

11, 1971

IN THE PRIVY COUNCIL

No. 6 of 1970

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

JAMES MICHAEL MARZOUCA

Appellant

- and -

ATLANTIC AND BRITISH COMMERCIAL
INSURANCE COMPANY LIMITED

Respondents

CASE FOR THE APPELLANT

Record

- 10 1. This is an appeal from an order of the Court of Appeal of Jamaica (Eccleston and Luckhoo, JJ., Moody, J. dissenting) dated the 1st August, 1969, allowing the Respondents' appeal from an order of the Supreme Court of Jamaica (Chambers, J.) dated the 10th February, 1967, whereby judgment was entered for the Appellant against the Respondents on the Appellant's claim for the sum of £40,075.0.0 under a policy of insurance. UNIVERSITY OF LONDON
OF ADVANCED
LEGAL STUDIES
- 7 APR 1972
- 20 2. During the night of the 19th/20th May, 1964, a building owned by the Appellant known as the 25 RUSSELL SQUARE Ethelhart Hotel, at Montego Bay, and its contents were destroyed, and the concrete boundary walls and patio damaged, by fire of unknown origin. Under a policy of insurance issued on the 12th December, 1958 by the Respondents and renewed from time to time, the last renewal having been effected on the 24th July, 1963, the Ethelhart Hotel was insured against loss or damage by fire in the sum of £40,000, the contents of the building in the sum of £5,000 and the concrete boundary wall and the patio (added in the year 1960) in the sum of £2,400. The loss resulting from the fire exceeded the amounts insured in respect of the building and its contents and the damage to the concrete boundary walls and patio amounted to £75. The Appellant's claim for £40,075.0.0 under the said policy in respect of such loss and damage was rejected by the Respondents on the ground that the policy had been avoided by non-compliance with conditions 8(a) and 8(b) contained in the policy. These
- Ex. 5
pp. 194-8
- 30
- 40
- Ex. 5
p. 195

Record conditions read as follows :-

"8. - Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insured, before the occurrence of any loss or damage, obtains the sanction of the Company signified by endorsement on the Policy by or on behalf of the Company -

- (a) If the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire. 10
- (b) If the Building insured or containing the insured property become unoccupied and so remain for a period of more than 30 days."

3. The Ethelhart Hotel was acquired by the Appellant in April, 1945. In July, 1958 an insurance broker (Mr.Thwaites) acting for him arranged with the Respondents through their managing director, Mr.Rowlands, to insure the building and its contents against loss or damage by fire and certain other risks in the sums of £40,000 and £5,000 respectively. No written

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Ex. 1 pp. 190-1 proposal or application was made. A cover note dated the 25th July, 1958 was issued, "subject to the terms, exceptions and conditions of the Company's policy." On the 24th July, 1958 no one was residing in the hotel, but it was anticipated that in a matter of 6 - 8 weeks a lease would be taken by the Government and the hotel would be used as a residence for nurses employed at the Montego Bay Hospital. No description of user or occupation was inserted in the said cover note. The lease was taken by the Government, and the nurses resided in the hotel from the 1st October, 1958.

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Ex. 2 pp. 192-3 On the 4th December, 1958 another cover note, stated to be for 12 months with effect from the 24th July, 1958 and to replace the earlier cover note, was issued by the Respondents, again "subject to the terms, exceptions and conditions of the Company's policy." On the 12th December, 1958 the policy was issued containing the said

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Ex. 5 pp. 195-8

conditions 8(a) and 8(b). No requirement of any particular type of occupation appeared in either cover note or in the policy. The lease to the Government was terminated at the end of September, 1963 by notice given on behalf of the Appellant, and the nurses then ceased to reside in the building.

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10 4. From the time the nurses left, for a period of 51 days the Appellant employed a constable at night to watch the building. Thereafter until the fire, part of the building was under reconstruction to form self-contained apartments, and the independent contractor engaged by the Appellant for this work employed a night watchman for the purpose of guarding the building and the materials to be used in the course of such work. The work of reconstruction started on the 21st November, 1963, and was going on when the fire occurred on the 19th/20th May, 1964. The Appellant had intended to let the apartments for residential use when the work of reconstruction had been completed.

pp. 1-2

5. By his Amended Statement of Claim, dated the 6th July, 1965, the Appellant set out the facts relevant to his claim and contended that the said policy of insurance was in full force and effect on the 19th/20th May, 1964 and the sum of £40,075.0.0. was due thereunder. The Appellant claimed the said sum and further or other relief.

pp. 3-6

30 6. By their Amended Defence and Counterclaim dated the 12th July, 1965, the Respondents admitted the said policy and the renewal thereof from time to time, and contended that:-

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(a) the Appellant was in breach of condition 8(b) of the said policy by reason of the fact that from the end of September, 1963 the Ethelhart Hotel became unoccupied and so remained without their sanction signified by endorsement on the said policy until the occurrence of the said fire;

(b) the Appellant was in breach of condition 8(a) of the said policy by reason of the fact that without their sanction signified by endorsement on the said policy he had subjected the Ethelhart Hotel to extensive

Record

works involving substantial structural alterations and conversion, whereby the circumstances affecting the building were changed in such a way as to increase the risk of loss or damage by fire.

The Respondents, therefore, contended that the insurance had ceased to attach to the Ethelhart Hotel and admitted that they had denied liability under the said policy. By their Counterclaim, the Respondents sought a declaration that the said policy had ceased to attach to the Ethelhart Hotel at the time of the fire. 10

pp. 6-8 7. By his Amended Reply and Defence to Counter-claim, dated the 28th October, 1965, the Appellant denied that the Ethelhart Hotel was unoccupied within Condition 8(b) of the said policy. He further contended that the occupation after September, 1963 did not amount to a change of occupation within the meaning of Condition 8(a) of the said policy, and in any event did not increase the risk of loss or damage by fire within the meaning of the said condition. 20

8. Evidence was given by the Appellant and three witnesses on his behalf and by seven witnesses on behalf of the Respondents.

pp.117-131 9. In his judgment, dated the 10th February, 1967, p.119, Chambers, J. said there was no dispute that there ll. 28-39 was no one residing in the Ethelhart Hotel for a period of over 6 months prior to the fire, and extensive internal alterations were taking place at the annex to the hotel and certain materials of an inflammable nature were stored there. He set out the two points which arose for decision, thus: 30

pp.119-120 "1. Whether the work of alteration that was going on at the premises and the further intended alterations to the remainder of the building resulted in a breach of clause 8(a) of the Policy;
2. and also whether the premises were unoccupied so as to create a breach of clause 8(b) of the Policy." 40

pp.125-130 After analysing the evidence as to whether the alterations were such as to increase the risk of

loss or damage by fire, the learned trial judge found that "on the whole, the Defendants" (the Respondents) "have not shown that reconstruction would increase the risk over and above the time when the nurses occupied the Building."

Record
p. 130
ll. 17-21

- 10 10. In dealing with condition 8(b) of the policy, Chambers, J., discussed certain authorities, and held that, where tenants vacated a building and neither the landlord nor other tenants proceeded to reside in it, there was prima facie a cesser of occupancy, and the onus was on the landlord to repel that presumption. He might do so if he established a de facto intention to have the place re-occupied by other tenants, and clothed that inward intention with some formal, outward and visible sign. The learned Judge was satisfied on the facts of the case that there had been no non-occupancy such as to create a breach of condition 8(b) of the policy. He had to determine, however, whether during the absence of the workmen the building was sufficiently protected so as not to increase the risk of loss or damage by fire. He found as a fact that between the departure of the nurses on the 30th September, 1963 and the commencement of the alterations in mid-November, 1963 the hotel was sufficiently protected by the police department and by hired special constables. Further, the learned trial judge found that during the period of reconstruction and up to the time of the fire a watchman was employed to watch the hotel and that "the adequacy of the protection to the insured building had been established."
- 20 p. 123,
 ll. 1-6
 pp.120-122
- 20 30. The learned Judge accordingly held that although conditions 8(a) and 8(b) formed part of the contract of insurance there had been no proof that conditions 8(a) and 8(b) had been broken. He therefore entered judgment for the Appellant on the claim for £40,075. 0. 0. with interest at 6% from the 30th December, 1964, with costs to be taxed or agreed, and on the Counterclaim with costs.
- 30 p. 124,
 l.41 -
 p. 125,
 1.2
- 40 11. The learned Judge accordingly held that although conditions 8(a) and 8(b) formed part of the contract of insurance there had been no proof that conditions 8(a) and 8(b) had been broken. He therefore entered judgment for the Appellant on the claim for £40,075. 0. 0. with interest at 6% from the 30th December, 1964, with costs to be taxed or agreed, and on the Counterclaim with costs.
- 40 p. 131
- 40 12. The Respondents appealed to the Court of Appeal of Jamaica, and the Appellant served a Respondent's Notice. The appeal was heard by Eccleston, Luckhoo and Moody, JJ. on eleven days in January and February, 1969, and judgment was
- pp. 132-6
- p. 137

Record given on the 30th July, 1969, allowing the Respondents' appeal by a majority.

pp.157-175 13. Eccleston, J. found in relation to condition p. 175 8(a) that Chambers, J.'s finding that there had been no breach thereof was 'open to much doubt', and on the weight of the evidence the probabilities appeared to come down in favour of the Respondents.

pp.164-172 14. In relation to condition 8(b), the learned Judge considered the contentions of the parties pp.172-173 and a number of authorities. He quoted Stroud's Legal Dictionary as saying that ' "occupied" means dwelt in and "unoccupied" when no one lives in.' He held that when the nurses left, at the end of September, 1968, the hotel became unoccupied. He considered that although the type of user was not stated in the policy, it could be gleaned from the very nature of the building itself and from the rate of premium charged. A proper conclusion was, he thought, that the use to which the building was to be put was residential. He considered that there was no intention in the nurses to return after they left, and the Appellant's control was not such as was contemplated in the terms of the policy. He concluded that the Appellant was in breach of conditions 8(a) and 8(b), and accordingly was in favour of allowing the Respondents' appeal.

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pp.175-187 15. Luckhoo, J. said, in relation to condition p. 182, 8(b), that it was beyond doubt that the nature and ill. 32-36 character of the building was residential, and the occupation contemplated by condition 8(b) was occupation for residential purposes. He further p. 184 held that the words "become unoccupied" must relate to the absence of physical presence in the building as distinct from a presence outside the building. He considered that this was not a case where the Appellant had been merely temporarily absent from the building. He found that the occupier (the Government) had gone permanently out of occupation and that no intention of the Appellant to let the building or a part or parts thereof to other persons as tenants at some time in the future would suffice to render the departure of the nurses a temporary absence of the occupier. He also thought that nothing short of someone sleeping in the building after the departure of the nurses would have operated to

save the period of non-occupation from continuing to run.

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16. In relation to condition 8(a) the learned Judge considered that Chambers, J. did not approach the testimony of the Respondents' expert witnesses in the proper way. He would have proposed that this issue be retried if he had reached a different conclusion on condition 8(b). He was in favour of allowing the Respondents' appeal.

p. 187

10 17. In his dissenting judgment, Moody, J. set out the facts relevant to this appeal. In dealing with condition 8(a), he could not agree that the conclusion of Chambers, J. that there was no breach thereof was unreasonable and could not be supported by the evidence. On reviewing the evidence and the submissions, he was unable to say that that learned Judge had been wrong in his conclusion that there had been no increase of risk of loss or damage by fire occasioned by the alterations. The Respondents had failed to establish that a breach of condition 8(a) had occurred.

pp.138-157
pp.146-148

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18. In relation to condition 8(b), the learned Judge held that the contract of insurance, having been reduced into writing, could not be explained, contradicted, added to, subtracted from, or otherwise varied by extrinsic evidence. It would have been competent for the Appellant and the Respondents so to agree as to have made continued occupation of the building by the nurses a condition or the basis of the contract. The evidence showed that they did not so agree. The Appellant did not do so because he was uncertain what the occupancy would be, the Respondents because they had computed the rate they would charge on the basis that the building was then being guarded by a watchman only and would continue to be so guarded for at least 6-8 weeks. Counsel for the Respondents had conceded that, if the building had been damaged by fire between the 24th July, 1958 and the 30th September, 1958, condition 8(b) would have been inoperative against the Appellant. There was no evidence to support the view that condition 8(b) would only become operative when the nurses took up residence or that it should relate to their continuing tenancy. There was no reason for disturbing the finding of Chambers, J. that the Ethelhart Hotel was

p. 153

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p. 154

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pp.154-5

Record sufficiently protected from the 30th September, 1963 to mid-November, 1963 by the police department and by hired special constables, and thereafter by the employment of a watchman.

pp.155-6 19. Moody, J. considered the meaning of the phrase "become unoccupied" in the light of certain authorities. He held that the phrase implied a change of status. As applied to a dwellinghouse, it implied that the occupier had ceased to dwell in it. Such a change did not occur when absence was merely temporary, and there was a manifest intention to return, and control of the building adequate for its protection from intruders was retained. Proof that no one had actually lived in the house for more than 30 days raised a presumption in favour of the insurer that the house had become unoccupied and had so remained for that period, and he was entitled to succeed unless there was evidence to the contrary sufficient to counterbalance such presumption. 10

pp.156-7 On the nurses leaving on the 30th September, 1963, there was no valid objection to the Appellant as owner re-occupying or re-possessing the hotel.

p. 157 This he did by installing a watchman, and by leaving furniture and contents therein insured for £5,000, and by having in his possession or under his control the keys. Up to the time of the fire the Appellant was manifesting his possession in fact in that workmen employed by him were engaged in carrying out alterations, so that he might let the flats so formed by the alterations to tenants. There was no cesser of possession or occupation by the Appellant owner nor any change of status. Moody, J. concluded that the Respondents had failed to show that there had been a breach of condition 8(b). He was in favour of dismissing the appeal. 20

20. The Appellant respectfully submits that this appeal ought to be allowed, and the judgments of Chambers, J. at the trial and of Moody, J. in the Court of Appeal were correct. Chambers, J.'s approach, in relation to condition 8(a) to the evidence of the Respondents' expert witnesses was proper, and he was justified in finding that the Respondents had failed to establish a breach of condition 8(a). The Court of Appeal ought not, in the respectful submission of the Appellant, to have upset the finding on this point made by 30 40

Chambers, J. after hearing and seeing the
witnesses.

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21. In relation to condition 8(b), it is respectfully submitted that Eccleston and Luckhoo, JJ. were wrong in finding that the occupation contemplated by condition 8(b) was occupation for residential purposes. On the proper construction of condition 8(b) in the context of this policy, with regard to the circumstances in which the cover was originally granted, Chambers, and Moody, JJ. were right in holding that no breach of that condition had been established by the Respondents.

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22. The Appellant respectfully submits that the Order of the Court of Appeal of Jamaica was wrong and ought to be reversed, and the order of the Supreme Court of Jamaica ought to be restored, and this appeal ought to be allowed with costs, for the following, (among other)

REASONS

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1. BECAUSE the Respondents failed to establish a breach of either condition 8(a) or condition 8(b) of the policy:

2. BECAUSE on its proper construction condition 8(b) of the policy did not require that anyone should be resident in the Ethelhart Hotel:

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3. BECAUSE on the proper construction of condition 8(b) the Ethelhart Hotel never became unoccupied before the fire:

4. BECAUSE the Court of Appeal ought not to have upset the finding of Chambers, J. that there had been no change of circumstances affecting the building such as to increase the risk of loss or damage by fire:

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5. BECAUSE the said finding of Chambers, J. was right:

6. BECAUSE of the other reasons given by Chambers, and Moody, JJ.

(Sgd) J. G. LE QUESNE.

(Sgd) STUART N. MCKINNON.

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OF JAMAICA

B E T W E E N :

JAMES MICHAEL MARZOUCA
Appellant

- and -

ATLANTIC AND BRITISH
COMMERCIAL INSURANCE
COMPANY LIMITED Respondents

CASE FOR THE APPELLANT

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