COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2016/CLE/gen/00818

BETWEEN:

RONALD DEVEAUX
(T/A BAHAMAS RUBBER STAMP PRINTING)

Plaintiff

AND
SECURITY & GENERAL INSURANCE CO. LTD.

Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Alfred Gray for the Plaintiff
	Raynard Rigby for the Defendant
Hearing dates:	25-27 November, 11 December 2020, Submissions January 2021

RULING

KLEIN J.

Contract—Insurance—Construction of terms—Causation—Proximate cause—Concurrent Causes—Claim for damage to printing equipment and stock —Damage caused by rain from passage of hurricane—Rain entering through opening in roof allegedly created by burglars just prior to passage of storm—Whether damage caused by hole or rain from storm—Rain an excepted peril unless entering building as a consequence of the direct force of the storm—But-for test—Whether insurance company liable under Policy—Breach of Policy—Negligence in processing claim—Whether cause of action lies in negligence for insurance losses

INTRODUCTION AND BACKGROUND

1. The principal question I have to decide in this matter is whether it was an opening created in the roof of the plaintiff's printing shop by alleged burglars or the rain which entered through that opening from the passage of a hurricane that was the cause of the damage to the plaintiff's printing machines and stock.

2. "Of course it was the rain!", might be the ready answer from a layman. And while he might be correct in that, the legal answer lies in the proper interpretation of the contract of insurance between the parties and, in particular, the law relating to proximate cause in insurance law. That answer will determine whether the defendant company is liable for the damage under the contract of insurance between the parties.

Essential factual background

3. The plaintiff, Ronald Deveaux, is the owner of a print shop called "Bahamas Rubber Stamp and Printing", which was insured by the defendant, Security & General Insurance Co. Ltd. ("the insurer" or "the Company") under a contract of insurance entered into with effect from 3 September 2017 ("the Policy').

4. It is alleged that at some point over the period Friday 8 to Saturday 9 September 2017, burglars attempted to gain access to the building through the roof by prying open the plywood. As fate would have it, Hurricane Irma passed just west of The Bahamas that weekend. While it did not have any significant wind impacts, it is thought to have brought a significant amount of rain.

5. The plaintiff claimed the rain from the storm entered through the opening that had been created in the roof and water damaged his printing machines and stock beyond repair. He reported the incident to the insurers on the 12 September 2017, and shortly thereafter made a claim for damaged stock in the amount of $19,610.00 and equipment replacement in the amount of $103,328.00. This was based on a report prepared by Larry Cabrera, a printing and graphics expert in the US (the "first Cabrera report"). This was rejected by the insurers, mainly on the ground that it was based on second-hand information as Mr. Cabrera had not, at that point, conducted an inspection of the equipment and material (as further explained below).

6. Eventually, on 11 July 2018, the plaintiff filed a generally endorsed writ claiming, *inter alia*, damages for breach of the insurance policy by the failure of the defendant to pay the losses, which he asserts were covered under the policy, and for negligence in connection with the processing of the claim. He filed a statement of claim ("SOC") on 11 September 2018, in which he fleshed out his claims for breach of contract and negligence in the handling of his claim. In addition to the breach by failure to pay for the losses, the following particulars of negligence were pleaded:

(i) Requiring the plaintiff to spend money on a report that would not be considered or used;
(ii) Failing to ensure that the claim was handled in a timely manner;
(iii) Causing or permitting undue delay in the settlement of the claim.
(iv) Giving the plaintiff a false belief that the matter was going to be settled favourably and quickly when they knew or ought to have known their position very shortly after the claim was made.

7. As a result, the plaintiff claimed the following amounts in damages: (i) replacement cost of printing equipment in the amount of $234,448.00; (ii) cost of supplies and stock in the amount of $25,000.00; (iii) cost of "*having an inspector fly into the country and prepare a report*" in the amount of $6,500.00; and (iv) loss of income as a result of not being able to print and operate his business (unquantified). These figures were supplied from a second report prepared by Mr. Cabrera, which was based on his actual examination of the equipment.

8. The defendant denied the claims. In its defence filed 30 October 2018, it pleaded that "*no insurable risks occurred under the Policy arising from any alleged or purported loss suffered or sustained by the Plaintiff*" and further that such damage as the plaintiff claimed under hurricane cover was excluded under the terms of the policy.

9. Just prior to the commencement of trial, counsel for the defendant proposed that, as the issues were very narrow and there seemed to be some logistical issues with procuring the plaintiff's expert witness for trial (as well as the fact that the defendant was also considering engaging an expert for the issue of quantum), the Court should first determine the issue of liability to avoid any further delays with the trial. Depending on the outcome, the matter could then proceed to an assessment of quantum by a Registrar. After some back and forth between counsel and the court, the trial proceeded on the issue of liability only, pursuant to the court's case management powers under the *Rules of the Supreme Court* (R.S.C.) 1978, *Order 31A*, Rule 18(f).

10. For the purposes of this Ruling, the Court was assisted with the following materials: (i) opening and closing submissions from the parties; (ii) bundles of documentary evidence from both parties; (iii) transcripts of the hearings; and (iv) the Zoom recordings of the proceedings. All of this material has been considered, but it is not necessary to refer to each of them in the Ruling.

DISCUSSION AND ANALYSIS

11. The plaintiff submitted that there were three main issues for the determination of the court:

(i) Whether there was loss or damage to the plaintiff's property;
(ii) Whether the damage or loss was covered by the policy;
(iii) Whether the damage or loss came within any of the exceptions of the policy.

12. It appeared to me that the primary issue for resolution is whether, on the true construction of the contract of insurance, the loss sustained was a peril covered under the terms of the policy and was not within any of the exceptions or exclusions.

<u>The Evidence</u>

13. On behalf of the plaintiff, the court received the witness statement of the plaintiff and the witness statement of Larry Cabrera of the US, an expert in the sales, service and repair of graphics and printing equipment. There were three witness statements from the defendant: the first from Ruthnell Bethell, Claims Manager of the Company; the second from Laurie Johnson, Loss Adjuster; and the third from Donna-Marie Dennis, Underwriting Manager of the Company. All of the witnesses (with the exception of the US expert, whose evidence was only considered *de bene esse*) gave live evidence and were cross-examined.

The plaintiff

14. The plaintiff's evidence begins with his arrival at his printing shop on the morning of 9 September 2017. He says that when he entered the building and turned on the lights, he was confronted with the following scene:

> "Once I entered the back room I stepped into water which had settled on the floor. Waddling through the water, I looked up and noticed a rip in the roof. Then I noticed that the equipment and materials in the room were extremely damaged and/or destroyed as a result of rain entering the building through the hole in the roof."

15. I have set that out in the form in which it appears in the witness statement because that is the only part of the witness statement that describes the condition of the shop when the damage was initially discovered. The rest of the plaintiff's witness statement relates to what he did afterwards to attempt to process the claim. He said that he called the police, assuming that someone had broken into the shop "overnight". When the police arrived, he gave them a statement, and their investigation revealed that nothing was stolen.

16. During the period 10-12 September, he contacted the insurance Company and was directed to Ms. Ruthnell Bethel in claims, who requested a copy of the police report and indicated that a loss adjuster would be coming to visit the site. He says that on the 13 September 2017, he obtained a copy of the "police report" and sent it to Ms. Bethel. The material part of the report stated:

> "Sometime between Friday 8th September 2017 and 9:40 a.m. on Saturday, 9th September 2017, culprits removed the plywood to the northern section [of the shop], gained entry and searched but nothing was stolen."

I note here that the "police report" was actually a letter written to the insurance Company by the police, and it was dated the 20 November 2017.

17. A few days later, Laurie Johnson visited the site and inspected and took photos of the equipment. Another adjuster came a few days later to inspect the roof of the building. He was later contacted by Ms. Johnson and requested to furnish an estimate for the repair and/or replacement of the equipment. In this regard, he forwarded photographs of the equipment and material which was damaged to Larry Cabrera, the owner of the company in Miami from whom he purchased the equipment, and asked him to produce a report. He sent the report to Laurie Johnson, but she told him that they would require the person preparing the estimate to have personally inspected the equipment and stock if the report was to be relied on for processing the claim.

18. After some back and forth with the company on this issue, Mr. Cabrera flew into Nassau on 28 November 2017 to conduct the inspection. A revised report containing photos of the damaged equipment and stock, containing his estimates for the replacement of machines and material and the expenses for producing the report was produced and sent to the insurance Company in December of 2017 (the "second Cabrera report").

19. Concerned that the process of dealing with his claim was taking too long, the plaintiff's attorney wrote a demand letter to the insurance company following up on the claim. This letter sought the replacement value indicated in the second Cabrera report, which far exceeded the original estimates, which as noted were based on second-hand information. Again, there was some back and forth between him and the insurance company, and the company explained that any delay in processing the claim was because they were waiting on the report from the loss adjusters.

20. The loss adjusters replied by letter dated 16 March 2018 to the plaintiff's attorney, pointing out the relevant sections of the policy, in particular the exclusions related to hurricane damage. That letter stated, in material part:

> "As the alleged damage caused to the building and the property within the building, i.e., Machinery, Equipment and Stock was not caused by the direct force of the hurricane on this occasion, the claim presented for consideration falls beyond the scope of policy cover and is therefore not valid.
>
> We are instructed to advise you that the claim presented by yourself on the Insured's behalf has, regrettably, been denied. Notwithstanding this, and as mentioned earlier on in this letter, Insurers are satisfied that there is within this policy cover for damage to the building caused by theft/attempted theft.
>
> Should your client wish to submit a claim in this regard for Insurer's consideration, please let us/Security & General have relevant details at your earliest convenience so that these may be reviewed and awarded net of applicable deductibles."

21. As mentioned, the details of the plaintiff's witness statement, the police report, and the pleadings are rather sparse on the events leading up to the damage and the conditions of the premises when the damage was discovered. For example, none of these documents mentioned Hurricane Irma in connection with the damage. The plaintiff was vigorously cross-examined on the omission of these details by Mr. Rigby, counsel for the defendant, and the exchange was as follows:

> "Q: Do you accept that on the Property Loss form you made no mention of Hurricane Irma?
> A: Mr. Rigby a hurricane was passing at the time.
> Q: Is that why you did not include Hurricane Irma on the form dated 10th September 2017, because you knew that the damage was not caused by the passage of Hurricane Irma?
> A: I do not know Sir.
> Q: Tab 2 of the Defendant's bundle, your letter (dated 27 September 2017) to Ruthnell Bethel. Read the second paragraph. [*Read*]. You see you made no mention of Hurricane Irma to the insurance company.
> A: Yes Sir."

22. He was also asked about the inconsistences in his recollection of events when he allegedly discovered the damage to the equipment and supplies. The following exchange is revealing:

> "Q: Do you remember the time of the morning you went to the building?

A: I am not sure about the time but it was in the morning.
Q: You said when you opened the door to check the building…
A: I went in the back and there was a big hole.
Q: How big is your building, 20"x20"? Do you recall how much water was on the floor?
A: 1 inch or ½ inch.
Q: How much settled in the back where the equipment was?
A: I can't say. ½ inch where the machines were.
Q: All of the machines in that area?
A: No.
Q: Was there damage to the equipment in the front?
A: No.
Q: You said you were 'waddling' in your witness statement?
A: Yes. Water was on the ground.
Q: You said you notice the machines at the back were completely destroyed?
A: Any water or corrosion would destroy the machines."

23. He was also questioned about whether he understood the terms of his policy, and although he said he had not read all of the provisions, he indicated that he went "briefly over it" and he trusted the agent. I will return to several of these inconsistencies later.

Larry Cabrera

24. As noted, Larry Cabrera apparently owns a company that sold and repaired printing and graphics equipment ("Larry and Associates"). He was the "expert" retained to assess and provide estimates of the damage to the machine. He specialized in sales and service of all types of graphics and printing equipment, and has also provided technical support and training on used, rebuilt and new printing equipment to many printing companies in the United States. He managed Sir Speedy's Printing Co., said to be "*the largest printing company in the US*" before starting his own business.

25. His initial report to the Company, which was then only based on his viewing of photos which had been sent to him, was dated 19 September 2017. It said, in material part:

> "Upon inspection of the equipment at Bahamas Rubber Stamp & Printing, we found extensive water damage to all the equipment. All this equipment has electrical components therefore all electrical components of these machines would need to be replaced which will exceed the value of the machines."

26. However, he later travelled to the Bahamas in November of 2018, and submitted a more extensive report (the second Cabrera report referred to above). His report provided photos of all the printing and binding equipment that was said to be damaged by water and estimates for replacement units, as well as the paper stock and other supplies said to have been damaged. These were the figures which were included in the plaintiff's statement of claim. He concluded in that Report:

> "After a complete & thorough inspection and evaluation of all the items/equipment listed above at the location above, our findings were worse than previously expected. Every piece of machine has huge amounts of rust and visible signs of excessive water damage. …In our opinion, none of the items/equipment at Bahamas Rubber Stamp & Printing is salvageable and we highly recommend replacing it all."

Ruthnell Bethel

27. Ms. Bethell was the claims manager at the Company. Her witness statement confirmed that the plaintiff contacted the insurance Company on or about 12 September 2017, and reported that "*culprits attempted to gain entrance to his property by prying open the plywood on the roof and as a result of the opening in the roof, rain water flooded the building which damaged his machines*." She contacted Technical Adjusters Bahamas Ltd. and requested their assistance in investigating, and later received two reports from them in connection with the claim. She said that when the Claims Department assessed the claim, they formed the view that the loss and damage did not qualify for a covered loss under the terms of the policy. The plaintiff also confirmed to them that the alleged theft did not lead to any loss of goods or equipment.

Laurie Johnson

28. Laurie Johnson was the loss adjuster who visited the plaintiff's printing establishment on 18 September 2017 to conduct an inspection and prepare a report. She stated that the plaintiff informed her that robbers accessed and forced open the plywood roof of the establishment and as a result rainwater penetrated the exposed roof, flooding the printing room. She confirmed that she told the plaintiff that he would be required to have the items that he was attempting to claim for examined by a "*qualified technician and that a written report detailing the prognosis of each* [*piece of] equipment*".

29. The plaintiff subsequently submitted an invoice in the amount of $19,610.0 for damaged stock and a "pro forma" invoice in the amount of $103,328.00 in support of the claim for equipment replacement. She indicated that she informed the plaintiff that his claim would not likely progress based on the fact that the documents he submitted were not "*adequate in identifying the nature of any defect or malfunctioning*".

30. As a result, the plaintiff indicated that he would arrange for the technician to travel to Nassau to inspect the equipment and that he would produce invoices for the ruined stock. The plaintiff by email dated 29 September 2017 informed her that "*he had finally gotten the technician to come and inspect the equipment*". However, when she independently telephoned the technician about when he had physically inspected the equipment, he told her that he had not, and his report was based on information relayed to him over the phone by the plaintiff.

31. There was some back and forth between her and the plaintiff over this, and she indicated to him that she was "*unconvinced that his claim was entirely fortuitous*" and that "*he had not been completely honest with regard to the assessment report presented to us for the machinery and*

equipment". The plaintiff initially denied that a representation had been made that the technician had visited, but eventually conceded, in a letter dated 11 October 2017, that an email was sent to that effect, although he claimed the statement was inadvertently made by his secretary, and not by him.

32. Johnson's statement concluded with the following observations on her examination of the property:

> "17. Upon examination of the roof, it was apparent that only a relatively small section of it had been exposed, and it appeared to me that only a few items of equipment could have been exposed to rainwater. I took photographs during my initial site inspection. These photographs show that the equipment was aged and looked obsolete. Formal reports were prepared by Technical Adjusters on 23rd November 2017 and 19 January 2018 of our investigations and findings and are marked as Exhibit-6 hereto.
>
> 18. Based on my observations at the site and the thorough investigations conducted, I do not accept that the alleged damage was caused by the direct force of Hurricane Irma."

33. She was cross-examined on her findings with respect to her site visit by counsel for the plaintiff as follows:

> "Q: Did you see the water damage?
> A: On this occasion, I cannot say the damage to the equipment was because of water damage.
> Q: Wasn't it you who asked the Plaintiff to get a report from an expert?
> A: Yes.
> Q: One from abroad?
> A: It's his claim…it's for him to…[…]
> Q: Did photos of the damage even come into discussion?
> A: My photos?
> Q: Were you ever in a discussion with the plaintiff that more than photos were needed to assess the damage?"

34. On re-examination on this issue, her evidence was as follows:

> "Q: You said that you could not tell if the equipment was damaged by water. Why did you say this?
> A: It did not look like fresh damage…".

Donna-Marie Dennis

35. Ms. Davis was the Underwriting Manager at the insurance Company at the time. Her evidence was simply to indicate that she was familiar with the terms of the policy and that based on her opinion of the relevant clauses "*the wording in the policy does not cover theft*" and that the "*policy did not aid Mr. Deveaux in seeking compensation*."

36. I should indicate at once that this evidence was of no probative value, as it purported to provide (in the guise of factual evidence) opinion evidence as to the interpretation of the policy. Counsel would be aware (and as pointed out below by reference to the relevant authorities) that the interpretation of commercial contracts or any contract is based on objective principles and the subjective views of the parties or others are irrelevant.

Assessment of the evidence

37. I have given careful consideration to the evidence of the plaintiff, and I conclude with some regret that I did not find him to be a credible witness. At times he was evasive and argumentative and there were significant gaps in his evidence that were never logically explained. For example, when he was challenged in cross-examination as to whether the "1 inch" of water which he said was on the floor in the back caused the damage, the exchange was as follows:

> "Q: Okay. And it's about an inch of water on the floor in the rear?
> A: Mr. Rigby, I don't measure no water, sir. I said water was on the floor.
> Q: How much water was on the floor?
> A: I couldn't tell you that. I didn't get no tape and measure no water.
> Q: No problem. No problem. I will move on. You said you were "waddling" through the water. They are your words.
> A: Water was on the floor…waddling can be anything sir. You can waddle through a cup of water on the floor.
> Q; All right sir. Is it fair to say that it was not a lot of water on the floor?
> A: I don't know sir. My determination can be different from yours, sir. I see I spill and my wife says, look at all of that water on the ground. And it could be a little. I could take a tissue and dry it up. It depends on how you determine which is more and much is more."

Earlier in his testimony, he had said of the water that "…*it was just a flood, I was walking in the water on the floor and everything*."

38. There was similar evasiveness and combativeness with the size of the hole in the roof:

> "Q: How big was the hole in the roof on your estimate?
> A: Mr. Rigby I didn't go and measure that. That's why the adjusters came. They have all of that of stuff. I didn't measure no hole or nothing, sir.
> Q: I am asking you what you observed. How big you thought the hole in the roof was? Was it big as your hand? Was it big as a basketball? How big was the hole in the roof?
> A: Mr. Rigby, it's a hole. If you take up and check a piece of plywood, you could imagine a plywood lift up. That's the size of it. Not the whole plywood. The plywood was turned up."

39. However, in the claim letter he submitted to the insurer, he had said: "*To briefly delineate, a burglar entered the establishment from the roof leaving a <u>large hole</u> causing extensive damages to paper supplies printing machines*." Furthermore, although he said it was left to the adjusters,

the undisputed evidence of the adjuster was that when she came out on 18 September 2017, the roof had already been repaired, although the inside ceiling had not.

40. He was also equivocal about what caused the damage to the roof. Take the following exchange:

> "Q: So you agree with me having seen that [*his claim Form to the insurer*], that the rip of the roof was not caused by the passage of Hurricane Irma?
> A: Well, I don't know sir. I can't recall.
> Q: Mr. Deveaux, look at what you wrote on page 2.
> A: I know Mr. Rigby.
> Q: Please describe the nature of the loss or damage. […] You even said burglary.
> A: Mr. Rigby, if I tell you something, you are not going to believe me. That is what the law is for. I brought the law in. And whatever they say on the report that's what it is. Not what I say.
> Q: Mr. Deveaux, I am asking you about what you, what you wrote.
> A: Well, that was my assumption. That didn't have to be accurate."

41. These answers were wholly inconsistent with his case and evidence. His pleaded case was that his place of business was "*broken into and as a result his business equipment and supplies were left exposed to and damaged by the elements*." His claim form dated 10 September 2017 said "*Water Damage/Burglary; culprits entered roof*…". His follow-up letter of 27 September 2017 said: "*A statement was submitted for earlier review. To briefly delineate, a burglar entered the establishment from the roof leaving a large hole causing extensive water damage to paper supplies and printing machines*."

42. There were several other unexplained inconsistences and gaps arising in the evidence, of which the following are just a few. He was pressed, by the Court itself, on the issue of whether burglars had actually entered the establishment (as he seemed to have suggested in his report to the Police and the insurer). His answer was "I could not say", because nothing was lost and although some drawers were open, he proffered that they could have been opened by his staff. The photos of the rooftop submitted with his claim form (presumably taken by him) only shows the raised edge of the plywood which, although big enough to allow the ingress of rain, did not appear large enough to allow a person to enter or exit. One edge of the plywood was raised, but it was still attached at the other corners.

43. Additionally, the plaintiff testified that he checked his building every day, but he was unsure whether he attended on the Friday 8 September 2017, which he says might have been because the hurricane was travelling and he believes everyone was "shut down". I did not find it credible that the plaintiff would not know whether or not he visited his business establishment on the 8 September (that Friday), especially as a storm was travelling and it is only reasonable that he would have checked/taken some precautions in respect of the building.

44. His evidence was also that he discovered that his machines had been "damaged/destroyed" that morning. Even if some rain had gotten on his machines, which could only have occurred during the night of the 8th or early morning of the 9th, it is most unlikely that they would have rusted and been "destroyed" within that short period. He certainly could not have known that they were "destroyed", even accepting his explanation that printing equipment needed to be kept dry. I prefer the evidence of the adjuster that the damage (or certainly some of it) was not fresh damage. By his own evidence, the machines were over 20 years old.

45. Furthermore, the plaintiff falsely stated that the technician had travelled and physically inspected the equipment, when this was clearly not the case. The email, which was dated 29 September 2017 and addressed to Ms. Johnson, said:

> "I finally got the technician to come in and inspect the equipment. Can you kindly put a rush on the process please. Thank you for your time."

The plaintiff attempted to walk this back only when the claims manager caught him in the false statement, but it was a clear representation that the inspection had been done.

46. I must say that the damage said to have been done to the roof occurred in rather mysterious circumstances. It seems strange also that the plaintiff admitted in cross-examination that in the 38 years or so that he operated the business, this was his first time taking out insurance on the equipment, which was effective from 4 September 2017 to 3 September 2018. The incident allegedly occurred on 8 or morning of the 9 September.

47. In any event, I accept the evidence of the adjuster that only a relatively small section of the roof had been exposed and even if rain came in, only a few items could have been wet from the rain. It was unlikely that it could have caused the full-scale damage alleged by the plaintiff, as the plywood was not completely removed and only one of the ends raised. By his own evidence, the standing water was only ½ to 1 inch on the floor, and therefore it could not have damaged the machines by immersion.

<u>The essential terms of the insurance policy</u>

48. I move on now to consider the critical terms of the Policy. The relevant and applicable terms of the Policy were included within "*Section A: Property*", although the plaintiff also relied on several of the definitions in the Definition section. The portions identified by the parties were as follows:

> <u>Definitions:</u>
>
> "Buildings" includes:

a. Landlord's fixtures and fittings therein and thereon, walls, gates and fences and made up surfaces to roads. Paths, yards and car parks for which the insured is responsible.
b. Small outside buildings, annexes, conveniences, external signs, staircases, fire escapes and other outside structures, hoists, platforms and gangways attached or belonging to any of the buildings insured; and
c. Except where more specifically insured on, buildings include gas, water and electrical instruments, meters, piping, cabling and the like and the accessories thereof including similar property in in adjoining yard, roadway or underground and pertaining to the buildings insured thereby, all the property of the insured for which the insured in responsible.

Section A: Property (Fire & Additional Contingencies):

In the event of Damage to the Property described in Appendix A by any contingencies stated below the insurers will pay the insured the value of such property at the time of its Damage or at option reinstate or replace such property or any part thereof; PROVIDED THAT THE LIABILITY OF THE Insurers during any Period of Insurance shall in no case exceed in respect of each item the Sum Insured in Appendix A or such sum or sums as may hereinafter be substituted thereof by endorsement signed by or on behalf of the Insurers.

Exceptions:

Cl. 7:

"7. Damage to Building caused by theft or attempted theft excluding Damage;

a. More specifically insured by or on behalf of the Insured.
b. In respect of any Building which is empty or not in use.

Cl. 8 (d)

"8. Hurricane, tropical storm, tornado, windstorm (including rain accompanying these contingencies) inundation by the sea, tidal wave, sea surge or flood occasioned thereby, but excluding:

a. Damage to tennis courts, fencing, gates and posts, hedges and movable property in the open or in transit;
b. Costs of repairing, clearing or making good drains or water courses;
c. Damage of or to external television and radio receiving aerials, aerial fittings and masts and satellite dishes, unless noted in Appendix A;
d. Damage caused by water or rain, whether driven or not (other than Damage caused by inundation by the sea, tidal wave, sea surge or flood) unless the Building insured or conditioning the property insured shall first sustain any actual damage to the roof or walls of the same by the direct force of hurricane, tropical storm, tornado or windstorm. The insurers shall then be liable only

for such Damage to the interior of the Building through openings in the roof or walls made by the direct force of the said contingencies."

49. The property insured under "*Appendix A: Section A*", in material part, was as follows:

"Building(s)	Sum Insured
Business equipment, fixtures, fittings, plants, machinery and All Other Contents (excluding property covered under Items 1 and 3) the property of the Insured or held by them in trust for which they are responsible and within the Insureds Premises.	$250,000.00
Stock and materials in trade the property of the Insured or held by them in trust for which they are responsible and within the Insureds Premises."	$50,000.00

Submissions of the Parties

Plaintiff's submissions

50. The plaintiff makes three central arguments in respect of the issues. Firstly, he submits that there was clearly damage and loss to the property, in particular the damage to the machines and stock detailed in the second Cabrera report. As mentioned, as the court was not dealing with the quantification of the damages at this stage, no contest was taken as to estimates contained in the report by the defendant. It should also be made clear that the Court makes no finding of fact based on those reports, or the estimates contained therein.

51. On the second issue, the plaintiff submits that the damage was of the kind covered by the Policy. This was reasoned as follows. Firstly, it is said that under the definition section, "Building" includes "*Landlord's fixtures and fittings therein and thereon*…". In this regard he relies on **Reyolds v Ashby & Sons** [1904] UKHL (05 August 1904) for the principle that machines attached to the floor constitute fixtures. But he submitted that in any event, as the definition of property insured specifically covered "equipment, fixtures, fittings, plants, machinery and All other content" (See Appendix A, above), it was not strictly necessary to rely on that authority.

52. Next, it was argued that the operative clause of Section A provides for payment of the insured value or the reinstatement costs at the option of the insured, "*In the event of Damage to the property described in Appendix A by any contingencies stated below*…". The contingencies stated below include (at Cl. 7) "*Damage to building caused by theft or attempted theft*," except in respect of damage caused to property that is "*more specifically insured*" or where the building is empty or not in use. It was not disputed that the two exceptions to Cl. 7 were not operative.

53. Under Cl. 8, damage caused by water or rain, whether driven or not, is an excluded peril, unless the rain or water enters through a breach in the building directly caused by one of the contingencies (hurricane, tropical storm, windstorm, tornado). To get around this difficulty, the

plaintiff sought to connect the hole with the entry of the rain water by relying on the "but-for" principle. It was submitted that the hole was one of two possible causes for the damage, which he identified as: (i) the damage done to the roof creating the hole; and (ii) the rainwater from Hurricane Irma. As was put in the written submissions "…*But for the damage done to the building as a result of theft or attempted theft, there would be no loss of the machine and stock*." He therefore submitted that the "proximate cause" for all the damage and loss is the hole made to the roof.

54. The plaintiff buttressed this submission with reference to two cases. The first was to **Boiler Inspection and Insurance Company of Canada v. Sherwin Williams Company of Canada Ltd.** [1951] A.C. 319, where the House of Lords referred to the decision of the Privy Council in **Canada Rice Mills Ltd. v. Union Marine and General Insurance Co.** [1941] A.C. 55, where Lord Wright stated (at pg. 71):

> "It is now established that…that "*causa proxima*" in insurance law does not necessarily mean that cause last in time, but what is in substance the cause…or the cause to be determined by common-sense principles."

55. The second case was **Petroleo Brasileiro SA v ENE Kos 1 Ltd** [2012] UKSC 17 (2 May 2012) TAB 3, where Mance LJ, stated [at 42]:

> "The search is therefore for the proximate cause. Devlin J cited **Reischer v Borwick [1894] 2 QB 548** as indicating that there can be situations in which two causes are so closely matched that both are identified as proximate causes. That is a largely theoretical analysis which finds little practical application in the authorities and has achieved any prominence only in discussion about exception clauses. **Reischer v Borwick** itself was a case on a marine insurance policy covering "only …. collision", and not perils of the seas. The vessel was holed by collision, the hole was temporarily plugged, but the plug failed as she was being towed to safety and she sank due to the inflow of water. Not surprisingly, the claim succeeded. Only Lindley LJ addressed the possibility that this situation could and should be analysed as one of concurrent proximate causes (although even he in his concluding remarks identified the injury by collision as "really … the cause of the loss – the causa causans and not merely the causa sine que non"). Both Lopes and Davey LJJ analysed the position throughout in what one would have thought to be more conventional terms as involving a single proximate cause of the sinking (the collision holing the vessel)."

56. It was submitted that based on the principles cited and the facts of this case, and using a common sense approach, "but for" the hole in the roof attributable to theft or attempted theft—which is a covered peril—the damage would not have occurred to the machine and stock.

57. In addition to reliance on "*theft or attempted theft*" under Cl. 7, the plaintiff argues that the damage may also be covered under Cl. 6, which refers to damage caused by "*malicious persons*" (subject to certain exceptions), and he submits that Cl. 6 is therefore applicable even where there is no intention to steal or actual theft committed. By reference to section 316 of the Penal Code, which deals with "Housebreaking", the plaintiff submits that even if the actions of creating the

hole in the roof do not amount to theft or an attempt within the meaning of s. 316, it constituted "*criminal damage*" and it can therefore be said that it was done by a "*malicious person*".

58. The final submission made by the plaintiff is that the damage is not excluded or excepted under the terms of the policy. He contended that "*if the roof of a property is damaged, and that damage is covered by the policy, then the contents of the same that have been exposed to the elements as a result of that damage, should also be covered by the policy*." The essential submission on this point is captured in paragraph 4.7 of his submissions as follows:

> "The defendant has seemingly taken the position that the damage done to the machines was caused by rainwater from Hurricane Erma (*sic*) which would have been covered under Contingency 8, however they further rely on the exclusion at 8(d), that because the damage that occurred to the building which, allowed the rainwater to enter the building did not happen as a result of the storm, they are therefore not under any obligation to honor the claim for damages as a result of the "rainwater". That was clearly not the implied or expressed intention when the contract was entered into, and under the Infa-Referendum Rule (*sic*) [*presumably contra proferentum*] the interpretation should always be a part of "the Maker of the Policy".

Defendant's submissions

59. The defendant adverts first to the general principles of contractual interpretation in respect of commercial documents, the objective of which is to determine the intention of the parties based on an objective exercise that gives precedence to construing the language used by the parties having regard to the context and background: **Marley v Rawlins and Another** [2014] 1 All ER 807, (per Nueberger P), and **Rainy Sky SA and others v Kookmin Bank** [2012] 1 All ER 1137. In the latter case, the UK Supreme Court said [at 14]:

> " [T]he ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffman made clear, in the first of the principles he summarized in *Investors Compensation Scheme* case [1998] 1 All ER 98 at 114-115, [1998] 1 WLR at 912-913, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

60. The essential argument of the defendant was stated at paragraph 28 and 29 of its written submissions as follows:

> "28. In interpreting the Policy, the Defendant invites the Court to apply the ordinary meaning to the terms and words set out in clauses 7 and 8 of the Policy. The Defendant contends that the Policy taken out by the Plaintiff according to clause 8(d) only covers damage by water where the actual damage was first sustained by the roof or wall caused by the direct force of the hurricane, tropical storm, tornado or windstorm.

29. When the Court considers the totality of the evidence adduced during the course of the trial, it should, and we invite the Court to arrive at the conclusion, that the Plaintiff failed to prove that the hole in the roof was caused by the passage of Hurricane or by any peril or contingency insured by the Policy."

61. The defendant argues that the reliance on damage done by "malicious persons" under Cl. 6 is not applicable to the facts of the case, based on an interpretation of the contract. Firstly, it points out that the plaintiff "*led no evidence at trial of any malicious conduct that fell within the definite cause of the Policy*". Secondly, it notes that the contingencies under Cl. 6 are focused on "*riot civil commotion, strikers locked out or labour disturbances*." It contends that no events of this kind are applicable (or were even argued) and therefore this interpretation should be rejected by the Court.

62. The defendant's main attack on the plaintiff's case, however, is that the plaintiff's attempt to advance multiple causes or concurrent causes as proximate causes for the alleged losses and, in particular, the plaintiff's reliance on the hole created in the roof as one of the "proximate causes" is misconceived and wrong in fact and law. In this regard, it cites the case of **Wayne Tank and Pump Co. Ltd. v Employer's Liability Assurance Corporation Ltd.** [1969 W. No. 364] [1974] Q.B. 57, for the principle that where there are concurrent causes, one of which is excluded, the exclusion generally prevails and the claim fails unless the express terms of the policy provide otherwise.

63. In **Wayne Tank and Pump Co**., the UK Court of Appeal had to consider whether the insurers were liable for a fire which had concurrent causes, each of which was efficient to have caused the fire: (i) the conduct of an employee who negligently left untested equipment switched on overnight which overheated (covered by the policy); and (ii) the defective nature of the goods supplied by the insured (which was exempt from liability under the policy). The CA held that the exemption of the insures from liability was not taken away because "*there was another cause equally efficient also operating to cause the loss*" (per Lord Denning). As later said by Lord Justice Roskill that in that case:

> "An exception clause is inserted into a policy of insurance (whether marine or not marine) in order to exclude liability which - apart from the exception clause - would rest upon the underwriter. I cannot think that the effect of the exception clause depends upon whether it is preceded by the traditional words - one might almost say traditional jargon - in a marine insurance policy "warranted free of," or the less romantic and more mundane words of a non-marine policy: 'The company will not indemnify.' I think the law in this respect is the same both for marine and non-marine, namely, that if the loss is caused by two causes effectively operating at the same time and one is wholly expressly excluded from the policy, the policy does not pay."

64. The defendant submits that on a preponderance of the evidence and based on the legal principles, the plaintiff's loss was "*primarily due to rain from the passage of Hurricane Irma after the roof was opened by culprits/thieves*". It was not due to any damage by the direct force of any

of the contingencies (hurricane, tropical storm, tornado or windstorm) and therefore the defendant's loss/damage is excluded from coverage under the terms of the policy.

The Law and Legal principles

65. The general principles relating to liability for losses in insurance policy were neatly summarized by the UK Court of Appeal in ***Brian Leighton (Garages) Ltd. v Allianz Insurance Plc*** [2023] EWCA Civ 8. Lord Justice Popplewell set out the principles as follows:

> 27. [I]t is a general principle of insurance law, codified in s. 55 of the Marine Insurance Act of 1906 but equally applicable to non-marine insurance, that the insurer is liable, and only liable, for losses proximately caused by a peril covered by the policy. Because of its historical origins, the expression proximate cause is apt to mislead. The proximate cause of the loss is not the last cause of the loss, but that which is proximate in efficiency, being the dominant, effective or efficient cause: *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350; *Yorkshire Dale Steamship Co v Minister of War Transport* [1942] AC 691; *FCA v Arch* at [163-170]. There may be more than one proximate cause of a loss. Where there are concurrent proximate causes, one an insured peril and the other excluded, the exclusion prevails: *Wayne Tank and Pump Co. Ltd. v Employers Liability Assurance Corpn Ltd.* [1974] QB 57, at pp. 67B-F, 69B-D, 74E-75D; *Atlasnavious-Navega LCD v Navigators Insurance Co. Ltd.* [2018] UKSC 26 [2019] AC 136 at [49] FCA v Arch at [174].
>
> 28. It is commonplace in human experience, and therefore insurance claims, that a loss may result from a combination of causes, either operating independently of one another, or often, in a chain where each would not have arisen but for that preceding it in the chain. Of these causes, the search is for the, or a, proximate cause and it is generally irrelevant if a cause is either more remote in the chain than the proximate cause, or more immediate.
>
> 29. This is subject to an important qualification. The requirement of proximate causation is based on the presumed intention of the contracting parties; it is a presumption capable of being displaced if, on its proper interpretation, the policy provides for some other connection between loss and the occurrence of an insured or excepted peril. This is reflected by the words in s. 55 of the Marine Insurance Act "unless the policy otherwise provides". Typically, this is done by a clause referring to losses caused "directly or indirectly" by the insured or excepted peril."

66. Several of the principles relating to causation were extensively reviewed and stated authoritatively by the UK Supreme Court in the recent case of **Financial Conduct Authority v Arch Insurance (UK) Ltd. and other appeals** [2021] UKSC 1. That was a test case brought on behalf of thousands of businesses in the United Kingdom who asserted that they suffered heavy business losses due to business interruption and who made claims which the insurers declined to pay on the grounds that the policies did not cover effects (or certain) effects of the Covid pandemic. The facts are not important for this case, but the Supreme Court discussed all of the leading principles in insurance law, which are worth setting out in some detail.

Proximate causation

67. Referring to the leading House of Lords' case of **Leyland Shipping Ltd. v Norwich Fire Insurance Society Ltd.** [1918] AC 350, [1918-19] All ER Rep 443, the Court said [at 166-168]:

> "166. By far the fullest discussion of the concept of cause is contained in the speech of Lord Shaw of Dunfermline. He made it clear, first of all, that the test of causation is a matter of interpretation of the policy and that '[t]he true and overruling principle is to look at the contract as a whole and to ascertain what the parties to it really meant' (see [1918] AC 350 at 369, [1918-19] All ER Rep 443 at 453). He went on to say:
>
> > 'What does "proximate" here mean? To treat proximate cause as it if was the cause which is proximate in time is…out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.' […]
>
> 168. The common-sense principles or standards to be applied in selecting the efficient cause of the loss are, however, capable, of some analysis. It is not a matter of choosing a cause as proximate on the basis of an unguided gut feeling. <u>The starting point for the inquiry is to identify, by interpreting the policy and considering the evidence, whether a peril covered by the policy had any causal involvement in the loss and, if so, whether a peril excluded or excepted from the scope of the cover also had any such involvement.</u> The question whether the occurrence of such a peril was in either case the proximate (or 'efficient' cause) of the loss involves making a judgment as to whether it made the loss inevitable—if no, which could seldom ever be said, in all conceivable circumstances—then in the ordinary course of events. For this purpose, human actions are generally not regarded as negativing causal connection, provided at least that the actions taken were not wholly unreasonable or erratic." [Underling supplied.]

Concurrent causes

68. Then, as to concurrent causes, the Court said:

> "173. The leading authority which illustrates this possibility in the insurance field is *JJ Lloyd Instruments Ltd. v Northern Star Insurance Co. Ltd., The Miss Jay Jay* [1987] 1 Lloyd's Re 32. This case concerned a yacht inured against loss caused by 'external accidental means'. The yacht sank as a result of what was held to be a combination of causes which were 'equal, or at least nearly equal in their efficiency' (per Slade LJ at 40). They were adverse sea conditions and design defect which rendered the yacht unseaworthy. The first of these causes fell within the scope of the insurance; the other, unseaworthiness, did not but nor was it an excluded peril. The Court of Appeal held that in these circumstances the loss was proximately caused by a peril insured against and was therefore covered. See also *ENE Kos 1 Ltd. Petroleo Brasileiro SA* (No. 2) [2012] UKSC 17, [2012] 4 All ER 1, [2012] 2 AC 164 (at [12] and [74]). As Lord Clarke of Stone-cum-Ebony stated in para [74]: '[W]here there are two effective causes, neither of which is excluded but only one of which is insured the insurers are liable.'

> 174. This situation is to be contrasted with one where there are two proximate causes of loss, of which one is an insured peril but the other is expressly excluded from cover under the policy. Here, although it is always a question of interpretation, the exclusion will generally prevail: see *Wayne Tank and Pump Co Ltd. v Employer's Liability Assurance Corp Ltd.* [1973] 3 All ER 825, [1974] QB 57; *Midland Mainline Ltd. v Eagle Star Insurance Co. Ltd.* [2004] EWCA Civ 1042, [2004] 2 Lloyds Rep 604; *Atlasnavious – Navegacao, Lda v Navigators Insurance Co. Ltd., The B Atlantic* [2018] UKSC 26, [2018] 4 All ER 589, [2019] AC 136 (at [49]).

The 'but for' test

69. Lastly, the Court also reiterated the principle that care must be taken in applying the but-for test to the analysis of what is the proximate cause. They said:

> "181. […] The most conspicuous weakness of the 'but for' test is not that it wrongly excludes cases in which there is a causal link, but that it fails to exclude a great many cases in which X [the prior event] would not be regarded as an effective or proximate cause of Y [the event caused]. If, for example, a cargo is lost when a ship sinks, an unlimited number of circumstances could be identified but for which the loss would not have occurred. These will include some which may be plausible candidates for selection as a proximate cause—for example, the unseaworthy state of the vessel or exceptionally severed weather conditions. But they will also include an endless number of other circumstances. For example, it might equally be said that the loss would not have occurred but for the decision to manufacture the vessel, the decision of the owner or charterer to deploy the vessel on this particular route the buyer's decision to purchase the cargo and the seller's decision to ship the cargo on that particular vessel, and so on. The main inadequacy, in other words, of the 'but for' test is not that it returns false negatives but that it returns a countless number of false positives. That explains why it is often—and for the most part correctly—described as a minimum threshold test of causation."

Court's discussion and conclusions

70. In summary, the principles expressed in the above authorities (which refer to the authorities relied on by the parties) may be distilled as follows. The doctrine of proximate cause provides that, unless the policy provides otherwise, the insurer is only liable for losses proximately caused by an insured peril which is not excepted or excluded under the policy. If there are concurrent proximate causes, one of which is insured and the other excluded, the exclusion generally prevails, subject to the precise wording of the Policy. Furthermore, all of the cases hold that the search for the proximate cause is not the cause that is last in time, nor is it determined on a "but-for" test. It is the cause which is the most effective (or efficient) or dominant in bringing about the loss, as determined based on a common sense and broad view of the facts. Of course, all of these issues are determined against a construction of the policy.

71. Against this background, I now turn to the wording of the Contingencies in Section A to resolve this claim. The first question is what caused the loss? The plaintiff argues that there were concurrent causes (the hole in the roof and the rain) and that the hole was the proximate cause.

The defendant argues that the rain was the proximate cause, and the manner of its ingress was an excepted peril under the terms of the insurance policy.

72. In my view, having regard to the facts of this case, the proximate cause of the loss was the ingress of the rain through the hole created in the roof. I accept that while damage caused by rain or water would otherwise have been an insured peril, it was excluded under the clear terms of Cl. 8, unless the water or rain entered the building through "*openings in the roof or walls made by the direct force of the said contingencies*" (hurricane, tropical storm, windstorm, tornado).

73. In the present case, there was no evidence that any structural damage was caused by the hurricane. The testimony of the plaintiff was that the storm was "just a pass-over" and that it was not a direct hit. More importantly, as explained, the positive and pleaded case of the plaintiff was that the hole was caused either by burglars or "malicious" persons. I agree with the defendant that there was no evidence of any malice by anyone. Furthermore, when damage by "malicious persons" is construed in its context (the so-called *noscitur et sociis* rule), it clearly requires some civil or industrial disturbance or unrest to be operative for the damage to come within the perils covered under Cl. 7.

74. The plaintiff claimed that the hole in the roof created by the culprits was a concurrent cause, which was covered under Cl. 7. But even assuming this were so, in my judgment it clearly falls within the **Wayne Tank and Pump Co. v Ltd. v Employers' Liability Assurance Co. Ltd.** principle, and the exclusion in the respect of the rain damage prevails. There is no language in the policy that would lead to any different result. For example, Cl. 8 speaks to damage "caused" by "*water or rain; whether driven or not*": it does not open up the category by including damage caused "*directly or indirectly*" by water. It specifically states how the water must enter as a pre-condition to liability.

75. The plaintiff argued in his written submissions that this exception was "*clearly not the implied or expressed intention when the contract was entered into*…". I disagree. The expressed intention of the parties, as deduced from the language used, is that damage from rain or water which did not enter as a result of structural damage caused by one of the named contingencies, was excepted under the policy, whatever the plaintiff may have thought. There was no ambiguity here, and the plaintiff's reliance on the *contra proferentum* rule is completely misplaced.

76. Although the above analysis disposes of the claim, I also find that the plaintiff's reliance on the 'but for' test is misconceived. It seems to me to be exactly the kind of false positive the Supreme Court warned about in **FCA v Arch.** The fact that a hole was created in the roof, while it may have provided an opening that allowed the ingress of the rain, was not in my view a proximate cause of the damage. Had the hole been made and no hurricane was travelling, or there was no rainfall, the damage to the equipment and stock would not have occurred. So it cannot be said that X (the hole in the roof) *caused* Y (the damage to the equipment and stock). As noted, there may have been no loss or damage at all if there was no rain.

77. As to the alleged theft, to the extent that this was a covered peril, it was not in dispute that the alleged entry (or attempted entry) did not lead to any goods or equipment being stolen. Furthermore, the insurer was clearly willing to cover the costs of the repairs to the roof, as was indicated in the Laurie Johnson loss adjusters report. However, it appears that the damage to the roof was fixed out of pocket, and the plaintiff confirmed in cross-examination that he did not make a claim for reimbursement in this regard.

78. In the circumstances, the plaintiff's claims for breach of contract by the insurer in denying his claim for damages for the alleged losses fails and is dismissed.

The Negligence claim

79. The plaintiff also pleaded "negligence", particulars of which were said to consist of the defendant: (i) requiring the plaintiff to spend money on the Cabrera report; (ii) failing to ensure that the claim was handled in a timely manner/causing undue delay in the settlement of the claim; and (iii) giving the plaintiff a "false belief" that the matter was going to be settled favourably. These claims were not developed in submissions, and neither were they addressed by the defendant. But in any event, there is no basis on which a claim in negligence would lie for late payment of damages under an insurance contract, or consequential losses for delay, whether framed in negligence or contract. This appears very clearly from the following authorities.

80. In **President of India v Lips Maritime Corporation** [1987] 2 WLR 572 at p. 580, Lord Brandon said:

> "Once it is recognised that a claim for demurrage sounds in damages rather than in debt, it becomes apparent that the two concepts, first, of a contractual date for the payment of such damages, and, secondly, of a claim for damages for breach of contract in not paying them by such date, have no basis in law. As I said earlier, an owner's cause of action for demurrage, being one for damages, albeit liquidated damages, accrues *de die in diem* from the moment when the ship is detained beyond the stipulated lay days. There is no thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute."

81. That case was cited and applied in **Spring v Royal Insurance (UK) Ltd.** [1997] CLC 70, [1996] Lexis Citation 1220, where the Court of Appeal said (per Beldam LJ):

> "By long-standing decisions it is settled that the liability of insurers under a policy arises when the loss occurs and the liability is to pay money for that loss. That the insurers have the option themselves to reinstate or to pay for the reinstatement of the property damaged under the terms of the policy does not alter the essential nature of their liability, which is to pay the sum of money as damages. Thus the failure to pay is a failure to pay damages and, by decision binding on this court, an assured has no cause of action for damages for non-payment of damages. To compensate a plaintiff in such circumstances, Parliament had provided that the court should be able to award interest on the damages which the court eventually assesses."

82. Although it is clear that no action will lie in the circumstances, the court observes that in any event no reasonable complaint can be made of the timeline in processing the claim. The plaintiff reported the loss on or about the 10 September 2017, and was notified that the claim was denied by letter to his attorney dated 16 March 2018. The insurers cannot be faulted for requesting proper documentation in relation to the claim and assessment by professional adjusters in order to process the claim. The plaintiff did not provide a properly authenticated estimate for the consideration of the insurer until December 2017. In all the circumstances, this could hardly constitute an inordinate time, allowing a reasonable time for the completion of their investigatory process.

CONCLUSION AND DISPOSITION

83. For all the reasons given above, the claim for breach of policy for failure to pay damages for the alleged loss is denied and dismissed. The negligence claim in relation to the processing of the claim is misconceived and also dismissed.

84. Costs are awarded to the defendant, to be taxed if not agreed.

11 December 2025

Klein J.