Frances

A.537/77

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN TOLMIE ALEXANDER SCOULAR of Wellington, Chartered Accountant

Plaintiff

AND CORNHILL INSURANCE COMPANY LIMITED

Defendant

Hearing: 28, 29 May 1979

Counsel: P.D. McKenzie for Plaintiff
Lilian Tringham for Defendant

Judgment: 19 December 1979

JUDGMENT OF O'REGAN J.

Pursuant to an order of this Court, the plaintiff is the Manager of a partnership known as Bonanza Developments which was dissolved by the Court on 26 May 1975. The partners were Stanley Wilford Parsons, Alan Charles Whitcher, Henry Alves Major, Peter John McLeod and Trevor Richard Lewis.

The plaintiff is the insured under a policy of insurance bearing reference number F.279.W issued by the defendant on 7 February 1972. The amount of the cover was originally $15,000 but this sum was increased to $16,500 on 16 November 1974.

The risk insured is recorded in the policy as follows :

" RISK: On building, including all Landlord's fixtures and fittings

STREET: The Barn, Coast Road TOWN: Wainuiomata "

It is common ground that the policy provides insurance against damage or destruction by fire to the building constructed of walls of iron and concrete, roof of iron, floors of concrete and wood known as "The Barn" erected on land owned by the dissolved partnership at Coast Road, Wainui-o-mata together with architect's fees and demolition costs as defined in the policy.

On 14 May 1976 the building was so damaged by fire that it became unuseable. The plaintiff pleaded that it became unuseable and was a total loss. The defendant admits that the property became unuseable but denies that it was a total loss. To the contrary, it avers that it "may have been capable of reinstatement."

The proposal declared that the property was to be occupied by the insured as a store. In the report of the defendant's inspector on the reverse of the proposal, in response to the direction "Give age and state of repair of building" is the handwritten answer "30; Many windows broken*" and at the end of his report appears "*being repaired and covered by wire mesh." I accept the evidence of Mr Parsons, one of the insured, that such work was done promptly after the proposal was made.

At the time of the proposal the partnership was engaged in developing part of a large holding of land to the rear of the site upon which the insured property stood. A large part of the land was purchased from Anker Homes Limited and later, at a public auction, the partnership purchased from that company a pre-nailed frame of a house, a quantity of dressed timber, asbestos sheathing, pipes, scaffolds, foundation forms and a deal of miscellaneous equipment. All such material was stored in the insured property. Later, other articles of equipment and goods of various kinds acquired by the partership for use in its enterprise were also stored there.

Mr Parsons was the mainspring of the partnership. He had worked as a land salesman for Anker Homes before it sold out. He conceived the idea of the development and interested the other parties in the project. He also had an interest in other companies operating in the area, one of which was a building company. He lived in Wainui-o-mata and was the partnership's man on the spot. As part and parcel of his various enterprises he had at various times stored in the premises a variety of chattels either belonging to companies of which he was a member or to himself personally.

At a time not precisely disclosed in the evidence the partners had serious differences and at some date in 1974 Mr Parsons and a man named Horton sued the partners (including Parsons). On 26 May 1975 an order was made inter alia decreeing a dissolution of the partnership and ordering the appointment of a manager to be nominated by the President for the time being of the New Zealand Society of Accountants and that such manager have "together with all other

statutory powers, the specific direction to sell all the land and assets of the defendant partnership, granting the plaintiff Parsons the first option to purchase such lands and assets at a price being the valuation of same to be fixed by a registered public valuer to be appointed by the manager, such valuation to be fixed as at 10 December 1974, and in the event that any one of the defendants shall not accept such valuation then and in that event at a valuation to be determined by a sole arbitrator appointed by the manager and the valuation fixed by such arbitrator shall be final and binding on all the defendants . . . "

The plaintiff in these proceedings having been nominated by the President of the New Zealand Society of Accountants was formally appointed Manager by Court order on 29 August 1975. Pursuant to leave reserved, he applied for and, on 30 June 1976, was granted additional powers and authorities, none of which affect the present case.

The defendant denies liability under the contract. It asserts breaches of paragraph 8 of the general conditions of the policy. The relevant provisions of paragraph 8 are :

> " Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured, before the occurrance (sic) of any loss or damage, obtains the sanction of the Company, signified by endorsement

> upon 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 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 becomes unoccupied and so remain (sic) for a period of more than 30 days. "

Mrs Tringham accepted that the onus of establishing that these various conditions have not been fulfilled is upon the defendant and that, so far as subparagraph (a) is concerned, that it must also establish that the change in the nature of the occupation or other circumstances increased the risk of loss or damage by fire.

She submitted that the nature of the occupation so changed between the date of issue of the policy and the fire and that such was not notified to the company. She submitted that both the proposal declared and the policy recorded the property to be "occupied by the insured." She placed a deal of reliance on the contents of a letter written by Mr Parsons on 8 June 1976 to officer-incharge of the Wainui-o-mata Police Station concerning the security of the property the relevant part of which reads :

> " Re : The property known as
> 'The Barn' 100 Coast Road
> Wainui-o-mata.
>
> Further to our telephone conversation of this day I wish to place on record these facts.
>
> Over the past four years or so the above property has been unoccupied through the day and presented growing difficulties with security. In the initial period, all broken windows were replaced and wire mesh screens secured over all windows in the building, nevertheless vandalism and stealing continued, although throughout this period I have made numerous complaints to the Police . . . . "

The first question then, is "had the nature of the occupation changed during the currency of the policy up to the date of the fire?" The answer so it seems to me, must turn upon the meaning of the word "occupied" as used in the policy of insurance. In Lambert v Wawanesa Insurance Co Ltd (1945) O.R. 105 Gillanders JA, at p 113, said :

> " It is first necessary to have in mind what occupancy involves as used in the fire insurance policy in question and with relation to the subject matter involved . . . . "

Roach JA in the same case, at p 120 said :

> " . . . . I think in answering that question regard must be had to the sense in which that word is used in the policy as applicable . . .
> The language used in the policy in describing the buildings to be used is significant. "

(see also Miller v Portage La Prairie Mutual Ins Co (1936) 2 DLR 787 at 791.)

The word "occupier" has many shades of meaning varying according to the context in which it is used. The Shorter Oxford English dictionary (3 ed) gives the following meanings :

> " To take possession of; seize; to hold possession of; to dwell; reside; to stay; abide; to take up; use up; to make use of; use. "

The Oxford dictionary (1971), in addition to these meanings gives the following :

> " To hold possession of; to have in one's possession or power; to reside in and use (a place) as its tenant; or regular inhabitant; to tenant. "

The defendant cited Marsouca v Atlantic and British Commercial Insurance Co Ltd (1971) 1 Lloyds Rep 449 P.C. and relied particularly upon a passage from the judgment, delivered by Hodson LJ in which he said (at p 453) :

> " 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 cesser of occupation . . . . 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. "

The policy of insurance in that case was in respect of a hotel. The hotel was used as a nurses' home

until September 1963 when the nurses moved out and the property became vacant or unoccupied by residents. The insured intended to convert the buildings into flats but the work did not commence until November 20 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. The contractor employed a watchman who occupied a hut upon another building from which he had a view of part of the insured building. The police continued to keep an eye on the property but had no access to its interior.

It was against this background of fact that Hodson LJ made his observations. He was concerned with a property which was intended for use and occupation as residential quarters when the cover was given; it became so occupied and then later became unused and unoccupied. The dicta upon which the defendant places reliance were clearly apposite in that situation. That case is clearly distinguishable on the facts from the present case in which there was not at the time of the issue of the policy or at any time thereafter residential use of the property or any change in "the nature of the occupation" during the relevant period. Hodson LJ, at p 453, observed "the condition in the policy with which the Board was concerned" with its reference to change of occupation may well contemplate use for other purposes, as, for example office accommodation and he went on to preface the decision of the Board with the words "on the admitted facts of this case their Lordships are of the opinion . . . "

It is perhaps not inappropriate to give currency anew to the well-known but oft forgotten

words of the Earl of Halsbury LC in Quinn v Leathem 1901 AC 495 at p 506 :

> " . . . . there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found . . . . "

In the present case, "the nature of the occupation" of the building at both the date of the proposal and the date of the policy was usage of the premises for storage. Both documents so state. They describe the building and qualify it as "occupied by the insured as a store." There are, of course, no words that identify it as residential premises. There are no words that portend that the building insured is to be a place where men worked. The only inference available from the document is that the building would necessarily be visited by the insured or their servants when putting goods in or taking goods out of store. And at the time of the fire "the nature of the occupation" was still the same as always. True, the extent of the use and hence the occupation was less but its nature

was the same.

I pass to a consideration of Mr Parsons' letter of 10 June 1976 to the police and in particular the words "over the past four years or so the above property has been unoccupied through the day." The policy was issued on 7 February 1972. The words "over the past four years or so," if they do not encompass the whole period since the issue of the policy, virtually do so. For present purposes, I take them as doing so because any change in the extent of the use and the consequent reduction in the frequency of attendances at the premises did not take place until much later than four years before the date of the letter. I take that approach because it is the alteration in the frequency of visitation and attendance upon which reliance is placed by the defendant. In my view, Mr Parsons in writing that the premises were "unoccupied through the day" was referring to "occupancy" in a different sense from which the cognate "occupation" is used in the policy of insurance. He is telling the police that the property was not subject to human surveillance by reason of human occupation which is altogether a different concept from "occupation as a store by the insured." - the use of the premises by them for the storage of property and not for personal use as residence or place of employment.

For the foregoing reasons, I reject the submission.

The defendant submitted also that there were "other circumstances affecting the building insured . . . . changed in such a way as to increase the risk of loss or damage by fire" (Clause 8(a) of the general conditions of the policy) and that the insured having failed to obtain

its sanction before the loss accrued, the insurance ceased to attach.

The defendant accepted that the plaintiff repaired the broken windows referred to in the proposal and covered them with wire mesh. It contended however that through the depredations of vandals over the years not made good by the insured, the property became attractive to children and ready of access to such an extent that the risk of loss or damage by fire increased. It submitted that the requirement to obtain its sanction as a prerequisite to its continuing liability was a continuing one and in particular arose on the occasion of each annual renewal of the policy - see Lambert v Cooperative Insurance Society Ltd (1975) 2 Lloyd's Rep. 485 at 487;.

The evidence as to the state of the building during the relevant period is conflicting. The broken windows mentioned in the proposal having been replaced and covered with wire mesh promptly, the building must be regarded as having been secure against intruders from the outset of the risk. From Mr Parsons' letter of 8 June 1976 it is clear that vandalism and stealing from the premises had been rife. He recorded that he had made numerous complaints as to such to the police and referred to a complaint made a month earlier of his having found twonamed boys on the premises and to his having supplied the police with a list of other youths "that those two boys knew to be involved also." In evidence, he acknowledged that he was aware of an incident where intruders had gained entry to the building and splashed paint about the premises and spoke of occasions on which he himself had closed doors left open by intruders and nailed them up from the inside of the building.

Mr William Molenaar, Chief Fire Officer of the Wainui-o-mata Fire Brigade deposed that his brigade had two calls to the property on 14 May 1976. The first was around midday. It was a small fire which was extinguished in a few minutes. It occasioned but little damage. On arrival at the scene on that occasion the brigadesmen gained entry to the building through the front door of the building which was wide open on their arrival. That factor is equivocal as to the question of the general security of the building. It may have been opened by the person who discovered the fire; it may have been opened by the children who lit the fire (if indeed it was lit by children.) It could well have been secured before the fire and opened after it started by those who lit it and had gained ingress through some other part of the building.

Mr Molenaar had occasion to look over the building. He said that very few of the window frames had glass in them; some of them without glass were covered with wire mesh; that the galvanized iron sheets (which provided the exterior walls) were in many places pulled away from the framework and that the interior walls of the upstairs portion of the building were virtually wrecked. The latter fact does not directly touch upon the security of the building but it goes to show that ingress had been obtained by vandals. He said also that there was no door to the loft of the building but allowed in cross-examination that it being a sliding door, may have been drawn back from the doorway. Later in the day he met Mr Parsons on the site and enjoined him to secure the building to prevent intruders gaining entry and causing a further fire. Parsons did then secure the front door but as to general security, told Molenaar that he had com-

plained to the police on many occasions and there was very little he could do about it. Mr Parsons disagreed with Mr Molenaar's description of the building on that day. I prefer and accept the evidence of Mr Molenaar. I find that the security of the building deteriorated seriously subsequent to the issue of the policy and in such a way as to increase the risk of loss or damage by fire.

The defendant also submitted that there was a further breach of paragraph 8 of the conditions in that the extent to which the property was used for storage purposes diminished greatly during the currency of the policy. I think that such was clearly established. In the initial stages the timber and equipment purchased from Anker Construction were stored there. During the currency of the partnership developmental work its own equipment was also stored there. At a later stage and particularly after differences arose between the partners there was little, if any, in the way of equipment or dressed timber. It became a depositary for variegated goods owned either by Parsons personally or other companies in which he was a shareholder. At the time of the fire - and on this I accept the evidence of Mr Hansen, the insurance assessor employed by the defendant - there was on the premises a few old cars and but small quantities of builder's material. In my view, however, the diminution in quantity of the goods stored did not involve a change or a circumstance "in such a way as to increase the risk of loss or damage by fire" and accordingly it does not avail the defendant.

The defendant submitted also that the building had remained unoccupied for a period of more than 30 days and that accordingly paragraph 8 (b) of the conditions applied. This submission is allied to the defend-

ant's general submissions as to the meaning of the word "occupied" in the subject policy. Having regard to my ruling as to that and the evidence I reject the submission.

The plaintiff submitted that in or about January 1976 the defendant waived its rights under sub-paragraphs (a) and (b) of paragraph 8 of the general conditions of the policy. An amendment to the pleadings to lay the ground for this submission was made at the trial. On 28 January 1976 the plaintiff wrote to the defendant as follows :

> " Your account in the name of Bonanza Developments of P.O. Box 43-006 Wainui-o-mata has been referred to me.
>
> I am the Court appointed Manager of this syndicate.
>
> Would you please provide details of the cover extended under your policy number F 279, the premium for which amounts to $88.21. "

The defendant replied by letter of 29 January as follows :

> " We acknowledge receipt of your letter dated 28 January 1976 and as requested advise that our

> policy F 279 W insures the building situated Coast Rd, Wainui-o-mata for the amount of $16,500. The premium outstanding of $88.21 is for the year 16-11-75 to 16-11-76. The cover afforded by our policy is Fire and full extraneous perils included. "

On 27 February 1976 the plaintiff replied :

> " Further to your letter of 29 January 1976 we wish to advise our intention to continue policy F 279 W and enclose herein our cheque for $88.21. "

It is upon the base of this correspondence and in particular the defendant's letter that the plaintiff advances his submission as to waiver. He contends that the defendant then had the opportunity of raising the matters it now advances but did not do so. For my part, I do not think that waiver arises from the correspondence. That apart, - and Mr McKenzie in his final address acknowledged the difficulty this creates - there is no evidence that the defendant knew of the matters which it now advances as factors bringing into operation paragraph 8 of the General Conditions. "A waiver must be an intentional act with knowledge" - per Lord Chelmsford in Earl of Darnley v London, Chatham and Dover

Railway Co (1867) LR 2 HL at p 57 which was cited with approval in Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd and others 1975 1 Lloyd's Rep 52 at p 65.

In my view, the submission cannot be upheld.

Against the event of my finding on the defendant's second submission not being upheld, I will record my views on the defendant's submission as to the quantum of plaintiff's loss. The defendant pleaded that prior to the fire it was the intention of the insured to demolish the building at some future time preparatory to redevelopment of the land on which it stood for residential purposes in order to profit thereby and that, in the event of its being held liable to indemnify the plaintiff, the loss must be restricted to the cost of demolition. In support of her submission Mrs Tringham cited Falcon Investments Corporation (NZ) Limited v State Insurance Office 1975 1 NZLR 520 in which it was held that on a policy of indemnity the sum payable thereunder is the loss to the insured and not the value of the property insured. - see also C.R. Taylor (Wholesale) Limited v Hepworth's Ltd (1977) 2 All ER 784 at p 794. In my view the Falcon Investments case is distinguishable from the present case on the facts. Inthe former, the demolition of the insured dwellinghouse was a foregone conclusion and it was held that it would probably have taken place 12 months after the fire. In the present case, the insured property, unlike the dwelling in the Falcon case, was of sound structure at the time of the fire. Whilst it was situate in a residential zone and was capable only of non-residential use, it had the advantage of the existing use provisions of the statute and the relevant

code. Its intrinsic value as determined by a public valuer commissioned by the defendant after the fire, was $30,000.

The defendant, however, placed reliance on the purposes of the original partnership and the facts that emerged from the steps taken to implement the Court order as to the disposal of the partnership land by the plaintiff. The valuation obtained by the plaintiff for the purpose of the implementation of the provisions in the order for the granting of an option to Mr Parsons was not accepted by him and as a result arbitration became necessary. The three valuers who gave evidence in the arbitration proceedings valued the land upon which the insured property was erected on the bases of demolition of the insured property and of a potential development of the land into seven allotments for sale as residential sites and the award was also made on such basis. In computing the value of the land each valuer made a deduction for the cost of demolition of the building. Their respective assessment of such cost was $2500, $3000, and $3862. The proceedings before the arbitrator were heard on 10, 11 and 14 March 1977 and 4 July 1977.

The arbitrator, invested by the parties before him with power so to do, held that there was "no justification for awarding the proceeds of the fire claim to one partner to the exclusion of the others by directing that the claim be included in the option but at a nil value. The justice of the case clearly requires that the proceeds of the claim be excluded from the option and dealt with separately as an asset of the partnership."

In the result, he held that in the event of the option being exercised by Mr Parsons, the plaintiff, as statutory manager of the partnership assets, was entitled to the proceeds, if any, of the claim under the policy of insurance.

Mrs Tringham stressed that the determination of value made by the arbitrator was, in pursuance of the Court order, made at 10 December 1974 and that, inferentially, the valuations of the experts who gave evidence before him were as at that date also. She submitted also that it is manifest from the arbitrator's award that he and, again inferentially, the valuers had before them a plan of subdivision upon which the findings as to land value were ultimately made. She submitted that it was open to the parties to have put their cases to the arbitrator as to the value of the property as 10 December 1974 on the basis of a single unit of land with a building upon it but they did not do so; that instead they joined in treating the building as fit for demolition only. She submitted further that the probabilities were that Parsons would exercise the option at and the remaining partners would receive their share of the proceeds on the basis of a price of $17,000, the value determined by the arbitrator which was the land value less the cost of demolition of the building and the expenses of development. It followed, so it was argued, that the partnership and therefore the plaintiff had suffered no loss as a result of the fire. She allowed that as at the date of the fire, Parsons, however, had not exercised the option. Mr McKenzie submitted that this factor is fatal to the defendant's submission. He submitted - and Mrs Tringham accepted - that the relevant time for determination of the loss was the date of the fire, 14 May 1976; that at that date it was a

matter of speculation whether Parsons would exercise the option and that his decision as to that was dependant upon his ability to finance an overall transaction involving an outlay of a large amount of money for a substantial area of valuable land apart from the land upon which the subject building was situate. He submitted also that the method of valuation adopted at the arbitration and assented to by the parties was a matter domestic to the partnership and that if the insured building and its appurtenant land had been valued separately from the other lands, a different approach could well have been made. He submitted that the decisions in Budhea v Wellington City (1976) 1 NZLR 766 and Carly v Farelly 197511 NZLR 356 are authority for the proposition that the insurer is not entitled to adopt, as the defendant seeks here to do, a wait and see policy and have the quantum of the insured loss established in relation to events subsequent to the date of the loss itself. I do not think that these cases so decide. Both cases, however, show that an insured is entitled, vis-a-vis the insurer, to the amount of his loss notwithstanding his having a contract for sale with a third person at market price.

In my view the most that could be said in this case is that it was possible that in the not too distant future the building would be demolished and the land developed but, at the relevant time, there were too many unresolved factors to elevate that possibility to a probability. The option had not been exercised. The subject matter of the option was a large and valuable amount of property of which the insured property and its appurtenant land was but a small proportion and Mr Parsons' ability to raise the finance necessary was a prime factor precedent to his

decision to exercise it. Whether the option was or was not exercised the land could have been sold "as was" or it could have been subdivided in such a way that the building with a comparatively small area of land could have been sold separately from the rest of the subdivided land.

In Matergio v Canada Accident and Fire Assurance Co (1926) 1 DLR 1002 the approach to fixing the amount of loss under an indemnity policy of insurance was stated thus :

> " The main inquiry . . . . is not what it would cost to reconstruct (it) but what amount will indemnify the owner for the loss he has sustained. To put the same thing in other words, what was its value to the assured. Or again, what amount will put him in as good a condition as he would have been had no fire occurred." - per Harris CJ at p 1004.

In the present case the buildings at the time of the fire had an intrinsic value of $30,000. The valuer who made the assessment of value, considered, intmr alia the rental aspect of the building for storage purposes. In the absence of probability of its demolition in the immediate or indeed the long future, I think the amount of $30,000 was the amount required to put the plaintiff in as good a condition as he would have been had no fire occurred. The maximum amount of the indemnity, however was $16,500 and

had I not upheld the defendant's second submission as to the applicability of paragraph 8 of the general conditions I would have given judgment for the plaintiff in that sum, with costs.

In the result, however, judgment must go for the defendant to whom leave is reserved to apply for costs.

Solicitors for the Plaintiff : Buddle Anderson Kent & Co (Wellington)
Solicitors for the Defendant : Cornhill Insurance Co Ltd (Auckland)