

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W288/76

BETWEEN

HOFETON WILSON

PLAINTIFF

AND

NATIONAL EMPLOYERS MUTUAL
GENERAL INSURANCE ASSOCIATION
LTD.

DEFENDANT

Mr. N. Forsythe instructed by Messrs. Myers Fletcher & Gordon, Manton & Hart for Plaintiff.

Mr. D. Brandon instructed by Messrs. Livingston, Alexander and Levy for Defendant.

Heard 1st June 1981, 21st September 1981.

J U D G M E N T

Gordon J.

Plaintiff is the owner of a house situated at Galina in the parish of St. Mary. At the time the cause of action arose he lived at 39 Westminister Road, Kingston 10. In March 1974 through brokers Fraser, Fontaine and Kong Ltd., he insured the house at Galina with National Employers Mutual General Insurance Association Ltd. for \$15,000.00. In August, 1974 he increased the coverage to \$35,000.

Plaintiff is a Transport Operator and in 1974 he travelled regularly between Kingston and Galina operating his public passenger vehicle. His daily run covered this route and he slept in the house at Galina 4 or 5 nights per week commencing Monday nights. He spent his weekends in Kingston.

In the early morning of 5th October 1974 the Galina house was destroyed by fire. Plaintiff had not slept at the house on the night of the 4th October and Isaiah Campbell a fisherman and farmer who lived at the house was at sea fishing at the time of the fire. The plaintiff brought this action against the defendant to recover \$25,000 damage he suffered in the fire. He contended the risk was covered by the contract of insurance he had with the defendant and the amount was payable by the defendant notwithstanding the disclaimer of the defendant sent to the brokers by letter dated 16th December 1974.

There was no serious challenge of the plaintiff's case that he was a farmer and reared animals on the land on which his house at Galina stood. He was supported in his evidence that he slept at this house some 3 or 4 nights per week by Isaiah Campbell who said he Campbell lived there and worked on the farm during the day and fished at night when the weather was good. The plaintiff's assessor Arthur Aitken gave evidence of his assessment of the damage caused by the fire. This evidence also went unchallenged.

The defendant's case was that the defendant having disclaimed liability in accordance with clause 8 of the policy of insurance, the plaintiff failed to comply with the provisions of the said clause and did not refer the matter of the disclaimer to arbitration within the agreed time, and as a consequence his rights had therefore been determined. The defence further relied on a failure by the plaintiff to disclose material facts in completing the proposal form and claimed that the letter of disclaimer sent to the brokers was sufficient notice to the plaintiff as the brokers were agents not of the defendant but of the plaintiff.

- Exhibits tendered included,
- Exhibit 1: The proposal form and policy,
 - Exhibit 4: Claim by plaintiff,
 - Exhibit 5: Assessor's report,
 - Exhibit 9: Disclaimer.

The plaintiff contended he had been informed by the brokers that the house should not be left unoccupied for a period 30 days. This information was given to him when he queried that section of the proposal form which asked:

"Section 8 (Exhibit 1): Will the dwelling be left unoccupied?
If so please give details"

He said that it was on this explanation he answered the question in the negative as he knew he was on the premises daily except for period Saturday night to Monday morning.

The defendant submitted that there was no requirement that

the premises should not be left unoccupied for 30 days. The defendant further submitted that the plaintiff failed to make a disclosure material to the defendant's consideration of accepting or rejecting the risk proposed. The plaintiff in his claim submitted to the defendant (exhibit 4 part (e)) stated:

"No one was on the premises at the time of the fire".

In their letter (exhibit 9) disclaiming liability the defendant wrote:

"In answer to question 8 on the proposal, made in March of this year, the answer was "No". However, our information is that, at the time of the fire the premises were not occupied. Indeed, there does not appear to have been a tenant for some considerable time while the insured of course, was resident in Kingston.

In all the circumstances we do not feel able to make a payment of any kind and no doubt you will so inform the insured".

The disclaimer by the defendant was based on their finding that the insured premises had been left unoccupied. In Marzouca vs. Atlantic and British Commercial Insurance Co. Ltd. 12 J.L.R. P.368 - P.C. the Privy Council considered the term "Unoccupied" and held -

"Though mere temporary absence did not necessarily involve a cessation of occupation, the occupation to be effectual must be actual and not constructive and must involve at least the regular daily presence of someone in the building".

The unchallenged evidence of Isaiah Campbell is that he lived in plaintiff's house at the material time, worked on the farm in the day-time and fished at night when the weather permitted this. I find that the plaintiff was not at fault in answering question 8 on the proposal form in the negative; the house was not left unoccupied. The disclaimer by the defendant was based on a wrong premise. Did this affect the plaintiff's rights under the policy?

To answer this I now turn to consider the second paragraph of Condition 8 of the policy issued to plaintiff by the defendant..

This provides:

"If the Association shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder".

The first paragraph of Condition 8 stipulates the manner in which differences under the policy are referred to arbitration and the composition of the tribunal.

The plaintiff maintained that Condition 8 of the policy cannot operate to oust the jurisdiction of the Court and he is entitled to pursue his action in this Court without reference to this condition. He referred to:

Dawson et al vs. Lord Otho Fitzgerald 1876 Vol. 1 Exch. P.257
Horton vs. Sayer 44 & N.P. 643. Scott vs. Corporation of Liverpool
28 L.J. Ch. 230.

I do not find any of these cases supportive of the plaintiff's contention.

In executing the proposal the plaintiff made this declaration:

"I agree that this declaration and the answer given above as well as any further proposal or Declaration or Statement made in writing by me or anyone acting on my behalf shall form the basis of the contract between me and the association and I further agree to accept indemnity subject to the conditions in and endorsed on the association's policy".

In so declaring plaintiff agreed to be bound by Condition 8 of the policy. This Condition is a submission as defined in Section 2 of the Arbitration Act.

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

Section 3 of the Act states:

"A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court".

Condition 8 of the policy did not operate to prevent the plaintiff from pursuing his common law right of action within one year of the 16th December 1974. It cannot be said that plaintiff had no notice of the disclaimer as by letter (exhibit 8) dated 21st

May 1975 plaintiff's Attorney demanded settlement of the claim from Messrs. Fraser Fontaine and Kong Ltd. and by letter (exhibit 10) dated 19th June 1975 plaintiff's Attorney Mr. D. L. Richardson was informed by the defendant of the disclaimer. Messrs. Fraser Fontaine and Kong Ltd., are the agents of the plaintiff and not the defendant and notice of disclaimer sent by the defendant to the brokers is notice to the plaintiff. This is settled law and is clearly stated in 22 Halsbury's Laws of England (3rd Edition) 201 paragraph 382.

"If a person wishing to obtain insurance of a non-marine character employs an insurance broker, as distinct from going direct to the insurers or their agents, the broker is his agent and the ordinary law of agency governs the responsibility of the proposer for the acts and omissions of the broker".

Plaintiff did not seek the assistance of the Court under Section 3 of the Arbitration Act nor did he file an action to enforce his claim under the contract within the year stipulated by Condition 8 of the policy. Had he filed an action within the time stipulated the defendants would have undoubtedly invoked the provisions of Section 5 of the Act and obtained a stay of proceedings pending the outcome of arbitration proceedings.

"The parties to a submission do not lose any of their legal rights unless it is so stated in the submission but a clause in a submission to oust the jurisdiction of the Court is not valid" (see Czarinkow vs. Roth Schmidt and Co (1922) 2 K.B. 478)"

Halsburys Statutes of England, Third Edition Volume 2. P.435 - Notes.

Condition 8 of the policy does not purport to oust the jurisdiction of the Court. The plaintiff sought by letter dated 18th June 1976 to defendant (part of exhibit 10) to refer the matter to arbitration, he failed to conform with the terms of the condition and I hold he cannot recover under the policy.

There will be judgment for the defendant with costs to be taxed if not agreed.