**MUMFORD HOTELS LTD**

**v.**

**WHELER AND ANOTHER**

CHANCERY DIVISION

1963 JULY 18, 19, 22, 23, 24, 31.

**LEX (1963) – CH. 117**

OTHER CITATIONS

2PLR/1963/49 (CH.D)

[1962 M. NO. 966.]

[1964] CH. 117

**BEFORE THEIR LORDSHIPS:**

HARMAN L.J. (sitting as additional judge of Chancery Division).

**BETWEEN**

MUMFORD HOTELS LTD – Appellant

AND

WHELER AND ANOTHER – Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW - LANDLORD AND TENANT:- Covenant - Insurance - Tenant covenanting to pay "insurance rent" which Landlord was to apply in securing insurance of whole property - Whether implied covenant, in the event of destruction of property, for land to use money paid under the reinsurance policy to reinstate/restore the property - Whether obligation to insure for mutual benefit.

REAL ESTATE AND PROPERTY LAW:– Lease and Tenancy Rent – Express and Implied Covenants - Rent covenants - covenant to insure – Who bears cost of insurance – Where Landlord is not obligated to insure – When landlord is deemed obligated to reinstate insured property with insurance money – Relevant considerations

INSURANCE AND REINSURANCE:- Property insurance - Interest of third party – Landlord's covenant to insure property tenant paying an insurance rent for which no other consideration or value exist - Whether implies landlord bound to use payment received pursuant to the policy to reinstate building when destroyed

WORD AND PHRASES: - “a yearly insurance rent," - "Damage” – Meaning of

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

By a lease dated February 10, 1961, the tenant covenanted, inter alia, to pay "a yearly insurance rent equal to the premium for keeping the property insured against comprehensive risks ..." and the landlord covenanted "to keep the said message and buildings adequately insured against comprehensive risks." There was no covenant to reinstate. The property was largely destroyed by fire, and the insurance money was paid to the landlord and her co-trustee as trustees under the Settled Land Act, 1925. The trustees refused to reinstate the property. The tenant claimed a declaration, inter alia, that the trustees were bound to expend the insurance moneys in or towards the restoration of the property:-

The Syndale Estate was the absolute property of Lieut.-Colonel Wheler. By a lease dated October 14, 1948, he demised the mansion house with about seven acres of land to the plaintiff company for a term of 21 years, from Christmas, 1948, at a rent rising to £400 a year, and in addition a yearly insurance rent equal to the sum the lessor should from time to time pay by way of premium for fire insurance in accordance with his covenant to that effect in the lease. That was a covenant to insure against fire in an adequate sum. The lease contained full repairing covenants, and the use of the property was limited to that of a private dwelling-house, hotel, or guest house. Lieut.-Colonel Wheler died in 1949, and by his will he made an executory settlement of the Syndale Estate which was carried into effect by a trust instrument of October 26, 1960, and two vesting assents bearing the same date whereby the mansion house and some 200 acres were vested in the first defendant, his widow Mrs. Wheler, for her life. By the trust instrument Mrs. Wheler, as tenant for life of the mansion house, was under an obligation to insure against fire.

The mansion house, which was at all material times being used as an hotel, and its ancillary buildings were in a bad state of repair, and the repairing covenants in the lease proved very onerous. In these circumstances Edward John Mumford-Cooke the managing director and in effect the sole owner of the plaintiff company, pressed for further security of tenure in the form of a further lease, and for some relief from the burden of the repairing covenants. Negotiations went on during the year 1959, and eventually the terms of a new lease were agreed. That document was dated February 10, 1961, but was actually executed on February 15.

By the new lease Mrs. Wheler made a grant to the plaintiff company of the same parcels as were included in the 1948 lease. The term was for 31 years from Christmas, 1959 (thus putting an end to the 1948 lease) and the rents were expressed in three sub-paragraphs;

(a) a money rent rising to £442 a year;

(b) "in addition to the above-mentioned rent a yearly insurance rent equal to the premium for keeping the property insured against comprehensive risks in accordance with the lessor's covenants in the lease";

(c) an additional rent equal to 8 per cent. per annum "calculated upon one-half of the cost to the lessor toward the making good of any one major damage occurring to the said mansion house ..."

The tenant covenanted, inter alia, to pay the rent and one half of all expenses incurred by the lessor pursuant to her covenant to repair the exterior and main structure on receipt of written notice and subject to a financial limit. He further covenanted to paint and to do interior repairs. Finally by a proviso he was released from liability "to make any contribution (other than additional rent as hereinbefore reserved) to carry out any repairs in respect of any one major damage occurring to the said mansion house ... if the cost of making good such damage ... shall exceed the sum of £1,500 ..."

The lessor covenanted, conditionally on the tenant's covenants to contribute as stated above, to keep the exterior and main structure of the mansion house "in at least as good a state of repair as the same are now in namely good tenantable order." But there was excluded liability to repair "in respect of any one major damage contribution to the cost of the making good of which is excluded" by the proviso to the tenant's covenant "and which cost shall exceed £5,000." She further covenanted "at all times during the said term to keep the said messuage and buildings adequately insured against comprehensive risks."

There followed a provision for the suspension of an appropriate part of the rent in the event of part or all of the demised property being destroyed, rendered uninhabitable or unfit for use by fire or by any one major damage contribution to the making good of which was excluded by the proviso to the tenant's covenants.

Within a week of the execution of the new lease the whole of the main portion of the mansion house was completely gutted by fire, and some damage was also done to a wing. There was no policy under the new lease against comprehensive risks, but the property was insured under a fire policy dated June 12, 1956, effected under the lease of 1948, and last revised in 1959. The total sum insured was £29,172, which was apportioned, £20,250 being allocated to the buildings (both those destroyed and those damaged) and the balance to property with which the action was not concerned. Mrs. Wheler's agent duly made a claim on the insurance company, who eventually agreed to pay £20,250 as on a total loss. The estimated cost of reinstatement of the old building was £46,000.

The sum assured was paid to Mrs. Wheler and the second defendant, as trustees for the purposes of the Settled Land Act, 1925, of the settlement of the mansion house, and was said by the second defendant as the independent trustee to have been dealt with as capital moneys under the settlement. The money was not used to reinstate the property.

The plaintiff company brought an action claiming first that the terms of the covenant to insure by the lessor required for their fulfillment insurance for a sum sufficient to cover the cost of reinstatement at least of a building offering comparable accommodation. Secondly, the company sought a declaration against both defendants that they were bound to expend the insurance moneys in or towards the restoration of the hotel, or thirdly, alternatively, that they were bound to expend the insurance moneys to the same extent as the insurers would have had to do if the company had given due notice in that behalf under section 53 of the Fires Prevention (Metropolis) Act, 1774. There was a subsidiary claim for damages for delay in expending the insurance money.

This case is reported on the second claim only.

ISSUES FOR DETERMINATION

1. Whether in all cases, if a landlord insures when he is under no obligation to do so he insures for his own benefit.

2. Whether there are grounds under which the landlord's covenants should be construed as being for the benefit of both the tenant and the landlord.

DECISION OF CHANCERY DIVISION

Held that –

1. the true question was not whether a covenant to reinstate should be implied, but whether the true inference was that the landlord should be treated as insuring for her own behalf or for the joint benefit of herself and the tenant;

2. the landlord's obligation to insure, satisfied as it was at the tenant's expense, was intended to ensure for the benefit of both the landlord and the tenant; and

3. accordingly, the landlord was obliged to use the insurance moneys, if called upon to do so, towards the reinstatement of the property.

**MAIN JUDGMENT**

July 31. HARMAN L.J. delivered the following judgment which stated the facts and continued:

The company makes three claims, first against the first defendant for damages for failure adequately to insure; secondly, against both defendants a declaration that they are bound to expend the insurance moneys in or towards the restoration of the hotel; thirdly, alternatively that they are bound to expend the same moneys to the same extent as the insurers would have been bound to do if the company had given due notice in that behalf under section 53 of the Fires Prevention (Metropolis) Act, 1774. There is a subsidiary claim for damages for delay in laying out the insurance money.

[His Lordship dealt with the first claim and held that a lessor, being under an obligation to effect an adequate insurance fulfills his obligation if he takes proper advice, that is to say from the insurance company and follows it, as had been done in the present case. The first claim, therefore, failed. His Lordship continued:] The second claim by the company raises the difficult question in the case. Here is a lessor who exacts an extra rent, specifically referred to in the reddendum as "a yearly insurance rent," and who covenants adequately to insure, the lessee paying the premium. There is no express covenant to apply the insurance moneys in reinstatement. Such a covenant is, I think, almost common form in a well-drawn lease. In its absence, the lessor says that she is under no liability to reinstate and the company says that there is to be implied an obligation so to do. The company relies on three factors, first, that it is the company who bears the expense of the policy; secondly, that the landlord covenants expressly to insure; and thirdly, that under this covenant the amount insured must be adequate.

Lees v. Whiteley1 was a case between mortgagee and mortgagor, where there was a covenant by the mortgagor to insure, but none to reinstate. Kindersley V.-C. said:

"the present is not the case of the mortgage of premises on which there was a policy existing at the time of the mortgage, nor is there here a covenant that the policy money shall be applied in restoring the premises; but it is merely an assignment by bill of sale of machinery, containing a covenant to insure; and it would be impossible to hold, as was done in the case of Garden v. Ingram,2 that the benefit of the policy passed by the assignment, as the policy at the time did not exist. It appears to me that that case does not govern the present, and that if the plaintiff's contention can be sustained, it must stand on the footing that by reason of the covenant to insure there is an implied contract with the mortgagee that the policy moneys should be applied in liquidation of the mortgage debt. The question then comes to this: Can I imply such a covenant from the language of the bill of sale? and on examination of the terms of that instrument I am of opinion that I cannot. Were I to do so I should be making a new contract between the parties. It was perfectly competent to the plaintiff to have stipulated that the policy moneys should be applied in liquidation of the mortgage debt or in the restoration of the premises, but he has not done so; and how can I say that the parties intended something which is not stipulated for in this instrument, or make for the plaintiff a better agreement than he thought it necessary to make for himself?"

That very well exemplifies the kind of difficulty in implying a covenant of this sort in this kind of instrument.

The lessor further relies on the obligation placed on the company to contribute towards the cost incurred by her in making good any one major damage, subject to the absolution from making good damage exceeding £5,000. If, therefore, as is contended, "damage" in this context includes damage by fire, it is apparent that Mrs. Wheler can limit her expense to £5,000, which would be inconsistent with an obligation to reinstate if it cost more than that sum. In my judgment, however, the "one major damage" in the reddendum and elsewhere does not include damage by fire, but only damage of a repairing character. This seems to me to be clear from clause 4 (ii) which speaks of providing for non-payment of rent in the event of the building being rendered unfit for use "by fire or by anyone major damage contribution to the cost of the making good of which is excluded" by the lease. The same sub-clause at least anticipates reinstatement because it provides for an abatement of rent "so long as the demised premises or any part thereof shall remain uninhabitable or unfit for use" from certain causes.

2 (1852) 23 L.J.Ch. 478.

In my judgment, the true question is not whether a covenant to reinstate should be implied, but whether the true inference is that Mrs. Wheler is to be treated as insuring for her own benefit or for the joint benefit of herself and the company.

There appears to be no authority in point. Leeds v. Cheetham3 shows that where a landlord insures, the tenant has no equity to compel him to pay out the money. The case was decided upon demurrer, and the sidenote reads as follows:

"A tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt." Sir John Leach V.-C. said4: "With respect to the equity which the plaintiff alleges to arise from the defendant's receipt of the insurance money, there is no satisfactory principle to support it. The defendant having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant, and to those covenants must he alone resort."

This case was followed in Lofft v. Dennis,5 a common law case, where Lord Campbell C.J. in an interlocutory observation during the argument, replying to the suggestion of counsel that a tenant had a right to relief in the circumstances, said6: "Surely not unless the landlord had covenanted to insure. It might as well be contended that the tenant was entitled to relief if the landlord got a prize in a lottery." The defendant succeeded there on demurrer, and the case is no more than a suggestion that Leeds v. Cheetham7 might have been differently decided if the landlord had covenanted to insure.

3 (1827) 1 Sim. 146.; 4 Ibid. 150.; 5 (1859) 1 Ell. & Ell. 474.; 6 Ibid. 478.; 7 1 Sim. 146.; 8 [1918] 2 Ch. 18.

In Barnes v. City of London Real Property Co.8 an extra