IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO.ABU0048 OF 1995
(High Court Civil Action No. 254 of 1991)

BETWEEN:

BLUESHIELD (PACIFIC) INSURANCE LIMITED

APPELLANT

-and-

MAUREEN CHANDRA WATI

RESPONDENT

Mr. S. J. Stanton and Mr. S. P. Sharma for the Appellant
Mr. G. P. Shankar for the Respondent

Date and Place of Hearing : 5 August 1997, Suva
Date of Delivery of Judgment : 14 August 1997

JUDGMENT OF THE COURT

This appeal is against the judgment of Sadal J. in an action relating to two life insurance policies on the life of Dr. A.L. Dass. The respondent is his widow and the sole executrix of his estate. The appellant, an insurance company incorporated in Fiji, rejected her claim on the grounds of non-disclosure of material facts and misrepresentation by Dr. Dass. The learned trial judge found that there was not any such non-disclosure or misrepresentation and gave judgment for the respondent for $200,000, interest at the rate of 4% per annum from the date of Dr. Dass' death and costs.

The grounds of appeal are:-

The learned trial Judge erred in failing to find that the deceased had made a material non-disclosure by failing to disclose that he had a radical change in his health that it (sic) would have effected (sic) the risk that the appellant was prepared to consider in respect of the proposal of life insurance and the renewal thereof as at the 1st August 1988 by failing to disclose that the deceased had hypertension and suffered from chest pains from time to time.

The learned trial Judge erred in finding that he could not accept the evidence of Ambika Prasad in preference to the evidence of the Respondent.

The learned trial Judge erred in failing to find the deceased misrepresented and/or concealed a material fact viz hypertension, to the Appellant.

The learned trial judge failed to assess the evidence with respect to the defence of non-disclosure and misrepresentation as propounded by the Appellant and find that there had been such a non-disclosure and misrepresentation by the deceased thus avoiding the policies.

That the learned trial Judge erred in his analysis of the evidence adduced during the trial and especially so in relation to his findings on credibility given that the judgment was delivered approximately two years after the date of the trial.

Such further or other grounds as may become available upon perusing the record.

The appellant set out particulars in respect of the grounds of his appeal as follows:-

Ground 1, 3 and 4 particulars

The document concerning the renewal was in evidence insofar as it was discovered.

The existence of hypertension and the chest pains were material and the non-disclosure was equally material to the extent that it could have affected a prudent insurer in respect of the risk it was prepared to consider in writing the policy.

The fact that the doctor did not prescribe medicine for himself or that his wife as an experienced nurse or even Dr. Sorokin (sic) as the Appellant's designated medical practitioner did not take any notice of the same are irrelevant insofar as it is the Appellant ultimately that accepts the risk which it must do on the basis of the disclosure made to it.

The learned trial Judge erred in failing to hold and/or consider that there was a notice and/or a basis for the non-disclosure by the deceased and more particularly by the wife of the deceased, the Respondent in not bringing the matter to the attention of the insurer i.e. the benefit to be gained.

The effect of the ruling that there was (sic) a non-disclosure does not meet the evidence or the contentions taken with respect to the evidence as lead (sic) ultimately and on the whole

as opposed to in part and especially when considered against the evidence of Mr. Prasad called by the Appellant.

(a) The failure to so consider that evidence does not accord with the authorities which are referred to in a Schedule to the Amended Grounds of Appeal in respect of each individual ground the authorities are listed in that particular ground in the Schedule annexed.

Ground 2 particulars

(a) The failure to accept Prasad was without foundation because the learned trial Judge did not give due weight to the fact that Prasad although looking from his notes was not found to be a witness who fabricated or was untruthful in the evidence that he gave.

(b) There is nothing given as to the demeanour of Prasad or the manner in which he gave his evidence to indicate that he was capable of not being believed.

(c) Prasad was interviewing the Respondent who made admissions contrary to the interest of the deceased (sic) and of course to her own ultimate interest as the administratrix of his estate and in this regard the basis for rejecting Prasad's evidence was not alerted (sic) to or even made out in the trial Judge's reasons.

(d) The very fact that Prasad looked at his notes is of no moment and often occurs with witnesses in cases who give evidence of an investigation and the manner in which the investigation was given. No objection was taken to Prasad looking at his notes nor

did the trial Judge refuse him access to those notes.

(e) There was no issue as to the lack of contemporaneity with those notes.

(f) The reason for accepting the Respondent over Prasad is because the Respondent was a trained nurse and if the deceased was ill she would have had him treated. This is with respect to the trial Judge hardly a conclusive finding for accepting her over Prasad. In fact it belies the fact that there was a hidden agenda in the evidence of the Respondent.

(g) The fact that Prasad had no memory of the conversation but needed to refer to his notes does not mean the conversation did not take place. More particularly the fact that he had notes of the conversation was of itself an indication that his testimony of the Respondent (sic) and should not have been discarded as it was. In any event the failure by the trial Judge to give a judgment in a period soon after the evidence was given – two years later – meant that his memory of the events himself and in particular the demeanour of the witnesses and the manner in which the evidence was given would have had to be severely impaired by the time he came to write his reasons. More to the point no transcript of the proceedings being taken but rather just notes of what was said would have equally hampered his recollection of the manner in which the testimony was given and the assessments he would have had to come to with respect to demeanour and the evidence of each of the witnesses and the acceptance and/or rejection thereof.

(h) The basis upon which such evidence should be given and the purpose that is best served in considering evidence should be given (sic) and the purpose that is best served in considering evidence of such a nature is referred to in the decisions which

appear in the Schedule hereto. It is submitted that the trial Judge did not adopt the procedure as referred to in the authorities and on that basis an appeal court would be justified in interfering with his findings of fact.

Ground 5 particulars

This ground speaks for itself. It is axiomatic that in any decision or judgment if at all possible it should be given as expeditiously as it can be. This was not a matter where there were complex questions to be decided and the failure to give judgment with due dispatch within the time frame that would be regarded as reasonable i.e. 1-3 months as compared to two years facilitates the observation regarding the fact that passage of time has prevented proper resolution of the issues and has clouded or dimmed the ability to gauge the demeanour and the fact finding ability by virtue of the passage of time since the case was heard.

At the trial numerous documents were received as evidence; they constituted most of the evidence regarding the issue of the two policies. Brief oral evidence was given by the respondent, by a private investigator Mr. Ambika Prasad, by a Claims Officer of the appellant Mr. Wilson Tokowara and by a consultant physician Dr. M. Sorokin.

The documentary evidence established that in 1986 Dr. Dass, through an insurance broker, sought life insurance cover from Blue Cross (Asia-Pacific) Insurance Ltd., a company incorporated in Hong Kong. Part of his proposal, containing his answers to

questions concerning his health, was included in the documents tendered at the trial. Essentially he answered that his health was good. There was no evidence at the trial whether Dr. Dass was medically examined nor whether his blood pressure was measured and, if so, what it was. A policy was issued providing life cover of $200,000 and total permanent disability cover of $100,000. The policy commenced on 19 September 1986, Dr. Dass' 54th birthday, and was for a term of five years renewable up to his 70th birthday. Premiums were payable annually on 19 September.

On 1 August 1988 the insurance broker wrote to Dr. Dass informing him that his policy could be "localized". That, the broker wrote, would avoid delays by making it unnecessary to obtain permission from the Commissioner of Insurance to "place this policy offshore" and would facilitate the making of "changes throughout the policy year". The administration of "this policy" would be "looked after" by the "local insurer". The last paragraph of the letter read:-

> ***"Kindly return the duplicate of this letter with the Declaration completed and premium cheque made out to Blue Shield (Pacific) Ins. Ltd to this office at your earliest opportunity to ensure continued protection."***

The declaration was in capital letters and as follows:-

> *"DECLARATION: HAS THERE BEEN ANY RADICAL CHANGE IN THE STATUS OF YOUR HEALTH SINCE THE FIRST TIME YOU TOOK YOUR*

CURRENT POLICY? IF SO GIVE DETAILS."

Dr. Dass wrote "NO CHANGE", signed the declaration and, presumably, returned it to the insurance broker; the broker sent it to the appellant and it was tendered in evidence by the appellant.

At the foot of the insurance broker's letter is a note indicating that "Replacement policy terms and conditions & policy rates" were enclosed with it; they were not tendered in evidence and no evidence was given whether or not they were in fact enclosed. It appears that the appellant did not require Dr. Dass to make a formal proposal for the "replacement policy" with details of his health or to be medically examined. It is reasonable to infer, however, that it did require the declaration to be made.

On 12 October 1988 the insurance broker wrote to the appellant asking it to hold Dr. Dass covered for $50,000 life insurance and stating that "this is a renewal of his Blue Cross [policy] but at a reduced sum assured" and without cover for total permanent disability. On 22 October 1988 the appellant issued a life insurance policy with cover of $50,000. The term of the policy was five years. In the recital at the commencement of the policy it was stated that the life insurance cover was provided on the basis of declarations made by Dr. Dass. Subsequently the insurance broker informed the appellant that Dr. Dass wanted the "balance" of the cover for a term of one year. On 4 February 1989 the appellant issued a second life insurance policy providing life cover of $150,000 and total permanent disability

cover of $100,000; its term was stated as "renewable one year". It contained the same recital as the policy issued on 23 October. Its date of commencement was 19 September 1988. Again, it appears that Dr. Dass was not required to complete a proposal form or answer detailed questions about his health.

On 19 September 1989 the appellant issued another policy providing life cover of $50,000. It bore the same number as that issued on 22 October 1988, except that the final figure was (2) instead of (1). The type of the policy was stated, as previously, to be "5 Years Level Term" but the last premium was shown as due on 19 September 1989, if paid annually, or 19 May 1990, if paid quarterly. No evidence was adduced why a new policy was issued or why its term was possibly changed. There was no evidence that Dr. Dass was required to make a new proposal or give any information about his health.

On 19 September 1989 the appellant also issued another policy providing life cover of $150,000 and total permanent disability cover of $100,000. It bore the same number as that issued on 4 February 1989 except that the final figure was (2) instead of (1). It contained the same recital. There was no evidence that Dr. Dass was required to make a new proposal or to give any information about his health.

Dr. Dass died on 29 August 1990, before the expiration of the term of those two policies. He died suddenly in the evening after doing a full day's work as a medical practitioner. Dr. Sorokin gave evidence that in his opinion the cause of death was acute

cardiac failure. No post-mortem examination was conducted.

The earliest documentary evidence of Dr. Dass' health was a report by Dr. Sorokin dated 6 July 1985; Dr. Sorokin gave evidence that it was written in connection with insurance, the insurer being New Zealand Insurance Co. The report gives details of urinalysis, electrocardiograph, blood count and blood biochemistry. Dr. Sorokin gave evidence that the electrocardiograph reading was "normal" and that Dr. Dass' health was normal. No evidence specifically relating to the details in the report was adduced at the trial. Endorsed on the report, apparently by Dr. Sorokin, is a note "21/3/87 BP 170/100 Advised".

The next documentary evidence of Dr. Dass's health was a report of a chest X-ray carried out on 27 May 1988 "for immigration purposes" at the request of Dr. Jamnadas. The consultant radiologist recorded "NAD", i.e. nothing adverse detected. The final piece of documentary evidence was a report to Mr. Ambika Prasad's firm dated 20 February 1991 by Dr. Sorokin. Dr. Sorokin's oral evidence was essentially the same as the contents of his written report.

Dr. Sorokin gave evidence that he had known Dr. Dass since 1968, as a junior, then as a colleague and as a friend. He said that Dr. Dass consulted him once in March 1987 and asked him to measure his blood pressure. Dr. Sorokin found it to be 170/100; he described that in his evidence as "marginally elevated". Dr. Sorokin said that they discussed investigation and treatment and that Dr. Dass told him that he would "carry on himself"; he

did not measure Dr. Dass' blood pressure again. The next occasion when he discussed Dr. Dass' health with him was, he said, in February 1990; he met Dr. Dass at a conference and Dr. Dass told him that he was having chest pain. Then in August 1990, the month of Dr. Dass' death, Dr. Dass told him, in the course of a telephone conversation about another matter, that he was much better. It was as a result of what Dr. Dass had told him and his knowledge of Dr. Dass' "previous history" that he formed the opinion that the cause of death was acute cardiac failure. He said that blood pressure readings could vary from one time to another; it could be elevated one time and normal the next. He said also that he could not say whether Dr. Dass suffered from any heart disease or heart problem.

The only other evidence of Dr. Dass' health was given by the respondent. She said that she was a qualified nurse with forty years' experience. For the last years of Dr. Dass' life she had been working with him; she had done so on the day of his death. She gave evidence that he was in very good health and taking no medicine for his heart; if he had had any health problem, being a nurse she would have had him treated. She gave evidence also that, when Dr. Jamnadas examined Dr. Dass in 1988 for the purpose of obtaining approval for immigration to Australia, she was present. Dr. Dass' blood pressure was found to be normal. She said that she "last knew" his blood pressure to be 120/100. She said that Mr. Ambika Prasad came to see her and that she gave him Dr. Dass' death certificate but denied telling him that Dr. Dass had had a heart problem or high blood pressure.

Mr. Ambika Prasad gave evidence that he had been a Superintendent in the police

force before retiring. He said that on 24 January 1991 he visited the respondent, interviewed her and made notes of their discussion; however, they were not read back to her. After refreshing his memory from those notes, he gave evidence that the respondent told him that Dr. Dass had had hypertension and heart disease and that he had had the hypertension for 3-4 years. He did not give his evidence of those matters in any greater detail and under cross-examination said that the respondent told him that Dr. Dass "was in good health". Re-examined, however, he reasserted that she had told him that Dr. Dass "had heart problem".

Mr. Tokowara tendered a number of the documents received in evidence. He admitted that he did not know what the expression "radical change" in the declaration meant. Otherwise he gave no evidence of any significance.

Sadal J. noted in his judgment that the appellant contended that in September 1986 Dr. Dass gave a false answer to a question in the proposal form for the Hong Kong insurer's policy when he wrote "No" in response to the question "Are there now any circumstances which may affect the risk of an assurance on your life?". His Lordship commented, with regard to that contention, that Dr. Dass "was examined by Dr. Sorokin in 1987 and the insurance company's designated doctor" and that "Dr. Sorokin gave a report stating that [Dr. Dass] had no health problem". With respect, he appears to have confused Dr. Sorokin's evidence of examining Dr. Dass at his request in 1987 with his evidence of the medical examination which he carried out in 1985 for the New Zealand insurer. The Hong Kong insurance company issued its policy on 6 November 1986. There was no evidence before

His Lordship whether in 1986 Dr. Dass was suffering from hypertension or a heart problem or not.

The next contention of the appellant with which Sadal J. dealt was that Dr. Dass gave a false answer when he made the declaration that the insurance broker asked him to make in August 1988. He said that Dr. Sorokin had given evidence that he could not say from the one blood pressure reading in March 1987 whether Dr. Dass was suffering from hypertension. The record does not include any evidence of Dr. Sorokin in those express terms; however, it may possibly have been His Lordship's paraphrasing of Dr. Sorokin's evidence, referred to above, that blood pressure could vary up and down from time to time. He preferred the evidence of the respondent to that of Mr. Prasad in respect of what was said when he came to see her in January 1991. He found that Dr. Dass did not answer the question untruthfully. He found further that Dr. Dass did not conceal anything within his knowledge.

The appellant did not deny that it issued the policies but asserted misrepresentation and non-disclosure of material facts by Dr. Dass. The onus of proving that rested on the appellant.

Mr. Stanton correctly acknowledged that there was no evidence that Dr. Dass was aware of any heart problem until 1990, after the policies current at the time of his death had been issued. There was, of course, no obligation on him to disclose any change in his health

after the issue of those policies (**NSW Medical Union Ltd v. Transport Industries Insurance Co. Ltd.** (1985) 4 NSWLR 107).

Mr. Stanton based his argument that Dr. Dass was guilty of misrepresentation and non-disclosure on the fact that Dr. Dass knew from March 1987 that his blood pressure had been measured in that month at 170/100. He submitted that because of that, Dr. Dass knew that there had been a radical change in the status of his health since the first time he took his Hong Kong policy. He also failed to disclose the blood pressure reading; Mr. Stanton submitted that, as a medical practitioner, Dr. Dass must have been aware that it was material information. He related that non-disclosure to his obtaining the two new policies in 1988. As the second of them was for a term of only one year renewable, he might have made the submission also in respect of the renewal of that policy in 1989. However, there was no evidence that the state of Dr. Dass's health and his knowledge of it in 1989 was different from what it was in 1988. Consequently, the evidence relevant to the issue of non-disclosure is the same for both occasions.

We shall deal first with issue of misrepresentation. In order to establish that, the appellant needed to prove:-

(a) that by August 1988 there had been "a radical change in the status of [Dr. Dass's] health". since September 1986; and

(b) that Dr. Dass knew that.

In order to establish (a) the appellant needed to prove both the status of Dr. Dass' health in September 1986 and its status in August 1988. It adduced evidence that Dr. Dass wrote in his proposal in 1986 that his health was good but it did not adduce evidence of blood pressure measurements at that time. It therefore, failed to establish that the "status" of his health (whatever it intended by that term) had changed at all between the two dates. It certainly did not establish a "radical change" which we interpret as meaning a thorough change (see Shorter Oxford English Dictionary, 3rd edition, meaning No.3 of "radical"). Consequently there was no evidential basis on which His Lordship could have found that there was misrepresentation.

The duty of disclosure is distinct from the requirement not to misrepresent facts. It arises out of the fact that a contract of insurance is a contract ***uberrimae fidei.*** A person seeking to be insured must disclose to the intended insurer any facts within his or her knowledge that are material, that is to say which would affect the mind of a prudent insurer in deciding whether or not to provide cover (**Mayne Nickless Ltd v. Pegler** [1974] 1 NSWLR 228). Facts are material if the person seeking the insurance knows that the intended insurer regards them as so, even though he or she might otherwise not regard them as material (**Glicksman v. Lancashire and General Insurance Co. Ltd.** [1925] 2 KB 593). The manner in which a person seeking insurance generally finds out what the intended insurer regards as material is by reference to the questions which the intended insurer requires him to answer. Of course, some persons may have such knowledge by reason of their having worked in the insurance industry or in connection with it. Mr. Stanton submitted that, because Dr. Dass was a medical practitioner, he would have had that

knowledge. However, there was no evidence that he ever carried out medical examinations on behalf of an insurer or that he had any specialist qualifications relevant to the assessment of medical risks. In **Condogianis v. Guardian Insurance Co. Ltd.** [1921] 1 AC 125 the House of Lords held that, if upon the fair construction of a question which an insurer requires to be answered the person seeking to be insured gives a truthful answer, the insurer cannot contend that it wanted more information. In Dr. Dass' case the insurer asked only whether there had been a radical change in the status of his health from what it was two years before.

Mr. Stanton has submitted that the learned trial judge failed to evaluate properly the evidence presented before him and consequently did not make a correct finding in respect of Dr. Dass' knowledge of the state of his health. He referred to Mr. Ambika Prasad's evidence of the respondent's admission that Dr. Dass had suffered from hypertension for 3–4 years and submitted that there was no proper basis for His Lordship's conclusion that the respondent's evidence that she did not make that admission was to be preferred to Mr. Prasad's. Certainly he gave no reasoned explanation of why he reached that conclusion. He did not deliver his judgment until two years after having heard the evidence; that could well have affected his memory of the demeanour of the witnesses. On the other hand he had received lengthy written submissions from counsel which would have served to keep his memory fresh. Mr. Prasad did not obtain any written acknowledgement from the respondent regarding her admission; the admission as he related it was in the most basic form without detail. He did not give evidence of how he elicited it or whether the words in which he recounted it were the respondent's or his own interpretation of what she told him. As the respondent already given evidence denying that she made the admission, the onus was on the

appellant to prove that she did. Detailed evidence should have been adduced from Mr. Prasad by the appellant. On the evidence which had been given it was, in our view, not unreasonable for the learned trial judge to as he did; even if he had accepted Mr. Prasad's evidence, it would have been surprising if he had concluded that any admission made by the respondent added substantially to the sum of the established facts regarding Dr. Dass' health in 1988 and 1989 and of his knowledge that those facts were material and should be disclosed.

Apart from the respondent's alleged admission, the only evidence of any abnormality in Dr. Dass' health in 1988 was the one blood pressure measurement of 170/100 in March 1987. There was no evidence of any abnormality in 1989. Dr. Sorokin described the blood pressure measurement of 170/100 as "marginally elevated". He did not prescribe any medication. There was simply no evidence before Sadal J that the single blood pressure reading in March 1987 indicated that there had been any significant change to Dr. Dass' health from what it was in 1986, so that it could not be said that he would have known that the single blood pressure reading was a material fact which he should disclose to the insurer. What evidence there was relevant to that issue was that to which we have referred above where Dr. Sorokin said that blood pressure readings could vary from one time to another; it could be elevated one time and normal the next. That does not suggest that one "marginally elevated" measurement indicates a significant change of health so as to amount to a material fact that should be disclosed to an insurer.

Relating the above discussion and the conclusions which we have reached to the grounds of appeal, we are satisfied that the appeal cannot succeed on any of them. Accordingly it is to be dismissed.

However, before concluding it we wish to refer to two matters. First, the delay time between commencement of the action and judgment of the High Court was excessive, over 3½ years. Dr. Dass died in 1990. He insured his life in order to make financial provision for his wife if he died. She was deprived of that provision first by the appellant's refusal to pay her and then by the delay in hearing and determining her action in the High Court. There has been a further delay of nearly two years in getting the appeal to hearing in this Court. Those delays reflect no credit on the persons responsible for them. There were several far too lengthy adjournments in the High Court (from March 1992 to September 1993), for which counsel must take much of the responsibility and there was the delay by the judge in delivering his judgment, a delay of 18 months from filing of the last of counsel's written submissions.. If his workload is too great, that is a matter which needs to be addressed urgently.

The second matter to which we refer is the attitude taken by the appellant to the respondent's claim. Dr. Dass was previously insured until 1991 by the appellant's associated company in Hong Kong and would ordinarily still have been covered by its policy at the time of his death if he had not accepted his broker's suggestion that he should "localise" it. The policies under which the respondent made her claim were issued simply to "localise" that policy in Fiji.

It was not suggested that the appellant had any grounds to believe that Dr. Dass was guilty of any misrepresentation or non-disclosure when he obtained the Hong Kong policy in 1986. As the evidence was presented at the hearing, there appeared to be little to justify its taking the course taken in respect of the respondent's claim under the "localised" policies, which has led to the respondent, a woman in her sixties, suffering for nearly seven years deprivation of the money to which she was entitled under the policies, for which her husband had paid, and the appellant had accepted, the premiums over the years. We trust that, following the delivery of this judgment, the appellant will not delay payment further.

We dismiss the appeal and order the appellant to pay the respondent's costs of the appeal.

I.R. Thompson
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Mr. Justice I. R. Thompson
Judge of Appeal

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Mr. Justice J. D. Dillon
Judge of Appeal

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Mr. Justice Savage
Judge of Appeal

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