(11), 1971

IN THE PRIVY COUNCIL No. 6 of 1970

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

JAMES MICHAEL MARZOUCA (Plaintiff) Appellant

- and -

ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED (Defendants) Respondents

---

RECORD OF PROCEEDINGS

DRUCES & ATTLEE,
82 King William Street,
London, E.C.4.

Solicitors for the Appellant.

MASONS,
10 Fleet Street,
London, E.C.4.

Solicitors for the Respondents.

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

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

E X H I B T S

LIST OF DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date
IN THE SUPREME COURT OF JAMAICA	
Judge's Notes of Opening Speeches by Counsel and their subsequent submissions	
Order granting conditional leave to appeal to her Majesty in Council	3rd Oct. 1969

LIST OF DOCUMENTS NOT TRANSMITTED

Description of Document	Date
IN THE SUPREME COURT OF JAMAICA	
Summons with Affidavit in support to stay execution pending appeal	
Affidavit and Orders extending time for filing of Record in Court of Appeal	
Specially endorsed Writ of Summons	
Appearance	
Summons and order for Directions	
Consent to file Reply etc. out of time	
Praecipes for subpoenaes	
Application for Leave to Appeal to Privy Council	
Affidavit of J.C. Edwards in support	
Application for final leave to appeal to Privy Council	
Affidavit in Support thereof	
EXCLUDED EXHIBITS (PLAINTIFF'S EXHIBITS)	
Cheques to Gooden and Superintendent of Police St. James (Exhibit 3)	
Letter dated 5.4.65 (Exhibit 4)	
Four copies endorsement on Policy of Insurance (Exhibit 6, 6(a), 6(b), 6(c))	
Cuttings from newspaper (Exhibit 12)	

LIST OF DOCUMENTS NOT TRANSMITTED (continued)

Description of Document	Date
EXCLUDED EXHIBITS (DEFENDANT'S EXHIBITS)	
Receipt dated 16.7.62 (Exhibit 7)	
Letter dated 26.7.60 from Clinton Hart to Dyol Insurance Company (Exhibit 10)	
Letter dated 23.7.61 from Plaintiff to Clinton Hart (Exhibit 11)	
Plaintiff's Claim Form and Schedule (Exhibit 14)	
Letters 31.12.64, 5.3.64, 2.4.65 and paid cheque (Exhibit 15)	
Inventory of goods and bills dated 11.11.63 and 22.11.63 respectively (Exhibit 16)	

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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RECORD OF PROCEEDINGS

In the Supreme Court of Jamaica

No. 1

Amended Statement of Claim.

6th July 1965

No. 1

AMENDED STATEMENT OF CLAIM

Suit No. C.L.839 of 1965

In the Supreme Court of Judicature of Jamaica

In the High Court of Justice

COMMON LAW

BETWEEN	JAMES M. MARZOUCA	PLAINTIFF
A N D	ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED	DEFENDANT

1. By a Policy of Insurance dated the 12th day of December 1958 alternatively by a contract of Insurance dated 25/7/58 the Defendant Company in consideration of an annual premium of Two hundred and sixty pounds agreed to insure buildings, owned by the Plaintiff and known as the Ethelhart Hotel, Montego Bay and the contents thereof against loss or damage by fire to the extent of £35,000 in respect of the building and £5,000 in respect of the contents.

In the Supreme Court of Jamaica

No. 1

Amended Statement of Claim.

6th July 1965 (continued)

2. The said policy of insurance alternatively the said contract of Insurance was renewed from year to year and extended to cover the boundary walls and patio to the extent of £2,400 and on the 19th day of May 1964 and at all material times was in full force and effect.

3. During the night of the 19th and/or early morning of the 20th day of May 1964 the said building and contents were destroyed by fire of unknown origin and damage to the extent of £75 was done to the boundary walls and patio.

4. The value of the buildings and contents destroyed as aforesaid were considerably in excess of the amount of £35,000 and £5,000 abovementioned.

5. Notwithstanding repeated requests and demands the Defendant Company has failed, neglected and/or refused to pay the sum of £40,075 due and owing under the said policy alternatively the said contract of Insurance and claims to be entitled so to do.

Wherefore the Plaintiff claims the sum of £40,075 and such further or other relief as may be just.

Settled

(sgd) David H. Coore, Q.C.

(sgd) Clinton Hart & Co.
Plaintiff's Solicitors
6th July, 1965

The underlined amendments made by Plaintiff 1/2/67

Filed by Clinton Hart & Co. of 58 Duke Street, Kingston, Solicitors for and on behalf of the abovementioned Plaintiff.

No. 2

In the Supreme Court of Jamaica

No. 2

Amended Defence and Counterclaim.

12th July 1965

AMENDED DEFENCE AND COUNTERCLAIM

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

1. Paragraph 1 of the amended Statement of Claim is admitted but the Defendant Company says that the said Policy of Insurance was subject to the conditions endorsed thereon, which were expressly made a part thereof and the Defendant Company will at the trial refer to the said Policy of Insurance for its exact terms and effect.

2. Save and except that the Defendant Company admits that the said policy of Insurance was renewed from year to year, and that it was extended to cover the concrete boundary walls and patio to the extent of £2,400 with effect from the 24th day of July 1960, paragraph 2 of the amended Statement of Claim is denied.

3. The Defendant Company says that at the date of issue of the said policy of insurance and during the several renewals thereof, the buildings known and described in the policy as Ethelhart Hotel, were occupied as living quarters for the Nurses Staff of the Montego Bay Hospital and it was expressly provided by Condition 8 of the said policy, inter alia, as follows:-

> "8. Under any of the following conditions 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.

In the Supreme Court of Jamaica

No. 2

Amended Defence and Counterclaim.

12th July 1965

(continued)

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

4. The Defendant Company says that the Plaintiff terminated the tenancy whereby the said buildings were occupied as a Nurses Living Quarters as aforesaid, with effect from the end of September, 1963, and as from that date the said buildings became unoccupied and so remained, unknown to and without the sanction of the Defendant Company, and without the Policy being endorsed as required in the aforesaid Condition 8, until the occurrence of the fire referred to in paragraph 3 of the amended Statement of Claim.

5. Further and/or alternatively the Defendant Company says that during the period between the 30th day of September, 1963 and the time of the fire referred to in paragraph 3 of the amended Statement of Claim the Plaintiff, unknown to and without the sanction of the Defendant Company, and without the Policy being endorsed as required by the aforesaid Condition 8, had subjected the said buildings to extensive works involving substantial structural alterations and conversion, whereby the circumstances effecting the buildings were changed in such a way as to increase the risk of loss or damage by fire.

6. The Defendant Company says that the Plaintiff was in breach of Condition 8 (a) and (b) of the said Policy of Insurance and that at the time of the occurrence of the loss and damage referred to in paragraph 3 and 4 of the amended Statement of Claim, the Insurance had ceased to attach to any of the property referred to therein.

7. The Defendant Company admits that it has denied liability to the Plaintiff under the said Policy and the Defendant Company denies that the Plaintiff is entitled to recover the amount claimed in paragraph 5 of the amended Statement of Claim or any other sum from the Defendant Company.

7a. The Plaintiff is estopped from alleging that the Policy of Insurance dated the 12th day of December 1958 and the terms conditions and exceptions thereof is not the Contract insuring the Ethelhart Hotel premises, by reason of the following facts :-

(i) The Plaintiff having mortgaged the said premises to Lenbar Limited by himself his servants and agents treated and represented the said Policy as being the Contract of Insurance covering the said premises, and procured from the Defendant the endorsement on the said Policy of the Mortgage to Lenbar Limited being the Endorsement No. 332 dated 9th October 1967.

(ii) Pursuant to the said endorsement the Defendant Company paid the sum of £7,722.0.2d. to Lenbar Limited on the 31st March 1965, the said payment being made under the said Policy and the said endorsement thereof.

(iii) In making the aforesaid payment, the Defendant relied on the aforesaid representations of the Plaintiff his servants and agents that the said Policy and the endorsement thereof represented the Contract of Insurance between the Plaintiff and the Defendant.

(iv) Furthermore, the said Policy of Insurance was renewed on the 25th day of July 1963 on the representation of the Plaintiff by himself his servant or agent that the Policy of Insurance constituted the Contract of Insurance covering the said building.

8. Save and except as expressly admitted herein, the Defendant Company denies each and every allegation in the amended Statement of Claim as if the same were separately set out and traversed seriatim.

In the Supreme Court of Jamaica

No. 2

Amended Defence and Counterclaim.

12th July 1965

(continued)

COUNTERCLAIM

9. By way of Counterclaim, the Defendant Company repeats paragraphs 1 to 7 (inclusive) of the Defence herein and claims :-

A declaration that the said Policy of Insurance had ceased to attach to the property affected thereby at the time of the loss and/or damage caused by the fire which occurred during the night of the 19th and/or early morning of the 20th day of May, 1964.

SETTLED

(sgd) LEACROFT ROBINSON

FILED and DELIVERED this 12th day of July 1965 by ALBERGA & MILNER of No. 119 Tower Street, Kingston, Solicitors for and on behalf of the Defendant Company

Paragraph 7a amended on the 7th day of February, 1967.

No. 3

Amended Reply & Defence to Counterclaim.

28th October 1965.

No. 3

AMENDED REPLY & DEFENCE TO COUNTERCLAIM

1. Save as the same consists of admissions the Plaintiff joins issue with the Defendant on its defence.

DEFENCE TO COUNTERCLAIM

2. As to the Counterclaim the Plaintiff repeats paragraph 1-3 (inclusive) of the Statement of Claim and denies that the Defendant is entitled to the relief counterclaimed or any relief.

3. In particular the Plaintiff denies that the said premises were unoccupied within the meaning of clause 8 of the Insurance Policy as alleged or at all. The Plaintiff says that from and after the end of September 1963 the

said premises were occupied by the Plaintiff's servants or agents and/or independent Contractors for the purpose of effecting certain repairs and alteratinns.

4. The Plaintiff further says that such occupation as mentioned above did not amount to a change of occupation within the meaning of clause 8 of the Policy and in any event did not increase the risk of loss or damage by fire within the meaning of the said clause.

5. The Plaintiff further says that :-

(a) the said policy of Insurance dated the 12th day of December 1958 is expressed on the face of it to be in effect as from the 24th day of July, 1958, and that the contract of insurance between the Plaintiff and Defendant commenced on the said 24th day of July 1958.

(b) On the 25th day of July 1958 the Defendant Company issued to the Plaintiff a cover note effective from the 24th day of July 1958 and the Plaintiff will at the trial refer to the said cover note for its full terms and effect.

(c) On and prior and for some time subsequent to the 24th day of July 1958 the insured premises were to the knowledge of the defendant Company not in use.

(d) On the 4th day of December 1958 the Defendant Company confirmed in writing that the said premises were insured on the terms and conditions set out therein and the Plaintiff will at the trial refer to the said document for its full terms and effect.

(e) By reason of the matters set forth in (a) - (b) above clause 8 of the Policy document does not constitute a condition of the Policy of insurance made between the Plaintiff and Defendant, or alternatively the said clause 8 is ambiguous and uncertain and unenforceable or must be read and construed in the light

In the Supreme Court of Jamaica

No. 3

Amended Reply & Defence to Counterclaim.

28th October 1965.

(continued)

of the circumstances above set out.

(f) By reason of the matters set forth in (a) - (d) above the Defendant is estopped from replying on any of the matter pleaded in paragraphs 4 - 6 of Defence.

6. The Plaintiff further says that on 25/7/58 when Defendant issued a cover note of that date relating to the premises the Defendant knew that the said premises were then unoccupied and would so remain for 6 - 8 weeks. In premises, Plaintiff will contend that Defendant cannot rely on the said condition 8 (b) referred to in paragraph 3 of the Defence & Counterclaim and/or has waived its rights thereunder.

Settled

(sgd) DAVID H. COORE, Q.C.

Dated the 28th day of October, 1965.

CLT. HART & CO.

PLAINTIFF'S SOLICITORS

Amendment to paragraph (5) made on 26th September '66 ((a) to (e))

Amendment to (f) on ??

Amendment to paragraph (6) made on 2/2/67

Filed by Clinton Hart & Co. of 58 Duke Street, Kingston, Solicitors for and on behalf of the abovenamed Plaintiff whose address for service is that of their said Solicitors.

No. 4

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

26th September 1966.

JUDGES NOTES OF EVIDENCE
26th September 1966

CLAIM BY PLAINTIFF FOR PAYMENT OF £40,075 DUE UNDER AN INSURANCE POLICY.

Counter-Claim: A Declaration that the said Policy of Insurance had ceased to attach to the property at the time of the loss or damage to the property on the night of the 19th and/or early morning of the 20th May, 1964 (by reason of a particular condition in the policy).

Mr. David Coore, Q.C., and Mr. R.Williams of Counsel for plaintiff instructed by Messrs. Clinton Hart & Co., Solicitors for plaintiff. Mr. Leacroft Robinson, Q.C., and Mr.Mahfood, Q.C., of Counsel instructed by Messrs. Alberga & Milner, Solicitors for the defendant Company.

Mr. David Coore:

Plaintiff has application to make to amend Defence and reply to Counter-claim by adding a paragraph as paragraph 5 as drafted and submitted.

The onus of proving that the clause was a condition and that there was a breach lies on the defendant. It is desirable that plaintiff should in his reply and defence to Counter-claim indicate what points he is relying on so that the defendant may not be misled.

This amendment applied for should have been contained in the original reply and defence to Counter-claim, for which I apologise. Pleadings can be amended at any time.

Defendants have had very short notice of it, but the facts here alleged are all within the knowledge of defendants as it consists of reference to documents except 5(c) which is a question of fact.

Pleadings involve an allegation of law but

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

26th September 1966.

(continued)

defendant has to prove that paragraph 8 is a condition. I can see no inconvenience to defendant if amendment is granted. On those grounds I apply for the amendment.

Mr. Robinson replies:

As my learned friend pointed out, this application is only now being made and my learned friend Mr. Mahfood happened to have been in his office on Saturday afternoon of 24th September, 1966 when offices normally would have been closed and for the fortuitous circumstances that Mr. Mahfood's chambers is in the same building as that of Mr. Coore who acquainted him of the proposed application. I myself learned of it late on Saturday evening at my home in Red Hills - 9 miles from my chambers and the library.

My instructing solicitor heard of it at the same time. This is a fundamental variation of the case of the plaintiff as originally pleaded. The original statement of claim relied exclusively on the policy of Insurance dated December 1958 which said policy they pleaded in paragraph 2 was renewed from year to year, and which said policy was on 19th May, 1964 as renewed in full force and effect.

They were relying on the policy as being in full force and effect. Our defence and Counter-claim also deals with that policy and relies on clause 8 of that policy as being the clause of the contract under which the defendants were entitled to repudiate the claim and proceeded to set out what the defendant considered to be the breaches of that clause and on which they based their denial of liability and because of the breaches of clause 8 we counterclaimed for a declaration that the Policy of Insurance had ceased to attach to the policy on the 19th/20th May, 1964. The plaintiff then put in a defence and reply to that counterclaim.

In that reply and defence to counterclaim, they expressly repeated that they are relying on the policy which they claim was in full force and effect at the time of the fire.

They then proceeded, not to dispute that they were bound by clause 8 but to deny that there was any breach of clause 8. Pleadings closed from October 1965, nearly one year ago. The issue is, "Was there a breach of clause 8 of the policy?" If yes, defendants are entitled to succeed, if no, the plaintiff is entitled to succeed - one issue.

On the day of trial you are told that the only issue between us is not the only issue.

Their pleadings showed that clause 8 was a part of their case - and that they were not in breach of it. All our preparations were based on the fact that we were ad idem that clause 8 was part of the contract. They now are suing on something else. Their pleadings as amended is inconsistent with their claim. They haven't stated what is the contract as referred to in these amendments. I ask that they clarify precisely what their case is, or Court refuse the amendment. We would like to know what is the contract on which they say they are suing. There is only one Policy of Insurance - the one dated 12th December, 1958, and which contains Clause 8.

The application as worded in the proposed amendment should be rejected.

Mr. Coore replies:

My learned friend says there is a contradiction. The point was not taken in the pleadings that is why I am applying to amend. There is no contradiction. I am suing on a policy dated 12th December 1958, but the question is, what are the terms of that policy. All I am saying in the amended reply is :-

Whereas in the face of it the condition No. 8 would appear to be one of the terms of the policy, but in the light of the facts I allege in the amendment Clause 8 is not a condition of the policy. It should be read as though Condition 8 was struck out. I am now challenging Clause 8, that is why I am applying for the amendment. A party cannot be shut out from raising a point of law that might

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

26th September 1966.

(continued)

decide the issue one way or the other. The fact that I am late does not alter the fact that your Lordship should have all the facts before you. The question as to what are the conditions of the policy. All I am saying is that the prima facie appearance on the Insurance Policy is wrong. I ask that the amendment be allowed. If they have to file some answer we will have to pay the costs but this does not seem to arise.

Amendment granted and case will proceed. If during the hearing it becomes necessary to ask for an adjournment because of this amendment costs to defendant will be allowed for the adjournment, if adjournment is granted.

27th September 1966

Resumed hearing.

Resumed Hearing

JAMES MICHAEL MARZOUCA Sworn

Examined by Mr. Coore

I live at Red Hills, Montego Bay. I am a merchant. I am owner of premises known as Ethelhart Hotel. I acquire those premises April 1945. After acquiring them, I lived there for about two or three years. After that I operated it as an hotel. I employed managers to operate it. This continued until late February 1957. After that, the premises continued to be used as a hotel by Mr. Peter Cowper who bought the premises on instalments. He did not complete the purchases as he died in June 1958. As a result of this, after his death the premises was taken over by me and I resumed possession of the premises around late July, 1958. Up to July 1958, these premises were insured against fire, earthquake, hurricane, etc., with Dyoll Limited. I dealt with Mr. Tony Thwaites at Dyoll Insurance Limited. At that time I owned other buildings all of which were insured through Mr. Tony Thwaites with Dyoll Limited.

In July 1958, Ethelhart Hotel was insured for about £35,000. During Mr. Cowper's incumbency he had effected repairs and

improvements. After I resumed occupancy in July 1958, I decided to increase the insurance on the building. I had a conversation with Mr. Thwaites about this. Mr. Thwaites said if I would mind if he would pass over some of the business to a friend of his he wanted to help.

Mr. Robinson objects to this conversation as he intends to contend that Mr. Thwaites was the agent of the plaintiff. If Mr. Coore admits that Mr. Thwaites was plaintiff's agent I withdraw the objection.

Mr. Coore states :- no one is contending that Mr. Thwaites was not plaintiff's agent.

Court allows question.

I said to Mr. Thwaites if it is a reputable firm and the terms, conditions and rates are the same it makes no difference to me.

Mr. Thwaites assured me it was an A1 firm as good as his. Shortly after 25th July 1958, I received this document from the defendant Company. This letter came enclosed with a letter from Mr. Thwaites. At the time Mr. Thwaites spoke to me I cannot recall that he told me the name of the Company. When I received this letter and document, I then knew the name of the Company.

Exhibit 1: Letter dated 25th July, 1958 and enclosure in evidence Exhibit 1. At around the 25th July, 1958, I saw a representative of the Defendant Company in Montego Bay. Mr. Thwaites and the representative of defendant Company came to my business place at Montego Bay. Mr. Thwaites introduced him. We met in one of my shops in the City Centre building. The City Centre building is on the Ethelhart lands and about 20 to 30 feet at the nearest points. The hotel is higher than the shops. The land was excavated for the shops. I can't recall the name of the representative. Tony Thwaites said in the presence of the representative "we have just inspected the Ethelhart hotel and everything is O.K."

Exhibit 1

At that time the Ethelhart hotel had only a

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

27th September 1966.

(continued)

watchman on it while we were trying to rent it to the Government for the nurses. We were negotiating with Government in July but no agreement reached them. After receiving Exhibit 1, I paid the year's premium of £266 to Dyoll Limited. This £266 was included in a cheque sent to Dyoll. Atlantic and British was insuring the building for £35,000 plus £5,000 for the contents. The building was also insured with Lloyds through Dyoll for about £10,000 total £50,000. I concluded the lease with Government and the nurses took possession on October 1, 1958. I cannot recall the date the lease was actually signed I was getting £300 rental per month from Government. About 20 or so nurses occupied the premises. The nurses slept and ate there. In July 1958, I had a mortgage on these premises. The solicitors for the Mortgages were Clinton Hart & Company. The Mortgage was with a company known as Lenbar.

I cannot recall the date of the Mortgage. Between July 1958 and December 1958, there was a Mortgage on the premises. Sometime after 4th December, 1958, I received this document. Another Cover Note from Atlantic & British Commercial Insurance Co. Limited which refer to the Mortgagees as the Bank of Nova Scotia.

Exhibit 2 — Document in evidence Exhibit 2.

I had notified Mr. Thwaites of the mortgage and I assume he passed the information to the Insurance Company. The mortgage was transferred from B.N.S. to Lenbar Limited around 9th October 1962. Lenbar became the Mortgagees from 9th October, 1962. Between July 1958 and October 1962, the B.N.S. was the Mortgagee.

I cannot recall who are the solicitors for B.N.S. Montego Bay. Up to the end of December 1958, the Bank of Nova Scotia was the Mortgagee, and from October 1962 the building was mortgaged to Lenbar.

The nurses continued to live in these premises until the end of September 1963. I gave them notice to quit through my solicitors. My solicitor was Mr. Peter Kerr-Jarrett.

When I gave the nurses notice to quit at

end of September 1963, I had intended to turn the building into apartments for rental to people to live in. Turning it into flats required interior decoration. Re-arranging the interior by putting rubber tiles over the floor and removing and putting partitions and changing some bath rooms into kitchenettes. No alteration was being done to the exterior, neither was any new building being added to it. It required new furnishings being brought in. The premises was rented furnished to Government. After the nurses left all the furniture remained there. At the time when the nurses left, I was engaged in other building operations at 6 Market Street, and I was concluding the City Centre Buildings.

R.W. Ainsworth was my builder on those projects. In connection with converting the building into flats, I spoke to Mr.Ainsworth very early in October 1963. I came to an arrangement with him and Mr. Ainsworth commenced working on the premises.

Up to the time when the fire took place in May 1964, Mr. Ainsworth had not yet completed the work. Mr. Ainsworth started working on the building about mid-November, 1963 and he continued working there right upon until the fire took place. Between 30th September, 1963 when the nurses left and Mr. Ainsworth started working on the premises. The night before the nurses left, I phoned the police to get a constable watchman there and I got one who started watching from 1st October, 1963 until Mr. Ainsworth took over. I paid him by cheque. His name was Constantine Gooden. These are the cheques. The first cheque was for £9. 9. 0. for period 1st October 1963 to 9th October, 1963. He was paid at £1. 1. 0. per day. The second cheque was to the same person and was for £7. 7. 0. for period 10th October 1963 to 17th October, 1963. The third one was for £7. 7. 0. and dated 26th October, 1963 and for period 18th to 25th October, 1963. Then the police advised that the cheque should be made out to the Superintendent of Police. The remaining cheques for the watchman were made out to the Superintendent of Police and went up to the 8th November, 1963. Six cheques

Exhibit 3

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

27th September 1966.

(continued)

in evidence Exhibit 3. When Mr. Ainsworth started work I had one Mr. Edward Fray a builder and contractor to supervise the work on my behalf. Mr. Ainsworth is dead, but Mr. Fray is alive up to now. After Mr. Ainsworth had commenced work in November 1963, I went to Miami on 28th November, 1963 to purchase fittings for the building and I got seriously ill over there with an heart attack. I remained in hospital in Miami until 3rd January, 1964, and brought to the Airport in an ambulance.

I came to Jamaica on 3rd January 1964 and remained in bed for about 8 to 9 months. After that I never left my house.

On 20th May, 1964, a fire occurred at the Ethelhart Hotel which destroyed the entire building and furniture. The building was valued before destruction for at least £70,000 and the furnishing about £15,000. During the period after my return from Miami up to the fire, I was not able to go to the building.

Mr. Ted Byles is my personal friend and he would always come up to my home almost every evening and report on the progress of the building. He did at least four times a week. I also saw Mr. Fray from time to time. After the fire I got someone to notify the Insurance Company. On the morning of the fire my daughter phoned Thwaites and in due course, I made a claim for the policy monies due to me.

Lloyd's has paid, but the defendant Company refuse to pay and so I brought these proceedings.

Exhibit 4

On 5th April, 1965, I got a letter from defendant Company in which they declined liability. This is the letter Exhibit 4. I see this document shown to me dated 12th December 1958. When the fire occurred in May 1964, this document was with Clinton Hart & Company. I had sent it off to them as they were the solicitors for the Lenbar, the Mortgagees. I sent it when Lenbar became the Mortgagees. I got the document in December 1958 and I am not sure where it was prior to my sending it to Clinton Hart & Company. At the

time of the fire, the document was with Clinton Hart & Company. At the time of the fire the document was with Clinton Hart & Company and was with them for some time.

Document (Policy) in evidence exhibit 5. I cannot recall sending any of these 4 documents. Marked 6 for identity.

Sometime in 1960 I had occasion to increase the cover of the policy with defendant Company for £2,400 because of the addition of a tiled patio and retaining wall. I communicated with Mr. Tony Thwaites who handled the matter for me. I paid my premiums year by year. I cannot say at what time. At the time the fire occurred I had already paid my premiums for that year.

Having seen this receipt, I remember it was my practice to send in my premiums in July. In 1963 I sent my premium in July which would cover me until July, 1964.

Cross-examined by MR. LEACROFT ROBINSON:

This is the policy of Insurance, Exhibit 5 I had with the defendant Company. The Policy number is F7006. This is the policy I renewed from year to year until the fire occurred. This receipt from which I refreshed my memory is a receipt for premiums paid in July 1962. Receipt dated 16th July, 1962. Receipt in Evidence Exhibit 7.

Exhibit 5

Exhibit 7 is for renewal for policy No. F7006. Dyoll was giving me 10% for giving them my business. I send my cheque to Dyoll less 7½% and 10% The 7½% is for a 5-year contract and 10% is for giving them my business.

Exhibit 7

This letter shown to me is dated 25th July, 1963. According to this letter I am to get 7½% as from 24th July, 1963 if I give them the business for 5 years. I had agreed to keep the policy for another five years so as to get the 7½% discount. Letter in evidence Exhibit 6(a). I must have got the information from Mr. Thwaites about £2,400 increase as I have been paying the premium. When I got the endorsement about the increase

Exhibit 6(a)

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

27th September 1966.

(continued)

Insurance, I must have put it in the iron safe. I never looked in the iron safe for it. I required the patio and stone wall to be insured for £2,400. This copy letter or endorsement dated 4th August, 1960 appears to represent what we had agreed about the £2,400.

I had been paying the premium on £2,400 as from that date. Endorsement in evidence Exhibit 6(b). Quite possible I could have paid off the B.N.S. the monies I owed them on Ethelhart. I don't recall seeing this endorsement of the policy dated 22nd March, 1960, but I might have seen it. When I borrowed the money from Lenbar, I had freed the hotel from the B.N.S.

Exhibit 6(b)

Clinton Hart & Company was solicitor for me and for Lenbar. Clinton Hart represents Lenbar. This document dated 9th October, 1962 along with the one dated 22nd March, 1960 shows the Bank was removed and Lenbar put in the policy. I agree that on 22nd March, 1960, the Bank was retired from the policy. Endorsement of 22nd March, 1960 in Evidence Exhibit 6(c).

Exhibit 6(c)

I probably advised Mr. Thwaites when the Bank had been paid off. The document dated 9th October 1962 correctly represents that I got a Mortgage from Lenbar. Document in Evidence Exhibit 6(d). This was the policy I sent to Clinton Hart, Exhibit 5 after I got the loan from Lenbar Limited. Before sending Exhibit 5 to Lenbar it should have been in my iron safe or with my bankers. I never read Exhibit 5. I read the front of it for the first time today. I have been insuring premises from about 1920.

Adjourned 1.45 p.m.

2.00 p.m.

I insure my places. I never read the fine prints of any of my policies. I left that to the integrity of my insurers. I left that to Mr. Ansel Hart, Fletcher & Company, Clinton

Hart & Company, Mr. Thwaites. I have been dealing with Mr. Thwaites from around 1954. From then I had Mr. Thwaites doing the majority of my insurances on my buildings. Mr. Fletcher did some.

Since 1954 I insured over 7 separate buildings and my home Red Hills, Montego Bay. City Centre has 31 shops downstairs and 18 shops and offices on the upper floor. The entire shops are covered with a policy. One with Lloyds through Dyoll and one with Lloyds through Russell Harrison. The policies for £60,000 and £100,000 respectively.

I have insured with Fletcher & Company for a long time. Fletcher & Company are agents for two or three companies. The insurance is with one or other of his companies.

Manton & Hart represents Commercial Union, not Lloyds. Mr. Clinton Hart represents Phoenix.

I do not know the difference between the Tariff Companies and Lloyds. I don't know if Lloyds give cheaper rates than the Tariff Companies.

City Centre is insured for £160,000. The bank values it for Half Million. Cornwall Home is valued for £55,000 and carries £20,000 insurance. 6 Market Street is valued for £22,000 or £24,000 and is insured for £9,000.

Delgado's of Falmouth is insured for £10,000 and is valued for £20,000. Orange Street was bought for £5,000 and insured for £2,000. Golden Square is insured for £10,000 and the Banks value it for £28,000. Red Hills is insured for £11,000 and value about £25,000.

We don't use much academic learning in Commerce.

I leave Mr. Thwaites to negotiate terms and conditions of the policies also with other representatives. After explaining to Mr. Thwaites that of the terms and conditions and rates are no higher. I mean no higher than in Lloyds. I have had two or three fires in adjoining premises which did damage to mine.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

27th September 1966.

(continued)

I was paid for damage which I suffered from water.

Ethelhart was my first fire. I have never had fires starting on my own shops.

Cornwall House is covered. Bryden & Evelyn rented the back and the back got damaged by fire to a few hundred pounds. When Mr. Thwaites sends me letters I would just read them and file them away. Mr. Thwaites told me he had a friend he would like to help. I don't recollect getting a letter from Thwaites telling me he had passed some of the insurance to Atlantic & British. I remember Mr. Coore passing such a letter to me.

Looking on Exhibit 1 and looking on the letter from Mr. Thwaites I read the letter and the documents attached. The letter is dated 25th July, 1958 and refers to Cover Note 4563 and Cover Note from the Atlantic & British Commercial Company Limited in respect of Insurance on the Ethelhart Hotel.

Policies will be sent to you in due course.

I understand that two policies were going to be sent to me. I would be expecting to get them. I read the letter when I got it. I mentioned that he didn't wish to carry so much insurance in Montego Bay. He did tell me he wanted to help a friend.

I would have read Exhibit 1. I took it that the conditions were mentioned in the letter. I told Mr. Thwaites I wanted coverage for those periods mentioned in Exhibit 1.

Rate as mentioned was agreed.

Premium was worked out.

I do know that all these policies have conditions and exceptions on them. I never read them. I knew Lloyds have lots of conditions but I don't know the conditions. What was set out in Exhibit 1, to me was as good as a policy. It is just like an agreement for sale when the formal thing come down it should have all you agree.

The conditions and exceptions are on page 2. I regarded the "Endorsement on page 2 as a condition or a term." I regarded "Description of property Insured" as a description. I regarded "Perils covered" as a condition.

I did not expect the policy to contain any more conditions and terms than Lloyds. I expected when I got the policy it would be just like Exhibit 1 but in a long winded way.

Letter from Dyoll Limited dated 25th July, 1958 and signed by Mr. Tony Thwaites in evidence Exhibit 8.

Exhibit 8

Cover Note 4563 accompanying Exhibit 8 in evidence Exhibit 9. I notice Exhibit 9 has three endorsements whereas Exhibit 1 has only two, in other respects they look alike. When I received Exhibits 9 and 1 I did not at that time notice any difference. I did not bother to make any comparisons at that time. Mr. Thwaites never told me that if I had a fire I must make a claim within 15 days and notify them immediately the fire occurs.

Exhibit 9.

I didn't know that the Insurance Company must be notified immediately but I always do. I didn't know if there was a dispute the matter should be referred to arbitration. I never have any trouble that way. On 4th December 1958, the two was sent to me. I saw it and read it at the time I received it just like any other letter.

I see Exhibit 2 has "Subject to Standard. Mortgage Clause in favour of B.N.S. Mortgage Clause." I had never seen the Standard Mortgage Clause. It should be in the policy. That is where I would expect to find it. I never looked on the policy to see if the Standard Mortgage Clause was there. I might have looked for the covering Letter which forwarded the Insurance Policy. If I found it, it would be with my lawyers. I wouldn't expect Mr. Thwaites to read the policy before sending it to me, but I expect he would know the clauses. If I am covered or not and I relied on his judgment in that connection.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

27th September 1966.

(continued)

I would not expect Mr. Thwaites to know all the conditions in policies because lots of us should read them and we don't. I relied on Mr. Thwaites because I would expect him to be familiar with all the terms and conditions in insurance policies issued in this country. I am wondering who sent the policy to me but it must have been Mr. Thwaites.

In this case I never read the policy because I relied on Thwaites. What I mean is when I have policies with other companies I do not read them either as I rely on the integrity of the respective insurance companies. I was relying on Mr. Thwaites to get Ethelhart insured for me. I relied on him to arrange the policy for me. I relied on Mr. Thwaites to get satisfactory terms and conditions for me. He advised that he had effected these insurances for me.

Adjourned to 10.00 a.m. 28.9.66.

28th September 1966.

28th September 1966 - Resumed - 10.00 a.m.

Cross-examined by MR. ROBINSON continues:

I haven't found the letter referred to yesterday. I found afterwards that the policy was sent direct to B.N.S. and not to me. I found this out from my solicitors that Mr. Tony Thwaites sent the policy direct to the Bank. I regard Mr. Tony Thwaites as a friend of mine. I call him Tony and he calls me Jim, sometimes Mass Jim and sometimes Mr. Marzouca..

Exhibit 6(c) indicates that the interest of the B.N.S. as mortgagees ceased from 5th November, 1959. After the B.N.S. ceased as Mortgagees they either kept the policy or sent it to me. They must have sent it back to me. This copy letter from Clinton Hart & Company to Dyoll Limited dated 26th July 1960 must have come to me. The contents of this letter are to my knowledge correct. Copy letter in evidence

Exhibit 10

Exhibit 10. The letter shows that I had the instant policy, and the Lloyds Policy and I sent the policies to Clinton Hart & Company. I can remember sending the two policies to Clinton Hart & Company on 23rd July 1960. Letter in evidence

Exhibit 11

Exhibit 11.

Q. Were you using these policies as part security for a loan?

A. Yes.

Mr. Coore objects (1) question is based on a false premise as a fire policy cannot be used as a security for a loan. The policy cannot be the security for the loan.

Question as framed disallowed.

I was using the two policies to show that the premises on which the loan was to be made were insured premises, by these two policies.

Mr. Cowper had made a deposit of $5,000 on Ethelhart and arranged to buy it on instalments, Mr. Peter Kerr Jarrett was my lawyer and Nation & Nation solicitors for Cowper on this transaction. Cowper also made a payment of £15,000 three months after the deposit. He then had about one year to pay £10,000. This contract was made in July, 1957.

The purchase price was either £45,000 or £50,000. The final payment was to be stretched over some years, what it was I don't know. The time for payment of the £10,000 was from July 1958 and he died June 14, 1958. Cowper committed suicide.

My solicitor Mr. Peter Kerr Jarrett must have the contract. I don't know if any forfeiture clause was in the contract. I left the legal part to my lawyer. I did the business part. After Cowper's death, his Solicitors wrote to my solicitor that they won't bother with the contract. I therefore got back the place and kept approximately the under £17,000 I had already received, plus the improvements of about $50,000 to $60,000. After Cowper's death his solicitors asked me to take back the place and I took it back and after that agreed to lease it for nurses residence. My lawyers have a copy of the lease. The nurses took over on 1st October, 1958, but the lease was not signed until the 7th December, 1959. The lease took effect from 1st October 1958. The Government came and

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

28th September 1966.

(continued)

inspected the place between July and October 1958 and I did the business and the lawyers prepared the legal side. The nurses didn't need all the furniture so we took out some. I prepared an inventory of furniture which they got to use. A stock was taken and a list made.

At the time I took back the premises from Mr. Cowper's estate the building and contents were insured. The insurance was then for probably £40,000. I don't remember. Now that you say it, it was insured for £35,000 and after Cowper's death I increased it. Immediately I took it back from Cowper I started to negotiate with the nurses. The business side of the negotiation with the nurses took about two weeks. They approached me through a friend one Mr. Arthur Davis.

The major discussion as far as I was concerned was the amount of rent. I got £200 per month the first year, £250 the second year and £300 thereafter. I asked that and got that. They never asked me to cut down the rate. They wanted a place and this was the ideal spot and I offered no difficulty. I terminated the lease because I found I could get better rental and they refused to pay excess water rates. If they hadn't made a fuss about the water rates they probably would still be there. I had to give them one year's notice. My lawyers said the best thing was to give them one year's notice. He did.

They left on 30th September 1963. After the nurses left, I phoned the police to send a man to watch at nights all the time until I told them no. I paid £1.1. a night. I arranged with Mr. Ainsworth to re-decorate. Each and every room had a bath room. After the decoration separate contained flats could be rented.

There was a main building and an annex. The annex was there when I bought it. The work Mr. Ainsworth was to do commenced with the annex he hadn't finish when the building burnt down. The arrangement was that he was to start on the annex on the upper floor and after that

we make another arrangement about the lower floor of the annex, and then the same thing with the main building. Up to the time of the fire there was a definite arrangement for the annex. One could go into each and every room without being into the main building. The annex couldn't be shut off from the main building. Mr. Ainsworth's men had access to the other part of the building. Mr. Ainsworth had all the keys for the entire building. I never kept any of the keys, The annex and the main building are all joined together.

When the fire occurred there might have been police investigations. I was very sick. I cannot remember if I told the police that Mr. Ainsworth had the keys for the annex and I kept the keys for the main building locked in my safe. I cannot even remember if I saw the police. If I see my statement I can say. I cannot recall giving a statement. I remember my daughter phoning the Insurance about the fire and they came down. I just can't remember if the police came to me. As far as I remember now, I gave the keys to Ainsworth. I am inclined to think I gave Ainsworth all the keys. As you say a statement is there, I am not sure.

I must have read the article in the Star which said that it was understood a watchman on the project is said to have been removed to another building, owned by Mr. Marzouca that is now under construction. This portion of the report was not true. I would have been annoyed. I remember the day after the fire three people came to see me in my room - Mr. Thwaites, Mr. Bates and Mr. DePass. On that occasion I could not have said that there was no watchman at the hotel. I am saying that from the time the nurses left, I had a watchman there and I was informed that when Mr. Ainsworth took over that he had a watchman there. I was sick.

It was part of the contract or agreement that Mr. Ainsworth was to have a watchman there. I had no written agreement with Mr. Ainsworth as it was a small project of £5,000 to £10,000.

Looking on Gleaner of 24th May, 1964, I see it stated the same thing the Star stated about

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

28th September 1966.

(continued)

the watchman. I was annoyed because it was not the truth. I never told Mr. Bates that the article was not true because there was no watchman at the hotel. My other project under construction in Montego Bay had a watchman. Ainsworth employed the watchman on my other projects and he paid them. Watchmen are here to give evidence for me. I have the Constable watchman who watched until Ainsworth took over. He is Constantine Gooden. The other watchman was summoned by you - he is Ainsworth watchman and I call him Watchie. I summon him too. I think his name is Peter McDonald. Ainsworth had a man at Ethelhart as watchman who was called Lyon. Ashley Reid may be the one called Lyon. Peter McDonald always watches for Ainsworth. He started at City Centre Building according to what I heard - I was sick. I understood that Lyon was laid off from Ethelhart and McDonald sent up to the hotel. I understood this from Ainsworth. They said McDonald was sent to Ethelhart to take up watchman duties the day before Holy Thursday which day I believe is before April the 1st. I understand Lyon was laid off then. Up to the time of the fire the City Centre building was on the finishing. On the night of the fire Peter McDonald was watchman at the Ethelhart according to what I heard. I was sick in bed. I heard from Mr. Ainsworth. I must have got that information from Mr. Byles and others also. I can't remember. I recalled a conference at my office on 30th December, 1964 with Mr. Myrvin Phillip and Peter Bate where the fire was discussed. On that date Mr. Peter Bate repudiated liability on behalf of defendant Company. They were trying to convince me that I was not covered but they didn't succeed. They put up all kind of arguments.

They argued that the place was unoccupied for more than 30 days before the fire. That was one of the things they argued. I never said then that if the building was occupied by the nurses the fire would not have got such a hold and would not have done so much damage.

I remember saying - "Are you trying to put me into a trap by saying that if the place was occupied that there would not have been a fire".

They just kept quiet and their faces changed colour and tried to give other examples. I meant by that that they wanted me to say that why there was a fire was because the nurses were not there. I never said the place was not occupied. I said the nurses were not living there. They were contending that the building was unoccupied. I must have told them about a watchman being there. I did not dispute that the nurses were not living there. They never told me that I didn't tell them the nurses had left. I never told them the nurses had left, but they never brought that up. I never said to them "If I had been going to set the building on fire I would not have been so stupid as to leave it unoccupied." I never said "I would have put about 500 people in it." How could I have said that when I never knew about the occupancy clause. Previous to the fire I never knew anything about the occupancy clause.

I do remember that when Thwaites and Bate came to the home about the day after the fire they said something about occupancy clause and I said "What's that", and they said "oh it is all right." They were saying something to each other. I didn't remember if in any of the discussions with the Insurance representatives whether or not I mentioned that the policy contained clauses and conditions of which I was not aware.

I have a tape recorder in my office. I borrowed one. I had it in my office on the 30th December, 1964 and it just didn't work. They were fortunate. I say the tape recorder didn't work. It was plugged out by the sweeper. I never told them of the tape recorder because of what they wrote me saying that they wanted a conference with me to arrange a compromise but that no solicitor should be present. I have the letter here. The reason for not telling them of the tape recorder is because they came making a lot of promises and that I would soon get the money. I felt that if they knew a tape recorder was there they would not say some things. They made it plain to me that they denied my claim. When I received a letter on 5th April 1965

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

28th September 1966.

(continued)

Exhibit 4 they were confirming what they had told me on 30th December, 1964. If there had been no fire I personally couldn't say how much longer the alterations would take - let say about six weeks more. The annex portion would have taken about seven months in all to complete.

It is known as the annex but it was really one big building. After the upstairs I think I would go on to have the downstairs done. That wouldn't take so long. Probably about another 3 months. After that the front portion. The main building was a little larger than the annex. The whole operation before occupancy would take probably a year or thirteen months.

Re Cross-examined by Mr. Coore.

Mr. Bate and Mr. Myrvin Phillip came to speak to me. Two against me. Both are experienced insurance men. One is an assessor. They never suggested that I should have someone knowledgable to attend during the conversation. The men had come to discuss my insurance claim. If a man's conduct is above board, there should be no reason to fear that they were accurately recorded. The article in Star that was shown to me. I see the sentence "after the nurses left the building undergoing alterations and repairs which were not completed at the time of the fire." Neither Mr. Bates or Phillip had contended that the work had been completed before the fire. I had been told that a watchman from one project was moved up to the Ethelhart at Easter. The report in the Star of the removing of the watchman from Ethelhart to another project is inaccurate according to what report I had got.

I had a police from 1st October, 1963 to mid-November until Ainsworth took over. During period Ainsworth had a watchman, I didn't have one. If it was suggested that before the fire and during the fire I had a watchman that would not be correct.

Adjourned to 2.00 p.m.

2.00 p.m.

Re Cross-examined (continued) by Mr. Coore

There is no difference between the annex and the main building. The annex is an extension of the main building. One can get from the main building to the annex without going outside by simple walking along the verandah. The front building would be about 90 feet by 60 feet and then on that building is the annex about 140 feet long by about 26 feet. The annex and the main building is formed like a L.

The work that was proceeding was on the upper floor of the annex - a conversion into flats. When these were completed, I would put those in the market before the lower floor was complete, and when the lower floor was complete I would have put those on the market before the main building was complete. I never demanded back the property from Cowper's estate. They wrote saying they were not prepared to complete the transaction and were washing their hands of Jamaica. That is how I was given back the estate.

In July 1960 I was in possession of the policy. B.N.S. had policy in November 1959 and I got it after that possibly when Clinton Hart wanted it. B.N.S. could have sent it to me in November 1959 and I sent it to Clinton Hart in July 1960. The maximum period I could have had the policy was about seven months. By November 1959, the policy has been in existence for over a year. The policy document was in existence for about 11 months. My earliest opportunity to see the policy document was 11 months after it was issued.

In July 1963, I agreed to renew the policy for 5 years.

Star clipping of 20th May, 1964, and Gleaner clipping of 21st May, 1964 together in evidence Exhibit 12.

Exhibit 12

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

28th September 1966.

(continued)

EDMOND FRAY (led by Mr. R.H.Williams of Counsel)

Sworn

I live at Queen's Drive, Montego Bay. I am a contractor and builder for the past 30 to 35 years. Sometimes I take straight contracting work and sometimes I do supervising work for the owner when another contractor is employed on the actual construction.

I know Mr. James M. Marzouca. I have done quite a lot of work for him in Montego Bay. I was the supervisor on the Ethelhart for certain work being done. The contractor was Robert Ainsworth who is now dead. It was my job to see that the work was satisfactorily done. We were not working on a definite plan. Plaintiff would tell me what he wanted doing and I would pass it on to Mr. Ainsworth. My work was more in the nature of a Supervisory Architect. The work of conversion started 20th November, 1963.

Prior to 20th November 1963, I had gone and looked on the rooms at the Ethelhart and took measurements and took rough drawings of what we should do. After the work started on 20th November, 1963, I visited the project every working day at least two to three times per day. Working days were Monday to Friday. Occasionally I would go to have a look on a Saturday or Sunday when nobody was on the job.

On the occasions prior to 20th November 1963 when I went to Ethelhart, I went in the day and I never saw a watchman there. It was a pretty large building, and I would go to the annex. The Annex is joined on to the main building. It is the newer section. After 20th November 1963, I have seen a watchman there. On the first part of the job I used to see a watchman called Lyon there - I called him watchie. I used to see him there after 5.00 p.m. I used to leave at 5.00 p.m. or a few minutes after. He would report to work while I was still on the premises and when I leave at 5.00 p.m. or a few minutes after, I would leave him there. The conversion entailed making the 11 rooms into suites by converting two bedrooms into one. Each of the 11 rooms had a bath-room and we

would change one bathroom into a kitchenette. We were reducing 10 rooms into 5, and the eleventh room was a large room. This work did not involve any change in the exterior walls of the building except the blocking up of one external door. It was a conversion of the inside by removing 7 partitions. Quite a bit of woodwork was involved. It was cabinet work. There would be a cabinet dividing each room. The six stoves would be gas stoves. We never had to interfere with the electrical fittings at all. The old bath rooms would be improved. We dropped the floors which were of wood in order to lay tiles. The internal walls forming the bathrooms and kitchen were done of expanding metal, plaster and tiles.

Prior to the conversion all the walls and floors of the bathrooms were wooden. Subsequent to conversion the walls and floors would be plastered over with cement and laid with tiles.

There was a fire on 20th May, 1964 and the building was gutted.

At the time of the fire a watchman was there. The watchman was not Lyon. One Peter McDonald had taken Lyon's place. He replaced Lyon on the 25th March, 1964. This was during the week ending with Good Friday.

The work was still in progress at the date of the fire. If there had been no fire on 20th May, 1964, the upstairs of the annex would be completed in about 8 weeks.

Cross-examined by Mr. Leacroft Robinson

The Ethelhart project was not the only one I was supervising. I was also supervising the City Centre project. At the time of the fire there was no watchman at the City Centre Project. The City Centre project wasn't finished - very little was left. The City Centre project was finished maybe 2 months after the fire.

Mr. McDonald was not the watchman at the City Centre building on the night of the fire.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

28th September 1966.

(continued)

There was and is a watchman's hut at the City Centre building. Mr. McDonald did not occupy that hut on the night of the fire. I am not lying. Peter McDonald had been watchman at the City Centre building up to 25th March, 1964.

I never kept pay bills for the City Centre building but I OK them.

Question: Can you get the pay bills?

Mr. Coore objects. The onus is on the Defendant to prove that the building was unoccupied. It is their duty to issue a duces tecum, but cannot ask this witness to go and ransack someone's papers to get evidence for them.

Mr. Robinson

I ask this witness if he could get these papers and he said he would try and I asked him to do so.

Court allows the question but asks how will counsel use them unless they are subpoenaed or are actually in Court in the possession of the opposing side.

I cannot remember when the City Centre building project started. On 25th March, 1964, McDonald ceased to be watchman in the City Centre project. From 25th March, 1964, City Centre was without a watchman.

From 20th May, 1964 until two months later when the City Centre was completed no watchman was there. For four months prior to the completion of the City Centre project, there was no watchman at the City Centre project.

After the fire McDonald was without a job - I was supervising 6 Market Street also. As supervisor employed by Mr. Marzouca I got a percentage. I don't know how much I got. I would have to check from my books.

I never drew a penny on the Ethelhart project as I drew enough on the City Centre to carry me on.

I never saw Mr. Ainsworth's pay bills. The pay bills of both City Centre and Ethelhart were kept in one. The payments to me were on a percentage on the overall cost. I knew approximately what the costs would be in the end.

I got my percentage on the monies that were spent so far.

Mr. Ainsworth was supplying material only on the City Centre and Mr. Marzouca was supplying that material.

I don't know if separate records were kept by Mr. Ainsworth on the work done at City Centre and the work done at Ethelhart. I don't know anything about Mr. Ainsworth's records. I assumed that as Mr. Ainsworth kept moving the men from the City Centre to Ethelhart and vice versa, that he didn't keep separate pay bills.

I did say that I had to O.K. paybills for City Centre Building. That was an error. By pay bill I didn't mean itemized pay bill, I meant that as the work was finished I measured and recommend payment for the amount done.

My percentage was to be based on the total cost of the project. The watchman's pay would be part of the cost of the project. I had to O.K. the sum of money paid to Mr. Ainsworth each week. The amount to be paid to the watchman is covered in the measurement. I have nothing to do with the watchman's services.

I cannot remember the contract price. I would have to look it up.

I was to see that the work was done properly and the proper amounts paid. The contract was for a fixed price and on that fixed price I am paid my percentage. Mr. Marzouca has all the contracts. They were written contracts but not on Ethelhart. I don't remember the contract price for the Ethelhart project. I am almost certain Mr. Marzouca told me the price for the project at Ethelhart. Mr. Marzouca would offer me a

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

28th September 1966.

(continued)

flat price on some projects, and on others a percentage for supervision. I got 5% on some, on the last section of City Centre I got 8½%

We did not discuss how much I was to get on the Ethelhart supervision as I was doing other jobs for him. Mr. Marzouca and I haven't got together to settle the amount due to me for my supervision on Ethelhart.

I am 60 years Wednesday last. Mr.Marzouca is over 60 years.

Up to now no amount has been agreed on for my supervision of Ethelhart. I have been paid for City Centre. We haven't agree on whether I was to be paid a flat amount for the Ethelhart or by percentage. Mr. Ainsworth knows me in this matter. Mr. Ainsworth was a building contractor. He learnt with me. He has had several years experience as a building contractor up to the time of the fire.

I drew the plans for City Centre. I designed it. The four months of work left at City Centre was some tiling, plumbing and painting. The tiling was floor tiles 2000. About 3000 tiles were needed. Plumbing involved pipes and fixtures. Two to three thousand tiles would cost a couple of hundred pounds. Two to three thousand tiles would cost roughly £100. Tiles cost about £3.10/- per hundred less a discount. Plumbing fixtures meant basins and toilets. The tiling could not be done after the plumbing. Ainsworth had a lot of trouble with his plumber hence the delay. The basins were 11, and there were 11 toilets. The 11 basins were valued at about £5 to £6 each. The toilets were about £10 each. There are about 20 to 30 toilets in City Centre. The section of the building at City Centre not yet occupied by tenants had 8 toilets installed already. We painted the interior first. The corridors needed painting.

Special constables were on City Centre all along so the watchman was taken off City Centre. He was Peter McDonald. Peter McDonald was not working at City Centre right up to the night of the fire.

One Dobson would give me the key on certain occasions when I wanted to go to the hotel before the 20th November, 1963, before the job was started. I would get the keys for the annex. I got the keys for all eleven rooms opening on a corridor. I wasn't concerned with the main building. It was kept locked with furniture in them.

Ainsworth's work was confined to the annex.

Eventually work would be done on the main building. I got the keys to the annex to take measurements prior to the work starting. I don't know who kept the keys for the main building. I expected to get a job to draw plans for the main building in due course. The main building can be locked off from the annex. The corridor from the annex leads right to the main building. When the work was going on the annex, I don't know if the door leading to the main building was locked. It was closed.

My supervisory work did not require me to go into the main building. The main building was bigger than the annex.

Adjourned

29th September - resumed 10.00 a.m. 29th September 1966.

Cross-examination by Mr. Leacroft Robinson continues.

Cross-examined (continued)

There were occupied buildings as businesses at City Centre when I started supervising the extensions at the City Centre.

The special constables at the City Centre were at one stage employed by Mr. Marzouca. All along special constables were at the City Centre. On and off I saw specials there and I know at one stage Mr. Marzouca had them there. Special constables were on the sidewalks during the extension work at City Centre. I don't know who employed them. They were not employed by Mr. Ainsworth. I saw them there all along

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

when the last phase of the project at City Centre started. They were there while Peter McDonald was watchman at City Centre.

At the time of the fire at Ethelhart the last phase of City Centre project was being worked on for probably six months before. The last stage of City Centre project started before the work on Ethelhart. The work at Ethelhart started on 20th November, 1963. The last phase of City Centre started about five months before that.

The watchman's duties when employed by contractors is to guard the materials. Mr. Ainsworth apparently thought it was necessary to employ a watchman to watch materials although Special Constables were seen by me on the pavement. In the early stages lumber and other materials would be there e.g. lumber, nails, sand, steel, building blocks, etc. would be there.

It took some months after McDonald ceased being watchman at City Centre building for the work to finish. During those four months the work done was mostly plumbing, painting and some tiling. Those materials were locked up in a shed on top of the roof. Nobody watched it.

After the fire McDonald went to 6 Market Street belonging to Marzouca. He was working with Mr. Ainsworth. I do not know who McDonald is working with now.

For the last four months of the City Centre project, Mr. Ainsworth took no steps to protect the materials. There were always Special Constables on the pavement. Those Special Constables could have been doing normal police duties. Those Special Constables were on the scene from the phase started and building well lighted.

At the early stage there were lots of loose materials lying around and which we wouldn't put in the shed. Right now there are thousands of pounds of materials locked away in the shed without a watchman. Other phases of the project haven't started yet. The material belongs to Mr. Marzouca.

Special Constables are there, they are being paid by Mr. Marzouca now to protect the entire premises. There was a watchman employed at Ethelhart project from Reid was dismissed. McDonald was there from Reid was dismissed. The work at the Ethelhart involved quite a lot of wood work - cabinet making. They were making kitchen cabinets, fixing up clothes closet and partial partitions by decorating shelves between the proposed rooms and dining rooms. In the kitchen were low cabinets and cabinets on the walls built of wood with formica on top. All that work was done at the place. The cabinets were made there and formica laid there. About four kitchens were finished. The formica was being laid with contact cement. Contact Cement is highly inflammable. Some of the cabinets were glued together, screwed or nailed. The gluing was done with Wellwood Glue. Contact Cement is not used for wood.

We took up the floor boards and chipped off some of the joices to about two inches, nailed back the floor so that the tiles could be laid level with the original floor. It would not have been absolutely necessary to plane the chipped joice. I am not sure if they were planed or not. Venyl tiles were laid in the bathrooms. We laid it on hard board. A little planing might have to be done in the bathroom to get the floors level for the venyl tiles. The bathrooms were plastered and tiled. These tiles on the walls were laid with cement and sand not with contact cement. Tiles on walls can be laid without contact cement. I know unibond. I don't know if unibond is the best thing to use in laying glazed tiles. I don't use it. I instructed them to use cement and sand mortar. Contact cement is one of the approved methods of affixing glazed tiles to walls. In the kitchen we chip the joices down 2 inches and treat it with Atlas A, a wood preservative and then replace the floor boards and tack expanding metal on the floor boards and treat it with mortar and then lay the tile. The level of those floors can thus be adjusted without planing. The making of the cabinet required planing, sawing leaving shavings there. There was also paint. Paint is inflammable. Supplies of paint had to be

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

used on the job. We had just started painting. There was a small amount of paint there. We hadn't started painting inside yet. The zinc roof was being painted. The area of the roof was about 3 times the size of this Court roof. The roof was pitched. About 6 gallons was required to paint the roof. Better rates are obtained by buying large quantities of paint. I don't know how much paint was at the building. No interior painting was done - only the roof. I don't know if there were stacks of paints there. I was only concerned with the annex. If painting was going on in the main building Mr. Marzouca would have told me. If he forget to tell me I wouldn't know.

Each room had a door leading to a verandah which verandah leads right to the main building through a little hall way which had a door, which may or may not have been locked though closed.

The wall upstairs that was removed was of wood. I never found much rotten board during the course of the work. Some was found in the bathroom.

No provision was made for air-conditioning. We proposed to use gas stoves but hadn't got them yet. One big gas cylinder was proposed in the plan. The gas and stoves would be laid by the gas contractors. They hadn't done anything yet. I would know where each stove would be placed. The gas people would just make a little hole for the copper tubes.

The refrigerators were stored in one of the rooms on the lower floor. These fridges were electric. Electric plugs has not been laid yet, neither conduits. The building was of wood and the cables would be laid on the surface as they were throughout the building.

Water heaters were to be installed throughout. They were gas heaters. The gas men would lay those. The plumbing for the gas heaters were already laid out - the gas heaters had not been installed.

The project didn't involve a lot of electrical work. Lights were there before also plugs and switches. Only an addition plug was needed for each kitchen to accommodate the fridge. There was ceiling light already in the bathrooms but no plugs.

We would do the (word) near the fridge. A dual plug. The project in the annex was estimated to finish in December 1964. As far as I know the annex wouldn't be ready for occupancy until about December of 1964, that would include the lower floor, but the upper floor would be ready for occupancy about July or August 1964.

The gas people were waiting for meters. I don't know when they would get them. I was assuming there would be no delay. Mr. Dobson is called Mr. Marzouca's "Man Friday." He is a general handyman for Mr. Marzouca. If I wanted the keys I spoke to Mr. Dobson and he would speak to Mr. Marzouca and I would get the key from Mr. Dobson.

Re Cross-examined by Mr. Williams:

City Centre, last stage started about 11 months before the fire. Before that one, had done two or three stages of City Centre which was the construction of at least 20 shops at City Centre. When McDonald left City Centre around Easter 1964 an additional 11 shops to the 20 of the first two stages had been completed and most of them had been occupied. The City Centre was on two stories. Around Easter of 1964, Special Constables were there night and day patrolling that area. Mr. Marzouca always had a day Special Constable at City Centre at Easter of 1964. He paid him. I didn't know who paid the night Special Constables. After McDonald left City Centre the materials were kept in a shed on the roof of the ground floor and that was about 14 ft. from the ground. At Easter of 1964, most of the 31 shops were occupied and they lit up at night.

EDWARD MELBOURNE BYLES Sworn (Examined by Mr. R.H.Williams:)

I live at Sunset Boulevard, Montego Bay.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

I am Manager of Fire Stone Tyre Trader's Montego Bay. I know Mr. Marzouca. I am a close friend of his from the early twenties. Before I became Manager of Tyre Traders, I was Senior Motor Vehicle Examiner for the whole Island and stationed in Montego Bay. I retired on pension. I know that Mr. Marzouca was away from Jamaica in November/December 1963. He returned to Jamaica in January 1964. I met him at the Airport. He was a very sick man. He was a wheel chair patient. After his return I saw him frequently after he was allowed visitors which was about two or three weeks after his return. I was aware that certain work was going on at the Ethelhart. Before the fire I knew plaintiff would appreciate my visiting the site and reporting to him regularly. I did so. I used to go to the site 3 to 4 times per week to look on the progress of the work and report to him. I started going to the Ethelhart to look - see around second to third week in January, 1964. I continued doing this until about 2 days before the fire occurred. I visited the site on different days per week. I go there about 4.30 p.m. to 5.00 p.m. when passing from work. When I first started going to Ethelhart sometimes I see the watchman just arriving when the workmen were still working. I didn't know his name, I just called him watchie. Between the time I first started visiting Ethelhart and the last time I went there before the fire, the same watchman was not always there. During the Easter Week - I think it was a Wednesday, I saw a different watchman. He was the one previously at the City Centre. I just called him watchie too. I always see this second watchie at Ethelhart up to the last time I went there prior to the fire. The watchman sometimes came there just after I arrived. On those occasions he would come on duty about 5.30 to 6.00 p.m.

I used to go to City Centre to see the progress of the work there and saw the second watchie there and after Easter I saw him at Ethelhart. No work was being done on the exterior of Ethelhart - all interior.

Cross-examined.

I knew Mr. Ainsworth. I knew he was contractor doing the work at Ethelhart. At City Centre Mr. Ainsworth worked there and Mr. Fray was a kind of supervisor at both places. I only kept my eye on them to see if anything was going on right. I only knew of two places for Mr. Marzouca that work was going on then.

After the fire I knew that work started at Market Street. After the fire the watchman for Ethelhart went to Market Street. City Centre didn't require a watchman as there were no materials left knocking around that required a watchman.

Only plumbing materials and tiles were left and the glass doors of the completed shops were on and they could keep the materials in those places.

The interior of the shops were not complete. The buildings had on the doors before the plumbing and tiling were done but I am not sure if they could be locked. There were nine shops at City Centre that were under construction work. When I say no material was lying around at City Centre I am referring to the period just about three weeks before the watchman was removed. The watchman was removed sometimes in Easter Week up to Ethelhart. I continued visiting City Centre after the watchman was removed. Around the time of the fire there was a watchman's hut on top of City Centre building. I am not sure if the watchman's hut is still there. There is no work going on there now. There were lots of material up at Ethelhart such as ply wood and new pipes and plumbing equipment on the lower floor below where the construction was going on on the upper floor. The plumbing equipment was pipes and fittings. Not all the rooms were completed. About 4 were. The most of the work that was carried on was cabinet work. Stoves and heaters and ice boxes were locked away in one of the rooms at Ethelhart.

The downstairs of the annex was an open dining room like a patio with a verandah on it.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

The open dining room was going to be partitioned. It had 3 walls but no wall on the side to the verandah.

Plywood was going to be used to partition the various rooms of the dining room. This dining room could be divided in about 5 rooms. Pipes would have to be carried to the various rooms downstairs.

I suppose that electric wires would have been carried to each apartment. A watchman was required at Ethelhart to watch loose material on the main building that had valuable furniture inside. There was no fixtures at City Centre buildings. Those who rent the shops furnish them. The plumbing upstairs of Ethelhart wasn't completed. The material downstairs was for the construction upstairs and perhaps some for downstairs.

City Centre buildings were about 30 to 40 feet to Ethelhart at the nearest point. If vital things were at City Centre one watchman couldn't cover both buildings but in the state of affairs at the time this was not so and one watchman could keep his eye on City Centre if he concentrated on Ethelhart. People wouldn't bother to steal toilets already installed.

Whenever I went to Ethelhart I saw the watchman that came from City Centre. During that four to five times per week I never see him at City Centre. I remain at Ethelhart for about 5 to 6 minutes and I always see the watchman there. I went to look at the fire from about 5.00 a.m. I never saw the watchman there. I have been in Kingston from Monday. I came in my own car. I came and saw the watchman in Kingston. Mr. Dobson told me the watchmen were coming to Kingston on either the Friday or the Saturday as witness for Mr. Marzouca. I haven't seen the first watchie at the Courthouse. The watchman at the City Centre was transferred to Ethelhart. Peter McDonald was transferred from City Centre to Ethelhart during the Easter week. Ethelhart was not without a watchman after Reid was

dismissed. Peter McDonald was not watchman at City Centre building up to the night of the fire. Peter McDonald has been watchman at Ethelhart. I saw Peter McDonald outside. I know he was coming to Kingston. I don't know if it is Mr. Marzouca he is giving evidence for or for who.

ANTHONY MICHAEL THWAITES SWORN (EXAMINED BY MR. COORE)

I live at 12 Hopefield Avenue and the Managing Director of Dyoll Insurance Limited, 46 Duke Street. I have been associated with Dyoll Limited since 1950. It changed to Dyoll Insurance Company Limited since 1965. Between 1950 and 1965 I was Managing Director.

Dyoll engaged as Insurance Brokers, placing business with Lloyds on what we call binding Authorities with Lloyds. I wrote up policies fixed premiums, investigate claims sometimes, recommend whether claims are to be paid or not and generally do everything necessary in the conduct of an insurance business. We write fire insurance and allied perils, marine and accident policies. My business is island wide. I know Mr. James Marzouca, Montego Bay. My Company has for many years carried insurance for plaintiff on his many buildings. Prior to July, 1958, my principals carried insurance on premises known as Ethelhart hotel. The insurance of Ethelhart prior to July 1958 was probably in the vicinity of £15,000 to £20,000. In 1954 we had £5,000 on the building and £5,000 on the contents. In 1957 there was £25,000 on the building and contents. I recall having a conversation with plaintiff in July 1958 about insurance on the Ethelhart. It was about his increasing the Insurance on the Ethelhart. I told him I could not accept the increase as I had recently made arrangements with my underwriters to keep my limits down but that I would endeavour to place the insurance or part of it with the Atlantic and British Commercial which was operated by friends of mine. Plaintiff agreed. Plaintiff wanted £50,000 insurance broken between building and contents. Having got these instructions I communicated with Mr. Fred Rowlands, the Manager of

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

Atlantic & British Commercial. The business was placed by word of mouth. I advised them that the building was unoccupied at the time. That was in July 1958. We must have discussed generally the risk involved.

We discussed terms and rates. The rates were 14/- per cent as was with us. They sent us a Cover Note. This is it Exhibit 1. I also issued my own Cover Note which I sent to plaintiff along with Exhibit 1. This is it Exhibit 8 and 9.

The description of the building is identical on both Cover Notes. That description does not describe the use or occupation of the building. The use or occupation usually forms a part of the description of the policy. It was omitted because the building was unoccupied at the time, and we were not absolutely certain as to what the occupancy would have been.

2.00 p.m.

I visited Montego Bay sometime around the issue of the Cover Notes I visited Montego Bay along with Mr. Rowlands. I went up to the Ethelhart Hotel and it is my recollection that he went with me. I also saw plaintiff at his offices at Golden Square building. When I went there Ethelhart was unoccupied. This Cover Note Exhibit 2 dated 4th December, 1958 mentions the B.N.S. as Mortgagees and makes mention of the Standard Mortgage Clause. This was not on Exhibit 1. It was placed on Exhibit 2 because we had been requested by the Bank or the plaintiff to have it done.

Looking on the policy Exhibit 5, I remember receiving it some time after from the defendant Company. I have the letter that came along with Exhibit 5. This is it dated 6th January, 1959 and written by Mr. Fred Rowlands. Letter in evidence Exhibit 13. Exhibit 13 referred to another letter which was enclosed but which I never sent out as it had to do with renewal and we had plaintiff's instructions already. Plaintiff had instructed not to allow any of his policies to lapse without prior reference

to him. As a result I renewed this policy with Atlantic from year to year on behalf of plaintiff.

Policy had been renewed covering the period 20th May, 1964 when the fire occurred. The letter of 6th January, 1959 Exhibit 13 referred to my Company as being the leading Company on the risk and this usually means that the following companies will follow the terms and settlements of the leading Company subject to any terms and conditions the policy may have. When I got the policy Exhibit 5 from A.B.C. on 6th January, 1959, I kept it waiting on the Lloyds policy which hadn't arrived from London as yet. I waited until about April 1959, when the Lloyds Policy had not yet arrived, so I sent it, Exhibit 5 to the B.N.S. Some time in early 1960 the policy with A.B.C. was increased by £2,400 to cover the patio and walls, this was done as from 24th July, 1960 the renewal date in 1960.

I was advised of the fire and I visited the premises. The insured property is totally destroyed. The value of the building prior to the fire was in excess of £35,000 and the contents in excess of £5,000. I see Condition 8(a) and 8(b) of the policy. These conditions do not appear on the Lloyds policy. I have never seen Condition 8(b) in a Lloyd's policy. The Lloyd's policies that we have issued in Jamaica have never contained clauses 8(a) and 8(b). Lloyd's does a fair amount of fire insurance business in Jamaica. Lloyds is one of the largest insurance organisations in the world. The general principle on which insurance premiums are fixed is based on the risk involved. As an Insurance man I have to be able to estimate the degrees of risk on the buildings I insure. I am familiar with estimating the degrees of risk on buildings I insure. If an insured is insured with Lloyds through me and is paying his premiums and he does something which increases the risk and it is brought to my attention I would probably have to charge him an additional premium. He would have to judge whether it was a material increase in the risk or not.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

I now know that at the time of the fire the building had been closed to make alterations to the interior. I believe that so many rooms were being changed into apartments. I know that previous to this the building was being used as a nurses home. I should imagine about 30 to 40 nurses would be housed there. If I had been told that the nurses were going to come out and the building was going to be reconverted as I describe, I would not require a higher premium. A change from a building that was holding about 30 person to a building as I described in my opinion would not materially increase the risk of fire for a temporary period. In my judgment such a change in the user of the building would not call for higher premiums from my Company. In the case of an ordinary Lloyd's policy without conditions like 8(a) as my Company issued if the insured does something which increases the risk of fire materially and doesn't tell us about it the effect would avoid his policy if the duty of disclosure in that regard was not conformed with. As a person who is dealing with Lloyds policy, if a Lloyds policy does not have written conditions or a policy such as this, - if an insured materially alters the risk in such a manner as to change the original risk all together then I think that in law, insurers would have the right to say the policy is void. I have to be conversant with what does or does not constitute a change of risk.

At the time of the fire I did not know what was happening at Ethelhart but I discovered it a few days after the fire when I went down. My Company has paid plaintiff under the policy he had with me.

Cross-examined by Mr. Robinson

I went to the place after the fire. I cannot remember if any tins like this one shown to me were there. I never examined the debris. This is a contact cement tin. I know what contact cement is used for. I really don't know how inflammable is contact cement. I know it is inflammable. I know it is used for attaching arborite or formica to board or walls. I know

that lots of cement of that type contain a caution not to use near an open flame, to ventilate room while using and not to smoke while using. I believe that a building being constructed from the ground up would be greater risk than an occupied private dwelling.

When I refer to a temporary period I mean that the reconstruction should not be over too long a period that is taking from a year and over to complete. Temporary would be about 6 months. I would say 7 months would be still temporary. By temporary I mean something that is not going to be permanent. By temporary I don't mean it would take over a year. I see no difference between six or eight months. If it takes over six months, I would give a querulous ear and eye. I might have known plaintiff from 1952. I call plaintiff Jim. I cannot say when I started calling him Jim. One's knowledge of a person has to do also with risk my personal knowledge of Mr. Marzouca did not affect my answers to Mr. Coore. I did not know that the reconstruction at the Ethelhart was estimated to last over one year. I learnt how long it was going on, prior to the fire. I learnt that the reconstruction was going on from November 1963 until the fire. I knew the top annex was being dealt with and it was overdue for completion. I didn't know of the overall plan for the entire building - if I had known the overall plan for the whole building and that it was going to last over one year I do not think I could regard the matter as temporary.

Each time a policy is renewed it is for 12 months. Nothing over twelve months can be temporary in regard to an insurance policy that only last twelve months.

If a house is being reconstructed and which reconstruction is going to last over one year I would expect that owner if insured with us to notify me. If I knew it was going to be a prolonged job I would want to know details about it. Until I knew all the facts I wouldn't know if there would be an increase in risk. I don't know exactly how many apartments they were going to create out of the rooms in

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

29th September 1966.

(continued)

the annex. I knew that they were converting twelve rooms upstairs into 6 self-contained apartments with each having its own kitchen and bath. I didn't know they were contemplating repeating that exercise downstairs. I am aware that the making of the cabinets, counters and all the wood work was being done on site and that formica was being laid on site with contact cement. I knew that all the materials were being stored on the premises. All this I learnt after the fire. What I knew of it did not materially increase the risk.

I maintain that what I knew as going on at the time would not increase the risk as far as I am an underwriter is concerned. I would require to know more about the further intended reconstruction contemplated before I could answer in regard to risks.

Adjourned

30th September 1966.

30th September - resumed 10.00 a.m.

Cross-examined by Mr. Robinson (continues)

I do not necessarily agree that as a general proposition that a building undergoing substantive reconstruction involving a lot of woodwork would involve a greater fire risk than such a building occupied as a dwelling. It all depends on what you mean as substantial. I would consider that in a building of that sort, substantial would mean removal of external walls such as to leave the premises open. If these alterations at normal progress are such that it would take over a year, one would have to call it substantial - in regard to internal alterations. If I would take as long as eight months, one would have to regard it as fairly substantial. Work involving substantial alterations internally involving sawing, planing, lowering of joice, carrying on cabinet work, removing room dividers, building kitchens could possibly increase the risk.

It would put me on enquiry if I knew that work of that nature was going on. It could possibly increase the risk of fire. An increase risk from fire would increase the risk

of loss or damage from such fire. If workmen were to work intermittently on the job and leave and return again while no one as being there in between and continue the work, it would probably increase the risk over and above a place that was occupied by someone being there.

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.

I do not agree that building cabinets in the buildings would increase the risk. If you are talking of cabinet work for 12 kitchens and 12 room-dividers etc., it could probably increase the risk over and above that of a private dwelling house. The rates of insurance for a cabinet factory or woodwork factory are higher than those charged for a private dwelling house. It carries a fairly higher premium. The rates fluctuate. The rates could be twice as high or it could be less than a dwelling house. It depends on the size of the factory. If someone buys a risk on a cabinet factory of £100,000 which factory has all the fire-fighting equipment, the rates could be lower than a private dwelling-house with a concrete nog shingle roof construction of say £5,000. If the owner of a dwelling-house decided to use the house as a cabinet factory, the rates would be higher, probably one and a half times that of the dwelling-house. I have been in the insurance business since 1950. For the greater part of that period I acted as underwriting agent for Lloyds. I acted as such in Jamaica. Our rates are usually based on tariff rates. I am roughly aware of the tariff rates for a private dwelling house for fire only. It is roughtly 3/6%. That basic rate stands at 3/6 or goes up. Comparing that with a cabinet factory of the same class as the dwelling. I don't know the rates for a cabinet factory - I would have to look up the files. I would have to look up the tariff rates for a cabinet factory. I haven't a clue but I imagine it

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

30th September 1966.

(continued)

would be roughly twice of a dwelling house. We use the tariff rates as a type of guide. Lloyd uses the tariff as a guide as they believe that the association having got the experience have set out rates that they consider reasonable. Lloyds usually charge 10% to 15% less than the tariff rates. When I say the tariff companies have the experience I mean rates relative to the risk involved. If a man had a dwelling-house insured with me and came to me and say I am going to use this house from next month as a cabinet factory, I would not continue the insurance as a dwelling-house. If plaintiff had come to me and said that he was going off to Miami and he was going to use his dwelling-house at Red Hills for the manufacture of a number of cabinets, kitchen counters, room dividers to furnish 12 self-contained apartments in the first instance at Ethelhart and thereafter to do the same thing for 12 more rooms until this particular job had been finished and that such work is just temporary not more than a year what would you do. If I was told that he was going to use the house as a cabinet factory for a year or more, I believe one would ask for an increase in the rates. If he was only going to use it for making these things, my answer would depend on how many men he was going to use and whether the work could be done in his outside garage or so. In other words is it something more in line with a factory or just a dwelling-house of your own. If it is not in the line of a cabinet factory one would not increase the rates. If the work was such that one could say he was running something similar to a small cabinet factory, one would have to increase the rates. In the case you describe, in regard to plaintiff's home at Red Hills, I believe we would ask for an increase in rates. The factors determining whether we ask for increase rates is whether there was an increase in risk. In asking for increased rates the contract is being changed. If you say it is a new contract I accept it. I wouldn't note. Each renewal is regarded as a new contract. In any case in which I have a right to ask for an increase premium you have a right to decline carrying on the policy unless the proposed project was abandoned. If he didn't tell me and just went ahead and did

it and a fire resulted and a claim is made I would be in a position to maintain I was not liable. Assuming he agreed to pay the increased rates for the increased risk, I would normally go to the tariff rates to work out the amount, bearing in mind our discount we normally take out. I have never claimed to be an expert in anything. I believe I know a little about insurance. I am not claiming to be an expert in insurance. I claim to be reasonable familiar with the tariff rates used in Jamaica. I use them quite often. I don't carry the rates around in my head. I haven't read the book, "The Principles and Practice of Fire Insurance" by Frank Goodwin, 7th Edition by Kenneth C. Woods, F.C.I.I. I have never heard of Mr. Frank Goodwin. I do know of the Phoenix Insurance Company. They are a very big company and operate in Jamaica. A cabinet factory's rate might be ten times as high - I don't know. Having refreshed my memory from the tariff Rate Book, I say the rates for a dwelling are 3/6% basic.

This covers: Private dwelling houses, schools, colleges, hospitals, banks, offices, municipal public buildings.

The cabinet rates are say as woodworking risks.

The tariff rates for wood-work rish hand work only is 15/9%. Mechanical power - not exceeding 5 horse power 18/-%, over 5 horse-power 20/-%. The rates vary from four times to roughly six times in the tariff book.

I presume the rates for handwork cabinet factories is four times because of the experience as to the various risks. The rates for a cabinet factory is the same for small as for large factories but this is not so in practice. Most of the companies in this country are tariff companies. The tariff companies cannot vary their rates without permission from the local association of the tariff companies. The tariff rates indicate that the risk for hand-operated cabinet factories is four times greater than private

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

30th September 1966.

(continued)

dwelling houses. As far as I am concerned a cabinet factory is where cabinet work is done. One of the reasons for the increased risk is because of the wood shavings present.

Plaintiff had a coverage with Lloyds through me for £25,000 and wanted to increase it to £50,000 that was when the second Company, the defendant Company was brought in. I have an arrangement with plaintiff that all his policies would be automatically renewed without his expressly asking. I believe that arrangement applied to the £25,000 policy in 1957. I do not remember when that arrangement was made. Refreshing my memory it was from 1956. I have been insuring that building from 1954. I had arranged with my principals probably in 1958 that the maximum coverage on any one building of that type should be £10,000. The building was regarded as a class 2 building. In 1958 at the renewal date of the £25,000 policy on the Ethelhart, I would have tried to cut down the risk to £10,000 in any event.

The rate I allowed Mr. Marzouca in 1957 on the £25,000 was 15/-%. I don't remember how we arrived at the 15%. In 1957 the building was operated as a hotel. The tariff rates for a hotel is higher in tariff rates than a private dwelling. I think plaintiff had got a reduced rate to 14% because he was increasing the amount of insurance on the building. We were told that nurses were going to occupy the building and that would be one of the factors taken into account in fixing the rates. At the time plaintiff agreed with me that I should endeavour to place some of the insurance with defendant company and when I discussed the matter with Mr. Rowlands it was explained that the premises were at the moment unoccupied, but was expected to be occupied by nurses depending on the lease to Government. Plaintiff had given me that information and I made full disclosure to A.B.C. so that they could decide whether to take the risk. The plaintiff was negotiating for a lease to Government so when I spoke to Mr. Rowlands it was not absolutely certain the nurses would occupy the building. It was in the light of all that information that defendant

company decided to accept the risk for £40,000. The discussion with Mr. Rowlands included the risk of covering the building for a few weeks unoccupied until the nurses came in. I believe it was a lease. We presumed if it was for a nurses home, it would be occupied for some time. It appeared to me that it was reasonably certain that a lease would be finalised. That factor was put to Mr. Rowlands and he may have considered it. The discount of 5% was on a 3-year premium. I had known of the Atlantic and British for some time. I know their policies contained condition 8. This Cover Note Exhibit 1 is addressed to Mr. M. Marzouca but was sent to me. I supposed I must have read it. I understood paragraph 1 of Exhibit 1 to mean that the building was being insured subject to the company's policy. I know that the policy was standard company policy and that none of its conditions were in Exhibit 1. I see "Policy Wording as attached" on Exhibit 1. I didn't attach any significant meaning to it. The attached has the perils covered, description of the policy insured, a co-insurance clause and a three year agreement. We knew that page 2 of exhibit 1 was going to be on the policy, it is called a policy schedule. I didn't think that when I received Exhibit 1, that that would be all that would appear on the policy.

The terms and conditions on the policy Exhibit 5 are 19. I expected that those 19 conditions would appear on the policy <u>in so far as they apply</u> to the risk. I also expected to find attachment "A" in the policy. I expected that attachment "A" to make it clear that earthquakes, hurricanes, etc., were covered by the policy notwithstanding condition 6 on the policy. When I got the policy it conformed to what I expected to find. Looking at Exhibit 1, paragraph 1, I did not really read the words "as follows" to mean that the terms of the policy followed. I expected that this was a cover note and would be superceded by the policy and I accepted it as such. I accepted Exhibit 2 similarly as I accepted Exhibit 1. In due course I got the policy Exhibit 5 which I accepted as superceding

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

30th September 1966.

(continued)

those earlier Cover Notes. I didn't know that plaintiff had given notice to Government to terminate the lease to Government. I didn't know until after the fire. Up to the time of the fire, I didn't know that the nurses had left.

Exhibit 6(a) is an endorsement referring to a five-year renewal. Our office would have negotiated that agreement with defendant company on behalf of plaintiff. At the time the agreement was negotiated in Exhibit 6(a). I didn't know that notice had been given to terminate the nurses lease neither did I know that plaintiff had contemplated converting the hotel into an apartment building. Condition 8 is not in the Lloyd's Policy but I believe it is a condition in most company policies and in all tariff company policies in Jamaica and before 1958. My present company is a non-tariff company. I don't think I carry any insurance for plaintiff, his insurances are with Lloyds. We still do some business for Lloyds but we now have our own company. We use the standard clause in our policies and it would have something similar to clause 8.

2.00 p.m.

Mr. Fred Rowlands was Managing Director of defendant Company at the time of these negotiations.

I agree that is a highly skilled and experienced expert in the field of insurance. I have the highest regard for him in the insurance business. He is a Fellow of the Chartered Insurance Institute. It is one of the highest qualifications obtainable in the Insurance world. He is employed to my firm as our technical advisor. My firm is Dyoll Insurance Company Limited. I know Mr. Peter Bates, he is a Director of Graham, Miller & Co. Limited. Graham, Miller & Company Limited, is a firm of International Loss Adjusters of high repute in the world. I believe he is an associate of the Chartered Insurance Institute. The next examination is the Fellows. He is also a Fellow of the Chartered Institute of Loss Adjusters. I believe he is also a Fellow of

Association of Insurance Adjusters. He is well respected in the field of insurance.

Re Cross-examined by Mr. Coore:

Saw Mills, joiners or wood-working risks including timber in Stores or in the open within 20 yards thereof. When they speak of cabinet work in the first part of the tariff they would be talking about factories. It is a building that is being renovated or altered in the course of it some cabinet work will have to be done that could not be regarded as equivalent to a cabinet making factory. If asked to say if a particular alteration used constitutes a change of risks, my answer would depend on the type of user that was taking place prior to the alteration that was taking place. As far as the private dwelling house is concerned, assuming that Ethelhart hotel was being used as a lodging house for 30 nurses I would put the risk a bit higher than a private dwelling house, when it was being used for 30 nurses that user was appropriate to the tariff rates for hotels, boarding and/or lodging houses, cafes and club excluding stands. The basic rate that is 5/6%. The private dwelling is 3/6%. The type of alterations that was going on at the Ethelhart is not as risky as a building being constructed from the ground up. The tariff for buildings under construction including materials on site is 6/9%. This covers all buildings under construction from the ground up. Having seen the tariff rates; these rates confirm my opinion that the alterations were described as going on at the Ethelhart did not increase the risks, and confirms my original opinion. When I received the Cover Note Exhibit 1 I thought it was an ordinary Cover Note. It is something with which I am very familiar. When I received Exhibit 1 I did not scutinize it to see what was its correct interpretation in law. Looking on the Cover Note, Exhibit 9, I see on the right "Lloyd Policy Form" and "C" Form amended.

The "C" form is the standard Lloyd's fire policy. My Cover Note make special reference to my standard policy form.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

30th September 1966.

(continued)

Q. Does Exhibit 1 make reference to the Company's policy form?

A. It says here "Subject to terms, exceptions and conditions of the company's policy as follows :-

There is no reference to any form written on Exhibit 1. Exhibit 2 is the same wording. When I got the Cover Note, I sent it to Mr. Marzouca.

Q. Did you regard yourself as under any obligation to explain this document Exhibit 1 to Mr. Marzouca?

Mr. Robinson objects on grounds -

(1) Does not arise out of my cross-examination of the witness.

(2) It is contrary to something that was settled earlier in the case and it is irrelevant to any issue that is the case at the present time. Whether he regarded himself as being under any obligation is a question of law.

Mr. Coore replies:

It is very difficult for your Lordship to decide at this state decide what was relevant or not.

Mr. Robinson has asked Mr. Thwaites as to what he understood was the meaning of the documents.

Whether Mr. Thwaites is or is not an agent. I hold I am able to ask witness whether he regarded himself as under any obligation to explain this document, Exhibit 1.

Court allows Question:

I did not regard myself as under any obligation to explain the document to Mr. Marzouca so I did not.

Looking on Exhibit 5, Condition 8, I agree that it is a condition that appears in most

policies. At the time I received the policy Exhibit 5, I must have read it. I must have scanned the 19 conditions.

Q. Can you recall when you received Exhibit 5 and looked on it whether you specifically considered the effect condition 8 would have on the policy?

Mr. Robinson objects (1) does not arise and is totally irrelevant as to the issues between the parties in this suit.

Mr. Coore: The point was raised by the defence as to Condition 8 as to whether Condition 8 was a standard condition. Question is admissible and allowed.

Ans. I never considered the question as to how Condition 8 would affect the Ethelhart Hotel.

By the Policy Exhibit 5 the insurance coverage ran from 24th July, 1958, until the 24th July, 1959. I learnt some time after 30th September, 1958 that the nurses had gone into the hotel. When I received Exhibit 5 in January 1959, I knew that on the 24th July, 1958 that the hotel had not been occupied. I knew by January 1959 that the nurses had occupied the hotel as from 30th September, 1958 or 1st October 1958.

Case for plaintiff.

Adjourned for a date to be fixed.

30th January 1967 - resumed hearing:

30th January 1967.

Counterclaim: A declaration that the said policy of insurance had ceased to attach to the property at the time of the loss or damage to the property on the night of the 19th and/or early morning of the 20th May, 1964 (by reason of a particular condition in the policy.)

Mr. David Coore,Q.C. and Mr.R.Williams of Counsel instructed by Messrs.Clinton Hart & Co. for Plaintiff.

Mr.Leacroft Robinson Q.C. and Mr.R.Mahfood,Q.C. instructed by Messrs.Alberga & Milner,Solicitors for Defendant Company.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

30th January 1967. (continued)

FREDERICK OWEN HALSALL ROWLANDS (sworn)

Examined by Mr. Robinson:

I reside at Aram, Belvedere Road, Red Hills, St. Andrew. I am an Insurance Official. I am Fellow of the Chartered Insurance Institute. That is the highest diploma obtainable in Britain in General Insurance. There are about 2 other persons in Jamaica with similar qualifications. They are Mr. Peckover of the National Employers Mutual Insurance Company. I do not remember the name of the other person but he is an Englishman.

I have been engaged in the insurance business for 35 years. During 6 years of that 35 years I was in the Army. I have been in Jamaica doing insurance business since December of 1953. I arrived here with my present qualification which I gained 35 years ago.

I spent 4 years with the Insurance Company of Jamaica as Office Manager. Prior to my arriving in Jamaica I was employed at the head office of the London & Lancashire Insurance Co. I was in charge of the underwriting of 13 or 14 agencies in the West Indies dealing with insurance.

After my first 4 years in Jamaica I became Managing Director of the defendant company and in July, 1958, I held that position. I held that position until 30th September, 1962, after which I formed my own company to represent Insurance Companies out here as an Agency. My Company is Frederick Rowlands (Insurance) Ltd.

Since I terminated my employment with defendant company on 30th September, 1962, I had no financial interest in defendant company as I sold out all my shares at the time I left.

In or around July 1958 I had discussions with Mr. Tony Thwaites of Dyoll's Ltd. He is now of Dyoll's (Insurance) Co. Ltd. I had discussions with him about the building known as the Ethelhart Hotel. Mr. Thwaites offered a proposition of the insurance against fire, earthquake and other risks on the building known as the Ethelhart Hotel. When he made that

proposal I asked him questions as to the type of construction, occupancy and the ownership.

I was told that the plaintiff Mr. Marzouca was the owner. That the building was Class 2 construction. That it was unoccupied but shortly to be occupied as residential quarters for nurses working for the Government.

I enquired how long the building would be unoccupied before being tenanted by the nurses. No Insurance Company would indefinitely cover an unoccupied building. I was told that it was expected to be occupied within about 6 or 8 weeks from the end of July. After I was told that we issued the cover note. If unoccupied, earthquake might be different, in some companies.

31st January, 1967: Resumed

31st January 1967.

10.00 a.m.

FREDERICK ROWLANDS (sworn):

Examination-in-chief continued by Mr. Robinson, Q.C.

After being told occupation by the nurses would be within 6 to 8 weeks I issued the cover note Exhibit 1. The note was 14/-%. The rate is based on the intended occupation of the risk, the location of the risk and the construction of the risk. In addition it has reference to the perils covered. The intended occupation of the risk was for intended residential occupation by nurses. Location of the risk: The part of the island it is situated and the type of building it has on either side.

Construction of the risk means the materials of which the building is constructed. In this case it was of Class 2 construction. Class 1 construction is of brick, stone concrete, concrete block or a mixture of these materials. Class 3 is of wood, metal, iron, aluminium, different metals.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

31st January 1967.

(continued)

This particular Class 2 construction consisted of brick nog, concrete nog and wood. If the amount of wood had exceeded 50% of the total surface area it would be rated as Class 3 construction. If the building had been listed as Class 3 the rate would have been more than 14/- and if Class 1 the rate would have been less than 14/-

I was told the intended occupation was residential quarters for nurses. If I had been told that the intended occupation would be as a hotel I should not have accepted it. I have now accepted a hotel of Class 2 construction.

Class 2 construction for hotels have been accepted by many companies but it has never been my practice to accept Class 2 construction for hotels. Most hotels prior to 1950 were of Class 2 construction and the risk is notoriously poor.

The basic difference between residential quarters such as dwelling houses, banks, schools and certain municipal buildings and hospitals is 3/6 per £100 and the basic rate for hotels, guest houses is 2/- more for Class 1 construction and 3/- more for Class 2 construction. The reason for this difference is in hotels in tourist areas and is that persons come to enjoy themselves and they drink a little bit too much perhaps and enjoy themselves and go to bed and smoke in bed.

Hotels are classified as a higher risk than nurses quarters, hospitals and private dwelling houses.

If I had been prevailed upon to accept the Ethelhart Hotel as a hotel I would have doubled on the rates. I have no idea of the rates which companies would put on a Class 2 hotel.

Having issued the cover note Exhibit 1 I enquired of Mr. Thwaites from time to time and I learnt that the nurses had in fact occupied the Ethelhart Hotel sometime in October 1958. Had I not been told that it was to be occupied by nurses I would not have accepted the risk unless it was to be occupied by what I

considered a similar non-hazardous purpose.

Had I been told that it would not have been occupied in the immediate future I would not have accepted the risk.

On 4th December, 1958, I also issued this cover note Exhibit 2. The Bank of Nova Scotia had apparently become mortgagors. I was aware that the nurses were in occupation at that date.

This is the Policy Exhibit 5. I signed it on 12th December, 1958. It is issued the day it goes to the Stamp Office. I signed it and issued it shortly after. When the policy was released I was aware that the nurses were in occupation. Had the nurses not gone into occupation I would not have issued Exhibit 5 or Exhibit 1. I was referring to the policy that was in fact issued, Exhibit 5.

Ques: What are the terms exceptions and conditions of the Company's policy?

Mr. Coore objects: As it relates to the construction of a document and is a question for the Court.

Q - Ans. The Company has terms, conditions and exceptions for the policies that it issues.

The terms, conditions and exceptions are to be found on the policy form. All fire policy forms are printed and that is widely known in the insuring and insurance world.

Mr. Tony Thwaites was well known to me as Manager of the organisation known as Dyoll Ltd., agent for Lloyd's brokers.

The company's form and conditions therein have been in constant use in Jamaica since 1904, though not used by Lloyds and are well known to all insurance men. The policy form is known as the U.P.C. form, Uniform Policy Conditions. These forms are known to all insurance people.

Mr. Tony Thwaites is a very well known insurance man in Jamaica. Up to when I terminated my association with defendant company

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

31st January 1967.

(continued)

on 30th September, 1962, I knew that the nurses were in occupation. I used to visit Montego Bay often and glanced at the activity there.

I regard myself as an expert in General Insurance matters including Fire Insurance. If the occupation of those premises as a nurses quarters had been terminated at end of September 1963 and the building or a substantial part of the building was handed over to a contractor to do internal alterations which involved converting internally 11 rooms into 6 self-contained apartments each with its own kitchen and bath facilities, while such work was being done I would regard it as an increase in the risk so far as it relates to the possibility of fire. So far as it relates to hurricane and earthquake there would be no increase in risk unless the roof had been removed.

I would regard it as a risk from fire because with such extensive alterations and reconstruction, particularly with a Class 2 building as the Ethelhart, there would be bound to be carpentry work going on, the presence of shavings and so on and in addition there would probably be a fairly large quantity of paints and varnishes and other combustible materials.

I would expect the company carrying a policy such as Exhibit 5 to be consulted before any such work is carried out. I would expect the company to be consulted in such an instance because it constitutes an alteration in the subject matter of the contract.

Under the terms of the contract such as Exhibit 5 a company would not be obliged to carry the risk while such work was going on. If a company were consulted and were minded to carry the risk during such reconstruction, they would call for an increased premium during such reconstruction. If it turned out that all the cabinet work was being carried out on the building, if such cabinet work is substantial it would be natural to take into consideration the higher rating of cabinet shops.

I meant <u>cabinet Manufacturing shops</u>.

If I was told the work involved lowering the flooring to about two inches, I would regard it as part of the whole process of reconstruction and adjust the rates accordingly. I would regard the work being done for the period of reconstruction as a fair increase in the fire hazard. I was referring to the period of reconstruction regardless of the length of the reconstruction right up to the end of reconstruction. Supposing in July 1963 the insured requested a reduction in the premiums in consideration of carrying the period of insurance for another five years from July 1963 and at the time of putting that proposition to me, the nurses were under notice to leave by September 1963, and it was plaintiff's intention at the time of the proposals to carry out reconstruction. I would expect plaintiff to make that disclosure. If that disclosure was made to me it would affect my decision as to whether to give a five year agreement. One possible way was to extend the coverage up to when the nurses vacate and at that stage one would have an opportunity of assessing the risk it was to become, but certainly I would not give a five year extention.

Question Would you as an insurance expert in the situation related. If in July I had been told that in July notice had been given to terminate the occupancy by the nurses in the September following, would you in July have agreed to extend the policy on the same terms for another year?

Mr. Coore Q.C. objects because the question is not made admissible by putting in the words as "an expert" at the beginning for the simple reason that decisions of this sort are made by persons acting as insurance salesmen and it is not a matter in which expert opinion can be given. He can be asked what would be the general practice, but not what he would do, because it is pure opinion evidence.

Mr. Robinson

My friend is confusing an insurance salesman with an insurance expert.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

31st January 1967.

(continued)

Court rules

Experts may do matters in a way personal to themselves, even as experts, and yet that manner may not be the way others to it including other experts. The question should be as to the general practise. The question as framed is therefore not allowed.

Question Would you consider it a prudent risk to accept a renewal for a year in July 1963 if you were then made aware that the premises would become unoccupied at the end of the following September 1963?

Answer No.

Cross-examined

It is easy to say what I said at anytime. Before or after any event a person's intelligence remains the same whether he is wise or foolish. At the time you agreed to accept this risk and the premiums on behalf of your company did you make any type of occupation a written condition of the agreement?

Mr. Robinson objects to the question on grounds.

(1) If my learned friend would re-phrase the question omitting the word written, I will withdraw the objection as all the written documents are in evidence.

Mr. Coore replies it is a perfectly proper question. I want to know if there is anything in writing other than what is in evidence as to the type of occupation being a condition of the agreement.

Court rules that question seemed a simple and straightforward question and is allowed.

Answer I don't know if I wrote it down or not. When Mr. Thwaites assured me that the building was shortly to be occupied nurses residential Quarters.

I cannot say if I wrote anything down re type of occupancy. I never wrote Mr. Thwaites,

Mr. Marzouca or anyone to say that the coverage would be subject to nurses coming into occupation. The contract was a contract in good faith, and it was unnecessary to put anything of that nature in writing. There are 19 or 20 Standard Conditions. In fairness to an insured person it is vital to let him know what are the conditions under which the risk is carried, and his agent was so told.

Mr. W.A. Thwaites was plaintiff's agent. I cannot remember saying to Mr. Thwaites "Unless the nurses came in within some specified or indicated period the coverage would be off." I never told plaintiff that.

Question When I added "and his agent was so told, what did you so tell him."

It may or may not have been said, I cannot say. I told Mr. Thwaites either on 23rd, 24th or 25th July 1958 that - I cannot remember the details. Mr. Thwaites was told that the question of occupation by nurses was important to us. It must have been on the 24th or 25th July, 1958 that I told Mr. Thwaites that. The terms of the conversation concerned the character of Mr. Marzouca, the contractor of the building, where the building was situated, how the building was occupied, what perils Mr. Marzouca required, what was Mr. Thwaites relationship to plaintiff, what has his loss experience been while his insurance been placed with Mr. Thwaites. What rates Mr. Thwaites have in mind. That was more or less the gist of what the conversation was. Part of the information Mr. Thwaties gave me was that nurses were expected to come in within a few weeks. I specifically told Mr. Thwaites to the effect that unless the nurses took up occupation as residents within a specified time, the cover would be off. I believe the time specified was between 6 to 8 weeks. I don't know whether I ever told the defendant companies' legal advisers that I specifically laid this down as a condition of the agreement. It is quite common for insurance policies to state specific types of occupation being covered. This policy Exhibit 5, does not in fact do that.

Looking on Cover Note Exhibit 1.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

31st January 1967.

(continued)

As far as 24th July, 1958 the building was being covered subject to the terms and conditions in the document Exhibit 5 which was at that time in the course of preparation.

I knew on 5th July 1958, that the building was in fact unoccupied. I don't think that I had ever heard it had been used as a hotel before. The fact that it was called Ethelhart Hotel indicated to me that it was originally built as a hotel building. I wasn't interested in its history only its condition at the time. I knew that nurses had not been living there before. I had no knowledge of what the occupancy of it was immediately before. I appreciated that for nurses to occupy the building certain alteration and repairs might have been necessary, that is why I inspected the building. I inspected the building probably ten days after issuing the Cover Note. I was bound by the Cover Note but it could be cancelled. At the moment I issued the Cover Note, I appreciated the building was unoccupied, that repairs and alterations might become necessary. Nonetheless I was at risk with that Cover Note for ten days. As prudent insurance man, I inspected, and was satisfied of a reasonable risk. As from the 24th July 1958, defendant's company had covered that building then occupied. If the policy is for 5 years, the risk of fire would be five times that of a one year policy. That is why the premium is five times. The risk of fire from day to day in a one year policy is no different from the risk of fire from day to day on a five year policy, provided there is no alteration of the circumstances surrounding the risk. The Cover Note Exhibit 1 makes a discount for a three year period over a one year period in view of the Stamp Acts for Jamaica. On a one year policy on a clause 1 risk, the stamp duty would be 3/1½% on a premium of 3/6%, while on a three year policy the longer the stamp duty lasts for the period of the policy. On a one year policy the stamp duty has to be paid each year. The terms and conditions last for whatever period is agreed. The Recognised Claims of occupation fall into several classes. Residential fall into one class. Manufacturing into a different class. There are scores and scores of classes.

Residential Buildings - If a building is being used for Residential Purposes, we have an idea of the amount of risk involved. The category of the occupation or profession of the dweller at the premises would not matter provided he doesn't carry on his job on the building. If nurses had left the building but persons of different occupations carried on outside, occupied the building, as far as my assessment of the risk is concerned, it does affect the acceptance. A Building occupied by nurses would pay the same insurance rates as a similar building occupied by stenographers. A similar building occupied by soldiers would pay more - as far as I personally am concerned other insurance people may not agree with me. There is room for difference of opinion between experienced insurance men as to the relative hazards of different types of occupation.

2.00 p.m. Still on oath.

Cross-examined (Continued)

I agree that a great deal depends on the detailed circumstances of each case. I have no personal knowledge of the work that was being done at the time of the fire. I agree that fires in buildings are either caused by some electrical fault or by the careless use of some flame by the occupant. Those are the main causes. The more people that one has in continuous occupancy of a building, the greater the risk of carelessness leading to a fire, even if they are nurses. Paint, wood shavings and formica. I am not saying formica is inflammable, but the glue used to stick it is highly inflammable. It is the vapour of the glue that is inflammable. Once it has dried and become hard, it is no longer inflammable. It is only when the adhesive is exposed in large quantities that it becomes highly inflammable. Adhesive in tubes and tins can become inflammable if the temperature is high. I agree that the people who have to store large quantities and supply these things would be in a good position to know the conditions under which these things become dangerous and should know. I have heard of the Facey Commodity Company.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

31st January 1967.

(continued)

I do not agree with you that this adhesive material only becomes dangerous when held to an open flame. I still maintain that it is dangerous when heated. I am talking of any adhesive of that nature that is used for sticking formica. The adhesive can explode under heat. I agree that the Facey Commodity Company supplies these things. I have read that they store hundreds of gallons of this material in their store-houses. I have never heard of them giving any trouble in Jamaica. I have read of it happening in other countries even cooler countries. I have had no personal experience of it. Paint explodes if the temperature is high enough and there is enough space in the tin. Under normal circumstances I would not expect paint to explode. If a fire starts elsewhere and paint is in the way, it burns rapidly. Once a fire is started, wood will burn. Apart from the adhesive, fire has to start somewhere for these things to burn. Many articles of household use are highly inflammable. Aerosol tins of hair spray, cleaning fluids and insect repellants and nail polish. These are the things one expects to find in a densely populated residence especially of women. I wouldn't expect workmen to be using any nail polish or hair spray, but terpentine. I am familiar with the general form of fire policies issued by English Insurance Companies. It is not customary to find in English Fire Insurance Policies a clause specifically referring to non-occupancy. The American Companies differ from State to State. The American Companies include this non-occupancy clause as a rule in countries outside America. They have got along well in England without it. It is a policy of mine not to insure class 2 buildings occupied as hotels. The number of persons residing at the premises is one of the factors one takes into account in coming to the conclusion of not insuring class 2 hotels. I have known Mr. Tony Thwaites for 12 or 13 years. I agree he is a highly skilled and experienced underwriter.

Re Cross-examined by Mr. Robinson

I would say Mr. Thwaites in regard to the number of years would not have as much experience

and skill as me in the insurance world. As far as academic qualifications are concerned in insurance, I have more qualifications than Mr. Thwaites. Assuming a fire is started by an electric short circuit or carelessness, the presence of large quantities of adhesive, paints, turpentine and wood shavings would increase the risk of the loss or damage that the fire would cause. The more people occupying a building is the greater chance of the early discovery of a fire. The greater the chance of putting it out before it could do much damage.

Question Would you normally expect with a building of the same size occupied by women who use hair sprays, nail polish and so on including cleaning fluids, insect repellants to have those items in as large quantities as if that building was undergoing substantial structural alterations, would have paints, adhesive, turpentine, wood shavings, and other things include wood work.

Mr. Coore objects to question as (1) it involves so many unknown factors any answer given can be only speculation and the most it can be said, that it is an argument he can use.

(2) An insurance man is not an expert of how many tins of hair spray and nail varnish ladies would use.

Court allows question it goes to weight not admissibility.

Answer In my opinion no. A building under construction carries about twice the fire rate as after the construction is completed and it is occupied whether by men or women or both. That is true of all insurance companies. The rate is higher because it is a greater risk. If internal alterations is substantial and prolonged the higher rate would usually be charged than for the same building that is occupied. That is

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

31st January 1967.

(continued)

for the individual underwriter to decide. By prolonged I would mean anything over 5 or 6 weeks. but prolonged depends on the individual interpretation. Alterations that are estimated to take nearly a year are obviously prolonged. In the insurance world all underwriters expect to be given an opportunity to make a decision. The only policies in Jamaica that I know of that do not have a non-occupancy clause is Lloyds. I am aware of over seventy companies operating in Jamaica that use the U.P.C. policy form which contains a non-occupancy clause.

One of the leading causes of fires in Jamaica are burglars entering buildings or either through carelessness or maliciously setting fires to those premises. If a premises is unoccupied for 2 or 3 days, it is not usual to become general knowledge, but by the time a building is unoccupied for 30 days everyone who has evil intentions as to theft, arson etc. would know about it.

ALBERT NATHAN FOSTER Sworn.

Assistant Superintendent of Police stationed St. James, Montego Bay.

In May 1964, I was Detective Inspector in charge crime in the parish of St. James. I was in charge of the investigations of the circumstances surrounding the fire at the Ethelhart Hotel in May 1964. Prior to that fire it was used as a nurses quarters. The nurses occupied it. The nurses left between June and December 1963. So far as I know after the nurses left the building was locked up and later on I saw men working converting a part of the building - that is the annex. As a result of information I received, I gave the police under me certain directions and occasionally they would visit the premises and I would do so also. I have visited the premises at nights during the time the work was going on at the annex. At nights I have seen several people there watching the cinema show from there. From there they get

a free show. I arrested some and others ran. I might have seen someone there, but I wouldn't know who is who, and whether they had a right to be there. I have never seen anybody there at night who asserted a right to be there. The police made regular visits to the premises at nights. Those visits continued right up to the night before the fire. Among the police officers who visited those premises at nights were Detective Corporal Wilbert Walker and Sergeant John Graham. They were among the men who visited under my direction. They made reports to me. After the fire, I took several statements. I took one from Mr. Ainsworth - he is now dead. I spoke to one Peter McDonald. I know the plaintiff Mr. Marzouca. I spoke to him after the fire. He told me something about the keys. He told me that the keys at the annex were handed to Mr. Ainsworth and the other keys for the main building were locked away in his safe.

Plaintiff said the doors to the main building were locked.

1st February 1967. Resumed

1st February 1967.

ALBERT NATHAN FOSTER Sworn by Mr.R.Williams.

Cross-examined

I cannot say what time exactly this work commenced, but I know it started shortly after the nurses left the Ethelhart Hotel. I knew the police visited the premises occasionally because they told me and because I could see from the records that they made arrests on the premises. I visited these premises both at nights and in the day. During the day when I visited, I saw workmen there working. I visited these premises at night about 3 times. The first time I went there at night. I am not certain whether or not work had already started. I remember that on my second night's visit, work had started and it had been in progress on my third night visit. I think it was on the second night that I arrested some trespassers. On all occasions I visited the premises both day and night - I have seen people there. I am unable to say if among the people I see there at nights whether a watchman was amongst them.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

1st February 1967.

(continued)

When I say police visited the premises at nights, this I say from information given to me.

Re Cross-examined by Mr. Robinson

I know Peter McDonald. I have never seen him at the Ethelhart on any of my visits at night. I don't remember seeing Peter McDonald at all on my night visits whether at Ethelhart or elsewhere.

Question Around the time of the fire did you know if Peter McDonald was working?

Mr. R. Williams objects on grounds.

(1) Doesn't arise from cross-examination.

(2) It is more than likely to let in hearsay evidence just as hearsay was let in examination in chief as is shown by the cross-examination.

Mr. Robinson replies:

In regard to objections number 2, I am prepared to re-phrase the question "Did you know of your own knowledge whether Peter McDonald was working around the time of the fire?"

In regard to the first objection, plaintiff's case is that Peter McDonald was the watchman and witness was cross-examined as to whether any watchman was seen there at nights.

Court Rules: Mr. Williams is technically correct that the question does not arise in cross-examination and though I would be inclined to allow the question as re-phrased, I am afraid I am bound by the rules of evidence.

Question and Answer My third night visit was about one week before the fire.

Question Did you see Peter McDonald there that night?

Answer No.

JOHN GRAHAM SWORN (Cross-examined by Mr. Richard Mahfood, Q.C.)

I am a Sergeant of Police stationed at Montego Bay from January 1962.

Shortly after my arrival in Montego Bay in January 1962, I got to know the premises known as the Ethelhart Hotel. I knew the premises before then. I visited the Ethelhart Hotel when the Government nurses were living there. I visited the premises after they left and up to shortly before the fire. I visited it for the last time about 5 or 6 weeks before the fire. I visited the premises after the fire. I visited the premises while the nurses lived there because of reports of theft from the nurses and also vagrants visiting the premises at nights to watch the show at Coral theatre. In respect of the report of thefts, I went to investigate. My other visits were either to get these vagrants off the premises or catch them if I could. The period after the nurses left and prior to the fire I visited the premises about once per week. There was no particular reason why my visits didn't continue right up to the time of the fire. There were other patrols to the premises other than the ones I went with. When I visited the premises, I travelled there in a motor vehicle with other police from the station. When I go I am in charge. I know one Reid who was supposed to be a watchman at those premises. I have seen Reid at the premises during the period after the nurses left. Repairs were at that time going on at the premises. I didn't see Reid the last time I visited the premises at night. The fire was in May 1964. The last time I saw Reid there was sometime in January or February. During the period of the repairs up to January/February, I also saw Reid there when I visited. After January/February 1964 when I made my visits, I never saw Reid there. I can recall making about two visits between the last time I saw Reid there and the fire. I know one Peter McDonald. I have known him for several years before 1964. Around the time of the fire I know from my personal knowledge where McDonald was working. He was a watchman between the City Centre Building and this Ethelhart Hotel. I saw Peter McDonald about five to six weeks on the front of the Ethelhart Hotel looking

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

1st February 1967.

(continued)

down towards the City Centre Building. I have seen him at the City Centre Building and spoken with him. I saw him on the piazza of the City Centre Building. Around the time of the fire - I knew the watchman's hut Peter McDonald occupied. It was on the top of the City Centre Building. It was on the roof. That was the hut he was occupying before the fire. I wouldn't be certain if after the fire he occupied it. I didn't make any investigations after the fire. On my nightly patrols within one month before the fire, I had occasions to pass the City Centre Building. On these occasions, I have never talked to Mr. McDonald. I don't recall seeing him in that month. On the occasions I visited Ethelhart after January/February 1964, I recall seeing Peter McDonald there twice.

Question Are there any occasions after January/February 1964 that you visited Ethelhart that you didn't see McDonald there?

Mr. Coore objects on grounds:

(1) Mr. Mahfood is cross-examining his own witness. The witness has already said that after January/February he made two visits to Ethelhart Hotel between January/February and the fire. He has also said that in that same period he recalled seeing Peter McDonald at the Ethelhart on two occasions.

(2) The question is either asked for the purpose of contradicting his witness or his repetitions and is not a proper question as it may illicit from his own witness a contradiction.

Mr. Mahfood replies:

Mr. Coore's objection is based on a misquotation and a misunderstanding of the evidence. (Witness asked to leave the room.)

Mr. Coore's objection is based on a misquotation and misinterpretation of the evidence. The misquotation is a very simple but very important one. The witness said as a matter of recollection about numbers, that the

numbers were about two. The phrase about two visits cannot be interpreted as pleading and that the witness said "I visited twice". He said "About twice". Witness said around January or February was the last time I saw Reid, that after that he visited the premises about twice, and that he saw McDonald there about twice. This is an estimate of numbers and nothing else. I asked the witness a concrete question and the answer he gave was perfectly reconceivable with his previous answers. His answer was yes. No basis for saying I was cross-examining my witness.

Court allows the question

Yes, once on my visit I didn't see him. On the occasion that I saw Peter McDonald on the City Centre piazza was some time before the fire. I cannot be sure whether it was before January or February 1964.

Cross-examined by Mr. Coore:

These visits that I paid to Ethelhart after the nurses left were visits of about 2 to 3 minutes. The premises are of a reasonable size. I wouldn't be looking in all places on my visits there, but can walk around. Reid or McDonald or anybody could be in the building and I not see them. Most of the times I went to the Ethelhart, I either saw Reid or Mr. McDonald there. Reid appeared to be the watchman at the Ethelhart up to January February, and after that McDonald. That is my estimate.

Re Cross-examined by Mr. Mahfood

I couldn't answer that, as I couldn't be sure if Reid was ever the watchman for both Ethelhart and City Centre. I have seen McDonald at both places. I felt he was the watchman at both places. I just feel so. This is based on my observations. When I said McDonald was the watchman - that was after February.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

1st February 1967.

(continued)

WILBERT WALKER SWORN

Detective, Corporal police, Montego Bay (Cross-examined by Mr. Robinson).

I have been in Montego Bay for four years. I know the Ethelhart Hotel. I knew it when it was occupied by the nurses. I had occasion to go there on police duties while the nurses occupied it. After the nurses left the premises, I went there. I went there often on regular patrol duty and because of reports of petty thefts and vagrancy. After the nurses left, I went there at least once or twice per week, right up to the time of the fire. I knew a man named Reid. I have seen him at the Ethelhart premises after the nurses left. He was supposed to be watchman there. While I saw him there as watchman, a reconstruction of the building was going on then. Reid was not there throughout the reconstruction. He was there up to February or early March 1964. I knew one Peter McDonald. Around the time of the fire, I knew Peter McDonald was working at the City Centre which is on the same premises. The City Centre Building is on the same stretch of land at the foot of the hill just below the Ethelhart. To get from City Centre Building to the Ethelhart there are two ways. By road from Orange Street to Ethelhart and a suspended ladder from the Ethelhart to the top of the City Centre Building - on to the roof. The ladder is a risk in using it. There was a hut on the City Centre Building. Up to the time of the fire, McDonald was occupying that hut. I have seen McDonald at that hut and spoken to him regularly. I have stopped and talked with McDonald there often. After the fire McDonald still occupied that hut. I have seen him there. After the fire, I assisted in the investigation of the fire. In the course of those investigations, I took statements from more than one person. I took a statement from Peter McDonald sometime in June, the month after the fire. I took it at City Centre Building at his hut. McDonald was still watchman at City Centre Building when I took the statement from him. In the course of my patrols up to the Ethelhart building, I have seen McDonald there standing on the premises. I saw him up there about twice on the front of the premises just standing there.

Where he was standing he could see the cinema from there. In that same vicinity I have seen vagrants hanging out. From this spot McDonald could also see the City Centre Building. He could perform two functions from there. Keep an eye on the City Centre Building as well as on the cinema. When Reid was watchman at Ethelhart, I usually saw him back towards the kitchen. From the watchman's hut on top of City Centre Building, not all of the Ethelhart premises could be seen.

Cross-examined by Mr. R. Williams:

These patrols I spoke of would cover the entire township. We would travel along the roads on foot and Land Rover. We started doing these patrols from early 1963 going on. We still do them. These patrols I am speaking of were by night.The hours were rotated on five-hour shifts 8.00 p.m. to 12.00 midnight. Midnight to 4.00 a.m. or 5.00 a.m. The patrols took us past the City Centre every night. We never drove up the road to the Ethelhart every night. Most of the times on these patrols, the nearest we got to the Ethelhart would be when we passed the City Centre. Regular patrols lead us to the Ethelhart. There were occasions when we never went to the Ethelhart. We went there because of reported incidents of thefts and vagrancy. We only went there because of these reports. I was never satisfied after some of my visits that there were no vagrancy and petty thefts. It is not possible to go to the Ethelhart every night because it was just not possible to go every-where. Reconstruction at the Ethelhart continued after Reid left. I don't know if McDonald took over at the Ethelhart after Reid left in late February/early March. After Reid left, I visited the Ethelhart at least once per week and maybe sometimes twice. There were occasions on these visits that I saw McDonald there. I would not say that on most of the occasions that I visited Ethelhart at nights after Reid left that I saw McDonald there. Not about 50% I was not on the same patrol as Sergeant John Graham. We do not patrol on the same nights. I would patrol on one night and Sergeant Graham on another night. We supervise

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

1st February 1967.

(continued)

the same area. I saw McDonald about two times at the Ethelhart after March 1964. On the occasions I saw him there, it was unoccupied. He never appeared to be the watchman because he never spoke to me about the premises. That is the only reason. I did not know if he was the watchman. I never arrested him for vagrancy. I thought he was at the Ethelhart on lawful purposes. City Centre is owned by the same owner on the same premises. When I saw McDonald there, he was at the front of the Ethelhart premises. I would not agree with you that between March and the night of the fire that McDonald appeared to be the night watchman at the Ethelhart. From my observation, McDonald did not appear to be performing the functions of watchman for both premises. I say so because he is always based at the City Centre Building. That is where I found him most of the time. By always I meant most of the time. Most of the time that I saw McDonald at nights he appeared to be based at the City Centre. By most of the times I mean about 90%. During the other 10% I still tied him with the City Centre. During the other 10%, I considered him to be based at the City Centre. The 10% is when he is not on the City Centre building. That is when I see him. He is mostly on the roof of City Centre. The 10% I would see him either at Ethelhart or on the street in front of the City Centre Building. It wasn't every occasion that I passed City Centre that I saw McDonald. I would see McDonald about once or twice weekly when we visit the premises on our patrols. If I passed the City Centre eight times per month, I would see McDonald maybe six times for the month. For a month I would pass the City Centre on patrol at nights more than four times per month. I last passed the City Centre before the fire about three nights before. Before the fire, I went up to Ethelhart within a week before the fire. Between early March and the fire, I went to Ethelhart about fourteen or sixteen times.

Re Cross-examined by Mr. Robinson

We started visiting Ethelhart because of the reports of theft and vagrancy. In the early shifts the vagrants were mostly looking on the

cinema show. The cinema has shows nightly.

Adjourned to 2.00 p.m.

Mr. R. Williams of Counsel applies to amend the statement of Claim, paragraph 1 by inserting after the figures 1958 the following "alternatively by a contract of Insurance dated 25th July, 1958." And to add in paragraph 2 after the word Insurance, the following "alternatively the said contract of Insurance." And to add in paragraph 5 after the word policy in line 3, the words "alternatively the said contract of Insurance." And to add as paragraph 6 to the amendment to Reply and Defence to Counter Claim the following:

6. The plaintiff further says that on 25th July 1958 when the defendant issued a Cover Note of that date relating to the said premises, the defendant knew that the said premises were then unoccupied and would so remain for six or eight weeks in the premises. The Plaintiff will contend that the defendant cannot rely on the said condition 8(b) referred to in paragraph 3 of the Defence and Counterclaim, or has waived its rights thereunder. I submit re the amendments that this issue as to whether condition 8 can be relied on by the defendant or not has been before the Court from the opening of the case, and evidence has been led by both sides on this point and indeed Mr. Mahfood in his opening has dealt with it. Your Lordship has intimated an interim view on the matter so there is no question of surprise on the defendants on this matter and they are not embarrassed to prejudice in anyway by this amendment.

In Mr. Coore's opening, he made the point that the wording of the Cover Note purports to contain all the terms of the contract between the parties and the sending of the policy at a later date was of no effect. This amendment is only a matter of formality so as to cover the point which is already before the Court. Mr. Mahfood in opening agreed that the issue is whether Condition 8 applied. No question of surprise or embarrassment and no question of costs would arise.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

1st February 1967.

(continued)

Mr. Robinson opens re first amendments.

It seems that plaintiff is seeking to have his claim on two separate contracts by way of alternative clauses because if the amendment were granted, the claim would read that either by a policy dated 12th December 1958 or by a contract dated 25th July 1958, the defendant company agreed to insure the Ethelhart building. Then they go on to say that either the policy dated 12th December, 1958 or the contract of insurance dated 25th July, 1958 was renewed from year to year as in paragraph 2 if amended. Then they go on as in paragraph 5 if amended. It seems strange if they didn't know which is the contract they have with us so how can we know. They must elect under what they are suing so we are able to answer. It seems to me they are trying to abandon their claim on the policy and substitute a Cover Note. Mr. Coore states in his opening he is relying on a policy. The amendment granted at the opening. The whole of Mr. Mahfood's opening was based on the pleadings as amended. That is whether clause 8 could be relied on. Plaintiff in pleadings are relying on the policy, but say clause 8 should be excluded. After Mr. Coore states it is the policy they are relying on at this late stage after their case is closed and after our main witness has given evidence and been cross-examined and released, they now apply to amend to introduce the very position I said they were trying and intending to do at the opening of the case. There is another angle. It is all very well for Counsel in his opening to say what his case is when it is the evidence in the box which shows what their case is. The plaintiff categorically told this Court that Mr. Thwaites was his agent in this matter and Mr. Thwaites is the only person who can say what he understood the position to be. What is important is what Mr. Thwaites said in evidence and that is when we find out what their case is. Mr. Thwaites said he knew defendant policies contained Condition 8. Mr. Thwaites for plaintiff stated I accepted the policy as superceding the Cover Notes and that is the case for the defence. The application to amend the pleadings is contrary to the evidence they have led. The evidence does not support the application.

Mr. Williams replies.

First point in effect made by Mr. Robinson is that plaintiff is suing in the alternative and that we must elect on which contract we are suing. My answer, no party need rely on one contract. He can protect himself by suing in the alternative. There is no substantial difference between the alternatives in a negligence case.

Re the second part of Mr. Robinson's opening that Mr. Coore said he was relying on policy of 12th December, 1958 - nevertheless that does not preclude a plaintiff from later widening his case to rely on an alternative. A plaintiff or their counsel can change this case later in the proceedings. Mr. Coore certainly adverted to a position that he was saying that the sending of the policy on 12th December, 1958 had no effect in law. He stated that what was renewed was the policy of insurance which came into being on 25th July, 1958 i.e. the Cover Note. No policy was in existence on 25th July, 1958. My friends were altered to this very point that the contract was entered into on 25th July, 1958. The amendment only formalising something already before the Court. The Court could not decide one of the vital issues in the case without the amendment. If they wish an adjournment we will consent - of they wish to recall witnesses we will consent.

Court Rules:

The question whether the contract is in being from the issue of a Cover Note is to be gathered from the evidence notwithstanding the policy may or may nor supercede the Cover Note. Plaintiff is therefore at this stage allowed to amend to sue in the alternative. Amendment granted to paragraphs 1, 2, and 3 of Statement of Claim.

2nd February 1967 - Resumed

2nd February 1967.

Mr. R. Williams

Re application to add paragraph 6 to the amendment to reply and Defence to Counterclaim.

In the Supreme Court of Jamaica

Judges Notes of Evidence

2nd February 1967.

(continued)

The point only crystalised when the defence gave evidence and arose during the course of the case. Thus the application is made so that the plaintiff is not debarred from arguing a legal point at the end of the case, which legal point only arose during the case.

Mr. Robinson replies:

I again say that if something comes out in evidence which throws a new light on the situation which the plaintiff did not know of before then that offers an excuse for seeking leave to amend during the course of the trial, but when my learned friend said that he could not make the application until he heard Mr. Rowland's evidence - because Mr. Rowlands only confirmed what Mr. Thwaites had said, Mr. Thwaites said "we were told that the nurses were going to occupy the building and that would be one of the factors taken into account in fixing the rates." Later he said "when I dismissed the matter with Mr. Rowlands it was explained that the premises were at the moment unoccupied, but were expected to be occupied by nurses depending on the lease to Government." Plaintiff had given me that information and I made full disclosure so that they would decide to take the risk. Mr. Thwaites further said "it was in the light of that information that defendant decided to take the risk for £40,000." Mr. Thwaites further said "the discussion with Mr. Rowlands included the risk of covering the building for a few weeks unoccupied until the nurses came in," If application is made on other grounds, I may not oppose it. I am opposing the amendment formally because plaintiff has laid no grounds for justifying the application. Court states the matter has already been included in the pleadings especially the amendment to reply and defence to Counterclaim and therefore legal arguments could be adduced on the lines of the addition of paragraph 6 as suggested even if the amendment is not granted. Amendment by adding paragraph 6 would therefore add nothing except to clarify what plaintiff proposes to argue. Amendment therefore granted.

Mr. Mahfood states:

In view of these amendments of the Plaintiff's Pleadings which have been allowed very late in the trial particularly the first three amendments which were allowed yesterday, it may be necessary for us to ask for an adjournment to consider the question of what further evidence we should bring if necessary and what amendments are necessary to our Pleadings - in view of the multifarious amendments to plaintiff's pleadings. In order to save time we won't ask for the adjournment now, but ask for leave to file an amendment to our Defence and Counterclaim if we should consider it necessary because of the amemdnemts granted to Plaintiff. (Mr. Coore consents or agrees to the application to amendment being confined to the amendments granted yesterday and today - Mr. Mahfood is in agreement).

DONOVAN MAGNUS DEPASS SWORN

I am a Manager of Atlantic and British Insurance Company Limited, and I reside at 21 Myers Drive, Kingston 8, St. Andrew. I have been Manager of Defendant Company since November 1st, 1962. Prior to that, I was the Manager of the Delta Insurances Limited who are agents of the Dominion Insurance Company Limited of London, and I had that position for about two years.

Prior to that, I was the Superintendent of the Accident and Marine Department of the Insurance Company of Jamaica Limited. As Manager of Defendant Company, I am responsible for the underwriting. I knew that Ethelhart Hotel was one of the risks issued. I didn't visit the Ethelhart Hotel before the fire. The Insurance of the Ethelhart became due for renewal on 24th July, 1963. At that time I knew the premises were occupied by nurses. Prior to the renewal date, I was contacted by Dyoll Limited about the question of the renewal of the policy. Mr. Thwaites contacted me. He asked if we were prepared to renew the policy on a five year contract basis, and to allow the insured an additional 2½% discount. This Policy Exhibit 5 is the policy he asked to be renewed for a five year period. I agreed.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

2nd February 1967.

(continued)

At that time I bore in mind the fact of the occupancy by the nurses. I did not know at that time that the government was under notice by the plaintiff to vacate the occupancy by the nurses. No one informed me either that the nurses were under notice or that plaintiff was contemplating giving them notice. At that time I did not know of Mr. Marzouca's plans to carry out extensive operations to the premises. I would not have made that agreement with Mr. Thwaites to renew the policy for five years if I knew the nurses were going to vacate the premises. I would not have made that agreement with Mr. Thwaites to renew policy for five years if I knew that there was going to be extensive alterations to the premises.

Cross-examination continued

I say I would not renew because the building would be vacated and alterations being carried out would automatically increase the fire hazards. Non-occupancy would increase the fire hazard by the fact that no one would be present in the event of a fire starting to spread the alarm. Also the possibility of it being opened for any malicious person to set fire to the premises. The size and construction of the building would be relevant to these things. It was a large building of second-class construction. I subsequently learnt that eleven rooms were being converted into six flats. I first learnt that these alterations were going on when I first visited the premises two days after the fire. I subsequently learnt that these alterations went on for a substantial period, between six and eight months prior to the fire. This involved building kitchenettes, lowering floors, painting the premises, attaching formica to counters and building cabinets on the premises with the collection of wood shavings and other matters. In my view these activities would increase the risk of loss or damage by fire. With this knowledge, a lot would have to be done before I would agree to accept the renewal for any period at all. I would have to know the duration of his proposed work, the name of the contractor who was carrying out the work, and the extent of the work that was going to be carried out. I also would have made a personal

survey of the premises at that stage. If I had agreed to accept after doing all these things, I would put on certain warranties and insisting that certain things should be done during the currency of the policy and also a substantial increase in the rates. In my view these things would be necessary to minimise the consequential increase of risk due to non-occupancy and alteration work. That is if I had to accept it. In deciding whether to accept the risk like that, I would have had to consider the desirability of sharing the insurance risk with others. At that time I had the vast bulk of the insurance.

On 20th May, 1964 before going to work, I heard on the radio that the Ethelhart Hotel was destroyed by fire during the night. On my arrival at the office, I was officially advised by Mr. Thwaites on behalf of Mr. Marzouca of the fire. I agreed with Mr. Thwaites that Graham Miller & Company should be appointed Claim Adjustor. I also arranged with Mr.Thwaites to go to Montego Bay the next day to see the damage. We both went by car to the site and inspected the ruins. We were there for about half hour. Mr. Peter Bates was there at the time. The first thing that struck me was that the place was completely burnt. I then noticed charred stacks of formica and a number of gallon size tins in the rubble. I picked up all of those tins and rubbing off some of the dirt and ash from one of the tins, I noticed the words Highly Inflammable on the bottom of one of these tins. I pointed it out to Mr. Thwaites and Mr. Peter Bates. I left the site with Mr.Thwaites to plaintiff's house, there I saw Mr. Bates arriving. Plaintiff was in bed. Plaintiff welcomed Mr. Thwaites and asked him who is the Atlantic & British Insurance Company. The endorsement and other papers from my compamy was on his bed. Mr. Thwaites told plaintiff "they are a good company and are friends of his." Mr. Thwaites then introduced me to plaintiff as the Manager of the Company. Plaintiff asked Mr. Thwaites if he could try and rush the settlement of the claim for him. Mr. Thwaites told plaintiff it has to be investigated first. I never discussed with anyone there the merits or demerits of the claim. I didn't because it

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

2nd February 1967.

(continued)

is not normal for Insurance people to do anything until receiving the Adjustor's report. Subsequently Mr. Marzouca phoned our office often about his claim. I had never told plaintiff that there was a 99% certainty of getting the claim. I told him that investigations were being done by Graham Miller and Company, and I had not yet got the report. This is plaintiff's claim form with an attachment. The claim form is signed by Mr. Marzouca. This is plaintiff's claim on us arising out of the fire. Tendered in evidence

Exhibit 14

Exhibit 14. Lenbar Limited were mortgagees under an endorsement to the policy. That endorsement is this, Exhibit 6 (d). The policy had attached to it our usual conditions for mortgage endorsement and that is attachment (c) to the endorsement, part Exhibit 6 (d). Under that endorsement my company is liable to indemnify the mortgage if the mortgagee is not aware of the breach. Lenbar Limited made a claim for indemnity under the policy and supported it by asserting that if there was a breach they were not aware of it. I settled with the mortgagees on the basis they were not aware of any breach. These letters dated 31st December, 1964 from Clinton Hart & Company to Atlantic & British Commercial Insurance Company. Next letter dated 5th March, 1964 from Clinton Hart & Company to Atlantic & British Commercial Insurance Company Limited. The third letter is from Clinton Hart & Company to defendant Company's Solicitors dated 2nd April, 1965. These letters set out the claim of the Mortgagees in the way I previously described. This is a paid cheque dated 31st March, 1965 from defendant Company to Lenbar Limited for £7,722.0.2. Three letters and

Exhibit 15

cheque together Exhibit 15. I see this Cover Note, Exhibit 1. At the time I renewed the policy for five years in July 1963, I was not aware of this Cover Note. I never discussed any Cover Note with Mr. Thwaites when I had discussions with him for renewing the policy for five years. Mr. Thwaites was asking that the policy be extended for five years. If Mr. Thwaites had asked me to extend the Cover Note, Exhibit 1, or any Cover Note for five years, I would not have extended the contract of Insurance. Mr. Thwaites never asked me to exclude any of the conditions in the policy Exhibit 5 when he asked me to renew it for five years. If he had asked me to extend the policy Exhibit 5, and exclude a condition of the policy

like Clause 8, I would not have extended the policy. When the Claim Exhibit 14 was made, it was made under the policy, not the Cover Note. I was aware of this when settling with Lenbar. Up to the time I paid Lenbar, Mr. Marzouca never said Exhibit 5 was not the contract of Insurance covering the Ethelhart premises. If I was aware that plaintiff was contending that the Cover Note was the contract, I would not have paid the money to Lenbar.

Cross-examined by Mr. Coore:

I first discovered the nurses were not in occupation when I read the Gleaner report the day after the fire. I confirmed this two days later on my visit to Montego Bay. I first discovered that alterations were going on when I went to Montego Bay two days after the fire. I was quite satisfied at that time that that was the position. For a period of several months after the fire, plaintiff telephoned me on several occasions as to when settlement of the claim would be made. The gist of my replies on each occasion was that I couldn't say as the matter was under investigations. That was the truth. You would be right in concluding that for a period of several months my Company hadn't made up its mind whether it was going to pay the claim or repudiate it. The Company eventually decided to repudiate the claim towards the end of 1964. Looking on this letter Exhibit 4 from my Company. I see this letter referring to our declining liability on the policy. Letter dated 5th April, 1965 and referring to 30th December 1964 declining liability.

Investigations were proceeding. Investigations by the Assessors as to the amount of loss. The principle whether to repudiate or not did not depend on the quantum. The decision was held up because we were at the same time getting legal advise from our solicitors. We had to get a report from the fire brigade and the police, also the Assessors report. I eventually got all these reports before the end of the year. I am not contending now that there was any deliberate setting of the fire. I am relying on Clause 8 (a) and 8 (b) of the policy Exhibit 5. All the facts about Clause 8 (a) and (b) to some extent were known by me two

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

2nd February 1967.

(continued)

days after the fire. I knew the nurses weren't there. I knew alterations were going on and the extent of the alterations. I knew of the existence of Clause 8 (a) and (b) from long ago.

I wouldn't say that it was after I discovered there was no arson that I decided to rely on Clause 8 (a) and 8 (b). I wouldn't say that was the sequence of events.

Until an Insurance Company has all the reports they say nothing.

In any fire the question of arson is never ruled out. Repairs and alterations increase the risk of loss from fire. That was obvious to me two days after the fire. I never repudiated at the time. We had no claim then. I had a perfect answer under 8 (a) and 8 (b). It is not a matter of keeping it to myself. We had to get in our reports and legal advice. The statement about the increase of risk was my view at the time of my visit to Montego Bay after the fire. It is not every alteration or repair to a building that increases the risk of fire. It is a matter of degree and opinion. I wouldn't know if experienced assessors would disagree in a particular case. I do not claim to be an experienced assessor. I am not an expert assessor. I am an expert at assessing what increases the risk of fire. Experts do not usually differ in their views as to whether particular repairs will increase the risk from fire. It can happen. The contract of Insurance was renewed in 1963 on the basis it would continue for five years with an annual renewal. What was being renewed was the policy of Insurance whatever its terms might have been that was in force at end of June 1963. That policy purported to come into effect as from 24th July, 1958. I was not with the Company in July 1958. I did not know that in July 1958 Ethelhart was an unoccupied building.

In July 1958, Mr. Fred Rowlands acted for the Company. When I was agreeing on the renewal of the policy in June 1963, I made no enquiries from Mr. Rowlands what the position in regard to Ethelhart in July 1958. It was much more

than a dozen formica sheets. I saw it was easily a hundred. It would surprise me that only eleven sheets of formica was required for the work. I do not regard formica is inflammable. It gave me an indication of the work that was going on there.

Adjourned to 2.00 p.m.

2.00 p.m. Still on Oath.

Re Cross-examined by Mr. Mahfood.

My Company regards a denial and repudiation of liability under a policy of this size a very important thing. I take into account before repudiation and denial of liability. First we seek legal advice. We make thorough investigations pertaining to every aspect of the claim. The question of arson on the part of the insured and the situation of the risk at the time of the fire. There are many facts to be investigated. I was referring to policy F.7006 in the name of James Marzouca. At that time in June 1963 the terms, conditions and exceptions were the 19 conditions appearing thereon as well as the endorsements thereon. As far as I was concerned I understand plaintiff wanted to renew the Insurance on the Ethelhart building occupied by nurses. When Mr. Thwaites asked me to renew the policy for five years, I understood Mr. Thwaites to be referring to that same policy.

DENNIS HUGH LALOR SWORN

I reside at 7 Sailsbury Avenue. St.Andrew.

I am an Insurance Company Manager. I am in charge of Dennis Lalor Insurance Company Limited. I have been engaged in Insurance business for fourteen years. I am an Associate of the Chartered Insurance Institute, that is the highest diploma below the Fellowship. I operate an agency representing the Contingency Insurance Company of London. The Northern Insurance Company Limited, the Employers Liability Assurance Corporation and Merchant Marine Insurance Company Limited, all of London.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

2nd February 1967.

(continued)

I am responsible for all the underwriting decisions of these Companies for business and settlement of claims in Jamaica. I was recently the Chairman of the Jamaica Fire Insurance Company, the Jamaica Motor Assurance Association, and the Jamaica Insurance Advisory Council. That Council advises Government on the proposed legislation affecting Insurance in Jamaica. Looking on Exhibit 5. Condition 8 (a) and (b). I am familiar with that condition in insurance policies. My policies contain a similar condition. Condition 8 is a condition my companies have been using in Jamaica for a number of years. A large building, second class construction originally as a hotel with 11 rooms being connected to 6 apartments requiring woodwork being done on premises, the wood floor being lowered 2 inches, bathrooms being converted into kitchenette, cabinets being constructed on premises, formica being attached with certain adhesives, and the work proceeding for a period of about 6 to 8 months and not yet finished - in my view the conversion work having regard to these factors increase the risk of loss from damage by fire.

My reasons for that view :-

Firstly any building of class 2 construction which require repairs would immediately cause me to think about the nature of the repairs and the person carrying out the repairs. If these repairs necessitated large scale woodwork, I would before accepting the risk require to know the extent of the wood shavings which would be on the premises at any one time. Also I would wish to know the quantity of paint or other inflammable material which would be stored on the premises at any one time. The period of the alterations would also affect my thinking on the basis that the longer the period, the more likelihood of these factors contributing to or causing fire. Any period over 30 days would attract my serious attention. If alterations are to take place, I make it a warranty of the Insurance that wood shavings be removed twice per day. The reason for that is that wood shavings when presented to a naked light are a very real source of fire and the

more workmen I have in a building, the more likely chance of the wood shavings coming into contact with a naked light such as cigarette ends or matches or as in most cases the fire which is used to melt glue for joining of wood work. My view of the situation where there is conversion work you have described has gone on for a period of about 6 months - it is my opinion - that work would constitute an increase risk of loss or damage by fire. Assuming nurses are occupying a place as a residence and they depart, and during a period of about 8 months no one is living in the premises my views in regard to increase risk of damage or loss by fire, my view is that there is an increase risk of loss. Having regard to the absence from the premises of a number of people who were originally there, there would be increase risk of damage.

Question Having regard to the work that was being carried on, on the premises and the departure of the nurses from the premises, what is your view on the question of the increase risk of loss or damage by fire.

Answer Having regard to the work being carried out, it is my view that there was an increase in the risk of loss by fire and having regard to the absence of the number of people envisaged, it is my view that there was an increase risk of damage by fire.

Cross-examined by Mr. Williams

None of my companies are financially interested in this claim. None of my companies have any connection with defendant company. All my companies like the defendant company have the word insurance in them. It is not in the interest of Insurance companies as a whole that Condition 8 should be widely interpreted. I say so because you imply that insurance companies set out to protect themselves. Insurance companies protect themselves and also their clients. I agree with you that Insurance companies set out to protect their clients. In

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

2nd February 1967.

(continued)

providing insurance for their clients, they attempt to protect themselves against any change in risk which might afterwards arise.

Question Doesn't it suit Insurance Companies to have a Clause such as Clause 8 interpreted widely so that if in their view, there is any increase in risk, they can rely on that wide interpretation of Clause 8 to repudiate liability if they so wish.

Answer No. Because in my experience Insurance Companies do not rely on wide interpretations to deny liability to their client.

Question Do they rely on narrow interpretations

Answer Not necessarily.

Question What do you think the proper interpretation by the Insurance Compamy should be in regard to Clause 8.

Answer I am not in a position to say. I have had discussions with other Insurance Companies about Clause 8. During those discussions I have never arrived at any consensus of opinion as to how Clause 8 should be interpreted. I have never heard it advocated in insurance circles that Clause 8 should be interpreted widely. I have not recollected that it being advocated in the Insurance circles that Clause 8 should be interpreted narrowly.

Question What is your own view of how Clause 8 should be interpreted?

Answer My view is that it depends entirely on the circumstances.

The circumstances I refer to are :-

Where the breaches complained of are, of a serious nature or of a minor nature. If it was of a minor nature, my view is that that Insurance Company should not rely on Condition 8.

If of a serious nature, they should be able to rely on Condition 8.

The best Insurance official is the one who has personal and detailed knowledge of the circumstances of the alleged change of circumstances. I have no personal knowledge of the change of circumstances in this case. Whether there has been a change of circumstances sufficient to say whether there has been a change of risk of damage or loss from fire would depend on one's knowledge of the circumstances existing before the change. I have no detailed knowledge of the circumstances prior to the alleged change of circumstances in this case.

Question Would you agree that there were a number of other matters you would like to know about before expressing a concluded opinion as to whether there was an increase risk of loss or damage by fire?

Answer No. It is not necessary to know the number of nurses who were at the premises to satisfy me that there has been a change in the circumstances existing prior to the fire occurring to increase the risk of loss or damage of fire. If 500 nurses were packed in, as compared to 20 nurses, those circumstances would be relevant. it is not necessary for me to know the number of nurses in occupation for me to express the opinion I expressed.

3rd February 1967 - Resumed

3rd February 1967.

10.00 a.m.

DENNIS LALOR SWORN

CROSS-EXAMINED BY MR. WILLIAMS CONTINUED

I agree that before one can offer an opinion, on whether the alterations being carried on at the Ethelhart increased the risk of loss or damage by fire one would have to know

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

3rd February 1967.

(continued)

a number of things.

(a) One would have to know the nature and extent of the previous occupancy.

(b) the nature of the alterations being carried on,

(c) the identity of the contractor,

(d) the amount of woodwork being done,

(e) the extent of the wood shavings,

(f) the quantity of paint or other inflammable materials being used,

(g) the period of the alterations. I do not agree that the speed at which the alterations were being carried out would be too relevant.

(h) whether or not open fires being used to melt glue for woodwork.

In regard to (a) if for instance the building was previously occupied as a dynamite store as opposed to a residence.

Assuming the previous occupation was residential, I would want to know the identity of the residents. I would want to know the number of residents. I would also want to have some idea of their habits and whether they as individuals had suffered previous fire losses. By identity I have in mind what type of use they propose to put the building to in other words, do they propose to use a lot of open fires for cooking, do they propose to use a lot of electrical equipment. For a dwelling I wouldn't worry too much as to whether they had a lot of inflammable material around them. I would also want to know the occupation of the residents whether they were children, rastas or nurses. All I know about the extent and occupation of this building is that it was occupied by nurses.

Re (b) - the nature of the repairs. I would want to know whether this involved large-scale removal of boards, what possibility

there would be of electrical wires shorting. What precautions generally had been taken to keep the place tidy. What I know about the alterations that were going on at the Ethelhart is only what Mr. Mahfood said to me yesterday. It was on the basis of what Mr. Mahfood told me that I mentioned an opinion. I don't know the identity of the contractor. I don't remember if that question was not put to me by Mr. Mahfood.

Re (c) - It is important to know not only the name of the contractor but his competence. His competence being most important.

Re (d) - It would be necessary to know the amount of woodwork by the way of sawing, shaving, or smoothing or planing. The amount of actual putting together of woodwork. The amount of wood being used would have a direct bearing on the amount of sawing and planing.

Re (e) - The extent of wood shavings - the quantity or situation of the shavings in relation to open fires. I would want to know two things - the quantity of wood shavings and the relation to the open fire.

(f) Re the quantity of paint. I would want to know the quantity being used and where they are stored.

(g) Re the period of the alterations. Whether 100 men were working every day, or two men every other day would be ancillary to my main requirements in regard to the nature and extent of the alterations.

(h) I would also want to know if any naked flames are being used whether to melt glue or for any other purpose. I would agree that before anyone can offer an opinion as to the absence of the nurses from the Ethelhart increasing the risk of damage from fire, one would also have to know a number of things. These would include the nature and extent of the occupancy of the building with similar considerations as I dealt with already when dealing with the question of alterations. I would also have to know the nature and extent of the occupancy if any of the building after

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

3rd February 1967.

(continued)

the previous occupants left. On my own evidence I have not mentioned opinions in this case without having the necessary material before me on which to base those opinions. I haven't given my opinion without knowing a number of things which I told the Court one ought to know before giving an opinion. I have not mentioned an opinion as to the absence of nurses increasing the risk of damage by fire without my knowing a number of things which I have admitted I should know before passing an opinion.

Re Cross-examined by Mr. Robinson

It is a matter of policy of Insurance Companies that if a breach of Condition 8 is minor, they don't rely on that condition, but if major, they ought to be able to rely on it. On the question of whether there is a breach at all, be it major or minor, the Insurance Companies seek legal opinion and do not rely upon the opinion of their own officers. On the question of how Condition 8 should be interpreted they seek legal opinion in each case. In being able to make up its mind as to whether a breach is of a minor nature, or of a serious nature that involves extensive investigations. The investigations may be long or short depending on the circumstances

Mr. Williams objects to question as to investigations being long or short as it does not arise through this witness.

Mr. Robinson It does arise in so far as I have already asked, and in so far as the answers I have already received. The answers given by this witness in reply to questions in cross-examination as to how Clause 8 should be applied and in what circumstances Insurance Companies should enforce it and in particular the answer of the witness that if a breach was of a serious nature as opposed to a minor nature, Insurance Companies should have the right to rely on Clause 8 and it was a matter that depended entirely on the circumstances.

Court rules that on a proper interpretation of the cross-examination the question does not

arise in regard to whether the investigations were lengthy or short.

To determine whether a breach is minor or severe, I would have to do something:-

(1) To employ somebody competent and Secondly - to submit his findings to our legal advisers.

It is not essential that I should have information in relation to each and everyone of the 8 or 9 matters suggested by Counsel for the plaintiff. In one of my answers the emphasis was on the type of occupation when I referred to dynamite store or nurses. When I was told that the building was of class 2 construction, that told me a lot more than the expression itself would convey to a layman. For my company, a building of class 2 construction is described as having walls of concrete nogging or brick or clay or hollow concrete in which the total amount of wood does not exceed 50% of the wall area. I do not think that is peculiar to my company. That applies to the Companies belonging to the Fire Association. Class 1 construction are buildings constructed of reinforced concrete walls in which there is no wood except for window panels and door frames. What I heard about the alterations being carried out told me what I want to know of the nature of the operation being carried on.

Question Would that information meet your requirements as to the amount of woodwork being done?

Answer Generally - yes. For the purpose of the opinion I expressed in this particular case, that information was sufficient as to the amount of woodwork being done. Having been told that wood floors were being lowered etc., and cabinets being made on premises and having regard to the number of rooms that were being altered would give me sufficient information as to the extent of wood shavings to enable me to express an

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

3rd February 1967.

(continued)

opinion. Having regard to the amount of rooms that were being altered, the apartments being altered and cabinets being made and formica being applied with adhesive that would give me a general idea as to how much paint and other inflammable material would be involved to enable me to express the opinion I expressed in this case. I was told that the work had been proceeding for 6 to 8 months and was not yet finished. I required no further information as to the period of the alteration. All the above gave me sufficient information as to the likelihood of naked flames being involved in the work on those premises. Prior to anything being done is the time an Insurance man has to make the decision whether an increase risk of loss or damage by fire is involved. That is when he decided whether to carry the risk or to increase the premium. Having been told the premises were being used for nurses as a residence, I wouldn't want to know the number of nurses. I would expect the premises not be overcrowded having heard that it was nurses residence. I gave a statement to the solicitors in answer to particular questions put to me. The fact that I didn't know the identity of the contractor wouldn't affect my opinion. One would require to have the information in regard to the details as to nature of occupancy prior to affecting the policy.

Question Is there a difference between the extent of knowledge you require before deciding and accepting a risk as a prudent underwriter and the extent of knowledge necessary to enable you to express an opinion that on certain facts there has been an increase of risks?

Answer No. Once an Insurance man decides after getting information that premises are being used as nurses residence and does not concern himself with how many use hair sprays. In the Insurance world nurses are

associated with a sense of responsibility. Telling me that wooden floors were being lowered by 2 inches that suggests to me a large-scale removal of boards. Converting of 11 rooms would suggest a large-scale use of paints. An open fire is any flame which is not prevented from coming in contact with any person or thing. A flashlight is not naked flame. A lighter is. A cigarette butt if lighted is a naked light. An open fire includes a cigarette that is lit. After all the matters Mr.Williams put to me, the absence of the nurses and the carrying out of the work at the premises created an increase in the risk of loss or damage by fire.

PETER GEOFFREY BATE Sworn.

I live at 3 Brewery Avenue, Kingston 10. I am a Director of Graham Miller & Co. (Ja.) Ltd. It is a firm of Chartered Loss Adjusters. It has a parent Company in England. The Jamaica Company is one of several all over the world. Chartered Loss Adjusters are the highest qualification that any firm of Insurance Claim Adjusters can have in England. I am an associate of the Chartered Insurance Institute. That is just one step below the highest academic qualifications one can have in the Insurance world. I am a Fellow of the Chartered Institute of Loss Adjusters. That is the highest qualification in the field of Loss Adjusters.

On the 20th May, 1964, my firm was appointed by defendant Company as adjusters in regard to fire that occurred at Ethelhart, Montego Bay. I personally proceeded to Montego Bay and set in motion the commencement of investigations after the fire. On the following day I again visited Montego Bay and on that occasion I saw the plaintiff in this case - at his home. I discussed the fire with plaintiff. In the course of that discussion, Mr. Marzouca said he was very incensed about a report in the Daily Gleaner that a watchman at the Ethelhart Hotel had been dismissed shortly before the fire. He said that this could not be true for the reason that he did not have a

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

3rd February 1967.

(continued)

watchman at the hotel. Plaintiff told me that the annex of the hotel was in the course of conversion into an apartment block. That he started the conversion in November 1963 or had then gone to Miami to buy the furniture for the apartments. That on arrival in Miami, he had been taken ill and only came back to Montego Bay in January 1964. That visit was part of my investigations. The investigations continued throughout most of the remainder of 1964. Subsequent to this first visit after the fire, I saw plaintiff on several occasions. Plaintiff told me that the furniture from the annex had been placed in the main building which had been locked up and that he had the key. I submitted a final report towards the end of 1964. After submitting this final report, I went with Mr. Mervin Phillips to see plaintiff on 30th December, 1964 at Montego Bay. Mr. Phillips a Director of the defendant Insurance Company. On that occasion 30th December, 1964, Mr. Phillips spoke to plaintiff and told him that the Insurance Company could not admit his claim and outlined the reasons for this. Subsequent to that visit, I saw plaintiff on several occasions. I recall seeing plaintiff on 25th August, 1966 at Montego Bay in his office. He discussed his claim and matters arising out of it.

On 30th December, 1964 when Mr.Phillips and I saw plaintiff, plaintiff said a record was made of the discussion. I did not see a record being made. Plaintiff told me on 25th August, 1966 that he made a secret tape recording of the meeting on 30th December, 1964, I know Mr. DePass. I recalled visiting the ruins some two days after the fire. Mr. DePass and Mr. Thwaites were there. I recall Mr. DePass pointing out that there were a large amount of similar tins amongst the ashes. Some of these have markings indicating that they had contained a fixative or cement and marked highly inflammable. Mr. DePass pointed them out to me. He picked one of them up and showed it to me. This claim form Exhibit 14 shown to me. I forwarded the blank claim form through the post to plaintiff and it was returned to me through the post by Dyoll Limited with a covering letter signed by A.M. Thwaites - letter dated 1st June 1964.

Adjourned to 2.00 pm.

Still on oath.

Examination in Chief Continued

On 25th August, 1966, I saw plaintiff in Montego Bay and he told me of his having a tape recording of an interview on 30th December, 1964. Seeing him on 25th August, 1966 had nothing to do with this matter. Plaintiff was the proprietor of City Centre Building and my visit had to do only with City Centre Building. These investigations carried in regard to the fire. I personally interviewed a large number of people. I interviewed the police on several occasions, the fire brigade, the Jamaica Public Service Company and many other parties. I know Mr. Chambers the Manager of the Montego Bay Hospital. I went to interview him to get information about the contents of the hotel and its occupancy. I know Mrs. Peter Charley. She is the occupant of a house adjacent to the hotel. When I was conducting my investigations I saw her leaning over a fence between the two properties. I interviewed her in pursuance of my investigations. They were two teen-age daughters of hers whom I interviewed also. Other members of my company pursued investigations on the lines I did in the Montego Bay area. Mr. Marzouca was more forthright than you when you used the word downright lie re the watchman and the Gleaner report. I would say I am an expert adjuster with a knowledge of Insurance. I am an expert adjuster with 19 years experience. The work of an adjuster is defined as that of a Judge and Jury in the field, and he is instructed by an Insurance Company to attend at the scene of a loss to make sure that everything is being done to safeguard life, limb and property. He is required to investigate the cause and circumstances of the loss. To examine claims arising from the loss and to submit a report to insurers covering all facets of the loss and the claims arising from it. In investigating the circumstances of the loss that requires me to examine the terms of the policy. I am familiar with the terms and conditions of Insurance policies in Jamaica. I am familiar with the terms and conditions of the defendant Company's policies. I was not familiar with the Ethelhart

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

3rd February 1967.

(continued)

premises before the fire.

Question Assuming?

Answer I have to look into the terms and conditions of the policy to be able to differentiate between those facts that are material and those that are immaterial. Insurers often look for advice to their adjusters on this matter. For advice on policy terms. I had been asked by a number of Insurance Companies to give advice as to whether their policies covered the Flora Damage. I was an Insurance expert. That was the subject of policy controversy at the time. I accepted the assignment and I did give advice. I considered myself competent to give the advice. The Tariff Companies asked me to give that advice. I do not know if it is a normal practice for Insurance Companies to ask adjusters to give advice on matters of that sort. It was not a new experience for me. In my investigation of this particular case, re Ethelhart Hotel, I had to give attention to Condition 8 of this policy Exhibit 5. I had to give considerations to the implications of Condition 8 in relation to the facts as I found them on investigation. In submitting my report to the Company, I had to deal with Condition 8 as it applied to the facts as I learnt them in my investigations. After I submitted my report to the Defendant Company, they in my presence denied liability to plaintiff. At that interview with Mr.Phillips, plaintiff and myself on 30th December, 1964, Mr. Phillips gave plaintiff reasons. Mr. Phillips at that interview dealt specifically with Conditions 8(a) and 8(b). Assuming these premises to be a Class 2 construction. I am not familiar with what is called a Class 2 construction.

Assuming that building was occupied by about 20-30 nurses by virtue of a lease to Government by plaintiff for the building to be occupied as a residence for nurses. Assuming it was so occupied for some years until 30th September, 1963. Assuming that after 30th September, 1963 the buildings remained unoccupied in that nobody lived in them until 20th May, 1964, when they were destroyed by

fire. Assuming as from around the end of November 1963 work of reconstruction was commenced in the Annex portion of the building whereby 11 rooms were being converted into 5 self-contained apartments requiring wood-work to be done on the premises requiring the wooden floor to be lowered by two inches, requiring bathrooms to be converted into kitchenettes, requiring cabinets and counters for the kitchenettes to be made on the premises, requiring formica to be laid on the counter tops and kitchen, cabinets with highly inflammable adhesive, requiring painting. That, that work was proceeding for a period of 6 to 8 months up to the night of the fire. Assuming all these things, these circumstances in my opinion would alter the risk of damage or loss by fire as against the risk when occupied by the nurses. It would increase the risk. I say it would increase the risk.

One considers three headings :-

(1) Origin of the fire.

(2) Spread of the fire.

(3) Intensity of the fire.

(1) I think that the chances of a fire origination had been increased because of the possibility of uncontrolled smoking, the use of inflammable materials could have given rise to spontaneous combustion.

The use of trade processes such as saulderings and what is called in Insurance circles bad house-keeping - i.e. lack of control.

(2) In regard to the spread, the risk would be increased because of the removal of internal fire brakes such as doors and the presence of inflammable materials.

(3) In regard to the intensity of the fire, the risk would also be increased by the presence of quantities of plywood, chipboard, paint and fixatives. Chipboard is board made of compressed wood chips.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

6th February 1967.

6th February 1967.

10.00 a.m.

PETER GEOFFREY BATE SWORN

EXAMINATION IN CHIEF CONTINUED

Regarding the early discovery of a fire and methods to prevent its spread, the risk would be increased if no one was present, because there would be less possibility of the fire being discovered in its early stages and by the same token, it is more probable that the fire would have got a good hold before it was discovered. Apart from the qualifications I gave you, I am a Fellow of the Society of Loss Adjusters which has its Headquarters in Florida, United States. The letters F.A.I.A. was a Fellow of the Association of Insurance Adjusters. I do not hold that qualification now. I held that when I was in Africa.

Cross-examined by Mr. Williams

I recall sending this document to Mr. Marzouca. It is an Inventory of Goods contained in the Ethelhart Hotel in October 1963. The purpose of sending that Inventory to Mr. Marzouca is because I was endeavouring to establish the value of the contents of the buildings at the time of the fire.

In October 1964 I was endeavouring to discover the value of the furniture in the holding at the time of the fire. There was no movement of furniture when the nurses moved out in October 1963. My estimate of the value of the contents at the time of the fire. The inventory in October 1963 would be the same as at the time of the fire. On page 3 of the Inventory dated October 1963, I see that last item is building materials. Those building materials. The Inventory as at October 1963 ends at "4 wash pans as at page 2." That is the fourth item on the list on page 2. The last item on page "buidling materials, stones etc." £944. That figure would have been based on information given to me by Mr. Marzouca and which I checked as far as possible. I think the

words stores should have been stoves. I cannot give a breakdown of whatwas included in "Building Materials, Stoves etc." I haven't got a note. I see this bill from V.L. Chensue dated 22nd November, 1963. Mr. Marzouca did show me this bill in support of his claim that certain stoves and water heaters were destroyed in the fire. I cannot recall if I placed the two ticks on it. I was satisfied on the information before me that those stoves and water heaters were destroyed in the fire. The total £540 in this bill is probably included in the item Building Materials and Stoves for £944. This bill from Cecil B. Facey Ltd. dated 11th November, 1963 totalling £145.13.4. was shown to me by Mr. Marzouca in support of his claim. This £145.13.4. is probably included in the item for £944. If we deduct these two amounts we will have approximately £259 which probably is the value of the building materials on the site at the time of the fire. Building materials which had been incorporated in the building at that date would not appear on the list of contents.

Question Would you agree that having regard to the fact that at the time of the fire there was only about £259 worth of materials on site, the amount of alteration work that was proceeding at that time must have been very minor.

Answer I do not agree. In the first place the value of building materials on site. If demolition work was going on there would be no materials on site at all.

On the basis of the work that was pointed out to me as going on I do not agree that the amount of materials on site would indicate that the work was minor.

I think it was brought out already that the work included lowering of floors, removal of partitions, repositioning of doors and preparatory work for repainting and re-decorating. None of this work involves the presence on the site of any building materials. If that work I just mentioned was going on I would consider

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

6th February 1967.

(continued)

it major work. I cannot say whether from the amount of the building materials on site whether major or minor work was proceeding.

I have been in the insurance world for 19 years altogether. All that time has been spent in adjusting. It follows from that that I have no experience in underwriting.

The question of estimating increase of risk comes within the province of a surveyor. Insurance surveyor is concerned primarily with inspecting premises and issuing a report for the guidance of the underwriter. Our letter heads are "Adjusters and Surveyors". I haven't come across any degrees or qualifications for surveyors: Surveying work in the Insurance field.

My qualification includes competence as a surveyor. I consider myself an expert surveyor in the insurance field. I don't know if it is the normal practice for insurance companies to ask their adjusters to advise on whether those companies are liable to the insured or not having regard to the policy conditions. It is usual for me in matters of this sort to be asked by insurers to advise them.

We are the only firm of Chartered Loss Adjusters in the Caribbean. My experience in the West Indies has been 5 years. Outside of the Caribbean I do not know what is the experience of adjusters on matters of this sort.

I advised the defendants that there had been a change of circumstances and that there had been a period of unoccupancy. I do not think I affirmatively told defendants whether they were liable or not. When I am asked to advise I do advise. I think it my duty to comment on the conditions of the policy and to express an opinion as to whether they have been complied with and in this case I commented on the two sections of Condition 8 and gave the opinion that there had been a change of circumstances and period of non-occupancy.

Unless I get a specific request I do not affirmatively advise insurers whether they are

liable or not. Less seldom than not I get this specific request. In the majority of cases I do not offer final advice on questions of the insurance companies' liability.

Question Would you in the majority of cases advise affirmatively whether there has been an increase of risk of loss or damage by fire or not?

Answer I would say it is a Chartered Loss Adjuster's implied and specific duty to report immediately to insurers any increase in risk which he discovers.

I would advise in all cases where there has been an increase of risk that there has been a change of circumstances such as to increase the risk of loss or damage by fire which entitled the company to repudiate liability.

If I went to a private dwelling house and found it was occupied as a gun powder factory I would, if there had been a fire, immediately advise the insurance company that there had been an increase of risk and that in my opinion they would be entitled to repudiate the policy. I give my opinion as to whether the policy conditions have been breached and await their further instructions.

In this case I advised the insurers that there had been a change of circumstances and that was an increase of risk of loss or damage by fire. I certainly advised defendant company that there had been a breach of condition 8(a) but without the Dyoll's file I cannot say if I advised them similarly. I advised defendant company at a number of discussions in 1964. I cannot remember when the first discussion was.

Before the 29th May, 1964, the date of plaintiff's claim, I advised defendant company that there might have been a breach on conditions 8(a) and (b) and that my investigations were continuing.

On 22nd May, 1964, I gave the advice to the insurance company. An underwriter is better qualified to advise on the question of risk than

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

6th February 1967.

(continued)

a loss adjuster.

Mr. Thwaites in a case such as this is not in a better position to advise on condition 8(a) than I. An expert underwriter who has been in the business for say 30 years would be a better person to express an opinion on condition 8(a) than I.

I have no knowledge of Mr. Thwaites' underwriting capabilities. I wouldn't think underwriters deal with condition 8(a) much more frequently than loss adjusters. I wouldn't think that this specific point comes up more often in an underwriter's life than an adjuster. It should come up when policies are to be renewed but I do not think it is dealt with more often than by adjusters. When it does arise it is a matter not for the final decision of a loss adjuster whether to repudiate the policy. The final word whether to repudiate or not is a matter for insurers.

It is my view in this case that there was a breach of condition 8(a).

Before one can say whether there has been an increase in risk one has to have a detailed knowledge of the existing risk before the change of circumstances. In this case I had a detailed knowledge of the existing risk before the change of circumstances. I interviewed the hospital authorities and they informed me that nurses resided there from 1958 to 1963. All the detailed knowledge I had was that there had been a change of circumstances and it simply consisted of the fact that nurses previously resided there.

All I knew of the previous circumstances was that nurses from the Montego Bay hospital were residing in that building. The change of circumstances was that nurses moved out and certain reconstruction work commenced. I have no knowledge of Mr. Lalor's underwriting capabilities.

Before I or anyone else can pass an opinion after a fire as to an increase of risk such as that envisaged by condition 8 I or that

person would have to know a number of matters. I agree those matters would include:

(1) The nature of the previous occupation. the extent wouldn't have much to do with it. The number of people occupying it would be important.

(2) I would also want to know or have some idea of the use to which the occupiers had been putting the building.

I would want to know if they used open fires or the extent to which they used electrical equipment or inflammable materials. If I am surveying a resident I do not ask if they use electricity because it is obvious they used electricity.

My opinion as to conditions 8(a) and (b) is based on information I used to have but no longer have. I used to know how many nurses were residing there but now I don't know.

Question Do you think it is imprudent to venture an opinion on a matter when certain information essential to the formation of that opinion you no longer have?

Answer I am saying yes I agree that all I needed to know in this case about the pre-existing circumstances was that the building was being occupied by 20 to 30 nurses as a residence, if that is the number. (sic)

I am saying that when the word residence is used it is admissible to build up a picture of the type of residential occupation.

For the purpose of passing an opinion it is enough to be merely told that the building was occupied as a residence by 20 to 30 nurses from the hospital from October 1958 to September 1963, if the person passing the opinion is familiar with the premises at any time. One would form a mental picture having got that information. I knew that the building was lit by electricity. I can find that out after the fire. Other facts would be facts of public knowledge.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

6th February 1967.

(continued)

To pass an opinion as regards increase of risk under Condition 8(a) :

(1) I would want to know whether the building is residential or not.

(2) The number of the residents. Matters of public notoriety as to what country it is in, the nationality of the inhabitants and what town it is in, the construction of the building, the method of illumination, the occupation of the residents. From the practical point of view that would be the information I want before giving an opinion. I was not told about the method of illumination but I had a knowledge of the building.

How is it that yesterday you gave an opinion as to increase of risk when you didn't have the information about method of illumination?

Adjourned to 2.00 p.m.

Still on oath.

Cross-examination continued:

I agree that before one can pass an opinion such as I gave one would have to know the nature of the alterations being carried on at the Ethelhart at the time of the fire. One need to know the scope of the alterations whether the basic structure of the building was being affected at all. By basic structure I mean the walls, roof and floor. Not necessarily external. The type of materials being incorporated in the structure - whether it is cement or wood. I would not need to know whether there was likely to be shorting of electric wires.

The identity of the contractor would be sufficient in determining the precautions against accident. I would like to know if he is a reputable contractor and if so I would not have to enquire about safety precautions. I now know the name of the contractor. He is Mr. Ainsworth. I would say he was a small competent contractor. My observation is he was

not often there.

Supervision never was as good as it should have been.

I found nothing to indicate there was not adequate supervision. From that I conclude there was adequate supervision. Nothing else one need know apart from the various processes being used.

I knew wood was being incorporated in the building. I never saw any bills for cement. I know carpentry, joinery, painting, plumbing gas fittings for the stoves were being used.

I have no knowledge as to the extent to which wood shavings were present during the alterations except there must have been some. I do not know whether the wood shavings were inside or outside the building. I do not see how they could have lowered floors and fitted cupboards without wood shavings being inside.

Before passing the opinion I passed one would not have to know of the extent of wood shavings in the building. I agree that all the knowledge one need know was that wood shavings were present.

Before passing the opinion I passed it is not necessary to know how much paint and inflammable material were being used. In regard to paint and inflammable material all one need know was that there was some paint and inflammable material to pass the opinion I passed. Before passing this opinion one need not know the rate at which the job was progressing.

I thought you were trying to reflect on my ability as a person to give an opinion. When I gave my opinion in 1964 my mind was much fresher than it is now. I do not agree with your suggestion that I have not got sufficient facts before me now to give an opinion from the witness box.

My remark that my mind was much fresher in 1964, in 1964 I was in a better position to give an opinion than now because the knowledge of the facts was much more fresh. I am in a position

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

6th February 1967.

(continued)

now to offer an opinion despite the time lag.

Whether the work was proceeding slowly or not would not affect the increase in risk. It would be more risky to have 100 men working rather than 2 or 5. The risk is increased in one way but lessened in another. One being a shorter risk and one longer risk. The rate is not a relevant matter.

Re the risk of fire:

Origin of the fire: Lack of control would increase the risk of fire - lack of control of the building.

It is my view from what I know and was told as to what was taking place that the possibility of the risk of fire was increased over and above when the nurses were there. There was not the possibility of the risk of fire not being increased.

It is highly probable that the risk of fire would be increased and highly probable that it would be decreased. The reasons for saying that is the reasons I gave Mr.Robinson.

I do not know if there was uncontrolled smoking or whether there was smoking at all. I would say on a job of this nature there cannot be continuous supervision, so the probability of uncontrolled smoking would be high.

I do not agree that if I don't know that there was uncontrolled smoking I would have to assume it. In evaluating the risk one has to take into account the probability of uncontrolled smoking. I agree if there was no uncontrolled smoking this reason I have given would be a bad one.

I have seen invoices for paint and it has been known that rags soaked in paint can give rise to spontaneous combustion. I think it highly improbable that nurses were using inflammable material that could give rise to spontaneous combustion. I agree that it is probable that inflammable materials such as hair spray and floor polish was being used by the nurses. Apart from rags soaked in paint that

is subject to spontaneous combustion there are hay stacks, oil soaked shavings or oil soaked rags, fish meal (the flesh of fish in a finely divided state), powdered grass, organic matter such as compost.

By lack of control of the building I mean building being left unsecured during both day and night. If the workmen went away and didn't lock up it would be unsecured. If nurses went away and the maids were out and the door unlocked it would be insecure. That and lack of sweeping up, and cleaning would be bad housekeeping.

I have no information as to that in so far as it relates to the workers.

Increase of spread of fire was more likely when the work was in progress than when the nurses were in occupation.

1. Removal of fire brakes.

2. Presence of inflammable material.

Absence of occupants - during the night.

I do not know as a fact if more inflammable material was there when workers were there than when the nurses were there but it is hardly probable that more would be there when the nurses were there.

I know the paint was in the building because it was claimed that the paint was destroyed in the fire. Hair spray is inflammable, nail polishes, floor polishes, arm spray, furniture paste will burn, cologne and perfume, nail polish remover, certain insecticides are inflammable. A large number of things women use are inflammable.

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

7th February 1967.

7th February 1967. Resumed

PETER GEOFFREY BATES (sworn):

Cross-examined continued.

I understood that the sections of the building that was being converted in the annex were being lowered. Not all the floors. It was my understanding that the floors of each apartment including bedrooms, bathrooms and kitchen were being lowered.

By internal fire brakes I meant walls and doors and floors for that matter. You would have to take up the floors to put them down. That would only take a matter of days if the work wasn't interrupted. I understood the internal walls, floors and doors were wooden. A wooden door is surprisingly an effective fire brake from experience. The doors will burn.

I agree that the discovery and the spread of fire would be more effectively curtailed if workmen were in the building than if it was unoccupied.

The discovery of fire and the prevention of the spread would be better if workmen are in the building than if all the nurses or most of them were out. If there were less nurses than workmen. Nurses work on a shift system. I knew there was a shift system of nurses operating at the Montego Bay hospital.

The only information I have at the present time is that those nurses at the plaintiff's building were going on and off duty during the day and night. I had more specific information of the shift times but I haven't got it now.

I understood that the plyboard, chip-board, paint, etc. were stored upstairs and downstairs of the annex. I knew the values of the items stored upstairs and downstairs. From the notes I have from my first interview with Mr. Marzouca I have the value of the materials that were used at the Ethelhart. This does

not reveal how much was already incorporated in the building. I gathered that the value of building materials which were unincorporated in the building at the time was £944, including stoves valued £360. I think that sum of £944 probably also included water heaters.

Inventory of goods contained in Ethelhart Hotel in October 1963, and bills from Chen Sue dated 22/11/63 and bill from Cecil B. Facey dated 11th November, 1963, tendered together in evidence Exhibit 16. Exhibit 16

The question whether certain changed circumstances lead to an increase of risk of loss or damage by fire is essentially I would think a matter of fact. The person answering questions as to increase of risk on questions of facts is giving facts and all I can do is give an opinion on it. I gave opinion on facts. Another person's opinion may differ on the same facts.

Re Cross-examined:

The question as to what increases risk as far as insurance goes is based on rates. The higher the risk the higher the rates as thought by insurance companies. The differing rates for different risks are based on experience in the field over a period of 150 years.

In studying to be an expert in insurance matters to reach the qualifications I possess involves studying the history of the actual experience of insurance companies as to what constitute varying degrees of risk and a study of what influences insurance companies in charging different rates for different risks.

When a place is occupied as a residence and ceases to be occupied as a residence and workmen are employed to work on that building and go in and work from day to day they don't reside on the premises, the premises are not regarded in insurance circles as occupied.

I knew the details of the shift system of the nurses at the time I expressed my final opinion to the insurance company. These nurses

In the Supreme Court of Jamaica

No. 4

Judges Notes of Evidence

7th February 1967.

(continued)

that I learnt were going on and off duty at various times during the day and night were the nurses that resided at the Ethelhart and who worked at the Montego Bay hospital.

Generally the quantities of inflammable materials kept by any one woman is minute. The quantity of inflammable material kept by 20 to 30 nurses would be a very very small proportion to the quantity that would be at a building undergoing the reconstruction as in this case.

I understood from plaintiff that the floors of each apartment including bedrooms, bathrooms and kitchen were being lowered.

In Jamaica my job frequently takes me onto building sites and I frequently have seen building workers with lit cigarettes but no ash trays. I often come across ash trays in Jamaica in residences. I would say there was a certainty of increase in risk of fire having regard to what was going on at the Ethelhart hotel with workmen working there after the nurses left.

I constantly have dealings with Mr. Thwaites in the insurance world. In order to know whether he was a good underwriter I would have had to have access to his company's accounts to see whether he was making a profit or not. Those dealings I have had with Mr. Thwaites only arose when he consulted me or when he gave me instructions to deal with a particular claim for his company. He has sought my opinion on insurance matters on question of liability. I was instructed by Mr. Thwaites' company and by defendant company to do the adjustment on this loss.

I sent a separate report in relation to the Thwaites' policy. Mr. Thwaites' company paid the claim made against them. I assume they paid after getting my report but I don't know. In making my report to him I had to give consideration to the terms and conditions of their policy. The Thwaites' policy doesn't have Condition 8 or any condition similar to Condition 8. That difference affected my report I made to Mr. Thwaites.

Application to amend Defence and Counterclaim by document dated 7th February 1967, allowed - there being no objection.

No. 5

In the Supreme Court of Jamaica

No. 5

Judgment

10th February 1967

JUDGMENT

This is a claim for the payment of £40,000 on a Policy of Insurance on the Ethelhart building and furniture etc., owned by the Plaintiff James M. Marzouca. The claim was as a result of a fire on 19.5.64 which destroyed the entire building and furniture etc.

The defence to the claim is that the policy ceased to attach to the building because the Plaintiff did not comply with Clause 8 of the policy which required the Plaintiff to give certain notices to the Insurers and receive the appropriate endorsement on the policy prior to any disaster which included destruction of the insured property by fire.

The question for the decision of the Court is (1) whether or not the policy, Exhibit 5 is binding on both parties and whether or not Clause 8 formed part of the Conditions of the policy binding on both parties. (2) If Exhibit 5 is the binding policy and Clause 8 forms part of that policy, whether a breach has been committed entitling the Defendants the Insurance Company to repudiate the policy.

The first question, creates no difficulty. Exhibit 1 and 2 show that by an agreement between the Plaintiffs and the Defendants the property, the subject of this suit was covered by fire insurance with the Defendant Company to the extent of £40,075.-.-. (The property was destroyed by fire on the 19th May, 1964) after the issuing of Exhibits 1 and 2 and after the policy document Exhibit 5 was issued.

The letters and documents Exhibits 1 and 2 were somewhat ambiguously drafted and no doubt may have given the impression to the Plaintiff that the formal policy document when prepared would contain what was written on Exhibits 1 and 2 with no snags attached.

However, both Exs. 1 and 2 stated quite clearly that the policy was in the course of preparation and would be forwarded to the Plaintiff at an early date. Exhibits 1 and 2 contained the following words -

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

"Policy wording is attached", and there was an attachment to both Exs. 1 and 2.

The Plaintiff admitted that he read both Exhibits 1 and 2 and even if the only terms agreed to were those on Exhibit 1 and 2, Plaintiff knew that he would be receiving a formal document. In any case the cover note came to an end when the policy was issued.

Plaintiff did receive the formal document Ex. 5, and he stated that he was accustomed to receive similar formal documents when he took out property insurances throughout the years.

This formal document Ex. 5 stated quite clearly on the face of it "N.B. For your own protection you are particularly desired to read your Policy, and if incorrect to return it for alteration; etc".

The Plaintiff accepted this document, and even if he did not read anything on it other than the amount of the insurance, the period of the insurance, and the building referred to therein, he made use of the document when he sent it to the lawyers for his mortgagees, and thus deliberately giving the mortgagees the impression that this was the agreed policy and that Clause 8 applied. Therefore, any inconsistency between his agreed terms and those appearing on the formal policy document Exhibit 5, which document, as stated before, Plaintiff accepted as correct and made use of, and this inconsistency should have been brought to the attention of the Insurers and to the Mortgagees if Plaintiff did not wish to be bound by them.

Not having done so, the Plaintiff lead the Defendants into a sense of false security -

that the formal Policy document was in order and as agreed, and that the conditions endorsed were not inconsistent with the agreed coverage and that page one of the formal policy document was correct and accepted by the Plaintiff. In other words the Plaintiff accepted by implication the Conditions subsequent to the date of Exhibit 1 and 2. Put another way, he waived any objections he might have had to Conditions 8 appearing in

the policy, which conditions he could have objected to and negotiated on at any time prior to the fire. The fire having occurred he cannot now be heard to say that Condition 8 didn't apply.

The Defendants were therefore entitled to rely on Clause 8 as forming part of the conditions to which the policy was subject and the Plaintiff was also bound by the document Exhibit 5, which I shall hereafter referred to as "the policy" rather than calling it a policy document.

Conditions 8(a) and (b) therefore forms part of the policy even if as stated by his counsel Mr. Coore, these conditions did not form part of the agreed contract.

I will now proceed with the question as to whether Condition 8 of the policy was broken entitling the Defendant Insurance Company to refuse payment to the Plaintiff of the £40,075.-.-. damage which is claimed under the policy.

There is no disputing that the premiums were paid from year to year as from 24th July in each year. The fire occurring on 19th or 20th May, 1964, within the period of a year for which the premium was paid and accepted and during the currency of the policy Exhibit 5, which on each renewal is a new contract.

There is also no dispute that there was no physical occupancy of the Ethelhart Hotel either by the owner personally or by any tenants for a period of over six months prior to the fire which destroyed the building. In other words, there was no one residing in the premises for a period of over 30 days.

Again there is no dispute that extensive internal alterations were taking place at the portion of the Insured premises known as the Annex and that certain materials of an inflammable nature were stored there. The annex would take about seven months and then put on the market.

The matter for decision on this point is -

1. whether the works of alteration that was going on at the premises and the further

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

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 was unoccupied so as to create a breach of Clause 8(a) of the Policy.

In regard to (1) whether the particular alterations increased the risk of loss or damage by fire is a question of fact and must be proved by the insurers. Plaintiff's witness Mr. Thwaites denies that he, as an Insurance Broker, would regard the particular alterations as an increase in risk.

It would seem to this Court from the evidence produced and accepted that internal alterations which reduces the number of rooms from 11 to 6 by removing partition walls of wood and substituting tiles and plaster and cement for boards would reduce the risk from fire rather than increase it though should a fire start the risk of it spreading would be greater owing to the removal of fire breaks such as walls and doors. However, I shall analyse and deal with the evidence on Clause 8(a) more fully after dealing with Clause 8(b) in regard to occupancy.

However, the Court holds that the intended use of the building as flats is not such a change of user from the building being occupied by nurses as their place of abode, and in this regard would not increase the risk of loss or damage by fire.

In regard to the building remaining unoccupied contrary to Clause 8(b), the evidence disclosed that the physical occupiers of the Ethelhart Hotel were tenants - to wit about 30 nurses and that they had left the premises and the owner was making internal alterations with the intention of it being occupied as flats by tenants. The Defendants knew that the premises were being used under a lease to tenants and the latter intention by the Plaintiff to let it out in flats to other tenants after alterations were completed would not ipso factor cause ..... the building to be unoccupied.

I am fortified in this opinion as to occupation, though this opinion is not based on an insurance case, by the case of McKennon v. Porter

Motors Ltd., (1956) 3 W.L.R. 262 to 266 at p.265 E: (which case was not cited by either party) Held:- A landlord may in our opinion enter into occupation of premises, intending as part of his enjoyment thereof to demolish the building and substitute others there for which he in turn will occupy (not rent to someone else). He is occupying premises if he occupies the lands and such buildings as from time to time is situated thereon.

The question here is the intention, coupled with other facts to show occupancy, interruption of occupancy with the intention of having the premises occupied and coupled with such acts as repairs and modification of a kind which would show the intention to let for occupancy to tenants.

The submission that a building cannot be said to be occupied if it is being repaired and altered for purposes of occupation would apply to some building that had never been occupied in the past but could not apply to one that had been occupied and the occupation interrupted solely for the purpose of the building being repaired and altered for the purpose of future occupation especially of a similar nature.

The case of Arbuckle Smith & Co. Ltd. v. Greenock Corporation (1960) 1 All E.R. 568, which was cited turns on its own particular facts and is based on the meaning and intentions of the legislature in regard to the liability for rates as required under the Local Government (Scotland) Act, 1947 and the question was whether the premises were unoccupied during the period of repairs and alterations to those premises which were not previously occupied for the purpose for which repairs and alterations were being done. Occupation in the sense of the cited case has no application to the instant case.

The case of Swaby v. Prudential Ass. Co. (1964) 6 W.I.R. 246 also turns on the particular facts of that case insofar as the liability of the Insurers were affected on those facts by Clause 8(b) of the policy which was in similar terms to Clause 8(b) in this case. However a dictum of Lewis J.A. in the Swaby case which would seem to apply to this instant case with reference to occupancy is:- Where a building is vacated by tenants and not resided in by

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

the landlord or other tenants there is prima facie *a cesser of occupancy. The question is one of* fact and degree. Assuming the vacation by tenants of the same residential type is sufficiently prolonged to have this effect. The legal result would seem to be as follows:-

"(1) The onus is then on the landlord to repel the presumption that that occupation by tenants or by himself has ceased.

(2) To repel it, he must at all events establish a de facto intention to have the place re-occupied by tenants after its vacation by other tenants.

(3) He cannot do this simply by proving an inward intention to have the place tenanted after a protracted period of non-occupancy.

(4) Notwithstanding vacancy so protracted as 5 years, its effect may be averted if he couples and clothes his inward intention with some formal, outward and visible sign of it."

The type of tenant may have some individual and personal effect on the insurer as to whether he would accept the risk for new and different types of tenants but in a general way the type of occupation or means of livelihood which is carried on outside the building by the new tenants would not affect the risk as far as the occupancy of the building by other tenants of a similar type are concerned. The Court is therefore satisfied that on the facts of this case and on the authorities there is no non-occupancy which created a breach of Clause 8(b) of the Policy Exhibit 5. However, the Court has to determine whether the building was sufficiently protected during the absence of the workmen so as not to increase the risk of loss or damage by fire and whether the alterations that were going on at the building were such as to increase the risk of loss or damage by fire.

Firstly in regard to whether the building was sufficiently protected after the workmen had left work each day one has to consider the evidence in regard to the watchman.

The Court accepts the evidence that between the departure of the nurses on 30th September, 1963 and the commencement of the alterations in mid-November 1963, the building was sufficiently protected by the police department and by hired Special Constables.

With reference to the period of the reconstruction and up to the time of the fire, the Plaintiff's evidence was that the responsibility for keeping or employing a watchman for the Ethelhart was the responsibility of the Contractor & Builder - a Mr. Ainsworth now deceased. Mr. Peter Fray, the Supervisor of the Reconstruction said a watchman was always at the building. At first one Reid and later one Peter McDonald. Mr. Edward Byles for the Plaintiff stated that on his various visits to the Ethelhart, up to two days before the fire, there was always a watchmen there in the afternoons, the last watchman there being Peter McDonald who was the one previously at the City Centre building. That the work at City Centre had reached the stage where there was no necessity to keep a watchman there any longer as the remaining materials were locked away and that in the state of affairs at the time it was possible for one watchman to keep his eye on the City Centre building if he concentrated on Ethelhart.

Asst. Supt. of Police Albert Foster for the Defendant in giving evidence told the Court of various visits that he made to the Ethelhart Hotel building at nights during the reconstruction, that he saw trespassers there watching the show at the cinema but he could not say if among the persons he saw there were any who had a right to be there. That no one there asserted a right to be there. This defence witness in his examination in chief was negative as to whether there was or was not a watchman at the Ethelhart building at nights. However, under cross examination he told the Court more positively that of the people that he saw at the Ethelhart at nights he was unable to say if a watchman was amongst them.

Under re-examination this witness stated that he never saw Peter McDonald at nights at either the City Centre building or the Ethelhart.

The next witness for the defendant, Sgt. of

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

Police John Graham, in giving evidence as to whether a watchman was at the Ethelhart after the nurses left, stated that he saw a watchman called Reid at the Ethelhart at nights up to January or February 1964. That after that, he Sgt. Graham visited the Ethelhart on about two occasions at nights and that he can recall seeing Peter McDonald there about twice.

This witness also stated that on one occasion he saw Peter McDonald at night on the City Centre piazza but cannot be sure whether it was before January or February, 1964.

Under cross examination Sgt. Graham stated that on most of the times he visited the Ethelhart at nights he either saw Reid or McDonald there. That Reid appeared to be the watchman up to February and after that Mr. McDonald. "That is my estimate." "I feel McDonald was the watchman at both places."

The other eye witness for Defendant as to watchman being at Ethelhart was Det. Cpl. Walker who said that after March 1964, he visited the Ethelhart building about 14 to 16 times at nights and on two occasions he saw Peter McDonald there but that most of the times he saw him at the City Centre building which is on the same premises just below the Ethelhart. This witness also stated under cross examination, that he didn't know if McDonald took over from Reid at the Ethelhart after Reid left in late February or early March but that after March he had seen McDonald at Ethelhart about twice. Further that having seen McDonald at the City Centre building most of the time he formed the impression that McDonald was the watchman at the City Centre.

However, this witness also stated that at the spot at the Ethelhart where he saw McDonald on two occasions, McDonald could view the City Centre building from there and that from the City Centre roof where the watchman's hut was, not all of the Ethelhart building could be seen.

From this evidence both by the Plaintiff's witnesses and the Defendant's witnesses, the Court finds that a watchman was employed to watch the Ethelhart during the period of the reconstruction and up to the time of the fire and that the

adequacy of the protection to the insured building has been established.

I shall now proceed to deal with the analysis of the evidence as to whether the alterations that were going on at the Ethelhart was such as to increase the risk of loss or damage by fire.

Plaintiff's witness, an Insurance Broker Mr. Thwaites says no. The Defendant's witnesses say yes. The evidence by Mr. Anthony Thwaites for the Plaintiff is this - "I now know that at the time of the fire the building had been closed to make alterations to the interior - I believe that so many rooms were being changed into apartments. I know that previous to this the building was being used as a nurses home. If I had been told that the nurses were going to come out and that the building was going to be reconstructed as I described, I would not require a higher premium.

A change from the building that was holding about 30 persons to a building as I described would not materially increase the risk of fire for a temporary period." Mr. Thwaites further stated:- "By temporary I mean that the reconstruction should not be over too long a period, that is taking over a year to complete. Temporary would be about six months.....I see no difference between six or eight months. If it takes over six months I would give a querrelous ear and eye.....If I had known the overall plan for the whole building and that it was going to last over a year I do not think I could regard the matter as temporary. Nothing over 12 months can be temporary in regard to a policy that only lasts 12 months."

The evidence shows that the first stage of the reconstruction before it would be put on the market for tenants would take about 7 months. Mr.Thwaites further stated that if a reconstruction was going to last over a year he would expect the owner, if insured, to notify him and if he knew it was going to be a prolonged job he would want to know details about it and that until he knew all the fact he wouldn't know if there would be an increase in risk. Further that he knew after the fire, of all that was going on at the upstairs of the Annex and of the storage of various materials and that as an insurance man and underwriter he would not

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

regard that as increasing the risk of loss or damage by fire.

The question was put to Mr. Thwaites and he said "If you are talking of cabinet work for 12 room-dividers and for 12 kitchens, etc., being built on the premises it probably could increase the risk over and above a private dwelling house."

However, the evidence in this case is that the work that was going on at the Ethelhart was the reduction of 10 rooms to 5 by removing seven room-dividers and converting six of the eleven bath rooms into kitchenettes, and not the building of 12 room-dividers and 12 kitchenettes.

Without going further into Mr. Thwaites' evidence, it can fairly be said that Mr. Thwaites did not regard the work that was presently going on at the building as creating any increase in risk and the question about cabinet factories would not apply to the making of cabinets in a house for use in that house during a conversion.

Turning to the evidence for the defence as to the increase of the risk of loss or damage by fire we have the following witnesses -

Frederick Rowlands an expert on Insurance matters and the holder of the highest qualification in Britain in Insurance matters and who was the Manager of the Defendant Company when the Ethelhart was insured with them, but left the Defendant Company nearly two years before the fire and had no personal knowledge of the work that was being done at the time of the fire.

Mr. Rowlands states that the conversion of eleven rooms into six self-contained apartments each with its own kitchen and bath facilities, while such work was going on he would regard it as an increase in the risk so far as it relates to the possibility of fire especially as in a class two building, there was bound to be carpentry work going on, the presence of shavings and so on and the presence of paint and other combustible materials. Further that he would expect the Company to be notified as such conversion would constitute an alteration in the subject matter of the contract, yet he stated that he expected that

when the nurses were to occupy the building that repairs and alterations may become necessary after issuing his Cover Note.

Mr. Rowlands further stated that if the cabinet work being carried on in the building were substantial it would carry the higher rate for cabinet manufacturing shops. He however gave no evidence as to how substantial this cabinet work was. Mr. Rowlands also stated in chief that he would not have extended or given a five-year extension if he was told that the nurses were under notice and that re-construction was going to take place. As to this answer, the Court wonders why, and if it was a matter of what Mr. Rowlands personally would do or whether it was general insurance practice.

Mr. Rowlands further said in chief that he would not consider it a prudent risk to accept a renewal for a year in July 1963, if he were then made aware that the premises would become unoccupied at the end of the following September, 1963.

The Court finds that this answer is in effect in relation to actual physical occupancy though may be not so intended, but finds that the building would not have been unoccupied for the purpose of insurance coverage because the vacating by one set of tenants and a reconstruction of the building with the intention of letting in other tenants at the end of the reconstruction does not make a building become unoccupied especially when a watchman is employed to guard the building, and reconstruction commences in a reasonable time for the intended purpose of having new tenants.

In any case, Mr. Rowlands has stated that if a building is being used for residential purposes, the category of the occupation or profession of the dweller at the premises would not matter, provided he doesn't carry on his job on the building.

One has therefore to consider this witness' evidence only insofar as the increase of risk by the type and duration of the alteration of the internal structure is concerned.

Mr. Rowlands further stated under re-examination that a building under construction carries about twice the fire rate as after the construction

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

is completed and it is occupied.

The evidence in this case which is not in dispute is that there was no construction going on, only an internal construction. Mr. Rowlands stated also that individual underwriters decide which internal alterations carry higher rates over occupied buildings and that these rates are higher if the alterations are substantial and prolonged, but that prolonged depends on individual interpretations.

The Court therefore finds that as far as this witness is concerned whether any particular internal alterations create an increase of risk depends on individual interpretations and his evidence is therefore of not much help in showing that it should be held that there was an increase in the risk of loss or damage from fire as the result of the internal alterations.

Defendant's witness Mr. Donovan Magnus Depass the present Manager of the Defendant Company and who was Manager since November 1962, has stated in chief that he would not have renewed the policy on 24th July, 1963 for five years if he knew the building would be vacated and alterations being carried out as that would automatically increase the fire hazards, also that the type of reconstruction as is agreed was going on, would have increased the risk of loss or damage by fire. This witness also said that burnt tins of paint marked inflammable were found at the site.

This witness' evidence of increase of risk of loss or damage depended on the advice of others and therefore he adds nothing of assistance insofar as this matter is concerned and whether he personally would or would not renew the policy does not prove an increase of risk.

Mr. Dennis Lalor, an Insurance expert gave generalised evidence as to what increases the risk but he had no knowledge of the type of supervision that was given at the Ethelhart during the reconstruction and he was not sufficiently conversant with the circumstances in this case and therefore his evidence does not add very much in the way of proving that there was increased risk of loss or

damage from fire at this particular building.

The last witness for the Defendant in regard to whether there was an increase of risk of loss or damage by fire as a result of the alterations was Mr. Peter Bate, a highly qualified Insurance man and Loss Adjuster. Mr. Bate stated that the increased risk of loss or damage by fire under the circumstances outlined as happening at the Ethelhart Hotel from 30th November 1963 when the nurses left and reconstruction commenced, up to the time of the fire was due to such non-occupancy and the type of work going on there. Mr. Bate gave as his reasons for this conclusion which he said fell under three heads -

(1) Origin of the fire
(2) Spread of the fire
(3) Intensity of the fire

1. In regard to the origin of the fire, Mr. Bates stated that the chances of the fire originating had been increased by the possibility of uncontrolled smoking; the use of inflammable materials could give rise to spontaneous combustion. The use of trade processes such as sauldering and what is called in insurance circles - "bad housekeeping" - lack of control.

2. In regard to the spread of the fire, he stated that the risk would be increased because of the removal of internal fire breaks such as doors and the presence of inflammable materials.

3. In regard to the intensity of the fire, the risk would also be increased by the presence of plywood, paint, chipboard and fixatives. Further, when the building is unoccupied, there would be no one present to make early discovery of a fire and therefore, the risk of its spread would increase.

In regard to No. 1, Mr. Bates stated in cross examination that he did not know if there was uncontrolled smoking or whether there was smoking at all but that on a job of this nature there cannot be continuous supervision and the probability of uncontrolled smoking would be very high. However,

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967 (continued)

Mr. Bates agrees that if there was no uncontrolled smoking this reason would be a bad one.

In regard to No. 2, Mr. Bates stated that rags soaked in paint could give rise to spontaneous combustion also wood shavings soaked in oil. The absence of the workmen and lack of sweeping-up and cleaning would be bad house-keeping, but he had no information as to that insofar as it relates to the workers.

Further that he does not know as a fact if more inflammable material was at the building when the workers were there than when the nurses were there but it is hardly probable that nurses would have more.

With reference to the spread of the fire and its early discovery, the evidence disclosed that workmen were at the building during the days and a watchman at nights. On the whole, the Defendants have not shown that reconstruction would increase the risk over and above the time when the nurses occupied the building.

Without going further into the details of Mr. Bates' evidence, Mr. Bates has stated that the question whether there is a breach of Clause 8(a) is more the province of an underwriter of experience than for an adjuster though both deal with the same matters in Clause 8.

Finally, on the evidence on a whole and that tendered by the defence, the Court is not satisfied that there was a breach of Clause 8 (a) or Clause 8 (b) such as to entitle the Defendants to repudiate the policy and as the Court has held that the policy Exhibit 5, including Conditions 8 (a) and (b) is the binding contract agreed to or adopted by the Plaintiff's Clause 8 (a) and (b) would be binding on both parties notwithstanding the dictum referred to at page 44 of Odgers 4th Edition - Construction of Deeds and Documents which was brought to the Court's attention by Mr. Coore.

The case referred to in Odgers is not dealing with an insurance policy document which, whether partly written and partly printed becomes the binding contract in the circumstances of this case.

The Court holds that even though Clause 8 (a) and (b) forms part of the Contract there has been no proof that those clauses have been breached.

Judgment is therefore entered for the Plaintiff on the claim for £40,075.0.0., with interest at 6% from December 30, 1964, with costs to be taxed or agreed.

Judgment for the Plaintiff on the Counter Claim with costs.

Dated this 10th day of February, 1967.

(Sgd.) H.V.T. CHAMBERS

H.V.T. Chambers
Judge (Ag.)

In the Supreme Court of Jamaica

No.5

Judgment

10th February 1967
(continued)

No. 6

ORDER ON JUDGMENT

THE 10TH DAY OF FEBRUARY, 1967

No.6

Order on Judgment

10th February 1967

This action having on the 26th, 27th, 28th, 29th and 30th September, 1966, the 30th and 31st January, the 1st, 2nd, 3rd, 6th, 7th and 9th February, 1967 been tried before the Honourable Mr. Justice Chambers, Acting and the said Mr. Justice Chambers on the 10th day of February, 1967 ordered that Judgment be entered for the Plaintiff against the Defendant on the claim for the sum of £40,075 and costs to be agreed or taxed IT IS THIS DAY ADJUDGED that Judgment be entered for the Plaintiff against the Defendant on the claim for the sum of FORTY THOUSAND AND SEVENTY-FIVE POUNDS (£40,075.0.0.) and costs to be agreed or taxed.

Stay of execution for six weeks.

(Sgd.) Clinton Hart & Company
PLAINTIFF'S SOLICITORS

Entered by Clinton Hart & Co. of 58 Duke Street, Kingston, Solicitors for and on behalf of the Plaintiff whose address for service is that of his said Solicitors.

In the Court of Appeal

No.7

Notice of Appeal

15th March 1967

No. 7

NOTICE OF APPEAL

IN THE COURT OF APPEAL Civil Appeal No. 9 of 1967

BETWEEN

ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED DEFENDANT-APPELLANT

A N D

JAMES M. MARZOUCA PLAINTIFF-RESPONDENT

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Defendant-Appellant On Appeal from the whole of the judgment herein of the Honourable Mr. Justice Chambers (Acting) given at the trial of this action on the 10th day of February 1967 whereby it was adjudged (i) that "judgment should be entered for the Plaintiff on the claim for £40,075.0.0. with interest at 6% from December 30, 1964, with costs to be taxed or agreed. (ii) Judgment for the Plaintiff on the Counterclaim with costs". 10 20

For an Order that the judgment in the Court below be set aside, and judgment entered for the Defendant-Appellant on the Claim and Counterclaim, with costs here and in the Court below. Alternatively, that a new trial be ordered.

AND FURTHER TAKE NOTICE that the grounds of this appeal are (iii)

1. The conclusion of the Learned Trial Judge that there was no breach of clauses 8(a) and (b) of the Policy of Insurance is unreasonable and cannot be supported on the evidence. 30

2. In coming to the aforesaid conclusion, the Learned Trial Judge failed to take advantage of seeing and hearing the witnesses, and did not draw the correct inferences from their evidence.

3. In considering whether there was a breach of clause 8(b) of the policy, the Learned Trial Judge concluded that -

" There is also no dispute that there was no physical occupancy of the Ethelhart Hotel either by the owner personally or by any tenants for a period of over six months prior to the fire which destroyed the building. In other words, there was no one residing in the premises for a period of over 30 days."

The Learned Trial Judge failed to appreciate that this state of affairs established or strongly indicated a breach of clause 8(b) of the policy.

4. In finding that there was no breach of clause 8(b) the Learned Trial Judge misdirected himself on the facts and on the law (inter alia) -

(a) In relying on the decision of McKennon v. Porter Motors Ltd. (1956) 3 M.L.R. 262.

(b) In distinguishing the case of Arbuckle Smith Co. Ltd. v. Greenock Corp. (1960) 1 All E.R. 568, and ignoring the important judgment of Lord Reid in that case.

(c) In stating that "the question here is the intention coupled with other facts to show occupancy, interruption of occupancy with the intention of having the premises occupied and coupled with such acts as repairs and modifications of a kind, which would show the intention to let for occupancy to tenants."

(d) In relying on a dictum of Lewis J.A., in the case of Swaby v. Prudential Assurance Co. (1964) 6 W.I.R. 246, although the dictum does not assist the plaintiff on the facts of this case.

(e) In failing to appreciate that on the admitted facts at the trial, a prima facie case of non-occupancy was established, and that the plaintiff failed to rebut the onus that had shifted to him.

In the Court of Appeal

No.7

Notice of Appeal

15th March 1967 (continued)

(f) In ignoring the fact that the main building was locked up and the keys kept in plaintiff's safe.

(g) In failing to appreciate the difference between a temporary interruption of occupation for the purpose of necessary repairs with a view to resumption of occupation by the same tenants and the complete termination of the occupation of such tenants with a view to offering fresh tenancies to new and unascertained persons at some future time and only after a prolonged period of non-occupation during which substantial reconstruction work is effected.

5. The Learned Trial Judge erred in accepting the evidence of Mr. Thwaites that there was no increased risk of loss or damage by fire in terms of clause 8(a) of the policy, as (inter alia) -

(a) If Mr. Thwaites' evidence is taken as a whole, it gives little, if any support to the plaintiff's case. Furthermore, his contention as to what amounted to a "temporary period" of reconstruction should not be accepted on any judicial assessment of his evidence and all the evidence in the case.

(b) The evidence of the expert witnesses called for the defence was overwhelming.

(c) Mr. Thwaites, the only expert witness to give evidence in support of the plaintiff's case, was the plaintiff's agent.

6. The Learned Judge having found expressly and implicitly

(i) that extensive internal alterations were taking place at the portion of the insured premises known as the Annex,

(ii) that certain materials of an inflammable nature were stored there,

(iii) that the annex (presumably the top floor

only) would take about 7 months to be ready for rental again,

(iv) that further intended alterations were to take place (involving the entire remainder and greater portion of the insured building) before that portion would be ready for rental again,

should have found that the Plaintff-Respondent was in breach of Clause 8(a) of the Policy. Inter alia -

(a) He misunderstood the evidence as to the details of the alterations that were taking place.

(b) He failed to appreciate that the alterations were scheduled to last for over a year.

(c) He failed properly to distinguish between the circumstances affecting the building during the entire period of the contemplated alterations (i.e. over a year) and the circumstances which existed prior thereto and in particular on the occasion of the last renewal of the Policy.

7. The Learned Trial Judge erred and misdirected himself on the facts in finding that the evidence of the witnesses (including Assistant Superintendent Albert Foster, Sergeant John Graham, and Detective Corporal Walker) established that "a watchman was employed to watch the Ethelhart Hotel during that period of the reconstruction and up to the time of the fire and that the adequacy of the protection to the insured building has been established." On the contrary, the evidence showed that the premises were overrun by vagrants and trespassers, that no watchman was employed to watch the premises, or if he was, he was often absent at night and that the main building was kept locked with the key in the plaintiff's safe.

8. The Learned Trial Judge erred in rejecting the evidence of the expert witnesses called for the defence on the ground that these witnesses had no personal knowledge of the cause of the fire

In the Court of Appeal

No. 7

Notice of Appeal

15th March 1967 (continued)

or the actual events that transpired in the period preceding the fire. Such knowledge was wholly irrelevant to the issue to which their evidence was directed, namely, whether there was an "increase in the risk of loss or damage by fire". This issue can only be resolved by expert evidence based on probabilities. It follows, therefore, that the Learned Trial Judge failed to appreciate the significance of many portions of the evidence, e.g. the statement of Mr. Bates in cross-examination that he did not know as a fact if there was uncontrolled smoking by workmen on the premises. The Learned Trial Judge wrongly concluded that observations of this nature, elicited in cross-examination, were a proper basis for rejecting the expert testimony that the circumstances established at the trial constituted an increased risk of loss or damage by fire.

9. The reasons given by the Learned Trial Judge for rejecting the evidence of the defendant's expert witness are based on misdirections of fact and law including a misunderstanding of the nature of the evidence required to resolve the legal issues in the case.

10. The reasons given by the Learned Trial Judge for rejecting the evidence of Mr. Lalor are not only unwarranted in law, but are equally applicable to the evidence of Mr. Thwaites which was accepted.

DATED this 15th day of March, 1967.

SETTLED

.....
RICHARD A.MAHFOOD, Q.C.

(Sgd.) Alberga Milner & Muirhead
SOLICITORS FOR THE ABOVENAMED APPELLANT

TO: The abovenamed Respondent,

AND TO: Messrs. Clinton Hart & Co.,
58 Duke Street,
Kingston.

His Solicitors.

FILED by ALBERGA, MILNER & MUIRHEAD of No: 119 Tower Street, Kingston, Solicitors for and on behalf of the Defendant-Appellant.

No. 8

In the Court of Appeal

No. 8

Respondent's Notice under Rule 14(2)

31st March 1967

RESPONDENT'S NOTICE UNDER RULE 14(2) OF THE COURT OF APPEAL RULES

Suit No. C.L. 839 of 1965

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 of 1967

BETWEEN	ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LTD.	DEFENDANT-APPELLANT
A N D	JAMES M. MARZOUCA	PLAINTIFF-RESPONDENT

TAKE NOTICE that at the hearing of the above Appeal the Respondent intends to contend that the decision of the Learned Trial Judge may be affirmed on the following grounds in addition to the reasons given by the Learned Trial Judge:-

(1) In all the circumstances of the case and on the evidence the conditions on which the Defendant purported to rely did not form part of the Contract of Insurance between the Plaintiff and the Defendant.

(2) Alternatively the Defendant had by conduct waived its right to rely on the said conditions and/or was estopped from contending that the said conditions formed part of its Contract of insurance with the Plaintiff.

(3) In view of the fact that the contract of insurance did not specify any type of user or occupation for the insured building the conditions in Clause 8 of the policy were ambiguous, uncertain and unenforceable.

DATED the 31st day of March, 1967

(sgd.) Clinton Hart & Company

SOLICITORS FOR THE PLAINTIFF-RESPONDENT

In the Court of Appeal

No. 8

Respondent's Notice under Rule 14(2)

31st March 1967 (continued)

To: The Registrar,
Court of Appeal, Kingston.

And

To: The Defendant-Appellant,
Or its Solicitors,
Messrs. Alberga, Milner & Muirhead,
119 Tower Street, Kingston.

Filed by Clinton Hart & Co. of 58 Duke Street, Kingston, Solicitors for and on behalf of the Plaintiff-Respondent.

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969

No. 9

JUDGMENT OF MOODY J. (DISSENTING)

January 27, 28, 29, 30, 31;
February 10, 11, 12, 13, 14, 21 and
30th July 1969

MOODY, J.A.

This is an appeal by the defendant against a judgment in favour of the plaintiff for £40,075 with interest at 6% from 30th December 1964 with costs to be taxed or agreed and judgment for the plaintiff on the counter claim.

The respondent was insured with the appellant company against loss or damage by fire to the extent of £35,000 in respect of a building and £5000 in respect of the contents of the building. The policy described the building as known as Ethelhart Hotel, situate Fort Street, Montego Bay, St. James, Jamaica, constructed of Brick Nog, Concrete Nog and Timber Walls, with roof mainly of corrugated iron sheeting with a small proportion of shingles.

The insurance was extended to cover the boundary walls and patio to the extent of £2400.

During the night of the 19th or early morning of the 20th May 1964 the said building and contents

were destroyed by fire of unknown origin and damage to the extent of £75 was done to the boundary walls and patio.

The appellant refused to pay the said sum of £40,075 for the damage and the respondent sued. The respondent was the owner of the Ethelhart Hotel. He acquired the premises in April 1945. He lived there for about 2-3 years and then operated it as an hotel until late February 1957 when he sold it to a Mr. Peter Cowper who likewise operated it as an hotel. Cowper died in June 1958 and the respondent resumed possession of the premises in July 1958. These premises were then insured against fire, earthquake, hurricane etc. with a company known as Dyoll Insurance Ltd. for about £35,000. During Cowper's tenure repairs and improvements had been done to the building. The respondent decided to increase the insurance on the building and spoke to Mr. Thwaites with whom he had dealt previously. It was agreed that the Insurance would be split between Dyoll Insurance and the appellant Company. Thwaites communicated with Mr. Rowlands of the appellant Company. Both these gentlemen visited and inspected the Ethelhart hotel and also spoke with the respondent. Thwaites and Rowlands discussed terms and rates and the business was placed by word of mouth. The appellant company thereafter on the 25th July 1958 issued the Cover Note Ex.1 and Thwaites issued the cover note Exhibits 8 & 9 from his company. At the time of the visit and inspection of the building by Thwaites and Rowlands only a watchman was there guarding the premises. The respondent was negotiating with the government to lease the premises as living quarters for nurses at the Montego Bay Hospital but no agreement had been reached. Subsequently the respondent concluded an agreement with the government and 20-30 nurses were housed there as from the 1st October 1958 until the 30th September 1963 when in consequence of a year's notice to quit they left.

The insurance was renewed from year to year and was in force on the 19th May 1964 when the building and contents were destroyed by fire. During this period no fresh or further negotiations took place beyond that reflected in Ex. 6 a. viz that in consideration of the insured agreeing to renew this insurance for a period of 5 years with premium payable annually in advance a discount of 7½% was

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

allowed of the gross premium payable thereunder.

On giving the nurses notice to quit the respondent intended to turn the buildings into flats for rental to people to live in. This required interior decoration and a rearranging of the interior. No alteration was to be done to the exterior neither was any building to be added. This work would be carried out consecutively in sections. The first section was the portion known as the upper floor of the annex. Work on this section started on the 20th November 1963. On completion of this portion it would be offered for rental and work on the lower floor of the annex would be arranged for and put in hand.

Between the period of the nurses leaving and the alterations commencing i.e. 1st October 1963 and 23rd November 1963 a watchman was employed to guard the premises and cheques vouching payment for such services were put in evidence as Exhibit 3.

As to the period when the alterations were proceeding, it was disputed that a watchman was exmployed. The learned judge after reviewing the evidence of the witnesses found that a watchman was employed to watch the Ethelhart up to the time of the fire and that adequacy of protection had been established.

The respondent notified the respective insurance companies and put in his claim. Dyoll Insurance Ltd. paid the amount for which they were liable but the appellant company refused to pay. The appellant pleaded condition 8 of the policy of insurance which in effect is that the insurance ceases to attach to the property insured, unless the insured before the occurrence of any loss or damage obtains the sanction of the company signified by endorsement on the policy by the company, 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; or if the building insured or containing the insured property become unoccupied and so remain for a period of more than 30 days. The appellant claimed that both these limbs of condition 8 (a and b) were breached inasmuch as the respondent had subjected the building to substantial structural

alterations and conversions whereby the circumstances affecting the building where changed in such a way as to increase the risk of loss by or damage by fire. Secondly that the building had been occupied as living quarters for nurses on the staff of the Montego Bay Hospital and that the respondent had terminated the tenancy of the nurses with effect from the 30th September 1963 whereby the building then became unoccupied and remained so for a period of more than 30 days. The appellant counterclaimed for a declaration that the insurance had ceased to attach by reason of the breaches complained of.

The respondent denied that the building was unoccupied within the meaning of condition 8 of the policy and averred that the building was occupied by the respondent's servants or agents and/or independent contractors for the purpose of effecting certain repairs and alterations which did not increase the risk of loss or damage by fire within the meaning of condition 8. Further that the policy of insurance is dated the 12th December 1958 and on the face thereof is expressed to be in effect from the 24th July 1958. On and prior to and for some time subsequent to the 24th July 1958 the building to the knowledge of the appellant company was not in use and the appellant is estopped from relying on any change in the nature of the occupation or other circumstances affecting the building so as to increase the risk of loss or damage by fire or that the building was unoccupied for more than 30 days. The appellant on the 25th July 1958 issued a cover note effective from the 24th July 1958 and knew then that the building was unoccupied and would remain so for 6-8 weeks. Accordingly the appellant cannot rely on condition 8 (b).

The learned trial judge found that the policy of insurance had been renewed from year to year as from the 24th July 1958 and that each renewal was a new contract; that there was no physical occupancy of the Ethelhart Hotel by the owner personally or by any tenants for a period of over six months prior to the date of the fire; that extensive internal alterations were taking place at the portion of the premises known as the annex; that certain materials of an inflammable nature were stored there. He concluded that there was no increase in the risk of loss or damage by fire from the work that was going on and that the building was not unoccupied

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

within the meaning of condition 8 (b) of the policy of insurance. It is mainly in relation to these final conclusions of the learned trial judge that this appeal is brought.

Learned counsel for the respondent abandoned ground 1 of the respondent's notice.

In regard to the alterations the respondent intended to turn the building into apartments for rental to people to live in. This required interior decoration - rearranging the interior by putting rubber tiles over the floor - removing and putting partitions and changing some bathrooms into kitchenettes. No alteration was being done to the exterior nor was any new building being added - new furnishings would be brought in - after the decoration separate contained flats could be rented. Work was to begin on the upper floor of the annex, next the lower floor then the main building. The annex portion would take about seven months to complete.

The work was being done by a contractor named Ainsworth, now deceased, under the supervision of Edmund Fray a contractor of 30-35 years experience. It began on the 20th November 1963. It involved converting 11 rooms into suites by converting two bedrooms into one. Each of the 11 rooms had a bathroom. One bathroom would be converted into a kitchenette. - 10 rooms would be reduced to 5 and the 11th room would be a large room. With the exception of the blocking up of one external door there would be no change in the exterior walls of the building. Seven partitions would be removed. Quite a bit of woodwork - cabinet work was involved - a cabinet dividing each room. Six gas stoves would be installed. The wooden floors were dropped in order to lay tiles - The internal walls forming the bathrooms and kitchens were of expanding metal, plaster and tiles. Prior to the conversion the walls and floors of the bathrooms were of wood. At the date of the fire 19/5/64 it needed about 8 weeks to complete the work.

The cabinet work consisted of the making of kitchen cabinets, fixing up clothes closets - partial partitions by decorating shelves between the proposed rooms and dining rooms. In the kitchens were two cabinets and cabinets on the

walls with formica tops. About four of the kitchens were complete at the date of the fire. Refrigerators and water heaters were to be installed. Shavings would result from the woodwork involved. The formica was being laid with contact cement which is highly inflammable. It is not used for woodwork. The wall tiles were laid with cement and sand - not contact cement. No interior painting had started - the zinc roof was being painted. No electrical fittings had been interfered with.

The appellant in his grounds of appeal complains that the conclusion of the learned trial judge that there was no breach of clause 8 a. of the policy was unreasonable and cannot be supported by the evidence and that in reaching that conclusion failed to take advantage of seeing and hearing the witnesses and did not draw the correct inferences from their evidence.

The learned trial judge erred in accepting the evidence of Mr. Thwaites that there was no increased risk of loss or damage by fire for the following reasons. If Mr. Thwaites' evidence is taken as a whole it gives little if any support to the respondent's case. Furthermore his contention as to what amounted to a "temporary period" of reconstruction should not be accepted on any judicial assessment of his evidence and all the evidence in the case. The evidence of the expert witnesses called for the defence was overwhelming. Mr. Thwaites, the only expert witness to give evidence in support of the respondent's case was the respondent's agent. Further the learned judge having found expressly and implicitly that the extensive internal alterations were taking place at the portion of the insured premises known as the Annex; that certain materials of an inflammable nature were stored there; that the annex would take about 7 months to be ready for rental again; that further intended alterations were to take place (involving the entire remainder and greater portion of the insured building) before that portion would be ready for rental again, should have found that the respondent was in breach of clause 8 (a) of the policy. The learned trial judge misunderstood the evidence as to the details of the alterations that were taking place; failed to appreciate that the alterations were scheduled to last for over a year; failed properly to distinguish between the circumstances

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

affecting the building during the entire period of the contemplated alterations (i.e. over a year) and the circumstances which existed prior thereto and in particular on the occasion of the last renewal of the policy. The trial judge erred in rejecting the evidence of the expert witnesses called for the appellant on the ground that they had no personal knowledge of the cause of the fire or the actual events that took place in the period preceding the fire. The trial judge failed to appreciate the significance of many portions of the evidence of the expert witnesses for the appellant. His reasons for rejecting the evidence of the appellant's expert witnesses were based on misdirections of fact and law including a misunderstanding of the nature of the evidence required to resolve the legal issues in the case.

Learned Counsel for the respondent inter alia made the following submissions:-

> The alterations to the building was not one job to last over a year but rather alterations to a section viz the upper floor of the annex which on completion would be rented out as flats then alterations on another section would commence.
>
> The policy Exhibit 5 is printed in parts and typewritten in parts. The printed parts are in common form and intended to apply to the range of categories in which the Company deals.

The typewritten sections are those that relate to an individual contract in a particular case. Condition 1 is general and the second portion of this clause is appropriate to a situation in which a proposal form is submitted and the insured warrants the accuracy of the proposal form; thus both parties know what are the facts relied on. If the insured misstates any of these facts the basis on which the contract is made is falsified and the insurer can repudiate the contract. In this case there was no proposal form. There is no evidence or any agreement as to any particular fact or statement being material beyond that stated in the typewritten portions of the policy. These contracts are uberrimae fidei. If the company has it in mind to make a particular fact a condition then the insurer has a duty to bring it to the

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

The basic rate for fire was 6/6 per £100 according to Rowlands.

6/9 per £100 according to Thwaites.

Rowlands made an important admission when he said, at page 101 line 8, that there is room for difference of opinion between experienced insurance men as to the relative hazards of different types of occupation. Rowlands regarded Thwaites as a highly skilled and experienced underwriter (102 line 31) and Thwaites agreed that Rowlands is a highly skilled and experienced expert in the field of insurance.

There was no misdirection in law, no misdirection on the evidence, the learned trial judge had not ignored any of the evidence, there was no cause for complaint.

The onus of proof that 8(a) was breached was on the appellant and the learned trial judge felt this onus had not been discharged.

In regard to this area of the case I cannot agree that the conclusion of the learned trial judge that there was no breach of clause 8 (a) was unreasonable and cannot be supported by the evidence nor that the conclusion of the learned trial judge based on the sum total of Thwaites' evidence was untenable.

By paragraph 5 of the Defence the appellant undertook to establish a breach of condition 8 (a) of the policy. To accomplish this he had to rely on the respondent's witnesses as to what work was being done by the contractors employed by the respondent to effect the repairs; on the respondent himself as to what work he intended to have done and four experts in the Insurance field: Rowlands, DePass, Lalor and Bates who would give opinions on the assumption that the work the respondent had put in hand was being carried out. This was necessary as the appellant produced no witness who gave any evidence of the alterations that were being done. The policy contained no term requiring the insurer to be notified when any repairs or alterations are to be done save and except when the alteration would cause such a change as will

attention of the insured and cannot keep it to himself and when called on to pay says I would never have issued the policy otherwise. He must bring such condition to the notice of the insured either by way of a proposal form or having the particular condition written into the policy or by express oral warranty.

Condition 6 as printed is avoided and superseded by attachment "A" to the policy.

Condition 8 is a general condition the meaning and application of which will vary considerably depending on the terms agreed in any individual case and will operate in a wide variety of situations e.g. commercial buildings, factories, warehouses, personal property, chattels, depending on what is being insured.

It is of fundamental importance that this policy does not stipulate for any particular type of user or occupation.

The policy although issued in December 1958 it is agreed as stated therein that it became operative from the 24th July 1958. There was no evidence of any further negotiations in December 1958 or at any other time. Everything that followed was working out on what was agreed between Thwaites and Rowlands on or about the 24th July 1958.

The rate of premium charged was 14/- per £100. This rate was appropriate to that charged in respect of an hotel in operation; A rate highly in excess of that charged for a private dwelling. The value of the risk for the type of alteration being done is less than 6/9 per £100 which is the rate for buildings under construction from the ground up including materials on site. There is no evidence as to how much of the 14/- per £100 was allocated for fire only but it is a reasonable inference that the rate the respondent paid for risk of fire only could not be less than the rate paid for the risk appropriate to this type of alteration and valued at less than 6/9 per £100. In so far as the rates give any assistance they support the contention that such alterations as were being carried out did not constitute an increase in the risk of loss or damage by fire.

increase the risk of loss. The only other witness on this point gave evidence for the respondent. He was Anthony Thwaites. He like the 4 experts in the insurance field gave his opinion on the assumption that the work the respondent had put in hand was being carried out. Unlike them however his opinion was that these alterations did not bring about such a change in the circumstances affecting the building as to increase the risk of loss by fire. It emerged from his evidence, page 94 of the record, that "the type of alteration that was going on at the Ethelhart Hotel is not as risky as a building being constructed from the ground up. The tariff for buildings under construction including materials on site is 6/9 per £100. This covers all buildings under construction from the ground up. Having seen the tariff rates; these rates confirm my opinion that the alterations described as going on at the Ethelhart did not increase the risks and confirms my original opinion." The appellant's witness Rowlands puts the rate at 6/6 per £100 instead of 6/9.

After a discussion between Thwaites and Rowlands the rate charged the respondent was 14/- per £100. No attempt was made at the trial or on appeal to show how this rate was computed nor to shew whether the maximum rate for fire was not included in the rate of 14/- charged the respondent.

The learned trial judge found that extensive internal alterations were taking place at the portion of the insured premises known as the annex and that certain materials of an inflammable nature were stored there.

These alterations were on the evidence limited at the time of the fire to the upper floor of the annex and did not extend to other areas of the building.

There was the positive evidence that in his opinion these alterations did not increase the risk of loss or damage by fire given by the respondent's witness Thwaites. There was the evidence of the appellant's witness DePass - page 124 line 17 that he is an expert at assessing what increases the risk of fire and that experts do not usually differ in their views as to whether repairs will increase the risk from fire but it can happen. It was clear

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

that the learned trial judge considering the evidence before him did weigh the several opinions of these experienced insurance men and found the evidence of the appellant's witnesses unconvincing. Whether there has been an increase of risk is a question of fact. Baxendale v. Harvey 1859 4 H & N 445.

I am unable on reviewing the evidence and hearing the submissions of counsel to say that the learned trial judge was wrong in his conclusion that there was no increase of risk of loss or damage by fire occasioned by the alterations that were being carried out. In my judgment the appellant failed on this aspect of the case to establish that a Breach of clause 8 (a) had occurred.

In regard to this appeal as it concerns clause 8 (b) the appellant complained inter alia as follows:- The conclusion of the learned trial judge that there was no breach of clause 8 (b) is unreasonable and cannot be supported on the evidence. In coming to a conclusion the learned trial judge failed to take advantage of seeing and hearing the witnesses and did not draw the correct inferences from their evidence. The finding of the learned trial judge that "there is no dispute that there was no physical occupancy of the Ethelhart hotel either by the owner personally or by any tenants for a period of over six months prior to the fire which destroyed the building: in other words, there was no one residing in the premises for a period of over 30 days" established or strongly indicated a breach of Clause 8 (b). The learned judge misdirected himself on the facts and on the law.

The evidence shows that when Exhibit 5 was issued and during the several renewals the buildings described was occupied as living quarters for nurses of the Montego Bay Hospital. The respondent had given one year's notice to the tenant and the nurses left on the 30th September 1963. Nonetheless the policy was renewed on the 25th July 1963 in the terms set out in Exhibit 6 (a) without the insurers being informed that notice had been given to terminate the tenancy. There was no doubt that this contract was at rates as a residence for nurses including a risk of non-occupancy for 6-8 weeks. It is conceded that this was not embodied in the

contract. One must look at the policy at the time of issue. Whether or not the policy states the use to which the building should be put the actual occupation at the time is what matters unless there is between the parties some arrangement to the contrary. The contract was for residential purposes. There is no doubt from the negotiations between Thwaites and Rowlands that the plain basis of the proposal was as a residence for nurses and the rates were agreed on that basis. The learned trial judge found as a fact that between the departure of the nurses on 30th September 1963 and the commencement of the alterations in mid-November 1963 the building was sufficiently protected by the police department and by hired Special Constables but failed to recognize the significance of this finding in relation to clause 8(b). During the period July to October 1958 a watchman was watching the premises at night and both sides negotiated then on the basis that the building was unoccupied but between 30th September 1963 and the 23rd November 1963 when the contractor Ainsworth entered to effect repairs the building was unoccupied for 51 days. Occupancy means living in the building. On an examination of the evidence there was no watchman employed and accordingly the appellant was entitled to succeed in relation to a breach of clause 8(b). No period exceeding 30 days can possibly be treated as temporary having regard to the policy.

Learned Counsel for the respondent submitted inter alia:-

As in relation to Clause 8(a) the onus was on the appellant to show that there was a breach of clause 8 (b) of the policy Exhibit 5. The main question is what is the proper construction of the Policy Exhibit 5 and whether the evidence establishes that there was a breach.

It is not correct as submitted by the appellant that Thwaites (the Respondent's witness) and Rowlands (the appellant Company's managing director when the policy was effected) had clearly agreed that the insured premises was to be occupied by nurses and that this formed the basis of the contract. If the appellant company desired to insist that the building should be occupied in a particular way it could have done so when the policy was issued in

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

December 1958 superseding the cover note issued in July 1958.

The whole case of the appellant on Clauses 8 (a) and (b) of the policy is based on asking the court to accept that there was a binding obligation on the respondent to bring some one to reside in the building (Nurses). If there was such an obligation it could only be found in the written contract or in some collateral agreement. It is conceded that it is not in the written contract; that there is no written collateral agreement; and as appears at page 143 - 13 line 11 no oral warranty.

The contract being one which has been reduced to writing extrinsic evidence is not admissible either to explain it, or to contradict, add to, subtract from or otherwise vary it. Levy v. Scottish Employers Insurance Co. 1901 17 T.L.R. 229.

Page 82 line 31 to page 83 line 5 and page 96 - 11 line 8 - 26 and page 98 to page 100 line 13 of the record reveal a conflict of evidence as to what was said and understood when the contract was made in July 1958. The learned trial judge was justified in not accepting the evidence of Rowlands as it was contradictory and inconsistent.

The construction of Clause 8(b) is a question of law. What in the context of this policy is the proper construction of the words "become unoccupied". Counsel for the appellant had submitted that ceasing to be occupied meant ceasing to be occupied as a residence. Respondent submitted that neither party could contend it was to be occupied other than as a residence. The words as a residence do not occur in the policy and can only be read into it if (1) the contract in some other clause had provided that occupation must be residential or (2) there was some binding collateral warranty apart from Exhibit 5 to the effect that occupation must be residential or (3) there was an express representation to that effect and was intended to be part of the basis of the contract. There was no such clause in the contract; no binding collateral agreement. The normal place to find an express representation would be in the customary proposal form, signed by the assured and vouched that the information was intended to be the basis of the contract. The insurers did not require

this. The evidence does not shew any such representation expressly or impliedly. The only people who could speak as to this were Thwaites and Rowlands. The evidence of Rowlands on pages 98 and 99 of the record is unreliable and not acceptable. The evidence of Thwaites if true and accepted shows that it could not be true that the parties understood and agreed that the residential occupation was to form the basis of the contract. The type of occupation was not made a basis of the contract however strong were the chances that nurses would have gone into residence. It is only if the learned trial judge made a finding that Thwaites was false and Rowlands true that it could be argued that residential occupation was the basis of the contract. There is no such finding and no complaint in the grounds that Thwaites was speaking falsely. The appellant has failed to establish that residential occupation was to be the basis of the contract. The appellant's position cannot be improved by the fact that nurses were in occupation when the policy Exhibit 5 was issued in December 1958 as no further negotiations took place between July '58 and December '58. Neither were there any further negotiations when the renewals were effected. The evidence of the respondent and Thwaites was that it would not be operated as an hotel. There was no ground for saying that there was a legal obligation on the respondent to confine the user to residential purposes.

The absence of any clause, warranty or representation as to occupancy renders the phrase 'become unoccupied' ambiguous. Accordingly the ambiguity should be resolved by adopting a construction least favourable to the appellants as the clause was drafted by them in protection of their own interest and seeks to create an exemption in their favour. Simmonds v. Cockell 1920 1 K.B. 843. In re Bradley and Essex and Suffolk Accident Indemnity Society 1912 1 K.B. 415. The word occupy is capable of a variety of meanings. One legitimate and ordinary meaning of "become unoccupied" is that there is no one exercising sufficient control over the premises to prevent interference by strangers - Control meaning an intention to prevent such interference coupled with some overt act carrying that intention into effect. The ordinary meaning of occupation is not restricted to residence or the actual physical presence of the occupier. In Re Gibbons 1920 1 Ch.

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

372; Newcastle City Council v. Royal Newcastle Hospital 1959 1 All E.R. 734; Wheat v. Lacon & Co. Ltd. 1966 1 All E.R. 582. The purpose of clause 8(b) was to give the insurer the assurance that there will be reasonable protection for the building both in terms of preventing unauthorised people from entering and maliciously setting fire to it and also that the building was under the control of someone so that acts which might lead to destruction are prevented or a warning given in case of fire or some appropriate action taken.

The two main issues in this area of the appeal seem to be (a) whether the basis of the contract of insurance was that the building would be occupied by nurses and (b) what in the context of this case is the meaning of the phrase "become unoccupied".

In regard to (a) the evidence is that the respondent disclosed to the appellant that apart from a watchman no one was living in the insured building. The appellant confirmed this by inspection before the policy was issued. The respondent informed the appellant that negotiations were proceeding between himself and the government for rental of the building as a residence for nurses on the hospital staff but that no agreement had been reached. The building was insured as from the 24th July 1958. The appellant was informed that the nurses would take up residence in 6 - 8 weeks time. The nurses in fact moved in on the 1st October 1958. The policy was issued and dated 12th December 1958 and expressed to be effective from the 24th July 1958. No proposal form was prepared or presented, the negotiations were conducted orally. There was no term stipulating the type of use or occupation to which the building would be put. The description of the building did not include any reference to its use or occupation. The explanation of this omission was that at the time the building was unoccupied and they were not absolutely certain as to what the occupancy would be. The managing director of the appellant company Rowlands said in cross-examination that he never wrote to the respondent or his agent Thwaites to say that the coverage would be subject to the nurses coming into occupation as the contract was a contract in good faith and it was unnecessary to put anything of that nature in writing although in examination in chief he had said that the rate was

based inter alia on the intended occupation by the nurses. There was no binding collateral warranty nor any express representation that occupation by the nurses was intended to be part of the basis of the contract. Rowlands in cross-examination says "I cannot remember saying to Mr. Thwaites "Unless the nurses came in within some specified or indicated period the coverage would be off. I never told the plaintiff (respondent) that". Very shortly after this witness says "I specifically told Mr. Thwaites to the effect that unless the nurses took up occupation as residents within a specified time the cover would be off. I believe the time specified was between 6 - 8 weeks."

The learned trial judge did not deal specifically with the issue (a) perhaps because at the trial it did not receive from counsel the emphasis that it was accorded on appeal.

In my view the contract being one which has been reduced into writing extrinsic evidence is not admissible to explain it or to contradict, add to, subtract from or otherwise vary it. It would have been competent for the appellant and the respondent if both had agreed to it and had sufficiently expressed their intention so to agree to have made continued occupation of the building by the nurses a condition or the basis of the contract. Thomson v. Weems, 1884, 9 App. Cas. 671 @ 683. On examination of the evidence clearly they did not so agree nor did they sufficiently express their intention so to agree. The respondent because he was uncertain as to what the occupancy would be and the appellant because he had computed the rate he 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 six to eight weeks. In these circumstances no term could be implied that it was a condition of the contract that the building should be occupied as a residence for nurses. Luxor (Eastbourne) Ltd. v. Cooper 1941 A.C. 108 @ 137. The opportunity was present if the respondent so wished to have included it as a term in the policy as the policy was not issued until approximately six weeks after the nurses had taken up residence in the building. The glaring instance of the witness Rowlands contradicting himself as to whether he told the respondent's agent with whom he had negotiated that unless the

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

nurses came in within some specified period the coverage would be off, is unexplained and would certainly result in a rejection of his evidence on this vital issue. Learned Counsel for the appellant conceded that if the building had been damaged by fire between the 24th July 1958 and the 30th September 1958 Clause 8 (b) would have been inoperative against the assured. There is no evidence to support the view that the parties had agreed that clause 8 would only become operative when the nurses took up residence and that it should relate to their continuing tenancy.

It seems to me that the true reason why clause 8 (b) could not be invoked by the appellant against the respondent in the circumstances last mentioned is because the policy contained no stipulation as to the use to which the building could be put. The appellants could not then have hoped to contend that it was the basis of the contract that the building was to be occupied as a residence for nurses.

In my judgment to argue that it was the basis or part of the basis of the contract that the building was to be occupied as a residence for nurses is to attempt to alter the terms of the written contract and to introduce a term that was never agreed by the parties. The simple fact is that the appellant insured the respondent's building and contents which at the time the contract was concluded there was no stipulation regarding the use to which the building was to be put and the said building was under the protection of a caretaker or representative and then being occupied by the respondent. This is the only type of occupation to which clause 8 (b) could have referred at that time.

In regard to (b) the learned trial judge who had the great advantage of seeing and hearing the witnesses 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 building was sufficiently protected by the police department and by hired Special Constables. With reference to the period of the alteration and up to the time of the fire he found that a watchman was employed to watch the building and that adequacy of protection had been established by the

respondent's witnesses. I see no reason for disturbing these findings of the learned trial judge. Also the learned judge concluded that on the facts and on the authorities there was no such non occupancy as to create a breach of clause 8 (b).

Learned Counsel on both sides cited several authorities in support of their submission as to the true meaning to be given to the phrase "become unoccupied" in the context of this case i.e. as it appears in the policy Exhibit 5. I have considered these cases and for the purpose of expressing the conclusion at which I have arrived I do not think it necessary to refer to all of them.

In the case of Swaby v. Prudential Assurance Co. Ltd. 6 W.I.R. 246 which was cited by counsel a clause in an insurance policy covering loss or damage by fire, identical with clause 8 (b) in the instant case, was considered by the Court of Appeal in Jamaica. This case was cited to the learned trial judge and referred to in his judgment. The facts in that case were different to the facts in the instant case. There on the evidence, the inference seemed irresistible that the appellant had ceased to live in the insured building and considered that occupation of the out house by his tenant was sufficient occupation for the purpose of the policy. There was no other evidence from which an intention to return could be inferred, and it had been established that the insured building became unoccupied and so remained for a period of more than 30 days before the fire. The clause therefore attached. Lewis J.A. in the course of his learned judgment said "the propositions stated in Brown v. Brash 1948 2 K.B. 247 are most nearly in accordance with my own view of the way in which construction of clause 8 (b) should be approached, and I shall cite them here." After citing the proposition he continues "The foregoing principles, with necessary modifications, bearing in mind that here we are dealing with the occupation of a building insured against fire and other perils, seem to me to afford a reasonable and if I may say so respectfully, a common sense approach to the construction of the words "become unoccupied and so remain". In my judgment if the learned trial judge meant that actual physical occupation was the determining factor, he gave the phrase too restricted a meaning. The words appear in one of a number of

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

printed conditions and are applicable to buildings which may be occupied in various ways, such as dwellings, seaside cottages, shops, warehouses, etc. In some cases the parties may not contemplate continuous actual physical occupation and it must always be a question when the building became unoccupied within the meaning of the condition. "Become unoccupied" seems to me to imply a change of status - as applied to a dwellinghouse it implies that the occupier has ceased to dwell in it. Such a change does not, I think occur when absence is merely temporary, there is a manifest intention to return and control of the building adequate for its protection from intruders is retained. But I agree with counsel for the respondents; that when the insurers have proved an absence of physical occupancy for more than 30 days the evidential burden of proving that there was in fact no change of status, that the house had not "become unoccupied" or that it only became unoccupied within 30 days shifts to the insured, though slight evidence may be enough to discharge this burden. I think that proof that no one has actually lived in the house for more than 30 days raises a presumption in favour of the insurer that the house has become unoccupied and has so remained for that period, and he is entitled to succeed unless there is evidence to the contrary sufficient to counterbalance this presumption.

..... the sufficiency of the counterbalancing evidence must depend upon the circumstances of each individual case; but the temporary nature of the absence, the manifest intention to resume residence, and the adequacy of protection must be established."

The principles stated above in Brown v. Brash were related to the circumstances of occupation by a tenant. In Swaby v. Prudential Ins. Company the principles were related to consideration of the circumstances of occupation by an owner which, in my judgment, are apposite to the instant case. In my judgment on the tenants leaving on the 30th of September 1963 there was no valid objection to the respondent as owner re-occupying or re-possessing the insured premises and this he did by, installing in the premises a caretaker or representative to wit a watchman; (caretaker meaning one whose only business is to guard the premises against injury vide Stroud's Judicial Dictionary 3rd edition 1952);

leaving furniture and contents in the building insured for £5,000 and having in his possession or under his control the keys to the building and was in fact in possession. Up to the time of the fire he was manifesting his possession in fact in that workmen employed by him were engaged in carrying out alterations, with the intention of renting the flats so formed by the alterations to tenants. There was no cessor of possession or occupation by the respondent owner or any change of status.

In my view the appellants have failed to shew there was a breach of clause 8(b) in the context of this case or to shew that the learned trial judge was wrong in concluding there was no breach of clause 8 (b) and the appeal should be dismissed with costs to the respondent.

In the Court of Appeal

No. 9

Judgment of Moody, J. (Dissenting)

30th July 1969 (continued)

No. 10

JUDGMENT OF ECCLESTON, J.

No. 10

Judgment of Eccleston J.

30th July 1969

By a cover note dated 25th July 1958 the Defendant Company agreed with Plaintiff to insure the buildings and contents known as the Ethelhart Hotel, Montego Bay against loss or damage by fire to the extent of £35,000 in respect of the building and £5,000 in respect of the contents in consideration of an annual premium of £266 for a period of 12 months from the 24th July 1958. The rate was 14/- % less 5% for a 3-year agreement. The buildings were then unoccupied.

On the 1st October 1958 the buildings became occupied by nurses as a result of a lease of the premises entered into by Government with the plaintiff.

By a cover note dated the 4th December 1958 replacing the cover note dated 25th July 1958 the same terms were expressed with the addition: "Subject to Standard Mortgage Clause in favour of Bank of Nova Scotia", Montego Bay.

The policy of insurance was issued on the 12th

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

December 1958 effective from the 24th July 1958 to the 24th July 1959. The risk was on (1) the buildings known as Ethelhart Hotel situate at Fort Street Montego Bay constructed ..... in the sum of £35,000. (2) On the whole contents of the above in the sum of £5,000.

Among the conditions in the policy to which the risk was made subject were the following

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.

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

The nurses continued to live in the buildings until they vacated them on the 30th September 1963 because of a year's notice given by the Plaintiff to Government terminating the tenancy.

During the intervening years and on the due date in July of each year the policy of insurance was renewed, the premium being paid; and on the 25th July 1963 appears the following memorandum of endorsement of the policy: "It is hereby declared and agreed that with effect from renewal date 24th July 1963 and in consideration of the insured having agreed to renew this insurance for a period of 5 years premium payable annually in advance, a discount of 7½% has been allowed off the gross premium payable hereunder. All other terms, exceptions and conditions of the policy remain unaltered. N.B. also insured through Dyoll Ltd. in the sum of £12,400." It may be mentioned that

as from the renewal date 24th July 1960 in consideration of an additional premium paid annually the concrete boundary walls and concrete and stone patio were covered to the extent of £2,400 thereby increasing the coverage with the Company to the extent of £42,400. After the nurses left no one went to live in the buildings, but a watchman was placed there by the Plaintiff from the 1st October 1963 until 20th November 1963 when Mr. Ainsworth a contractor began work of conversion of the interior of the building into flats, which work Plaintiff had arranged with him to do. Ainsworth was to supply a watchman until the work was completed, and this arrangement continued until the early morning of the 20th May 1964 when the buildings were destroyed by fire.

Paragraph 4 of the defence stated that the plaintiff terminated the tenancy whereby the buildings were occupied as Nurses Living Quarters, with effect from the 30th September 1963 and from that date the buildings became unoccupied and so remained unknown to and without the sanction of the Defendant Company and without the policy being endorsed as required by Condition 8 until the occurrence of the fire on the morning of the 20th May 1964 and paragraph 9 by way of counter claim asked for a declaration that the said policy of Insurance had ceased to attach to the said property at the time of the fire.

The learned trial Judge found the following:

"In regard to the building remaining unoccupied contrary to Clause 8(b), the evidence disclosed that the physical occupiers of the Ethelhart Hotel were tenants - to wit about 30 nurses and that they had left the premises and the owner was making internal alterations with the intention of it being occupied as flats by tenants. The Defendants knew that the premises were being used under a lease to tenants and the latter intention by the Plaintiff to let it out in flats to other tenants after alterations were completed would not ipso facto cause ..... the building to be unoccupied.

I am fortified in this opinion as to occupation, though this opinion is not based

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

on an insurance case, by the case of McKenna v. Porter Motors Ltd., (1956) 3 A.E.R. 262 to 266 at p.265 E: (which case was not cited by either party) Held:- A Landlord may in our opinion enter into occupation of premises, intending as part of his enjoyment thereof to demolish the building and substitute others there for which he in turn will occupy (not rent to someone else). He is occupying premises if he occupies the lands and such buildings as from time to time is situated thereon.

The question here is the intention, coupled with other facts to show occupancy, interruption of occupancy with the intention of having the premises occupied and coupled with such acts as repairs and modification of a kind which would show the intention to let for occupancy to tenants.

The submission that a building cannot be said to be occupied if it is being repaired and altered for purposes of occupation would apply to some building that had never been occupied in the past but could not apply to one that had been occupied and the occupation interrupted solely for the purpose of the building being repaired and altered for the purpose of future occupation especially of a similar nature.

The case of Arbuckle Smith & Co. Ltd. v. Greenock Corporation (1960) 1 All E.R. 568, which was cited turns on its own particular facts and is based on the meaning and intentions of the legislature in regard to the liability for rates as required under the Local Government (Scotland) Act, 1947 and the question was whether the premises were unoccupied during the period of repairs and alterations to those premises which were not previously occupied for the purpose for which repairs and alterations were being done. Occupation in the sense of the cited case has no application to the instant case.

The case of Swaby v. Prudential Ass. Co. (1964) 6 W.I.R. 246 also turns on the particular facts of that case insofar as the liability

of the Insurers were affected on those facts by Clause 8(b) of the policy which was in similar terms to Clause 8(b) in this case. However a dictum of Lewis J.A. in the Swaby case which would seem to apply to this instant case with reference to occupancy is:- Where a building is vacated by tenants and not resided in by the landlord or other tenants there is prima facie a cessor of occupancy. The question is one of fact and degree. Assuming the vacation by tenants of the same residential type is sufficiently prolonged to have this effect. The legal result would seem to be as follows:-

"(1) The onus is then on the landlord to repel the presumption that that occupation by tenants or by himself has ceased.

(2) To repel it, he must at all events establish a de facto intention to have the place re-occupied by tenants after its vacation by other tenants.

(3) He cannot do this simply by proving an inward intention to have the place tenanted after a protracted period of non-occupancy.

(4) Notwithstanding vacancy so protracted as 5 years, its effect may be averted if he couples and clothes his inward intention with some formal, outward and visible sign of it."

The type of tenant may have some individual and personal effect on the insurer as to whether he would accept the risk for new and different types of tenants but in a general way the type of occupation or means of livelihood which is carried on outside the building by the new tenants would not affect the risk as far as the occupancy of the building by other tenants of a similar type are concerned. The Court is therefore satisfied that on the facts of this case and on the authorities there is no non-occupancy which created a breach of Clause 8(b) of the Policy Exhibit 5."

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

The appellant took the following grounds of appeal among others:-

In considering whether there was a breach of clause 8(b) of the policy, the Learned Trial Judge concluded that -

"There is also no dispute that there was no physical occupancy of the Ethelhart Hotel either by the owner personally or by any tenants for a period of over six months prior to the fire which destroyed the building. In other words, there was no one residing in the premises for a period of over 30 days."

The Learned Trial Judge failed to appreciate that this state of affairs established or strongly indicated a breach of clause 8(b) of the policy.

In finding that there was no breach of clause 8(b) the Learned Trial Judge misdirected himself on the facts and on the law (inter alia) -

(a) In relying on the decision of McKenna v. Porter Motors Ltd. (1956) 3 W.L.R. 658 (1956) 3 A.E.R. 262.

(b) In distinguishing the case of Arbuckle Smith Co. Ltd. v. Greenock Corp. (1960) 1 All E.R. 568, and ignoring the important judgment of Lord Reid in that case.

(c) In stating that "the question here is the intention coupled with other facts to show occupancy, interruption of occupancy with the intention of having the premises occupied and coupled with such acts as repairs and modifications of a kind, which would show the intention to let for occupancy to tenants."

(d) In relying on a dictum of Lewis J.A., in the case of Swaby v. Prudential Assurance Co. (1964) 6 W.I.R. 246, although the dictum does not assist the plaintiff on the facts of this case.

(e) In failing to appreciate that on the admitted facts at the trial, a prima facie case of non-occupancy was established, and that the plaintiff failed to rebut the onus that had shifted to him.

(f) In ignoring the fact that the main building was locked up and the keys kept in plaintiff's safe.

(g) In failing to appreciate the difference between a temporary interruption of occupation for the purpose of necessary repairs with a view to resumption of occupation by the same tenants and the complete termination of the occupation of such tenants with a view to offering fresh tenancies to new and unascertained persons at some future time and only after a prolonged period of non-occupation during which substantial reconstruction work is effected.

Under Rule 14 (2) of the Court of Appeal Rules Respondent filed a notice that he intended to contend that the decision of the trial Judge may be affirmed on the following grounds in addition to the reasons given by the trial Judge.

(1) In all the circumstances of the case and on the evidence the conditions on which the defendant proposed to rely did not form part of the contract of insurance between the Plaintiff and the Defendant.

(2) Alternatively the defendant had by conduct waived its right to rely on the said conditions and/or was estopped from contending that the said conditions formed part of its contract of insurance with the plaintiff.

(3) In view of the fact that the contract of insurance did not specify any type of user or occupation for the insured building the conditions in clause 8 of the policy were ambiguous, uncertain and unenforceable.

At the outset of the hearing of the appeal Mr. Coore informed the Court that he did not propose to

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

argue ground No. 1 in the Respondent's notice under Rule 14 (2) of the Court of Appeal rules as he accepted the Judge's finding on that point.

Condition 8 B: Mr. Robinson for Defendant/Appellant submitted that as each renewal of the policy annually by mutual consent created a fresh contract of insurance there would have been a new contract on each of the occasions while the buildings were occupied by the nurses so that the conditions in clause 8 of the policy would have been effective on the 24/7/61, 24/7/62 and 24/7/63 and whether or not the policy stated the use to which the premises were to be put the actual occupation at the time of the issue of the policy is what mattered, unless some arrangement to contract otherwise out of the policy was made. He further submitted that there was the fullest disclosure between Thwaites as agent for the Plaintiff and Rowlands the manager of the Defendant Company that the building would be unoccupied for 6 to 8 weeks before the nurses took up residence. In that event Condition 8 would be inoperative but says he when the policy was completed and forwarded the nurses were actually in residence and from then took up residence condition 8 was effective and binding on the insured. He further submitted that Plaintiff, having given one year's notice to the Government, knew, on the 24th July 1963 when renewing the policy that the Nurses would be leaving on the 30th September 1963. That he contemplated no immediate tenancy of the building but rather that structural alterations internally, in its conversion into flats, were to be undertaken and such work would take some considerable time before the buildings would again be tenanted, withheld this information from the insurers when renewing the policy and did not obtain the sanction of the company for the continuance of the policy. That for 50 days from the 1st October 1963 until the 20th November 1963 when Ainsworth commenced the work, the buildings were unoccupied and the policy of insurance ceased to attach and so continued until the 19th May 1964 the night of the fire and that the finding of the learned trial judge that there was no non-occupancy which created a breach of clause 8B of the policy cannot be supported. The court was referred to some American cases viz. C.F. Hoover et al Respondents vs. Mercantile Town Mutual Insurance Coy Appellants. This was an

appeal from the Oregon Circuit Court in an action upon a fire policy issued by Defendant Company to J.S. Hoover insuring him against loss by fire on his two-storey frame building with shingle roof etc. occupied as a private dwelling: The most important phrase of the defence was to be found in a stipulation of the policy to the effect that "This entire policy, unless otherwise provided by agreement endorsed thereon or added to shall be void if the building herein described whether intended for occupancy by the owner or tenant be or become vacant or unoccupied and so remain for ten days." The jury found for the Plaintiff and assessed damages. On appeal the verdict was set aside and a new trial ordered as the defence of non-occupancy was not left to the jury as the fire did not occur during such period.

It is of interest to quote from the Judgment of Barclay J. the following. "It has been held by the Supreme Court of Missouri, following a New York case on the same subject, that "occupation of a dwelling house is living in it." Cook v. Insurance Co. 70 M. 610. He goes on to say the policy, which should always be closely read for the purpose of determining the intention of the parties, describes the building insured as being "occupied as a private dwelling." It is proper, and often necessary, to consider the use for which premises are intended in determining the question whether or not they are occupied within the meaning of such a stipulation as is before us now. Continental Ins. Co. v. Kyle 124 Ind. 132. Counsel next referred us to Ross & Others vs. Scottish Union and National Insurance Company (1919) 58 Canadian Supreme Court Reports p.169 at para. 179 where it is stated that 'occupied' is actual as distinguished from mere possession. He next referred us to the case of Lucille Page v. Nationwide Mutual Fire Insurance Coy. (1962) 223 N.Y.S. 2 at 573; wherein an insured brought an action against an insurer on a fire policy, and the insurer asserted an affirmative defence under provision of the policy that the insurer is not liable for fire loss occuring while the insured building is vacant or unoccupied for more than 60 consecutive days in which the evidence was that during the 60 days the owners had slept on improvised bedding on the floor while renovating the building. Bergon Presiding Justice of a bench of five giving the judgment said: "The presence of

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

furniture does not alone make occupancy; and its absence does not negative it necessarily." It is the regular presence of inhabitants that makes occupancy. And three days of such presence is enough to break the 60 day chain of unoccupancy which had occurred. Of course, the mere renovation of a house with no one staying there during the process does not make out occupancy: and this is all that was held in Barry v. Prescott Insurance Co. 35 Hun. 601: It was held that the burden of establishing the affirmative defence was on the insurer, and that the evidence sustained the finding that the insurer did not establish such defence.

The other American case referred to was David and Lizzie Duckworth vs. Peoples Indemnity Ins. Co. No. 5 - 2663, Supreme Court of Arkansas 14th May 1962 in which it was held that a house was vacant or unoccupied within exception to fire policy at time of fire on or about July 7, where tenant had moved out about May 30, and no one moved in thereafter, though the owners stored furniture in two unused rooms, they were last in house about April 5 or 6, and they had never actually lived in the house, though they apparently intended to make it their home upon return from a trip. In arriving at that decision the Court accepted the finding of the trial court in which it recited the general rules relative to "vacant or unoccupied" as follows: "In 29 A. Am. Jur. p.112 para. 907 it states: "Although sometimes used interchangeably, the terms 'vacant' and 'unoccupied' are not generally regarded as synonymous terms in the law of insurance. 'Vacant' means without inanimate objects: 'unoccupied' means without animate occupants and the terms 'vacant or unoccupied' imply a situation in which the insured buildings are without an occupant of the kind and during the time, contemplated by the intention of the parties, as indicated by the terms and descriptions of the policy. A dwelling is 'occupied' when it is in actual use by human beings, who are living in it as a place of habitation, and is 'unoccupied' when it has ceased to be a customary place of habitation or abode and no one is living or residing in it." In 29 A. Am. Jur. p.115 para. 910, it further states "If, however, a dwelling is left without an occupant for an unreasonable length of time, it should be deemed unoccupied irrespective of the intention of the occupant."

Mr. Coore for Plaintiff/Respondent submitted that there were two broad issues involved viz

(1) What is the proper construction of the policy of insurance Exhibit 5.

(2) Whether on that construction the facts as found by the trial Judge or admitted on the pleadings and in evidence establish that there has been a breach of either or both conditions 8A or 8B of the policy.

The policy consists of the printed and typewritten parts: the printed parts are common form and apply to the whole range of insurance categories with which appellant deals, while the typewritten sections relate to this particular contract of insurance and must be construed together with the documents which form the basis out of which the policy arose. It is his submission that there being no proposal form, there was no evidence that there was any agreement as to any particular fact or statement as being material other than anything as specifically stated in the typewritten portion of the document and it was the duty of the company to bring to the attention of the insured condition 8 of the policy. There being no proposal form on which it could be filled in there should have been some expressed oral collateral warranty and thus show how Clause 8 would be applicable in the particular case. The fact that the contract of insurance does not stipulate for any particular type of user or occupation is of the most fundamental importance and when they came to supersede the cover note with the policy there was then the opportunity if they wished the building to be occupied in any particular way to have placed in policy the type of occupation or user that was to be effective. It is his contention that precisely the same situation obtained under the policy document from and after the 1st October 1963 as existed under the cover note between the 24th July 1958 and 1st October 1958 and Respondent was entitled to continue with the building with the watchman as heretofore. It is his submission that the whole of the Appellant's case on Condition 8A and 8B is asking the Court to accept that there was a binding obligation on Respondent to bring nurses or somebody to reside in the building. However, this binding obligation was not in the contract nor

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

was there any collateral agreement evidencing it and the fact that when the policy Exhibit 5 was signed the nurses were in occupation was of no significance for the relevant period was July '58 when the contract was negotiated. It was what was settled and agreed on at 24 July '58 concluding in cover note dated 25 July '58 that was of material importance as no new negotiations took place afterwards for the new policies. Thus in the construction of the phrase "become unoccupied" it is Mr. Coore's submission that appellant is asking the court to construe it to mean "becomes unoccupied as a residence" and if that assertion is not accepted then says he, their case on condition 8B fails.

Nowhere in the policy do the words "as a residence" occur nor was there any such warranty. It is necessary therefore to turn to the evidence for assistance. Mr. Coore contends that the evidence of Thwaites and Rowlands differ on this important matter: Rowlands purports to say that some such representation was made while Thwaites' evidence is that the use and occupation usually forms part of the description in the policy, but was omitted as the buildings were unoccupied at the time and there was no absolute certainty as to what the occupancy would have been. In cross-examination he said "when I discussed the matter with Rowlands it was explained that the premises were at the moment unoccupied, but was expected to be occupied by nurses depending on the lease to Government. Plaintiff had given me that information and I made full disclosure to A.B.C. so that they could decide whether to take the risk. The plaintiff was negotiating a lease to Government so when I spoke to Rowlands it was not absolutely certain the nurses would occupy the building. It was in the light of all that information that defendant company decided to accept the risk of £40,000. The discussion with Rowlands included the risk of covering the building for a few weeks unoccupied until the nurses came in."

It is the submission of Mr. Coore that in the absence of any interpretation clause in the contract or any warranty or obligation of what occupancy was, the phrase in Clause 8B "become unoccupied" is ambiguous and must be construed in a manner least favourable to the insurers because

it was drafted by them and inserted for their own protection and creates an exemption in their favour. He referred to Simmons v. Cockell (1920) 1 K.B. 843 the head note of which is as follows: "By a policy of insurance the contents of premises used for business and residential purposes by the assured and his wife were insured against loss by housebreaking or theft. The policy contained a clause: 'Warranted that the said premises are always occupied.' During a temporary absence of some hours of the assured and his wife on a Sunday the premises were left unattended and were broken into and some of the contents were stolen. In an action on the policy. Held, that the warranty did not mean that the premises should at no time be left unattended, but that they should be continuously occupied as a residence; that there had in the circumstances been no breach of the warranty, and that the assured was therefore entitled to recover the loss on the policy."

The policy contained no term as to the type of occupation the plaintiff was to have on the premises and Appellant's counsel admitted that there was no warranty thus parol evidence could not be admitted to vary the contract made through the agent.

See Levy v. Scottish Employers Insurance Company 17 T.L.R. 229.

His submission is that where there are different meanings of 'occupied' the meaning most favourable to the insured is to be preferred and one legitimate meaning indeed the ordinary meaning of the phrase 'become unoccupied' means there is no one exercising sufficient control over the premises to prevent interference by strangers. To control consists of an intention to prevent such interference coupled with some outward act carrying the intention into effect. Thus occupation is not restricted to residence or the actual physical presence of the occupier. Re Gibbons (1920) 1 Ch. 372. He next referred to Newcastle City Council v. Royal Newcastle Hospital (1959) 1 A.E.R. 734 at 736 where Lord Denning said 'but legal possession is not the same as occupation. Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering.' There must be something actually done on the land, not necessarily on the whole but on part in respect

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

of the whole. No one would describe a bombed site or an empty unlocked house as occupied by anyone, but everyone would say that a farmer occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another.

Reference was also made to the case of Wheat v. E. Lacon & Co. Ltd. (1966) 1 A.E.R. 582 where at 593 F, Lord Denning said "In the Occupiers Liability Act, 1957 the word 'occupier' is used in the same sense as it was used in the common law cases on occupiers liability for dangerous premises. It was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who lawfully come on to the premises." and at p.595 B in the fourth group "Where an owner employed an independent contractor to do work on premises or a structure, the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there. In some cases he might fulfil that duty by entrusting the work to the independent contractor." Several other cases where referred to but they dealt with occupation for rating purposes as also under the Rent Restriction acts. In Swaby v. Prudential Insurance Company (1964) 6 W.I.R. 246 a portion of the head-note reads: "become unoccupied" implied a change of status - as applied to a dwelling house it implied that the occupier has ceased to dwell in it. Such a change would not occur when absence was only temporary and there was a manifest intention to return and control of the building adequate for its protection from intruders was retained." It is Mr. Coore's submission that following that decision if "become unoccupied" means "become unoccupied for residential purposes" then the fact that no one resided in the building is not conclusive but only shifts the burden to the insured to show that this was only a temporary state of affairs and not intended to be permanent as there was a manifest intention to reserve the user of the buildings for such purposes as hitherto and there was adequate protection, and the insured on evidence admitted by appellant has discharged that onus as found by the trial Judge. Alternatively Respondent retained sufficient control of the premises intentionally so as to protect it from interference by intruders either through his

own servants or agents or through his own independent contractor Ainsworth.

Whatever may have been the legal position during the period 25/7/58 the date of the cover note and 1/10/58 the date when the nurses went into residence may be considered in the light of the case of Woodruff v. Imperial Fire Office (1880) 83 N.Y. Rep. (Fire) 113 mentioned in Bunson's Law of Fire Insurance 7th edition at p.158 but the report of that judgment was not available so that a decision could be taken. In any event the policy with its condition had not yet come to the knowledge of the respondent so that condition 8 may not have been operative. For particular consideration however, is the position from and after the nurses went into residence as a result of the lease of the buildings to the Government for that purpose together with the position following on their leaving.

The learned trial Judge found as a fact that Plaintiff accepted as correct and made use of the policy of insurance Exhibit 5 which contained condition 8 and with this finding Counsel for the Respondent is in agreement. It is therefore important to construe the words 'becomes unoccupied' in condition 8 B of the policy. What was insured in the policy was "the buildings known as Ethelhart Hotel". There was no description of the user which is usually contemplated in discussions so as to arrive at the premium. The buildings had been used previously for hotel purposes and insured in Dyoll Insurance Company of which Thwaites was manager and when Plaintiff expressed his desire to increase the insurance on his repossession of them, Thwaites acted as his agent in the negotiations with Rowlands the manager of the appellant company. An examination of the evidence discloses that the buildings were not to be used for hotel purposes in future. Were they to be used for dwelling purposes? Rowlands in his evidence suggests this, while the evidence of Thwaites might be considered indecisive. However, within three months of the negotiations the buildings were occupied as a dwelling and so continued for 5 years, the policy of Insurance being renewed on the due date during these years, subject to the terms, exceptions and conditions of the policy remaining unaltered.

On the 30th September 1963 the occupants

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

vacated the premises having been given one year's notice, to do so, by the Respondent, which notice then expired, and the evidence of the Respondent is that he decided to effect structural alterations to the buildings and so make them into flats. This work was however not begun until the 20th November 1963 and it is the contention of the appellants that during those 50 days the buildings became unoccupied and the policy had ceased to attach at the date of the fire. The evidence for the Respondent was that on the nurses vacating the premises policemen at his request patrolled the premises and there was a watchman placed there until the 20th November when Ainsworth the Contractor by arrangement supplied a watchman. Mr. Coore submitted that what was required was to have someone on the premises who would prevent interference by strangers while the control remained in the owner, which when coupled with his outward acts would demonstrate his intention to carry same into effect, so that occupation would not be restricted to residence or actual physical presence of the occupier in the building but that some one would be in control or be present to take action should a fire break out. He further submitted that once there was some one employed to exclude strangers from interfering there was sufficient occupation in terms of the policy. Following Swaby v. Prudential Company (supra) he submitted that the respondent had discharged the burden on him and that condition 8 (b) had not been breached.

There is no evidence that, after the nurses left, anyone slept or lived in the buildings, but rather that the watchman was on the outside and without the means of entry as the buildings were locked up with furniture stored in a portion until the work began on the annex into which portion only, was any entrance gained.

In Stroud's Legal Dictionary 3rd Edition p.1959 No.14 "occupied" means dwelt in and "unoccupied" when no one lives in. The nurses on leaving had no intention to return and though the control may be in the Respondent it was not such as contemplated in the terms of the policy. There was no evidence that Respondent intended to live in the buildings and it is my view that when the nurses left at the termination of the tenancy agreement with the Government the buildings became unoccupied.

Mr. Coore further submitted that the appellant had waived condition 8 B and was estopped from contending that the said conditions formed part of the contract.

Because of the endorsement "all other terms, exceptions and conditions of the policy remain unaltered" which was made on each renewal date over a period of 5 years and in Respondent's dealings with the policy can either waiver or estoppel avail? It is suggested that the position that obtained after the nurses vacated the building was no different to that which obtained before they went into residence so that the condition in the policy would not have been effective. In this context one has to take into account the fact that the Respondent knew from a year before the date the nurses left just when they would be leaving. At the time of the last renewal some three months before they actually left, he said nothing to any one and kept from the company and his agent his intentions with regard to the proposed alterations to the building which were contemplated as also the future use after completion which would take some considerable time. In such circumstances I do not see that waiver or estoppel can avail.

Mr. Coore next submitted that the conditions in Clause 8 of the policy were ambiguous, uncertain and unenforceable because the contract of insurance did not specify any type of user or occupation. The evidence disclosed that the buildings were hitherto used as an hotel. It was not intended that they should be so used in future by the Respondent. He contemplated renting them to Government as a residence for Nurses, but the contract had not been finalised. In the circumstances the type of user was not stated but it can be gleaned from the evidence that a type of user was contemplated and discussed. The very nature of the buildings themsevles would assist in this contemplation and as user is helpful in assessment of the rate to be charged a reference to the rate as charged would lead to the conclusion that the use to which the buildings were to be put was residential.

I am of the view that Respondent was in breach of condition 8(b) during the 50 days after the 1/10/63 and also at the time of the fire on the 20/5/64.

In the Court of Appeal

No. 10

Judgment of Eccleston, J.

30th July 1969 (continued)

With regard to condition 8 (a) of the policy the evidence of conversion of the building was given by Edmund Fray viz the work that was being done on the building entailed making 11 rooms into suites by converting two bedrooms into one. Each of the 11 rooms had a bathroom and we would change one bathroom into a kitchenette. We were reducing 10 rooms to 5 and the 11th room was a large room. This work did not involve any change in the exterior walls of the building except the blocking up of one external door. It was a conversion of the inside by removing 7 partition. Quite a bit of wood work was involved. It was cabinet work. There would be a cabinet dividing each room. The six stoves would be gas stoves. We never had to interfere with the electrical fittings at all. The old bathrooms would be improved. We dropped the floors which were of wood in order to lay tiles. The internal walls forming the bathrooms and kitchen were done of expanding metal, plaster and tiles. Prior to the conversion all the walls and floors of the bathrooms were wooden. Subsequent to conversion the walls and floors would be plastered over with cement and laid with tiles.

The work was begun in the annex which adjoins the main building. The main building in which the furniture was stored was kept locked. Materials including lumber, cement, paints, tiles and other similar for construction were kept on the lower floor of the annex. It was intended to complete the work on the annex by the end of December 1964 when the flats would be let and then to undertake the work on the main building which was larger.

The trial judge found that the reduction in the number of rooms by removing partition walls of wood and substituting tiles, plaster and cement for boards would reduce the risk from fire rather than increase it though fire having once started, the risk of it spreading would be greater owing to the removal of fire breaks such as walls and doors.

The evidence for the Respondent was that of Thwaites whose opinion was that the nature and extent of the work involved and done up to the time of the fire and the storage of the materials for use in the reconstruction did not increase the risk of loss or damage by fire.

The evidence for the appellant consisted of that of Rowlands, DePass, Lalor and Bates. Each gave his opinion and the sum total was that it would increase the risk of loss or damage by fire. This evidence conflicted with that given by Thwaites. For different reasons the trial Judge dismissed the evidence of each of these witnesses and, in his findings accepted the evidence of Thwaites.

It is the contention of the appellant that the Judge failed to fully appreciate the nature and purport of this evidence and so could not be said to have properly evaluated same. A careful reading of the evidence gives some support to this ground of complaint. These were expert witnesses whose testimony was given to assist the Judge on a difficult question which he had to decide. I am of the view that his approach to that evidence was wrong and thus his finding that there was no breach of Condition 8 (A) is open to much doubt. Without detailing the several portions I would say that on the weight of the evidence the probabilities appear to come down in favour of the appellant.

I would allow this appeal and set aside the Judgment for the Respondent and enter Judgment for the Appellant with Costs.

No.11

JUDGMENT OF LUCKHOO, J.

During the night of the 19th or in early hours of the morning of the 20th May, 1964 a building owned by the respondent James M. Marzouca known as the Ethelhart Hotel situate 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 appellants and renewed from time to time the last renewal being effected on the 24th July, 1963, the building 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 walls and patio (added in the year 1960) in the sum of £2,400. The loss resulting

In the Court of Appeal

No. 11

Judgment of Luckhoo, J.

30th July 1969 (continued)

from the fire exceeded the amounts insured for in respect of the building and its contents and the damage to the concrete boundary walls and patio amounted to £75. The respondent's claim of £40,075 in respect of such loss and damage was rejected by the appellants on the ground that the policy had been avoided for non-compliance with both condition 8 (a) and condition 8 (b) contained in the policy. The respondent thereupon filed a claim against the appellants in the Supreme Court in the aforesaid sum of £40,075. The learned trial judge held that there was no breach of either of those conditions and gave judgment for the respondent in the sum claimed. The appellant's counterclaim for a declaration that the policy had ceased to attach to the property affected thereby at the time of the loss or damage was rejected.

The provisions under which the appellants seek to deny liability under the policy (referred to in the policy as conditions) appear among a number of printed conditions in the policy and are 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 or of 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.

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

In the court below it was contended on behalf of the respondent that in the circumstances of the case conditions 8 (a) and 8(b) did not form part of the contract of insurance between the respondent and the appellants. The learned trial judge rejected that contention. At the hearing before us counsel for the respondent Mr. Coore expressly

abandoned the first paragraph of the respondent's notice in the appeal which sought to raise a similar contention. He relied instead on the learned trial judge's finding that the evidence accepted by the trial judge disclosed that there was no breach of either condition 8 (a) or condition 8 (b). In the alternative he submitted (i) that the appellants had by their conduct waived their right to rely on conditions 8 (a) and 8 (b) and/or were estopped from contending that those conditions formed part of their contract of insurance with the respondent; (ii) that in view of the fact that the contract of insurance did not specify any type of user or occupation for the insured building those conditions were ambiguous, uncertain and unenforceable.

In order to appreciate the submissions made it is necessary to refer to the way in which the policy came to be effected and to certain of the events occurring thereafter and up to the time of the fire. The building had been acquired by the respondent in April, 1945 and the respondent lived in it for some two to three years. Thereafter, the respondent operated it as an hotel under managers until February, 1957, when one Mr. Cowper, now deceased, entered into an agreement of sale and purchase with the respondent the purchase price being payable by instalments. Mr. Cowper operated it as an hotel and effected repairs and improvements. Mr. Cowper died in June 1958. In July, 1958 the respondent resumed possession of the building which at that date was insured against loss or damage by fire and certain other perils, with Dyoll Insurance Co. Ltd., (referred to as Dyoll's) in the sum of £25,000. The respondent decided to apply for an increase in the amount of insurance and spoke with Thwaites, at that time Managing Director of Dyoll's, as a result of Dyoll's being unwilling (as a matter of policy) to carry insurance beyond the sum of £10,000 on any one building. Thwaites acting as the respondent's agent (this is admitted) thereupon arranged with the appellants through their managing director Rowlands to insure the building and its contents against loss or damage by fire and certain other perils in the sums of £40,000 and £5,000 respectively. No written proposal or application was made. A cover note dated 25th July, 1958 effective for 12 months from the 24th July, 1958 was issued "subject to the terms, exceptions and

In the Court of Appeal

No.11

Judgment of Luckhoo, J.

30th July 1969 (continued)

conditions of the Company's policy". At the 24th July, 1958, no one was residing in the building but it was anticipated that in a matter of 6-8 weeks a lease would be taken by Government for occupation of the building as a residence for nurses employed at the Montego Bay Hospital and this information was communicated by Thwaites to Rowlands (previous to Rowlands agreeing to issue the cover note) for the purpose, according to Thwaites, that the appellants could decide whether to take the risk involved. No description of user or occupation was inserted in the cover note. According to Thwaites "it was omitted because the building was unoccupied at the time and we were not absolutely certain as to what the occupancy would have been." The lease to Government being entered into the nurses went into occupation of the building on the 1st October, 1958. On the 4th December, 1958, another cover note stated therein to be for 12 months with effect from the 24th July, 1958 and as replacing the earlier cover note, was issued with the endorsation that the policy was issued subject to the standard mortgage clause in favour of the Bank of Nova Scotia, Montego Bay. This cover note was also issued "subject to the terms, exceptions and conditions of the Company's policy." On the 12th December, 1958 the policy was issued stated therein to be effective from 24th July, 1958 and containing the conditions (among others) which are in point in this matter. The policy was renewed from time to time the last renewal being made on 24th July, 1963. No description as to user or occupation appeared in the second cover note or in the policy. The lease to Government was terminated by the respondent upon notice to Government and the nurses ceased to occupy the building with effect from the 1st October, 1963. It is conceded that the last renewal of the policy took place after notice of termination of the lease had already been given to Government and that this fact was not communicated to the appellants before the fire. It is also conceded that the fact that the nurses had ceased to reside in the building was also not communicated to the appellants before the fire. After the nurses left no one resided in the building up to the time of the fire. In the meanwhile for a period of 51 days after the nurses left the respondent employed a constable at nights to watch the premises and thereafter until the time of the fire part of the building - the upper floor of the annex

to the main body of the building - was under reconstruction for the provision of self-contained apartments (part of a plan for reconstruction of the entire building into self-contained apartments) and the independent contractor employed by the respondent for the reconstruction employed a night watchman for the purpose of guarding the materials to be used in the course of the reconstruction. There is no evidence that the constables or watchmen ever had access to the interior of the building. Indeed the evidence appears to be that they did not. The work of reconstruction on the upper floor of the annexe was carried on by day from the 21st November, 1963 was yet unfinished when the fire occurred, on the 19th or 20th May, 1964. The respondent intended to rent the apartments for residential use when they were completed. Materials for use in the reconstruction were stored on the lower floor of the annexe. The details of the nature and extent of the reconstruction are pertinent only to the appellants' contention that there was a breach of condition 8 (a) of the policy and may conveniently be referred to after consideration of the appellants' contention that the respondent was in breach of condition 8 (b) of the policy whereby in the circumstances the insurance ceased before the time of the fire to attach to the property lost or damaged by the fire.

The case in relation to condition 8 (b)

Before dealing with the finding of the learned trial judge that at all material times the building insured was occupied within the contemplation of condition 8 (b) it will be convenient to consider the alternative submissions made by counsel for the respondent Mr. Coore. He submitted that the appellants had "waived" their right to rely on condition 8 (b) by making the policy effective as from the 24th July, 1958 since to their knowledge the building was unoccupied at that date and was thereafter likely to continue to be unoccupied and in fact did continue to be unoccupied for more than 30 days. He contended that if condition 8 (b) were to be treated as forming part of the policy it would have the result that the policy would have become void from the very moment of its issue. The fact that the appellants had nevertheless received premiums and continued to receive premiums showed that they were not regarding the policy as having

In the Court of Appeal

No. 11

Judgment of Luckhoo, J.

30th July 1969 (continued)

ceased the moment it came into existence and that could only mean that the appellants were not relying upon condition 8 (b) as forming part of the policy.

Counsel for the appellants Mr. Robinson while conceding that in respect of a policy issued with knowledge in the insurer that the building insured was unoccupied at the date of issue of the policy and would remain unoccupied for more than 30 days from the time it had become unoccupied a condition similar to condition 8 (b) would be ineffective to avoid the policy if the loss or damage by fire occurred while the building was yet unoccupied, submitted that upon the building insured becoming occupied that condition would become operative and effective. In this regard counsel for the appellants referred to a statement to this effect contained in Bunson's Law of Fire Insurance (7th Edition) at p.158 and to the case Woodruff v. Imperial Fire Office (1880) 83 N.Y. Rep. (Fire) 113, cited thereat in support of that statement. Unfortunately the report of the judgment in that case is not available in Jamaica.

I think that it is clear that when the first cover note was issued the appellants did not intend that condition 8 (b) should be operative so as to defeat a claim if loss or damage by fire occurred to the property insured with the building remaining in its unoccupied state. The appellants carried the risk under the first cover note even throughout such period as the building remained unoccupied. When the second cover note superseded the first on the 4th December, 1958, the period of risk was to be computed as from the 24th July, 1958 by virtue of it being stated in the second cover note that it was effective from that date. Similarly in respect of the policy issued on the 12th December, 1958 and stated thereon to be effective from 24th July, 1958. Leaving aside for the moment the question what the position was under the cover notes and the policy up to and including the day before the first renewal of the policy it is to be observed that the endorsement attaching to and forming part of the policy on the first renewal specifically states that apart from the cancellation of the standard mortgage clause dated 24th July, 1958 attached to the policy, all other terms, exceptions and conditions of the policy remain unaltered. Counsel for the respondent accepts that condition 8 (b) formed part of

the policy but pleads waiver and/or estoppel in relation thereto. It is difficult to see how waiver or estoppel can successfully be pleaded in the face of the endorsement referred to above and indeed in the face of a similar endorsement attaching to the policy upon the last renewal made with effect from the 24th July, 1963 (See Exhibit 6 b). The policy makes provision (condition 10) for the appellants to terminate the policy upon notice. There is no absolute right of renewal and the appellants could terminate the risk at each renewal period. At the time of issue of the policy and the time of each renewal the appellants were aware that the nurses were still in occupation and were not made aware that there was an intention on the part of the respondent to terminate the lease. As far as the appellants knew at the time of issue of the policy and on each renewal of the policy the nurses were still in occupation. It was within the competence of the appellants to accept the risk and renew the policy with all of the printed conditions including condition 8 (b) forming part of the renewed policy and so they did as is evidenced by the endorsements attaching to the policy. Apart from the renewals of the policy I think that for the same reasons the pleas of waiver and estoppel would be inapplicable where the first cover note is superseded by a second cover note the building being occupied to the knowledge of the appellants at the time of the issue of the second cover note. Similarly in respect of the issue of the policy itself. As to the first cover note I can see no valid objection being taken to an insurer and an assured agreeing that the insurance is to be subject to a condition as to occupation similar to condition 8 (b) but that such a condition is not to apply unless and until there is occupation of the building. I think that this was in effect what was done when the first cover note was issued. As soon as the building was occupied during the currency of the first cover note the terms of condition 8 (b) came into operation.

An additional aspect of the doctrine of waiver and/or estoppel was raised. It was urged that as at the time of the negotiations between Thwaites and Rowlands leading to the issue of the first cover note the building was being watched at nights by a constable hired by the respondent the appellants could not say there was a breach of condition 8 (b)

In the Court of Appeal

No. 11

Judgment of Luckhoo, J.

30th July 1969 (continued)

when the position for 51 days after the departure of the nurses was exactly the same in that regard. The short answer to that contention is that neither Thwaites nor Rowlands was made aware of the position which obtained at that time and obviously there was no representation by the appellants that this was regarded by them as occupation within the meaning of condition 8 (b).

Mr. Coore's next submission that condition 8 (b) is ambiguous, uncertain and unenforceable by reason of the fact that the contract of insurance did not specify any type of user or occupation I am unable to accept as sound. The omission to specify in the policy any type of user or the nature of occupation only means that no warranty is given that the building is habitually to be used in a particular way or occupied for a particular purpose. It is quite permissible to make it a condition that a building insured is not to become unoccupied and continue to be unoccupied for longer than a specified period. Thwaites' evidence as to the reason why there was an omission to state the user - that it was not certain what the occupation would be - refers to uncertainty as to whether the lease to Government would materialise and not to the user of the building whenever occupied, as a residence. The type of user or nature of occupation depends on the nature and character of the building unless otherwise provided by the policy. It can hardly be urged that a building like the Ethelhart hotel was not intended for use or occupation in some way. Indeed it is beyond doubt that the nature and character of the building was residential and I would hold that occupation as contemplated by condition 8 (b) is in this case occupation for residential purposes.

On the question as to whether there was breach of condition 8 (b) the learned trial judge held that the lack of physical occupancy for a period exceeding 30 days after the nurses had left at the end of September 1963, did not ipso facto render the building unoccupied within the contemplation of condition 8 (b), the respondent having formed the intention of later on letting out the apartments after reconstruction to tenants. The learned trial judge considered that the question was the intention of the respondent coupled with other facts to show occupancy, namely, repairs and

modification of a kind which would show the intention to let for occupancy to tenants. He held that on the facts of this case and applying certain authorities referred to by him the building was at all material times occupied within the contemplation of condition 8 (b). In fairness to the learned trial judge it ought to be stated that at the trial of the action it was not stressed (as it was before this Court) that it was not until a period of 51 days had elapsed after the nurses had departed that the work of reconstruction began. During that period apart from casual visits of the police to the premises only a night watchman in the form of a constable was there to keep out intruders. No one resided or stayed in the building. The constable's duties did not involve going into the building. The respondent it is true remained in control of the building but was he or anyone for him in occupation of the building? Counsel for the respondent Mr. Coore urged that in the above-mentioned circumstances there was occupation by the respondent within the contemplation of condition 8 (b) in the policy. Mr. Coore submitted that the ordinary meaning of the words "becomes unoccupied" is that there is no one who is exercising sufficient control over the premises to prevent interference by strangers and control consists of an intention to prevent such interference coupled with outward acts carrying that intention into effect and that in that sense occupation is not restricted to residence or actual physical presence of an occupier in the building. As to the purpose of condition 8 (b) Mr. Coore urged that such a condition is meant to give the insurers the assurance that there would be reasonable protection for the building both in terms of preventing unauthorised persons from going in and maliciously setting fire to it and of the building being under the control of someone so that acts which might lead to the destruction of the building are prevented or if a fire starts spontaneously there is some person who is in a position to take appropriate action; once there is some person who is employed to exclude strangers from interfering there is sufficient occupation within the meaning of the policy. Mr. Coore urged in the alternative that if the words "become unoccupied" in the policy mean become unoccupied for residential purposes then on the authority of Swaby v. Prudential Assurance Co. Ltd. (1964) 6 W.I.R. 246 the fact that no one resided in the building is not conclusive but

In the Court of Appeal

No. 11

Judgment of Luckhoo, J.

30th July 1969 (continued)

only shifts to the insured the burden to show that this was a temporary state of affairs in the sense that there was a manifest intention to resume use of the building for residential purposes and that there was manifest control by the insured over the building. Mr. Coore urged that on the evidence the respondent had discharged this burden and that consequently breach of condition 8 (b) had not been established. Counsel for the appellants Mr. Leacroft Robinson on the other hand, urged that nothing short of some person sleeping in the building during the relevant period would suffice to save the building becoming unoccupied or continuing to be unoccupied. He cited a number of American cases in support of this contention. Those cases appear to turn on the building insured being required in each case to be occupied as a residence.

I agree with Mr. Coore's view as to the purpose of condition 8 (b) though not as to its scope. The general purpose is indeed the prevention or early detection of fires. However, fires may result from very many causes some of which cannot by their very origin or nature be susceptible to prevention or early detection by a watchman on the outside. It is in this regard that I think Mr. Coore's submission breaks down. It is the building itself and its contents which are insured not the premises as such and the words "become unoccupied" must relate to the absence of physical presence <u>in</u> the building as distinct from physical presence <u>outside</u> the building. In so holding I do not doubt that mere temporary absence from a building by an occupier would not render the building unoccupied. Here the position is different because the occupier - Government - had gone permanently out of occupation, that is without any intention on its part of returning. No intention of the owner 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.

Further I find myself in agreement with Mr. Robinson's submission that in respect of the building occupation in condition 8 (b) means occupation as a residence and that in the circumstances of this case nothing short of someone sleeping in the building at some time during the period of 51 days after the departure of the nurses would operate to

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

For these reasons I think that the respondent was in breach of condition 8 (b) before the fire and that therefore the insurance had ceased to attach as regards the property affected.

The case in relation to condition 8 (a).

On the question as to whether the respondent was in breach of condition 8 (a), there was much argument addressed both to the learned trial judge and to this Court on the nature and extent of the reconstruction which had been made up to the time of the fire and as to the relative merits of the opinions given by Thwaites on the one hand and the witnesses called in support of the appellants on the other hand as to whether by reason of these alterations there was an increase in the risk of loss or damage by fire.

For the appellants it was urged that by reason of the work of reconstruction carried out the circumstances affecting the building insured had changed in such a way as to increase the risk of loss or damage by fire. The learned trial judge found that the work which was going on at the material time involved the reduction of 10 rooms to 5 by removing 7 room dividers and converting 6 of the 11 bathrooms into kitchenettes. According to the supervisor of the work being carried out, one Edmund Fray, the work did not involve any change in the exterior walls of the building except the blocking up of one external door. The wooden floors were dropped in order to lay tiles on them and the internal walls forming the bathrooms and kitchenettes were made of expanding metal, plaster and tiles. Extensive cabinet woodwork was being done in the building involving the making of kitchen cabinets, fixing of clothes closets and partial partitions by decorating shelves between the rooms and dining rooms. Some of this work involved the use of inflammable material e.g. contact cement and paints. No evidence was given as to the nature of any precautionary measures taken to ensure safety from fire originating from, in the course of or as a result of this work. The learned trial judge held that the reduction in the number of rooms by removing partition walls of wood and substituting tiles,

In the Court of Appeal

No. 11

Judgment of Luckhoo, J.

30th July 1969 (continued)

plaster and cement for boards would reduce the risk from fire rather than increase it though should a fire start the risk of it spreading would be greater owing to the removal of fire breaks such as walls and doors.

Thwaites gave it as his opinion that the nature and extent of the work involved in the reconstruction done up to the time of the fire and the storage in the lower flat of the annexe of materials for use in the course of reconstruction did not increase the risk of loss or damage by fire. On the other hand Rowlands, DePass (now the manager of the appellant company), Lalor (an insurance expert), Bate (described by the trial judge as a highly qualified insurance man and loss adjustor) all were of the contrary opinion. The learned trial judge declined to accept and act upon Rowlands' opinion and indeed upon his reasons for his opinion after recalling that this witness had said that individual underwriters decide which internal alterations carry higher rates over occupied buildings and that these rates are higher if the alterations are substantial and prolonged but that prolonged depends on individual interpretations. The learned trial judge remarked that so far as Rowlands was concerned whether any particular alteration created an increase in the risk depended on individual interpretation and concluded that Rowlands' evidence was therefore not of much help in showing that it should be held that there was an increase in the risk of loss or damage by fire as a result of the internal alterations. I think that the learned trial judge's rejection of Rowlands' evidence proceeded from a misunderstanding either of what Rowlands did say or of the nature, scope and purpose of the testimony of an expert witness. Clearly Rowlands, as indeed Thwaites and the other expert witnesses, had put to them a number of facts as to the nature and extent of the alterations which had proceeded up to the time of the fire. Rowlands gave his opinion as an expert upon these facts and I can see no valid objection to this. It was the trial judge's function and not Rowlands' to decide the question whether in fact there was an increase in the risk by reason of the alterations which had taken place up to the time of the fire after due consideration of the opinions of the experts including Rowlands'.

DePass' evidence was dismissed by the learned trial judge as depending upon the advice of others. In fact the question of advice - from the appellants' legal advisers - only related to the acceptance or rejection of the respondent's claim to be indemnified under the policy and cannot be fairly said to have determined his opinion on the question as to whether in the circumstances there was an increase in the risk.

Lalor's evidence was dismissed by the learned trial judge on the ground that he had no knowledge of the type of supervision that was given during the period of reconstruction and that he was not sufficiently conversant with the circumstances of the case. The opinion of this witness was given, as were the opinions given by the other expert witnesses, upon the hypotheses put to him in the course of his evidence.

Bate's evidence was dismissed by the learned trial judge apparently upon the basis that the question involved was one more in the province of an underwriter (which he was not) than for an adjustor though Bate stated during the course of his evidence that both an underwriter and an adjustor deal with the same matters to which condition 8 refers.

It appears to me therefore that the learned trial judge for one reason or another deprived himself of the assistance of the expert witnesses called on the part of the appellants.

What the finding of the learned trial judge would have been had he approached the evidence of the expert witnesses called on the part of the appellants in the proper way cannot be known. A consideration of the printed record does not in my opinion resolve the question in issue. In the ordinary course of events I would have proposed that this issue be retried but in view of the conclusion I have reached that the respondent was in breach of condition 8 (b) I would allow the appeal, set aside the judgment entered by the learned trial judge and in substitution therefor enter judgment for the appellants on the claim and counterclaim with costs here and in the court below. Declaration accordingly in terms of the counterclaim.

In the Court of Appeal

No. 12

Certificate of Order on Judgment

1st August 1969

No.12

CERTIFICATE OF ORDER ON JUDGMENT

Civil Appeal No. 9 of 1967

Appeal from the judgment of the Supreme Court dated the 10th day of February 1967

C.A. 9/67 Appeal No.

Between

ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED (Defendant) Appellant

and

JAMES M. MARZOUCA (Plaintiff) Respondent

This appeal came on for hearing on the 27th - 31st January, 1969, 10th - 14th February, 1969, 21st February, and 30th day of July, 1969 before The Hon. Mr. Justice Moody, The Hon. Mr. Justice Eccleston, The Hon. Mr. Justice Luckhoo in the presence of Mr. L. Robinson, Q.C. and Mr. J. Cools-Lartigue for the Appellant and Mr. D. Coore, Q.C. and Mr. R. Williams for the Respondent

I HEREBY CERTIFY that an Order was made as follows:-

"Appeal allowed; judgment set aside. Judgment entered for Appellant with costs on Claim and Counter-Claim".

Given under my hand and the Seal of the Court this 1st day of August, 1969.

(Sgd.)

Deputy Registrar.

c.c. Messrs. Alberga, Milner & Muirhead, Solicitors, 119 Tower Street, Kingston.

To: Messrs. Clinton Hart & Co., Solicitors, 58, Duke Street, Kingston.

No. 13

In the Court of Appeal

No. 13

Order allowing Final Leave to Appeal to Her Majesty in Council

30th January 1970

ORDER ALLOWING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

BEFORE: SHELLY (Act.President) ECCLESTON & GRAHAM-PERKINS J.J.A.

THE 30th DAY OF JANUARY 1970.

The Application on behalf of the Plaintiff/Appellant for Final Leave to Appeal to Her Majesty in Council coming on for hearing this day and after hearing Mr. D.H. Coore Q.C. and Mr. R.H. Williams of Counsel on behalf of the Plaintiff/Appellant and Mr. J. Cools-Lartigue of Counsel on behalf of the Defendant/Respondent and on referring to the Affidavit of Mr. John Colin Edwards, Solicitor of the Supreme Court of Judicature of Jamaica sworn to on the 31st day of December 1969 and filed herein IT IS HEREBY ORDERED that Final Leave to Appeal to Her Majesty in Privy Council be granted AND THAT the time for despatching the Record to England be extended to Friday the 6th day of February 1970 AND THAT the cost of this application be cost in the cause

BY THE COURT

R E G I S T R A R

THIS ORDER is entered by Clinton Hart & Co. of No. 58 Duke Street, Kingston, Solicitors for and on behalf of the Plaintiff/Appellant herein.

E X H I B I T S

Plaintiff's Exhibits

Exhibit 1

EXHIBIT 1 - LETTER FROM ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED TO JAMES M. MARZOUCA

Letter - Atlantic & British Commercial Insurance Co. Ltd. to James M. Marzouca

25th July 1958

25th July, 1958.

James M. Marzouca, Esq.,
Montego Bay.

Dear Sir:

We thank you for your valued instructions and have much pleasure in confirming that we are holding you covered subject to the terms, exceptions and conditions of the Company's policy as follows:-

Risk	Buildings & Contents of Ethelhart Hotel
Situation	Fort Street, Montego Bay
Construction	Brick nog, concrete nog & wood with roof of iron etc.
Perils	Fire, lightning, earthquake (fire & shock) hurricane (fire & material)
Sum Insured or Limit	Buildings - £35,000. Contents - £5,000.
Rate	14/- % less 5% for 3 year agreement
Premium	£266.
Remarks	For 12 months with effect from 24/7/58

The policy is in course of preparation and will be forwarded to you at an early date.

Yours truly,

(Sgd.) FRED ROWLANDS

for the Company

Policy wording as attached.

Plaintiff's Exhibits

Exhibit 1

Enclosure to letter

25th July 1958

Perils Covered: Fire and/or Lightning, Earthquake, Shock, Volcanic Eruption and Fire thereby. Gales, Hurricanes, Cyclones, Windstorm and Fire thereby.

Description of Property Insured.

1) On Buildings known as Ethelhart Hotel, situate at Fort Street, Montego Bay, St. James, Jamaica, constructed of Brick Nog, Concrete Nog and Timber walls with roof of corrugated iron sheeting with small proportion of shingle.....£35,000.

2) On the whole contents of the above....£ 5,000.

£40,000.

Endorsement: It is hereby noted and agreed that the interest insured by the within Policy is also insured with Messrs: Dyoll Ltd., subject to Pro Rata Contribution Clause.

Endorsement: In consideration of the Assured having agreed to renew this Insurance for a period of 3 years, premium payable annually in advance, a discount of 5% has been allowed off the gross premium payable hereunder.

ATLANTIC & BRITISH COMMERCIAL INSURANCE CO., LTD.

Per:- F. Rowlands.

Plaintiff's Exhibits

EXHIBIT 2 - LETTER FROM ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED TO JAMES M. MARZOUCA

Exhibit 2

Letter - Atlantic & British Commercial Insurance Co. Ltd. to James M. Marzouca

4th December 1958

4th December, 1958.

James M. Marzouca, Esq.,
Montego Bay.

Dear Sir:

We thank you for your valued instructions and have much pleasure in confirming that we are holding you covered subject to the terms, exceptions and conditions of the Company's policy as follows:-

Insured: J.M. Marzouca, Owner and Bank of Nova Scotia, Mortgagees

Risk Buildings & Contents of Ethelhart Hotel

Situation Fort Street, Montego Bay

Construction Brick nog, concrete nog & wood with roof of iron etc.

Perils Fire, lightning, earthquake (fire & shock) hurricane (fire & material damage)

Sum Insured or Limit Buildings - £35,000.
Contents - £5,000.

Rate 14/- % less 5% for 3 year agreement

Premium £266.

Remarks For 12 months with effect from 24th July 1958.

The policy is in course of preparation and will be forwarded to you at an early date.

Yours truly,

(Sgd.) FRED ROWLANDS

for the Company

Policy wording as attached

Subject to Standard Mortgage Clause in favour of Bank of Nova Scotia, Montego Bay.

Replacing Cover Note dated 25th July 1958.

Plaintiff's Exhibits

Exhibit 2

Enclosure to letter of 4th December 1958

Perils Covered: Fire and/or Lightning, Earthquake Shock, Volcanic Eruption and fire thereby. Gales, Hurricanes, Cyclones, Windstorm and Fire thereby.

Description of Property Insured.

1) On buildings known as Ethelhart Hotel, situate at Fort Street, Montego Bay, St. James, Jamaica, constructed of Brick Nog Concrete Nog and Timber walls with roof of corrugated iron sheeting with small proportion of shingle £35,000

2) On the whole contents of the above.. £ 5,000

£40,000

Endorsement: It is hereby noted and agreed that the interest insured by the within policy is also insured with Messrs: Dyoll Ltd., subject to Pro Rata Contribution Clause.

Endorsement: In consideration of the Assured having agreed to renew this Insurance for a period of 3 years, premium payable annually in advance, a discount of 5% has been allowed off the gross premium payable hereunder.

EXHIBIT 5 - POLICY OF INSURANCE NO. F 7006

Atlantic & British Comm

Insurance Company Limited

Head Office:— Kingston, Jamaica.

SUM INSURED £ 40,000. 0.0. NET PREMIUM £ 266. 0.

This Policy of Insurance Witnesseth that in consideration of

Owner, and the BANK OF NOVA SCOTIA, Mortgagees

hereinafter called the Insured) having paid to ATLANTIC & BRITISH COMMERCIAL INSURA

hereinafter call the Company) the sum of Two hundred and sixty-six pounds

for insurance against Loss or Damage by FIRE or

ientioned, the property hereinafter described, in the location named and not elsewhere, in the

1. On the buildings known as Ethelhart Hotel, situate Fc Street, Montego Bay, St. James, Jamaica, constructed Brick Nog, Concrete Nog and Timber walls with roof ma of corrugated iron sheeting with small proportion of shingle in the sum of THIRTY FIVE THOUSAND POUNDS....

2. On the whole contents of the above in the sum of FIVE THOUSAND POUNDS.....

1.—If there be any material misdescription of any of the property here place in which such property is contained, or any misrepresentation as to any mating the risk, or any omission to state such fact, the Company shall not be relates to property affected by any such misdescription, misrepresentation or

2.—No payment in respect of any premium shall be deemed to be paym form of receipt for the same signed by an authorised Official of the Comp Insured.

3.—The Insured shall give notice to the Company of any Insurance or In may subsequently be effected, covering any of the property hereby insured, and t particulars of such Insurance or Insurances be stated in or endorsed on this Po before the occurrence of any loss or damage, the Insured shall not be entitled

4.—If the whole or any part of any Building hereby insured or containin whole or any part of any building of which it is part shall fall or become displace or its contents shall cease unless the Insured shall prove that the fall or displace

5.—The Insurance does not cover—

(a) Loss by theft during or after the occurrence of a fire.

(b) Loss or damage to property occasioned by its own fermentation provided in accordance with Condition 7f), or by its underg

(c) Loss or damage occasioned by or through or in consequence of

(1) The burning of property by order of any public authori

(2) Subterranean fire.

6.—This insurance does not cover any loss or damage occasioned by or t or indirectly, of any of the following occurrences, namely:—

(a) Earthquake, volcanic eruption or other convulsion of nature.

(b) Typhoon, hurricane, tornado, cyclone or other atmospheric dist

(c) War, invasion, act of foreign enemy, hostilities or warlike ope or not), civil war.

(d) Mutiny, riot, military or popular rising, insurrection, rebellion power, martial law or state of siege or any of the events or mation or maintenance of martial law or state of siege.

Any loss or damage happening during the existence of abnormal conditio which are occasioned by or through or in consequence, directly or indirectly, be deemed to be loss or damage which is not covered by this insurance, except prove that such loss or damage happened independently of the existence of

E. ORSEMENT attaching to Policy No. F.7006
.M. MARCOUCA AS OWNER AND THE BANK OF NOVA SCOTIA A
)rm part thereof, as if written or printed thereon.

(1) IN CONSIDERATION of the payment by the Insured to the Company of the sum of

.....

ditional premium, the Company agrees that notwithstanding anything stated to the contrary in Con
mage by fire occasioned by or through or in consequence of earthquake,...volcani
indstorm, cyclone or tornado.

....

..... subject

SPECIAL CONDITION OF AVERAGE.

James A. Marzouca, Owner and Ba

MORTGAGE CLAUSE:

Loss if any, under this Policy shall
Scotia as Mortgagees or Assignees of Mortgage
interest.

It is hereby agreed that in the event
writers will pay the Mortgagees or said Assig
interest and that this Insurance in so far as
of the Mortgagees or said Assignees only shal
or neglect of the Mortgagor or Owner of the p
whereby the risk is increased being done to,
insured without the knowledge of the Mortgage
always that the Mortgagees or said Assignees
any change of ownership or alteration or incr
this insurance so soon as any such change, al
to their knowledge, and on demand shall pay t
additional premium from the time when such in

(b) Particulars of all other Insurances, if any

The Insured shall also at all times at his own expense produce, procur further particulars, plans, specifications, books, vouchers, invoices, duplicates o and information with respect to the claim and the origin and cause of the fire the loss or damage occurred, and any matter touching the liability or the amou as may be reasonably required by or on behalf of the Company together wit legal form of the truth of the claim and of any matters connected therewith.

No claim under this Policy shall be payable unless the terms of this Co

12.—On the happening of any loss or damage the Company may witho

(a) Enter and take and keep possession of the Building or Pren happened.

(b) Take possession of or require to be delivered to it any prope on the Premises at the time of the loss or damage.

(c) Examine, sort, arrange or remove all or any of such property

(d) Sell or dispose of, for account of whom it may concern, any session of or removed.

In no case shall the Company be obliged to undertake the sale or disp Insured under any circumstances have the right to abandon to the Company a whether taken possession of by the Company or not. Entry upon or taking pos shall not be taken as recognition of abandonment by the Insured.

13.—If the claim be in any respect fraudulent, or if any false declarati of, or if any fraudulent means or devices are used by the Insured or anyone benefit under this Policy; or if the loss or damage be occasioned by the w the Insured; or if the Insured or anyone acting on his behalf shall hinder any of the acts referred to in Condition 12; or, if the claim be made and n commenced within three months after such rejection, or (in case of an Arbi the 18th Condition of this Policy) within three months after the Arbitrator made their award, all benefit under this Policy shall be forfeited.

14.—The Company may as its option reinstate or replace the property

EXHIBIT 13 - LETTER FROM ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED TO A.M. THWAITES

Plaintiff's Exhibits

Exhibit 13

Letter - Atlantic & British Commercial Insurance Co. Ltd. to A.M. Thwaites

6th January 1959

6th January, 1959.

A.M. Thwaites, Esq.,
Dyoll's Ltd.,
46, Duke Street,
Kingston.

Dear Tony:

I have pleasure in enclosing Policy No: F 7006 at last, and trust that you will find it to be in order.

I also enclose a letter addressed to Mr.Marzouca which we customarily send out to clients whose business we consider to be attractive. If it appeals to you, you might possibly wish to scrap our letter and substitute a similar one of your own as you are leading Company on the risk, and the business originates through you.

Yours sincerely,

(Sgd.) FRED.

Defendant's Exhibit

EXHIBIT 8 - LETTER FROM DYOLL LIMITED TO JAMES M. MARZOUCA

Exhibit 8

25th July, 1958.

Letter from Dyoll Ltd. to James M. Marzouca

Mr. James M. Marzouca,
Montego Bay.

25th July 1958

Dear Mr. Marzouca,

I enclose herewith Cover Note No. 4563 and Cover Note from the Atlantic & British Commercial Insurance Company Ltd., in respect of the insurance on the Ethelhart Hotel. Policies will be sent to you in due course.

The total premium payable in respect of the new insurance of £50,000 is £332.10.0 and the total refund due to you in respect of the cancellation of the existing policy is £203.3.7, accordingly, there is an additional amount of £129.6.5 due to us, and I would be glad if you would let me have your cheque to cover.

As mentioned to you, I have placed a good portion of this insurance with the Atlantic & British Commercial Insurance Co., Ltd., as I did not wish to have such heavy commitments in Montego Bay at present, however, you will of course, receive your 7½% commission.

With kindest regards,

Yours sincerely,

(Sgd.) TONY THWAITES.

AMT:vl
encl.

EXHIBIT 9 - COVER NOTE - DYOLL LIMITED TO JAMES M. MARZOUCA

Defendant's Exhibit

Exhibit 9

Cover Note - Dyoll Ltd. to James M. Marzouca.

25th July 1958

DYOLL LIMITED.

4 Duke Street,
Kingston, Jamaica.

No. 4563

25th July, 1958.

Dear Sir or Madam,

Acting on your instructions we have today effected Policy with Lloyd's Underwriters covering the risks mentioned below and in due course the Policy will be forwarded to you.

Yours Faithfully,
DYOLL LIMITED.
(Sgd.) A.M. THWAITES

Name & Address of Insured

James M. Marzouca, Esq.,
Montego Bay.

Period of Insurance From 24/7/58 to 23/7/59

LLOYD'S POLICY FORM

Risks Covered: Fire and/or Lightning, Earthquake Shock, Volcanic Eruption and Fire thereby. Gales, Hurricanes, Cyclones, Windstorm and Fire thereby.

"C" Form amended Excess Clause - excl. Fire & Lightning - £20 or 1% whichever is less

Description of Property Insured		Rate %	Premium
1) On Buildings known as Ethelhart Hotel, situate at Fort Street, Montego Bay, St. James, Jamaica, constructed of Brick Nog, Concrete Nog & Timber walls with roof of Corrugated Iron Sheeting with small proportion of Shingle.....	£5,000		
2) On the Whole Contents of the above...	£5,000		
	£10,000	14/-	£ 70. 0. 0.
		Less 5% Discount 3 y.a.	3.10. 0.
			£ 66.10. 0.

Endorsement: British Empire Jurisdiction and Service of Suit Clause naming Messrs. Wood, Costa & Harty to accept service of process on behalf of Underwriters.

Defendant's Exhibit

Exhibit 9

Cover Note - Dyoll Ltd. to James M. Marzouca

25th July 1958 (continued)

Endorsement: It is hereby noted and agreed that the interest insured by the within policy is also insured with the Atlantic & British Commercial Ins., Co., Ltd., Subject to Pro Rata Contribution Clause.

Endorsement: In consideration of the Assured having agreed to renew this insurance for a period of 3 years, premium payable annually in advance, a discount of 5% has been allowed off the gross premium payable hereunder. 10

It is recommended, for your protection, that you should insure for the full value and satisfy yourself that the amount shown is adequate.

IN THE PRIVY COUNCIL No. 6 of 1970

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

JAMES MICHAEL MARZOUCA (Plaintiff) Appellant

- and -

ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED (Defendants) Respondents

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RECORD OF PROCEEDINGS

DRUCES & ATTLEE,
82 King William Street,
London, E.C.4.

Solicitors for the Appellant.

MASONS,
10 Fleet Street,
London, E.C.4.

Solicitors for the Respondents.