IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2004 HCV 1657

IN CHAMBERS

BETWEEN	THE COFFEE INDUSTRY BOARD	CLAIMANT
AND	THE ALL ISLAND JAMAICA COFFEE GROWERS ASSOCIATION	DEFENDANT/ ANCILLARY CLAIMANT
AND	ST. CLAIR SHIRLEY	INTERESTED PARTY/ 1ST ANCILLARY DEFENDANT
AND	OSWALD O'MEALLY	INTERESTED PARTY/ 2ND ANCILLARY DEFENDANT
AND	CARL McDOWELL	INTERESTED PARTY/ 3RD ANCILLARY DEFENDANT
AND	GORDON LANGFORD (Trustees of the Coffee Industry Insurance Fund)	INTERESTED PARTY/ 4TH ANCILLARY DEFENDANT

HEARD WITH

CLAIM NO. 2007 HCV01758

BETWEEN	ST. CLAIR SHIRLEY	APPLICANT/ 1ST ANCILLARY DEFENDANT
AND	OSWALD O'MEALLY	APPLICANT/ 2ND ANCILLARY DEFENDANT
AND	CARL McDOWELL	APPLICANT/ 3RD ANCILLARY DEFENDANT
AND	GORDON LANGFORD (Trustees of the Coffee Industry Insurance Fund)	APPLICANT/ 4TH ANCILLARY DEFENDANT
AND	THE COFFEE INDUSTRY BOARD	INTERESTED PARTY/ ANCILLARY CLAIMANT

Ms Maria Gayle instructed by C. M. Vassall & Co. for The All Island Jamaica Coffee Growers Association

Mr Emile Leiba instructed by DunnCox for the Trustees: Oswald O'Meally, Dr Hansel Beckford, Carl McDowell and St Clair Shirley.

Mr Dave Garcia and Ms Ky-Ann Taylor instructed by Myers Fletcher and Gordon for The Coffee Industry Board.

Insurance – Collection of cess from coffee growers- Cess authorised by statute – A portion of the cess paid into a trust fund - Trust fund intended for assisting growers in the event of loss - Whether payment to the trust fund is "insurance business" within the contemplation of the Insurance Act – Whether trustees conducting insurance business - Insurance Act, sections 2, 6, 7, and 21.

22nd October 2010 and 16 March 2011

BROOKS J

Jamaica's Blue Mountain coffee has developed a reputation that has made it one of the most expensive and sought-after coffees in the world. Although it is but one of the types of coffee which is grown in Jamaica, it is not surprising, given that reputation, that the state took steps to protect the island's coffee industry. The Coffee Industry Board was, therefore, established and charged with the general responsibility of encouraging the growth and development of the coffee industry (including the Blue Mountain branding) and protecting the welfare of its stakeholders. The Board was established by the Coffee Industry Regulation Act and its work is financed by a cess on the proceeds of sale of coffee which is produced in Jamaica. It is that Act which authorises the levy of the cess.

In January 1992, the Board established a trust fund. The fund was named "The Coffee Industry Insurance Fund" and will be referred to hereafter as "the Fund". The Fund was established in order to finance "an Insurance Scheme for the benefit of all coffee growers and other persons who are subscribers to the Scheme". Trustees (the

Trustees") were appointed to administer the Fund and each year thereafter, the Board paid a large portion of the collections from the cess, into the Fund.

In 2001 the Insurance Act was brought into force and on or about 23 June 2004, the Board received an opinion that the Fund was in breach of the provisions of the Act. The opinion caused the Board some consternation and it sought, through the medium of a fixed date claim, to have this court decide the point. The claim was contested and it was eventually discontinued, but not before another claim and related ancillary claims were filed, in connection with the issue.

In its claim, the Board had sought the Court's permission to terminate the Fund and requested directions as to the appropriate method of applying the monies standing to the Fund's credit at the time of filing the claim. The Trustees, as well as The All Island Jamaica Coffee Growers Association ("the Association"), were joined as defendants to the claim. The Association represents, at least some of, the registered coffee growers. Subsequent events, including the Board establishing a different fund in replacement of the Fund, have overtaken this matter to some degree but the parties still wish to have a decision on the point.

The questions presently for adjudication by the court were raised by the Association. By an order made on 18 March 2005, Beswick J authorised the following to be argued as preliminary questions:

> (i) whether by virtue of the Trust Deed dated 7th January 1992, the Coffee Industry Board…is engaged in any insurance business within the meaning of the Insurance Act;
>
> (ii) whether the said 1992 Trust is contrary to the Insurance Act.
> (Underlining as in the original)

Surprisingly, when all the parties had completed making their respective submissions on these questions, it seems that, with the exception of the Board, they are all of the view that there had been no breach of the Act. The Board, although maintaining that it was not in breach of the Act, was neutral in respect of the position of the Trustees and the Fund. This ruling is in respect of those preliminary questions.

The Relevant Legislation

Before considering the submissions, it would be helpful to outline the relevant legislation governing the matter.

As mentioned above, The Coffee Industry Regulation Act, by section 10, gave authority for the imposition of the cess. The regulation which first imposed the cess is the Coffee (Cess) Order 1951. The cess was calculated on particular quantities of coffee and the amount of the cess was adjusted from time to time over the years. The last relevant adjustment was made by virtue of The Coffee (Cess) Order 1993.

The next relevant piece of legislation is the Insurance Act ("the Act").

Courts have traditionally declined to set out a definition for the term "insurance" and there is no definition set out in the Act. The Act does, however, in section 2, define "insurance business" and various types of insurance business. I start with the former:

> ""insurance business" means the assumption of the obligations of an insurer in any class of insurance business and includes reinsurance business;"

"Property insurance business" is one class of insurance business and it is defined as:

> "… **the issue of, or the undertaking of liability under, policies of insurance** against loss of or damage to real or personal property of every kind and interests therein, from any hazard or cause, or against loss consequential upon such loss or damage, not being risks the insurance of which is motor vehicle insurance business or marine, aviation and transport insurance business;" (Emphasis supplied)

Section 2 also defines "insurer" to mean:

> "a company carrying on insurance business and, except where otherwise stated, includes all the members of an association of underwriters which is registered as an insurer;"

Section 6 of the Act stipulates that "no person other than a body corporate shall carry on insurance business in Jamaica". The relevance of this section will be addressed in the analysis which is to follow.

Finally, for these purposes, section 7 of the Act stipulates that a body corporate shall not carry on any of the specified classes of insurance business, including property insurance business, unless it has been registered by the relevant regulatory authority, The Financial Services Commission (the FSC), and has satisfied certain other requirements, including the payment of a deposit to the FSC. That deposit is required by section 21.

The Trust Deed

The name and the preamble to the trust deed establishing the Fund, makes it clear that the Board had intended to provide the benefits of insurance. Whether or not the Board achieved its aim is yet to be determined. The name of the Fund is "The Coffee Industry Insurance Fund" and the preamble states in part:

> "a) The Board has determined to establish a Coffee Industry Insurance Fund (hereinafter called "the Insurance Fund") in order to establish an Insurance Scheme for the benefit of all Coffee Growers and other persons who are subscribers to the Scheme under the provisions of the rules set out in the Schedule hereto."

Clause 15 of the trust deed speaks to the monies to be paid into the Fund. Those monies include "all monies received under the Coffee Cess Order". Insofar as the operation of the business of the Fund is concerned, the following clauses are relevant to the questions under consideration:

"20) The Insurance cover granted herein shall be for loss of the value of crop caused by any of the following perils
1) Fire including bush fires
2) Earthquake
3) Landslip or subsidence
4) Hurricane and/or windstorm
5) Flood
6) Riot, strike and civil commotion."

21) The aforesaid Insurance Coverage shall apply to all fields that have borne fruit based on…

22) The annual insured sum per box shall be based on the average cost of producing a box of coffee and the average price per box for coffee grown in both the Blue Mountain and Lowland coffee growing areas.

23) An excess of 20% of the insured production shall be borne by each insured unit. An insured unit is a field or group of fields with an annual production of…This field or group of fields must be discrete and identifiable.

24) The Premium for the Insurance for Lowland Coffee and for Blue Mountain Coffee shall be by box and this premium which may vary from year to year will be paid by a cess on the actual production.

25) To ensure that all eligible growers are covered under this Scheme periodic assessment of farms shall be conducted by the [Board] and by a Retained Loss Adjuster and by production delivery records being kept by the [Board].

26) The Production estimate will be determined by surveys…

27) In the event of a Grower suffering damage which may result in a loss of crop his Co-operative or Private Grower must be informed within 48 hours and the [Board] must be informed within four (4) days of such information being received. Immediately on notification to the Board Extension officers will conduct a physical survey of the affected farm and records thereof will be inspected to determine the historic and specified yield and the amount reaped up to the time of the loss.
Finally the Insurers reserve the right to carry out a survey to clarify any outstanding matter."

From clauses 20 through 26, quoted above, it may be deduced that the aim was to compensate the grower for the value of the crop which was lost, less the "excess", or

deductible, which each field or group of fields would absorb. Provision was also made for the following:

a. the perils which were covered;

b. a method of assessing the value of the loss;

c. a premium (although the method of calculation it was not set out), and,

d. a method of identifying growers (who could be termed the beneficiaries).

As was mentioned above, the arrangement continued under the auspices of the trust deed and the Fund until the FSC decided that that arrangement was in breach of the Insurance Act. Importantly, no corporate body was created in these transactions.

The Opinions

It was the FSC which first rendered an opinion to the Board. In a letter dated July 19, 2004, the Executive Director of the FSC stated:

> "…Based on the information provided by the Board the [FSC] is of the view that the Board is involved in carrying on insurance business pursuant to section 2 (2) (b)…of the Insurance Act as an unregistered insurer."

The FSC did not explain that aspect of its opinion. The Board, however, sought an opinion from the Attorney General and received a response containing a detailed examination of the point. An important part of the Attorney General's opinion followed immediately after the author thereof, quoted the definition of "property insurance business" as it is set out in the Act. The author then stated:

> "The type of insurance business undertaken pursuant to the Coffee Crop Insurance Fund falls within the definition of "property insurance business", and as a result, the Trustees of the Fund should be regarded as an insurer for the purposes of the Insurance Act. **The Board takes insurance premiums, in the form of the cess, on behalf of the Coffee Crop Insurance Fund, and in the event of property loss by coffee growers and other contributors, insurance payments from the Coffee Crop Insurance Fund are made to beneficiaries in keeping with insurance coverage set out in the governing Trust Deed**.

> It is also clear from the language of Section 2 (2) of the Insurance Act that the Trustees of the Coffee Crop Insurance Fund are "carrying on insurance business in Jamaica", through the activities of the Fund. Section 2 (2) (b) of the Insurance Act indicates that where any one of a list of activities are effected in any manner by an unregistered insurer or any person acting with actual or apparent authority of the insurer or on his behalf that activity shall be regarded as carrying on insurance business in Jamaica. **The Coffee Crop Insurance Fund undertakes a number of the activities set out in Section 2 (2) (b), including, among other things: the making of insurance contracts as an insurer, taking or receiving an application for insurance, collecting a premium as consideration for insurance, effecting of insurance and renewals thereof, dissemination of information as to coverage and rates, and assisting persons with respect to properties, risks and exposures located in Jamaica.**" (Emphasis supplied)

The author also pointed out three major breaches of the Act, firstly, that neither the Fund nor the Trustees constituted a body corporate, secondly, that if it were argued that the Board was the insurer, it had not been registered as an insurer, and thirdly, that the Board did not qualify as an entity exempted from the operation of the Act.

None of the parties rendering those opinions made submissions at the hearing concerning the preliminary questions.

The submissions

The theme behind each of the submissions which were made, was that there was none, or at least insufficient evidence thereof before the court, of the indicia of the conduct of "insurance business", as defined by the Act. Counsel submitted that the following features militate against a finding that there was the conduct of such business:

a. this was a voluntary obligation undertaken by the Board;

b. there is no evidence of a proposal form, application for, or a contract or policy of, insurance;

c. there is no premium paid; the cess "should not be construed as being premiums for insurance coverage";

d. there is no contractual obligation to pay upon the occurrence of loss;

e. in the event of loss, the "exposure" of the Trustees is limited to the amount available in the Fund, rather than the value of the loss or any previously specified portion thereof;

f. there is no agency relationship between the Board and the Trustees;

The argument was also advanced that, because there is no **policy** of insurance, there is no "insurance business" and therefore no breach of the provisions of the Act. Counsel for the Association submitted that, on the evidence presented to the court, or more accurately, lack thereof, the court could not conclude that the Board or the Trustees were conducting insurance business.

It was also argued that because neither the Trustees nor the fund are corporate entities, they cannot be involved in "insurance business". It is clear however that the Coffee Industry Regulation Act constitutes the Board as a body corporate.

Analysis

There is, in my view, no gainsaying that the Board intended to provide insurance coverage for the growers. The Act came into force after the Fund was already in existence, but Parliament did not make any provision for that type of operation. Events, therefore, overtook the Board and the Fund. To determine whether they fell afoul of the Act depends on the examination of what the practice was and how the relevant sections of the Act are to be interpreted.

Although Courts have traditionally declined to set out a definition for the term "insurance", they have identified certain indicia by which a contract of insurance may be

identified. Such a formulation is contained in the judgment of Channell J in *Prudential Insurance v I.R.C.* [1904] 2 KB 658 at page 663:

> "It must be a contract whereby for some consideration, usually but not necessarily in periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then the next thing is that is necessary is that the event should be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen".

The learned authors of textbooks on insurance law have also been reluctant to offer a definition of "insurance". One formulation, though cautiously given, is contained in the 7th Edition of *Birds' Modern Insurance Law.* The learned author of that work opines that appropriate definitions may vary according to the particular context under consideration.

He suggests, at page 9, a definition for "regulatory purposes":

> "…a contract of insurance is any contract whereby one party assumes the risk of an uncertain event, which is not within his control, happening at a future time, in which event the other party has an interest, and **under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs**." (Emphasis supplied)

The learned author goes on to suggest that any person who regularly enters into such contracts as the party bearing the risks is carrying on insurance business. I gratefully accept that definition as an accurate and helpful definition for the instant case.

Using that definition, it can be determined that there are some of the indicia of insurance in the Board's structuring and use of the Fund. Firstly it possesses the element of uncertainty, which is a necessary feature of insurance. Secondly, the growers have an insurable interest in the property which is the subject of the insurance. Thirdly, the uncertain events covered, being natural disasters and civil commotion, are outside the

control of the Board or the Trustees. Fourthly, the trust deed contemplates the provision of money, or at least, money's worth, to the person claiming relief.

There are, however, some elements which are missing from the Board's structure which, in my view, prevent it from constituting "insurance business" within the meaning of the Act. Firstly, a contract of insurance must legally bind the insurer to compensate the other party. I find that the trust deed does not reveal such an obligation. Nowhere is it stipulated that the Trustees or the Fund **must** pay to the grower, the value of the crop which has been lost, or, in lieu of that, any specific figure. I also accept, as relevant to this point, counsel's submission that the "exposure" of the Trustees is limited to the amount available in the Fund. Secondly, there is no **policy** of insurance issued by the Trustees. In my view, the trust deed could not be considered a policy for these purposes.

In respect of the obligation to pay, the ruling in the case of *Medical Defence Union v Department of Trade* [1979] 2 All ER 421 is of assistance. In that case the Defence Union was constituted of medical and dental practitioners. Its work consisted of "conducting legal proceedings on behalf of members, indemnifying members against claims for damages and costs, and giving advice to members on various matters and providing educational guidance". The court found that the Defence Union was not "an insurance company carrying on insurance business", because its members had no right to the benefits, as under its constitution, the members had only a right to request the benefits. Accordingly, the members had no **right** to money or money's worth.

The absence of a policy of insurance is important because of the stress on the existence of a policy in the wording of the definition of "property insurance business". I reproduce below the relevant portion:

> "property insurance business" means **the issue of, or the undertaking of liability under, policies of insurance…"**

The importance of the existence of a policy was highlighted in the case of *Hampton v Toxteth Co-Operative Society* [1915] 1 Ch 721. In that case the society sought to pay monies on the death of any of its members or spouses thereof. It advertised the benefit as "free life insurance". The claimant alleged that the society had paid large sums of money in respect of life assurance and that it was carrying on the business of life assurance within the meaning of the Assurance Companies Act, 1909 in England. The court held that the society had not been carrying on the business of life insurance within the meaning of that Act because that Act required policies to be in writing and that the society had issued no policies. The court also found that there was no obligation on the society to continue to finance the insurance fund and that "the arrangement might at any moment be terminated by a general meeting".

The definition of "insurance business" in the Act depends on the definition of the various classes of insurance business, such as "property insurance business". It is, therefore, necessary for an activity to satisfy the definition in one or more of the classes before it can be termed "insurance business". There being no satisfaction of the definition of "property insurance business" or, indeed, any other class of insurance business, there is, I find, no breach of the Insurance Act by the Board or the Trustees.

Based on the above omissions from the Board's structure of the arrangement aimed at assisting growers, I agree with counsel for the respective parties that the Board was not engaged in "insurance business" as defined by the Act and that the Trust deed is not in breach of the Act. It is, admittedly, disconcerting that an entity could avoid the provisions of the Act by simply not issuing a policy and/or avoiding, by some method, in

its documentation, an obligation to pay a benefit in money or monies worth. It seems, however, that that is a matter for Parliament to address.

I am aware that the opinion rendered by the Attorney General to the Board asserted that the Board collects "premiums, in the form of the cess", receives applications for insurance, makes contracts and makes insurance payments. I find that the collection of the cess cannot be termed "insurance premiums" for these purposes, for two reasons. Firstly, the cess was not authorised by, or imposed pursuant to, the Coffee Industry Regulation Act for that purpose. Secondly, the Board did not pay over all of the cess to the Fund. Apart from that disagreement with the opinion, I find that the evidence presented to the court did not support the assertions made in the opinion that there were applications for insurance and the making of insurance contracts. It is mainly for those reasons that I have come to a different conclusion from the author of the opinion.

Finally, I note that section 2 (1) of the Act also stipulates a definition for "carrying on insurance business in Jamaica", which is a term that is used in the Act (it is so used in section 6). That definition includes:

> "…the use in Jamaica of any business description or title in any language of the words "insurance", "assurance", "indemnity", "guarantee", "under-writing", "reinsurance", "surety", "casualty", or any of their derivatives, or any expression which connotes or is intended to connote insurance business…

It could be argued that the title "The Coffee Industry Insurance Fund" connotes the "carrying on [of] insurance business".

That argument is attractive but I am not convinced that the use of that heading for the document or the use of the term "insurance" in the body of the document is sufficient to bring either the Board or the Trustees within the ambit of that definition. I find that one should not be unduly swayed by the title of the trust deed, which is not the entity

performing the functions. In *Prudential Insurance v I.R.C.* (cited above), at page 662, Channell J indicated that he did not place much importance to the heading of the document in question. He said, "[w]e must look at the contract itself to see what it really is". Although the learned judge did not have to contemplate a provision such as the one just quoted, I find that his admonition to "look at the contract itself" is applicable to the instant case.

Conclusion

The absence of two important essential elements of what constitutes "property insurance business", as it is defined by the Act, namely the absence of a policy instrument and the absence of an obligation on the Board or the Trustees of the Fund to pay the value of the grower's loss in money or money's worth, meant that neither the Board or the Trustees of the Fund were conducting "property insurance business" as contemplated by the Act. Consequent on that finding, there being no other class of insurance business conducted by them, the answer to the first preliminary question is that neither the Board nor the Trustees of the Coffee Industry Insurance Fund is engaged, by virtue of the trust deed dated 7 January 1992, in any insurance business within the meaning of the Insurance Act of 2001. It necessarily follows that the answer to the second question, namely whether the said 1992 Trust is contrary to the Insurance Act, is also in the negative.

The orders therefore are:

1. The answers to both preliminary questions as formulated in the order of Beswick J dated 18 March 2005 are in the negative.

2. The question of costs of the application shall abide the hearing of the ancillary claim herein.