S.C.A. No. 02649

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Matthews, Roscoe and Freeman, JJ.A.

BETWEEN:

THE CANADIAN SURETY COMPANY	)	George W. MacDonald, Q.C. Scott C. Norton for the appellant
appellant	)	
	)	E. J. Flinn, Q.C. for the respondent
- and -	)	
	)	Appeal Heard: October 15, 1992
PENTAGON INVESTMENTS LIMITED	)	
	)	Judgment Delivered: October 15, 1992
respondent	)	

THE COURT: Appeal dismissed on all three grounds with costs to the respondent to be taxed per oral reasons for judgment of Matthews, J.A.; Roscoe and Freeman, JJ.A. concurring.

The reasons for judgment were delivered orally by:

MATTHEWS, J.A.:

The respondent is the insured under a policy issued by the appellant providing for indemnity, subject to certain terms and conditions, against loss or damage caused by fire to the respondent's apartment complex.

There were three fires to the apartments which are situate in Halifax County; on November 16, 18 and 24, 1987. In the first two fires comparatively little damage was suffered some $28,000.00 and $15,000.00 respectively. However, in the third, buildings 128B and C were completely destroyed by fire, causing losses claimed at $3,162,300.00.

After a twelve day trial in July, 1991, during which extensive oral testimony, reports and exhibits were adduced, followed by two days of oral argument, Goodfellow, J, in written decision dated November 22, 1991, allowed for the most part, the respondent's claims and dismissed the appellant's counterclaim for repayment of monies the appellant expended in the agreed amount of $1,319,536.10 principally for payment to a mortgagee and some **ex gratia** payments.

The appellant now appeals from that decision and the order thereunder dated February 13, 1992, raising the following issues:

> "Did the Learned Trial Judge err in failing to find on the evidence before him that the Respondent breached Statutory Condition 4 of the Appellant's Policy of Insurance in that the Respondent failed to promptly notify the Appellant of changes material to the risk and in the manner in which the Learned Trial Judge characterized the test for determining whether there had been changes material to the risk;
>
> 2. Did the Learned Trial Judge err in failing to find on the evidence before him that the Respondent breached Statutory Condition 7 of the said Policy in that the Respondent wilfully made false statements in the sworn Proof of Loss filed with the

> Appellant in respect to certain materials and equipment alleged to have been lost in a fire which occurred on November 24, 1987.
>
> 3. Did the Learned Trial Judge err in failing to find on the evidence before him that the Respondent breached Statutory Condition 7 of the said Policy in that the Respondent intentionally damaged the premises by arson."

The trial judge considered each of these issues in some detail in his 64 page decision. In doing so he made strong definitive findings of fact in favour of the respondent and against the appellant.

ISSUE NO. 1 -

Statutory Condition 4 reads:

> "4. **MATERIAL CHANGE** - Any change material to the risk and within the control and knowledge of the Insured avoids the contract as to the part affected thereby, unless the change is promptly notified in writing to the Insurer or its local agent; and the Insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the Insured in writing that, if he desires the contract to continue in force, he must within fifteen days of the receipt of the notice, pay to the Insurer an additional premium; and in default of such payment the contract is no longer in force and the Insurer shall return the unearned portion if any, of the premium paid."

The trial judge commented:

> "The defendant sought to establish a material change in the risk that they had insured, through evidence of fire and city ordinance violations, deferred maintenance and low occupancy rate."

The trial judge reviewed some of the pertinent evidence, including admissions by the appellant's property claims manager that although the appellant complained of not being informed of the reduction in occupancy of the apartments there was no provision in the

policy "that required the insured to maintain a level of occupancy or advise of any change in occupancy". Here, in contrast to some decided cases, although many of the apartments were not occupied, the buildings were not vacant. Further, although there was evidence of lack of maintenance, there was no provision in the insuring contract "to maintain any particular level of maintenance". The testimony of the appellant's witnesses on this issue, in the opinion of the trial judge was far from convincing.

It is well established, as recognized by the trial judge that:

> "The question of whether or not there has been a material change to the risk is a question of fact, and the court has to weigh the evidence advanced to determine on a balance of probabilities whether or not the defendant has established a breach of statutory condition #4."

As to this issue the trial judge concluded:

> "I find, without any difficulty, that the defendant has failed to establish on a balance of probabilities that any material change in the risk had taken place to relieve Canadian Surety from its obligations under the insurance contract."

The burden on the appellant is heavy on that part of this issue, respecting a question of fact. In **LaPointe** v. **Hôpital La Gardeau,** [1992] 1 S.C.R. 321, L'Heureux-Dubè, J. reiterated the principle that an appellate court should not interfere with a trial judge's findings and conclusions of fact failing a manifest error. No such manifest error was demonstrated here.

The appellant stressed that the trial judge did not accurately express the test to be applied in determining this issue. Although that may be arguably so, in our opinion, the trial judge properly analyzed the evidence to determine if there was a change in the risk and if so was the change material. In doing so we cannot say that he erred in the conclusion he

reached.

We dismiss this ground of appeal.

ISSUE NO. 2 -

The relevant portions of statutory conditions 6 and 7 read:

> 6(1) **Requirements after loss** - upon the occurrence of any loss of or damage to the insured property, the insured shall, if such loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11,
>
> ...
>
> (b) deliver as soon as practicable to the insurer a proof of loss verified by a Statutory Declaration,
>
> > (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value with particulars of amount of loss claimed.
>
> 7. **Fraud** - any fraud or wilfully false statement in a Statutory Declaration in relation to any of the above particulars, shall vitiate the claim of the person making the declaration."

Again, the burden on the appellant is heavy. It alleges, in effect, criminal conduct. The appellant must prove the allegations of fraud with a higher degree of certainty than required in other civil actions. However, the burden remains proof on a balance of probabilities. **Dalton Cartage Co. Ltd.** v. **Continental Insurance Co.**, [1982] 1 S.C.R. 164.

The trial judge accepted that, to an extent, the credibility of one of the respondent's key witnesses was successfully attacked. However, on analysis of the testimony he did not

attribute "any deceit or dishonesty" to that witness. It is clear that his decision in respect to the issue of fraud was based on his assessment of the credibility of the various witnesses. He had the advantage not given to us of evaluating their testimony, of seeing and hearing them. We must defer to his judgment in that respect, unless we are satisfied that he was plainly wrong. **Powell v. Streatkam Manor Nursing Home**, [1935] A.C. 243 at p. 250.

Findings of fact based upon the credibility of witnesses should not be reversed unless the trial judge made some palpable and overriding error. **LaPointe, supra.**

The trial judge did not err in reaching his conclusion. We dismiss this ground of appeal

ISSUE NO. 3: -

Statutory condition 6(1)(b)(iii) requires that the insured file a proof of loss verified by a statutory declaration:

> "(iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured."

Statutory condition 7 has previously been set out.

As the trial judge remarked:

> "It is common knowledge that the second fire was deliberately set".

That cannot be said of the other two fires.

The trial judge had no difficulty respecting the issue of arson. After reviewing the evidence he found that there wasn't a shred of evidence to suggest that the respondent or anyone connected with it "caused or contributed" to the first or second fire. "Without reservation" he concluded "that the cause of the third fire has not been established". The

appellant now desires that this Court draw "our own independent inferences" that all three fires were set by the appellant.

Inferences can only be drawn by our Court from facts as found by a trial judge or agreed upon by counsel or clearly established on the record. Here the trial judge found no facts either by agreement or otherwise upon which the requested inferences could be drawn favouring the appellant. There are none on the record. With deference the appellant wishes us to try the case again. That is not our function. The heavy onus upon the appellant is that discussed in the first two issues. The trial judge said:

> "I conclude that Canadian Surety has failed to establish, on a balance of probabilities, that the plaintiff has committed or has been a party to arson."

In this issue, as with the others, there was a mass of suspicion and speculation, but little by way of hard facts. Simply put, we see no reason in law to disturb the decision of the trial judge respecting the third issue.

In consequence, we dismiss the appeal on all three grounds with costs to the respondent to be taxed.

Kenneth M. Jones
J.A.

Concurred in:

Roscoe, J.A.

Freeman, J.A.

1988
CANADA
PROVINCE OF NOVA SCOTIA

S.H. 64958

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PENTAGON INVESTMENTS LTD.

Plaintiff

- and -

THE CANADIAN SURETY COMPANY

Defendant

D E C I S I O N

HEARD BEFORE: The Honourable Mr. Justice Walter R.E. Goodfellow

PLACE HEARD: HALIFAX, Nova Scotia

DATES HEARD: July 8, 9, 10, 11, 12, 15, 24, 25, 26, 29, 30, 31, August 29, 30, 1991

DECISION DATE: November 22, 1991

COUNSEL: E.J. Flinn, Q.C.
Duncan Beveridge and
Doris Buss, Articled Clerk, for the Plaintiff

George W. MacDonald, Q.C.
Scott C. Norton and
Sheri Hodgeboom, Law Student, for the Defendant