**UPJOHN**

**v.**

**HITCHENS**

COURT OF APPEAL

1918 MAY 3, 6.

1916 U. 723.

**LEX (1916) – U. 723**

OTHER CITATIONS

3PLR/1918/1 (CA)

**BEFORE THEIR LORDSHIPS:**

PICKFORD, WARRINGTON, and SCRUTTON L.JJ.

**BETWEEN**

UPJOHN - Appellant

AND

HITCHENS - Respondent

ORIGINATING COURT

HIGH COURT (Roche J., Presiding)

**REPRESENTATION**

LEWIS THOMAS, K.C., and A. H. H. RICHARDSON - For the Plaintiff.

COLAM, K.C., and GERVAIS RENTOUL - For the Defendants.

Solicitor for Plaintiff: E. J. STOKES.

Solicitors for Defendants: HEWITT AND CHAPMAN

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

INSURANCE ANS REINSURANCE LAW: Covenant to insure against Loss and Damage by Fire – War Risks Excepted – Construction of Covenants – How treated

REAL ESTATE/LAND LAW: Landlord and Tenant - Aircraft Risks - Covenant to insure against Loss and Damage by Fire - Policy to be effected in named Company - Usual Policy - War Risks excepted - Admissibility of Evidence - Construction of Covenant.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

In a lease granted in 1905 the lessee covenanted that he would insure and keep insured the demised premises against loss and damage by fire in the names, of the lessor and lessee in the Imperial Insurance Company or in some other responsible office in London or Westminster to be previously approved of in writing by the lessor. Through the agency of the lessor the premises were insured with the Alliance Assurance Company, with which the Imperial Insurance Company had become incorporated, under a policy which excepted loss or damage occasioned by or happening through "invasion, foreign enemy, ... military or usurped power." This policy was accepted by the lessor as sufficient until July, 1915, when, in consequence of enemy air raids, he required the lessee to insure the premises also against loss and damage by fire occasioned by enemy aircraft in pursuance of his covenant. The, lessee refused to remedy this alleged breach, and the lessor commenced this action to recover possession:-

ISSUE(S) FOR DETERMINATION

Whether the covenant requires an unqualified policy to be taken out, or only the usual policy issued by the designated companies.]

DECISION OF COURT OF APPEAL

1. That evidence was admissible to prove that the named company and other tariff offices in London and Westminster had never insured against aircraft risks, and that their policies had always excepted the risks above mentioned;

2. That the covenant was to effect such a policy as was the usual policy of the companies in question at the date of the lease, or such a policy as might from time to time be usual during the currency of the lease;

3. That there had been no breach of that covenant by the lessee.

4. That there had been a breach of covenant by the lessee as his obligation was to effect an insurance against fire from all causes.

*Decision of Roche J.* [1918] 1 K. B. 171 affirmed.

**MAIN JUDGMENT REPORT**

*Lewis Thomas, K.C.,* and *A. H. H. Richardson,* for the plaintiff.

The covenant is to insure and keep insured against loss and damage by fire. That is absolute, and means insurance against fire from any cause, and the covenant is not satisfied by taking out the ordinary fire policy granted by insurance companies with the usual exception excluding liability for loss caused by invasion, foreign enemy, or military or usurped power. Evidence was wrongly admitted as to the practice of insurance companies, the words of the covenant being in themselves clear and unambiguous.

[WARRINGTON L.J. The question is whether the covenant requires an unqualified policy to be taken out, or only the usual policy issued by the designated companies.]

The covenant says nothing about usual policy. Roche J. has in effect interpolated those words, but, as Pollock C.B. said in *Gibson v. Small* (1), the Court cannot insert or imply a condition not warranted by the plain meaning of the language used by the parties in the particular document. Here the parties have not contracted with reference to any practice of insurance companies, and therefore that practice cannot be imported into their contract: *Yuill & Co. v. Scott Robson.* (1) Further, in *Enlayde, Ld. v. Roberts* (2) Sargant J., in construing a similar covenant, said: "In my judgment, this evidence was not admissible and there is nothing to show that the parties were contracting in such a way as to use those words 'loss or damage by fire' in any other than their strict and primary sense, or with any reference at all to any custom obtaining amongst all or any insurance offices." Neither the judgment of Hamilton J. in *Biddell Brothers v. E. Clemens Horst Co.* (3), nor that of Atkin J. in *Groom, Ld. v. Barber* (4), upon which Roche J. relied, has any bearing upon the present case. Moreover, even if the evidence was admissible it failed to establish that no London or Westminster insurance office would issue a policy covering loss and damage by fire caused by enemy aircraft. All that the witness said was that the Alliance Company had not issued policies covering that risk; he was unable to say whether the company had been asked to do so. If an adequate premium had been offered such a policy could no doubt have been obtained.

*Lewis Thomas, K.C.,* and *A. H. H. Richardson,* for the plaintiff.

*Colam, K.C.,* and *Gervais Rentoul,* for the defendants.

The covenant must be read reasonably and in a business sense. Reading it in that way its requirement is satisfied by the policy in fact taken out. The evidence established that the policies issued by the Alliance Company always contain condition 4, which excludes liability for loss caused by invasion, foreign enemy, military or usurped power. It is said on behalf of the plaintiff that by reason of containing condition 4 the policy does not satisfy the covenant. The policy, however, as was pointed out by Roche J. (5), contains other conditions causing a forfeiture of benefits upon non-compliance with certain rules of conduct by the assured, so that, even apart from condition 4, insurance companies do not issue absolutely unqualified policies. This again shows that the covenant must be construed reasonably and in view of what the parties contemplated. The evidence was rightly admitted to show the meaning of the phrase "insure ... against loss and damage by fire."

*(1) [1907] 1 K. B. 685; affirmed [1908] 1 K. B. 270.; (2) [1917] 1 Ch. 109, 119.; (3) [1911] 1 K. B. 214.; (4) [1915] 1 K. B. 316.; (5) [1918] 1 K. B. 179.*

[SCRUTTON L.J. In the case of a long lease may the practice as to insurance vary from time to time, or must it be determined as at the date of the lease?]

The obligation would appear to be to insure according to the practice for the time being of the named office. Roche J., citing Hamilton J.'s judgment in *Biddell Brothers v. E. Clemens Horst Co.* (1), pointed out that in reference to a contract for the sale of goods on c.i.f. terms the seller's obligation is "to arrange for an insurance upon the terms current in the trade."

[SCRUTTON L.J. A contract on c.i.f. terms does not specify what the policy is to cover. Here the insurance is against loss and damage "by fire." It has been held, however, that "fire" within the meaning of a fire policy means fire which has broken bounds, so that damage caused by excess of fire heat in an ordinary grate is not damage by fire within the policy.]

That shows that insurance against damage "by fire" cannot be construed as covering all classes of damage by fire. If the parties desired to cover loss and damage by fire caused by enemy aircraft they should have said so in express terms. With regard to *Enlayde, Ld. v. Roberts* (2), the observations of Sargant J. relied upon by the plaintiff were purely obiter.

*Lewis Thomas, K.C.,* in reply. The covenant requires the lessee to insure against loss and damage caused by any fire.

[SCRUTTON L.J. Would that include loss due to arson by the assured?]

The policy would be against loss by any fire, but if it was due to arson the assured would be unable to recover, as he could not take advantage of his own wrong. The fact that the policy contains other conditions besides condition 4 does not alter the interpretation to be put upon the clear words of the covenant which requires an unqualified fire policy.

JUDGMENT OF THE COURT

PICKFORD L.J.

This is an appeal from a decision of Roche J., who gave judgment in favour of the defendants, who are tenants of the plaintiff. The question arises upon a covenant by the lessee in the lease - the covenant being the same in each lease - which is in the following terms: "And also will at the like" (i.e. his own) "expense insure and keep insured all erections and buildings on the said piece or parcel of ground hereby demised against loss and damage by fire in the names of the lessor and the lessee in the Imperial Insurance Company or in some other responsible office or offices in London or Westminster to be previously approved of in writing by the lessor in the sum of 500l. at the least and will on demand produce to the lessor the policy or policies of assurance and the receipt for the current year's premium and' other sums payable in respect thereof."

*(1) [1911] 1 K. B. 214.; (2) [1917] 1 Ch. 109.*

The latter words about production of the policy are merely ancillary to the main covenant. The defendants effected an ordinary policy of insurance, condition 4 of which is in these terms: "This policy does not cover loss or damage occasioned by or happening through invasion, foreign enemy,... military or usurped power," and the question has arisen whether the covenant requires the defendants to insure against loss and damage by fire caused by enemy aircraft. The plaintiff claims that he is entitled to have an insurance effected by the defendants to cover that risk; the defendants, on the other hand, say that the plaintiff is not entitled to a policy covering that risk, but is only entitled to an insurance in the form that has in fact been effected. In my opinion the question we have to decide turns mainly upon the interpretation to be put upon the covenant, but to a certain extent it turns upon the evidence that was given. I regret to say that I do not take the same view as the other members of the Court, and, as I differ from them and from Roche J., I need hardly say that I have great doubt about the correctness of my decision, but as I have formed an opinion I think it right to express it.

It has been argued on behalf of the defendants that the covenant means that a policy is to be taken out with the Imperial Insurance Company or with some other office in London or Westminster, to be approved in writing by the lessor, in the ordinary terms in which the named or approved office issues policies from time to time. It is said that if the policy is effected in the terms of the ordinary policy current at the date of the lease that is sufficient, and it matters not that the terms of the usual policy may vary during the currency of the lease. That is one view. Another view is that the covenant means that what is required is the ordinary policy current from time to time, and, therefore, if the terms of the ordinary policy varied from year to year or from period to period during the currency of the lease, so the obligation under the covenant would vary. So also, although it does not arise in this case, if the insurance were effected, not in the Imperial Insurance Company, but in some other responsible office in London or Westminster approved by the lessor, the tenant's obligation might be different from that which would arise if the insurance had been effected with the Imperial Insurance Company, there being nothing to show that the ordinary policy of the various offices is the same. According to the argument, the policy therefore might vary from year to year according to the ordinary policy of the Imperial Insurance Company, or it might vary if the insurance were effected with some other office. I cannot think that that is the way to interpret the covenant. It cannot have been intended that the meaning of the obligation imposed by the covenant should be ascertained by an examination of the practice of the particular company or of more than one company from time to time. The covenant requires an insurance "against loss and damage by fire." Pausing there for a moment, although I do not ignore the words that follow, that seems to me to require an insurance against loss and damage by fire from all causes, not from fire from some causes, and I am not much impressed by the case which was put during the argument as to loss due to arson committed by the tenant. The policy might by its terms cover such a case, but it has been held that the tenant could not recover as he could not plead his own wrong. Nor am I impressed by the other case put where it has been held that the ordinary policy against fire does not cover damage caused by overheating from a fire in an ordinary grate. There the damage was held not to be damage by fire, but damage by heating, damage caused by an ordinary domestic fire not being covered unless it sets fire to the house. By this covenant the insurance is to be effected with the Imperial Insurance Company or with some other responsible and approved office in London or Westminster. The Imperial Insurance Company has been incorporated with, but not absorbed by, the Alliance Company. The insurance being effected with the Alliance Company, with which the Imperial Insurance Company has been incorporated, is an insurance with the Imperial Insurance Company, and it is unnecessary to consider whether the plaintiff would be entitled to raise the point that he had not approved in writing of this insurance with the Alliance Company, for the plaintiff does not in fact take the point. Being an insurance with the designated company, if the defendants had been able to show that they could not have effected with it a policy such as they ought to have effected against risks of fire of all kinds, I think that in all probability they would have discharged their obligation, but the evidence called on their behalf falls far short of showing that. The ordinary policy of the Imperial Insurance Company, and now of the Alliance Company, contains condition 4, which, as we know from the decision in *Drinkwater v. London Assurance Corporation* (1), has been in policies for considerably more than a century. It was inserted and has been kept in, no one paying any attention to it or having much occasion to consider it till recently. Whether if the tenants had asked the Alliance Company for a policy excluding that clause and covering all risks they could have got it I do not know, but the evidence fell far short of showing that they could not have obtained it. It was for the defendants to establish that they could not obtain such a policy. The evidence of the secretary of the Alliance Company was of the vaguest possible description. In examination-in-chief he was asked: "In 1905 did your company issue fire policies to insure against aircraft?" and he said "No." "Have you ever done so?" "No." In cross-examination he said he did not know whether his company had ever been asked at any time to insure against aircraft because the matter would not come before him. In answer to Roche J. he said that within his recollection the Alliance fire policies always excluded loss or damage happening through invasion, &c. Again, on being asked by the judge whether as a matter of policy his company had taken up aircraft risks, he said that they had never insured against aircraft risks or fire occasioned by aircraft risks, and that nearly all the London offices had done the same.

*(1) (1767) 2 Wils. 363.*

The witness only proved that the policy actually issued was the company's ordinary policy; he knew the company did not effect policies covering risk of fire caused by enemy aircraft, but did not know whether, if they had been asked and been paid an additional premium, they would not have issued a policy covering that risk. It may be that after the Government insurance scheme came into existence the company considered it better to work that scheme, but, however that may be, it was for the defendants to show, and in my opinion they failed to show, that they could not effect with the Alliance Company the policy they ought to have effected according to my interpretation of the covenant. I think, therefore, that there was a breach of covenant, but, as the other members of the Court think differently, the appeal will be dismissed.

WARRINGTON L.J., after referring to the terms of the leases and reading the covenant in question, continued: The plaintiff, who is the lessor, has in each case brought an action of ejectment, alleging that the terms have been determined by the defendants' failure to comply with the covenant to insure. The concrete question is whether the covenant is satisfied by the taking out of a policy in the ordinary form adopted by the Alliance Company (with which the Imperial Insurance Company has been incorporated), and which excludes from the risks undertaken "loss or damage occasioned by or happening through invasion, foreign enemy .... military or usurped power."

Before I deal with the question of construction there are one or two facts which I think should be mentioned. In each case there was subsisting at the date of the lease a policy against fire in the names of the builder and the lessor with the Alliance Company. In each case the policy was headed "Alliance Assurance Co. Limited with which is incorporated the Imperial Insurance Co. Limited." At the date of the lease the Imperial Insurance Company was no longer existing except so far as it existed in the body of the Alliance Company. I take it, therefore, that when the covenant says "insure and keep insured ... in the Imperial Insurance Company" that means, in reference to the facts of this case, in the Alliance Company. So far, therefore, the defendants have complied with the covenant by insuring in the office with which they were not only under an obligation to insure but had the right to insure, inasmuch as the covenant did not give the lessor a right to impose another office, but only gave him the right to approve or withhold approval from some other office apparently to be selected by the lessees. The primary obligation and right is to insure in the Imperial Insurance Company, now the Alliance Company.

I turn now to the covenant. It requires the defendants to insure and keep insured the premises against loss and damage by fire with the Alliance Company; I now leave out the others. The lessees are to "insure and keep insured." The word "insure" is equivalent to "shall take out a policy of insurance," because everyone who enters into an obligation of this kind is perfectly well aware that the great insurance companies, of which the Alliance Company is one, insure against fire by the issue of a policy of insurance. The words "keep insured" refer to a different matter. The policy when once effected is liable to expire at the end of the year for which the first premium is paid unless it is renewed by the payment of another premium. The tenant "insures" when he takes out the policy, and he "keeps insured" by paying the premium for the succeeding year. The question now is what is meant by the words "insure and keep insured... against loss and damage by fire." Does that expression mean loss and damage by fire however occasioned, or does it mean such loss and damage by fire as is provided for by a policy, meaning thereby such a policy as both the lessor and the lessee would expect to get if they made an ordinary application to the Alliance Company for a fire policy? It seems to me to mean that the lessee shall insure against such loss and damage by fire as is covered by the policy ordinarily issued by the designated office. It is true that the designated office is not the only office with which the policy can be effected, but for the purpose of construing the covenant I think that makes no difference, for I see no difficulty in saying that the covenant means an insurance against loss and damage as is covered by a policy in the form usually adopted by the office which by the process pointed out in the lease is the designated office, the one on which the parties agree. It has been suggested that the office may refuse to continue the policy in the form or subject to the same conditions as those on which it was originally issued and may require a new form of policy to be taken out. If the office refuses be continue the policy on the old terms I see no difficulty in saying that the tenant would satisfy his covenant by again insuring under the policy then adopted by the company.

The covenant does not require the tenant to do more than take out with the designated office one of those printed forms with which lessors and lessees are familiar certainly throughout the whole of London, and probably throughout the whole country. I cannot think that at the date of the lease either the lessor or the tenant contemplated for a moment that some special form of insurance would have to be adopted in order to comply with this covenant.

I take a view of the evidence rather more favourable to the defendants than that taken by Pickford L.J. The secretary of the Alliance Company in his evidence said: "We do not undertake any aircraft risks; it is the policy of the company not to undertake them," and from that I infer that if the company had been asked to issue a policy covering aircraft risks they would have refused. That is how the evidence strikes me.

I base my judgment upon the view I have expressed as to the construction of the covenant, and I think the decision of Roche J. was right and should be affirmed.

SCRUTTON L.J.

It is evident from the difference of opinion in this Court that this is a case of some difficulty, and I appreciate also that it is one of some general importance, but after the best consideration I can give to the arguments addressed to us I have come to the conclusion that the decision of Roche J. was right.

The case arises in this way: the plaintiff had some land on which buildings were commenced. On September 29, 1904, while the buildings were in progress, the plaintiff and the builder took out a policy with the Alliance Company with which is incorporated the Imperial Insurance Company, insuring the buildings against loss and damage by fire, subject to the terms and conditions indorsed thereon. One of the conditions was that the policy did not cover loss or damage occasioned by or happening through certain causes, including invasion, foreign enemy, and military or usurped power. If I am at liberty to use my own knowledge of the subject, that policy was the ordinary policy of fire insurance. If I am at liberty to look at recognized text-books, the ordinary fire policy excepts loss caused by military power. If I am at liberty to look, and I am sure I am, at what the plaintiff himself did, I find that in March, 1916, he wrote stating that the ordinary policy of insurance did not cover fire caused by enemy aircraft; that he had taken out in 1904 an ordinary policy of insurance on the buildings with the Alliance Company, and had let the buildings on leases containing the covenant in question, one of the leases being dated in January and the other in May, 1905; that in order that the tenants might comply with the covenant he indorsed to them the policy that he had taken out. The policy is the usual policy from Michaelmas to Michaelmas, and from Michaelmas, 1904, till Michaelmas, 1915, all parties went on, according to the argument for the plaintiff, breaking their covenant light-heartedly, it not having occurred to any one that the covenant was not complied with. Unfortunately, as we know, enemy aircraft began to come to England in September 1915. The premium on the existing policy for the year 1915 - 1916 was then paid to the plaintiff as agent for the Alliance Company. The tenants were asked to insure against damage by fire caused by enemy aircraft, but they declined to do so. In September 1916, another year's insurance having expired, the tenants again paid the premium to the lessor as agent of the Alliance Company and he accepted it, and that would ordinarily cover insurance for another year to September, 1917, but shortly afterwards the plaintiff served a notice under s. 14 of the Conveyancing and Law of Property Act, 1881, requiring the tenants to effect an insurance against loss by fire caused by enemy operations, and the tenants having declined to do so, these actions were commenced. The actions, I may say, are not concerned with the obligation on the tenants to reinstate the premises if enemy aircraft destroy them. The tenants have recognized that and have taken out policies against loss by enemy aircraft, but they did not do this in a company approved by the lessor or in the joint names. The object of these actions is to see whether there is an obligation on the tenants under this covenant to insure in the joint names of the lessor and lessee against fire caused by enemy operations. It is, however, I think admitted that no policy against loss or damage by fire would give the landlord security against every fire; for instance it would not cover a fire intentionally caused by the tenant.

Turning now to the covenant, I find that it is a covenant to effect a contract of insurance with a third party, who is under no obligation to grant it, and to produce the policy. It seems to me that in this and in other matters where a person has covenanted to get a commercial document, evidence is admissible as to the course of business in reference to such a document and as to the kind of document the person will get from a third party who is under no obligation to grant it. Take the case where evidence of this kind is clearly admissible but which I agree is at some distance from the present case. A person sells goods c.i.f. London. There the price includes the cost of the goods, the freight to London, and the insurance of the goods. Under that contract the seller must, inter alia, obtain and hand to the buyer a policy of insurance. Evidence is clearly admissible to show what kind of policy is necessary to comply with that obligation. I take another case which is nearer the present one. An employer engages a servant with a term that he shall provide a guarantee policy from a named company against dishonesty. It is well known that companies grant policies covering loss by the dishonesty of servants with certain conditions attached to the policies. Evidence would clearly be admissible to show which kind of document is issued - what is the ordinary form issued by the guarantee company. The employer could not insist upon the servant producing a policy from the company covering every kind of dishonesty under all circumstances. Following out that line of reasoning, it seems to me that when a person undertakes to insure against loss and damage caused by fire - a phrase used in every policy against fire - and to produce the policy, evidence is admissible to show what kind of document is issued by such an insurance company. If it is the fact that a person can only obtain a policy not against every accident by fire but limited to certain cases and under certain conditions, evidence may be given as to what document was contemplated by the parties and what can be obtained. In this case the evidence on the point was not too abundant. The defendants called the secretary of the Alliance company. He had not given a proof, and the evidence he gave was not so strong as it might have been, but I should have been more impressed by the criticism of it on behalf of the plaintiff if any evidence had been called by the plaintiff. If there is any substance in the plaintiff's case that the lessees could ordinarily get from a London company a policy covering loss by fire due to warlike operations it would have been easy to call evidence to that effect, and it would certainly have been simpler than relying on the point as to onus of proof. The plaintiff did not take that course, and I have a strong suspicion that he did not take it because he could not, because the ordinary policy issued by London companies does not cover loss due to warlike operations. I read the evidence given by the secretary of the Alliance Company as amounting to this: "It is the policy of our company and all tariff companies not to insure against war risks." When I know that the clause excluding loss due to foreign enemies has been in the ordinary printed form of policy for over a century, it seems to be abundantly established that the ordinary policy issued by the Alliance Company does not cover this particular kind of risk. On this ground evidence is admissible to explain what is the ordinary policy of insurance against loss and damage by fire that can be obtained from a third party, and, as the evidence satisfies me that the ordinary policy does not insure against war risks, I come to the same conclusion as Roche J. that there has been no breach of the covenant. I have the more satisfaction in arriving at that conclusion because it agrees with the practice of the plaintiff for eleven years under these two leases and agrees, I believe, with the practice of nearly every landlord in London.

I only desire to add this: Some reliance was placed by the plaintiff's counsel on the decision in *Yuill AND Co. v. Scott Robson* (1), but that case appears to me to have no application. At Lloyd's there is a form of policy f.p.a. and another known as an "all risks policy." The policy f.p.a. insures against total loss only. In every "all risks policy" there has been inserted for years the f.c. AND s. clause, so that the policy does not insure against risks due to the acts of hostile Governments. If an insurance against those risks was desired a policy against the risks excepted by the f.c. AND s. clause had to be effected. There are also policies which are wider than "all risks" policies and really cover "against all risks." This practice was well known in insurance circles, and in *Yuill AND Co. v. Scott Robson* (1) it was sought to be imported into a contract for the sale of cattle. There two people, not in the Lloyd's circle, made a contract for the sale of cattle for shipment from Buenos Aires to Durban, the seller to insure the cattle "against all risks." The contract did not speak of an "all risks policy" or use any technical terms. It was contended, and evidence was given in support of the contention, that the contract had imported into it the insurance practice at Lloyd's as to all risks policies. The contention failed, the Court holding that this practice could not be incorporated into a contract for the sale of goods. As I have said, the case seems to have little bearing upon the question we have to determine in the present case.

*(1) [1907] 1 K. B. 685; affirmed [1908] 1 K. B. 270.*

For the reasons I have given I think the appeal fails.

*Appeal dismissed.*

J. S. H.