Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S.206/94 Consolidated with

SUIT NO. C.L. W.318/94

I. SUIT NO. C.L. S.206/94

BETWEEN	S & T LIMITED	FIRST PLAINTIFF
	S & T DISTRIBUTORS LIMITED	SECOND PLAINFIFF
A N D	WEST INDIES ALLIANCE INSURANCE COMPANY LIMITED	FIRST DEFENDANT
A N D	GRAHAM MILLER & COMPANY JAMAICA LIMITED	SECOND DEFENDANT

II. SUIT NO. C.L. W.318/94

BETWEEN	WEST INDIES ALLIANCE INSURANCE COMPANY LIMITED	PLAINTIFF
A N D	S & T LIMITED	FIRST DEFENDANT
A N D	S & T DISTRIBUTORS LIMITED	SECOND DEFENDANT

Messrs Ian Ramsay, R. Codlin, Maurice Tenn & Mrs. Jacqueline Samuels-Brown instructed by Mrs. Samuels-Brown for Plaintiffs in first suit and Defendants in the second suit.

Miss Hillary Phillips and Mr. Walter Scott instructed by Mrs. Sharon Usim of Messrs Grant, Stewart, Phillips & Company for First Defendant in first suit as well as for plaintiff in the second suit.

Mr. Gordon Robinson, Mrs. Winsome Marsh and Miss Debra Newland instructed by Miss Suzette Mars of Messrs Nunes, Scholefield, DeLeon & Company for Second Defendant in first suit.

Heard: 19th, 20th, 22nd, 23rd, 26th, 28th, 29th February 1996; 1st March 1996; 29th & 30th April, 1996; 1st, 2nd, 5th, 6th 7th 8th May, 1996; 23rd, 24th, 25th, 26th 30th September, 1996; 1st, 2nd, 3rd, 7th, 8th

9th , 10th, 11th, 14th, 15th, 16th, 17th October 1996; 2nd June 1996; 22nd, 23rd September, 1997 & January 16, 1998.

J U D G M E N T

LANGRIN, J.

The plaintiffs are two companies engaged in the manufacture and distrubution of plastic bags and styrofoam products. Mr. Anthony Simmons and his wife Sandra are the sole shareholders and Mr. Simmons the Managing Director of both companies and the major shareholder. In 1982 they commenced business at 56 Brentford Road, St. Andrew. Wisynco Limited became their major competitor in styrofoam products.

The building consists of two floors, the ground floor and the second floor. The area of the ground floor was used for keeping of materials such as printing cylinders and solvents used in the printing process. This area is referred to as the Ink Room. The second floor contains the machinery that make the styrofoam. The central electrical panel may be found on the second floor as well as three extruder machines and two printing presses and cutting machines.

In 1990 Mr. Simmons purchased certain equipment in South Korea to manufacture styrofoam plates and meat trays. These were the extruder, thermoformer and trimming press. In addition four colour extruders were purchased for the bag factory.

It was the evidence for plaintiffs that they had sued the South Korean in Korea and made this statement:

"I sued them because they did not install the machinery as contracted to do, and sent me three pieces of machines where the capacities did not match one with the other as they were supposed to have. There was incompatibility in the extent that one produced faster than the other and the thermoformer produced too slow for the extruder .... the machines weren't working as I had contracted ....."

The Policies:

The plaintiffs had policies of Insurance with the defendant to wit Policy No.114422 - the Fire Policy and Policy No.120724 - the Profits Policy.

The Fire Policy was signed on the 19th August, 1991 and effective for a period of one year from 1st July, 1991 to 1st July 1992 renewable and renewed on 1st July 1992 and 1st July, 1993 for successive one year periods. The first defendant in consideration of premiums paid agreed to insure certain property more specifically described in the said policy against loss and damage by various conditions including an interim payment clause and including an upward adjustment clause of 25% to take into account (inter alia) an inflation factor.

Endorsed on the Policy were Mortgage Clauses in which the respective interests of C.I.B.C. Jamaica Limited, C.I.B.C. Trusts and Trafalgar Development Bank were noted.

A Loss of Profits Policy of Insurance was signed on the 19th August 1991 and effective for a period of one year from 1st July, 1991 to 1st July 1992, renewable and renewed on 1st July 1992 and 1st July 1993 for successive one year periods. The first defendant in consideration of premiums paid agreed to insure for loss and damage for loss of gross profit/consequential loss in respect of the sum of Thirteen Million (J$13,000,000) dollars plus 25% upward adjustment due to

interests:

(a) reduction in turnover and (b) increase in cost of working: And for Auditors Fees in respect of the sum of Sixty Thousand (J$60,000) dollars.

Events of the Fire

On Saturday the 17th July 1993 about 7:15 p.m. a fire occurred at the plaintiffs' factory. The evidence disclosed that Anthony Simmons was enclosed in his office at the front of the premises when the Security Guard observed a fire at the rear of the premises. The Fire Brigade was summoned promptly. While the Fire Brigade was putting out the fire many persons came to the building including the Police, Jamaica Protective Services personnel as well as the employees. The Police as well as the Fire Brigade inspected and investigated the fire and made reports. These reports never disclosed any suggestion of foul play. The Fire Brigade suggested that the fire was a probable result of short circuit.

On the 19th July 1993 a claim was made on the first defendant by the plaintiff. The first defendant hired the second defendant as Loss Adjusters. Discussions continued between the parties until February 10, 1994 a letter was written on behalf of the second defendant to the plaintiffs' attorney which stated inter alia "the one final matter outstanding in relation to their demands was the making available of the Security Guard."

The Pleadings

A writ was issued on the 28th June 1994. The pleadings have been amended and in summary the plaintiffs claim an indemnity under the Policies of Insurance it had with the First defendant and

for the following:

1. A declaration that the first defendant has been guilty of unreasonable delay in accepting/denying liability under the said policies in making interim payments to the mortgagees under the said Policies and/or in settling and/for paying the claim.
2. A declaration that the second defendant has been guilty of unreasonable delay in accepting or denying liability, adjusting the plaintiffs losses, and/or in recommending to the first defendant interim payments to the plaintiffs and to the said mortgagees.

At paragraph 5 of the Amended Statement of claim it was stated that: The Declared Value of the Property Insured was for a total sum of $J34,100,000 on the 1st July 1993 and the Total Sum insured for the said period of one year was for a total of J$42,000,000 (to take into account the said upward adjustment Clause).

A brief particulars of the relevant Insurance Claim are stated at Paragraph 6 as under:

6. Description	Declared Value	Sum Insured
A. On Reinforced Concrete buildings with zinc roof & Aluminium sheetings at 56 Brentford Road.	J$10,000,000	J$12,500,000
B. On Floating Stock including stock in the custody or control of the Insured situate at 56 Brentford Road, 115 Windward Road, and Shop #3, 51 Hagley Park Road	J$ 2,500,000	J$ 2,500,000

C. On furniture, fixtures, machinery, and refrigeration unit and other contents (excluding stock) situate at 56 Brentford Road aforesaid (see breakdown at para.7 below)	J$17,000,000	J$21,250,000
T O T A L	J$29,500,000	J$36,250,000

7. PARTICULARS of the sums insured in respect of Item C above is as follows:-

MACHINERY	Declared Value	Sum Insured
Styrofoam Department		
1. Extruding Machinery & Equipment	J$ 4,500,000	J$ 5,625,000
2. Thermoforming Machinery & Equipment	J$ 2,000,000	J$ 2,500,000
3. Automatic Trimming Press ancillary equipment	J$ 625,000	J$ 781,250
4. Manual Trimming Press	J$ 325,000	J$ 406,250
Extruding Department		
1. Extruder I, ancillary machinery/equipment	J$ 1,500,000	J$ 1,875,000
2. Extruder II, ancillary machinery equipment	J$ 1,500,000	J$ 1,875,000
3. Extruder III, ancillary machinery/equipment	J$ 1,5000,000	J$ 1,875,000
4. Printing Press, rubber rollers, ancillary machinery/equipment	J$ 1,8000,000	J$ 2,250,000
Printing Cylinders		
260 printing cylinders valued at a maximum of J$12,500 EACH totalling	J$ 3,250,000	J$ 4,062,500
Miscellaneous	N I L	N I L
S U B - T O T A L	J$17,000,000	J$21,250,000

At Paragraph 24 of the Claim it is stated:

24. PARTICULARS OF LOSS/INDEMNITY:

(1) UNDER 6A ABOVE: BUILDINGS:

Damage to buildings ..... J$1,735,767:

(2) UNDER 6B ABOVE: STOCK:

a - Ink and solvent valued at US$ 5,534

b - Styrofoam film valued at US$ 2,696

S U B - T O T A L = US$ 8,230

(3) UNDER 6C ABOVE: MACHINERY/EQUIPMENT:

a - Thermoforming Machinery & Styrofoam film extruding machinery/equipment valued at US$ 250,000

b - Printing cylinders valued at US$ 107,781

c - Trimming presses valued at US$ 34,400

c - Rubber rollers valued at .... US$ 2,760

S U B - T O T A L = US$ 404,941

T O T A L = US$ 413,171."

The first defendant denies that it is liable to the plaintiffs under the said Policies of Insurance and in particular the defence states:

"I(a) That the plaintiffs have in breach of the said Policy and the Profits Policy, wilfully and deliberately failed to produce, procure and give to the first defendant all such further particulars, plans, specifications, documents, proofs and other information with respect to the plaintiff's claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred and the liability or the assessment of liability of the first defendant.

(b) The Plaintiffs have wilfully and deliberately hampered the second defendant's efforts to investigage the cause of the fire and/or the extent of the loss.

(c) The plaintiffs have in breach of the said Policy and the Profits Policy failed and/or refused to take any or sufficient or any proper steps to establish a loss under the said Policy.

II. That in breach of the said Policy and the Profits Policy, the plaintiffs have been guilty of fraud.

Particulars

(a) Submitting a claim which was in respects fraudulent.

(b) Falsely presenting a grossly inflated and or exaggerated claim.

(c) Attempting to obtain a benefit under the said Policy and Profits Policy by fraudulent means or devices.

(d) Wilfully and/or with the connivance of its servants and/or agents, causing the loss or damage.

(e) Wilfully and/or deliberately denying the second defendant access to material witnesses.

III. That the plaintiffs have acted in breach of their duty of utmost good faith to the first defendant.

IV. That in consequence of the aforesaid matters the plaintiffs have forfeited all benefits under the said Policy and the Profits Policy and/or alternatively no claim under the said Policy and the Profits Policy is payable.

The first defendant, not surprisingly, says that it has no liability to the plaintiffs at all and in the consolidated actions seeks to recover from the plaintiffs the monies paid by it to the Mortgagees of the plaintiffs.

Burden and Standard of Proof

The standard of proof applicable in this case is the usual standard, as in civil cases on a balance of probabilities. However, in view of the gravity of the allegations which must be proved to that standard the harder it is to tip the balance. It is difficult to imagine allegations more serious than arson and fraud and the effect the allegations will have on the parties in the future. The law is clearly stated in the case of Slatberry v. Mauce (1962) 1 Lloyd's Report at page 60.

> "A yacht was insured under a marine insurance Policy. It was totally destroyed by fire, which was one of the perils insured against. Arson was alleged by the underwriter. Held, once it was shown that the loss was caused by fire, the plaintiff had made out a prima facie case, and the onus was on the underwriter to show that on a balance of probabilities the fire was caused or connived at by the plaintiff."

The learned Judge had this to say:

> "In my judgment once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case and the onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly, if at the end of the day, the jury came to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff will win on the issue."

The following fundamental issues are raised in these pleadings:

(1) Whether the fire was as a result of Arson.

(2) Was there fraud on the part of the plaintiffs.

(3) Was there a breach of Condition II of the Policy.

I now turn to an examination of the issues:

(1) Whether the fire was as a result of Arson

It is the contention of the first defendant that the plaintiffs set fire to their own buildings with the intention to defraud the Insurance Company. Miss Phillips submitted with much force that Anthony Simmons, Managing Director had the opportunity and motive either to be an arsonist or to connive in it. What emerged from the evidence are the following:

He was one of two persons on the premises that day, the Security Guard being the other. The Police concluded that upon their investigation no one entered the premises. However, their investigations never reached a level of suspected arson and the investigations are now closed. One of the experts who testified on behalf of the defendant stated that "this particular factory was really a fire hazard". While I find that Anthony Simmons was on the premises when the fire started, there is no evidence whether direct or inferential that he started the fire. There is also no evidence that anyone known to have a grievance against the plaintiff or Anthony Simmons could have done so. It is of significance to note that subsequent to the investigations of the Loss Adjusters on this question it was suggested to Simmons that if he could not or would not name a suspect who would have caused the fire then it must have been he since he was on the premises at the time.

In the present case the circumstances were extremely suspicious but not sufficient to tip the scales in favour of the defendant.

In my judgment the fire is equally consistent with arson as it was with an accidental fire. Metaphorically there was a great deal of talk amounting to smoke but none of fire. The defendant's allegation, therefore fails.

II. Was there fraud on the part of the Plaintiffs and/or its agent.

The Learned Author of General Principles of Insurance Law, Dr. E.R. Hardy Ivamy in the 4th Edition of his book at p.437 states as follows:

> "The question whether the claim is fraudulent or not is a question for the jury. The particular kind of fraud practised is immaterial. The claim may be fraudulent in that the assured has suffered no loss within the meaning of the policy, or in that although he has suffered a loss, it was not caused by the peril insured against. It may contain false statements of fact or it may be supported by fraudulent evidence. More usually, the fraudulent claim consists of an exaggeration of the extent of the loss. In dealing with exaggerated claims it is necessary to bear in mind that the assured may honestly over-estimate his loss and sometimes it may have been due to a mistake. In any case the extent and value of the loss are largely matters of opinion. An exaggerated claim is to be considered fraudulent in the following cases:
>
> 1. Where the assured clearly intended to defraud the insurers.
>
> 2. Where the over-estimate of his loss is so excessive as to lead to the inference that the assured cannot have made the claim honestly but must have intended to defraud the insurers.
>
> 3. Where the overestimate, though not deliberately put forward with the directly fraudulent intent of inducing the insurers to pay the full amount claimed, is designedly made for the purpose of fixing a basis upon which to negotiate with the insurers."

In Britton v. Royal Insurance Company (1866) 4 F & F page 905 Willes J. Had this to say:

> "A fire insurance is a contract of indemnity; that is, it is a contract to indemnify the assured against the consequences of a fire, provided it is not wilful. Of course, if the assured set fire to his house, he could not recover. That is clear. But it is not less clear that, even supposing it were not wilful, yet as it is a contract of indemnity only, that is, a contract to recoup the insured the value of the property destroyed by fire, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured make a claim for twice the amount insured and lost, thus seeking to put the office off its guard and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-bye to the origin of the fire, and it amounts to this - that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained."

It is the submission of the first defendant that the plaintiff deliberately presented a grossly inflated or exaggerated claim. Having exaggerated the extent of damage to the extruders, the thermoformer and the trimming press the plaintiff claimed a sum to replace these items of machinery. In relation to the printing cylinders the submission continues that the plaintiff failed to show that they had any insurable interest in them as the plaintiffs' financial statements do not reflect the cylinders as assets of the company.

Mr. Ian Ramsay on behalf of the plaintiffs made the following submissions:

The exaggerated claim allegation really rests on this proposition: If the plaintiffs' claim is not the same as the defendant's

assessment then it is exaggerated and fraudulent. On that basis no one could ever succeed against an insurance Company whenever pay-time came. A difference in the interpretation of facts or criteria governing facts cannot be a basis for an allegation of exaggeration or fraud Thus, for example, where the plaintiffs' legal advisors substitute a different method of computing loss of profits (the Turnover principle) which enhances the plaintiffs' claims opposed to or against older and more traditional methods of computation, this is perfectly justifiable. Further, if two Quantity Surveyors disagree as to the extent of repairs to buildings this cannot be a basis to say the plaintiffs are fraudulent when they have hired an independent contractor to guide them on the very issue.

Before I deal with this issue I am constrained to refer to two other important allegations (a) disburbing the scene of the fire and (b) denying access to witnesses:

The evidence of Anthony Simmons which I find credible makes it clear that it was with the permission of the Insurance Company and Loss Adjusters that he went to the scene of the loss on two occasions in respect of two particular items which required urgent attention.

The first defendant contends that the plaintiff wilfully/and or deliberately denied the second defendant access to a material witness, namely Marlene Christie, the Security Guard. In response to this submission Mr. Ramsay contends that instead of denying the defendants access to the Security Guard, the plaintiffs through Anthony Simmons had made her unconditionally available initially; and subsequently after allegations of arson, available with a stipulation that an attorney be present at the interview. The defendants then, unreasonably refused to interview the witness. In light of

this evidence that the witness remained at the disposal of the defendants which is unchallenged I find that there was no denial of access to this witness.

The plaintiffs contracted the services of independent professionals to assess the damage and provide estimates at the plaintiffs own considerable expense. All these reports from the Building Engineers and Consulting Services were provided to the second defendant in substantiation of their claim.

The plaintiffs made a number of suggestions pertaining to the settlement of the claim. They supplied the defendants with all the sales and accounting figures required under the consequential Loss Policy as well as other accounting figures requested by the defendants. In my view these were all attempts at fixing a basis upon which to negotiate with the insurers.

It is in my opinion manifest from the passages of law referred to above that much support may be given to Mr. Ramsay's submissions. I do not consider it necessary to go through each item of claim in respect of the machinery and building. However, I conclude on the basis of the evidence before me that there was no intention to defraud the Insurance Company and accordingly no act of fraud was shown on the part of the plaintiff. The defendants allegation of fraud therefore fails.

III. Was there a breach of Condition II of the Policy

It is the defendants contention that the plaintiffs are in breach of Condition 11 and Condition 4 of the Fire Policy and the Loss of profits policy respectively.

At this stage for a proper appreciation of the submission Condition II of the Fire Policy which is identical to Section 4 of the Loss of Profits Policy is set out in full:

"On the happening of any loss or damage the insured shall forthwith give notice thereof to the Company, and shall within 15 days after the loss or damage or such further time as the company may in writing show on that behalf deliver to the company

(a) a claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles of items of property damaged or destroyed and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind

(b) particulars of all other insurance, if any. The insured shall also at all times at his own expenses produce, procure and give to the company all such further particulars plans specifications, books, vouchers, invoices duplicates or copies thereof documents proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the company as may be reasonably required by or on behalf of the company together with a declaration on oath or in other legal form of the truth of the claim and of any matters in connection therewith.

No claim under this policy shall be payable unless the terms of this condition have been complied with."

As indicated in an earlier judgment (unreported) C.L. 024/88 Delbert Perrier v. British Caribbean Insurance Company Limited delivered on October 14, 1994, when dealing with Condition II of a Fire Policy I stated thus:

"If a term or the terms of the policy can be said to be a condition precedent it means that any breach would necessarily

> Invalidate the insurance policy. See the case of Welch v. Royal Exchange Assurance (1938) 1KB 757 in which the defendant's counsel placed great reliance. In that case it was held that a particular condition (Condition II) was a condition precedent to the liability of the insurers and that the failure of the assured to give the information required within a reasonable time constituted a breach of that condition and a final bar to his claim ....."

In my judgment a proper construction of Condition II requires compliance with it to be a condition precedent to the right of the insured to recover.

The complaints against the plaintiff in this regard comprise the following:

(1) Failure to produce accounts

(2) Failure to produce schematics

(3) Failure to inform the Insurance Company about a case in Korea.

Failure to produce accounts

Mr. Simmons evidence is that - the plaintiff supplied the defendants with all the sales and accounting figures required under the consequential Loss Policy and with all other accounting figures requested by the defendants including an unaudited profit and loss account.

However, the contention of the defendant which I accept is that audited accounts of 1993 which was requested was not supplied until June 1994.

Failure to produce schematics

Anthony Simmons testified that the schematics are not normally supplied by the Manufacturers as they constitute their

trade secrets. What was supplied were operational manuals. This was discussed with Hernandez and he agreed that Philbrick should send what information he had and ship the machinery to the United States at his own expense for the second defendant's engineers' examination and assessment. When the technical information was sent by Philbrick the second defendant said it was insufficient.

It was at that time on 20th September, 1995 when it was already established that schematics for the machines were unavailable that the second defendant said that the schematics were of the utmost importance. The second defendant made their own contract with the manufacturers and in April 1994 informed the plaintiff that the manufacturers had refused to give the sehematics.

On the 14th April 1994 George Bradden an Engineer attended on behalf of the defendant and made a visual inspection of the machines and gave a detailed report of his finding.

The letter dated 10th February, 1994 - Ex.5 document 52 - written on behalf of the second defendant to the plaintiffs' Attorney stating inter alia: the one final matter outstanding in relation to their demands was the making available to the Security Guard is significant as it demonstrates that all the requests except this one had been supplied.

The Court finds that the request for the audited accounts and schematics which persisted throughout the negotiations was not in the circumstances reasonable. This request was complied with by the plaintiffs so far as was reasonable.

Failure to inform the Insurance Company about a case in Korea.

It is the evidence of Anthony Simmons that he had informed the second defendant as far back as September 1993 of the existence

of the suit in Korea although this was not a requirement under the contract of insurance.

Notwithstanding this however, the plaintiffs contend that in 1990 the Styrofoam Extruder Thermoformer and Trimmer Press were purchased from Korean manufacturers for $280,000. A second trimming press, the clicker was later supplied by George Philbrick There were problems of incompatibility with the machines. The machines were modified by George Philbrick of Consulting Services after which they performed satisfactorily. Philbrick said Simmons could 'make money' for the purpose he was using the machines.

Much reliance was placed by the defendants in a recent case- Transthene Packaging Limited v. Royal Insurance (U.K.) Ltd. (1966) L.RLR 32 a judgment of the Queens Bench Division of the High Court of Justice in England where in a judgment by Judge Michael Kershaw Q.C. dated April 13, 1995 it was held inter alia, supporting the earlier authorities on fraud and exaggerated claims and specifically referring to Orakpo v. Barclays Insurance Services C.A. delivered 29th March, 1994 (unreported) he had this to say:

> "On that authority I direct myself that a known departure from the literal and absolute truth in a claim is not necessarily fraud, however to claim the full replacement cost under a fire policy in respect of the machine which was defective before the fire for as to be likely to be the subject of litigation against the manufacturer or supplier is fraud."

Learned Counsel for the Plaintiffs submitted that the Korean suit dealt with the issue of delivery according to contract between manufacturers and purchaser and not an issue of loss caused to an insured by reason of fire. Further the losses claimed in the Korean

suit did not affect the actual profit made in Jamaica and ultimately the claim against the Insurance Companies arising out of the fire. In any event the second defendant was advised of the legal battle with the Koreans.

Learned Counsel, Mrs. Samuels-Brown with her usual clarity and style distinguished this case from the instant case despite its superficial similarity.

In the Transthene case, the insured claimed for full replacement value of machines even though to his knowledge they were defective. While in the instant case there was no claim for new machines but rather the equivalent value of the machines as they existed before the fire. Exhibit 17 demonstrated the request by George Philbrick, for used machines. The estimate provided a starting point for negotiations.

In the Transthene case there was an obvious and deliberate attempt to deceive while in the instant case there was no concealment of a legal battle between the plaintiff and suppliers in Korea.

On a balance of probability, I find that there was no failure to inform the defendant of the suit in Korea and what was in fact claimed was the replacement value of the machines as they existed before the fire.

I now turn to an assessment of the plaintiffs' claim

(1) Damage to Buildings

The extent of damage to and repairs required for Buildings were established by a Building Contractor and also by a Quantity Surveyor namely Messrs Royston Campbell and Associates and Messrs Burrowes and Wallace respectively. Albert Gillings of Jentech a Civil Engineer inspected the building at the request of the second defendant.

His inspection was concentrated on the roof. However, he opines that the method of repairs was beyond his scope.

(2) Damage to machinery

The damage to the machines and repairs required were established by Messrs Consulting Services Limited and Plastic Maintenance Limited both Plastic Engineering Firms.

The items of physical damage were proved by Anthony Simmons, George Philbrick, Metcalfe and Ho You. George Bradden who visited the premises ten months after the fire for only one day admitted that it would take several days to properly check and test the machines. I prefer George Philbrick's evidence which is far more comprehensive and reliable. Further, Andrew Hernandez testified that there was substantial agreement between the experts as to damage and said that he accepted that the basis on which the machinery claim was made was fair.

In relation to the printing cylinders the defendants contended that they were not assets, nor were they listed among the assets of the plaintiff. Anthony Simmons stated that they were intermediate assets, that is, somewhere between fixed assets and consumables. The evidence which I accept is that these cylinders were initially bought with the clients' advance money, and then paid for by the plaintiff companies by discounting work done for the client to that amount. Hence in my view the cylinders were undoubtedly the property of the plaintiffs in which they had an insurable interest.

(3) In relation to the Stock, I accept the evidence of Anthony Simmons that they were damaged.

Accordingly, the damages are assessed as under:

(1) Damage to Building: J$1,735,767.00

(2) " " Machinery: US$413,171.00

(3) Damage to Stock: US$8230.00.

As indicated at paragraph 25 of the Statement of Claim the Plaintiffs will set-off in favour of the First Defendant from the above mentioned sums the following interim payments to the Mortgagees as follows:

(a) To the Trafalgar Development Bank - J$1,805000

(b) To the C.I.B.C. Jamaica Limited - (J$1,305,000
- (J$1,485,000

Loss of Profits Policy - No.120724

The sum incured as gross profit over a 12 month period is stipulated in the policy. The method of calculation is stated in the Policy and is referred to as the Turnover principle. The mode of calculation was explained in evidence by John Grewcock, Loss Adjuster. His report was tendered in evidence and he testified to a loss of $62,679,943.30 using a basis of a 3 year period and a sum of $134,792,809.82 using a 5 year period. He took the figure for gross sales for the financial year before the event causing loss and damage. Then he subtracted from this the reduced sales for the year after the fire. This gave the loss of gross sales. From this figure he deducted the manufacturing costs (materials, factory, wages and factory overhead) and the remainder represent the loss of gross profit. The rate of gross profit before the fire was established as a percentage by dividing gross profit by sales multiplied by (100) one hundred. The rate of gross profit times the loss of Turnover either actual or projected is the pecuniary loss suffered by the Plaintiffs. There was no formidable challenge to this evidence.

Under this principle the consequential loss is limited to the following:

Gross Profit $13,000,000

Auditors Fee -	60,000
Total	$13,060,000

The indemnity period is set out at 12 months.

Let me now turn to the defence of the second defendant in Tort.

The plaintiffs complain that the second defendant as professional loss adjusters and advisors to the first defendant owed to the plaintiffs: a duty of care within the rule in Hedley Byrne v. Heller (1963) 1 ALL E.R. 575 and followed in Dutton v. Bodlin Regis UDC (1971) 2 AER 1003.

The second defendant's case in answer to the complaint of his negligence is that it was the plaintiffs who caused the delay, in settling by their refusal to cooperate.

The issue is whether he owed a duty of care to the plaintiff to make a recommendation for settlement with all due promptitude and without unreasonable delay, and a duty to be deligent and fair in performing his functions.

Mr. Gordon Robinson, Learned Counsel for the second defendant submitted that Graham Miller was contracted by West Indies Alliance to oversee the presentation of the various insurance claims by the plaintiff in circumstances where Graham Miller was under a duty to the insurer to exercise care and skill in adjusting the claim. Graham Miller would be liable to W.I.A. if W.I.A. was sued by the insured for economic loss suffered by the insured as a result of Graham Miller's negligence. There is no direct contractual relationship between Graham Miller and the plaintiffs nor any assumption by Graham Miller of any direct responsibility to indemnify the plaintiffs under the policy contract.

In my view the Courts have always been reluctant to impose a duty of care in Torts when there is an available contractual remedy, whether against the party upon whom the tortious duty is

sought to be imposed or some other closely connected party. See Pacific Associates Inc. and Another v. Baxter and Others (1989) 2 ALL E.R. 159 (C.A.)

The plaintiffs claim in negligence has therefore failed.

Conclusion

I. Suit No. 1

Although I have referred to parts only of the evidence placed before me, I have reminded myself of all the evidence and on that evidence I am not persuaded that there are any grounds for concluding on the standard required that the defendants' allegations of fraud in addition to the other matters have been proved.

It follows therefore that there will be judgment for the Plaintiff against both Defendants as under:

1.	Damage to Building:	J$1,735,767.00	
2.	" " Machinery	US$413171.00	
3.	" " Stock	US$8230.00	
4.	Less sum paid to Trafalgar Development Bank		J$1,805,000
5.	" " " " C.I.B.C. Jamaica Limited		J$1,305,000 J$1,485,000
6.	Loss of Profit Policy: Gross Profit		J$13,000,000
	Auditors Fee		60,000

I make an award of interest at the rate of 30% on the balance from the date of writ on 28/6/94 to date of judgment. In my view this award of interest should satisfy the claim for economic loss. See British Caribbean Insurance Company Limited v. Delbert Perrier SCCA 114/94 (20/5/96) and Brandmaster Limited v. Bank of Nova Scotia (JA) Limited SCCA 66/95.

Costs awarded to Plaintiff against both defendants to be taxed, if not agreed.

II. Suit No. 2

The second Suit seeks to recover the interim payments by First Defendant to the Morgagees.

In view of my decision in relation to the first suit I dismiss the second suit and give judgment for the Defendants with costs to be taxed if not agreed.

It only remains for me to thank Counsel on both sides for the assistance which was given to the Court.