IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] SCCA 47 (19 August 2022)
SCA 49/2019
(Arising in CS 32/18)

SACOS INSURANCE COMPANY LIMITED **Appellant**

(rep. by Kieran Shah (SC))

And

JUSTIN ETZIN **Respondent**
(rep. by Olivier Chang Leng)

Neutral Citation: *SACOS Insurance Co Limited v Etzin (*SCA 49/2022) [2022] SCCA 47 (19 August 2022) (Arising in CS 32/18)
Before: Fernando, President, Twomey-Woods, Carolus, JJA
Summary: contract of insurance- householder's policy (fire) -applicable law- definition of indemnity
Heard: 2 August 2022
Delivered: 19 August 2022

ORDER

The appeal is allowed only insofar as it concerns a reduction in the moral damages awarded.

(1) The order of the court a quo is maintained with regard to the payment by SACOS Insurance Co Limited of SR 11,723,830 to Justin Etzin, being the insured sum for the total loss of the house.

(2) The order of the court a quo is maintained with regard to the payment of SR20,000 by SACOS Insurance Co Limited in respect of expenses incurred.

(3) The order of the court a quo for the payment of moral damage is quashed, substituting in its place an order for payment of SR100,000 by SACOS Insurance Co Limited

(4) The whole with interests and costs.

JUDGMENT

TWOMEY JA

Background

1. Mr. Justin Etzin owned a house at Takamaka, Mahé. On 20 December 2015, while he was out on the beach with his wife, the house and its contents were totally destroyed by fire. He filed a claim for the total value of his home and its contents against the insurer, SACOS Insurance Company Limited (SACOS), under a householder's policy of insurance he held with the company.

2. SACOS accepted liability under the insurance policy. They did not contest the sum of SR 458,500 claimed for the house contents. Indeed, this sum has already been disbursed to Mr. Etzin. However, they contest the sum of SR 11,723,80 being claimed for the property.

3. In a judgment delivered on 29 July 2019, the court *a quo,* although not confirming what the substantive insurance law of Seychelles was, relied on the English case of *Leppard v Excess Insurance Co. Ltd* [1976] WLR 1485 for the proposition that "the insured may not recover more than his actual loss." In this regard, the trial court concluded that since Mr. Etzin had lost his entire house, "it st[ood] to reason that for him to recover his actual loss, he was entitled to be paid the full insurance money, namely SR11,723, 830 and not the SR 14,732,550.48 quoted to rebuild by Hari Builders."

The grounds of appeal

4. Dissatisfied with this decision, SACOS appealed on the following grounds:

    1. *The Learned Trial Judge erred in her analysis that the Respondent was entitled to a declaration that the Appellant had breached the contract in that the Appellant had admitted liability. Still, the Parties did not agree on quantum.*

    2. *The Learned Trial Judge was in error to amend moral damages, and alternatively, if moral damages were due, it could not exceed the sum prayed, namely R100,000*

3. *The learned trial Judge erred in her appreciation of the evidence as to the floor area of the burnt house, including evidence of Mr. Patel that he was unsure of the details on the plan used to give a quotation was based on the original burnt dwelling house and or ongoing plans, and that the reconstruction cost was between R10,000 to R10,500 per square metre.*

4. *The learned Trial Judge erred in her appreciation that the extension to the house in 2013 was significant when it cost R575,500 and would not justify an assumption that the house was more than 360 square metres.*

5. *The judgment award of R11,723,830 is manifestly excessive and ought to be reduced.*

6. *The learned Trial Judge's judgment failed to apply the correct principles of indemnity whereby the loss of the Respondent should be the value which the fire has taken away from his property. "*

5. A differently constituted bench heard the appeal of the Court of Appeal to the present one, but due to procedural irregularities, the decision delivered on 18 November 2021 by one judge of that bench was subsequently declared null and void - hence the present rehearing of the appeal.

6. This appeal turns simply on the interpretation of the provisions of the householder's insurance policy contracted by the parties and in the light of the legal regime relating to insurance contracts.

The Householders Insurance Policy

7. A householder's insurance contract was signed between the parties on 16 June 2015. The following provisions of the policy are relevant to the claim in issue before the court:

> *"… WE THE COMPANY agree to pay or make good to the Insured's Executors or Administrators all loss or damage and to indemnify the Insured against all such liability and costs which he or they may from time to time sustain by any one or*

more of the perils insured after such loss and or damage and/or liability are proved." (emphasis added).

Buildings
This section covers the building of the private dwelling(s) stated in the Schedule…

The Building are (sic) covered against loss or damage caused by:
1. Fire…

8. There is correspondence between the parties prior to the insurance contract's signature concerning the house's value. Ms. Rouillon from SACOS wrote to Mr. Etzin on 1 April 2014, asking him to advise SACOS of any changes he would like to make for the renewal of his policy of insurance. To this effect, Paris Searles, an architect, valued Mr. Etzin's house on 14 My 2014 for SR 11,723,830, having taken into consideration that "the house has been well maintained and the following alterations and additions have been undertaken:

- *Replacement of all guttering on roof*
- *Replacement of all timber balustrading at balcony*
- *Addition of a massage room*
- *Conversion of office into an additional bedroom*
- *Addition of 5 new windows and sliding door"*

9. Based on this valuation by the Architect, SACOS issued a policy to Mr. Etzin charging him SR 55,548 for its benefit.

The law of insurance

10. Before we address the grounds of appeal in this matter, we must address the law regarding insurance in Seychelles. At the appeal hearing, we agreed with learned counsel for SACOS, Mr. Shah, that the law of contract contained in the Civil Code applies where claims under insurance policies are brought. Mr. Chang Leng has conceded this point. We pause only to note the historical legal development of the regime of insurance law in Seychelles and to explain what provisions of the law are applicable to the present case.

11. An excerpt from the author's thesis summarises the position:

> *"Before the repeal of Article 190 of the Commercial Code by operation of the Insurance Act of 1994, a peculiar situation obtained in Seychelles in terms of the law of insurance. The provisions of Article 190, as explained in the preceding section, together with a cross reference to Article 1964 in the Civil Code which states that contracts of insurance "shall be governed by the rules relating to marine insurance", meant that French laws relating to insurance in general no longer applied. The legal situation before the amendment was complicated as the cases of Mahé Trading Ltd v H. Savy and Co[1] and Lau Tee v Provincial Insurance[2] in 1975 were to confirm. Neither English law nor French law applied. Article 1964, supplemented by Article 1134 of the Civil Code, governed contracts of insurance. These were unclear and inadequate. France had updated its laws on insurance by the loi of 12 juillet 1930 but these were not applicable to Seychelles and the court could only rely on jurisprudence in France prior to 1930, an altogether unsatisfactory situation. The combination of the provisions of the 1975 Civil Code meant that contracts of insurance were to be treated as ordinary contracts.*
>
> *Subsequent to the new provisions in the Commercial Code, Didon v Provincial Insurance[3] expressed the applicable law in motor insurance claims: by virtue of Article 1964, contracts of insurance were governed by special legislation and in the absence of such legislation the rules relating to marine insurance applied. By virtue of Article 190 of the Commercial Code, it was the English law of marine insurance that applied. Hence, the English law of marine insurance applied to all kinds of insurance in Seychelles except where special legislation existed. This was confirmed in the case of Christen v General Insurance[4], another motor insurance case. In Pillay v General Insurance Company[5] where an insured had claimed under a policy of insurance against "theft involving entry to or exit from a building by forcible or violent means" for loss arising from looting by individuals as a result of an army mutiny, the court again found that English marine insurance applied and the exceptions relating to loss arising from perils were construed according to English law…"[6]*

[1] (1975) SLR 178.
[2] (1975) SLR 210.
[3] (1980) SLR 93.
[4] (1981) SLR 168.
[5] (1984) SLR 62
[6] Mathilda Twomey, *Legal Metissage in a micro-jurisdiction: The mixing of common law and civil law in Seychelles* (Thesis submitted to the National University of Ireland, Galway for the degree of PhD in law (2015) pp204 -205.

12. *Didon*, however, is no longer applicable. Although Article 190 of the Civil Code provided that contracts of insurance would be governed by special legislation and in their absence, the rules relating to marine insurance would apply, amendments to the Merchant Shipping Act[7] deleted the reference to the application of English law when the laws of Seychelles were silent on the matter. Maritime law or shipping matters are now solely governed by Seychellois law. As no specific insurance law has been passed, an insurance agreement is by inference now, therefore, governed only by the Seychellois law of contract as contained in the Civil Code.

13. This particularity has an essential bearing on the present matter, as will be seen later.

The issues before this court

14. The grounds of appeal as filed concern the following issues: whether there was a breach of contract, whether moral damages were due and if they were, was the quantum awarded correct, and whether the calculation of the judgment award was erroneous in terms of the destroyed building's extent and also in terms of the principles of indemnity under which it was awarded.

Was there a breach of contract - Ground 1

15. With regard to ground 1, the learned trial found that there had been a breach of the insurance contract giving rise to the payment of the indemnity with interest and costs. Mr. Shah, learned Senior Counsel for SACOS, has submitted that although liability under the insurance policy was not disputed, the failure to agree on quantum is not a breach of contract.

16. Mr. Chang Leng, learned Counsel for Mr. Etzin, has contended that in its pleadings, SACOS denied being liable to Mr. Etzin. On this basis, the court was entitled to declare that there was a breach of contract.

17. A reading of the pleadings reveals that the Amended Plaint has the following averment in paragraph 13:

[7] Part III Amendments, Merchant Shipping Act 1992, and S.I. 54/1995 Commencement Notice

"13. Despite numerous written and oral requests by the Plaintiff and/or his representatives to the Defendant for payment of the insured sums, the Defendant has, to date, failed, refused and/or neglected to pay the insured sums to the Plaintiff."

18. The Defendant counters this averment by pleading in its statement of amended defence as follows:

"The Defendant denies being able to pay the insured sums as alleged or at all. The Defendant avers that the cost for reinstating the damaged part of the house was approximately Seychelles Rupees Six Million Four Hundred and Two Thousand Four Hundred (SCR 6,402,400), which the Plaintiff refused."

19. The pleadings are clear - liability is denied. However, in the course of the proceedings, a letter was admitted (Exhibit P6) from SACOS to Mr. Etzin stating:

"We wish to advise you that we have accepted liability of your claim."

20. I would agree with Mr. Chang Leng that there appears to be equivocality with regard to the liability of SACOS. In the circumstances, the learned trial judge cannot be faulted for finding that there was a breach of contract. This ground of appeal has no merit and is dismissed.

Were moral damages due, and if so, was the quantum awarded correctly? - Ground 2

21. Mr. Etzin claimed SR 100,000 for moral damages. The learned trial judge, in awarding moral damages, cited Articles 1384, 1149(2) and 1153 of the Civil Code (respectively, provisions relating to liability for damages by a person who causes it, damages relating to those that cannot be measured such as pain and suffering, and damages arising from delayed performance) and relying on the closing submissions of learned counsel for SACOS found that moral damages were payable in the sum of 4% per annum on the award from the date the plaint was filed. This amount has not been liquidated, but Mr. Shah has submitted that the award was *ultra petita* as the amount granted for moral damages should not exceed what had been claimed. He has further submitted that as there was no breach of contract, no moral damages were due.

22. With regard to this last submission, we have already found that there was a breach of contract. Ultimately, therefore, moral damages could be granted.

23. In respect of the first submission, Mr. Chang Leng has replied that the learned trial judge correctly found that Mr. Etzin had suffered moral damage from being inconvenienced as a result of the failure of SACOS to adhere to the terms of the Householder's Policy in a timeous fashion. He further submitted that moral damages are assessed on a case-by-case basis and that the award in the present case was apt in the circumstances.

24. It would appear that Mr. Chang Leng is missing the point here. The learned trial judge's finding was erroneous in respect of what is meant by Article 1153. Article 1153 provides in relevant part:

> *"With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding."* (Emphasis added)

25. It is clear from the provision that the *damages* referred to relate to the principal sum agreed by parties to a contract. It does not relate to moral damages which the court always assesses. Furthermore, it is trite that the court cannot award what was not claimed. Mr. Etzin himself capped the claim for moral damages at SR 100,000 and that is the maximum that the learned trial judge could grant.

26. Mr. Etzin testified about the stress and inconvenience he suffered. In the absence of any evidence adduced by SACOS that the moral damage he suffered amounted to less than the amount claimed, we grant the total amount as specified in the pleadings, that is, SR 100,000.

The calculation of the judgment award under the Policy of Insurance – Grounds 3,4, 5, 6

27. The householder's policy of insurance is produced in paragraph 7 above. Its interpretation has caused much ink to be spilt. In her clarification of its terms, the learned trial judge referred first to the case of *Leppard v Excess Insurance Co. Ltd*[8] and concluded:

> *"[66] …And therefore, since the dwelling house was completely destroyed, it stands to reason that in order for the Plaintiff to recover his actual loss he is entitled to be paid the full insurance money namely Seychelles Rupees Eleven Million Seven Hundred and Twenty-Three Eight Hundred and Thirty (SR 11, 723, 8301-) and not the Seychelles Rupees Fourteen Million Seven Hundred and Thirty-Two Five Hundred and Fifty and Cents Forty-Eight (SR 14,732,550.481-) quoted to rebuild by Hari Builders. This is also in line with the court's ruling in the case of (Lau Tee v Provincial Insurance Co Ltd (1975), which held that:*
>
> > *"the loss or damage which the plaintiff is entitled to be indemnified by the defendant company under the policy is the value of the loss or damage actually suffered by the plaintiff to his house at the time of and as the result of the fire and not a sum equal to the replacement or reinstatement of his said damaged property."*

28. The case *of Lepperd* is an English case, and in view of the fact that it is not now contended that it is Seychellois law that applies to contracts of insurance, reference to that authority was erroneous.

29. Mr. Shah has submitted that the word indemnity in the contract means that the Appellant is obliged only to pay the insured the cost of repairing and rebuilding the house which had been built, namely as a light frame steel structure with wooden cladding and with the same surface area, regardless of the sum insured being more than the rebuilding cost. In his view, the court ought to have considered the evidence of witnesses from both parties in relation to the cost of rebuilding the burnt house. Had that been done, the learned trial judge would have come to the inevitable conclusion that the cost of reinstating the house does not amount to SCR 11 723,830 and that, therefore the sum awarded was excessive.

[8] [1979] 1WLR 512)

30. Mr. Shah has further submitted that applying the correct principles of indemnity; compensation ought not to be paid to the policyholder that exceeds their economic loss and that under such a principle, the benefit is limited to an amount that is sufficient to restore the policyholder to the same financial state they were in before the loss. He cites Halsbury's laws of England to the effect that in a contract of indemnity, the insured can only recover the actual amount of his loss and no more.

31. Mr. Shah has further submitted that the learned trial judge erred in her appreciation of the floor area of the burnt house, which she relied on to grant the judgment award. He contends that she assumed that the floor area had increased significantly when in fact, the extension built in 2013, valued at SCR 575,000, was in respect of guttering, timber balustrades, a massage room, the replacement of 5 windows, a sliding door and the conversion of an office into a bedroom.

32. Mr. Chang Leng has submitted in reply that the judgment award could not be manifestly excessive given the fact that that was the sum the house was insured for. Once a valuation was sought, received and accepted from Mr. Etzin's Architect, SACOS was bound by it. The purpose of valuing the house was to value the cost of rebuilding it. As the house was utterly destroyed and no longer exists, it is Mr. Chang Leng's submission that SACOS is trying to wriggle out of its contractual obligation to pay what was agreed.

33. With respect to the principles of indemnity, Mr. Chang Leng contends that the learned trial judge correctly determined that the loss to Mr. Etzin was the value of the house as insured. SACOS is instead equating Mr. Ezin's loss to the sum it has decided it will cost to rebuild the house, not the value of what Mr. Etzin has lost and proven at the trial.

34. With regard to the disputed floor area, Mr. Chang Leng submits that although both expert witnesses for the parties did not contend that the house was 300 or so square meters, the learned trial judge relied on the fact that the house had been burnt down completely in her assessment for the award and not on the floor area of the house.

The issue of the floor area only arose after Mr. Etzin had been asked for a valuation of his home so that SACOS could calculate the insurance premium due. SACOS' expert witness, Mr. Marc d'Offay, admitted that he had not seen the house and that Mr. Etzin's architect would be best placed to ascertain the house's actual value.

Discussion

35. We must return to the insurance policy to find the answers to the issues raised. The Policy, after stating that the total premium is SR55,548, in respect of the house valued at SR 11,723, 830, sets the following terms which bear repeating provide:

> *"WE THE COMPANY agree to pay or make good to the Insured's Executors or Administrators all loss or damage and to indemnify the Insured against all such liability and costs which he or they may from time to time sustain by any one or more of the perils insured after such loss and or damage and/or liability are proved."*

36. We have given anxious thought to what was meant by these provisions. Their plain meaning as we understand them is as follows: SACOS promises to make Mr. Etzin whole again for any covered loss in exchange for the premiums he pays. We are of the view that that was also intended by the parties.

37. But that doesn't seem to be the dispute between the parties. What is at issue was what "making good" meant. This stems from the fact that different meanings have been ascribed to the word *indemnify* in the policy. If I understand the submissions of the parties correctly, it appears that Mr. Shah contends that to *indemnify* meant the replacement cost or, as he put it, the cost of rebuilding the house, which in his estimation and based on SACOS' evidence is significantly less than the sum for which the home was insured. On the other hand, Mr. Chang Leng submits that the contract was clearly understood by the parties to mean that in the event of a total loss of the house, the full value of the policy would be paid.

38. It must be noted that the word *indemnity* is not qualified in any way in the policy. It is also not defined in the Civil Code, but its use across the different provisions indicates

that it is synonymous with the word compensation. In its analogous use in the French Civil Code, it has been defined as:

"[Une] somme d'argent accordée en compensation d'un dommage subi."[9]

(A sum of money awarded as compensation for damage suffered)

39. Its ordinary dictionary meaning is "security or protection against a loss or other financial burden"[10]

40. We confess to having difficulty discerning what the parties meant by *indemnity* in this case. We cannot agree with Mr. Shah's use of Halsbury's laws of England for its interpretation. In one breath, he submitted that Seychellois law applies to contracts of insurance, so he cannot now rely on English law. The agreement was drafted by SACOS and is in a standard format issued to all customers purchasing insurance. Without further elaboration as to whether the compensation is to be paid out to the insured in the event of a disaster, we can only assume that the word *indemnity* is an umbrella term that could signify the definitions ascribed to it by either party: a *replacement cost* insurance or *agreed value* insurance. Therefore, we believe that the meanings understood by both parties have equal validity.

41. However, what sways us towards the view that this was an *agreed value* policy is that SACOS conceded that it had paid the total value of the *contents* of the house that perished in the fire. Why the distinction when both were under the same policy? That discrepancy has persuaded us that SACOS has given a strained interpretation of the policy regarding the payment of indemnity for the house, which at the very least is self-serving.

42. In any case, as provided by Article 1156 of the Civil Code in the interpretation of contracts, the common intention of the parties is sought. Where the intention of the parties is not clear, it may be sought from their subsequent conduct.[11] In *Wilmot v W.*

[9] Lexicographie - Centre Nationale de Ressources Textuelles et Lexicales (voir par exemple, Code civil,1804, art. 682)
[10] Oxford English Dictionary online - OED
[11] *Chow v Bossy* (SCA 7 of 2005) [2006] SCCA 19 (29 November 2006)

& C. French (Seychelles)[12], the court reiterated that the way in which the parties have given effect to or acted upon a deed is one of the best pointers to its interpretation. That conduct is demonstrated in the present case, as we have already said, by the full payment of the value of the contents of the house.

43. Even if that were not to be the case, we are further strengthened in our view by the provisions of Article 1162 of the Code, which state that where there is doubt as to the terms of a contract, they shall be interpreted against the person who has the benefit of the term and in favour of the person who is bound by the obligation. It is, in our view, up to the insurer to specify clearly what indemnity means in the contract, given that the term is ambiguous.

Decision

44. In the circumstances, we are of the view that the agreement between the parties was that in the event of the house being completely destroyed, the total value expressed in the policy would be paid to the insured by the insurer.

45. That being the case, there is no need to consider the grounds concerning the alleged excessiveness of the judgment award.

46. The appeal is therefore only allowed on the issue of moral damages. The rest of the grounds are dismissed.

Order

47. In the circumstances, we order as follows:

(1) The order of the court a quo is maintained with regard to the payment by SACOS Insurance Co Limited of SR 11,723,830 being the insured sum for the total loss of the house.
(2) The order of the court a quo is maintained with regard to the payment of SR20,000 by SACOS Insurance Co Limited in respect of expenses incurred.
(3) The order of the court a quo for the payment of moral damage is quashed, substituting in its place an order for payment of SR100,000 by SACOS Insurance Co Limited.

[12] (1972) SLR 144

(4) The whole with interests and costs

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Dr. M. Twomey-Woods, JA.

I concur

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A. Fernando, President

I concur

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E. Carolus, JA

Signed, dated and delivered at Ile du Port on 19 August 2022.