend, George Wipf, now deceased, with him to "help him understand and to answer questions" raised by the insurance company as he (Mr Risse) did not speak English very well. He said he told Mr Ward that he had been told by one Mr Lightbourne that the building was actually worth about $700,000.00, so he needed to increase the insurance to that amount "in case something happens". As a result, the second policy was issued for that sum.

18. Under cross examination, Mr Risse said he told Mr Ward that he wanted to add another floor to the building after he had finished the renovations and that if needed, he would change the roof on the building. However, he said, the building was destroyed by fire before that could happen. He said he had engaged the services of Mr Clifford Pinder and his crew to carry out the renovations under his supervision and that at the time of the fire they had completed renovations on two of the twelve units. In addition to Mr Pinder and his crew, Mr Risse said he had also engaged the services of a plumber and an electrician, both of whom, at the date of the fire, had done some minor work on the building. He confirmed that at the time of the fire the work had stopped because he was off the island on vacation.

19. According to Mr Risse, after the building was destroyed by fire on or about 3 December 1992 his then attorneys wrote to the insurers making a claim under the aforesaid policy on his behalf but the claim was rejected. He said he was later told by Mr Ward that the insurers did not want to pay because the "London person" said he started the renovations without a permit from the Grand Bahama Port Authority Limited.

20. Mr Pinder, who said he had been a contractor for about 40 years, testified that in 1992 he, operating under a trade name "Ace Construction Company", did some renovations on the said building; that his crew of five (including himself) cleaned around the building then started the renovations in or about June or July 1992 and that at the date of the fire they had completed the carpentry work in two of the apartments; that the work stopped "probably the second or third week in November" 1992 because Mr. Risse had gone on vacation and it was intended that they continue with the work when he returned.

21. In describing the renovations which he and his workers did, Mr Pinder said that they did not work on the roof or the floors, except to take up old carpets and to put down new carpets and "a little tiling." That they did some work on interior doors, baseboard trims and on damaged rock sheet walls and "stuff like that". He agreed with counsel for the defendants that a lot of the work done by him and his crew was of a "cosmetic" nature.

22. According to Mr Pinder, at the time of the fire no materials were stored on the premises because materials previously stored in the building had been stolen, so materials were either purchased as needed or stored at another property owned by Mr Risse.

23. Mr Pinder said that a plumber and an electrician, not members of his crew, were also on the site during the time he and his crew were there.

24. Although Mr Grant, a well-known Civil Engineer and Appraiser in the Grand Bahama community, had apparently prepared and submitted a report on 18 January 1993, seventeen years later he said he did not recall the incident or the report. Nonetheless, he identified his signature on a copy of that report which stated, inter alia:

> " Report on Fire Damage to Apartment Building
> situate at Lot #6 Block #4 Unit 3 in Bell Channel
> Bay Subdivision, Freeport, Grand Bahama
>
> In accordance with instructions from Mr. Gunter Risse of Freeport, Grand Bahama, the undersigned inspected the referenced property to ascertain the extent of damage caused by a fire at the premises.
>
> EXTENT OF DAMAGE
> The roof was completely destroyed. There is no sign of it. The interior of the building (every apartment) is burnt out, upstairs and downstairs. The exterior masonry walls though still standing are cracked and are functionally useless.
>
> CONCLUSION
> In my opinion this building was One Hundred percent (100%) destroyed by the fire. There is nothing to be salvaged from it."

25. Mr Ward, the Business Development Manager of Insurance Management (Bahamas) Limited ("Insurance Management"), Freeport office, who has worked for Insurance Management since 1987 stated that in 1992 he was a salesman with Insurance Management, which, at the time, was the exclusive broker of insurance for Sun Alliance (Bahamas) Limited.

26. Mr Ward recalled meeting with Mr Risse and the late Mr Wipf and discussing insurance for a building which the plaintiff had purchased. He said that Mr Risse had inquired about a fire policy for the existing building but because of its dilapidated condition he had advised Mr Risse that Insurance Management would not sell a "fire-only" policy on a vacant building; that having visited the site and seen the said building, he formed the opinion that its poor physical condition made it inappropriate for an "all-risks" policy inclusive of existing structure and he would, therefore, not have sold such a policy to the plaintiff.

27. He admitted having recommended the CAR policy as, he said, it was the type of insurance that would include the actual work being done as well as the material for the work and would have "protected such work against major perils such as hurricane, theft, lightening and fire."

28. Under cross examination, Mr Ward said the defendants rejected insuring the Kings Road property as a stand-alone building as it was unfit for general insurance because it was unoccupied – which is why he recommended the CAR policy. In the end, Mr Ward said, Mr Risse accepted his recommendation and the first CAR policy was issued for a period of six months.

29. Mr Ward confirmed that the first policy lapsed and Mr Risse sought a reinstatement thereof for a period of one year to avoid the policy lapsing while he was out of the country, as had, apparently, happened with the first policy. However, Mr Ward said, Mr Risse then represented to him that the value of the contract works was $700,000.00 instead of $400,000.00. He said that Mr Risse advised that he had not begun the renovations at that time but that he still planned to do so, intending to start that month - July 1992 - and that he intended to self-contract using a building crew that had effected renovations on another building which he owned.

30. Mr Ward denied having been told by Mr Risse that the sum of $400,000.00 represented what he had paid for the building. He insisted that he was told that $400,000.00 was the cost to refurbish the building "European style."

31. With respect to the subject policy, Mr Ward at paragraph 8 in his witness statement states:

> "The application for the renewal policy was completed on a day after my meeting with Mr. Risse, Mr. Wipf, and Irene von Anhalt. I recall that Mr. Risse did not complete this application on behalf of Scandia. Irene von Anhalt did so, accompanied by Mr. Wipf. On this application Scandia requested coverage from July, 1992 to July, 1993, and represented that the value of 'the Contractor Works' was B$700,000.00. Insurance Management accepted the application and issued a contactors all risk insurance policy #C92010910 to Scandia covering the period July 27, 1992 to July 26, 1993."

32. Mr Ward denied that Mr Risse had told him that the reason he wanted to increase the insured value to $700,000.00 was because of a conversation with one Mr Lightbourne and insisted that the reason given by Mr Risse for the increased value of the policy was the addition of a new third floor.

33. At paragraphs 9 and 10 of his witness statement he states:

> "I am aware that there was a fire at the Scandia building on about December 3, 1992. I attended at the building the day after the fire. With me at the site was Mr. Risse, Irene von Anhalt, David Reynolds (the then manager of Sun Alliance in Grand Bahama), and Joe Ret. Looking at the site, my impression was that renovations had not been commenced on the building.
>
> I did not investigate the claim which Scandia made following the fire. Salesmen customarily do not become involved with such investigations; however, I was aware that the claim was subsequently denied, and that the insurance premium was refunded to Scandia.
>
> I wish to say that during the meetings with Mr. Risse to discuss insurance coverage for the apartment building I encouraged him to discuss and refer the contracts which Insurance Management had proposed to his attorneys for the purpose of obtaining legal advice on them."

34. Under cross examination Mr Ward said that his impression that renovations had not been completed, even though the building had been destroyed by fire, was an "unsubstantiated gut feeling that nothing took place." He said that the building had not been burned all the way to the ground and he was looking for something different – the "European–style" structure – but there was nothing.

35. Mr Colin Jones, a Chartered Insurer and a Fellow of the Chartered Insurance Institute of London, England, said he understood that he was called as a witness to say what policy is normally issued to an erecting contractor. He said that the subject policy was typical of the type of insurance policy that is issued to contractors when they are erecting a building or carrying out alterations to an existing structure.

36. Under cross examination Mr Jones said he had no knowledge of the issuance of the subject policy and in response to a question by counsel for the defendants as to what he thought the words "Renovations to a 12-unit apartment building constructed of concrete blocks with cement tile roof" meant, Mr Jones said: "the policy would cover the renovations that were taking place on an apartment building".

37. Mr Peter Harvey Muscroft is the Operations Manager for RoyalStar Assurance Ltd ("RoyalStar Assurance"), a position he has held since 2003. Prior thereto, he was the Claims Manager of Insurance Management (Bahamas) Ltd from October 1981 to December 1991; the Assistant General Manager of Sun Alliance (Bahamas) Limited from January 1992 to 1998; and the Operations Manager of Royal & Sun Alliance (Bahamas) Ltd from 1998 to 2002.

38. Mr Muscroft's evidence is that following the fire on 3 December 1992, an investigation, which included work performed by adjusters, was made into the fire by Sun Alliance. Following the investigation, Sun Alliance declined the plaintiff's claim on the basis that the renovation work that was the subject of the policy had not started and as such there was no damage to the insured risk. As the insured work had not yet commenced, Sun Alliance felt it equitable to declare the policy void from inception and return the premium. That position was communicated to the plaintiff's then attorneys by the aforesaid letter dated 21 January 1993.

39. Mr Muscroft said that Sun Alliance, and thereafter RoyalStar Assurance, has remained of the position that the plaintiff's claim with respect to the CAR policy ought not be honoured as there was no 'contract for the works' or preliminaries therefor existing at the time of the fire, and at no time was Sun Alliance asked to insure the existing structure.

40. Under cross examination Mr Muscroft said that the plaintiff did not provide the adjuster with any details of works completed or copies of invoices and materials purchased; nor had the insurer received such information otherwise.

41. In response to counsel for the plaintiff "putting" to him: "your policy in plain English said you were insuring the building and the works on the building", Mr Muscroft responded, "the policy said we were insuring the contract works which was the works being done on the building."

42. In response to an inquiry by counsel for the defendant as to what he meant by "no risk run" Mr Muscroft said:

> "Well, insurance is provided on an exposure. I would liken the situation to someone who might be buying a new car and they take out an insurance policy, and for some reason the sale falls through. It would be unreasonable for the insurance company to keep the premium. We return the premium as no risk had taken place and that was the reason - that the contract work had not started but we had received premiums - but at the time of the loss it became apparent to the adjuster that no risk had taken place so we found it equitable to return the premium."

43. He defined the risk in this case as :

> "actual physical work including the cost of labour to repair, renovate and demolish the existing building."

44. In my view, the issues that arise for determination are as follows:"

1. Whether, upon a true construction of the CAR policy the said building was included in the coverage?

2. Whether the defendants are entitled to avoid the CAR policy because of the lack of a construction contract for the contract works?

3. Whether a risk was run under the CAR policy? And if so,

4. Is the plaintiff entitled to be indemnified by the defendants for the sum of $700,000.00?

45. During the course of his submissions, Mr Maynard indicated that the plaintiff's evidence was chiefly in response to the pleaded defence in which, he contends, the defendants sought to avoid the policy and return the premium paid by the plaintiff on the ground that there had been no materials purchased and no contract in force at the time of the fire.

46. Further, he contends that the defendants, by returning the premium paid by the plaintiff, were implying avoidance of the policy. However, in his submission, a contract of insurance can only be avoided where the assured in applying for the insurance made a material misrepresentation such that the insurer, had he known the facts, the truth of the situation, would not have taken the risk. For that submission he relies on the case of *Berger v Pollack [1973] 2 Lloyds Report* and points out that the defendants had not pleaded that any incorrect or untrue information had been given in negotiating the aforesaid policy.

47. Consequently, he submits, there is no legal basis for the defendants avoiding the policy and, he suggests, that is probably why the defendants appear to have abandoned that position and instead seek to give a meaning to the said policy that varies from the plain and simple language contained in the document.

48. Miss Adderley for the defendants submits that the case of *Berger v Pollock*[1] does not support the plaintiff's contention that the only reason that an insurer can avoid a policy is for misrepresentation as, she points out, it is a case in which the

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1 Ibid

issue of misrepresentation was raised and deals with how the Court can approach misrepresentation cases.

49. In any event, counsel submits, the essence of the defendants' case is that the subject policy is a CAR policy which covered the proposed renovations to the said building and at the time of the alleged loss, the subject matter of the insurance policy did not exist and therefore no claim could be made thereunder.

50. It is not disputed that the insurance policy purchased by the plaintiff from the defendants and now the subject of this action is, in fact, a CAR policy. It is also not disputed that such policy included fire coverage. Nor is it disputed that the property insured is "the contract works." However, what appears to be disputed is what is included in "the contract works."

51. Each side contends that the terms of the policy are clear and unambiguous and support their respective position.

52. Mr Maynard agrees that the property insured is the contract works and he says, the ordinary meaning of "works" is "operations of building or repair often treated as factory." In his submission, it is clear that the subject of the policy is the "building premises and the works thereon" and the "all risk" or all loss is assured up to $700,000.00. Further, as I understand his argument, if "temporary works" are covered under the policy, then the permanent building must be the subject of the contract,

53. The defendants, on the other hand, say it is clear that the "all risk" cover related to the "contract works" which consisted of the proposed renovations and refurbishing to the said building, as well as the materials used therefor.

54. Further, counsel for the defendants points out, and this was not denied by the plaintiff, that when the CAR policy was issued both the insured and the insurer, through their respective agents, Messrs Ward and Risse, appreciated that its purpose was for the renovations to the building. Indeed, Mr Risse when asked what, as best he could remember, the coverage was, he responded "renovation job; that was the main thing."

55. In construing the terms of the CAR policy, I am reminded that a policy of insurance is to be construed like any other contract. In the first place, it is to be construed from the terms used in it, which terms are themselves to be understood in their primary natural, ordinary and popular sense; that when presented with a conflict between the parties as to the meaning of the policy, the Court's function is to interpret what the parties have in fact said in their contract as comprised in the words they have used2. The challenge, of course, may be in ascertaining what the words mean. Further, it is not the Court's function, by a process of construction, to make for the parties a reasonable contract which they have not made for themselves. So, if the words are clear and unambiguous effect must be given to them, however unreasonable the result may be3.

56. Further, where it is plain that the parties were intending to effect a contract of insurance or an insurance of a particular kind, the Court will lean against a construction which would defeat this intention or make it substantially ineffective

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2 Colinvaux's Law of Insurance, 7th edition at page 49

3 Halsbury Laws of England 4th ed. Volume 25, paragraph 395

and in cases of ambiguity the leaning will be in favor of the interpretation which tends to give business efficacy to the contract. Regard will also be had to the known or proven customs and usages and the phraseology prevalent, either in the insurance business or the assured's trade, those forming part of the context in which the particular words are used.4

57. I am also mindful that in construing the contract, although the Court may look at the circumstances surrounding the making thereof in order to see what was the objective that the parties had in mind, and a prior agreement is admissible as a guide to construction, the subjective views of the parties as to what they thought they had achieved is inadmissible.

58. In this case, the contract for the subject policy is labeled "Contractors' Indemnity Insurance (Overseas) Policy" and includes a warning to "read this policy carefully and see that it meets your requirements". All the defendants' witnesses say, and I accept, that it is a standard form of CAR policy issued to builders/contractors who are erecting or renovating buildings.

59. I agree with counsel on both sides that the terms of the contract of insurance are clear. In my view, the policy clearly identifies the property insured as "the contract works". Further, the contract is described as "renovations to a 12 unit apartment building..." and I understand that to mean, even without the evidence of the defendants' witnesses, whatever works were contemplated by the proposed renovations, inclusive of materials therefor. It seems to me that if it was intended that the building also be covered, the contract or the property insured would have been described as "the building and renovations thereto"; but it did not.

60. As for Mr Maynard's argument that if "temporary works" were covered under the policy, then the permanent building must be the subject of the contract, it appears to me that the opposite is true.

61. The policy provides that once any part of the work had been completed and turned over to the plaintiff as owner, it would no longer be considered part of the contract works. In that regard, Miss Adderley' submits, and I accept, that the reference to the issuance of a certificate of completion in clause 9 of the said policy necessarily implies that the term "permanent works" refers to work that is being constructed and not to the structure which existed prior to the issuance of the insurance policy.

62. To my mind, the fact that those permanent works are expressly excepted from coverage, supports the defendants' contention that the existing building was not part of the contract works and therefore not covered under the CAR policy.

63. I find further support for the defendants' position from the case of *Rowlinson Construction Ltd v insurance Co of North America (UK) Ltd5* as well as the following excerpt from the learned authors of Insurance of Commercial Risks: Law and Practice at pages 275-276:

> "'Works temporary or permanent' must be construed by having regard to what the insured contractor was actually going to do under the contract. Permanent works means the construction

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4 Halsbury Laws of England 4th ed. Volume 25, paragraph 399

5 *(1981) 1 Lloyd's Rep 332*

> works to be permanently achieved under the building contract i.e. the final product, for example, a three storey building. In contradistinction, temporary works are those works which do not form part of the finished building, but have to be carried out to enable construction of the building to take place...Thus if a particular existing structure on the construction site is not going to be rebuilt, but merely have its appearance improved that structure will not constitute part of the works; or similarly, where a contractor is building a new wing on a mansion, the existing mansion-house is not part of the works, even if the contractor had agreed to give that mansion-house a coat of paint."6 (Emphasis mine).

64. Further, I agree with counsel for the defendants and the defendants' witnesses that the situation has, no doubt, been complicated by the fact that the plaintiff as owner of the said building, having decided to self-contract the proposed renovations, had two different insurable interests: one in the existing structure as owner thereof; another in the contract works as owner/self-contractor. As pointed out by the adjusters and counsel for the defendants, ordinarily, a CAR policy is issued to a contractor hired to perform work at premises owned by another and in such cases it is easy to identify the aforesaid separate interests.

65. No authority directly on point was provided by either side. Nor was I able to find any. However, the literature seems clear that where renovations are to be made to an existing structure, it is recommended that all insurable interests are covered, in the contract works as well as in the existing structure. In this case, that would have meant the plaintiff, in addition to the CAR policy for the contract works, taking out some form of property insurance on the then existing structure and although the evidence is that Mr Risse had sought "storm and fire" coverage, the evidence also is that the defendants refused to provide such coverage and, in the end, Mr Risse, on behalf of the plaintiff, accepted the defendants' recommendation for a CAR policy.

66. It is obvious that Mr Risse, and by extension the plaintiff, believed that the CAR policy was sufficient to cover the plaintiff's present indemnity claim, that is that the coverage extended to the said building. However, no matter how genuine his belief, my task is simply to construe the terms of the policy as issued and in my judgment, on a proper construction of the subject CAR policy, the contract works consisted only of the proposed renovations to the aforesaid building and did not include coverage on the existing structure.

67. The defendants admit declining the plaintiff's claim and they say it was because firstly, coverage of the building was not included in the CAR policy and secondly, because the proposed renovations had not begun. Indeed, the defendants allege that at the time the building was destroyed there was no construction contract in force, no plans in existence and no materials had been purchased with respect to the proposed renovations. Therefore, they say, as the subject of the CAR policy, the contract works, was non-existent, no liability accrued under the terms thereof and, accordingly, the policy was void from its inception.

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6 Ibid

68. In counsel for the defendants' submission, a construction contract is a condition precedent to the validity of the CAR policy as it is the subject matter thereof. Counsel points out further that the plaintiff had produced no evidence that it had obtained permission from the Grand Bahama Port Authority Limited to undertake the proposed renovations, which she submits is prima facie evidence that no renovations had in fact begun and therefore no risk had been run, with the result that the plaintiff could not recover under the CAR policy but was only entitled to the return of its premium paid therefor.

69. For that proposition, Miss Adderley relies on the case of *Tyrie v Fletcher*[7] in which Lord Mansfield said:

> "I take it, there are two general rules established, applicable to this question: the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money is put into his hands, fails and therefore he ought to return it."

70. The plaintiff produced no written contract for the proposed renovations and Mr Risse admits that the plaintiff did not obtain a permit from the Grand Bahama Port Authority, Limited. His evidence is that he was advised by an architect that a permit was required for renovations costing more than $5,000.00 and since, at the time of the fire, he had only paid $4,300.00 to Mr Pinder, he did not think he needed a permit; he says he intended to obtain a permit once the renovations resumed.

71. Mr Maynard says that plans for the said building were on file at the Grand Bahama Port Authority Limited and the plaintiff only proposed to renovate; therefore, the defendants' assertion that there were no plans in existence was incorrect. By no plans in existence, I understood the defendants to mean plans specific to the proposed renovations, and there were none.

72. In any event, Mr Maynard argues, the defendants had not pleaded that the insurance contract provided that the insurer would not be liable for any loss until actual renovations had begun, although he pointed out that the evidence of both Messrs Risse and Pinder was that not only had renovations begun, but that two apartments had already been renovated. On the other hand, Miss Adderley pointed out that the plaintiff did not plead that renovations had begun.

73. The application form for the said policy shows the "contractor" as "self-contracting/Gunther Risse" and the evidence is that Mr Risse told Mr Ward that he intended to oversee the renovations himself, using a crew who had done renovation work on another building that he owned.

74. There is no evidence that Mr Ward or anyone on behalf of the defendants requested sight of a contract for the proposed renovations or indicated to the

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7 (1777) 2 COWP 666 at 668

plaintiff or its principals that a contract was required in order for the policy to become effective. The insurers were aware that the plaintiff intended to self-contract and if, as counsel for the defendants submits, a contract for the proposed renovations was a prerequisite for the CAR policy, that information ought to have been made known to the plaintiff prior to the defendants issuing the same. There is no evidence of that having been done, nor indeed, is it contended that it was and Mr Ward was sufficiently persuaded by Mr Risse that the proposed renovations would have begun in July 1992 and would have included a European style structure as well as a third floor to have accepted the risk and issued the said policy.

75. In those circumstances, it seems to me that all the plaintiff had to do was commence the proposed renovations within the insurance period for the policy to become effective and for risk to attach or run.

76. Both Messrs Risse and Pinder said renovations begun in June or July 1992. Mr Risse's evidence, which was confirmed by Mr Pinder, and which I accept, is that he had engaged the services of Mr Pinder and his crew as well as the services of a plumber and an electrician, all of whom had done some work on the building and that at the time the fire occurred and renovations to two of the twelve units had been completed, and, the evidence is that although no materials were being stored on the contract site at the time of the fire, materials were purchased as needed and excess materials were stored elsewhere because materials previously stored on the premises had been stolen.

77. I am, therefore, unable in those circumstances, to find that the failure or neglect of the plaintiff to produce a construction contract to the defendants entitles the defendants to avoid the CAR policy or that such failure renders the CAR policy void *ab initio*. Consequently I find that the plaintiff is entitled to be indemnified under the said CAR policy for the loss to the insured property as a result of the aforesaid fire at the contract site on or about 3 December 1992.

78. The plaintiff contends that as the said building was completely destroyed, its loss was total and it is, therefore, entitled to be indemnified for the full value of the CAR policy, that is, $700,000.00, less the agreed deductible.

79. On the other hand, counsel for the defendants submits, correctly in my view, that the plaintiff is only entitled to be indemnified for its actual loss to the insured property. See *Cockburn CJ in Chapman v Pole PO8,* and in light of my findings that the insured property consisted of the proposed renovations and not the building, the plaintiff, in my judgment, is entitled to be indemnified only for the loss related to those renovations, which I accept would have included the cost of materials and labour to repair and renovate the existing building.

80. In that regard, counsel for the defendants points out that despite requests by the defendants therefor, the plaintiff has failed to produce documentary evidence to prove its alleged loss. Consequently, counsel for the defendants submits that the plaintiff has not only failed to prove that it has suffered any loss with respect to the insured property, but has also failed to particularize the loss which it alleges it suffered.

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8 *(1870) 22 TLR 306 at 307*

81. Perhaps the plaintiff's failure to quantify its loss or produce invoices for materials, receipts, or other documentary evidence thereof was due to the fact that the plaintiff's position, as I understood its counsel's submission, has been that because the policy was an all-risk policy it was sufficient for the plaintiff merely to prove that the permanent building was totally destroyed in order for the plaintiff to obtain reimbursement of the full amount of the insurance cover. For that proposition, counsel relied on the dicta of Lord Sumner in the case of *British Foreign Marine Insurance Co. v Gaunt*[9].

82. However, as I understand Lord Sumner's comments, when a loss occurs to the insured property, it is sufficient for the insured to prove that the damage was caused by "some casualty insured against" and not necessarily how that casualty came about. For example, in this case, it would be enough for the plaintiff to prove that the insured property was destroyed by fire without necessarily proving how the fire was caused. Indeed, Lord Birkenhead L.C., in that case, at page 47 opined:

> "We are, of course, to give effect to the rule that the plaintiff must establish his case, that he must show that the loss comes within the terms of his policy; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss."

83. In this case, it is not disputed that the damage was caused by fire or that fire was included in the CAR policy as a risk insured against. However, whether the sum of $700,000.00 represented the value of the existing structure before renovations (as I understood Mr Risse's evidence) or the value of the contract works once completed (according to Mr Ward's testimony), the fact is, that the indemnity relates only to the actual loss suffered by the plaintiff to the insured property. It is, therefore, not enough simply for the plaintiff to say "I have a loss", even if it is complete destruction of the insured property, without firstly, proving that the loss occurred and secondly, quantifying such loss by credible evidence.

84. I find support for that position in the following dicta of Cockburn, CJ in *Chapman v Pole,* which I gratefully adopt in its entirety:

> ....inasmuch as the contract of insurance is simply a contract of indemnity he can only recover to the extent of the real value of the goods he has actually lost. You must not run away with the notion that a policy of insurance entitles a man to recover according to the amount represented as insured by the premiums paid. It is essentially a contract of indemnity. If a man chooses to insure goods worth 100*l* at a rate of premium which represents a value of 500*l*, he can only recover the real and actual value of the goods. The law will not allow of gambling in the form of insurance. Insurance companies are subject to fraud enough as it is and if persons were allowed to insure goods to a greater amount than the real value it is obvious that a door would be open to fraud and

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9 *(1921) 2 A.C. 41, at page 58*

> wickedness of the most abominable description. Therefore in all cases the only question – supposing the claim to be honest is, -- what was the real and actual value of the goods destroyed.

85. So, even if, and I have held that it does not, the existing structure were covered under the CAR policy, it would still be necessary for the plaintiff to prove and quantify its loss. In that regard, I agree with counsel for the defendants that the plaintiff has produced no evidence to show the value of the building at the effective dates of either policy or at the date of the fire that would justify the plaintiff being indemnified for the sum of $700,000.00.

86. According to Mr Risse, he and Ms von Anhalt purchased the said building in 1990 or 1991 for $400,000.00. However, the copy conveyance included in the plaintiff's bundle of documents which, presumably, evidences the plaintiff's acquisition and ownership of the contract site is with respect to lots 4 and 6 Kings Road; it is dated 1970 and shows a consideration of $1.00, and the only "evidence" regarding the $700,000.00 value was Mr Risse's testimony that he was told by one Mr Lightbourne that the building was worth that sum.

87. I re-iterate the comments of Cockburn, J.: "If a man chooses to insure goods worth 100*l* at a rate of premium which represents a value of 500*l*, he can only recover the real and actual value of the goods. The law will not allow of gambling in the form of insurance." Consequently, I reject counsel for the plaintiffs submission that it is merely sufficient for the plaintiff to prove a loss and then call upon the insurer to pay the face value of the insurance, without having to quantify such loss.

88. In that regard, I note here that Mr Risse, under cross examination when he was asked whether he had discussed with one of the defendant's agents whether he needed a building permit, replied: *"Yes, I went to the architect, to Mr Moss, and Mr Moss said what did you pay? And I said some $4,300.00 to Mr Pinder. And he said when you go over $5,000.00 and when you extend the next apartments you better ask for a permit from the Port. But that was not in my mind. I had to do that before we extend the jobs."*

89. So it would seem from that evidence that at the date of the fire the plaintiff had expended less than $5,000.00 with respect to the said renovations.

90. Nevertheless, as I understand the plaintiff's claim, the plaintiff seeks to be indemnified in the sum of $700,000.00, being the face value of the CAR policy, on the basis that the contract site, that is the said building, was covered under the said policy.

91. However, in the light of my finding that the building was not covered under the CAR policy, and that the plaintiff is entitled to be indemnified only for such loss to the insured property as it could prove and quantify, in my judgment, the plaintiff has failed to establish its claim for indemnity against the defendant for the sum of $700,000.00.

92. Accordingly, I dismiss the plaintiff's claim against the defendants with costs to be paid by the plaintiff to the defendants, such costs to be taxed unless agreed.

Delivered the 29th day of October 2010

Estelle G. Gray Evans, Justice