IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0010 of 1998S
(High Court Civil Action No. 0134 of 1997L)

BETWEEN:

NEW INDIA ASSURANCE COMPANY LIMITED

Appellant

AND:

SHAMBHU PRASAD

Respondent

Coram: **The Rt. Hon. Sir Maurice Casey, Presiding Judge**
The Hon. Sir Ian Barker, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing: **Friday, 5 February 1999, Suva**

Counsel: **Mr H. K. Nagin for the Appellant**
Mr V. Mishra for the Respondent

Date of Judgment: **Friday, 12 February 1999**

JUDGMENT OF COURT

The narrow issue raised in this appeal is the meaning of the expression "being left without an inhabitant therein" in relation to a residence covered by a policy of fire insurance issued by the appellant Company. It was extensively damaged by fire on 22/23 November 1995. The Company denied liability and in the High Court at Lautoka, Lyons J. found in favour of the respondent and awarded him the amount of the loss and interest.

The provision on which the Company relied reads:

> ***"In the event of the Residence stated in the Schedule being left without an inhabitant therein for more than thirty consecutive days the insurance by Section 1(a), (b), and (e) shall be entirely suspended in respect of any period or periods, during which the said Residence may be so left in excess of the aforesaid thirty days, unless with the written consent of the Company".***

Section 1(a) relates to loss by fire.

The learned Judge found the following facts:

> *"The plaintiff rented out the house, which had a pleasant aspect, to various persons. The last of those tenants was a logging gang. The rental paid was $140 per month.*
>
> *The logging gang last rented the premises in or about April/May of 1995. From then on the premises was left without a tenant. On the logging gang leaving the premises, it was found to be in need of repair before it was re-let. It was envisaged the logging gang would return as tenants in December of 1995. The repairs included the replacement of gutterings, painting outside, some inside painting was needed plus repairs to windows and screens.*
>
> *The plaintiff left the power and water connected and his son Rajendra Prasad, with the assistance by his friend Mr Autar, set about affecting the repairs.*
>
> *Both Prasad and Autar were otherwise employed so they visited the house in their spare time. They would bring with them the required hardware and tools which on occasion would be left in the house ready for use (although they wisely took their tools away each time).*
>
> *They set about the repairs slowly. They occasionally used the outside cooking area. There was a mattress on which they would rest whilst working but they did not stay overnight on any occasion. Before the 1995 Diwali celebrations they stayed in the house and lit some diyas and set fire works. Whilst they were away from the house they asked the neighbour Mr Ali to keep an eye on it.*
>
> *Autar and Prasad also cleared up the surrounding compound and cut the lawn".*

He found that Prasad and Autar visited the house with the respondent's authority on at least two occasions a week, mostly only for a few hours at a time, and used all of its facilities from time to time, but did not stay overnight, though on occasions they stayed in the house beyond nightfall. The evidence indicated they were there for 2-3 hours only on Diwali night.

After considering a number of authorities dealing with similar insurance provisions, he stated his conclusions as follows:

"Of course it is ultimately a question of fact, but in my opinion, what is required as "an inhabitant" in a policy such as this is the use of the premises and its facilities by a person who can, if need be, exercise the owner's right to exclude others, in such a manner as renders it visible that the premises are not deserted and are in fact "in use", albeit intermittently. I do not consider "sleeping over" to be in any way conclusive, one way or another. The crucial question is one of use associated with the appearance of claim of right to possession. As to how often that intermittent use, or the extent of it, constitutes having the premises with an inhabitant, " is a question of fact".

That is not to say I am reversing the onus; but rather that to discharge the onus, the insurer in discharging the onus, must satisfy the court, on the facts before the court, that the activities of the insured, during the 30 days (or whatever period) is moré akin to desertion of the premises (and the consequent exposure to risk) than to usage, the frequency of which could be said to exercise a proprietary right and, further, such use of the premises as evidences a supervision thereof.

Arguably I am imposing a more stringent test than that imposed in the authorities under review. Be that as it may, I can say that, on the facts before me, I am not satisfied that the Defendant insurer has discharged the onus required. I am not satisfied that the plaintiff, in the given circumstances, left the place without an inhabitant for the period required by the policy. I consider the plaintiff, through his son with proper authority, so used the premises and facilities with such regularity and with such claim of right as to render the defendant's efforts in denying the claim, unsuccessful".

Cases referred to by His Lordship covered a variety of situations, and dealt with different policy expressions. Identical language was considered by Cosgrove J. in the Tasmanian Supreme Court in Pryer v Mercantile Mutual Insurance Ltd. (1986) 4 ANZ Insurance Cases 60-711, and His Lordship saw merit in that Judge's view that in the context of the policy, an "inhabitant" was a person using the premises by virtue of a claim (not necessarily valid) of a proprietary right.

It is well established that in construing the language of a contract of insurance the ordinary meaning of the words used are to be adopted, having regard to the context of the policy and to the surrounding circumstances known to the parties at the time it was entered into. "To inhabit" is defined in the Shorter Oxford English Dictionary as "to dwell in; to occupy as an abode", and an "inhabitant" is one "dwelling in a place; a permanent resident". There is no ambiguity about those words, or about the word "uninhabited" derived from them, calling for a construction favourable to the insured.

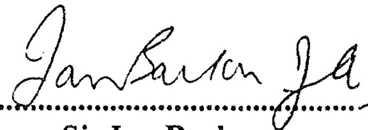
The question is whether the relationship of a person with the premises during the given period amounts to his or her dwelling or permanently residing there. These terms connote more than simple use or occupation. As the cases cited to us demonstrate, there can sometimes be a fine dividing line, but we see no need to embark on a consideration of them since they turn so much on their own particular facts. On those found by His Lordship in the present case, we are satisfied that the attendances of Messrs Prasad and Autar at the house over the period in question did not amount to their inhabiting it within the ordinary meaning of that word; they were not dwelling or permanently residing there. They clearly lived elsewhere and were no more than occasional visitors for the purpose of carrying out the repairs they were engaged to do for the insured. (We note in passing that in Pryer's case, Cosgrove J ruled that two friends of the owner who were there helping him to clean up the house could not be regarded as inhabitants).

Accordingly, the appellant has satisfied the onus on it of proving that the dwelling was uninhabited during the relevant period and it is not liable to indemnify the respondent for the fire.

Result:

The appeal is allowed and the judgment of the High Court is set aside. There will be judgment for the appellant, with costs of $1,500 for costs in both Courts, with disbursements in both as fixed by the Registrar.

Sir Maurice Casey
Presiding Judge



Sir Ian Barker
Justice of Appeal

Mr Justice Ian R. Thomspon
Justice of Appeal

Solicitors:

Messrs Sherani & Company, Suva for the Appellant
Messrs Mishra, Prakash & Associates, Ba for the Respondent

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