

IN THE PRIVY COUNCIL

NO. 6 OF 1970

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN

JAMES MICHAEL MARZOUCA (Plaintiff) Appellant

AND

ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED (Defendants) Respondents

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CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from a Judgment of the Court of Appeal of Jamaica, delivered on the 30th day of July, 1969, whereby that Court (Hoody J.A. dissentiente, Eccleston and Luckoo JJ.A.) allowed an appeal by the present Respondents from a judgment of the Supreme Court of Jamaica delivered by Chambers J. (ag.) on the 10th day of February, 1967 whereby it had been adjudged that judgment should be entered for the Plaintiff Appellant -

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- (i) on his claim for £40,075 with interest at 6% from December 30, 1964 with costs to be agreed or taxed
(ii) on the Defendants Respondents' counterclaim with costs.

The Court of Appeal reversed the said judgment and entered Judgment for the Defendants Respondents with costs on Claim and Counterclaim

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2. The claim of the Plaintiff Appellant was based on a Policy of Insurance first issued by the Respondents in the year 1958 in respect

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of the Plaintiff Appellant's buildings, known as Ethelhart Hotel at Montego Bay in the parish of Saint James, and the contents thereof.

3. The said Policy was stated to be subject to the conditions endorsed thereon and was renewed from year to year by the payment of annual premiums, the last such premium being paid in July, 1963. Inter alia, the Policy insured the buildings and the contents thereof against loss or damage by fire.

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4. The said buildings and the contents thereof were destroyed by a fire which occurred on the night of the 19th or early morning of the 20th May, 1964 and the loss suffered is admittedly in excess of the amount of £40,075 which was claimed by the Plaintiff Appellant as being due under the Policy.

5. The Respondents rejected the claim on the ground, inter alia, that the Plaintiff Appellant was in breach of Condition 8 of the Policy, the relevant portions of which read as follows :

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p.195

"8. Under any of the following circumstances the insurance ceases to attach as regards the property affect 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

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(b) If the Building insured or containing the insured property become unoccupied and so remain for a period of more than 30 days."

6. The Respondents contend that they were justified in rejecting the claim of the Plaintiff Appellant for the reasons appearing hereunder.

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7. When the contract of insurance was being negotiated in July, 1958, the buildings, with the furniture and other contents therein, were then untenanted and had only a watchman. In this state of affairs, the Plaintiff Appellant, by his agent, regarded the buildings as "unoccupied" and so represented them to the Respondents.

p.24,
LL.3-5 &
8-10
p.13, L.44
p.14, L.1
p.57,LL.22-
23
p.44,LL.1-3

10 8. The proposal made orally to the Respondents by the Plaintiff Appellant, through his agent, was that the buildings were then unoccupied but were expected to be occupied by nurses, depending on a lease to Government which it was "reasonably certain would be finalised", and the Respondents were induced to take into account as one of the factors in fixing the rates the fact that nurses were going to occupy the building and to consider "the risk of covering the building for a few weeks unoccupied until the nurses came in."

p.52,LL.31-
48
p.53, LL. 1
- 10
p.53,LL.8&9
p.52,LL.31-
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p.53, LL.2-
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20 9. The Respondents agreed to insure the buildings and contents on the basis of the above representation that the intended occupation was residential occupation by nurses and agreed to undertaking the risk of covering the building for a few weeks unoccupied until the nurses came in. A cover note (Exhibit 1) was therefore issued by the Respondents on 25th July, 1958, and on the Respondents' satisfying themselves that the nurses had in fact gone into occupation as was expected -- the nurses went into occupation on the 1st October 1958 -- they issued another Cover Note (Exhibit 2) and finally the Policy itself (Exhibit 5).

p.59,LL.4-15
LL.23-31

30 10. It is submitted that the clear intention of the parties was that the buildings and contents were to be insured "for a few weeks unoccupied until the nurses came in" and thereafter as buildings occupied as a residence by nurses, and that when the Policy itself (Exhibit 5) was issued on the 12th day of December, 1958 to cover a period of "any time between the 24th day of July, 1958 and 4 o'clock in the afternoon of the 24th day of July, 1959", the intention was that Condition

pp. 190 &
191
p.60 LL.37-
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p.14,LL.12
& 13
pp.192 & 193
pp.194-198

p.194

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8 (b) was to be deemed to have been inoperative between the 24th day of July, 1958 and the 1st day of October, 1958 only, and to have been in full force and effect from and after the 1st day of October, 1958 when the nurses went into occupation. And it is arguable that the Plaintiff Appellant may not have had the opportunity of knowing the conditions of the Policy before the contents of the Policy had been communicated to him by the delivery of the document, and may not therefore have been bound by Condition 8 prior to his receipt of the Policy, then at least Condition 8 and all the other conditions of the Policy became applicable to him on his receipt of the Policy in December, 1958, or alternatively on the renewal of the policy on 24th July 1959, and annually thereafter. 10

p.16, L.43

See Re Coleman's Depositories Ltd. and Life and Health Insurance Association. (1907) 2K.B.798; (1904-7) A.E.R. Rep.383.C.A. 20

See also Woodruff v. Imperial Fire Office (1880) 83N.Y. Rep. (Fire) 113, mentioned and referred to in Bunyan's Law of Fire Insurance 7th Edition, at p.158.

At those times the nurses were in residential occupation, and it was the very occupation that was contemplated by the parties when the Contract of Insurance was first negotiated and agreed.

11. It was also the type of user consistent with the nature and character of the buildings and the Respondents respectfully adopt the reasoning of Luckoo J.A. on this point in his judgment in the Court of Appeal of Jamaica. 30

p.182,
LL.9-36

12. It is accordingly submitted that when the Policy (Exhibit 5) was issued, and at each annual renewal, the buildings were occupied, not only within the meaning of the term as contemplated and understood by the parties, but also within the meaning of the term as the nature and character of the buildings required, and therefore the meaning, purport and effect of Condition 8 (b) was neither ambiguous nor uncertain but was crystal clear. 40

13. What was equally clear also, is that if the situation regarding the insured buildings should ever revert to the position which obtained in July, 1958 when the buildings were untenanted and "had only a watchman on it", then it would have become "unoccupied", not only within the meaning of the term as understood and contemplated by the parties, not only within the meaning of the term as represented to the Respondents by the Plaintiff Appellant and so accepted, not only within the meaning of the term as required by the very nature and character of the buildings, but also within the meaning of the term as admitted by the Plaintiff Appellant himself in paragraph 6 of his Amended Reply and Defence to Counterclaim, within the meaning of the term as an ordinary word of the English Language, and within the meaning of the term as used in the Policy and as so interpreted by relevant judicial decisions of the highest authority and weight in England, in Canada and in the United States of America.

p.13, L.44

p.14 L.1

p. 8,
LL.7-12

See, for examples -

England

Arbuckle Smith & Co. Ltd. v. Greenock Corporation (1960) 1 A.E.R. 568 H. of L.

Simmonds v. Cockell (1920) 1 K.B. 843; (1920) S.E.R. Rep.16

p.169,
LL.3-20

30 Winnicophi v. Army & Navy etc. Ins. Co. Ltd. (1919) T.L.R. 283

Clements v. National General Insurance - 1910
The Times. 11th June.

Canada

Rosset al v. Scottish Union & National Ins. Co. (1919) 58 Canada Supreme Court Reports, 169.

p.165,
LL.32-36

Metcalf & General Accident of Canada (1930)
D.L.R. 265

RECORD

Piercy v. Anglo Scottish Ins. Co. (1951) 27
M.P.R. 267, 171. L.R.217

U. S. America

Someborn v. Manufacturers Ins. Co. (1882) Court
of Errors & Appeals, 220; 44 N.J.L.
(15 Vroom 226); 43 A.R. 365 (1882)

Williams & Deyo v. The Pioneer Coop. Fire Ins.
Co. 171 N.Y.S. 353, 183 App.Div. 826 (1918),
and citing Herrman v. Adriatic Fire Ins. Co.
85 N.Y. 162

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p.166,
LL.14-49

Duckworth v. Peoples Indemnity Ins. Co. 235 Ark,
67; 357 S.W. 2d 26 (1967)

p.164,
L.48 to
p.165, L.31

Hoover v. Mercantile Town Mutual Ins. Co.
19 Ind.App. 173; 49 N.E. 285 (1902)
93 Missouri Appeal Reports, 111

p.165,L.37
to p.166,
L.13

Page v. Nationwide Mutual Fire Ins. Co. 223
N.Y.S. 2d 573 15 A.D. 2d 306 (1962)

Kineer v. Southwestern Mut. Fire Assn. 332
Pa. 100; 185 A. 194 (1936)

p.24, LL.
29-32
p.14, LL.
41-43

14. The evidence indicates that the situation
envisaged in the preceding paragraph hereof is
precisely what happened on the 1st day of
October, 1963. The Plaintiff Appellant had
given the nurses one year's notice to quit and
they did so on the 30th of September, 1963.
Thereafter, and for 50 days until the 20th of
November, 1963, the buildings were unoccupied,
as indeed they were regarded by the Plaintiff
Appellant as being, represented by the Plaintiff
Appellant as being, admitted by the Plaintiff
Appellant as being and agreed by the Respondents
as being in July 1958 and until the 1st of
October, 1958. From the 1st of October, 1963
until the 20th November, 1963, equally may it
be said, "... the Ethel Hart Hotel had only a
watchman on it". It was clear, therefore, that
the buildings had become unoccupied within the
meaning of Condition 8 (b) of the Policy and had
so remained for a period of more than 30 days.
And as the Plaintiff Appellant had not, before
the occurrence of the loss resulting from the
fire, obtained the sanction of the Respondents

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p.13, L.44
p.14, L.1
p.15, LL.
31-34
p.24, LL.
33-36

to this state of affairs, signified by endorsement on the Policy, or at all, it is submitted that the Insurance had ceased to attach and that the Respondents were entitled to the declaration to that effect, and to the judgment accorded them by the Court of Appeal of Jamaica.

10 15. Be it further observed, in this connection, that the Policy (Exhibit 5) was originally issued to cover a period of one year only, namely from the 24th of July, 1958 to the 24th of July, 1959, and that it was a case of its being renewed from year to year, with certain modifications as set out in each Endorsement of Renewal. Each such renewal constituted a new contract between the parties and on every one of the five renewals which took place in July of every year from 1959 to 1963, the buildings were occupied by the nurses, as indeed they were at the time of the issue of the Policy. 20 And on each such renewal, it was expressly stated that, save as regards any modifications specifically set out in each endorsement of renewal, "all other terms, exceptions and conditions of the Policy remain unaltered." See for examples, Exhibits 6 (b) and 6 (a).

p.173,LL.5-8
p.180, L.42
to p.181,
L.7

30 It is therefore submitted that it was knowledge common to both parties that at the time of the last contract of insurance, that is, the renewal of the 24th July, 1963, the buildings were being, and had for nearly five years previously been, used as a residence for nurses and had been and were so occupied. That was the very type of and indeed the only occupation that had ever been contemplated by the parties and the Plaintiff Appellant cannot now say that there was any uncertainty or ambiguity as to the meaning of Condition 8 (b) of the Policy or that there is any question of 40 waiver or estoppel. And the Respondents humbly adopt the reasoning of Luckoo J.A. in his judgment on this point in the Court of Appeal of Jamaica.

p.180,LL.
42 to p.
181, L.42

16. The Respondents also rely on the Grounds of Appeal as contained in the Notice of Appeal

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pp.132-136

dated the 15th day of March, 1967 and contend that for the reasons set out therein the Plaintiff Appellant was in breach of Condition 8 (a) as well as of Condition 8 (b) of the Policy

p.195

17. The Respondents will also seek leave to contend that there is another ground on which the judgment of the Court of Appeal of Jamaica can and should be affirmed, namely, that the Plaintiff Appellant was in breach of Condition 1 of the Policy (Exhibit 5) as renewed on the 24th day of July, 1963. 10

p.50 LL.45-46

18. On this last renewal, the Respondents agreed to allow the Plaintiff Appellant an increased discount of 7½% in consideration of his agreeing to keep renewing the Policy for another five years. The Endorsement of Renewal expressly provided however, that "all other terms, exceptions and conditions of the Policy remain unaltered." (See Exhibit 6 (a).)

19. Bearing in mind that the renewal of the 24th of July, 1963 was a fresh contract between the parties, the duty of disclosure had attached and the Plaintiff Appellant was in duty bound to disclose any facts which had become material during the preceding period of insurance 20

Pim v. Reid (1843) 6 Man. & G. 1 at p.25
per Creswell J.

Law Accident Insurance Co. v. Boyd (1942)
S.C. 384

p.24, LL.
29-32

20. At the time of this last renewal, that is, on the 24th of July, 1963, the nurses were under one year's notice to quit on the 30th of September, 1963. That notice had been given by the Plaintiff Appellant during the preceding period of Insurance. At the time the notice was given, the Plaintiff Appellant had formed the intention to subject the buildings to substantial and prolonged works of alterations with a view to converting them into apartments. That intention had been formed by the Plaintiff Appellant during the preceding period of insurance and it involved the premises remaining untenanted for the greater portion of the year 30 40

p.14, L.45
to p.15.
L.7.

that was being covered by the renewal of 24th July, 1963. Both these matters were facts material to be known for estimating the risk and the Plaintiff Appellant omitted to state them to the Respondents. He was therefore in breach of Condition 1 of the Policy which provides so far as is relevant, as follows :-

10 "1 - If there be any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the Company shall not be liable upon this Policy so far as it relates to property affected by any such misrepresentation or omission."

p.195

20 21. In the same way that the Plaintiff Appellant, through his agent, had considered it his duty when negotiating the original contract of Insurance in July, 1958, to explain to the Respondents that "the premises were at the moment unoccupied, but was expected to be occupied by nurses depending on the lease to Government," and which he described as being "full disclosure to A.B.C. so that they could decide whether to take the risk", so it was equally the duty of the Plaintiff Appellant to disclose to the Respondents when negotiating the renewal of the 24th July, 1963, with a further reduction in the premium payable, to explain that "the premises were at the moment occupied, but was expected to be unoccupied depending on the notice to quit which had been served on the occupiers terminating their tenancy as from the 30th of September, 1963", and also that extensive alterations were intended to be done after the Nurses quit.

p.52, LL.
39-41

p.52, LL.
42-44

30 40 22. The negotiations for the fresh contract of the 24th of July, 1963 were conducted for the Plaintiff Appellant by the same agent who conducted the negotiations on his behalf in July of 1958.

p.83, LL.
36-47

23. Be it observed that that same agent, called as a witness on behalf of the Plaintiff Appellant, said in the course of his evidence --

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p.49, L.8-
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"If my policy had a clause similar to clause 8 (a) of the A.B.C. Policy, I would expect the insured if he was going to make substantial alterations to tell me before starting the work. I would expect to have the right under that clause to decide whether I would carry the risk or not".

p.84, LL.
1-17

24. And the evidence of the Respondents' Manager was that the agreement of the 24th July, 1963 would not have been made if it was known that the nurses were going to vacate the premises or that there was going to be extensive alterations thereto.

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p.14 LL.42-43

25. It is submitted, therefore, that there is no room for any doubt that the fact that the nurses were under notice to quit at the end of September, 1963, and the fact that when that notice was given, the Plaintiff Appellant had intended to turn the building into apartments necessitating the extensive alterations disclosed in the evidence, and the fact that that intention had not varied and still prevailed at the time the fresh contract of the 24th July, 1963 was negotiated and agreed, were all facts "material to be known for estimating the risk" and the omission of the Plaintiff Appellant to state such facts to the Respondents, was a clear breach of Condition 1 of the Policy and constitutes another reason why the judgment of the Court of Appeal of Jamaica should not be disturbed.

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LEACROFT ROBINSON Q.C.

JOHN GRIFFITHS

