
CANADIAN HOME ASSURANCE } COMPANY (<i>Defendant</i>) }	)	APPELLANT;	1965 { *Oct. 27, 28 _____ 1966 { Jan. 25 _____
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AND

JOSEPH A. GAUTHIER (*Plaintiff*) RESPONDENT.

R. C. STEVENSON (*Defendant*) APPELLANT;

AND

JOSEPH A. GAUTHIER (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH,
 APPEAL SIDE, PROVINCE OF QUEBEC

Insurance—Fire—Hotel destroyed by fire—Risks insured by different insurers—Misdescription and concealment of fact—Whether policies invalid—Civil Code, arts. 2485, 2572.

Following a fire which destroyed his hotel, the plaintiff sued the ten insurance companies from whom he had obtained fire insurance policies. The property insured was described in the policies as a hotel in use having not more than twenty rooms, with a permit to sell alcoholic beverages. At the time of the fire, and for some time prior, the hotel had lost its permit and had been unoccupied. Some of the policies had been issued through C, an insurance broker, and the two policies which are in issue in this appeal were obtained through G, also an insurance broker. The defence was, *inter alia*, that the plaintiff had wrongly described the premises as a hotel in use and licensed. The action was maintained by the trial judge. The Court of Appeal, by a

PRESENT: Fauteux, Abbott, Ritchie, Hall and Spence JJ.

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majority judgment, held that the plaintiff was entitled to recover under the policies, as it found that the knowledge of C, through whom most of the policies had been obtained, that the premises were not as described in the policies was the knowledge of the insurers. Two judges dissented as to the liability of the two appellant companies, who were granted leave to appeal to this Court.

Held: The appeal should be allowed.

At all relevant times, C was familiar with the condition of the property, but as to G this was not so. The plaintiff failed to disclose to G that the hotel's licence had been cancelled or suspended and that the hotel was vacant. The description of the property both as to the occupation and the possession of a liquor licence was material to an appreciation of the risk. The insurer was entitled to take both of these factors into account when determining the premium to be charged or in deciding whether or not the risk would be assumed. The failure to disclose that the hotel had lost its licence was fatal to the validity of the policies in issue. The failure to disclose also that the building was unoccupied at the time the policy was issued and had continued so until the fire occurred was equally fatal. These two conditions were inseparable.

Assurance—Incendie—Hôtel détruit par le feu—Risques assurés par différents assureurs—Fausse description et dissimulation de fait—Les polices sont-elles invalides—Code Civil, arts. 2485, 2572.

A la suite d'un feu qui détruisit son hôtel, le demandeur a poursuivi les dix compagnies d'assurances de qui il avait obtenu des polices d'assurances contre le feu. La propriété assurée était décrite dans les polices comme étant un hôtel en usage n'ayant pas plus de vingt chambres, avec licence pour vendre des boissons alcooliques. Lors du feu, et depuis quelque temps, l'hôtel avait perdu sa licence et était inoccupé. Quelques-unes des polices avaient été émises par l'entremise de C, un agent d'assurances, et les deux polices dont il est question dans cet appel avaient été obtenues par l'entremise de G, un autre agent d'assurances. La défense a plaidé, *inter alia*, que le demandeur avait fausement décrit la propriété comme étant un hôtel en usage et ayant une licence. L'action a été maintenue par le Juge au procès. La Cour d'Appel, par un jugement majoritaire, a jugé que le demandeur avait droit de recouvrement en vertu des polices. Elle a décidé que la connaissance imputée à C, par l'entremise duquel la majorité des polices avaient été obtenues, que la propriété n'était pas telle que décrite dans les polices, était la connaissance même des assureurs. Deux Juges ont enregistré une dissidence quant à la responsabilité des deux compagnies appelantes, qui ont obtenu la permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu.

Durant la période critique, C était au courant de la situation de la propriété, mais il n'en était pas ainsi quant à G. Le demandeur était en défaut de ne pas avoir indiqué à G que la licence de l'hôtel avait été annulée ou suspendue et que l'hôtel était vacant. La description de la propriété quant à l'occupation et quant à la possession d'une licence de

boissons était un fait important dans l'appréciation du risque. L'assureur avait droit de tenir compte de ces deux facteurs pour déterminer le taux qu'il devait exiger ou pour décider s'il devait ou non assumer le risque. Le défaut d'indiquer que l'hôtel avait perdu sa licence était fatal à la validité des polices en question. Le défaut d'indiquer aussi que le bâtiment était inoccupé lorsque la police a été émise et a continué dans cette situation jusqu'au temps du feu était également fatal. Ces deux conditions étaient inséparables.

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APPELS d'un jugement de la Cour du banc de la reine, province de Québec¹, rejetant un appel d'un jugement du Juge Ouimet. Appel maintenu.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec¹, dismissing an appeal from a judgment of Ouimet J. Appeal allowed.

John A. Nolan, Q.C., and *Jerome C. Smythe*, for the defendants, appellants.

Jean Badeaux, Q.C., *Claude Benoît* and *Jacqueline Beaupré*, for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The present appeals, by leave, are from two majority judgments of the Court of Queen's Bench¹, rendered March 19, 1964, affirming two judgments of the Superior Court which maintained respondent's actions against the two appellants respectively.

Respondent originally instituted ten separate actions, against ten insurance companies, claiming indemnity under ten fire insurance policies, with respect to the loss by fire, on December 4, 1957, of a hotel property known as Hôtel Laval, situated at Lavaltrie, a small town on the North Shore of the St. Lawrence River between Montreal and Trois-Rivières. All ten actions were joined for trial and all were maintained by the learned trial judge.

Appeals were taken by nine of the defendant companies and all appeals were unsuccessful. Montgomery and Owen J.J. dissented as to the liability of the two appellants, who applied for and were granted leave to appeal to this Court.

¹ [1964] Que. Q.B. 861, *sub. nom. Royal Ins. Co. v. Gauthier*.

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The material facts are fully set out in the judgments below and it is unnecessary to repeat them here at any length. In their essential details they are not now in dispute.

The hotel property at Lavaltrie, the object of the insurance, was originally acquired by respondent in 1954. In July 1957 following a series of transfers, the property was owned by one Marcel Lapierre. Respondent was an hypothecary creditor, and the original deed of sale from him contained a "dation en paiement" clause. At that time the fire insurance coverage on the property had been cancelled for non-payment of premiums. During the month of July 1957, the respondent, through a broker Jean-Marie Corbeil, obtained ten fire insurance policies on the hotel from ten different companies. Of these policies, seven were subsequently cancelled.

On August 28, 1957, the said Marcel Lapierre was declared a bankrupt and one Yvan Massé named as trustee. The trustee operated the hotel for a short time, but on September 27, 1957, the licence to sell alcoholic beverages was cancelled by the Quebec Liquor Board and thereafter the hotel ceased to operate and became vacant.

By judgment dated November 7, 1957, effect was given to the "dation en paiement" clause above referred to, and the respondent Gauthier was declared to be the owner of the property with retroactive effect.

Gauthier did not wish to operate the hotel however, and desired to sell it. He testified that when he visited the hotel on November 10, 1957, it was closed and that on the date of the fire, December 4, 1957, it was not operating. On November 10, 1957, Gauthier appointed a caretaker, one Roger Miron, the owner and operator of a garage situated immediately to the west of the hotel property. This garage was between the hotel and Miron's residence. Miron testified that from the date of his appointment to the date of the fire he visited the hotel two or three times daily and attended to the operation of the heating system. The hotel was vacant at that time and continued to be unoccupied until the date of the fire.

On October 3, 1957, Corbeil was notified, on behalf of the insurance companies concerned, that seven of the policies above referred to were cancelled. On being advised of this, Gauthier then instructed Corbeil to obtain other insurance to replace the cancelled policies. At all relevant times Corbeil was familiar with the condition of the property, and knew that it was unoccupied and that the liquor licence had been cancelled. Corbeil testified he advised respondent that he was doubtful if he would be able to obtain the insurance requested, to which respondent replied "J'ai mon agent Monsieur Girardin" and Corbeil asked that Girardin communicate with him.

In fact three additional policies were obtained through Corbeil (which are not the policies in issue on this appeal) and four policies—two of which are the policies in issue here—were obtained through the agent Maurice Girardin. These policies were issued as of November 21, 1957. The hotel property was destroyed by fire on December 4, 1957.

Girardin testified that he was an insurance broker, that he knew the respondent Gauthier whom he had first met when he had insured Gauthier's private residence in Montreal. He said that in November 1957 Gauthier called him and asked him to insure part of the Hôtel Laval. Gauthier told Girardin that he had an insurance broker named Corbeil, but that the latter could not get coverage for the full amount. Gauthier requested Girardin to call Corbeil and ask him if he, Girardin, could take the balance.

Girardin called Corbeil and asked for information as to the construction of the hotel. He says that he knew nothing else at the time as to the condition of the hotel or its circumstances, but since he knew that respondent had spoken to Corbeil, he issued policies in terms similar to those contained in the policies previously issued.

Girardin obtained the two policies which are the subject of the present appeals. They were issued as of November 21, 1957, and upon receipt thereof, Girardin delivered them to respondent.

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The object of the insurance is described in the two policies as follows:

The Canadian Home Assurance Company—Policy No. 521743

Sur le Bâtiment seulement de l'immeuble à 3 étages construit en bois avec toiture en 1^{re} classe ainsi que ses annexes contiguës et communicantes par l'intérieur occupées aux mêmes fins et qui ne sont pas spécialement assurées ou séparées par un mur complet ou un espace, les fondations, les garnitures et aménagements permanents lesquels y sont assujettis en forment partie et appartiennent au propriétaire de l'immeuble, les clôtures, les fresques et les glaces, *seulement lorsque ledit bâtiment n'est occupé qu'à l'usage de Hôtel connu sous le nom Hôtel Laval avec pas plus de 20 chambres, licence pour boissons alcooliques et situé à Paroisse Lavaltrie, Cté. Berthier, Province de Québec.*

(emphasis added).

Lloyd's of London—Policy No. CH 15507

On Building and Contents, as per wording attached to Warranty Company's Policy.

The warranty company referred to is the appellant, Canadian Home Assurance Company.

Girardin says that when he delivered the policies to respondent he checked the descriptions therein against the descriptions in the policies already held by respondent. He pointed out to respondent that the policies stated:

Hôtel Laval, si je me rappelle bien, avec des chambres et avec permis de la Commission des Liqueurs.

He says that he asked respondent if that was correct, to which respondent replied:

Bien, avec permis, je vais l'avoir d'ici quelques jours.

Girardin states that he then told respondent:

S'il n'avait pas de permis, que l'assurance n'entre pas en force—il faut que ça suive la police.

He was told nothing further by respondent concerning the hotel when he delivered the policies.

At the time Girardin obtained the policies, he did not know that any previous policies on the hotel had been cancelled, nor did he know whether or not the owner of the hotel held a liquor permit.

Girardin's evidence as to these matters was not denied by respondent, and I am satisfied that respondent and Corbeil

failed to disclose to Girardin, when applying for insurance, that the hotel's licence had been cancelled or suspended and that the hotel was vacant.

The courts are frequently called upon to consider an insurer's defence based upon misdescription of, or failure to disclose information respecting the object of the insurance. Aside from certain well established general principles, most cases turn upon the circumstances in each case and the wording of the particular policy.

One of the general principles to which I have referred was stated by Newcombe J. in *Sun Insurance Office of London, England v. Roy*¹, when speaking for the Court he said:

There are many cases referred to in the factums, and more in the books, with regard to the effect of words forming part of the description in a fire policy and intended to describe, sometimes in the present and sometimes in the future tense, the user of the premises, but there is none inconsistent with the view, the reasonableness of which commends itself, that, where the property is described as occupied in a particular manner, and occupation in that manner is material to the risk, the insurance is not attached to the risk if the premises, at the date of the contract, be not, and have not subsequently been, so occupied.

That statement has been quoted with approval by the Court of Queen's Bench in *Dumais v. Laurentian Insurance Co.*² and *Ice Supply Co. Ltd. v. Guardian Assurance Co.*³.

Appellants principal defence to the actions against them was that the risk was not properly described in accordance with arts. 2485 and 2572 of the *Civil Code* which read:

Article 2485

The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.

Article 2572

It is an implied warranty on the part of the insured that his description of the object of the insurance shall be such as to show truly under what class of risk it falls according to the proposals and conditions of the policy.

¹ [1927] S.C.R. 8 at 14, 1 D.L.R. 17.

² (1930), 49 Que. K.B. 413.

³ (1935), 58 Que. K.B. 335, 2 I.L.R. 217.

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Appellants submitted (1) that what was intended to be insured was clearly a licensed and operating hotel, not an unoccupied and unlicensed building and (2) that there was fundamental error as to the object of the insurance with the effect that no contracts of insurance ever existed.

The significant words in the description of the object insured, as contained in the policies, are these,

... seulement lorsque ledit bâtiment n'est occupé qu'à l'usage de Hôtel connu sous le nom Hôtel Laval avec pas plus de 20 chambres, licence pour boissons alcooliques et situé à Paroisse Lavaltrie, Cté Berthier, Province de Québec.

The majority in the Court below were of opinion that the words "occupé qu'à l'usage de Hôtel" in this context were descriptive only, and meant a building furnished and equipped in such a fashion as to permit it to be used only as a hotel. With respect I cannot agree with that interpretation. In my opinion, the description of the property both as to occupation and the possession of a liquor licence was material to an appreciation of the risk. There is evidence to that effect in the record. The insurer is entitled to take both of these factors into account, when determining the premium to be charged, or in deciding whether or not he will assume the risk.

I share the view expressed by Montgomery J. that the failure to disclose that the hotel had lost its licence was fatal to the validity of the policies in issue here. I am also of opinion that the failure to disclose that the building was unoccupied at the time the policy was issued and had continued so until the fire occurred is equally fatal. In my view these two conditions are inseparable.

In the result I would allow both appeals and dismiss both actions with costs throughout.

Appeals allowed with costs.

Attorneys for the defendants, appellants: O'Brien, Home, Hall, Nolan & Saunders, Montreal.

Attorneys for the plaintiff, respondent: Turgeon & Beaupré, Montreal.