Privy Council Appeal No 61 of 2004

Nasser Diab *Appellant*

v.

Regent Insurance Company Ltd *Respondent*

FROM

THE COURT OF APPEAL OF BELIZE

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 19th June 2006

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Present at the hearing:-

Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell
Sir Martin Nourse

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*[Delivered by **Lord Scott of Foscote**]*

1. Mr Nasser Diab, the appellant, is, or rather was, the owner of commercial premises at 15 Queen Street, Belize. In his evidence at trial he described the business he carried on from the premises as "general business electronic, general clothing textiles, materials, shoes, watches, some electronics". The premises and their contents were insured against fire damage for the period 1 May 1996 to 1 May 1997 under a policy dated 1 May 1996 ('the Policy') taken out by Mr Diab with Regent

Insurance Co. Ltd ('Regent'), the respondent in this appeal. The limit of the cover was expressed in the Policy to be $480,000.

2. The premises and their contents were destroyed by fire on the night of 26/27 April 1997. By letter to Regent dated 2 June 1997 Mr Diab's solicitors, Musa & Balderamos, said that they had Mr Diab's instructions "to write to you in connection with the claim made by him in connection with the 26th April 1997 fire at his Oriental Store at No 15 Queen Street, Belize". $480,000 was claimed. This letter constituted the first written intimation of a claim that Regent had received from Mr Diab. Whether Mr Diab had earlier made an oral claim at a meeting he had had with Mr Flynn, Regent's managing director, on 7 May 1997 is one of the issues in the case. The letter of 2 June said that at the 7 May meeting Mr Flynn had "rejected the claim of our client" on the ground that the fire had been deliberately started.

3. By letter in response dated 12 June 1997 Regent denied that Mr Diab had made any claim under the Policy and therefore denied that they had rejected any such claim. The letter referred, obliquely, to Condition 11 of the Policy which required, as a condition precedent to the payment of any claim, that, among other things, a claim in writing be submitted within 15 days after the loss or damage in question and be accompanied by "as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed and of the amount of the loss or damage thereto …". It is common ground that no such written claim was submitted within the 15 days and that no such account has ever been submitted. The construction and effect of Condition 11 are central to the issues raised on this appeal.

4. Mr Diab's response to Regent's letter of 12 June was the commencement of the proceedings that have led to this appeal. The writ, issued on 26 June 1997, pleaded the Policy and the fire and claimed $480,000. The claim was a claim under the Policy. It was not a claim for damages for a repudiatory breach of the Policy.

5. Regent's defence relied, first, on Mr Diab's failure to comply with Condition 11, second, on an alleged breach by Mr Diab of Condition 8 of the Policy relating to the use of the premises for storing firearms and ammunition and, thirdly, on an allegation that the fire had been started with the connivance of Mr Diab.

6. Mr Diab served a Reply contending that what had been said by Mr Flynn at the meeting on 7 May constituted a waiver by Regent of the

Condition 11 requirements or, alternatively, estopped Regent from relying on Mr Diab's failure to comply with those requirements.

7. There were, therefore, three issues to be resolved at the trial; first, was Mr Diab's claim defeated by his failure to comply with Condition 11; second, and alternatively, was his claim defeated on account of the storing of guns and ammunition on the premises; and, thirdly, was the claim a fraudulent one, the fire having been deliberately started with Mr Diab's connivance?

8. The arson/fraud issue was withdrawn by Regent's counsel in his closing submissions to Blackman J, the trial judge. The judge, having heard evidence from Mr Diab and Mr Flynn about their 7 May meeting, said, in paragraph 15 of his judgment, that Mr Flynn had made it "pellucidly clear" that if Mr Diab did make a claim it would be rejected. It is implicit in this language that the judge did not think that a claim had yet been made. The judge went on to reject Mr Diab's waiver and estoppel contentions and to hold that since Mr Diab had failed to comply with the Condition 11 requirements his claim therefore failed. He did not express any opinion as to the merits of Regent's Condition 8 point and made no comment about the Regent's arson/fraud allegations that had been withdrawn. Mr Diab's appeal to the Court of Appeal of Belize was dismissed.

9. On this appeal to the Board Mr Peter Knox, counsel for Mr Diab, has based his main argument on the proposition that Mr Flynn, at the 7 May 1997 meeting with Mr Diab, repudiated Regent's liability to meet a claim for the damage caused by the fire. That repudiation, submitted Mr Knox, relieved Mr Diab of the obligation to comply with the Condition 11 requirements. He put this proposition as one of law. Alternatively Mr Knox submitted that what Mr Flynn said at the meeting constituted a waiver by Regent, or an estoppel by representation, relieving Mr Diab of the need to comply with the Condition 11 requirements. In the further alternative he submitted that Regent owed Mr Diab an obligation of good faith that required Regent to warn Mr Diab that he had only 15 days from the fire within which to comply with the Condition 11 requirements. No such warning had been given and, consequently, Regent were in breach of their obligation of good faith and were barred from relying on the Condition 11 requirements. And, finally, Mr Knox submitted that the Condition 11 requirements and their character as a condition precedent operated as a forfeiture provision depriving Mr Diab of the contractual benefit of the insurance for which he had paid. Equity, he submitted, should grant Mr Diab relief from forfeiture. These submissions, other

than the last one, all depend in one way or another on what passed between Mr Diab and Mr Flynn on 7 May 1997. It is necessary, therefore, to refer in more detail to the background to that meeting and to what was said, and what was not said, by the participants.

The facts

10. An important background fact is that at the time of the fire Mr Diab was in Lebanon visiting his mother. He had left his Belize business and the 15 Queen Street premises in the care of his nephew, Walid El Sayed, and his son, Haisam Diab. His nephew had the keys to 15 Queen Street. No one else had a key. Mr Diab was informed of the fire by a telephone call from Mr El Sayed on 27 April and promptly made arrangements to return to Belize. He was unable to obtain a flight for a few days and arrived in Belize on 5 May. After speaking to his nephew and his son, inspecting the fire damage and speaking to the police, he went, on 7 May, to Regent's offices and had the meeting with Mr Flynn.

11. Blackman J set out in his judgement, para.6, a passage from Mr Diab's evidence in chief. The same passage was set out by Sosa JA in his paragraph 14 but Sosa JA also set out a further passage from Mr Diab's evidence and a passage from Mr Flynn's evidence. These passages, taken from Sosa JA's judgement, were as follows:-

(i) Mr Diab's examination in chief:

> "When I entered Mr Flynn was sitting around the desk and I told Mr Flynn how are you, how you keeping. He say fine. I sit down. I was waiting for him to give me a piece of paper to make a claim to discuss the problem. So he nuh tell me nothing. He stand up like that and he say 'Nasser, I know who set the fire, what time they set the fire and how they set the fire.' Right away I feel terrible, bad when he told me that. I stand up. I told him 'Mr Flynn I am a good person in this country, you accuse me of setting the fire. I never could walk in Belize and the people point on me I am set fire. I tell him okay, I will see what I could do. He told me he will write me and his attorney will write me and my attorney also. I walk out and I gone back to the police to report him"

and

> "Right. Before I tell he nothing, I nuh tell him I want no (*sic*) make a claim, before I say any word he told me he

know who set the place fire, what time and how they set the place fire, that mean he reject me and I get out from his office."

(ii) Mr Flynn's evidence:

"He [the appellant] came into the office, he asked how my family was. I asked how his family was, the normal exchange of pleasantries that we would do as people who knew each other. And he looked at me and said 'Tony, the fire' and I put up my hands like this (indicating) and I said 'Nasser I know who did it. I know how it was done, when it was done and what was used but no one has made a claim. Listen to me nobody has made a claim and therefore no fraud has been done against me. Until a claim has been made no one is attempting fraud against me.'"

12. It is relevant to notice also that the police report, dated 27 April 1997, said that

"Fire is not believed to be accidental but I am unable to say how it got started"

and that a report dated 3 June 1997 made by INS Investigations Bureau Inc, who had been instructed by Regent, said that

"Based on the available evidence at this time, it is my opinion the fire originated in the second room …… as a result of a flammable/combustible liquid being poured across the floor to the front door area. The evidence further indicated the fire was incendiary in nature."

Condition 11 of the Policy

13. Condition 11 provided as follows -

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

(a) a claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of

> all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.
>
> (b) particulars of all other insurances if any.
>
> ……
>
> No claim under this Policy shall be payable unless the terms of this condition have been complied with."

14. Their Lordships have been told that Condition 11 is in a standard form to be found in most fire insurance policies. The condition is expressed as one that has to be complied with before any claim becomes payable and their Lordships find the categorisation of Condition 11 as a condition precedent easy to accept. There is no reason why there should be a contractual obligation on an insurer to pay a claim until at least the insurer has received proper particulars of the claim sufficient to enable there to be verification that the claim is a good one. It does not necessarily follow, however, that every element of Condition 11 must be treated as a strict condition precedent with any failure to comply barring the claim. Their Lordships have particularly in mind the 15 day period after the loss or damage has been incurred within which a claim in writing accompanied by the requisite particulars is required to be delivered to the insurer. Take the present case. The first part of Condition 11 was complied with. Regent was "forthwith" informed of the fire. But no claim in writing was delivered until after the expiry of the 15 day period. And the requisite accompanying particulars never have been delivered. But suppose the claim in writing and the particulars had been delivered reasonably promptly after the fire, within, say, a month. Condition 11 does refer to "such further time as the Company may in writing allow…" and Regent might have accepted the late delivery. Does this contractual provision give Regent a completely free and uncontrolled discretion or is there an implied contractual proviso that further time should not be unreasonably refused? This question was not debated before their Lordships and, in any event, no request for further time was ever made by Mr Diab. The point does not, therefore, fall for decision on this appeal.

15. There is a further point prompted by conditions like Condition 11 that, in principle, merits some consideration. Ever since the enactment of section 25 of the Supreme Court of Judicature Act, 1873, stipulations in contracts as to time are not to be deemed to be or to become of the essence of the contract unless they would be so treated in equity. This

statutory reform received close attention by the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 where the question at issue was whether a failure by a lessor to keep strictly to the timetable laid down in a rent review clause in a lease necessarily deprived the lessor of the benefit of the rent review. There are several passages in the speeches delivered in that case which might be regarded as relevant to the approach to be taken to a time limit such as that in Condition 11. See, for example, Lord Diplock at 930, Lord Simon of Glaisdale at 945 and Lord Salmon at 950 and 951.

16. In a case where notice of a claim has been given forthwith to the insurer and where a claim in writing with the requisite particulars of the loss and damage has followed sufficiently promptly to enable the insurer to verify that the claim is a good one, it is not obvious that a failure to deliver the claim in writing and the particulars within the specified period should be treated as relieving the insurer of any liability in respect of the claim. Perhaps the specified time should, as Lord Salmon suggested (at 951) be treated as directory, not mandatory. Perhaps the insurer's consent to an extension of the time should be subject to a proviso that it be not unreasonably withheld. But no argument on these points has been addressed to their Lordships and no conclusion on them can be reached on this appeal.

17. It is now some nine years since the fire and Regent have never been supplied with particulars of the stock in 15 Queen Street that was destroyed by the fire or with any estimate of the value at the time of the fire of the property destroyed. This failure means that Regent were deprived of the opportunity to investigate or query any such particulars and, given the nine year lapse of time, this failure could not now be satisfactorily remedied. The case comes before the Board, therefore, on the footing that the Condition 11 condition precedent has not been and cannot now be fulfilled. But their Lordships must not be taken to be assenting to the proposition that Mr Diab's failure to deliver a written claim and the requisite particulars within the 15 day period specified in Condition 11 would necessarily in all circumstances have barred his claim.

The Issues

18. The first issue is whether the effect of what passed between Mr Flynn and Mr Diab on 7 May 1997 relieved Mr Diab of the need to comply with the Condition 11 requirements. There is disagreement between the parties as to whether at the 7 May meeting Mr Diab made a

claim and whether Mr Flynn repudiated any liability of Regent under the claim. In their Lordships' opinion it is only the second part of this disagreement that matters. The important point is whether Mr Flynn made it clear to Mr Diab that Regent would not be paying-up on a claim made by Mr Diab in respect of the damage caused by the fire. If this was made clear it is immaterial whether there had or had not already been a claim. Blackman J said, in paragraph 15 of his judgment, that

> "Mr Flynn made it pellucidly clear that a claim if made, would be rejected ….."

Sosa JA, in the Court of Appeal, disagreed and, in his paragraph 20, said that he could see

> "… no basis for any inference by this Court that Mr Flynn and, through him, the respondent were repudiating liability, whether intentionally or otherwise, as the former spoke to the appellant on 7 May."

19. It is correct that at the 7 May meeting Mr Flynn did not in terms state that Regent would not pay-up on a claim by Mr Diab for the fire damage. But the implication that they would not do so was strong. Mr Flynn was asserting arson and, by implication, that one or other or both of Mr Diab's son and nephew were responsible. If they were the arsonists, the further implication that Mr Diab was complicit was an obvious one. Mr Flynn's remark "until a claim has been made no one is attempting fraud against me" was stating Regent's view that a claim, if made, would be a fraudulent claim. It is plain that Regent would repudiate liability on a claim they believed to be a fraudulent one. So, in their Lordships' opinion, Mr Diab was entitled to take Mr Flynn's remark as a repudiation by Regent of liability and Blackman J was entitled to so hold.

20. But what is the consequence of that? The repudiation was never treated by Mr Diab as a repudiation of the contract or accepted as putting an end to the contract. His specially indorsed writ issued on 26 June 1997 made a claim under the Policy and the Amended Statement of Claim dated 28 October 1997 did likewise. The contractual obligations owed by each party under the Policy therefore continued. But Mr Knox has submitted that a repudiation of liability by an insurer relieves the insured of the need to comply with any outstanding procedural requirements under the Policy that constitute conditions precedent to the

obligation of the insurer to make a payment on a claim, i.e. that Mr Diab became relieved of the obligation to comply with Condition 11.

21. In support of his submission Mr Knox relied on a number of decisions of United States courts and Canadian courts and on an obiter remark by Vaughan Williams LJ in *re Coleman's Depositories Ltd* [1907] 2KB 798 at 805/6. In the *Coleman's Depositories* case the insurance policy in question was a policy covering the liability of an employer to compensate his workmen for injuries in the course of their employment. The issue was whether the policy incorporated a condition requiring the employer to give immediate notice to the insurer of any accident causing injury to a workman and to forward to the insurer every notice of claim received by the employer within three days after receipt. There was a further condition that made the time element in these conditions a term of the essence of the contract. An accident befell a workman. Notice of the accident was not given to the insurer for over two months. The Court of Appeal held that these conditions had not been incorporated into the contract. So the claim under the policy succeeded. Vaughan Williams LJ said this, at 805/6:

> "The only question in the case is the obligation of this condition as to immediate notice. As to the condition as to forwarding notice of claim received by the employer within three days of the receipt of such notice, I agree with Bray J that there was no obligation to forward such notice after the association had repudiated."

22. The point made by Vaughan Williams LJ in the second sentence of this passage was obiter, was not concurred in by either of his colleagues and had not been mentioned by counsel in argument. In their Lordships' opinion the correctness of the point depends upon the circumstances in which the repudiation of liability by the insurers has taken place and the nature of the repudiation.

23. The Privy Council, in *Super Chem Products Ltd v American Life and General Insurance Co. Ltd.* [2004] 2 All ER 358, has recently re-affirmed in a fire insurance context that despite a repudiatory breach of contract, obligations under the contract survive until the breach is accepted by the innocent party as terminating the contract. (see Lord Steyn at 365 para.12). Lord Steyn, in rejecting the so-called *Jureidini* defence, added at para 13 that

> "Contract law cannot and does not prevent an insurer from resisting a claim on alternative bases, one involving an allegation of fraud and the other breaches of policy conditions."

Assuming, therefore, that at the 7 May 1997 meeting Mr Flynn repudiated Regent's liability for the fire damage on the ground of arson, that repudiation could not, ipso facto, have barred Regent from defending Mr Diab's claim on grounds additional to the arson/fraud ground.

24. It may be that the United States and Canadian decisions that go further, and appear to found a rule that a repudiation by an insurer of liability on a ground unconnected with compliance by the insured with the provisions of the policy regarding the delivery of a formal claim in writing and particulars of the loss or damage in question relieves the insured of the obligation to comply with those provisions, can be explained by reference to statutory provisions that have no counterpart in Belize, or in United Kingdom, statutory law. Be that as it may, the rule in question does not, in their Lordships' opinion, form part of the law of Belize, or of United Kingdom law. It may be, however, that the circumstances in which the repudiation has taken place and the repudiatory words in question justify the inference of a waiver by the insurer of its right to insist on compliance by the insured with the contractual provisions in question. It was Mr Knox's alternative submission that what was said by Mr Flynn at the 7 May meeting did constitute a waiver of the need for Mr Diab to comply with the Condition 11 requirements.

25. Their Lordships are unable to accept Mr Knox's waiver submission. A waiver by an insurer of a procedural obligation on the insured, such as the delivery of particulars of loss or damage within a specified period, may be produced by conduct either before or after the insured is in breach of the obligation. The principle is expressed in MacGillivray on Insurance Law, 10th Ed., at para.10-101:

> "[Waiver] means the abandonment or relinquishment of a right of defence which may occur either as the result of an election by the insurer or of the creation of an estoppel precluding him from relying on his contractual rights against the assured."

Their Lordships can see no basis upon which it could be said that Mr Flynn, on 7 May, was electing on behalf of Regent to relieve Mr Diab of

his contractual obligation to comply with Condition 11 if he (Mr Diab) wanted to pursue a claim under the Policy. A fair inference to be drawn from Mr Flynn's language is that he was trying to persuade Mr Diab not to pursue a claim under the Policy. But if, as was the case, Mr Diab was not so persuaded, there seems to their Lordships to be nothing in what Mr Flynn said to indicate that if Mr Diab did proceed to make a claim Regent would not expect him to comply with the procedural requirements of Condition 11 and would reserve their rights if he did not do so.

26. As to estoppel, Mr Knox's submission in that regard founders on the same rock. Nothing said by Mr Flynn constituted a representation, let alone an unequivocal one (see MacGillivrary para. 10-103), that, if Mr Diab decided to pursue a claim under the Policy, Regent would not hold him to the conditions of the Policy and its procedural requirements.

27. A submission by Mr Knox, associated with his waiver and estoppel submissions, was that Mr Flynn had said to Mr Diab that he would write to him and to his (Mr Diab's) attorneys, with the implication that no action need be taken by Mr Diab in prosecuting a claim under the Policy until he had received such letter. No such letter was written and, Mr Knox submitted, Regent's failure should impugn Regent's reliance on the strict time requirements of Condition 11. There seem to their Lordships to be a number of answers to this submission. First, no factual findings on which to base it were made by Blackman J. Second, the solicitors' correspondence to which reference has already been made contains no reference to the alleged promise of a letter. Third, for the reasons cogently advanced by Mr Butcher QC, counsel for Regent before the Board, it was inherently unlikely that Mr Flynn would have promised to write such a letter. Fourth, no request was ever made by Mr Diab or his attorneys for an extension of time within which to comply with Condition 11. The proceedings that were launched on 26 June 1997 and have ended up before their Lordships called on Regent to pay $480,000 under the Policy without Regent having been given any opportunity to verify the amount of the claim in the manner contracted for in the Policy. Their Lordships reject the submission based upon Mr Flynn's alleged failure to write the allegedly promised letter.

28. Mr Knox fortified his submission by praying in aid the good faith obligations owed to one another by parties who enter into contracts of insurance. These obligations might have been in point had Mr Diab in June or July 1997 asked for an extension of time to provide the outstanding Condition 11 particulars and if Regent had refused. But that never happened. Mr Knox's proposition that Regent were in breach of an

obligation of good faith in failing to warn Mr Diab on or shortly after 7 May that time for delivering the requisite Condition 11 notice in writing and the accompanying particulars was running out cannot be accepted. Whatever post-claim duty of good faith Regent may have owed to Mr Diab did not extend to an obligation to give such a warning. Moreover, no allegation of want of good faith was put to Mr Flynn.

29. Finally, there is Mr Knox's relief from forfeiture point. This was not pursued by Mr Knox orally before their Lordships, and rightly so in view of the excellent written case prepared by Miss Sioban Healy, junior counsel for Regent, which demolished the point. Condition 11 of the Policy is not a forfeiture clause. It constitutes conditions precedent to Regent becoming liable to pay on a claim. Equity may or may not have a role to play in regard to the flexibility or inflexibility of the 15 day period but thereapart has, in their Lordships' judgment, no role to play in relieving Mr Diab of the need to have performed the Condition 11 conditions precedent before requiring payment of a claim under the Policy.

30. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.