3/7

(3) FN7 X

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A.49/82

725

BETWEEN GLENLEITH HOLDINGS LIMITED
Plaintiff

A N D D.J. WHYTE
Defendant

A N D STATE INSURANCE GENERAL MANAGER
Third Party

AND A.47/84

BETWEEN BRIAN STEWART
Plaintiff

A N D DAVID JOHN WHYTE
Defendant

A N D STATE INSURANCE GENERAL MANAGER
Third Party

Hearing: 25 and 26 June 1984

Counsel: M.J. Knuckey for Plaintiffs
R.J. Somerville and T.P. Robinson for Defendant
M.M. Mitchell for Third Party

Judgment: 29 JUN 1984

JUDGMENT OF ROPER J.

In the early hours of the morning of Friday 27th June 1980 the restaurant and bar on the upper floor of the Robbie Burns Hotel was gutted by fire. It is not disputed that the cause of the fire was the faulty construction of a double fireplace which had been built by the Defendant Mr Whyte in the course of redecoration of the bar and restaurant. The concrete slab hearth had not been constructed in accordance with the relevant standard specification with the result that there was a transfer of heat from the slab to the wooden floor immediately below it and a piece of boxing left below the slab. It is unnecessary to say more as to the causes of the fire and the defects in the construction of the hearth

because liability for negligent construction is accepted.

The owner of the premises, Glenleith Holdings Ltd, issued proceedings in this Court claiming the costs of reconstruction and redecoration, and Mr Stewart, the licensee of the hotel, issued separate proceedings in the District Court claiming the cost of personal chattels lost in the fire. The District Court proceedings were subsequentl moved into this Court so that both claims could be heard together as the issues in each are identical.

Counsel have been able to agree on quantum. The sum due to Glenleith Holdings is $56,070.07 and to Mr Stewart $4,913.53.

The real dispute in the case is between Mr Whyte and the Third Party it being alleged that at the relevant time there was a contract of insurance in force indemnifying the Defendant against his liability.

Mr Whyte had worked for a firm of plasterers (who also did tiling and blockwork and the repair but not construction of fireplaces) and in 1972 commenced business on his own account. On the 21st November of that year he went to the Dunedin Office of the State Insurance for the purpose of taking out public liability insurance. A policy was duly issued on the 18th December 1972 and was renewed from year to year. It is this policy on which the Defendant relies.

The Third Party's answer to that in short is that there was no policy in force at the relevant time, namely the 27th June 1980; or, if there was, then it did not cover liability in respect of damage caused by fire; or if it does, it does not cover this particular fire because of the timing and location of its occurrence.

It is appropriate to deal first with the question of whether the policy covers damage resulting from fire, assuming it to have been in force at the relevant time.

The policy provides that the insurance company "will, subject to the terms exceptions limits and conditions contained herein or endorsed hereon indemnify the Insured against liability arising from accidents within New Zealand". Exception 3, so far as is relevant, provides:-

> "The indemnity expressed in this policy shall not apply to or include -
>
> (3) Liability in respect of damage to property -
>
> (c) Caused by or resulting from fire or explosion."

Endorsed by stamp on the policy is the "Scope of Indemnity" which reads:-

> "Accidents occurring
>
> (1) At or about the Place or Places at which this indemnity applies
>
> (a) In connection with the Business, or
>
> (b) Caused by any defect in the premises occupied by the Insured for the purposes of the Business
>
> (2) Elsewhere within New Zealand in connection with the Business
>
> (a) Where any work is being carried out but has not been completed
> (b) During and in connection with the performance of any duty
>
> by any person (including the Insured) employed in the Business "

With the best will in the world and adopting the most sympathetic approach I see no way in which the Defendant can bring himself within the indemnity given by the policy. In my opinion both the exception in 3(c) and the "Scope of Indemnity" provision exclude indemnity in the circumstances of this case.

As for the exception, Mr Somerville argued that according to the general statement at the commencement of the policy the risk insured against was the negligence of the Defendant which caused damage to property, and that as

that declaration of the loss insured against preceded the exclusion clause the general statement prevailed. His authority for that proposition is this passage from Ivamy's General Principles of Insurance Law 4th Ed. at page 417:-

> " Where the peril insured against precedes an excepted cause which actually produces the loss, there is a loss within the meaning of the policy if, notwithstanding the operation of the excepted cause, the peril insured against is to be regarded as the proximate cause of the loss."

That statement presupposes that an accident has occurred which comes within the perils insured against, and can best be explained by reference to the facts in one of the cases cited by Ivamy, namely, Fitton v. Accidental Death Insurance Co. (1864) 17 C.B.N.S. 122. There a hernia caused by an accidental fall was held not to be within an exception against hernia. What the present policy insures against is liability arising from accidents, with effect that the company has agreed to indemnify the Defendant for all sums he shall become legally liable to pay in respect of accidental damage to property. But that general statement is "subject to the terms exceptions limits and conditions" contained in the policy so that no insured peril arose. Further I cannot agree with Mr Somerville that indemnity arose at the time of the Defendant's negligence, which would have been in about February 1980. The policy gives indemnity for "accidents" for which the insured is liable, and thus where damage occurs due to negligence the "accident", in this case the fire, is the event which results in loss, not the negligent conduct which caused the event (See Pickford and Black Ltd v. Canadian General Insurance Co. (1974) 53 D.L.R. (3rd) 277; (1975) 64 D.L.R. (3rd) 179).

As for the scope of the indemnity, it is the distinction between "accidents" and "negligence" that takes the Defendant outside the scope of the policy. There may have been negligence "during and in connection with the performance of any duty", and indeed it seems clear that there was, but the "accident" did not occur within that period.

In the light of my conclusions it is unnecessary to determine whether the policy was in fact on foot at the time of the fire.

The fact of the matter is that this policy, even if it had been extended to cover damage caused by fire, as it could have been for an increased premium, was quite inappropriate for an insured who was going to engage in the construction of fireplaces, because any "accident" was only likely to occur some time after the work had been finished so that even had there been fire cover he would still have been caught by the "Scope of Indemnity" provision.

That brings me to what I see as the Defendant's main argument. The Defendant alleges that there was a pre-contractual negligent mis-statement by the employee of the State Insurance who arranged the insurance cover in 1972 as to the extent of the cover and indemnity it would afford. In reply to a request by the State Insurance for further particulars as to the negligent misrepresentation the Defendant gave this answer:-

> "The precise words used are a matter of evidence but it is alleged inter alia that the Defendant explained the nature of his work including the fact that he spent time constructing fireplaces and re-building fireplaces and chimneys. The Defendant explained that he required cover for this type of operation and explained in detail to the Insurance Officer the nature of the work that he proposed to undertake and whether or not the policy would cover this work. He was assured that there was a policy which would cover this very type of work and he was assured that all the matters concerning the Defendant were covered in the said policy. The Defendant relied on that representation and signed the proposal."

These are the facts: According to Mr Whyte he went to the insurance company in November 1972 to enquire about public liability insurance. He could not remember the name of the person he saw but it proved to be a Mr Campbell who was called as a witness. This is the Defendant's evidence:-

> "As to what occurred at that time, I went to the office and asked them for insurance cover on the type of work I was to do in the future. That was plastering, construction of blockwork, rebuilding chimneys for insurance claims and fire bricking, back of hearths, fireboxes. As to what type of insurance I was after, I knew what cover I needed. That was cover for fire, to do with construction of fireplaces, rebuilding of chimneys, external houses and general block walls and plastering. Prior to that time I had been involved with constructing fireplaces. My intentions for my future business as far as that type of work, to do generally all that type of work, fireplaces, chimneys and general plastering and blockwork and stonework. As to what exactly I recall explaining to the person I saw at the State Insurance, they asked me what cover I needed and I explained the scope of work I would be doing in the future. As to what he said to me, he set about to make out a policy."

A proposal was completed and signed by Mr Whyte and about a month later he received a policy which he did not read, as the instruction on the front of the policy suggested he should. Although he was understandably vague on the details of the conversation with Mr Campbell he maintained that he told Mr Campbell the full scope of his planned operations. In cross-examination he accepted that his former employers had not been in the business of constructing fireplaces from new, and that in the year preceding the date of the policy he had only constructed a few fireplaces for friends without payment. In the twelve months following the policy it seems that he constructed only one chimney and repaired one firebox. Mr Whyte could not remember anything Mr Campbell had said on the day except an enquiry as to what cover was required.

Because of the lapse of time the proposal form signed by the Defendant assumes considerable importance. In it his occupation is simply given as "plasterer" and the answer to the question "Do you desire this indemnity to include liability arising from fire" is "No". The Defendant could not explain how that answer came to be recorded except to say that the clerk "must have got it wrong somewhere".

Mr Campbell, who in 1972 had had just under three years' experience with the company as an insurance clerk, and is now a District Officer, had no recollection of his interview with the Defendant and was wholly dependent on the proposal form. He agreed that he had written in the answers to the questions in the form which he would have obtained from the Defendant. This is his evidence:-

> "Mr Whyte has said that I completed the details on the form, that is correct. On the proposal the occupation is given of the proponent. During his evidence Mr Whyte said that he made it clear to me he was engaged in business not only as a plasterer but as a block layer, bricklayer and constructor and repairer of chimneys and fireplaces, I don't accept that. If that was said to myself at the time I would have completed that section (a) in full. If there is more than one trade in the normal course of events the occupation of the proponent in this instance would have to be completed plasterer, blocklayer and any other occupation given at that time. There is a special reason for giving more than one occupation, we require it to be completed in full to enable us to assess the premium. That depends on the occupation of the proponent. Dealing with the extension available for fire, as to what my normal procedure is when dealing with that particular extension in the proposal, you would then once you got to that stage ask the insured did he require the policy to be extended to cover (a) fire (b) explosion. I have never completed that part of any proposal in my whole experience as an insurance clerk without correctly recording the answer given to me to the question by the proponent. I can say that categorically. At that particular time it was usual for the extension to be taken. Its more unusual for it not to be taken. As to whether I had any special instructions from my own company about selling the extension, no personal instruction, for instance if the underwriter or checking officer wasn't satisfied that that was completed to his satisfaction he would get back into contact. The extensions do increase the premium. In this instance it would increase the premium for the fire and explosion premiums by 35%. Mr Whyte alleges he informed me that he wished to have cover for all the various trades, I only state what I stated before, if that was so I would have filled in section (a) with all the occupations as nominated by the insured at

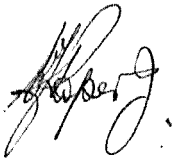
> the time. When the proposal was completed I would hand the proposal form back to the proponent to check, to check his answers to the questions, that is my invariable practice, and then to sign."

I see no basis for an allegation of negligent mis-statement or failure to advise on a salient matter and am satisfied on balance that the Defendant did not tell Mr Campbell of his proposed fireplace construction plans. It seems inconceivable that Mr Campbell could have been given that important information and then failed to record it or appreciate its significance. There was a suggestion that the officer who checks proposals should have queried the rejection of the extended cover for fire damage, as is apparently the practice, and that the company through its officers was negligent in not doing so. Negligence on that basis was not pleaded but in any event it could hardly be negligent to fail to check with "a plasterer" whether fire cover should not be included.

Mr Somerville did the best he could in what was really an impossible case.

There will be judgment against the Defendant for Glenleith Holdings for $56,070.07 and for Mr Stewart for $4,913.53; and judgment for the Third Party against the Defendant on the counterclaim in each proceeding.

The question of costs raises some problems because the cases were heard together and one came from the District Court. I require Memoranda from Counsel on the matter if they cannot agree.



Solicitors:
Knuckey, Woodhouse & Newell, Dunedin, for Glenleith Holdings Ltd
Jackson, Lucas & Deuchrass, Dunedin, for Brian Stewart
John Farry & Gowing, Dunedin, for Defendant
Mitchell & Mackersy, Dunedin, for Third Party