IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.S 330/1987

BETWEEN	S & S ENTERTAINMENT LIMITED THE ORCHID COLONY	PLAINTIFFS
A N D	CARIBBEAN HOME INSURANCE COMPANY LIMITED	1ST DEFENDANT
A N D	BRITISH CARIBBEAN INSURANCE COMPANY LIMITED	2ND DEFENDANT
A N D	MOTOR OWNERS MUTUAL INSURANCE ASSOCIATION LIMITED	3RD DEFENDANT
A N D	GLOBE INSURANCE COMPANY OF THE WEST INDIES LIMITED	4TH DEFENDANT

MISS HILARY PHILLIPS AND MRS. SHARON USIM
INSTRUCTED BY PERKINS, GRANT, STEWART, PHILLIPS & CO.
FOR PLAINTIFFS.

DENNIS GOFFE Q.C. INSTRUCTED BY MYERS, FLETCHER &
GORDON FOR DEFENDANTS.

HEARD: **18th July, 1994; 2nd, 3rd, 4th August 1994, 1st, 2nd and 3rd November 1994; 27th, 28th, 29th and 30th November 1995; 1st, 4th, 8th and 15th December, 1995 and 1st March, 1996.**

JUDGMENT

COOKE, J.

Mrs. Michelle Swan is the principal shareholder and a director in the plaintiff companies. Situated at 3 and 3(a) Waterloo Road in Kingston were a great house - a reminder of times past-and five cottages (hereinafter called "the property"). Mrs. Swan first became acquainted with this property in 1969 when she stayed there as a guest. An American national it would appear that overtime she increasingly became enamoured with its charms. In 1980 she took up residence and opened what is described as a garden restaurant. This enterprise attracted what appeared to be a most desirable clientele. Mrs. Swan's professional background was in education - not only

was she a qualified teacher of English but she had a post graduate qualification in educational administration. However, this background did not preclude her from envisaging the commercial potential of the property. In 1984 the two plaintiff companies were incorporated. This was to facilitate the purchase of the property and envisioned commercial activity. The property was acquired with the aid of a very substantial mortgage.

The somewhat derelict premises soon presented a more pleasing appearance as there was an overall refurbishing of the buildings. By September of 1985 the cottages were leased. One was for residential use but the others were all for business activities. There was Gallery Makonde an Art gallery; Aarons Photography Studio; Salon Cappalani which provided beauty treatment and Faces-a modelling and grooming school. In the latter part of January 1986 a night club called Revilo was in operation. This was in the library of the greathouse. In addition the rear portion of the verandah also formed part of the space alloted to the night club. This space was let to Mr. Oliver Magnus who was the entrepeneur as regards this activity. Discussions were underway for Mr. Donovan Kong for the setting up of a private members club in the upstairs of the great house. Then on the 23rd of March 1986 a fire engulfed the property resulting in near total loss of the buildings thereon. It is this loss which is the genesis of this action. The hearing began on the 18th July 1994. It lasted a great many days. The plaintiffs seek to recover their loss from the defendants who are all insurance companies and are all sued under the same policy of insurance.

Mrs. Swan instructed her broker Caribbean International Insurance Brokers to make a claim under a policy of insurance. She contacted her attorney (not those now representing her) to pursue the claim. Mr. David Waller a chartered loss adjuster and surveyor visited the property-firstly on the 24th March 1986. He went there acting on behalf of Caribbean Home Insurance Company Limited the first defendant in this action. He subsequently obtained what he considered to be all the relevant information including valuation reports and by 30th July 1986 he submitted his report to Caribbean Home Insurance Company. I should point at his juncture that this Insurance

company was the lead insurer in respect of the relevant policy of insurance. Apparently the stance of this company was that there was no policy in force. In exhibit 10 Caribbean International Insurance Brokers Ltd. the plaintiffs broker wrote to the insurance company in a letter dated June 5th as follows:-

> We refer to our letter dated 16th May 1986, your subsequent meeting at our office Friday 30th May 1986 and your reply to us on the 2nd June 1986, advising that the Fire and Allied Perils and consequential loss policies were not in force. In view of this development we wish to consider your decision based on the following point.....

Mrs. Swan also appealed to the office of the Superintendent of Insurance- to no avail. The Superintendent of Insurance showed some concern about certain aspects of her complaint but frankly stated "This office does not adjudicate claims."

So now Mrs. Swan turned to the Courts. By writ dated 11th August 1987, an action was initiated against the 1st and 2nd defendants. Then by order of the court on July 18th 1988, the 3rd and 4th defendants were added. On the 29th July 1986 it was pleaded that the policy of insurance relied on by the plaintiffs "was terminated by mutual agreement with effect from March 12, 1986 and was not therefore in operation at the time of the allegations or at any material time."

By an amended statement of claim dated 25th May 1993 this defence was amended and it was further or in the alternative pleaded that this "Defendant is entitled to avoid liability under the said policy by virtue of non-disclosure by the Plaintiffs of the material fact that the premises or a major part of them, were to be used, or were being used, as a night club a fact only disclosed to this Defendant after the loss occurred." In this amended defence this Defendant further pleaded that the claim was barred by the passage of time in accordance with condition 19 of the policy of insurance since 12 months had elapsed before the suit on behalf of the plaintiffs was commenced. The defence of the 3rd and 4th defendants with subsequent amendments is similar to that of the 1st defendant. Then on the 22nd of July 1994 all three defendants by a ruling of this court were further permitted to amend their defence to plead condition 8(a) of the insurance policy which is in these terms.

> "3 Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insured, before the occurrence of any loss or damage, obtains the sanction of the Insurers signified by indorsement upon the Policy by or on behalf of the Insurers.
>
> (a) If the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such ways as to increase the risk of fire.
>
> It is this condition that I shall now address.

Before the opening of the nigh club the operation of the Garden Restaurant was in existence. This has been described as an open shed. There was a canvas roofing. Inside there were the usual appurtenances associated with that type of establishment. The kitchen was in the great house and in addition there wasn open flame grill alongside that building. The restaurant opened its doors and about 12 noon and dining ceased at 10 p.m. but the grill would remain open for the pleasure of the guests who wish to tarry for there was a bar and from time to time a jazz ensemble would perform. It was not unknown for activity in the restaurant area to continue to midnight. On an estimated average of once per month there were wedding receptions. On those occasions there may have been dancing which would take place in the area which housed the nightclub. In addition there were other varied occasional social activities mostly of a genteel character.

The area occupied by the night club was of wooden structure. The only structural change to that area was the installation of an air conditioning unit. Wall art was added and there was the introduction of a Hi-Fi system for the provision of music. The actual night club space was estimated to be 9' x 16', but patrons had the use of part of the verandah of the guest house. The dancing area could accommodate about 15 couples and there was seating inside for some 20 to 25 persons. The night club which was open on Tuesdays through to Saturdays started at approximately 9. p.m. and would close at about 2 a.m. On an average the nightly attendance was 30 persons. Alcohol as could be expected was consumed therein and there was smoking of cigarettes. On the whole the type of clientele for both the restaurant and the night club was similar. In fact the conception was that both entities

would be complementary to each other.

Mr. Aubry McLeod gave evidence on behalf of the 1st defendant. He, since 1989 has been what he terms a general insurance consultant. He possesses qualification from the Associated Charter Institute of London. (A.C.I.I.) which qualifies him as an insurance practitioner. His exposure to this field in Jamaica started in 1948 and his experience since then has been wide and varied both here and in Canada. He has held very responsible positions in a number of insurance companies. In view of this court he can be properly be regarded as an expert witness. His evidence was as to the practice in the insurance industry pertaining to fire insurance. The prudent insurer in the assessment of the risk would primarily be concerned with (a) the construction, and location of premises and (b) the occupation. These considerations were derived from the experience in the industry. As regards construction the assessment is based on the capacity of the structure to withstand fire or otherwise. To the prudent insurer the best type of construction would be one of reinforced concrete blocks with a concrete roof. Shingle roofed buildings are regarded as "sub-standard" because of the danger of these roofs catching fire even from flying sparks. Accordingly, although he did not speak to this specifically, a construction of wood would be rated a higher risk than that of concrete. As regards occupation, the activity that takes place, is relevant to the risk. It can be readily understood that welding with the constant use of acetylene torches would increase the risk of fire. Restaurants have hazards since cooking necessitates use of flame and presence of oils and fats. Night clubs in which cooking takes place has the added potential danger because of the usual considerable amount of electricity that is used for the amplication of music as short circuits are common in these circumstances. It was his view that in the insurance restaurant and night clubs are not regarded as the same trade. He distinguished the occupation of a night club and a restaurant in this way. In the latter persons dine spending say about three (3) hours and leave. In the former

there is much more consumption of alcohol and smoking. The inference is that the combination of those activities - and the possibility of carelessness with a lighted cigarette increased the risk of fire. Generally nightclubs were rated 25% higher risk than restaurants. Of course it was not impossible that after the prudent insurer had made his survey (investigations) to a rate a particular restaurant on the same basis as another particular nightclub.

The wording of condition 8(a) (supra) is in plain and distinct terms. Have the defendants satisfied this court that they are entitled to place reliance on this condition? It would seem that for such a condition as this to apply the alteration in the trade or occupation must be for some sustained period. It must not be of a temporary nature. Thus in Dobson v Southeby (1827) 1 M & M 90 there was a condition against the storing of hazardous material on the insured premises. Tar was brought to those premises for the purpose of tarring the building. Fire ensued as a result of this operation. The insurers were held liable because the introduction of tar was only a temporary occurrence. Likewise in Shaw and Robberds (1837) 6 Ad &El 75 the insured was limited to utilising a granary containing a kiln for drying corn. On an occasion the insurers gratuitously allowed the kiln to be used for bark drying, an activity that was more dangerous than corn drying. As as result there was a fire. Here again the temporary use did not prevent the insurers from succeeding. See also Thompson v Equity Fire [1910] A.c. 592. It would further seem that the insurer is not permitted to rely on any such like condition where the alteration alleged is one which is known to take place within such trade or occupation. In Stanley v The Allied Traders Insurance Company Ltd. Vol. 21 Lloyds List Reports 195 the insurer tried to resist a claim in circumstances where a building insured for use as a cinema was over a four week period also used as place where variety shows were put on as what today we would called 'fillers' i.e. in the interval between the showing of different films. The court regarded

this practice as "a well known circumstance to the insurance world." Therefore the attempt to resist the claim on the ground of an alteration failed since there was no increase in risk prior to the destruction of the building by fire. The insurers well knew what was likely to take place in that building.

In the instant case it cannot be said that the defendant insurers or the insurance world would understand that a night club was probably incidental to the operation of a restaurant. Concievably they would be complimentary but as business ventures they are different types of endeavours. Nor can it be said that the night club was not a permanent feature. So, was there such a change as to increase the risk of fire? It is to be noted that the word a "increase" is not qualified in any way. This is an ordinary English world well understood by all. This court proposes to take a broad commonsense approach in resolving this issue. What existed before the night club operation must be compared with what obtained after to determine if there was any increase of the risk of fire. In respect of the cooking facilities there was no change. The changes as I understand them are:-

(a) In the restaurant the congregation of patrons was in an open shed whilst in the nightclub the congregation was in an enclosed room.

(b) This enclosed room was of a wooden structure and as already said the restaurant was of the open air variety.

(c) There was a Hi-fi equipment in the night club and none such in the restaurant. I must add here that a total electrical renovation had recently taken place in the great house.

(d) There was an increase in the number of patrons to the night club vis-a-vis the restaurant. Accordingly there were more persons in this enclosed area. The increase was between 5% to 10%.

I also have to consider the evidence of Mr. Aubrey McLeod. I have already averted to this. I accept his evidence as an expert in the insurance world that in a night club there would be more smoking and imbibing of alcohol than in a restaurant. The more cigarettes lit the more fire to do the lighting - the more possibility of sparks catching the wooden structure.

Again intoxicants do not foster caution. It is my view that taking into consideration the physical attributes of the night club as well as the occupation (i.e. activities that took place therein) there was increase in risk of loss or damage by fire. It is also my view that a prudent insurer being made aware of the existence of this night club as situated and operated would have rated the risk higher than that of the restaurant. It is all a matter of degree and it does appear to me that inherent in the operation of the night club as described in the evidence there was more potential for fire than hitherto. In Sillem and others v Thorton [1854] L.J.R. 352 it was recognised that an addition to a building increased the risk of fire - the addition affording an additional place to be set ablaze. I would imagine that more often than not it is the action of persons that cause fires. Therefore the more persons in an area such as that designated for the night club - behaving as night club patrons - the more probability that there would be an increase in the risk of fire in that area.

The defendants have put forward condition 19 as a bar to the plaintiffs pursuit of this action. Condition 19 states:-

> "In no case whatever shall the Company be liable for any loss or damge after the expiration of twelve month is from the happening of the loss or damage unless the claim is subject of pending action or arbitration."

The loss or damage occurred on the 3rd day of March 1986. It was not until the 11th of August 1987 that action on behalf of the plaintiffs began. However the plaintiffs contend that by the behaviour of the defendants they have waived that condition and consequently could not rely on it. The policy of insurance was not delivered until August 1987. Section 39(1) of The Insurance Regulations, 1972 made under section 104 of the Insurance Act requires an insurance company to issue the relevant policy to relevant parties within not later than 21 days after the receipt for the first premium. The defendants did not abide by this section. However it has not been submitted that this section is otherwise than directory. It is this late delivery of the policy, it is said which constituted the waiver. The plaintiffs relied

heavily on Re Coleman's Depositories Ltd and Life and Health Assurance Association [1904-1907] A.E. 4R. Rep. 383. This was a majority decision (Fletcher Alouton L. J. dissenting). The head note which accurately sets out the circumstance is as follows:-

> "On Dec. 28 the assured applied to the insurers for an an insurance against Workmen's Compensation Act risks, and received from their agent a receipt signed by him and bearing the words 'covered from date.' On January 2 a workman of the plaintiff's was injured by accident, and became entitled to compensation. On Jan. 10 a policy was delivered to the assured insuring them as from Jan. 1, and containing conditions that 'immediate notice' of any accident causing injury to a workman should be given, and that 'the observance and performance of the times and terms before set out are the essence of the contract.' The assured gave notice of the accident to the insureres on March 14, when teh insurers repudiated liability on the ground that the conditions contained in the policy had not been fulfilled.

In his judgment Vaughan Williams L.J. in finding for the insured expresses himself thus:

> "The whole matter for decision before is whether the failure of the employer to comply with that condition affords a good defence to this particular claim.
>
> It could not have been in the contemplation of the parties that his condition as to immediate notice should apply until the contents of the policy had been communicated to the employer. I hold that, on the face of the award, there is no evidence that the employer knew, or had the opportunity of knowing, the conditions of the policy did not impose upon the employer the obligation to give immediate notice of the accident to Corrin on Jan. 2, 1905, prior to the receipt by the employer of the policy or of the information of its containing such a condition or obligation. (emphasis mine)

Buckley L.J. was of a somewhat similar view. He said:-

> "The whole matter for decision before us is whether the failure of the employer to comply with that condition affords a good defence to that particular claim. In my opinion, it does not. On Jan. 2 the employer had no knowledge of the condition which required that he should 'give immediate notice to the association of the accident' which occurred on Jan. 2, for he had at that time no knowledge that it was required of him. The policy, when delivered, was dated Jan. 3, and was to be in force from Jan. 1, 1905. But upon these facts the true

> inference, in my opinion, is that the insurance office, as regards this risk which had resulted in a claim before knowledge of the condition was created, never imposed that condition. The point is not that there was a waiver of a condition which was applicable to this risk. It is that the condition never became applicable to this risk.

Relying on this authority the plaintiffs argued that the unquestionable late delivery of the policy of insurance resulted in a waiver by the defendant insurers of condition 19. It is my view that in this case this authority does not assist the plaintiffs. Knowledge can be imputed, especially when there was "the opportunity of knowing." The plaintiffs had had coverage prior to the effective of the relevant policy of insurance which covered the period of the fire. This for period '84-'85 had the identical conditions as that of the relevant period. In particular condition 19 was numbered similarly and was identical in working. It is Mrs. Swan evidence that she was renewing the old policy. This question was asked of her:-

> Ques. When you set about the negotiations of 85-86 was it in your mind that his policy would be on the same terms and conditions as the 84-84 policy.
>
> Ans. Yes.

She admitted receiving the '84-'85 policy but did not read the 'fine print', presumably the conditions. She would try to portray a picture of innocence as regard her insurance affairs choosing to place total faith in her broker. I hold that in these circumstances it cannot be said that the plaintiffs had not had the opportunity of knowing about condition 19. On the facts, this case is clearly distinguishable from that of Re Coleman's (supra). Accordingly there has been no waiver of condition 19 as contended by the plaintiffs. Condition 19 must be given its full effect.

What has already been said is sufficient as to the decision to which this court has arrived. However, I think I should deal quite shortly with the issue of non-disclosure. It was put forward that the plaintiffs did not disclose the existence of the night club. The plain fact is that when the contract of insurance was concluded there was no night club on the property.

Therefore it is impossible to regard this as a material fact to be disclosed. Finally I should record that that the wholly unmeritorious and unworthy stance of the defendants pertaining to cancellation and or termination of the policy of insurance was abandoned.

There is judgment for the defendants. At the handing down of this judgment I will hear submissions on the question of costs.