Date of Release: April 24, 1992 No. C875633

Vancouver Registry

In the Supreme Court of British Columbia

Between:

BLOCK BROS. INDUSTRIES LTD. and FIRST NATIONAL PROPERTIES LTD.

PLAINTIFFS

And:

WESTLAND INSURANCE CENTRE LTD. and ROYAL INSURANCE COMPANY OF CANADA

DEFENDANTS

And:

ALLSTATE INSURANCE COMPANY OF CANADA

THIRD PARTY

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE LAMPERSON

Appearances:

George E. H. Cadman, Q. C. - Counsel for the Plaintiffs

Peter J. Stanford, Esq. - Counsel for the Defendant, Royal Insurance Company

Patrick T. Gordon, Esq. - Counsel for the Defendant, Westland Insurance Centre Ltd.

Frank G. Potts, Esq. - Counsel for the third party, Allstate Insurance Company of Canada

Date of Hearing: February 27th and 28th, 1992

INTRODUCTION

The plaintiffs, Block Bros. Industries Ltd. and First National Properties Ltd. (Block Bros.) instructed their agent, the defendant Westland Insurance Centre Ltd. (Westland) to obtain multi-peril insurance coverage for them and their affiliated and subsidiary companies. Allstate Insurance Company of Canada (Allstate) issued such a policy, which was to be subscribed to by the defendant Royal Insurance Company of Canada (Royal) and two other insurance companies. Royal had expected the Zurich Insurance Company (Zurich), not Allstate, to be the lead insurer. The plaintiff suffered a major loss when the clubhouse on their Meadowlands Golf Course (Meadowlands) burned down. Royal has refused to pay $185,728.23, being its share of the loss, on the basis that:

(1) It did not agree to Allstate being the lead insurer,

(2) It was not privy to several of the terms contained in the policy which was issued.

Consequently, the plaintiffs seek judgment against Royal under Rule 18A, and failing that, judgment against Westland. They also seek judgment against Westland for loss of rental income for a restaurant in the Meadowlands Clubhouse which all insurers have refused to pay because rents were not shown in the Statement of Values provided to them.

FACTS

Block Bros. acquired Meadowlands in October of 1985. At the time it was covered by insurance until February 10th, 1986. Block Bros. also carried insurance for all its properties under a blanket multi-peril subscription policy which was to expire on August 1st, 1986. On February 7, 1986 Block Bros. instructed the defendant Westland to add Meadowlands to its blanket policy and then in May or June of 1986 instructed Westland to renew all of the insurance coverage. It provided Westland with a Statement of Values which did not list Meadowlands and it was not until August 13th, 1986 that the Meadowlands property was included in an updated Statement of Values. There is no question, however, that Meadowlands was discussed before that time by Block Bros. and Westland.

In any event, Mr. Schwaia, who was the person who dealt with this matter for Westland, attended at the Vancouver offices of Royal on July 18th, 1986 in order to solicit that company's participation as a subscriber to a blanket insurance policy covering properties owned by Block Bros. The Statement of Values provided by Schwaia to Royal did not refer to Meadowlands. Ms. Corney, who is an underwriter in Royal's Vancouver office, advised Mr. Schwaia that the company was not prepared to cover certain downtown Vancouver properties included in the Statement of Values and that it would not agree to an automatic acquisition clause.

Eventually Royal agreed to underwrite 20% of the risk on the understanding that the policy would be in Zurich's standard wording, that certain properties would not be covered by the policy and that it would not contain an automatic acquisition clause. On this basis Royal issued the following binder effective August 22nd, 1986:

"To: Westland Ins. Centre Ltd.

725 Carnarvon Street

New Westminster, B. C.

From: S. Corney, Commercial, Vancouver

Block Bros. Industries

Date: August 27, 1986

Attention: Alex Schwaia

To confirm our phone discussion of Friday. We have bound 20% of the above risk effective August. 22/86.

Rate .10

Deductible $10,000

Policy to be written on lead company's standard wording. An up-to-date statement of values will be provided included a split in values for office contents.

Await receipt of cover note.

Thank you.

S. Corney "

Westland, in turn, sent the following cover note to Royal.

"To: Zurich Ins. Co. Tim Courtnay

Gerling Global Joe Hawk

Allstate Pat Kelly

Royal Sharon Corney

Re: Block Bros. Industries Ltd.

Property Insurance: 90% Co-Insurance, Replacement Value, 10,000 - deductible each and every loss, except Earthquake at 3% - No automatic acquisition, Standard Zurich Insurance Company wording, - 10 cent rating.

Excluding Rental dwellings, coverage as per statement of values attached!

Annual premium 142,466 — $!

8/29/86

The Statement of Values, which accompanied the cover note, did not refer to Meadowlands, but had deleted building values for certain downtown Vancouver properties. It should be noted that Royal expected to eventually receive another updated Statement of Values.

The formal binder, sent by Royal's Calgary office on October 7th, 1986, indicated that it was for 120 days, from August 22nd, 1986 to December 20th, 1986.

Allstate, which became the lead insurer when Zurich decided not to assume the risk, issued a subscription policy in manuscript wording, retroactive to August 1st, 1986. The policy covered the Meadowlands property and showed Royal as 20% subscribing insurer. It was sent to Westland, whose duty it was to circulate the policy among the other subscribers for signature. Although there is no admissible evidence that Royal did not receive the policy, there is also no evidence that Westland sent the policy to Royal and I infer from all of the evidence that Royal did not receive it or the updated Statement of Values used by Allstate.

The Meadowlands clubhouse was destroyed by fire on February 25th, 1987. Block Bros. had leased out the restaurant in the clubhouse for $3,250.00 per month. All the insurers have denied a claim for loss of rental income because the rents were not disclosed in the Statement of Values. They have, however, except for Royal, paid their share of the loss with respect to the destruction of the clubhouse.

LIABILITY OF THE DEFENDANT ROYAL

Royal contends that this is not, as the plaintiff suggests, a case of material misrepresentation or fraudulent omission, but a situation where the parties were not ad idem and where the contract failed ab initio for the following reasons:

1. Royal did not agree to cover Meadowlands because that property was not shown in the Statement of Values provided to Royal.

2. Royal did not agree to cover companies associated and affiliated with Block Bros.

3. Royal did not agree to an automatic acquisition clause.

4. Royal did not agree to Allstate being the lead insurer because its policies contain manuscript wording as opposed to standard wording used by Zurich.

The following issues must be addressed in determining whether Royal is liable:

1. Was there a contract entered into between Royal and Block Bros?

2. Do Sections 14 and 16 of the ***Insurance Act*** in this instance affect the common law regarding insurance contracts?

3. Is Royal estopped from denying insurance coverage?

1. Was there a contract entered into between Royal and Block Bros?

The law relating to the formation of insurance contracts is summarized by Ivamy, ***General Principles of Insurance Law***, 4th ed., pp. 97 - 101. The learned author states at pp. 97 - 98:

"To establish the existence of the contract it is not necessary that all its terms should have been separately agreed. As the contract is in common form, there is, as a rule, no real negotiation of terms, the agreement being, on the part of the insurers, to issue, and, on the part of the proposer, to take, a policy in the ordinary form issued by the insurers. There must, however, be a clear agreement as to the distinctive features of the particular contract. The parties, therefore, must be ascertained; the insurers must have agreed to insure the particular assured, and the assured must have agreed to the particular insurers. They must be ad idem as regards the subject matter of the insurance. The period of insurance must be fixed, and there must be agreement as to the sum to be insured and the premium to be paid. Finally, it must be

clear that there was, in fact, an offer to enter into the contract on the one side, followed by an acceptance of the offer on the other and that thus a complete contract resulted.

Usually the acceptance of the offer will not take place at once, and before it does so, it is the practice for a "cover note" to be issued. . ."

Ivamy points out that as with all cases involving the formation of contracts, the facts may show that offers and counter offers go back and forth several times before a contract is formed. Ivamy says at p. 101:

"This may take place, even in an ordinary case where a proposal form is used, if the insurers, in the acceptance, introduce terms or impose conditions which do not appear in the proposal. In this case what purports to be an acceptance is not in reality an acceptance, but a new offer to contract upon new terms and conditions."

An insurance contract may be declared void ab initio where a condition precedent is broken. In such a case, the term of the insurance never begins to run and no claim can be made under the policy, even though the loss may have taken place before the insurer elected to avoid the policy. Whether something is a condition precedent and whether it has been broken, is not determined by the intention of the parties but by the court, which must apply the ordinary rules of construction after looking at all the terms contained in the insurance policy. If the performance of a certain obligation is the basis of the contract, then the stipulation is to be construed as a condition.

Block Bros., through it's agent Westland, applied to Royal for insurance coverage. Royal countered by offering to cover 20% of any loss contingent upon:

(1) the policy being in Zurich's standard wording,

(2) not containing an automatic acquisition clause,

(3) deleting coverage on certain Vancouver properties, and

(4) Royal being provided with an updated Statement of Values.

It is my view that those requirements were conditions and that their acceptance by the Block Bros. agent, Westland, is reflected in both the cover note and the binder.

The policy issued by Allstate, purporting to include Royal as a 20% subscriber, was in manuscript wording and contained an automatic acquisition clause. Furthermore, it is evident that Allstate had a different Statement of Values than that which was provided to Royal. Neither Allstate nor Westland can be considered to be agents for Royal. Thus if, in fact, a copy of the policy was sent to Royal, it could only be regarded as a counter offer and not one which was accepted by Royal. Accordingly, I am satisfied that no contract was entered into at common law.

2. The effect of Sections 14 and 16 of the ***Insurance Act*** on the common law as it pertains to the insurance contract.

Sections 14 and 16 of the ***Insurance Act*** read as follows:

"14. (1) A term or condition of a contract which is not set out in full in the policy or in a document in writing attached to it, when issued, is not valid or admissible in evidence to the prejudice of the insured or a beneficiary.

(2) This section does not apply to an alteration of the contract agreed on in writing between the insurer and the insured after the issue of the policy.

16. Where a policy or a receipt for the premium under a contract is delivered to the insured by the insurer or its agent, the insurer is bound by the contract, notwithstanding that the delivery may have been made by the agent without authority, or that the premium may not in fact have been paid.

Section 16 provides that if a policy or a receipt for a premium under an insurance contract is delivered to the insured, then the insurer is bound by the policy. That, however, is only so if delivery is made by "the insurer or its agent". That did not happen here. Allstate cannot be deemed to be Royal's agent. Westland received the policy as Block Bros.' agent and ought to have sent it to Royal for its endorsement. It would not be until Royal returned the endorsed policy to Westland or to Block Bros., that Section 16 would come into play because Royal could, in this instance, treat the Allstate policy as a counter offer. It was Westland's duty to ensure that Royal agreed to the terms of the policy issued by Allstate. Westland failed to do this and it cannot therefore be said that there was a contract between Royal and Block Bros. It is for that reason that Sections 14 and 16 of the ***Insurance Act*** do not apply in this case.

3. Is Royal estopped from denying insurance coverage?

It is common for insurers to issue a binder while the terms of a policy are being negotiated and it would be arguable that Royal was bound to pay had the fire loss occurred during the time that the binder was in force and before Allstate issued the policy. Although the other insurers obviously felt bound by the policy which was issued, it was not the policy which Royal agreed to and, in my opinion, Royal is not estopped from denying coverage.

LIABILITY OF THE DEFENDANT WESTLAND

One of the issues is whether Westland is responsible for:

(1) losses sustained by Block Bros. because Royal does not have to pay under the insurance policy, and

(2) the lack of insurance for loss of rental income caused by the destruction of the restaurant in the Meadowlands Clubhouse.

In a memorandum dated February 7th, 1986 Mr. Doll, the general manager of certain property interest owned by Block Bros., advises Westland that:

"In addition to the business of the country club, there is also a restaurant on the second floor that is leased to an outside operator. The current rate for this is $2,500. monthly with a lease due for renewal by November, 1986.

Further on in the memorandum, Mr. Doll summarizes Block's insurable interests and at paragraph 4 he says:

"Restaurant leased to Harvester IV (Meadowlands) Ltd. The list of equipment attached to the lease is owned by Block Bros. I am awaiting a summary cost so that we can establish a replacement value".

On February 11, 1986 Mr. Doll sent this memorandum to Mr. Schwaia Re: Meadowlands Golf and Country Club:

"Further to my memo of February 7th, I attach the list and original cost of furniture and equipment supplied to the premises which are leased to Harvester IV (Meadowlands) Ltd. This was identified as item (4) of my February 7th memo. This can be summarized as follows:

Furniture as per schedule 'A'	$ 40,444.78
Equipment	115,709.30
TOTAL	$ 156,154.17

An equipment list dated June, 1986 contains a handwritten reference to Meadowlands and shows rental income at $39,000. A revised equipment list shows the Meadowlands assets, but does not show any value for rent except that there is a pencilled notation showing "rent $3,250./business interruption $160,000./annum". That note was written by Mr. Doll after a meeting which he had with Mr. Schwaia on September 14th, 1986. Mr. Doll does not say in his affidavit that rental income was discussed at the meeting but it should be noted that $3,250. x 12 = $39,000., which was the amount shown in the previous document as rental income.

On September 18th, 1986 Mr. Doll sent a memorandum to Mr. Schwaia seeking confirmation that Meadowlands Golf and Country Club was covered by insurance. There was no reference to the question of rental coverage. In a memorandum dated October 30th, 1986 Mr. Doll wrote to Mr. Garland, Block Bros.' comptroller, saying that the statement of values are in accordance with discussions held with Alex Schwaia of Westland. Once again that Statement of Values makes no reference to rental income with respect to Meadowlands. On January 19th, 1987 Mr. Marr of First National Properties wrote to Westland expressing concern over the confusion pertaining to the insurance and he asked for an updated list of all insured properties.

Thus the question is whether Mr. Schwaia should have known that the insurance policy was to include coverage for loss of the rents from the restaurant. Mr. Schwaia had been Block Bros.' insurance broker for a long time and was familiar with its businesses. Although Block Bros. was a large sophisticated client, whose affairs were in a constant state of flux and in that sense different from an ordinary small business, which relies on its insurance agent to do the right thing, it is clear that Mr. Schwaia knew that Block Bros.' owned the Meadowlands Golf Course, which included a restaurant. Block Bros. customarily insured its rental income for other properties and there was no reason to believe that this was not so with respect to the golf course. It is also apparent from the various memoranda that rental income and the restaurant were, at various times, discussed by the parties and that Schwaia should have known that the restaurant was leased out. The memorandum should have prompted Mr. Schwaia to ensure that there was adequate coverage and to make detailed inquiries if he thought that there was some confusion or error.

The leading case on an insurance agent's duty is ***Fine's Flowers Ltd. et. al***

v. ***General Accident Insurance Co. of Canada***, 81 D.L.R. (3d) 139. The headnote reads as follows:

"The plaintiff, who had an extensive horticultural business, relied on the defendant agent to secure insurance coverage for the business, asking the agent to obtain "full coverage". The agent obtained coverage and a complex policy covering a number of business risks, but not that which in fact occurred, namely, damage to plants by freezing caused by failure of a water pump. The agent was held liable at trial, first for breach of contract and, secondly for breach of the duty imposed by the relationship of the parties to inform the plaintiff of the gap in coverage. On appeal held. The appeal should be dismissed. "

This case was applied by Dohm J. in ***Gerber*** v. ***Eaglestar Insurance Co. Ltd., et. al.*** [1981] 1 L.R. 1-1442. The facts before me go further than in the above cases in that Westland was instructed to obtain full insurance coverage which in my opinion was also to include loss of rent income.

CONCLUSION

Westland had a duty to exercise due care and skill with respect to Block Bros. insurance business. It was Westland's lack of attention to detail that caused this litigation and it must therefore bear the loss of rental income suffered by Block Bros. The same is true of the losses suffered by Block Bros. because Royal is exonerated from paying its share of the fire loss. Westland was Block Bros.' agent and it was Westland's duty to ensure that each of the subscribers had agreed to the insurance policy which was issued by Allstate. Westland failed to do so with respect to Royal and must therefore bear the consequences. Accordingly, Westland is liable to Block Bros. for the loss of rental income and $185,728.23, being Royal's share of the fire loss.

The defendant Royal is to have its assessed costs from the plaintiff, Block Bros. which in turn shall be entitled to its assessed costs from the defendant Westland, such costs

to include as a disbursement the assessed costs which Block Bros. must pay to the defendant Royal because of this decision.

"Lamperson J."

LAMPERSON J.

Kamloops, British Columbia

April 22, 1992