(21)

IN THE SEYCHELLES COURT OF APPEAL

Olivia Maillard **Appellant**

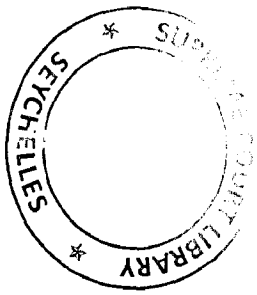
AND

State Assurance Corporation of Seychelles **Respondent**

SCA No. 5 of 2005

[Before: Bwana Ag. P, Hodoul & Domah JJA]

Mr. A. Derjacques for the Appellant
Mr. D. Lucas for the Respondent



JUDGMENT OF THE COURT

Hodoul, JA

[1] In CS No.235/2001, the appellant sued the respondent on an insurance contract claiming damages for her damaged house.

[2] The plaint is set out in extenso:

"*1. The Plaintiff is and was at all material times the owner and proprietor of a parcel of land, namely, Title V8992 and the house thereon situated at St. Louis, Mahe. The Defendant is and was at all material times an insurance company engage in the business of providing insurance coverage.*

2. On the 21st August 2000 the defendant issued the Plaintiff with an insurance policy namely policy number MAOHH001997 providing insurance coverage to the Plaintiff's dwelling house including fixtures and fittings in the total sum of Rs1,050,000/-.

3. *The said insurance policy inter alia provided insurance coverage up to a maximum sum of Rs1,050,000/- for damage or losses caused to the said dwelling house by storm, tempest and flood.*
4. *On or around the 15th February 2001 as a result of a storm, heavy rainfall, tempest and flooding the said house was severely and extensively damaged.*
5. *As a result of the said damage the house was rendered dangerous, structurally unsafe and imminently to collapse.*
6. *On the 11th May 2001 the Quantity Surveyor estimated the cost of reinstating the house to its original condition at One Million Two Hundred Thousand Rupees.*
7. *On the 17th July 2001 the Building Contractor estimated the cost of repair at One Million and Three Hundred and Seventy Five Thousand Rupees.*
8. *Despite several requests the defendant has failed, refused or neglected to pay the Plaintiff the sum assured or any sum at all.*

Particulars

1.	*Cost of repair of house*	
	Claimed from Defendant	*Rs.1,050,000.00*
2.	*Loss of rent (10% of insured value of house)*	*Rs. 105,000.00*
3.	*Moral Damage*	*Rs. 50,000.00*
	TOTAL	***Rs.1 205,000.00***

WHEREFORE, the Plaintiff prays this Honourable Court to give judgment in her favour in the sum of Rs.1, 205,000.00, together with interest and cost."

[3] The defendant company denied each and every allegation and specifically denied any liability on the ground that the cause of the damage does not fall within the scope of the policy it issued to the plaintiff. In fact, the relevant clause providing shelter for the company reads as follows:

> - "*The buildings are covered against LOSS OR DAMAGE DIRECTRLY CAUSED BY: ... ... 3. STORM, TEMPEST OR FLOODING EXCLUDING (a) subsidence or landslip - ...*" "*however caused*".

[4] The learned trial judge, Juddoo, J., heard a dozen witnesses including prominent witnesses, Mr. Adrienne for the appellant and Mr. Morel for the respondent, both competent and experienced civil engineers. The judge dismissed the plaint in his judgment dated 25th February 2005 which he concluded as follows:

> "*In the end result, I find that the proximate cause of the damages to the building to be differential settlement attributed to the inadequate foundation structure. This risk is an excepted peril under the insurance contract for which the insurer is not liable for loss and damages arising out of the excepted peril. I am left with no alternative other than to dismiss the plaint with costs.*"

[5] Aggrieved by the judgment, the appellant now appeals against the whole judgment on the following grounds:

(a) *The Learned Judge erred when he concluded that the proximate cause of the damage to the building was differential settlement attributed to inadequate foundation structure.*

(b) *The Learned Judge erred when he remarked that the two civil engineers reports are not in sharp contradiction.*

(c) *The Learned Judge failed to address the issue of burden and standard of proof in this matter at all which was a crucial issue in the case.*

(d) *The Learned Judge's conclusion and final determination that "... In the end result, I find that the proximate cause of the damages to the building to be differential settlement attributed to inadequate foundation structure" is flawed and based entirely on a mere presumption and opinion and of one witness not substantiated by concrete evidence.*

(e) *The Learned Judge erred when he concluded only "light to moderate" rain has fallen during the first two weeks of February 2001 in the St. Louis area.*

(f) *The Learned Judge failed to evaluate, analyse and consider the entire evidence properly, adequately or at all and had he done so he would have come to a different conclusion than the one reached.*

(g) *The Learned Judge erred when he concluded that "settlement" was an "excepted peril" under the policy. The Appellant avers that the said word was not expressly used in the policy nor was it intended to be used and that the Learned Judge was wrong to imply and import it in the policy in order to find in favour of the Respondent."*

[6] In this appeal, the appellant will be successful if he satisfies this Court that, on evidence adduced, she has established that flood was the direct cause of the damage. Whereas, the respondent will be successful if he satisfies this Court that, on evidence adduced, it has established that the direct cause of the damage was an excepted peril, namely, "subsidence". We note that in the operative paragraph of the judgment, the learned trial judge does not mention

"*subsidence*" but finds "*differential settlement attributed to inadequate foundation structure*" and to constitute an "excepted peril".

[7] We remind ourselves that, whereas the parties had recourse to highly technical expertise concerning building and construction techniques, soil structure, differential settlement, etc., the subject of all this expertise was a "light", single floor, three-bedroom house with a car port and not a "heavy" multi floor building. Two categories of buildings which, in the mind of an ordinary person, do not require foundations of the same solidity.

[8] We will start with ground (g) pertaining to the interpretation of the exclusion clause to the effect that:

> *This insurance does not cover "subsidence or landslip" howsoever caused.*

[9] The learned trial judge finds an "excepted peril" in differential settlement resulting from inadequate foundation structure which, it would seem, he equated with "subsidence". This is an erroneous interpretation of the exclusion clause.

[10] If by the rider "howsoever caused" it is intended to exclude, for the benefit of the respondent, damages caused by "subsidence" and "landslip" resulting from storm or flood, the policy would be taking away by one hand what it is giving by the other. Such an interpretation is not permissible in an insurance cover which should be interpreted "contra proferentem", that is against those who have drawn it up. In this regard, the learned Judge enunciated the correct principles but misapplied it to the facts.

Art. 1162, CCS, provides: "*In case of doubt, the contract 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.*"

[11] Hence, any interpretation of the exclusion clause which would exclude damage caused by "subsidence" resulting from flood is erroneous.

[12] Moreover, as has been also stated in Yvonne Lambert-Faivre, Dalloz, Droit Des Assurances, 2eme ed. Para. 135,

> "*L'exclusion doit être formelle; elle doit être claire, précise et non équivoque, qu'elle soit insérée dans les conditions générales ou les conditions particulières du contrat. Comme c'est l'assureur qui rédige la police, une clause d'exclusion ambigue sera interprétée par les juges du fond en faveur de l'assuré.*" (Pau, 15 mars 1972, D. 1972.2.529, note C. Berre et H. Groutel.

[13] The insurance contract was written by respondent company which itself inserted the exclusion clause. To an ordinary person, "subsidence" implies some form of sinking which is not synonymous with either differential settlement or inadequate foundation structure. We need not elaborate further on the lack of clarity and precision in the interpretation of "subsidence" which is evident from the proceedings. The judge himself prefers not even to mention the word in his judgment ... We have no alternative than to interpret this confusion in favour of the appellant.

[14] Grounds (a), (d) and (e) may be taken together in as much as they relate to the facts of the case pertaining to the crucial issue of what caused the damage to the house.

[15] The respondent's position is that the damage was caused by inadequate foundation structure and not by flood. This has not been established to our satisfaction for the reason, *inter alia*, that no investigation of the foundation or of the soil composition below the foundation was carried out and structure. This was common ground between the two main experts. On that issue we find that there was only speculation, inferred from the cracks. However, proof of inadequate foundation would not necessarily be proof of "subsidence"

[16] On the other hand, the only direct evidence on the condition of the foundation is that of Mr. Lefevre who built the house. He is certainly not an expert but he holds a maintenance and repairs license and employed a qualified mason. His evidence to the effect that he constructed a sound foundation on solid ground is not speculation; it stands unrebutted despite stringent cross-examination.

> "*I was there when they were doing it and I know the house is on firm ground.*" (p.42)
>
> "*The architect did the foundation plan and he came to supervise*" (p.43)
>
> "*I disagree*" was his curt reply when it was put to him that "*your foundation was inadequate and unworthy*" (p.44).

[17] This leads us to the crucial question. Was the learned judge correct in his conclusion that it is the inadequate structure of the house that led to the damage? The answer is obviously in the negative. The attempt to prove weak

foundation is unconvincing. The fact that other houses in the vicinity - and there is no evidence as to that - did not collapse was an attempt to give evidence from the bar. No evidence was adduced as regards other houses.

[18] The appellant maintains that the damage was caused by storm. We find unrebutted evidence that there was storm and sufficient evidence, *inter alia*, in the testimony and report of the engineer for the appellant, that storm was the direct cause of the damage.

[19] First, Robert Lajoie, a meteorological officer, at pages 27 & 30, establishes that rainfall of *121 mm and 93 mm* was recorded on the "13th and 14th February" and that such rainfall is normally termed *" a rainstorm"*.

[20] Mr. Adrienne, the engineer for the appellant, gave crucial and unambiguous evidence that the damage was caused by storm. At pages 83-85 he states:

- *"Since there were lots of water outside and it had rained previous days before I came to the conclusion that the water had caused the soil under the footing of the house to swell and then disturbed the foundation and as a result caused cracks to structure."*

- *Q: And when soil absorbs the water to that extend what happen to the soil?*
  A: It expends.

Q: And when it expands what happens to the structure and superstructure of the house?

A: The structure is moved and it affects the superstructure.'

- *"Since the underground water after heavy rain the amount of water is increased and this create movement under the footing."*

[21] Mr. Felix Morel, the engineer for the respondent, at page 332 agrees that "*during the month of February we had had some rather heavy rain*".

[22] Mr. Morel's replies to two questions are significant. In the first, he identifies flood (no. 5 in his report) as a "possible" reason for "differential settlement"; in the second, he refers to flood as the "predominant" reason.

1. "*Q: So no 5 is a possibility, it could have occurred.*
   A: It could have occurred." (p.356)
2. "*Q: Now no.5 is as you have already stated, flood caused by the rainstorm, you have already stated is the accelerant?*
   A: Yes which obviously is the predominant cause." (p.340)

[23] Hence, the finding of the learned trial judge at page 427, is erroneous:

"In Mr. Morel's opinion, the effect of flooding on the property would lead to an 'acceleration' of the settlement process but would not constitute the predominant cause of the cracks to the dwelling house."

[24] From the above, it is obvious that the cause of the damage was storm. We are of the view that the learned trial judge have reached an erroneous conclusion because he misapplied the law to the facts. He asked the wrong question as regards liability and introduced the factor of "differential settlement" into the equation and gave to it a determining weight, resulting in an erroneous identification of the main issue. "Differential settlement" is the behaviour of a building over time, owing to geological phenomena underneath it. There was a preponderance of evidence that the geological phenomenon in this case was movement of soil underneath the foundation caused by the storm, the flood and the rain at the material time. There is very little evidence that the house would have collapsed if there had been no storm.

[25] With respect to ground (c), from the moment the appellant had adduced evidence of the fact that there was flooding of the premises at the material time and that her house had suffered damage, she had discharged the legal burden to establish her case. Thereupon, the evidential burden shifted unto the respondent company to establish that the damage was not caused by the storm, flooding or heavy rain but by "subsidence" the relevant "excepted peril". This it has failed to do.

[26] As regards ground (f), pertaining to failure of the learned trial judge to properly evaluate, analyze and consider the entire evidence, we are of the view that it has been adequately covered hereinbefore. The respondent chose to plead the inadequate structure of the house and embarked on a difficult and complicated task of demonstrating that it was the foundation that was inadequate. To prove, even on a balance of probabilities, that the house would have collapsed - without storm and in any event - on or around the same date, is a herculean task (para.12).

[27] In the result, the respondent has failed to establish "subsidence", an "excepted peril", caused the damage; the appellant has satisfied this Court that flood was the direct cause of the damage. Hence, the appeal is allowed on all grounds, save for ground (b) which we need not consider. The case is remitted to the Supreme Court for the assessment of the indemnity payable to the appellant in the circumstances.

[28] The appellant is awarded costs in the trial Court and on appeal.

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J. M. HODOUL
JUSTICE OF APPEAL

I concur:

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S. J. BWANA
AG. PRESIDENT

I concur:

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S.B. DOMAH
JUSTICE OF APPEAL

Delivered at Victoria, Mahé on this 29th day of November, 2006