

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Division**

**2017/CLE/gen/00717**

**BETWEEN**

**BOLINGBROKE LIMITED**

**Plaintiff**

**AND**

**SUMMIT INSURANCE LIMITED**

**First Defendant**

**AND**

**INSURANCE MANAGEMENT (BAHAMAS) LIMITED**

**Second Defendant**

**AND**

**ISLAND HERITAGE INSURANCE CO. LTD.**

**Third Defendant**

**Before Hon. Chief Justice Ian R Winder**

**Appearances: Vanessa Smith with Miguel Darling for the Plaintiff  
Camille Cleare with Viola Major for the First and Third  
Defendants**

**12 and 13 October 2021, 29 March 2022, 8 April 2022, 6 and 8 May 2022**

**JUDGMENT**

## **WINDER, CJ**

This is essentially the assessment of damages with respect to an insurance claim brought against the First and Third Defendants (the Defendants) by its insured, the Plaintiff (Bolingbroke). The Defendants, by judgment entered on 28 September 2018, have admitted liability for the claim of Bolingbroke.

### **Background**

1. On the 16th April 2016, Bolingbroke entered into the Policy with the Defendants which covered its property known as Jacaranda ("the Property"). Jacaranda is situated at Christie Terrace, Lyford Cay. The Policy was a home policy and covered the Property for any and all damage sustained to it including hurricane damage.
2. The sum insured for the Buildings under Section 1 of the Policy was \$5,300,000 ("the Buildings") which comprised of the Main House insured for \$4,500,000 ("the Main House"), the Guest House insured for \$600,000 ("the Guest House"), and the Play House insured for \$200,000 ("the Play House").
3. The sum insured for Contents under Section 2 of the Policy was \$1,600,000 ("the Contents"), which comprised of the contents of the Main House insured for \$1,525,000 ("the Main House Contents"). The contents of the Guest House insured for \$75,000 ("the Guest House Contents"). There was a fixed 10% deductible of the insured values (i.e. \$450,000 on the Main House and \$152,500 on the Main House Contents).
4. In or around October 2016, Hurricane Matthew struck The Bahamas causing significant damage to the Property. Bolingbroke subsequently made a claim under the Policy for the Buildings ("the Buildings Claim") and the Contents ("the Contents Claim") (collectively referred to as "the Claim").

5. Prior to the hurricane, Bolingbroke had been engaged by SMG to conduct certain renovation at the Property. The works had not begun prior to the impact of Hurricane Matthew.
6. Bolingbroke pursues only the claim for an assessment of the value of the Claim and does not pursue any of the other claims against the Policy.
7. The Defendants make assertions that there is no proper cause of action and that the exercise here is not properly one for an assessment of damages. I did not find merit in the assertions having regard to the judgment already entered. The Defendants have admitted liability and a Judgment on Admissions was pronounced on the 28th September, 2018 calling for an assessment of damages.
8. The Defendants were well aware that the exercise to be conducted is one of an assessment. At paragraph 3 of the Defendants' Supplemental Statement of Issues, they state:
  - 3 "By way of Judgment on Admissions, the Plaintiff has also elected to pursue an assessment of the value of the claim under the Policy, which expands the fourth category of issues as follows: Valuation of Building Claim... Valuation of Contents Claim"
9. At trial Bolingbroke called Nicole Nickels, Peter McLeod, Harold Goodman, Nicholas Croan and Neil Cadman as witnesses in its case. The Defendants called Godfrey Bethell, John Michael Clarke and Alfred Joseph, as witnesses in their case.
10. I found the expert witnesses for both Bolingbroke and the Defendants, to be truthful professionals all independently minded and honestly believing their evidence to be accurate to the best of their knowledge and skill.
11. The issues to be determined by the Court are the following:
  - (1) What is the proper assessment of the value of the Claim under the Policy?
  - (2) Is any part of the Claim made up of irrecoverable betterment?
  - (3) Was the Property underinsured?

(4) Who has the burden of proof?

The Value of the Claim

12. Bolingbroke submits that the total value of the Claim is made up as follows:
- 1) Buildings Claim (\$1,021,735.26 less deductible of \$450,000) \$571,735.26
  - 2) Contents Claim is (\$441,273.19 less deductible of \$152,500.00)  
\$288,773.19
- \$860,508.45

*Buildings Claim*

13. Bolingbroke relies on its incurred costs of the repairs as the measure of the damage. They say that the Buildings Claim was \$1,021,735.26 made up as follows:
- (1) SMG Construction ("SMG") payments certified by the architect,  
inclusive of Value Added Tax \$ 935,762.78
  - (2) The Architect's fees, inclusive of Value Added Tax \$ 11,812.48
  - (3) Bolingbroke's direct purchases \$ 74,160.00
- \$1,021,735.26

14. Bolingbroke says that this sum of \$1,021,735.26 is confirmed by the DHP Associates Chartered Quantity Surveyors and Project Managers ("DHP") valuations. Peter McLeod, the principal of DHP confirms that the expenditure to repair the property was reasonably incurred. The DHP valuation assess the property claim at \$1,016,000.00

15. The Defendants complain, that the pleadings did not clearly outline how Bolingbroke was seeking to lay out its claim and that the prayer for relief and the sums claim therein did not match. There is some merit in that the claim in the prayer for relief sought, inter alia:

- 1) A true and correct accounting of fees due under the Policy (HOM10-159951-U) and/or an indemnity under the same to compensate the Plaintiff for damage sustained to the property known as Jacaranda as set out in the Plaintiff's letter dated 21 May 2017...



17. There is indeed a variance with these numbers and the approach to the valuation identified in the Amended Statement of Claim, as compared to the approach at trial. Bolingbroke claims that the details of its claim were as set out in a Scott's Schedule. This Scott's Schedule had been the subject of a request for further and better particulars issued by the Defendant seeking clarification as to the claim. Although it has featured in the action for some time, it was not an agreed document as the Defendant would not agree its admissibility. Bolingbrook maintains its relevance.

18. In Bolingbroke's *Statement of Facts and Issues*, it asserted that its scheduled and documented loss on the *property* claim is US\$1,021,735.34 and its loss on the content claim is US\$441,273.19. This was an issue a year prior to the trial of the action on 16 March 2020. Coincidentally the sums now claimed are lower than the sums referenced in the Amended Statement of Claim. Bolingbroke is entitled to abandon claims but that may have cost implications.

19. The Defendants make the following specific complaints as to the Buildings Claim of Bolingbroke:

- 1) McLeod of DHP agreed that the repair cost that he valued for the roof was 40% of the main house roof (90% was a mistake in the Construction Repair Estimate dated June 2020) and thus he and the Defendant's expert, Mr. John Michael Clarke each valued the cost of repairs for the same scope at 40% and 30% respectively for actual damage to the roof.
- 2) The inclusion of Ice and Watershield was an upgrade, a fact which Mr McLeod accepted. They say that under the Policy, the roof was insured in its current form and Insurers ought not to be responsible for the extra cost to bring it up to current standard. John Michael Clarke also points out that the roof upgrade was done not only to the damaged southern and western faces of the roof but the eastern face, which was not mentioned in the damage report by the Contractor. Upgrading the roof from sub-standard to standard form for the current period. They rely on the definition of Full Rebuilding Cost in the Policy which states as follows:

*The full cost of rebuilding all the Buildings in the same form, size, style and condition as when new including the cost of complying with Local Authority and other statutory requirements, Fees and Associated costs.*

- 3) McLeod agreed in cross examination that the \$126,734 charged by SMG Change Order #3 for Roll Down Shutters and allegedly certified by the Architect, for which he valued at \$71,000 plus overhead cost, ought not to be included in the amount claimed for the Main House.
- 4) Mold Remediation was charged by SMG in Change Order #2 in the amount of \$39,882.93. McLeod agreed that the substantial amount of this charge was for the staff quarters underground, which were under construction prior to the Hurricane, and was not within the scope of hurricane damage. He says he did not include this amount in his Valuation Estimate and, it should not be included in hurricane repairs.
- 5) The amount of \$90,000 for the cost of repair to the Main House Driveway, found in SMG Change Order #17. The Plaintiff's Expert, Peter McLeod, in his evidence and on cross examination, confirmed that he agreed with Mr. John Michael Clarke and that this item was removed from his valuation of the total cost of repairs. He said that it was not certified by the Architect and when he did his inspection, there wasn't any damage.
- 6) The Calypso Landscapers Invoice 1794 is claimed in the amount of \$10,938 however the work done was mostly removal of *trees and landscaping and not covered by the policy. The Defendants proposed a contribution of \$1620.00 plus VAT = \$1,741.50.*
- 7) The amount of \$4,081 was claimed for an invoice from Big Ass Fans. There is no indication as to how these fans ought to be apportioned between the two separate items (Main House or Pool House) on the Policy Schedule so that the applicable deductibles can apply.

20. The Defendants rely on the reports of the Veritas Consultants Limited ("Veritas") and say that the Buildings Claims is estimated to be \$645,644.93.

21. Bolingbroke complains as to the accuracy of the Veritas estimates on the basis that:

- 1) The reports was prepared by Mr. John Michael Clarke, the President and Managing Director of Veritas who did not visit the property. Clarke's associate, Alfred Joseph, who did visit the Property, prepared the first draft of the Veritas Report based on his contemporaneous notes produced when he visited the Property in January 2017.
- 2) Veritas produced an initial report dated 18 January 2017 which valued the loss and damage at \$287,576.66. Subsequently Veritas revised their estimate upwards to \$348,829.61 based upon a consultation with the Defendants' loss adjuster, AMEDEO Adjusting Ltd. ("AMEDEO"). At the request of the Defendants' counsel, Veritas prepared the Supplemental Construction Repair Cost dated the 20th October, 2017, which expressly acknowledges that the Veritas Report's value of the construction repairs was low and that the standard procedure of agreeing a scope of work was waived and instruction was given by SMG to commence the construction repairs.
- 3) Veritas does not conduct damage assessments on homes in Lyford Cay annually, nor do they have Lyford Cay projects every year, Mr. McLeod and DHP who are regularly involved with high-specification construction in Lyford Cay, Albany, and Old Fort Bay.
- 4) Alfred Joseph's concession under cross examination, that "given Veritas came in afterward and [were] not [privy] to a lot of information ... possibly there were some things we may not have captured..."
- 5) Amedeo, the Defendants loss adjuster, in its File Note dated January 2017 presented the view that after discussions with Bolingbroke, Veritas may not have adequately captured the quality of the construction items; therefore, the value of construction repairs as determined by Veritas was low. Nick Croan [of Amedeo] suggested that 'building repair costs would be validated by way of a *scope of works* being drawn up and agreed by the insured's appointed architect, Kevin Sweeting, and Veritas appointed by insurer'. [Amedeo] conceded that this procedure was not followed in this instance, and that the instruction was given to SMG Construction Company to proceed notwithstanding no *scope of work* had been prepared by the Architect and agreed by the Insurers.



- 6) The final Veritas estimate does not take into account the Plaintiff's Direct Purchases such as the replacement cost of furnishings, fitting, and effects or for contingencies. Under cross examination Mr. Clarke indicated that the absence of any contingencies might have been an oversight as generally Veritas does allow for a contingency. The DHP scope included patching around the replacement security panels. No scope included by Veritas.
- 7) The Veritas Report did not include the replacement Gazebo which was damaged and included in the DHP Report. This is a significant value line item (\$25,000) which should be deducted from the DHP Estimate if this was a cost not incurred.
- 8) The DHP estimate included approximately 90% replacement of the shingles, waterproof membrane and associated roof boarding. The Veritas estimate includes approximately 35% with no allowance for replacement roof boarding. The Veritas estimate excludes the scope associated with gutter repairs.
- 9) The Veritas estimate excludes a replacement wall-paper and specialist wall coverings. The internal masonry walls were also re-skimmed as the finish delaminated from the wall. Generally, the painting unit rated by Veritas is low based on comparable pricing.
- 10) The Veritas report excluded the specialist items for which DHP were provided quotes for during their inspection and report preparation. The shutter costs are included in the Veritas Estimate section 8 although the cost included \$58,250 is significantly less than the quote received \$126,734. Other specialist quote items excluded from the Veritas scope are specialist mould works: fireplace repairs.
- 11) The Veritas report excluded the specialist IT and Security Camera works totalling \$40,225 based on quotes provided to DHP by the Owner.
- 12) The Veritas Supplemental Estimate in the amount of \$645,644.93 is based on a review of the payment requests submitted by the contractor; in lieu of an update to their previous measured scope and pricing estimate methodology.
- 13) The Veritas Supplemental Estimate also does not capture the material cost associated with the wallpaper and carpet replacements as these were purchased directly by the Owner; not SMG. Those costs total \$105,713.

22. Bolingbroke says that:

If we take the Veritas Supplemental Estimate value and add for the following scope omissions the variance between the DHP Estimate and the Veritas Estimate reduces considerably as noted below:

Veritas Supplemental Estimate	\$645,645
Fireplace	\$ 13,120
Camera System as per SMGCO14	\$ 28,136
IT works as per SMG CO15	\$ 13,548
Owner Supplied Carpet/Wallpaper	\$105,713
Total	\$806,162
DHP ex Contingency	\$976,330...

23. I accept this submission that the variance between Veritas and the DHP estimate was not that significant and that Veritas may not have had the benefit of the vantage offered to DHP.

#### Contents Claim

24. Bolingbroke makes a claim for Contents loss in the amount of \$441,273.19. (See Bolingbroke's Skeleton and the Scott's schedule)

25. The Defendants say there is absolutely no pleaded claim specifically for contents loss, either from the Main House or the Guest House. They say that the letter referenced in the Prayer falls below the lowest standard of pleading, and that then we are left to assume that Matthew Carters Interiors 388,000.00, Bert McKinney Repairs 5,100, Sleep on the Best beds 9,296.00 and Direct TV Dish 3,014.00, which totals \$405,410.00, makes up a contents claim of sorts but, there is no allocation between Main House and Guest House. There is also no itemization of the contents and their value, either the original cost or the replacement cost.

26. The Defendants also complain that not only is there no particularization, there is also no evidence of what content items were damaged. They accepted that there was a lot of damaged furniture from the photographs in evidence. They complain that Mr. Nick Croan made numerous requests for an inventory list of contents to show which items

were damaged so that they could be identified, if necessary, by photographs, valued against their original invoice or replacement invoice and tallied. Nicole Nickels, they say, confirmed in cross examination that invoices from Matthew Carter Interiors, pre-date the Hurricane and total some \$852,000.00, but are not marked in any way to indicate which items were damaged beyond repair or repairable. There are also no allocations between Main House and Guest House on these invoices.

27. They also complain that there is no direct evidence from anyone from Bolingbroke to say who determined which items of contents were damaged, who inspected them, for example whether the direct TV was not working or any of the furniture was damaged beyond repair or how it was determined that Bert McKinney could repair seven (7) items.

28. There is no correlation between the invoices from Matthew Carter Interiors in 2017 etc. to what items were replaced or for which house. Nickels also confirmed that the 2017 Matthew Carter Interiors invoices total are a combination of contents and building items, such as interior carpet, wall paint and wall coverings, tiles etc. There is therefore no way of separating invoices allegedly spent for replacement of contents. The reference is made to a portion of the cross examination of Nicholls:

*Q. Okay. What is the basis of your contents – how is the court to value items to say whether there were – or how much these cost to tally up the contents claimed? Is there a document for that?*

*A. I mean I think you have to defer to the expert and interior decorator and his contents inventory and –*

*Q. Okay. So, you know which items were either replaced or repaired?*

*A. It's a generic payment, probably can tell based off picture and description, but I cannot say for sure.*

*Q. If you look at volume three tab three.*

*A. Yes.*

*Q. You see that's a letter from Michael Scott. And on the second page it says Matthew Carter Interiors 388 thousand?*

*A. Yes.*

*Q. So, would that be the total value of the contents claim for the main house for Matthew Carter items?*

*A. So I would have to imagine that was at that point in time, which was May of 2017. Because earlier I think that said around \$400. So that sounds a little bit more accurate as himself might have tripled it."*

29. I accept the submission of the Defendants as to the insufficiency of the contents claim, both from a pleading perspective and from an inability to determine what was in fact lost as a result of the hurricane. Whilst Bolingbroke certainly suffered damage to their contents, I am in no position to determine what that loss is, on the evidence. In the circumstances I am unable to award any loss to the Plaintiff under this head.

Is any part of the Claim made up of irrecoverable betterment?

29. Bolingbroke argues that the Buildings Claim does not include any expenditure for any betterment to the Property, specifically to the roof of the Main House. They assert that at the time the Hurricane struck, the Roof was fitted with ice and water shield and that the Roof, as a result of the Hurricane, was significantly damaged beyond patching, and 40% of the roof needed to be repaired as a result. SMG Change Order 1 reflects the cost of repairing 40% of the Roof in the amount of \$123,000.00.

30. They rely on an extract from the learned authors of *Colinvaux & Merkin's Insurance Contract Law* at paragraph C-0160:38 analysing the leading case of *Endurance Corporate Capital Ltd.* which identifies the three forms of betterment :

"... On this analysis, three situations have to be distinguished: (a) where the assured chose to make improvements at extra cost; (b) where the rebuilding incidentally and unavoidably resulted in improvements; and (c) where the assured derived real pecuniary advantage from reinstatement... In situation (b), the insurers are required to pay the full cost without deduction for betterment. Thus if the assured's machine is damaged and can be replaced only with a new one because a machine equivalent to that owned by the assured could not be found, there was no betterment."

Bolingbroke submits that it's valuation of the Buildings Claim represents only the total expenditure incurred by the Plaintiff to return the Property to the state it was prior to the Hurricane exclusive of the Renovations. They say further that if the Defendants establish that there was any form of betterment, it is of the kind detailed in situation (b) above where the insurers are required to pay the full cost without deduction for betterment. The addition of plywood, framing, and ice and water shield to the roof cannot be properly classified as an upgrade but reflects what is now considered to be standard practice. To bring the Roof up to standard practice would have only resulted in a difference of \$7,000 which they say is *de minimis*.

31. The Defendants reject the assertion that there has not been any betterment. They say, and I agree, that there has been an upgrade. I accept that, on the evidence, there was no ice and water shield on the roof prior to the Hurricane.

#### Underinsurance

32. It is accepted that the Policy contains a pro-rata Condition of Average that may reduce the amount of loss payable under Sections 1 and 2 of the Policy (“the Condition of Average”) if at the time of the damage the sum insured is less than 90% of the full rebuilding cost. The Defendants assert that the Main House is underinsured and have accepted that they bear the burden of proof in relation to this assertion. The only issue for resolution is the determination of true value of the Jacaranda.

33. The sum insured for the Buildings under Section 1 of the Policy was \$5,300,000 which comprised of: (1) the Main House insured for \$4,500,000; (2) the Guest House insured for \$600,000; and (3) the Play House insured for \$200,000.00. There are three valuations for consideration:

- (1) Appraisal of Robbin Brownrigg of Bahamas Realty dated 23 March 2016 in the amount of \$9,811,017;
- (2) Appraisal of Wilshire Bethel dated 31 October 2016 in the amount of \$5,990,560.00
- (3) Valuation of Peter McLeod of DHP dated 14 December 2016 in the amount of \$6,735,731.00

34. Bolingbroke argues that the proper value of the reconstruction cost of the Main House as per the DHP Construction Cost Estimate is \$4,685,256.00 (\$4,515,906.00 – Main House value plus \$169,350.00. They seek to exclude the value of the Main House Hardscapes in seeking to support a claim that the Main House was not underinsured. They also argue that the Defendants have not satisfied their burden of proof.

35. Bolingbroke says that the Condition of Average should not operate to reduce the net amount to be paid on the Buildings Claim. Their fall-back position is that the DHP Construction Cost Estimates' reproduction cost of the Main House inclusive of 79% of

the General Conditions (\$5,032,856.00) most accurately captures the replacement cost of the Main House for the purposes of calculating the Condition of Average.

36. I did not accept this submission. I preferred the evidence of Godfrey Bethel and his analysis of the three appraisals. Bethel's evidence considered each of the appraisals, extracting the portions which were inapplicable to the valuation, such as the Pool house and depreciation. He gave an average of the three appraisals of the Main House to come to a value of \$7,234,000.

37. I accept this as the value of the Main House and reject the submissions of Bolingbroke to the contrary.

*Conclusion*

38. In the circumstances therefore, the value of Bolingbroke's assessed claim (without deduction for underinsurance is as follows:

1) Buildings Claim (\$1,016,000.00 less deductible of \$450,000)	\$571,735.26
2) Contents Claim (unproven)	<u>\$-----</u>
	\$566,000.00

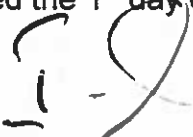
39. Taking into account the underinsurance, the true value of the claim is as follows:

$$\frac{4,500,000}{7,234,000} = 0.622 \quad \times \quad 566,000 = \$352,052$$

40. Judgment is therefore given for Bolingbroke in the amount of \$352,052.

41. I will hear the parties by way of submissions, within 28 days, as to the proper order to be made for costs in the action.

Dated the 1<sup>st</sup> day of March 2023



Sir Ian R. Winder

Chief Justice