CJ file

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 55 OF 1987

BETWEEN: **ESTHER MCLAUGHLIN** **PLAINTIFF**

AND: **THE AMERICAN HOME ASSURANCE COMPANY** **DEFENDANT**

For the plaintiff: Mr. M. Parkinson
For the defendant: Mr. D. Murray

JUDGMENT

This case arises from the denial of liability by the defendant under an insurance policy taken out by the plaintiff on her home which was heavily damaged by fire in the early hours of the morning of the 16th August 1986.

Evidence in support of her claim was given by the plaintiff herself and by two of her sons. It is notable that one of these is in the insurance business and another is a fireman.

The plaintiff described her respectable career. She is bursar at the Cayman Islands High School and for thirteen years worked in New York

and taking dinner to her son Richard who was on duty at the fire station she also called on a friend to arrange for her television set to be taken to Newlands the following day. She got back about 10:00 p.m. and went to bed about 10:45 p.m. Her 18 month old grandson Christopher was sleeping in the same room. She woke up later and believed that it was because she heard her son's Doberman dog barking, as she put it, "excessively and strangely." He was chained to a tree outside the utility room at the other end of the house. The dog kept on barking and she got up to see why. She said that when she got up the room appeared cloudy and she thought it was because she had suddenly done so. When she got to the living room she saw flames coming out from the kitchen between the kitchen and dining room (which according to the agreed plan is an area of the main room which adjoins the kitchen). She ran back to the bedroom, put on a dress and collected her grandchild, went to a neighbour but could get no reply to her knocking, returned and unchained the dog and drove to the fire station. She said that drive took ten minutes, may be five. Evidence about what happened at the fire station comes from the plaintiff, her son Richard and Officer Doorly McLaughlin, who is not related to the plaintiff, and who was at the time a sub-officer at the fire station on the Airport road.

Doorly McLaughlin was on duty on the night in question at the fire station. He produced a log book which was agreed to contain the entries for that night. It shows the following -

as a Supervisor in the Cashier's Department at the Brooklyn Hospital. She bought some undeveloped land in Maple Road, George Town on which she built the house in question. Her husband died in 1982 and she returned to live in the house in the following year. In 1984 she bought another piece of raw land in the Newlands area, and by 1986 had almost completed a substantial dwelling house upon it. She described her financial situation at the time of the fire and was cross-examined upon it. There is nothing in that evidence which indicated to me that she was in financial difficulties of a nature which would provide a motive for committing arson on her house or being party to a conspiracy to do so. That is the allegation which is being made by the defendant. A suggestion was made that the visit which she made on the evening before the fire to the builder of her new house to discuss financial arrangements indicated a problem. The builder was not called and there is no evidence to contradict that of the plaintiff which was to the effect that it was a routine meeting.

The plaintiff had insured her house with the defendant for $65,000 in 1984 and the contents for $5,000. With effect from 4th June 1986 the cover on the building was increased to $70,000 and on the contents to $20,000. That, she said, was done because her son Clarence advised her that her existing cover was inadequate. He is an insurance sales executive in the USA. That was confirmed by Clarence. He was asked why he had advised his mother to increase the cover on the house which she was about to vacate but gave her no advice about the Newlands property which she was about to enter. His answer was that in the United States you cannot get insurance on a vacant or uncompleted

property and he did not know what the position was in Cayman. There was no evidence to the contrary about what on the face of it appears to be a surprising feature of American Insurance Law, and I find it surprising also that as a insurance professional he did not consider how his mother could obtain cover on the new house which was for her a considerable investment, rather than advising her solely on the smaller house, which was about to be vacated, and its contents. I am not finding or even suggesting that Clarence was party to a conspiracy but his action, in my view, left the contents of Maple Road appreciably and possibly temptingly overinsured at the time of the fire.

The plaintiff's description of the situation at Maple Road on the night of the fire was this. Many of the personal belonging of the family had been removed, either because they had been taken to the Newlands House or given to charity. Her sons had also taken their personal things to Newlands. However, she intended that the furniture and utensils were to be left at Maple Road as that house was to be rented furnished. She described how the contents of two bedrooms had been taken and placed against the wall of the living and dining area. This was the point where the most intense conflagration occurred, according to the expert's report to which I shall be referring later.

I now turn to the evidence of the events surrounding the fire itself. The plaintiff says that after returning from her visit to the builder

0213	House Fire	Mrs. Esther McLaughlin came to the fire station stating she saw smoke in her house opposite the hospital.
0214	Left Station	Ric McLaughlin left the station in the TK 4 to go to the scene of the fire (and E. Webster)
0217	Report	Ric McLaughlin reported at the scene asked for assistance.
0218	Left Station	Station Office D. McLaughlin left the station in the rescue vehicle to go to the scene
0221	Arrive at scene	Rescue vehicle arrived at the scene of the fire.

There follow entries indicating a message at 2:35 to the effect that the fire was under control and at 2:56 that the firemen were making up to return to the station. At 3:05 and 3:06 are entries indicting that D. McLaughlin called to the fire control asking the attendant to notify the police and ask them to send someone over and that the police were notified and said they would do so.

In all those entries I find nothing to indicate any suspicion of arson accepting as I do the evidence that the notification to the police was

routine. Officer D. McLaughlin said that the entry "(and E. Webster)" should have been on the lower line as Officer R. McLaughlin had left the station alone whereas he, Officer D. McLaughlin, had travelled with Webster. That was confirmed by Richard McLaughlin.

The evidence of plaintiff's son Richard McLaughlin conflicts in some respects with that of the his namesake and in assessing the importance of that I take into account that both were describing events which took place nearly nine years ago. I shall make no references to discrepancies in the evidence which I regard as unimportant. Richard says that it was the officer in charge, Steve Porter, who notified him in the control room by phone of the fire and that he saw Porter and his mother in the recreation room. It was Porter who told him that he could respond using the emergency light but not the siren on the fire truck. By "respond" he understood that he could go "to check out and see what was what." His evidence is that his mother said that the house was full of smoke and Steve Porter did not mention fire. Richard said to Porter "what do you want us to do?" and Porter replied that he should "go quickly, take the truck, check it out and if there is anything you can call for assistance." That contrasts in an important way with the evidence of Officer D. McLaughlin who said that when Mrs. McLaughlin arrived she appeared to be just normal and simply asked whether she could see her son. She did not mention the house being on fire. He called Richard who came and had a conversation with his mother who was sitting in the car. Richard then drove off in the fire truck unaccompanied by any other officer, and he knew Richard had taken the truck because he heard an announcement on the truck radio.

His evidence was that a station officer would never jeopardise his job by instructing one man to go to a fire and in his 16 1/2 years of experience no senior officer had instructed his subordinate to respond to a fire like that. It would certainly be ground for disciplinary action and, his opinion, instant dismissal. For a subordinate to leave the station without permission would also be disciplinary matter but he could not say whether Richard was ever disciplined.

It was obviusly in Richard's interest to say that he had been authorised by the station officer to go off alone. On the other hand Doorly's evidence was disinterested and had the considerable advantage of being in accordance with common sense. I prefer it. It does not explain how the entry to the effect that Mrs. McLaughlin stated that that there was smoke in her house at 2:13 come to be made but it is not in dispute that Richard was in radio contact from the truck to the station. In any event there is no evidence that Mrs. McLauglin mentioned anything other than smoke.

When Richard arrived at his house he said he saw smoke coming from three windows and after he had extinguished the majority of the fire to a reasonable size he returned to the truck and asked for assistance by radio. Those whom he said arrived in three to four minutes after that were the officer in charge Steve Porter, second officer Doorly McLaughlin and two other firemen. There is some inconsistency between that account and the log book which indicates Richard left the fire station at 2:14 and reported at the scene and asked for assistance at 2:17. He could not possibly have gone from the fire station to the

house, and carried out any fire fighting before reporting back to the station three minutes later. He described some procedures for getting the hose into action which he said he was capable of performing but were more usually carried out by two people. I believe that. But on any view it must have been obvious to Richard as soon as he arrived at the house that he was dealing with a serious fire. That contrasts with the lack of any sense of urgency at the fire station which comes out of his own account and that of his colleague.

He said that he forced open the front door with the assistance of an instrument called a halogen tool. The defendant's expert Mr. Bryan Maphet said that he found no evidence of that having being done. None can be seen from any relevant photograph and I am left in doubt as to how Richard got into the house. There is a possibility of faulty recollection after so long and I have to leave it at that.

Evidence was produced by the defendant in the form of a written report by Mr. Maphet, whose credentials were impressive and accepted. He concluded that the fire was an act of arson. That is really beyond dispute. He found two unconnected points of origin of the conflagration and evidence that at each an accelerant such as kerosene had been poured. There is evidence from the police witness, Detective Inspector Brady, who inspected the premises on the night of the fire, that a liquid smelling of kerosene was also present but unignited at a third point - a chest of drawers in the bedroom in which Mrs. McLaughlin and the baby were sleeping. He said that the drawers were otherwise empty, but that enough liquid was present to run over his

hand when he pulled the drawers out; and that to the best of his recollection Mrs. McLaughlin's explanation was that she had been using kerosene to clean screens.

Mr. Maphet was cross-examined at some length. Indeed an attack on him and his kind as being willing to testify for either side depending on who pays was mounted as part of the plaintiff's case. It was submitted that his credibility was confined to the four corners of his report. While I entirely accept that Mr. Maphet is not entitled to give expert opinion - as he was induced to seek to do in cross-examination on behalf of the plaintiff herself - on such matters as the behaviour of Doberman dogs in general and the credibility of the plaintiff's account of why the many items had been taken from the house before the fire, he was positive in his view that the fire could not have been set by an unknown third party. Nothing of that was in his report which dealt only with the evidence of the existence of arson, but it was brought out on behalf of the plaintiff in cross-examination. For an individual to have come in, set a fire in the kitchen and another in the living room without fear of being caught is not, he said, the way it happens, ever. Force is lent to that observation by evidence of the presence of spilt kerosene in the bedroom. Moreover, on a topic particularly within his field of knowledge, he testified again under cross-examination, that for Mrs. McLaughlin to have got up with the room already, as she put it, cloudy and gone to the entrance of the living room was a physical impossibility. The phenomenon known as superheating of the air would by then have occurred and she would have been dead. A fortiori it would have been impossible for her to have

left through the front dooor, which would have meant going through the living room. A passage from the record of an interview dated 4th November 1986 which said that that was what she had done was put to her. She admitted the record but said she did not remember saying that. Mr. Maphet left the impression of being a somewhat opinionated man but I see no reason to disbelieve his firm evidence on the matter within his expertise.

There is another matter relating to the front door which I shall mention. The following passage appears in a signed statement by Mrs. McLaughlin dated 5th Septemeber 1986 -

> "The police say someone may have deliberately tried to burn me out. I was not very well liked in the area because I had objected on a number of occasions to neighbours burning rubbish. I had lost the key to the front door so it was pulled shut and could be opened from the outside". (my emphasis)

That is inconsistent with her evidence at the trial that the door could be locked with a knob from the inside and with her pleaded case; and it was the very door that Richard said he had to force with the halogen tool. It is difficult to avoid the conclusion that the statement that the door could be opened from the outside was a self-serving one calculated to lend credibility to the proposition that a stranger had entered and committed the act of arson.

Detective Inspector Brady gave evidence that he went to the scene of the fire some 15-20 minutes after receiving an emergency call. He indicated the front door depicted on the house plan as being the one through which he entered. He looked through the house, and recalled

seeing a telephone on the floor of a bedroom. He thought it was the bedroom numbered 2 on the plan, but the configuration shown on the photograph of the room makes clear that it must have been bedroom 3. Indeed the plaintiff's evidence confirms that. Detective Inspector Brady said the telephone was in working order - in fact he used it. I do not think that it is at all remarkable that Mrs. McLaughlin did not use it to summon assistance. Indeed, accepting as I do Mr. Maphet's evidence about the nature of the fire it would have been remarkable if she had.

Brady also said that he found no signs of forcible entry.

The real issue in this case is the cause of the loss. Negligence was pleaded in the alternative, and I can deal with that very briefly. Even if negligence were established here it would be irrelevant. Fires are frequently due to negligence and one of the objects of a fire policy is to protect the assured against the consequences of that, even if that negligence is his own. Even if a fire is deliberately lit for the purpose of destroying the property insured the insured is only disentitled to recover if he or someone acting with his privity or consent has done so. Midland Insurance Co. v. Smith (1891) 6 QBD 561. Whether that is what took place is the issue in this case.

In this connection I need to consider questions of burden of proof. The plaintiff has proved a prima facie case of loss within the policy, in that there is no doubt at all that a fire occurred. The

burden of proof has shifted to the defendant to show that the benefits under the policy are forfeited by reason of the claim being fraudulent. In Iorgulescu v. Swiss Bank & Trust Corporation Ltd (CICA No. 3 of 1983) it was said that the onus on a plaintiff seeking to establish fraud is a heavy one - higher than that of the balance of probability. The same must apply to a defendant to whom the onus has shifted. In the present case I need to look at that important matter of proof in a little more detail, by reference to the following passage in the judgment of Ungoed - Thomas J in a case which was not cited to me: Re Dellow's Will Trusts (1964) 1 W.L.R. at page 454. He said this -

> "The standard of proof was considered in Hornal v. Neuberger Products Ltd., (1957) 1 QB 247 where Morris L.J. stated: "Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."
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> It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but as Morris L.J. says, the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distinction and the practical result is stated by Denning L.J. "The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law.

I draw the following conclusion from the evidence as a whole.

The starting point is an inherently unlikely hypothesis - that while Mrs. McLaughlin and the baby slept a stranger entered her house in the small hours of the morning, with a Doberman dog chained in the yard, poured kerosene in the kitchen and living room of the house and probably in Mrs. McLaughlin's bedroom too, and lit a kerosene accelerated fire in the first two of these areas. The only explanation which Mrs. McLaughlin offered for such an event was that she was unpopular because she had objected to the burning of rubbish in the area and she was untruthful in saying that because she had lost the key to the door it could be opened from outside. I have to say that my first favouable impression of Mrs. McLaughlin as a witness altered considerably during her cross-examination when she seemed to me to become evasive and deliberately unhelpful.

I accept the expert opinion of Mr. Maphet that Mrs. McLaughlin's account of her observation of the fire at the entrance to the living room cannot be true.

Then there is the evidence of what happened next. Having tried to rouse her neighbour she said she returned to the yard. By that time, given the nature of the fire, and its location, the seriousness of the situation must have been obvious. Yet she took time to unchain the dog from a tree in the yard and drove not to the Central Police Station (which I am prepared to notice without evidence is a few hundred yards from her house) but to the fire station where her son worked on the

Airport Road. I accept that the Fire Service Vehicles took only 3 minutes to reach her house, as the log records, and her evidence that she may have taken 5-10 minutes to drive to the fire station. However, the picture which appears from the evidence of both fire officers McLaughlin is of a quite relaxed scene at the Fire Station. Mrs. McLaughlin arrived showing no signs of distress and reported smoke in her house. Discussion ensued as to what should be done, according to Richard, and he went alone to check things out. It was obviously not regarded as a serious matter. All that is quite incompatible with Mrs. McLauglin's own account of seeing flames coming from the kitchen and with what the evidence shows was a fearsome kerosene accelerated fire which must have been going for several minutes when Mrs. McLaughlin left her yard. It is far more consistent with the actions of someone who was in no hurry to have firefighters other than her son arrive on her premises.

And what was the reason for releasing the Doberman dog? Richard's evidence was that it only went loose when he was around. The foreseeable consequence was that people whom the dog did not know would be hindered on their efforts to fight the fire, and there is evidence from Doorly McLaughlin that this did happen when he and Webster arrived at the house and encountered a huge dog.

All this took place against the background of the insurance cover on the house having been increased, and the contents cover having been quadrupled from $5000 to $20,000 a matter of weeks before the fire and only two years after the lower figure had been arrived at in

connection with a new insurance proposal by the plaintiff. All these are facts to be weighed in the balance, taking into account in each case the explanations given.

I cannot be sure, and motive remians obscure. The matter falls short of the standard of proof which would be required in a criminal case. But the defendant has sufficiently satisfied me, on the basis of the standard of proof which is upon it in accordance with the principles set out in the passage from Re Dellow's Will Trust to which I referred, that it was entitled to forfeit benefit under the policy on the ground that the claim was fraudulent.

That disposes of the main issue, but it may be helpful if I record my views on other matters which were raised. The first is material non-disclosure. The plaintiff described a minor incident in June 1984 when she saw smoke coming from a breaker box in her kitchen. She got her son Richard to look at it and it stopped. There was, however, a more significant incident in 1986, before the major fire in August. The plaintiff was in her shower when the water stopped. When she went to ascertain the cause she saw smoke coming from the kitchen and flames coming from the breaker box. Once again she called Richard and he put out the fire. The meter box and some cabinets were burnt and the repairs cost approximately $1500. She made no insurance claim, and she did not disclose this matter to her insurers. It is now established by Pan American Insurance Co. Ltd. v. PineTop Insurance Co. Ltd (1994) 581 3 ALL. E.R. that for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure not only does

it have to be material but in addition it has to have induced the making of the policy on the relevant terms. Accordingly an underwriter who is not induced by the misrepresentation or non-disclosure of a material fact to the contract could not rely on these matters to avoid it. I do not think that disclosure of the 1986 incident would have made any difference, or that the insurers would have been entitled to deny liability on that ground.

I have already dealt with the issue of negligence, and in the light of my findings the question of failure to keep the premises in a proper state of repair does not arise.

On the evidence, had it been necessary to do so, I would not have found that there was such a breach of the defendant's claim procedure as in itself to be a ground for avoiding liability.

Costs in favour of the defendant.

Dated 13th July 1995

G.E. Harre

Chief Justice