Privy Council Appeal No. 6 of 1970

James Michael Marzouca – – – – – – *Appellant*

v.

Atlantic & British Commercial Insurance Company Limited – – – – – – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST APRIL 1971

Present at the Hearing:

LORD HODSON
LORD DONOVAN
LORD DIPLOCK

[*Delivered by* LORD HODSON]

This is an appeal from The Court of Appeal of Jamaica (Eccleston and Luckhoo JJ., Moody J. dissenting), allowing the respondents' appeal from an order of the Supreme Court of Jamaica (Chambers J.) dated 10th February 1967 whereby judgment was entered for the appellant against the respondents for the sum of £40,075.0.0. claimed under a Policy of Insurance.

The appellant is the owner of the Ethelhart Hotel at Montego Bay which together with the contents was destroyed by fire on the night of 19th/20th May 1964. At the same time there was damage to the concrete boundary walls and the patio.

Under a policy of insurance issued on 12th December 1958 by the respondents and renewed from time to time, the last renewal being on 24th July 1963 for the period ending 24th July 1964, the Hotel was insured against loss or damage by fire in the sum of £40,000 the contents in the sum of £5,000 and the concrete boundary wall and patio (added in the year 1960) in the sum of £2,400.

The respondents rejected the claim on the ground that at the time of the fire the policy had been avoided by non-compliance with the conditions 8 (*a*) and 8 (*b*) contained in the policy.

These conditions read as follows:

> "8. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insured, before the occurrence of any loss or damage, obtains the sanction of the Company signified by endorsement on the Policy by or on behalf of the Company—
>
> (*a*) If the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting

the Building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire.

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

On proof of breach of either condition the respondents must succeed.

The trial judge found in favour of the appellant on each issue and gave judgment in his favour. In the Appeal Court, by a majority, this decision was reversed on the ground that 8 (*b*) had been breached on the admitted facts. This made it unnecessary to decide whether there had also been a breach of 8 (*a*), but each of the majority judges in the Court of Appeal expressed his opinion that the trial judge's approach to the evidence given in relation to condition 8 (*a*) was also wrong. Eccleston J. considered that on the weight of the evidence the probabilities appeared to come down in favour of the insurers whereas Luckhoo J. would, but for the conclusion he had reached on condition 8 (*b*), have proposed a new trial.

Their Lordships will address themselves first to condition 8 (*b*) upon which the majority of the Court of Appeal arrived at a definite conclusion in favour of the present respondents.

The critical words in this condition are " become unoccupied and so remain for a period of more than 30 days " contained as they are in a fire policy.

The facts relevant to occupancy are these:

By a cover note dated 25th July 1958 the respondents agreed with the appellant to insure his Hotel for a period of 12 months from 24th July 1958. The building was then unoccupied, but was expected to be let to the Government in the near future for use as a nurses' home.

On 1st October 1958 the building was occupied by nurses, following a lease of the premises granted to the Government by the appellant.

A cover note of 4th December 1958 replaced the cover note of 25th July 1958 in the same terms with an addition relating to a mortgage, which was in turn replaced on 12th December 1958 by a policy of insurance effective from 24th July 1958 to 24th July 1959.

The nurses continued to live in the building until 30th September 1963 when they vacated the premises pursuant to a year's notice given by the appellant to the Government terminating the lease.

It was the intention of the appellant to convert the building into residential flats, but the work of conversion did not start until 20th November 1963. During the intervening period of 51 days there was no one at all in the building. It was locked up and the keys were retained by the appellant. The appellant paid a police constable to act as night-watchman, but he never went inside the building; he had no means of doing so.

On 20th November 1963 a contractor began the work of conversion on the instructions of the appellant. This work started on a part of the building known as the Annexe of which the keys were handed over to the contractor. The rest of the building remained locked up and the furniture was stored.

Under his contract, the contractor was required to supply a watchman until the work was completed. This he did. The watchman occupied a hut on the top of a building called the City Centre building which is not far distant from the Ethelhart building and commands a view of it but not all of it. During this period the appellant did not himself employ a constable as night-watchman, but the police continued to keep an eye on the building and to visit it from time to time in the course of their ordinary police duties. They had no access to its interior.

If upon these facts the building became unoccupied and so remained for a period of more than 30 days the appellant was in breach of condition 8 (*b*). Before the work of conversion began there is no doubt but that the building was unoccupied in the sense that there was no one in it for some 51 days. If this is sufficient to constitute a breach of condition 8 (*b*) it will be unnecessary to consider what conclusion as to occupancy should be reached during the period after the work of reconstruction had begun and workmen were regularly engaged upon the premises.

Both Eccleston J. and Luckhoo J. were of opinion that during the 51-day period the building was unoccupied and that for this reason the policy had ceased to attach. As Luckhoo J. said " 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 appellant has submitted to their Lordships that too narrow a meaning has been attributed to the word " unoccupied " by the majority judges, and that so long as the period during which there is no one in the building, though it exceeds thirty days, can be regarded as temporary because of the assured's intention to put the building again to residential use and to provide adequate protection to it in the meantime, the building does not become " unoccupied " within the meaning of condition 8 (*b*).

It was contended, and rightly so, that if there was any ambiguity in the expression used in the condition it must be construed in favour of the assured and against the insurer. But their Lordships can find no ambiguity in the simple straightforward words of the condition.

Reliance was placed on a judgment of Lewis J.A. on appeal from a judgment of the Supreme Court in *Swaby v. Prudential Assurance Co. Ltd.* (1964) 6 W.I.R. p. 246. That case was decided upon a condition in a fire insurance in the same terms as condition 8 (*b*). That condition is in common use in Jamaica. Although the decision went against the contention that the premises then under consideration had not become unoccupied, the judgment does contain observations which lend assistance to the appellant's argument.

Lewis J.A. cited a passage from a judgment of the Court of Appeal in England delivered by *Asquith L.J.* in *Brown v. Brash and Ambrose* [1948] 2 K.B. 247 a case dealing with a tenancy protected by the Rent Restriction Acts. Those Acts do not use the expressions, " occupied ", " unoccupied " or " occupation " at all. The relevance of the concept of actual use by the statutory tenant of a dwelling-house as his own residence is the result of judicial interpretation of the legislative policy to be gathered from a consideration of the provisions of the Acts as a whole. In their Lordships' view it has little relevance to the construction of the phrase " become unoccupied and so remain for a period of more than 30 days " in a fire policy.

In the " Swaby " case the trial judge gave his opinion crisply in the words " I think unoccupied there means left without anyone in it ". The word " there " points to the juxtaposition of the words " so remain for a period of 30 days " immediately following the words " become unoccupied ". To this their Lordships will return. The simple, everyday meaning ascribed by the trial judge to the ordinary English word " unoccupied " was, however, rejected on appeal.

It is convenient first to quote a part of the judgment in *Brown v. Brash and Ambrose* which was cited by Lewis J.A. with the caution that that judgment was concerned with " possession " not " occupation ".

Asquith L.J. had said in that case in speaking of the Rent Acts, and the effect of the tenant's ceasing to reside in the protected premises:

> " The legal result seems to us to be as follows:
> (1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it, he must, at all events, establish a *de facto* intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for 5 or 10 years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts as affirmed in *Keeves v. Dean* ([1924] 1 K.B. 685) and *Skinner v. Geary* ([1931] 2 K.B. 546). (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward and visible sign of it, *i.e.*, instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate homecoming. There will then, at all events, be someone to profit by the housing accommodation involved which will not stand empty. It may be that the same result can be secured by leaving on the premises, as deliberate symbols of continued occupation, furniture, though we are not clear that this was necessary to the decision in *Brown v. Draper* ([1944] K.B. 309). Apart from authority in principle possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an *animus possedendi* but a *corpus possessionis, viz.*, some visible state of affairs in which the *animus possidendi* finds expression. (5) If the caretaker (to use that term for short) or the furniture be removed from the premises otherwise than quite temporarily, we are of opinion that the protection artificially prolonged by their presence, ceases whether the tenant wills or desires such removal or not."

Lewis J.A. followed this citation by saying:

> " 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 '."

Later he said:

> " ' Become unoccupied ' seems to me to imply a change of status —as applied to a dwelling house 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."

Lewis J.A. concluded the same paragraph by saying:

> " As Asquith L.J. said in *Brown v. Brash* ([1948] 2 K.B. 247) the question is one of fact and of degree . . . the temporary nature of the absence, the manifest intention to resume residence, and the adequacy of protection must be established."

Their Lordships cannot accept that these considerations taken from the judgment about possession in a Rent Act case are of assistance in construing the phrase contained in condition 8 (*b*).

The period of 30 days no doubt is included in the condition as providing a period of grace in favour of the assured, but it is not possible to overlook their impact on the preceding words " become unoccupied ". They indicate the period of absence must not exceed 30 days if it is not to procure a breach of the condition. An intention to resume occupation cannot affect the risk of fire during absence. It matters not whether the assured had that intention during the 30 days' grace. In their Lordships' view it also matters not whether he had that intention after the 30 days had elapsed.

The conception of " adequacy of protection " as a relevant factor in determining whether premises are " unoccupied " is not to be found in the case of *Brown v. Brash* in the sense in which that expression was used by Lewis J.A. It was presumably introduced because the document in which the word " unoccupied " appeared was a fire insurance policy. But protection against risk of fire is dealt with by condition 8 (*a*) and the fact that the building, although there is no one in it for more than 30 days, is adequately protected against risk of fire, though it may prevent a breach of condition 8 (*a*), does not in their Lordships' view prevent its becoming and remaining unoccupied within the meaning of condition 8 (*b*). Otherwise condition 8 (*b*) would add nothing to 8 (*a*).

Their Lordships are not called upon to decide what form of occupancy other than residence would be sufficient to protect the assured. Occupation does not necessarily involve use as a dwelling house. Condition 8 (*a*) with its reference to change of occupation may well contemplate use for other purposes, as for example for office accommodation. However on the admitted facts in this case their Lordships are of the opinion in agreement with Eccleston J. and Luckhoo J. that the appellant was by 31st October 1963 already in breach of condition 8 (*b*). It is, as Luckhoo J. put it, the building and its contents which are insured not the premises as such and the words " become unoccupied " must relate to the absence of physical presence in the building as distinct from physical presence outside the building. This does not mean that mere temporary absence necessarily involves a cesser of occupation. In the nature of things one does not spend 24 hours under the same roof for 365 days in the year cf. *Winicofsky v. Army and Navy General Assurance Company* XXXV T.L.R. 283 where merely going away from the premises for an hour or two during an air raid at night did not make the premises unoccupied by night within the meaning of a declaration leading up to a burglary insurance. The occupation to be effectual must however be actual not constructive. It must at least involve the regular daily presence of someone in the building. If there is no one present for a continuous period of more than thirty days, there is a breach of condition 8 (*b*) and the insurance of the building and its contents comes to an end. In the instant case it had come to an end some three weeks before the contractor's men came into the building.

In view of the clear conclusions which their Lordships have reached upon the unambiguous language of condition 8 (*b*) they will deal shortly with the alternative contention that the work of reconstruction undertaken

on and after 20th November 1963 increased the risk of loss or damage by fire so as to constitute a breach of condition 8 (*a*). They by no means dissent from the criticism of the trial judge's judgment contained in the majority judgment of the Court of Appeal. On the face of the evidence it appears obvious that the work of reconstruction involved a change in the nature of the occupation of, or other circumstances affecting, the building in such a way as to increase the risk of loss or damage by fire.

The wooden floors were lowered. Extensive joinery and carpentry work was carried on in the building involving the making of kitchen cabinets and of clothes closets and the erection of decorated shelves to form partial partitions between the sitting rooms and dining rooms. Some of this work involved the use and storage in the building of inflammable material, *e.g.* contact cement and paints, but no evidence was given that precautionary measures were taken to ensure safety from fire originating from these hazards, in the course of, or as a result of, this work. Although expert evidence to the effect that the fire risk was increased was adduced, it was rejected by the trial judge. It would appear to their Lordships, in agreement with the majority in the Court of Appeal, that he mistook the relevance of this evidence. He appears to have treated it as if it were directed to establishing the actual cause of the fire. This remains unknown. The relevant enquiry under condition 8 (*a*) was quite different; namely—an enquiry as to whether the *risk* of fire was increased by the conversion operations.

By failing to recognise this he appears to have deprived himself of the assistance of the weighty and convincing testimony of the expert witnesses called by present respondents, on what was the decisive issue on condition 8 (*a*).

Their Lordships will accordingly humbly advise Her Majesty, upon the ground that the appellant was in breach of condition 8 (*b*), that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

JAMES MICHAEL MARZOUCA

v.

ATLANTIC & BRITISH COMMERCIAL INSURANCE COMPANY LIMITED

DELIVERED BY

LORD HODSON

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