Falcon Investments Corp (NZ) Ltd v State Insurance General Manager

Supreme Court Wellington
11, 12 November 1974
O'Regan J

Indemnity value – Policy of insurance – Dwellinghouse damaged by fire – Property to be developed – Loss to insured – Comparison with valuation

The plaintiff was insured under the defendant's policy of insurance against loss or damage to a dwellinghouse providing indemnity to a maximum of $12,000. The house was badly damaged by fire on 27 February 1973. Earlier the plaintiff, as purchaser, had entered into an agreement for sale and purchase of the property for $23,500 which was conditional on the plaintiff obtaining planning consent for the erection of rental flats on the land. Approval was sought and ultimately granted in March 1973. The plaintiff immediately placed the property on the market at $39,000. The property did not sell and the plaintiff set about the development itself.

The question for the court was the extent of the plaintiff's loss. The dwellinghouse was valued at $6,500.

Held, 1 The fire did not militate against a sale of the property. Its ultimate use for development was its most likely fate.

2 Valuing the realty and assessing the loss resulting from the fire are very different exercises. Reinstatement or repair of the house were not in question. What was in question was the loss to the insured, not the value of the property destroyed, the value of which was given by valuation evidence.

The land was about to be developed when the loss happened and that development involved the demolition of the house as it was before the fire. The fire resulted in savings in demolition costs. The plaintiff's loss as a result of the fire was the loss of 1 year's rental less the demolition cost savings.

Cases mentioned

re *110 Martin Street* [1973] NZLR 15
Burnard v Rodocanachi (1882) App Cas 333
Castellain v Preston (1882-83) 11 QB 380
Canadian National Fire Insurance Co v Colonsay Hotel Co (1923) 3 DLR 1001
McKee v Valuer General [1971] NZLR 436
Scott v Canadian Mercantile Insurance Co 49 DLR (2d) 601
Vanderburgh v Onoida farmers' Mutual Fire Insurance Co (1935) 1 DLR 257

O'Regan J: Claim under a policy of insurance.

The defendant is the insurer and the plaintiff the insured under a policy of insurance against loss or damage to a dwellinghouse situate at 781 Fergusson Drive, Upper Hutt and the domestic outbuildings used in connection therewith. The policy provided indemnity to a maximum amount of $12,000. The dwellinghouse was badly damaged by fire on 27 February 1973. It is common ground that reinstatement of the property was out of the question and the controversy is as to the extent of the plaintiff's loss.

The land on which the insured buildings stood has an area of some three eighths of an acre. It is a flat section situate hard upon the main shopping area of Upper Hutt City.

On 18 August 1972, the plaintiff entered into an agreement for sale and purchase of the property and certain chattels for $23,500. The purchase price was allocated in the agreement as to $600 to the chattels and $22,900 to the realty. The agreement was conditional upon the plaintiff obtaining the

Source: New Zealand Institute of Valuers (1993). Land valuation cases 1965-1992. Hutcheson Bowman & Stewart Ltd, Wellington.

consent of the Upper Hutt City Council to the erection of 12 rental flats on the land. The existing zoning of the land precluded this type of development without such approval. The plaintiff applied for such approval on 1 September 1972 and was granted it on 29 November 1972. It then wasted no time in applying for a building permit which was ultimately granted on 27 March 1973. The plaintiff did not at that time intend to undertake the development itself. It immediately placed the property on the market at an asking price of $39,000. It offered it as a site in respect of which planning approval had been obtained and a building permit approved for the erection of 12 flats. It had earlier let the dwelling on a monthly tenancy at $50 pw to help in meeting the outgoings on it.

The outgoings were to the order of $3,138.00 pa made up as follows:

Interest on $21,000 @ 13$^{1}/_{8}$%	2,835.00	
Rates		280.00
Insurance premium	23.00	
	$3,138.00	

Rental at the rate of $2,600 pa, then, did not cover the outgoings.

The tenants were never satisfactory. Some three days before the fire, either they or their invitees to or trespassers at a party, set about laying waste the windows, doors and walls of the house to such are extent that it would have cost – and I so hold – $500 to make good the damage.

The plaintiffs business is dealing in real estate in all its facets – buying, selling, letting and developing. It has been in business since 1962. A Director, Mr W E Blitz, stated in evidence that when he saw the property, it appealed to him immediately as a re-development site. The dwellinghouse comprising five bedrooms and the usual offices and a large billiard room, was very old and had almost run its course. The interior was in need of a great deal of renovation. Despite this, it was habitable and could well have been lived in for a number of years. The vendor, a Mrs Brooks, had not long prior to the sale, been widowed and the property had become too big and too much for her to maintain. Part of the house was built on a concrete floor and for this reason it was not practicable to shift it on to another site. Even if such had been practicable, a deal of expense would have been entailed. The situation was, then, that if the flats were to be erected, the house must need be demolished and an expenditure of $650 thereby entailed.

The plaintiffs efforts to sell the property in the two months preceding the fire and subsequently, were unavailing. It then set about the development itself. This entailed the raising of finance to the order of $100,000 and the drawing up of plans and specifications and the calling of tenders and the letting of the contract and getting the work under way. I was not told when the work actually commenced but it was nearing completion at the date of hearing. I think it likely that, first, further endeavours to sell the property and then when sale was abandoned the various matters to which I had just referred, would have occupied twelve months during which time the property could well have been let.

The plaintiff's attitude as avowed by Mr Blitz, was that it was indifferent as to whether a purchaser lived in the house as it was, or spent money in renovating it or developed it as flats. He conceded, however, that the obtaining of planning approval and building permit was calculated to fetch the maximum price. I think that the probabilities were that the property would have been developed in the manner it now has been either by the plaintiff or a purchaser from it. I do not think the fire militated against a sale of the property. Its ultimate use for development was its most likely fate and with the house partially destroyed it would, if anything, be available for purchase cheaper than if it was intact, even if only to the extent of the difference between the costs of demolishing the existing structure and the partly destroyed house.

Two public valuers gave evidence. Mr D W Simpson had not seen the property either prior or subsequent to the fire. However, with the aid of data concerning it which was available in his own

office from an earlier appraisement of it and as a result of searching of public and local body records, he established that the house had an area of 2,146 sq ft. He valued it at $6,500. Mr L T Mark did not accept this figure as the value of the property in situ but he went so far as to say that if the identical house were sited on a section incapable of development, he would not quarrel with the assessment. In these circumstances, it cannot be gainsaid that the intrinsic value of the dwellinghouse was $6,500. I think it follows that such figure must be the maximum to which the defendant could be liable. Both valuers submitted a mass of materials touching the value of the entire property and as to the value of the land in the various circumstances that might arise. Mr Mark, in particular, built his thesis on the basis of valuation of improvements laid down in *McKee v Valuer General* [1971] NZLR 436 and Re *110 Martin Street* [1973] 2 NZLR 15. He had valued the property at the behest of Mrs Brooks in June 1972. At that time, approval had neither been sought nor given for the building of residential flats on the site but Mr Mark, with his wide knowledge of local conditions, regarded the development and the approval of it as a foregone conclusion and based his valuation on these premises. He valued the entire property at $25,000. His valuation being built on the assumption that the house and other improvements would be demolished, he placed no value on them. His valuation allowed $500 for fencing and $24,500 for the land. The property having sold in August 1972 for $23,500, Mr Keesing submitted, on the basis of Mr Mark's June valuation, that the dwelling had a value of $1,000 ie the difference between the value of $24,500 which Mr Mark put on the whole property (excluding fences) and $23,500 it fetched on the market. I find myself unable to accept this submission. First the figures are wrong. The property sold for $22,900, not $23,500. Secondly, the submission is built upon the premise that Mr Mark's valuation of June 1972 was correct. Mr Mark proceeded on the basis that in the circumstances obtaining, the dwelling had no value at all. With the market price being taken as a reliable index of value, it does not necessarily follow that the house had a value. It follows rather that Mr Mark was astray in his assessment.

I do not find it necessary to consider in detail the data tendered by either valuer. They were valuing realty and their evidence is as to their reasons for the conclusions they reached. My task is to ascertain the loss resulting from the fire sustained by the plaintiff, which I apprehend to be a very different exercise. The policy provides that the defendant "in the event of any of the contingencies hereinafter described . . . will by payment, reinstatement or repair indemnify the Insured as hereinafter provided". The first of the contingencies described is "loss or damage to property described in the Schedule caused by . . . fire." Reinstatement or repair, it is agreed, are not for consideration. The question, therefore, is what payment should the defendant make to indemnify the plaintiff for the loss or damage to the property by the fire. Such loss is the loss *to the insured* whereas the opinions offered by the valuers is as to the intrinsic value of the property destroyed. The distinction between the two situations has been considered and made in a series of Canadian cases. In *Canadian National Fire Insurance Company v Colonsay Hotel Company* (1923) 3 DLR 1001, the insured property was a large hotel built in 1910 and sold in 1912 for $20,000. It was subsequently deprived of a licence by the introduction of prohibition. After having been occupied by a Chairman for a time, it, along with its contents, was acquired by the respondent in October 1920 – some eight months prior to its destruction by fire – for $3,950. For the six months prior to the fire, the hotel was run by the respondent at a substantial loss. The trial Judge directed the jury that the basis of indemnity was the replacement value of the property insured. The jury returned a verdict estimating the value of the hotel at $16,500 and the contents at $3,500. On appeal, the Saskatchewan Court of Appeal affirmed the judgment but the Supreme Court of Canada reversed it. Duff, J (at p 1005) had this to say:

> "The jury ought to have been told that the pecuniary loss suffered by the insured in the destruction of the hotel was the true and only measure of the indemnity to which it was entitled. It seems to be quite clear that the loss could in the circumstances be measured by the value of the property – not necessarily the selling value, if the insured could establish a value in use greater than the selling value – but I can entertain no doubt whatever that the point upon which a jury

should have been told to apply their minds was that of ascertaining *the value to the insured of the property destroyed."*

The italics are mine.

This decision was applied in *Vanderburgh v Onoida Farmers' Mutual Fire Insurance Company* (1935) 1 DLR 257 where, at p 258, Davis, J A said:

"There are, of course, many cases where replacement cost less depreciation is obviously no measure of loss. Old buildings are not infrequently a detriment, or at least of little value, in the sale of land, and it would be wrong to estimate loss in such cases by ascertaining replacement cost. One of such cases was *Canadian Nat'l Fire Ins Co v Colonsay Hotel Co* (1923) 3 DLR 1001; 1923 SCR 688. It is in every case the actual loss that is to be ascertained though different methods of arriving at that loss may be appropriate in different cases."

In *Scott v Canadian Mercantile Insurance Company* 49 DLR (2d) 601, the plaintiff claimed indemnity for the collapse of a portion of his five-storey chicken house due to a windstorm, basing his loss on replacement less depreciation. The policies in question limited indemnity to the actual cash value of the property at the time of destruction. The building was $5^1/_2$ years old when it collapsed. Because of adverse economic conditions in the egg production business in which he was engaged, it was clear that the plaintiff could not have continued operating for more than $1^1/_2$ years even if the building had not collapsed. The original cost of the building was $67,000. The award in favour of the plaintiff was calculated at its depreciated value after $5^1/_2$ years based on full depreciation for 7 years. In reaching its decision, the Court therefore, took account of circumstances peculiar to the plaintiff and the property in determining "The pecuniary loss suffered by the insured" and in so doing, followed *Canadian National Fire Insurance Company v Colonsay Hotel Company* (supra).

In *Burnard v Rodocanachi* (1882) 7 App Cas 333 at p 339, Lord Blackburn stated the principle involved in these words:

"The general rule of law (and it is obvious justice) is that where there is a contract of indemnity . . . and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay . . . "

This passage was cited with approval by Collin, L J in *Castellain v Preston* (1882-3) 11 QB 380.

In the present case, the land was about to be developed when the loss happened and that development involved the demolition of the house. In my view, the only loss accruing to the plaintiff was the rent revenue for a year beyond the date of the fire. He would have, however, had to spend $500 in making good the depredations of the vandals before it could be revenue producing. The fire resulted in a saving in demolition costs. The cost of demolition of the house as it was before the fire, I accept to have been $650. The cost of demolition of what was left after the fire, was $312. The saving then was $338 and I think the defendant should have credit for that. The defendant has already paid $312 under the policy and must have credit for that amount also. The defendant's net loss resultant upon the fire is accordingly:

Loss of 1 year's rental		2,600.00
Cost of reparation to render it tenantable	500.00	
Saving on demolition costs	338.00	838.00
		$1,762.00
Less amount already paid		312.00
		$1,450.00

Judgment for plaintiff for $1,450 with costs according to scale. I certify for the second day of hearing.