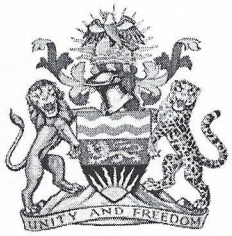


IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 226 of 2020

BETWEEN

TOUFIQ BILAL LIMBARDA t/a MOON PUFFS.....CLAIMANT

AND

LIBERTAS GENERAL INSURANCE COMPANY LIMITED.....DEFENDANT

Coram: **Manda, J**

Mbeta for the Claimant

Nthambi for the Defendant

M. Kachimanga Court Clerk/Interpreter

RULING

This is the claimant's application for Summary Judgment for the sum of MK2, 013, 755, 358. 98, compound interest on the stated amount at 5% above the commercial bank lending rate, legal collection costs and costs of the action. The defendant opposed the application.

The facts

The claimant is a business person who runs factories which manufacture food products in Limbe, Blantyre and the defendant is an insurance company. By a contract of insurance contained in a policy number 1/0153192/09, dated 2nd of September, 2021 ("FFM1"), the defendant agreed to provide the claimant with 100% insurance cover against any loss or damage arising from fore for the period starting from the 20th of October, 2021 to the 1st of September, 2022.

On the 4th of October, 2021, the claimant's premises caught fire and there was damage to the buildings and their contents (plant and machinery and stocks and raw materials). The damage having occurred during the subsistence of the insurance policy, the claimant proceeded to make a claim for indemnification. However, before the claim could be paid, an assessor by the name of Chiwaya of Harolds Group was engaged to make an assessment of the damage. According to Chiwaya, whose report the claimant exhibited as "FFM2", the damage suffered by the claimant came to MK2, 113, 755, 358. 97. It was the claimant's assertion that despite several reminders, the defendant has not paid him, except for an interim payment of MK100, 000, 000. 00, which was made on the 16th of May, 2022. The sum of MK2, 013, 755, 358. 97 still remaining due, the claimant commenced these proceedings.

In defence, the defendant admitted that there was a policy of insurance which covered loss from fire but that the same was conditional on the claim being submitted in good faith and without false representation. The defendant averred that the claimant's claim was fraudulent and fraught with misrepresentations. The defendant further stated that after being informed of the fire, they did appoint Chiwaya of Harolds Group as a loss assessor and that there was a recommendation that the loss be assessed at MK2, 113, 755, 358. 97. The defendant however averred that this assessment was based on erroneous and false information supplied by the claimant and that this was contrary to the terms of the insurance policy.

The defendant also admitted making a payment of MK100, 000, 000 and that this was made on the basis of the Harolds Group report, when the defendant was unaware of the false basis on the claimant's claim. It was the defendant's defence that following the Harolds Group report, it engaged Lloyd Warwick International as assessors of the claim and that the latter submitted reports that the claimant's claim was false and exaggerated. It was noted however that the purported report from Lloyd Warwick International in not on record. What we have on record is a document which

is no legible but one which is titled "Document Request List". A document request list is definitely not an assessment report.

Issues

The question I have before is whether the defendant has a good and arguable defence which would prevent me from entering summary judgment. In this context, it is noted that the only defence that the defendant is raising is that the claimant was fraudulent and that he had misrepresented himself. Of course if the claimant had committed fraud, the question would be what role did Chiwaya play? I would assume that Chiwaya is an assessor of note and that before coming to a decision he did go to inspect the damaged premises. Now if there is an assertion that Chiwaya acted on false information, then the same needs to be more specific. For instance, is there a suggestion being made that Chiwaya never actually visited the premises? Alternatively, is there a suggestion that Chiwaya was unduly influenced or that he was negligent in his duty?

The law

It is settled law that where fraud is being pleaded, then the same must done with specificity. In ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2001] UKHL 16 Lord Millett identified two overarching principles, as follows:

1. The pleading must give a party sufficient notice of the case being made against it, and consequently, in the case of a fraud claim, it may not be sufficient to say "willfully" or "recklessly".
2. An allegation of fraud or dishonesty must be sufficiently particularized; and therefore, in the case of dishonesty, it is necessary to plead the facts which will be relied upon at trial to justify inferences of dishonesty.

Further, in ***McEneaney and others v Ulster Bank Ireland Ltd and others*** [2015] EWHC 3173 (Comm) the Court reminded practitioners that pleadings, especially those alleging fraud, need to be clear and specific. This includes identifying the relevant causes of action and relief claimed. Furthermore, if the claimant wishes to plead negligence (in the alternative to fraud), then fraud must be pleaded first, clearly and separately from the plea of negligence. As noted by Lord Hope of Craighead in ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** at 55-56:

"As the Earl of Halsbury LC said in ***Bullivant v Attorney General for Victoria*** *[1901] AC 196, 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in* ***Armitage v Nurse*** *[1998] Ch 241, 256G, it is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal:* ***Belmont Finance Corporation Ltd v Williams Furniture Ltd*** *[1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence"*

Finally, in ***JSC Bank of Moscow v Kekhman and others*** [2015] EWHC 3073 (Comm) it was held that there is no need for the particulars pleaded to be consistent only with the defendant's dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence.

Analysis and Findings

In looking at the law, it is quite clear that where one asserts fraud or dishonesty, it is a requirement that the particulars of the fraud or dishonesty must be indicated. As indicated above it is not clear from the defence as to how the claimant could have been fraudulent or what misrepresentations he made to Chiwaya.

Further, I would want to believe that Chiwaya is an experienced assessor and has worked on a number of fires. With such experience, I do not think that Chiwaya would readily had been fooled

by the claimant. so either there must be an allegation that Chiwaya was negligent in his duty or that he colluded with the claimant in coming up with report. Otherwise the defence does not seem to have any merit, in my view. This is also in view of the fact that the defendant did pay the claimant an interim payment of MK100, 000, 000, which for all intents and purposes would amount to an admission of the insurance claim.

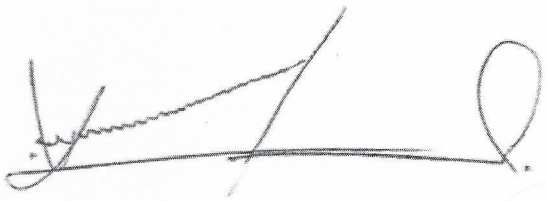
Further still, in the emails from the email exchanges between the defendant and the reinsurer, attached to the sworn statement in opposition to stay proceedings, deponed by Abdul Mageed Dyton, the defendant's Chief Executive Officer, there are no suggestions of fraud or misrepresentation. Rather the defendant was looking forward to the immediate settlement of the claim. This is specifically in an email dated 14th June, 2022 from Ted Kunje.

From the foregoing, I must state that I do not think the defendant has a good and arguable defence. The assertion of fraud or misrepresentation lacking particularity, must, according to law be struck out. Having struck out the assertion of fraud then clearly there is no good and arguable defence.

Conclusion

Having found that there is no good and arguable defence it means that I must enter judgment for the claimant. The Claimant is thus awarded the sum of MK2, 013, 755, 358. 97 plus interest. The interest will have to be assessed if not agreed. The claimant is also awarded the costs of action which would be taxed if not agreed.

Made in Chambers this.....8th .....day of.....December.....2023



K.T. MANDA

JUDGE