

SUPREME COURT
KINGSTON
JAMAICA
*Judgment
Book*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M319 of 1989

BETWEEN	GEORGE WESLEY MULLINGS	PLAINTIFF
A N D	VICTORIA MUTUAL BUILDING SOCIETY	DEFENDANT

Crafton Miller and Nancy Anderson instructed by Crafton Miller & Company for the Plaintiff.

Wandel Williams and John Donaldson instructed by Clinton Hart & Company for the Defendant.

HEARD: 22nd, 23rd, 24th October, 1991 and 11th, 12th, 13th 14th
May, 1992.

Judgment Delivered February 12th, 1993

COURTNAY ORR J.

The plaintiff migrated to Canada in 1931. He was the owner of three (3) properties in Jamaica, all of which were at some stage mortgaged to the defendant. One is situated at 147 King Street, Kingston and another at 12 York Castle Avenue, Kingston 6. The former was sold in 1990, the latter in 1985.

The property which forms the subject matter of this action is situated at Salem, Runaway Bay in the parish of Saint Ann. This property consist of about half an acre on which there was in 1988, a two story house with a swimming pool and retaining walls.

The defendant is a building society with registered offices at 6-10 Duke Street, Kingston. By an instrument of mortgage dated 30th July, 1988 the defendant obtained a mortgage over the plaintiff's property at Salem. This mortgage was to secure a loan of £9050 - by the defendant to the plaintiff to enable him to complete the purchase of the land at Salem, (hereinafter called the property). Later, the amount of the mortgage was increased on the completion of the house and the land. The swimming pool was built sometime afterwards.

The property was extensively damaged by hurricane Gilbert on 12th September, 1988. But alas! at that time it was insured for a mere \$40,000 -, a small fraction of its market value and

the repairs necessary to restore the structures on the property. He now seeks reimbursement in the sum of \$120,821.70 which he says is the cost of repairing his premises.

The plaintiff blames the defendant for this disastrous state of affairs.

THE PLAINTIFF'S CLAIM

In the endorsement on the Writ the plaintiff couches his complaint in the following terms:

"The Plaintiff's claim is against the defendant for damages for negligence and/or negligent misstatement in that in or about the month of April 1988, the defendant its servants and/or agents, represented to the Plaintiff that the defendant had insured his premises at Salem, Runaway Bay in the parish of Saint Ann comprehensively intending and knowing that the Plaintiff would rely on this representation, and making this said representation under a duty to take care in making the representation to the Plaintiff, and the Plaintiff acting on the faith of the representation cancelled another policy on his said premises and the said representation was false and untrue and by reason thereof the Plaintiff suffered loss when his said premises was (sic) severely damaged on the 12th September, 1988 by hurricane Gilbert."

The plaintiff gives the following particulars of negligence in his statement of claims:

PARTICULARS OF NEGLIGENCE

- (a) Failing to insure the premises for the full value on a comprehensive basis.
- (b) Failing to clarify the amount and quantum of insurance held on the premises and to tell the Plaintiff of this amount.
- (c) Failing to foresee that the insurance coverage placed by it was insufficient and grossly below the value of the premises so insured.

PARTICULARS OF NEGLIGENCE MISREPRESENTATION

- (a) The said premises was only insured for \$40,000 when at the time of such

insurance the said premises was valued at approximately \$500,000.

- (b) Making representation that the premises was comprehensively insured when it was insured for far less than its value".

THE DEFENCE

In its defence the defendant asserted inter alia as follows:

- (1) That the defendant comprehensively insured the plaintiff's premises in 1968.
- (2) The defendant had advised the plaintiff by letter from 1968 that the defendant normally only arranges insurance in an amount to cover the loan granted, and had invited the plaintiff to consider whether he had sufficient insurance coverage.
- (3) The plaintiff was also advised in the same letter that if he wished to have the insurance increased and so advised the defendant in writing, the defendant would make the necessary arrangements.
- (4) The plaintiff by virtue of clause 11 of the mortgage instrument had covenanted to insure the premises and keep them insured.
- (5) If the plaintiff suffered any loss or damage such loss or damage was caused or alternatively contributed to by the plaintiff's negligence and/or breach of the express terms of clause 11 of the mortgage instrument.
- (6) The defendant did not make the alleged or any misrepresentation to the plaintiff.
- (7) The defendant insured the premises of the plaintiff for \$40,000 - at his request.

THE EVIDENCE IN SUPPORT OF THE PLAINTIFF'S CASE.

The plaintiff was the only witness on his behalf. He said that on 18th December 1987, he was in Jamaica. He went to the mortgage department of the defendant's offices at Duke Street, Kingston, and announced that he had come to "settle my mortgage indebtedness.....on the said property in full." He asked how much he should pay in order to do so and was told the sum of \$5,250.03. He paid the amount and was given a receipt which was marked "TO CLOSE".

Having made this payment he asked for the duplicate certificate of title, he was not given the title; no reason was given for not

and the cost of replacing this building in the event of total disaster, and feel that the present insured value is inadequate, and am seriously thinking of increasing this coverage to twice as much. I might mention that the value taken at the time of the mortgage has been improved greatly, and a swimming pool constructed which latter I would like to have coverage of \$4,000."

There then followed correspondence between the defendant and Dyoll Insurance Company Limited, and the defendant and the plaintiff. On 20th April the plaintiff wrote the defendant as follows:

"Subject: Mortgage on premises at Salem, Runaway Bay.

Re: Insurance on the Premises in Question
Kindly insure for a value of \$40,000
(Forty thousand dollars this being the amount that Dyoll Insurance Company is prepared to insure the Premises for including the Swimming Pool there under the Combined Comprehensive Policy as per their letter to you dated 8th April, 1970."

(2) The defendant was aware that the property valued more than \$40,000 at the time of the hurricane. The plaintiff attested and the defendant's witness Mrs. McDonald also admitted that a valuation of the property was carried out in 1982, and the property was then valued at \$196,500. She also said that the recommended insurance value was then \$180,000, and agreed that the values of properties had increased substantially between 1982 and 1988.

(3) By the clause 11 of the mortgage instrument it was the defendant who advanced the premium for insurance of the property and then recovered the equivalent from the plaintiff. The defendant's witness admitted that the defendant renews the policy, keeps the policy of insurance and gets the receipt from the insurance company. Clause 11 of the mortgage instrument provides that the mortgagor covenants.

"To insure and help insured the buildings here after to be erected on the mortgage premises against such risks in such manner for such sum through such insurance office or offices as the Society may require from time to time the Society to advance the premium in respect of the said insurance and the borrower to refund the same in monthly instalments of one-twelfth of the said premium along with the regular monthly payments for principal and interest payable under **this mortgage.**"

(4) The said clause 11 also contained a restriction on the Borrower effecting insurance on the premises. The relevant portion reads thus:

"AND FURTHER the Borrower will not effect any other or additional insurance on the said buildings or any of them against any risks without first obtaining the consent in writing of the Society but that if any such other or additional insurance shall be effected by the Borrower (whether with the consent of the Society or not) the Borrower will hold all moneys received by the Borrower under any policy of insurance on the (said buildings or any of them as Trustee for the Society to be paid to the society as to be applied by the Society (so far as may be required) either in reinstatement of the mortgaged premises or in repayment or reduction of the Borrower's mortgage indebtedness as the Society may determine or at the option of the Society the moneys may be received by the Society and applied by the Society as aforesaid."

(5) The Defendant's employee's offer to assist the Plaintiff both by the testimony of the plaintiff and that of Mrs. McDonald, the defendant's witness, it was established that after the hurricane the plaintiff visited the defendant's office and was told that he could recover no more than \$40,000 on the insurance policy. He spoke to Mrs. McDonald and she said that she would try to persuade the insurance company to give him more money.

Do these facts amount to proof that the defendant was negligent as claimed in the first limb of the plaintiff's claim? I think not. I shall deal with them seriatim.

(1) The correspondence between the parties. The plaintiff's letter of 9th March 1970 to the defendant, did not request that whenever renewing the insurance on his premises the defendant should insure the premises for the market value. He merely said:

"I feel that the present insured value is inadequate and am seriously thinking of increasing the coverage to twice as much."

(emphasis mine)

True he did express shock earlier in the letter but that related to the fact that the policy did not cover damage to the glass door a matter of risk not quantum of coverage.

Moreover after correspondence between the parties he wrote asking the defendant to insure the premises for \$40,000. He never wrote in such terms again!

Again the plaintiff admitted receiving a standard form letter dated 12th September 1968 (Exhibit 10) in which the penultimate paragraph reads:

"The society normally only arranges insurance in an amount sufficient to cover the loan granted.

You should therefore consider whether or not you have sufficient insurance. If you decide to have the insurance increased and you advise us in writing we will make the necessary arrangements."

The plaintiff obviously appreciated the significance of that sentence and accepted this position and acted upon it. In his testimony he said that he took out a Home Cover-All-Insurance policy with Comprehensive Security and General Insurance Agency Limited for a total of \$500,000. In his own words he "took that policy to ensure that my property would be fully and comprehensively covered under all circumstances."

The abovementioned paragraph in the standard form letter also answers the Plaintiff's assertion that the defendant knew that the property valued more than the sum assured. That paragraph anticipates that very situation and urges the insurer to make provision accordingly. The fact that there were restrictions on how this may be done did not in any way prevent the plaintiff from taking the necessary precautions as he did in 1970 when he increased the coverage to \$40,000.

As regards to fourth fact of the defendant's servant Mrs. McDonald promising to try to persuade the insurance company to pay the plaintiff more than the sum assured, I find that this was merely an act of kindness on her part and in no way an admission or indication of negligence on the part of the defendant.

The fifth fact urged on the court as establishing negligence on the part of the defendant is that the defendant advanced the premiums and renewed the policy of insurance, kept the duplicate certificate of title and the policy. It was submitted that this

fact together with those mentioned earlier, cast a duty on the defendant to insure the policy for market value, and to "classify the amount and quantum of insurance" and to inform the plaintiff accordingly. I regard the defendant's keeping of the various documents as the actions of a prudent mortgagee anxious to secure his position. The fact that the defendant advanced the premiums was no doubt done to ensure that the property would always be insured in a sum sufficient to cover the defendant's interest.

Nor is the third element in the particulars of negligence established, that is, failure to see that the insurance coverage was sufficient. The evidence is that the defendant clearly knew that the property was worth more than the sum assured, but the defendant did what is said it normally does, namely, to insure the property for a sum sufficient to cover its interest.

The plaintiff therefore fails on the first limb of his claim.

I now turn to the second limb negligent misstatement. The first aspect of the particulars merely state the fact that the insurance coverage was grossly inadequate a fact accepted by both parties. The real pith of the plaintiff's claim lies in part (b).

"Making representation that the premises was (sic) comprehensively insured when it was insured for far less than its value."

The plaintiff's evidence to ground the claim for negligent misstatement.

The plaintiff said that he had two agents, Miss Barrett and Miss Taylor. He had taken out the additional policy mentioned earlier; the coverage on that policy took effect on 29th March, 1988. He "received information that Victoria Mutual Building Society was still covering the property with a comprehensive policy before September 1988". As a result he gave instruction to someone to cancel the additional policy. The policy was duly cancelled. So there remained only the policy for \$40,000. Cancellation took place in April 1988.

The plaintiff agrees that when he possibly received information from the defendant that his property was insured comprehensively it was after hurricane Gilbert.

Crucial to this leg of the plaintiff's case is the meaning of the word "comprehensive" in the context of a policy of insurance. The plaintiff himself gave two definitions one in chief and the other under cross-examination.

he said in chief:

"I understand comprehensive to mean damage caused by any means would be covered by such policy." (emphasis mine)

Under cross-examination he also said:

"My understanding of the term 'comprehensively insured' would mean all damages, perils of whatever nature save and except you wilfully damage your own property."

Both definitions are couched in terms of risks and not insured value. Yet he seeks to establish that the alleged statement was a negligent misstatement by reference to insured value.

Mrs. McDonald also gave a definition which relates to risks covered. She said:

"I am familiar with the term 'comprehensively insured.' My understanding of this term is that the insurance covers a number of perils among them being fire, lightning, hurricane, cyclone, bursting of pipes and overflow, and there are others"

And when asked:

"What does the term 'Household comprehensive Policy mean?"

She replied:

"This is an insurance which covers these perils to the extent of sum assured."

I hold that the word 'comprehensive in the context of household insurance such as in the instant case refers to the range of perils covered and not to the insured value as compared with the value of the property insured. The plaintiff therefore has not proved that the policy of insurance was not comprehensive in this sense and therefore this claim must also fail. It is worthy

of note, that the last time the plaintiff wrote to the defendant about the insurance coverage by letter dated 21st April, 1970 (Exhibit 16) he speaks of having "carefully gone into" a "specimen of Combined Comprehensive Policy", and later in the same letter he wrote:

"Kindly insure for a value of \$40,000 (forty thousand dollars) this being the amount that Dyoll Insurance Company is prepared to insure the Premises for including the Swimming Pool there under the Combined Comprehensive Policy as per their letter to you dated 8th April, 1970."

To sum up therefore, I reject the submission that the defendant owed a duty of care to the plaintiff to insure the premises for their market value. Further the evidence has not shown that a negligent misstatement was made.

I therefore give judgment for the defendant with costs to be agreed or taxed.

giving it to him then. Instead he was asked to return for it on January 1988. He returned as requested, but he did not obtain it, and again no reason was offered. He had requested others to collect it for him, but he has never received it. He was never told that the duplicate certificate of title was being held because of insurance premiums owing on the property. Although he repeatedly said no reason was given for its retention he eventually said that the defendant had said that the reason was that his indebtedness on the property at 14 King Street had not been settled and the society would not release the certificate of title until this was done. A receipt for \$5,250.03 from the defendant and marked "TO CLOSE" was tendered in evidence.

(A) THE EVIDENCE IN SUPPORT OF THE FIRST LIMB OF THE PLAINTIFF'S CLAIM.

From the oral evidence of the plaintiff and the exhibits, the following facts were proved in an effort to satisfy the first limb of the plaintiff's claim.

(1) Correspondence Between the Parties

The plaintiff deponed that as far back as 1970 he wrote to the defendant in terms which should have made the defendant aware that he, the plaintiff wished the premises to be insured for the market value. In that letter (Exhibit 11) dated 9th March, 1970 written by the plaintiff to the defendant, he expressed shock that damage to a glass door on the property was not covered by the insurance policy then in force, and he indicated that he could obtain a better deal if it was insured with R.S. Gamble and Sons.

He went on:

"In view of the above I am kindly asking you to let me have the premises covered by Messrs. R.S. Gamble & Sons Ltd. and forward the annual receipt to show you, or that your society insure the premises with this company and take advantage of the extra coverage at the lower premium. Further I would like to have a revision of my policy on premises No. 12 York Castle Avenue. Finally on the question of insurance on premises at Salem Runaway Bay, I have reconsidered the insured value