



and the second defendant was its servant or agent and technical director. It is common ground that:

- (a) On 24<sup>th</sup> May 1985 the defendants, acting as brokers for a Mr. J.A. Pottinger, made a written fire claim on his behalf against the insurers in respect of loss resulting from fire on 16<sup>th</sup> May 1985 to his building, machinery and baled stocks of paper.
- (b) On 24<sup>th</sup> May, 1985 the insurers received a preliminary report from Thomas Howell Kiewit, loss adjusters, appointed by the plaintiff to investigate the loss.
- (c) The parties soon reached an impasse in that "the stock of baled paper" portion of the loss had been denied by the insurers who alleged material non-disclosure of certain facts.
- (d) With regard to the "building and machinery" portion of the loss an interim payment was requested on Friday, 28<sup>th</sup> June, 1985. The request was made by the second defendant to the loss adjusters and not to the insurers or the plaintiff.

- (e) The adjusters' interim report recommending an interim payment of \$35,000.00 was received by the insurers on the afternoon of Thursday, 4<sup>th</sup> July, 1985.
- (f) At about 10.00 a.m. the following morning, Friday, 5<sup>th</sup> July, the insurers through the plaintiff told the second defendant that the interim report was incomplete.
- (g) The interim payment was made by the insurers on 10<sup>th</sup> July, 1985 after receiving a letter of clarification from the adjusters earlier that same day.
- (h) Two days earlier, the plaintiff received a letter from the defendants dated 8<sup>th</sup> July, 1985 which the defendants published to the following persons;
1. Mrs. E.W. Taylor,  
Superintendent of Insurance
  2. A.D. Blades,  
Chairman of the Insurers
  3. J.A. Pottinger, the insured and
  4. J. Silvera of Thomas Howell Kiewit, the loss adjusters.

In his action commenced almost six years later on 19<sup>th</sup> April 1991, the plaintiff alleges that he has been libeled by the defendants in

their letter of 8<sup>th</sup> July 1985 published to the aforesaid persons.

The letter reads as follows :

“July 8, 1985

David Sykes Esq.  
General Manager  
General Accident Insurance Company Ja. Ltd.  
15 Trinidad Terrace  
Kingston 5.

Dear Sir:

Re: Fire Claim 19<sup>th</sup> May, 1985  
Joscelyn Pottinger

On the 24<sup>th</sup> May, 1985, we sent to your Company completed Claim Form and other documents relating to the above.

Various additional documents, including the Fire Brigade Report were forwarded to your Company on different dates and up to the beginning of June 1985. Your office had appointed Thomas Howell Kiewit, Adjusters to investigate the loss on your behalf and towards the end of May Mr. Ziadie received the Adjusters Preliminary Report. He mentioned (verbally) to me that he would probably deny the Insured's claim for Stocks since these were baled paper items stored in the “open” at 34 Second Street, Newport West and not “30” as stated in the policy.

Mr. Ziadie subsequently confirmed this in his letter dated 30<sup>th</sup> May, 1985, though he stated this was an ‘initial reaction’ and that you were ‘preceding with the other

items such as Buildings, Plant and Machinery and Stocks contained in the building.

Your Adjusters proceeded on the basis of the above instructions and almost ten (10) days ago the Insured provided us with copies of various invoices in respect of the Buildings etc. At that time the writer contacted Mr. Slivera of Thomas Howell who advised that the details had not been received but he would give them urgent attention on arrival.

On Friday before last, the writer again contacted Mr. Silvera and informed him that it might be a while before repair/reinstatement was finalised and an Interim Report was, therefore, required. This was prompted by the following:

- a) the Insured had already expended monies to have certain work completed.
- b) the Insured had been forced to seek Bank funding at high interest rates (N.B. N.C. have a Mortgage interest in the Property)
- c) the whole position was aggravated by the situation concerning possible lack of cover on stocks.
- d) Debris Removal costs were still to be incurred and a portion of these would be affected by (c) above.

In consequence, Mr. Silvera was asked to check the sums claimed by the Insured for Buildings/Plant etc. Damage and make urgent recommendation to your Company that a portion of these losses be paid on account. This was subsequently done and your Adjusters Interim Report recommending a payment of \$35,000 was delivered to your offices early on Thursday afternoon last.

Mr. Ziadie advised that he would be leaving the office until Tuesday next but that he had informed you of the position and the writer would be able to negotiate cheque drawal with you.

In ringing your office the following morning, the writer was informed by your claims department (Miss West) that the Adjusters Report had not been received! After confirming delivery with the Adjuster. The writer again contacted Miss West who then transferred me to you on your arrival at that time (approx 10.30 a. M.). You confirmed that the Report was in your possession but was incomplete as it contained no details of loss. A promise was given by you that the File with Preliminary Report would be examined and if satisfactory you would arrange the issue and signature of a cheque.

You then rang back the writer at 11.00 a.m. and advised that you believed the loss was not due to a discarded cigarette. The writer whilst agreeing with your views as to the cause of Fire namely arson, pointed out that this did not affect the Insured's settlement rights unless you could establish complicity or fraudulent actions on the Insured's part. Having agreed this contention you then proceeded to relay a story concerning a letter of enquiry written to "someone" – not in this country – whose name was obtained from "somebody else" only contactable by a telephone number – purportedly provided by Mr. Ziadie – and that the reply to this letter written five weeks earlier "might" enable you to deny the entire claim.

Needless to say, you could provide no details as this may enable the Insured to circumvent or influence the reply. You gave no reason why this letter had not been "chased up" nor the reason for why Mr. Ziadie had not mentioned this aspect in our discussions. Indeed you went on to advise that the Adjusters were not even aware of this aspect, a fact you saw only as indicative of the generally poor level of Adjusting in Jamaica! You concluded by promising to seek verbal response to the

letter but that this would certainly delay settlement for what by your remarks may be an indefinite period.

The writers response, not unnaturally, was that you had provided nothing worthwhile for him to discuss with the Insured, and, in consequence, you would relay the position to Mr. Pottinger directly. Even this you could not do with complete honesty giving the Insured a lame excuse that you had not received an Adjusters Report sufficient to enable settlement of the loss. Not only is this a lie but it reflects badly on the writers own honesty and the Adjusters.

In conclusion, the writer only recourse has been to advise the Insured of all that has transpired (as summarised in this letter) and suggest that he bring the matter to the attention of the Insurance Superintendent – hence a copy of this letter to Mrs. Taylor.

It should be patently clear by the length and detail of this letter that the writer believes the actions of your Company and yourself in particular, to be shoddy and unprofessional. By what can only be described as “act of claims service” you “again” bring justification to the frequent criticisms levelled against our Industry regarding the non-payment of claims.

No one begrudges any Insurer the natural and necessary right to investigate (fully) claims made so as to ensure just and equitable claims settlements. In the same way surely the Insured and/or his Agents (the Broker) has a right to expect promptness and fair dealings from those with whom business is transacted?

In this case, it is the writers belief that our rights have not been observed or even considered and one is forced to raise the following questions:-

- 1) Why – notwithstanding the expressed urgency relayed to both your Adjusters and your own

- Deputy Manager 10+ days ago – was no attempt made (at that time) to seek a response to the letter you have referred to?
- 2) Why was the existence of this enquiry not mentioned to either your Adjuster or ourselves until Friday last (by you) when we were seeking a cheque?
  - 3) Why is it (from the writers personal experience in dealing with you) that whenever claims reach your desk they are immediately treated with suspicion, subjected to time wasting examination and delay – often over the most inconsequential and irrelevant issues imaginable?
  - 4) Why does your Company (or you) have the most deserved reputation of being one of the slowest – amongst insurers – for claims settlement?

Quite obviously, we as Brokers have a duty to our clients regarding claims and we do not see – in all conscience – how we can recommend placement of business with your Company, if the past and current claims handling service is to be continued.

To this end, a copy of this letter has been addressed to your Chairman, in the hope that he, at least, will not only action this complaint but may realise why his Company does not enjoy an even greater share of the market due to the inefficiencies and delays (particularly in claims settlements) so often created or aggravated (seemingly) by you, his General Manager.



Yours faithfully,  
GUARDIAN INSURANCE BROKERS LIMITED

Sgd. Brian M. Self  
Technical Director

BMS/re

P.S. As expected, you were again absent from the office when I visited at 3.45 p.m. on Friday and (also as expected) your message relayed to me was that you had been unable to contact the party(ies) who will enable you to settle or deny the Insured's loss!

- c.c. 1. Mrs. E. W. Taylor  
Superintendent of  
Insurance
2. A.D. Blades, Chairman
3. J.A. Pottinger.”
3. J. Silvera  
Thomas Howell Kiewit

The plaintiff contends that the words contained in paragraph 11 of the letter beginning with “The writer’s response” through to the final paragraph ending with “so often created .. by you, his General Manager” are defamatory of him in the way of his office and occupation.

The words complained of clearly refer to the plaintiff and I find that in their natural and ordinary meaning the words bore and were understood to bear the meanings pleaded by the plaintiff, namely that he:

1. Was dishonest;

2. Was a liar;
3. Deliberately lied in order to falsely cast a bad reflection on the second defendant and on the adjusters;
4. Was incompetent and inefficient, and failed to maintain professional standards of the insurance business;
5. Was shoddy and unprofessional;
6. Was guilty of deliberate and unnecessary delay in the settlement of claims;
7. Was not acting in the best interest of his employer in preventing it from enjoying an even greater share of the insurance market.

The words are incontestably capable of being defamatory of the plaintiff in his personal and business reputation. In spite of the defendants' denial I find that the words conveyed to the persons to whom they were published as reasonable readers the imputation that the plaintiff is a dishonest liar and shoddy and unprofessional in causing delay in settlement by his handling of the claim. "The test according to the authorities, is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libelous sense": **Capital & Counties Bank v. Henty**

(1882) 7 App. Cas. 741 cited with approval in **Jones v. Skelton** [1963] All E.R. 952 at 958 E-G (P.C.)

The defences pleaded by the first and second defendants are identical and are as follows:

1. Fair Comment on a matter of public interest
2. Qualified privilege.

### **Fair Comment**

Each defendant has made two pleas of fair comment: (1) the rolled-up plea (paragraph 5 of the defences, and (2) the general plea (paragraph 6 of the defences). The rolled-up plea which appears to roll up justification and fair comment together is really one of fair comment and not of justification: see **Sutherland v Stopes** [1925] A.C. 47. That plea is set forth in paragraph 5 of each defence as follows:

“In so far as the words contained in the said letter consist of statements of fact, they are true in substance and in fact; and in so far as they consist of expressions of opinion they are fair comment made in good faith and without malice on the said facts which are a matter of public interest”.

Where, as here, the rolled-up plea is raised particulars are required in terms of Section 185 of the Judicature (Civil Procedure Code) Act which provides:

“Where in an action for libel and slander the defendant alleges that, in so far as the words complained of consist

of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges to be statements of fact and of the facts and matters he relies on in support of the allegation that the words are true." (Emphasis supplied)

So, two sets of particulars are required in respect of the rolled-up plea: (1) particulars stating which of the words complained of the defendants allege to be statements of fact and (2) particulars of the facts and matters on which the defendants rely in support of the allegation that the words are true. While I agree with Dr. Manderson-Jones that the rolled-up plea is defective and cannot be relied on because only the first set of particulars have been furnished, I disagree that the general plea is defective for want of particulars. "Where a general plea of fair comment is raised the defendant must give particulars of the basic facts on which he relies in support of his plea but he is not required to give particulars stating which of the words complained of are statements of fact and which are expressions of comment for [Section 185A of the Judicature (Civil Procedure Code) Act] applies only to the "rolled-up plea", i.e. to a plea appearing to roll-up justification and fair comment together, and does not apply to a general plea of fair comment": see headnote in **Lord v. Sunday Telegraph Ltd.** [1970] 3 All E.R. 504

(C.A.) which correctly states the principle of the decision in that case. In the present case the particulars given under paragraph 5 of the defences satisfy, in my opinion, the requirement that the defendants must give particulars of the basic facts on which they rely in support of their general plea of fair comment. The particulars are as follows:

“PARTICULARS PURSUANT TO SECTION 185A  
OF THE JUDICATURE (CIVIL) PROCEDURE CODE) LAW

The following words are Statements of facts:-

- (a) On the 24<sup>th</sup> May, 1985 we sent to your Company completed Claim Form and other documents relating to the above.
- b) Various additional documents, including the Fire Brigade Report were forwarded to your company on different Dates up to the beginning of June, 1985;
- c) Your office had appointed Thomas Howell Kiewit, Adjusters to investigate the loss on your behalf;
- d) Towards the end of May Mr. Ziadie received the Adjusters Preliminary Report.
- e) He mentioned (verbally) to me that he would probably Deny the Insured's claim for stocks since these were

baled paper items stored in the "Open" at 34 Second Street, Newport West and not "30" as stated in the Policy.

- f) Mr. Ziadie subsequently confirmed this in his letter dated 30<sup>th</sup> May, 1985.
- g) ...he stated this was an "initial reaction" and that you were "proceeding with the other items such as Buildings, Plant and Machinery and Stocks contained in the buildings."
- h) Your Adjusters proceeded on the basis of the above instructions and almost ten (10) days ago the Insured provided us with copies of various invoices in respect of the Buildings, etc.
- i) At that time, the writer contacted Mr. Silvera of Thomas Howell who advised that the details had not been received but he would give them urgent attention on arrival.
- j) On Friday before last, the writer again contacted Mr. Silvera and informed him that it might be a while before

repair/reinstatement was finalised and an Interim Report was, therefore required.

- k) The Insured had already expended monies to have certain work completed.
- l) The Insured had been forced to seek Bank funding at high interest rates.
- m) N.C.B have a Mortgage interest in the Property.
- n) ...possible lack of cover on stocks.
- o) Debris Removal costs were still to be incurred and a portion of these would be affected by (c) above.
- p) ...Mr. Silvera was asked to check the sums claimed by the Insured for Buildings/Plant, etc. Damage and make urgent recommendation to your Company that a portion of these losses be paid on account.
- q) This was subsequently done.
- r) ...Your Adjuster's Interim Report recommending a payment of \$35,000 was delivered to your offices early on Thursday afternoon last.
- s) Mr. Ziadie advised that he would be leaving the office until Tuesday next but that he had informed you of the

position and the writer would be able to negotiate cheque drawal with you.

- t) In ringing your office the following morning, the writer was informed by your claims department (Miss West) that the Adjuster's Report had not been received.
- u) After confirming delivery with the Adjuster, the writer again contacted Miss West who then transferred me to you on your arrival at that time (approx. 10.30 a.m.).
- v) You confirmed that the Report was in your possession but was incomplete as it contained no details of loss.
- w) A promise was given by you that the File with Preliminary Report would be examined and if satisfactory, you would arrange the issue and signature of a cheque.
- x) You then rang back the writer at 11.00 a.m. and advised that you believed the loss was not due to a discarded cigarette.
- y) The writer whilst agreeing with your views as to the cause of Fire namely arson, pointed out that this did not affect the Insured's settlement rights unless you could



establish complicity or fraudulent actions on the insured's part.

- z) Having agreed this contention, you then proceeded to relay a story concerning a letter of enquiry written to "someone" – not in this country – whose name was obtained from somebody else only contactable by a telephone number – purportedly provided by Mr. Ziadie and that the reply to this letter written five weeks earlier "might" enable you to deny the entire claim.
- aa) ...you could provide no details...
- bb) You gave no reason why this letter had not been "chased up" nor the reason why Mr. Ziadie had not mentioned this aspect in our discussions.
- cc) ...you went on to advise that the Adjusters were not even aware of this aspect, a fact you saw only as indicative of the generally poor level of Adjusting in Jamaica.
- dd) You concluded by promising to seek a verbal response to the letter but that this would certainly delay settlement for what, by your remarks, may be an indefinite period.

- ee) The writer's response ... was that you had provided nothing worthwhile for him to discuss with the Insured and ... you would relay the position to Mr. Pottinger directly.
- ff) ... giving the Insured a ... excuse that you had not received an Adjuster's Report sufficient to enable settlement of the loss.
- gg) Not only is this a lie ...
- hh) ... the writers ... recourse has been to advise the Insured of all that has transpired (as summarised in this letter) and suggest that he bring the matter to the attention of the Insurance Superintendent ...
- ii) ... the expressed urgency relayed to both your Adjusters and your own Deputy Manager 10 + days ago ... no attempt made (at that time) to seek a response to the letter you have referred to.
- jj) ... the existence of this enquiry not mentioned to either your Adjuster or ourselves until Friday last (by you) when we were seeking a cheque.

kk) ... a copy of this letter has been addressed to your  
Chairman.

ll) ... you were again absent from the office when I visited at  
3.45 p.m. on Friday and ... message relayed to me was  
that you had been unable to contact the party (ies) ...”

Nevertheless, Dr. Manderson-Jones submitted correctly, in my view,  
that there are defamatory facts in the words complained of which are not  
covered by the particulars and that unless they were published on a  
privileged occasion without malice, the defendants are liable for them as  
they are not covered by the general plea. He lists them as follows:

1. That there was a lack of claims service;
2. That by lack of a claims service the plaintiff again brought  
justification to the frequent criticism levelled against the  
industry regarding the non-payment of claims;
3. Whenever claims reach the plaintiff's desk they are  
immediately treated with suspicion, subjected to time  
wasting examination and delay – often over the most  
inconsequential and irrelevant issues imaginable;

4. That the plaintiff has the most deserved reputation of being one of the slowest among insurers for claims settlement;
5. That the insurers did not enjoy a greater share of the market due to the inefficiencies and delays (particularly in claims settlement) so often created or aggravated (seemingly) by the plaintiff, the General Manager;
6. "Even if this [relaying the position to Mr. Pottinger directly] you could not do with complete honesty giving the lame excuse that you had not received an Adjuster's Report sufficient to enable settlement of the loss".

The defamatory sting in those unparticularised facts is the allegation of shoddy and unprofessional conduct of the plaintiff including deliberate and unnecessary delay in settlement of claims. That allegation is clearly comment and even if the matters listed from (1) to (6) above are also comment, there are, in my judgment, no facts on which the comments could be based that have been proven or admitted to be true.

The unchallenged evidence before me is that although the defendants filed a claim on 24<sup>th</sup> May, 1985, it was not until 27<sup>th</sup> June, 1985 that the insured provided the defendants with any invoices. And these were not















































