Indexed as:

Heer v. Allstate Insurance Co. of Canada

Between
Manjit Singh Heer and Baljinder Heer, Plaintiffs, and
Allstate Insurance Company of Canada, Defendant

[1993] O.J. No. 3360

48 A.C.W.S. (3d) 633

Ontario Court of Justice - General Division
Non-Jury Sittings - Toronto, Ontario

Eberle J.

December 23, 1993.

(33 pp.)

Insurance -- Fire insurance -- The risks or perils -- Material misdescriptions and changes, change of use -- Exclusions -- Business use -- The loss -- Measure of -- The risk -- Change in the risk -- Obligation to notify insurer -- Payment of insurance proceeds -- Actions, relief against forfeiture -- General.

Action for payment of loss allegedly due under a fire insurance policy. In 1985, the plaintiff took out fire insurance in respect of a property in which he resided with his family and two single male tenants. A fire occurred in November 1987 and did substantial damage to the home and its contents. However, about five months before the fire, the entire family of the plaintiff had moved to a new home which had been purchased by the plaintiff. After the move, the plaintiff filled the insured property with tenants so that at the time of the fire, it was occupied by a family of four and a group of three or four unrelated single men in addition to the two original tenants. The monthly rental income was $1,800. The plaintiff did not give any notice of these changes of use to the insurer before the fire occurred. The policy specifically stated that the property was to be occupied by the plaintiff's family and no more than two tenants. It also included statutory condition 4 which required the notification of all changes material to the risk and within the insured's control. The defendant insurer had a strict policy of not insuring rooming houses. On the evidence it was found that the property at the time of the fire was an unlicensed and illegal rooming house. The plaintiff argued,

inter alia, that even if it was in breach of the said statutory condition of the policy, he was entitled to relief from forfeiture pursuant to section 129 of the Insurance Act.

HELD: Action dismissed. The defendant insurer was not liable for the loss inflicted by the fire on the plaintiff. This was because by virtue of the changes that had occurred in the use of the property, and the plaintiff's failure to notify the defendant of those changes, the policy had ceased to be operative and the property had ceased to be insured thereunder. The court had no doubt that the changes to property use in this case were clearly material changes having the effect of increasing the risk within the meaning of statutory condition 4. Section 129 of the Insurance Act could not assist the plaintiff as it only referred to matters and steps involved in asserting a claim, after the loss has occurred. The language of the section, therefore, excluded requirements that must be fulfilled prior to the loss occurring, such as, in the plaintiff's case, a requirement to give notice of a change material to the risk.

STATUTES, REGULATIONS AND RULES CITED:

Insurance Act, s. 129.

QL Update: 940915
d/sdd

M. Roulston, for the Plaintiffs.
T. Charney, for the Defendant.

---

1 EBERLE J.:-- This is a claim brought under a fire insurance policy. The plaintiffs, who are husband and wife, own a property at 908 Ossington Avenue in Toronto, which I will hereafter usually refer to as 908. In 1985, they took out fire insurance with the defendant insurer. At that time, they lived in the house and with them were their children, the brother of the plaintiff Manjit Heer, and his parents. Further, they rented two rooms in the attic to two single men who were unrelated to the plaintiffs.

2 A fire occurred on November 23rd, 1987, and did substantial damage to the home and the contents. However, in June 1987, about five months before the fire, the entire family of the plaintiffs had moved from 908 to a new house which had been purchased in Mississauga.

3 After the move away from 908, the plaintiffs filled it up with tenants, so that at the time of the fire it was occupied by a family of four or five persons, plus three or four unrelated single men, in addition to the two tenants who still remained in the attic. The rental income approximated $1,800.00 a month.

4 The plaintiffs did not give any notice of these changes of occupation or use to the insurer before the fire occurred. The insurer says that the policy did not cover the home at 908 at the time of the fire because; (1), the policy described the property insured as a single-family home occupied by the owner as a private residence. This description would allow two tenants but no more than that, and the insurer says this description no longer applied to the house when the fire occurred; (2), the insurer says that the plaintiffs failed to notify the insured of a material change in the risk as required by Statutory Condition 4, "consequent upon the above changes in occupation and use."

5 In addition to these two issues, a third issue is raised by the plaintiffs; they seek relief from forfeiture under Section 106 of the Insurance Act as it then was. It is now Section 129. In addition to the liability issues, there are issues, as well, concerning the assessment of the claims.

6 By way of additional facts, I note that the house at 908 Ossington is a semi-detached house built about 1940 and has two storeys, a basement and an attic. The house has remained vacant in its damaged condition since the fire. The plaintiff wife really played no role in the events in issue and, in these reasons, whenever I refer to the plaintiff or plaintiffs, generally I will be referring a to the plaintiff Manjit Singh Heer only.

7 The policy contains the following relevant provisions: First, there is Exhibit 2, referred to as the declarations forming part of the policy. It contains, among other things, the following reference to 908 Ossington Avenue,

> "Dwelling is of brick construction and occupied by one family."

On the back of that document is a statement, which indeed is only one of a variety of statements on the back of the document; but the particular one I quote reads as follows:

> "The described premises are the only premises where the insured or spouse maintains a residence other than business property or farms. No business pursuits are conducted on the premises and not more than one flat or apartment in the principal residence premises is rented to others.

Then, in what has been referred to in the evidence as "the booklet," which also forms part of the policy and was entered as Exhibit 27 at the trial, there are also a number of relevant statements. On page 1, under the heading of Property Coverages, is the following definition:

> "'You' and 'Your' means the persons named as insured on the declaration page and while living in the same household, his or her wife or husband, the relatives of either or any person under 21 in their care. Wife and husband includes a woman and man who have been continuously living together for three years or for one year if a child was born from their union and they have been publicly represented as wife and husband and living together for the preceding year."

The next definition I quote is the definition of the word 'dwelling.' The policy continues,

> "Dwelling means the building described on the declaration page occupied by you as a private residence."

Then under the heading 'Coverage A, Dwelling Building,' it reads as follows:

> "We insure: 1. The dwelling and attached structures."

On page 6 of Exhibit 27 under the heading "Loss or Damage Not Insured" is the following:

> "We do not insure: (4) Building or structures used in whole or in part for business or farming purposes unless declared on the declaration page."

And on page 17 is set out Statutory Condition 4 which reads as follows:

> "Material Change: (4) Any change material to the risk and within the control and knowledge of the insured avoids the contract: as to the part affected thereby unless the change is promptly notified in writing to the insurer or its local agent."

The statutory condition goes on to set out the options available to the insurer in such event, such as to return the unearned premium and cancel the policy or stipulate for a higher premium, et cetera. Those parts of Statutory Condition 4 do not, I think, come into play in this case.

8 Naturally, the insurer relies heavily on the language of the policy, described in the evidence as a Home Owners' Policy. The insurer's evidence, and it is uncontradicted, is that such a policy is applicable only to a case where the insured himself resides in the house with his family, if any, and with not more than two tenants. Where the owner does not reside in the insured home, the evidence discloses that a different form of policy, called a Residential Fire Policy, is employed, and the premium is higher.

9 The uncontradicted evidence called on behalf of the defendants is also that, once the occupation or use of a house or building goes beyond the range I have just indicated, and if the occupation and use becomes that of a rooming house, for instance, this insurer does not insure such risks at all. It simply does not insure rooming houses, whether legal or illegal, licenced or unlicenced. The evidence also establishes that many other Ontario insurers treat the matter identically, although there are some insurers who will insure licenced rooming houses; but no insurer in Ontario will insure an unlicenced rooming house.

10 The insurer argues that 908 was at the time of the fire an unlicenced and illegal rooming house and uninsurable in the Province of Ontario. On the other side of the case, the plaintiffs allege that they did not understand the terms of the policy; their native language is Punjabi, and they gave evidence in that language through an interpreter. They argue that they could not be expected to

know what the policy meant or to know what constituted a material change in risk.

11 The plaintiffs' evidence shows that the plaintiff Manjit Heer was employed in a factory in Ontario for many years after his arrival here in 1972; later, he got into the taxi cab business. To do so, there were some tests which were given in English. In 1981 he became a taxi cab driver, and in 1988 he became a one-half owner of 3 licenced taxi cab in Toronto. Although he gave his evidence through an interpreter, as was his right, I am satisfied that the plaintiff Manjit Heer has a substantial familiarity with the English language.

12 He may have felt more comfortable in giving his evidence in court by way of an interpreter, but one cannot overlook his many activities during the 20 years or more that he has spent in Canada. He passed the necessary tests in connection with the taxi business, and this must have required a reasonable facility in the English language, both to pass the tests and to drive a taxi. As well, we know that he has purchased two houses in Canada and in doing so must have dealt with real estate agents, with lawyers, with the matter of commission on the transactions, negotiating the purchase price, arranging mortgages, et cetera. As well, in the taxi business, insurance is no doubt an important factor.

13 Further, the evidence shows that during his ownership of real estate in Toronto, he has dealt with a wide variety of fire insurance companies. The evidence is clear that Mr. Heer is and has been capable of conducting the rather broad range of business matters that he has engaged in since coming to Canada. He has obviously taken responsibility for those activities, and I can see no reason why he should not be responsible for his actions or omissions, as the case may be, in the activities relating to the house at 908 Ossington Avenue. I am quite satisfied that, if something arose in any of those business or semi-business dealings that he did not understand, he would have asked about it.

14 In connection with the matter of language and familiarity or otherwise with the English language in this case, the position taken by the plaintiff at the examination for discovery should be referred to. This portion of the transcript, as well as a number of others, were placed into evidence at the trial. At page 7, commencing at Question 25, the transcript reads as follows:

> "MR. CHARNEY: Okay. What I'm asking, Mr. Solomon, is this: When we get to trial, am I going to be faced with an allegation by Mr. Heer that he did not understand whatever took place between him and Allstate and the necessity to obtain insurance because of his inability to speak English or write English or read English, for that matter? Is that going to be put forward? If it isn't, I am content. If it is, I want the information."
>
> "MR. SOLOMON: No, I don't think that it will be. It's certainly not pleaded and to my knowledge we don't intend on amending that pleading."

> "MR. CHARNEY: All right. So that l can assume that for the purposes of dealing with Allstate, filling out forms and writing letters, Mr. Heer was competent to deal in English, but that for the purposes of today only he wants an interpreter. Is that fair?"
>
> "MR. SOLOMON: That's my understanding at this time."
>
> "MR. CHARNEY: And your answers bind your client here today."
>
> "MR. SOLOMON: Yes, they do."

15 It appears that the plaintiff, through his counsel at the time, took a very clear position, and there is no indication of any change in that position to this time. The plaintiff took the position that he was competent to deal in English for the purpose of the activities that are the subject matter of this lawsuit.

16 The weight to be given to the evidence of the plaintiffs was not helped by Mr. Heer's failure to disclose certain important information to the same insurer, by coincidence, Allstate, to whom he applied for insurance on his Mississauga home in 1988; that is the year following the fire at 908.

17 In the application that he made in 1988 for that insurance, and it is to be found now at Exhibit 44 in this case, he was asked by the agent (who was not the agent he bad dealt with when he obtained the insurance which is the subject matter of this action) whether he owned any other dwellings, and the answer recorded is 'None.' At that time he still owned, as I understand he does to this date, the property at 908, and the property he was applying to insure at that time was on Copernicus Drive, I believe, in Mississauga.

18 In the same application for insurance in 1988, he was also asked, under the heading of 'Loss History,' whether he had had any losses in the past five years, and the answer to that question is recorded as 'No,' even though only six or seven months earlier, the fire at 908 Ossington had occurred.

19 Both of these answers in that application for insurance are clearly untrue. No explanation for them has been offered in the evidence.

20 It is hard to understand how the questions could have been mis-understood, and there is no evidence that they were mis-understood. They appear to be nothing more nor less than two clearly and unmistakeably incorrect and misleading answers given to relatively simple and straight-forward questions.

21 I am not satisfied that I can rely upon the reliability of Mr. Heer as to his evidence in this case on any important aspect. The witnesses called for the defence, including the two insurance agents involved, the one in relation to 908 Ossington and the other in connection with the application for the Copernicus Drive property, and the other witnesses called by the defence gave their evidence in a straight-forward manner, and I have no basis for doubting their reliability in any way.

22 I conclude that, wherever there is any discrepancy between the evidence of the plaintiff and the evidence of the witnesses for the defendant, I am persuaded to accept the evidence of the defence witnesses and reject that of Mr. Heer. Even on matters where there is no contradiction between the witnesses on one side of the case and the witnesses on the other, on any important matter I would have difficulty in placing much faith in Mr. Heer's evidence.

23 I have already noted that the defendant, Allstate, does not insure rooming houses at all. I should expand on the significance of that statement for this case. The evidence shows, and it is largely if not entirely uncontradicted, the following points which I find as facts in this case:

Number 1; that 908 became a rooming house as defined in the Building and Fire Codes of Ontario after the plaintiffs and their family moved out in June of 1987.

Number 2; the house at 908 did not have the necessary building and fire safety features for a rooming house. It could not be licenced as a rooming house, and there is no evidence that any licence was ever applied for and certainly none was granted. It follows that 908 was an illegal rooming house under the laws of Ontario at the time of the fire and for some months prior to it.

Number 3; Mr. Inward, the insurance agent who sold the policy that is sued upon in this case, said that if he had been told the facts of the occupation and a use of 908 as they were after the plaintiffs moved out he would not and could not have sold them a policy. The evidence is overwhelming that this insurer, like many others, will not insure a rooming house in any circumstances.

24 In addition to what I have already mentioned, there is another reason why 908 could not be licenced as a rooming house, even if an application had been made for a licence, and that is that it is only one-half of a semi-detached house. The regulations prohibit the licencing of a rooming house in a building which is only one-half of a semi-detached house, unless the other half is also licenced as a rooming house; and there is no evidence that in this case the other half of the semi-detached building is a rooming house.

25 Mr. Inward also said in his evidence that he explained to Mr. Heer that if he moved out of 908 he should notify the agent or the company of that fact. The same instruction, Mr. Inward said, applied if the property at 908 should be rented. Mr. Heer, I believe, denied ever receiving these instructions, but he in fact did call Mr. Inward several times when or shortly after he moved out of 908 in order to tell him, he said, of that fact. The agent was not in at the time any of those calls were made and Mr. Heer left no messages on the answering machine. He then simply ceased to call the

agent and, in the end, there never was any notification of changes in use and occupation at 908 to either the agent or the company prior to the fire.

26 Mr. Inward said he sent to the plaintiff the booklet of policy terms, which has been marked as Exhibit 27 and to which I have already referred; together with a copy of 'the application form, which is Exhibit 1; and the declarations which I have already referred to and which I believe are Exhibit 2; and, of course, an invoice for the premium. Mr. Heer admits receiving the other documents but not the booklet of policy terms in Exhibit 27. Based on my assessment of the reliability of the witnesses, as I have already explained it, I find as a fact that Mr. Heer did receive all of those documents, including the booklet, Exhibit 27.

27 There are other findings of fact which I make in this case, again, upon the evidence which I accept.

(1) The obligation is on the insured to notify the insurer of such a change of use and occupation as took place here, for it was a material change in the risk.

(2) From June or July of 1987 to the time of the fire, 908 was no longer a private residence or dwelling; it was business premises. The business conducted on it and for which it was being used being the rental of accommodation to any persons who would pay the rent.

(3) The insurer responded promptly to the loss and quickly told the plaintiff, when the facts came to light, that the insurance policy in question did not cover the loss.

(4) The plaintiff had been informed by the agent that he was to notify the insurer of any change of use or occupancy, and he did not do so.

(5) The insurance policy with the defendant did not cover the fire at 908 on November 23rd, 1987.

(6) Any reasonable person would know that, when the owner moves out of a house that has been insured as this one was and converts it into the business of renting to assorted tenants, a change material to the risk has occurred and the insurer must be notified at once in order to preserve the insurance coverage. This is a matter of common sense, it appears to me. I note that the written submissions prepared on behalf of the plaintiffs for the final argument concurs on this point. I asked Mr. Heer whether he believed in his own mind that the change in occupancy increased the risk of loss by fire and he answered no. It is really irrelevant to consider this, since the test must be an objective one. The questions must be asked, would a reasonably prudent man have known that the change in occupancy at 908 Ossington was a material change and that it entailed an increase in the risk of loss by fire. If the answer is yes, then the obligation to report arises. This concurs with my view that the appropriate test is not a purely subjective one but is the test of a reasonably prudent person.

(7) The plaintiff's father must be well qualified in English, for the plaintiff attempted to use him as his interpreter at the beginning of this trial. The father lived in the same house at 908 Ossington and, I believe, moved with the rest of the family to the Mississauga house and was therefore readily available to the plaintiff if any problem in the English language arose. There is no evidence of any such problem.

(8) The plaintiff failed to comply with the a obligations he had entered into in the contract of insurance and, further, he ignored his agent's instructions to notify him if he moved out of 908 or rented it to others.

(9) There is no need in this case for statistics about relative fire risks between owner occupied premises and rooming house premises because this insurer, like many others in Ontario, does not insure rooming houses at all.

(10) The insured knew about the change of use and occupation and that change was under his control exclusively. It is not necessary in this case that the insurer also prove that the insured personally knew that these changes were material to the risk. It is sufficient, as I have found, that any reasonable person would have known that the changes were material to the risk and that the insured must notify the insurer accordingly. While on this topic, I should refer again to Statutory Condition 4 which, in my respectful opinion, makes it clear that knowledge by the insured of the materiality of a change is not required. I have already quoted the text of Statutory Condition 4 and will not repeat it, although I will attempt now to parse it as I think it should be done.

28 The relevant portions of it divide readily into four parts. The first part is "Any change." The second part is "material to the risk." The third part is and within the control and knowledge of the insured;" and the fourth part is "voids the insurance unless notice has been given."

29 It will be seen that what I have identified as the first part deals only with the change. When we reach the second part, the materiality of the risk, we are looking at the insurer's side of the matter. When we reach the third part, we are looking at the other party to the affair, namely, the insured. The language "within the control and knowledge of the insured" make this clear. The fourth part specifies the result.

30 Looking at the provision in this way makes it very clear that the materiality applies only to the insurer's side of the transaction and not to the insured's side. What must be shown about the change so far as the insured is concerned is that it be within his control and within his knowledge. There can be no doubt about these two factors in the present case.

31 If the aspect of materiality were, on the other hand, to be applied to the insured, one would have thought that the statutory condition would read somewhat as follows:

> "Any change that is to the knowledge of the insured, material to the insurer and also within the knowledge and control of the insured..."

and so on. But that is not the language employed. I am satisfied that the language of the statutory condition does not require any subjective knowledge of materiality of the change on the part of the insured. It is, as I have already said, to be tested on the basis of a reasonable person, and I have made my findings on that issue.

32 Before I leave this point, it may be worthwhile noting that many types of insurance contracts, of which this is one, have obligations of the highest good faith between the parties. This case and this type of policy are no exception. It is generally the insured who has the knowledge of the events and conditions and of any changes affecting the property insured. It is not the insurer who has that knowledge. The insurer is entitled to rely, therefore, on honest disclosure by the insured.

33 Before terminating my discussion of liability, I should mention one or two of the authorities to which I was referred. The plaintiff relies heavily on Doherty et al. v. The Home Insurance Company et al. (1986), C.I.L.R. 8202. While it is a useful and helpful case, it does not, in my view, bear the interpretation that the plaintiff draws from it.

34 The plaintiff's interpretation is that, unless the insurer adduces convincing statistical proof that an illegal and unlicenced rooming house is a higher risk than a private dwelling occupied by its owner, the plaintiff must succeed. The Doherty case does not say that. In my reading of that case, although statistical evidence of the type mentioned is referred to, it is not made mandatory for all cases. It may, no doubt, be helpful or even necessary in some cases, but it is only one means mentioned in that case by which an insurer may show that a particular change of occupation or use is material to the risk. In our case, there is reliable and uncontradicted evidence that the defendants will not insure a rooming house of any kind, and that that is the approach taken by many other insurers in this province.

35 The evidence in this case shows that the defendant's refusal to insure a rooming house is an absolute refusal. It is not dependent upon marketing considerations. The evidence is also uncontradicted that no insurer in Ontario will insure an illegal and unlicenced rooming house. There is, in addition, credible evidence in this case by a senior member of the Toronto Fire Department that tenanted premises are a greater fire hazard than owner-occupied premises. This evidence is uncontradicted.

36 Another case particularly relied upon by the plaintiffs is Ryan v. The Citadel General Assurance Company et al. (1983), C.I.L.R. 6416. As a trial decision, it is of persuasive authority but, of course, not binding upon me. At page 6419 of the report, it is clear that the policy there considered contains significantly different terms from the policy here. Further, that case turned essentially on the key factual finding by the trial judge that the change there in question was not a change that was material to the risk. In this case, I have made the factual conclusion that the change or changes in this case were material to the risk; thus, the Ryan case is not of particular assistance in resolving the issues in the present one.

37 Another case relied upon by the plaintiff is Golob et al. v. Dumfries Mutual Fire Insurance

Company (1979), C.I.L.R. 327. That is a decision of the Court of Appeal and is, of course, binding upon me. However, it was quite a different case from the present one. It turned on a factual finding that the house in question was not vacant at the time of the fire but that it was then occupied as a private dwelling. Accordingly, the terms of that policy were complied with. The policy described the insured property as tenant-occupied. There is no such language in the present insurance policy. All in all, the differences in factual situation between that case and this one are quite obvious.

38 I turn briefly now to some of the cases cited by the defence. One of them is Lejeune v. Cumis Insurance Society Inc. (1989), 41 C.C.L.I. 157. This is a decision of the Supreme Court of Canada and again, of course, is binding upon me. There the policy described the insured premises in the following language,

> "(While) occupied solely as private dwelling."

At the time of the fire, part of the insured premises was not so occupied but was used only for the holding of meetings a few hours each day. The Supreme Court of Canada held that that use, at the time the fire occurred, took the premises outside the description of the property insured by the policy and, accordingly, the claim under the insurance policy failed.

39 Then there is the case of Iacobelli et al. v. Federation Insurance Co. of Canada et al. (1975), 7 O.R. (2d) 657. There the building insured was described in the policy as being,

> "occupied as a private dwelling."

That is similar to, but not identical to, the language in the present case. In Iacobelli, at the time of the fire, the premises were being used as a motorcycle clubhouse, and it was held that this use took the premises outside the description of the property insured by the policy. It was held further that the change of use was a change which was material to the risk, and in the absence of any notification by the insured to the insurer of that change, he policy was avoided.

40 This review of the cases, and they are only few of those cited to me, show that on the facts of this case, as I have found them to be, the insured's claim must fail on both of the liability issues that have been presented.

41 A third submission made by the plaintiffs is that they are entitled to relief from forfeiture under Section 106 of the Insurance Act. That was, I believe, the section number in 1980. It is now Section 129 in the 1990 revision, but I do not think there has been any change of wording. That section reads as follows:

> "Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and

> the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just."

The question that arises immediately with respect to Section 129 is whether or not it applies to matters occurring or which should have occurred prior to the loss, or whether it is limited to matters arising only after the loss has occurred. A reading of the section makes it clear hat it refers only to matters arising after the loss has occurred, that is, generally speaking, matters and steps involved in asserting a claim, after the ground of claim has arisen.

42 I think that interpretation follows from the language used itself. That language excludes requirements that must be fulfilled prior to the loss occurring, such as, in the present case, a requirement to give notice of a change material to the risk.

43 I was not given any authorities to assist in interpreting Section 129, and the only thing that I have been able to find are some remarks by Chief Justice Fitzpatrick in the Supreme Court of Canada in Prairie City Oil Company v. The Standard Mutual Fire Insurance Company (1910), 44 S.C.R. 40 at 45. There the Chief Justice of Canada, in referring to a predecessor of Section 129, in admittedly somewhat different language so far as details are concerned, says,

> "The purpose of the statute was undoubtedly to protect persons insured who, by reason of necessity, accident or mistake, failed to comply strictly with the conditions of the policy as to the proof to be given to the company after the occurrence of the fire."

I hasten to say that the Chief Justice's comments in that case were in a dissenting decision and none of the other judges involved in that case commented on the origin of the section and its purpose, as did the Chief Justice.

44 I should also note that apparently at some time after 1910 the ambit of the section was clarified by amendments. In 1910 it referred only to the proof of loss, but now that language is enlarged by these words,

> "... or other matter or thing required to be done or omitted by the insured with respect to the loss."

45 These words, I think, while widening the scope of the section, continue to make it clear and, indeed, reinforce the meaning that the section comes into play only with respect to requirements imposed upon the insured after the occurrence of the fire and not before. Thus, the section cannot help the plaintiffs in the present case.

46 I conclude, therefore, that on the issues of liability the plaintiffs fail. Nevertheless, although I have found no liability on the defendant, I should go on to assess the amount of the claims.

Plaintiffs claim the following: First, for damage to the house, $85,000.00; second, for personal property damage, $12,350.00; third, for income loss, $17,600.00, which is the policy limit under this heading; fourth, they claim reimbursement for mortgage payments made since the fire in the sum of $54,093.00; fifth, they claim reimbursement of expenses of $100.00 a month for repairs and $20.00 a month for insurance, since the date of the fire. These two items respectively come to $7,300.00 and $1,460.00.

47 I will deal first with the last two claims. No authority for these last two as legitimate claims have been suggested in the argument, nor was there any evidence to support them. So far as I can see, they are not covered by the policy and must be disallowed.

48 Now, I go back to the head of the list. The first item is the damage to the house. The policy provides for replacement cost if the premises have been repaired and for actual cash value if not repaired. The house has not been repaired to this date, nor was any evidence given that it would be repaired in the future. Accordingly, the actual cash value is the figure to be used in the assessment.

49 The amount claimed of $85,000.00 is an estimate made by a Mr. Finnegan, an adjustor for the insurer. Finnegan was not called as a witness; he is no longer in the employ of the company but is thought to be somewhere in British Columbia. The plaintiffs' own appraiser appears to have arrived at a figure of $144,570.00, but I gather that the plaintiffs, in the closing submissions, do not rely on that estimate.

50 The $85,000.00 figure is undoubtedly taken from the evidence of Mr. Norgard who was called by the defence and who estimated the costs at $85,703.76. I was favourably impressed by his evidence. He appeared to have done his work carefully and thoroughly and I accept these figures, but this amount gives replacement cost not actual cash value.

51 The latter involves depreciation, but how much? The defence says that before applying depreciation, the figures that are contained in the $85,000.00 estimate for overhead and profit should be deducted, and depreciation should be then taken on the resulting lesser figure. It appears to me that, normally, repairs of the kind involved in this case would be done by a contractor rather than by the owner and perhaps his friends; and that to have the work done by a contractor would require an outlay for profit, overhead, planning, etc. In my view, it would be unreasonable and unrealistic to deduct these amounts before considering what amount ought to be deducted for depreciation.

52 In my opinion, we start with the $85,372.00 figure. The defence evidence is that depreciation at the rate of one percent a year should be applied from the time of construction of the house, which appears to have been accepted by both sides as being 1940. Mr. De Berardis used he one percent a year figure because, he said, of the heavy use of the building. What Mr. De Berardis knows about the use of the building cannot be very much. He may know something about the use as it was at the time of the fire, and I think that would properly be classed as heavy, but I do not see how he can have any knowledge of the nature of the use at any earlier time or through most of the life of the

house from 1940 onwards. There was no evidence about that.

53 Finally, it seems to me to be an error in principal to apply straight-line depreciation to a house which, according to the evidence, was probably built for a life expectancy of about 100 years, and we are now only at about the mid-point in that expectancy of life. What we are talking about is the cash value of damage to the house. I think it would be wrong to look at the matter as if we were dealing with individual pieces of lumber and individual bricks and to say that a piece of wood or a brick now 50 years old has an actual cash value of only half of its original purchase price. Clearly, a house in 1975 or 1985, if it were undamaged, would be worth much more than it was in 1940, and that is so even disregarding entirely any land value or anything else. Materials, as parts of an existing, standing and usable home, have, in my view, greater cash value than they have as disparate pieces of lumber in piles, somewhere, and as yet unused.

54 I am not persuaded that Mr. De Berardis's approach to depreciation is correct. On the other hand, some deduction for depreciation is probably appropriate, and in the circumstances of this case I would estimate that at 15 percent. Applying that depreciation, we would arrive, if my arithmetic is correct, at a net figure of $72,566.93, and I would assess the actual cash value of the fire loss to the building at that amount.

55 I turn now to the personal property claim. The claim is summarized in Exhibit 10 where there is a list of items with figures totalling $12,350.00. Individual prices are however, I believe, estimates of the original purchase price of those items. Pictures put in evidence show that some of the items claimed for were apparently not damaged at all. With respect to some of the appliances, the evidence of the plaintiff was that when he tried to turn some of them on after the fire they would not work. To me this is not surprising because if the fire did not put the electrical system out of action, subsequent short circuiting probably did; or someone may have, out of precaution, cut off the electrical supply to the house after the fire. There is no evidence about any of these things, but they are all in my view reasonable explanations for an electrical appliance not working after a substantial fire as occurred in this instance.

56 I am not persuaded that the plaintiff's conclusion is sustainable. In fact, there is virtually no evidence of the extent of damages listed on Exhibit 10. The evidence is so scanty that perhaps the value of this claim ought to be assessed at zero. However, on the other hand, there may have been some loss and I would assess the amount at $3,000.00 as a reasonable figure.

57 I turn now to the income loss. Here the plaintiffs claim the rental they have lost from each of the tenants in the attic at $160.00 a month for six years and one month from the time of the fire to the time of trial. This is, therefore, $320.00 a month for 73 months or $23,040.00. The claim as finally made, the one that I have just outlined, is, as I say, limited to the rental income from the two men in the attic and does not include loss of rental for the balance of the building. However, the claim as formulated and amounting to $23,040.00 fails to take into account the reasonable time that it would take to repair the damage to the house. In my view, any claim for loss of income must be

so limited. There is no evidence of what a reasonable time would be, and on this ground alone the claim ought to be disallowed. However, I think I am prepared to guess at what a reasonable time might be, and I arrive at four months to do the repairs in this case and that would produce an assessment of this claim as $1,280.00.

58 There are still two other claims that are made: Reimbursement for mortgage payments made since the fire, and reimbursement for repairs of $100.00 a month and for insurance premiums of $20.00 a month, from the time of the fire to date. So far as the mortgage payments are concerned, these are not covered by the insurance policy and nothing should be assessed for it.

59 So far as the monthly repair claim and the monthly insurance premiums claims are concerned, I am unable to see any basis in the policy for allowing these, and I do not think counsel was able to suggest any basis and, accordingly, nothing should be assessed for these claims.

60 To summarize, the claims are assessed as follows: Damage to the house, $72,566.93; personal property damage, $3,000.00; income loss, $1,280.00. Total: $76,846.93. However, since I have found no liability, no sum can be awarded. For these reasons, the action is dismissed.

61 What do counsel have to say about costs?

--- Submissions on costs.

62 Although I well understand the seriousness of this matter to the plaintiffs, they have pursued an action to and through trial which has been entirely unsuccessful. While it is no doubt true that everyone is entitled to a day in court, the plaintiffs have had their day or days in court, but the risk of losing also brings with it the risk of paying costs. I really cannot see anything in this case which takes it out of the usual rule by which the successful party should have the costs of the action. They should not be on a Solicitor-and-client basis, and they are not asked for on that basis except for the first day of the trial. I think that the defendant is entitled to its costs but that they should be on a party-and-party basis throughout.

63 It is true that the first day of the trial was largely wasted because of the failure of the plaintiffs to have arranged for a suitable interpreter, but I do not think that in the circumstances of this case that delay should be treated any more severely than the rest of the time that has been consumed by the trial.

64 Accordingly, the order for costs to the defendant on a party-and-party basis throughout will include costs of all of the day of December 13th, as if it here a normal trial day, in addition to the subsequent days upon which the trial really took place.

65 Mr. Charney, as to the money held in court, I am reluctant to order that to be paid out. It will be perfectly safe in court and I think your client will not go into bankruptcy or anything like that while waiting for the costs to be taxed. I will order that upon completion of the assessment of costs

that that amount should be paid out to the extent it is necessary to meet the costs as assessed.

66 I have endorsed the record as follows:

> "For oral reasons given today, the action is dismissed with costs to the defendant on a party-and-party scale. The costs assessed should include December 13, 1993, as a full day of trial. The money in court should remain there until the assessment of costs is completed at which time it is to be paid out to the defendants so far as needed to meet the costs as assessed, and any balance to the plaintiffs"