RAMPATI

v.

QUEENSLAND INSURANCE CO. LTD.

[SUPREME COURT, 1964 (Mills-Owens C.J.), 27th-30th July, 25th August]

Civil Jurisdiction

Insurance—fire policy—breach of condition for supply of particulars of claim—misrepresentations made orally in course of preparation of proposal—"dash" in space for answer implying nothing to be disclosed—incorporation of proposal in policy—repudiation of liability by insurance company.

The plaintiff claimed on an insurance policy for damage to her premises, plant and furniture caused by fire. The defendant company relied upon defences (a) that the plaintiff was in breach of Condition 11 of the policy in that she had not forthwith given notice of the loss and had not, within fifteen days, delivered particulars in writing of the items damaged or destroyed, and (b) that the plaintiff had given false information in oral answers to two questions in the proposal viz. (i) whether she had ever had any property damaged or destroyed by fire and (ii) whether she had ever had any insurance cancelled. The policy contained a proviso that the insurance was subject to the particulars in the proposal, which should be deemed inserted or furnished by the insured, and the proposal *(inter alia)* constituted the basis of the insurance and formed part of the policy.

Held: 1. On the evidence, the requirement in Condition 11 that notice of the loss should be given forthwith had been complied with but the further requirement that particulars in writing be delivered within fifteen days had not.

2. The requirement of the delivery of such particulars had not been waived by the defendant company and it was therefore unnecessary to decide whether Condition 20 of the policy, which protected the defendant company against the consequences of waiver except in certain circumstances, could itself be waived.

3. On the evidence the defence succeeded on the ground of misrepresentations orally made by the plaintiff in answer to questions on both of the matters pleaded.

4. The fact that the space in the proposal provided for the answer to each of the questions was completed by a mark in the nature of a dash, and not by the word "No" could not avail the plaintiff, as the reasonable inference, accepted by the plaintiff by signing the proposal, notwithstanding in the circumstances of the case her illiteracy, would be that there was nothing to be disclosed.

5. That the proviso incorporating the proposal in the policy disposed of the question of whether the representations were made with respect to a material fact or whether the representations became part of the contract as a term thereof.

A

Cases referred to: *Thomson v. Weems* (1884) 9 App. Cas. 671: *Dawsons Ltd. v. Bonnin* [1922] 2 A.C. 413; 128 L.T.1: *Glicksman v. Lancashire and General Assurance Co. Ltd.* [1927] A.C.139; 136 L.T. 263: *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356; 141 L.T.570: *Welch v. Royal Exchange Assurance* [1939] 1 K.B.294; [1938] 4 All E.R. 289: *Marcovitch v. Liverpool Victoria Friendly Society* (1912) 28 T.L.R. 188.

B

Action on insurance policy to recover fire damage.

R. A. Kearsley for plaintiff.

C

D. M. N. McFarlane for the defendant company.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J.: [25th August, 1964]—

D The Plaintiff was insured against fire with the Defendant Company under a policy of insurance current for the year commencing 17th January, 1962, in the aggregate sum of £3,400. On the 27th December, 1962, in the early hours, a fire occurred in consequence of which the property insured was extensively damaged, if not destroyed. The Plaintiff now claims to recover under the Policy. The arbitration clause contained therein has not been resorted to by the parties. The E property insured comprised a building used as a dwelling house and mill, machinery and plant therein, and household furniture and personal effects, the respective values of which were stated in the Policy to be £2,450, £550 and £400, but the Policy is not a valued policy in the sense that these amounts are recoverable without proof of the actual loss or damage sustained. The claim includes an item for stock-in-trade but it is clear that the Policy does not extend F thereto. It is agreed by counsel that in the event of liability being established then the matter of ascertainment of the amount recoverable should be referred to the Registrar.

The first ground of defence is that the Plaintiff is in breach of Condition No. 11 of the Policy, which provides, inter alia—

G

"11. On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within fifteen days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company—

H

(a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto

respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.

.....

No claim under this Policy shall be payable unless the terms of this condition have been complied with." A

There is an acute conflict of evidence as to the lodgment of the claim. According to the case for the Plaintiff, the claim form, duly completed and sworn by her, was lodged by her and her son, Prem Singh, at the Defendant Company's Suva Office at about 2 p.m. on the day B of the fire. It is not suggested that the claim form was then accompanied by the particulars required under Condition No. 11. The son says that he saw the Manager, Mr Quartermaine, and that he, having scrutinised the form, told him, first "This is alright" and then that he wanted to see their solicitor, Mr. Ramrakha, about the matter. According to their evidence, the Plaintiff and her son then went to C fetch Mr. Ramrakha and brought him to Mr. Quartermaine's office where a conversation ensued between Mr. Ramrakha and Mr. Quartermaine. Mr. Ramrakha corroborates them with respect to this meeting having taken place but puts the time of the meeting as about 11.30 a.m. or 12 noon. He also corroborates the son as to what was then said. It is alleged that Mr. Quartermaine stated that they could take their time about sending in the necessary particulars and fur- D ther that, in answer to a question by Mr. Ramrakha, he said that he regarded the claim as lodged. Mr Quartermaine categorically denies that any such conversation took place, or indeed that any such meeting took place. What happened, he says, is that on an occasion two or three days after the fire Mr. Ramrakha came hurriedly into his, Mr. Quartermaine's office and said that the claim was "not right". Mr. Quartermaine, as he says, then had the claim form on his desk E but it was still unfolded and he was not even in a position to say whether it had been completed. He was unaware how the form had been delivered to his office. In view of what Mr. Ramrakha then said he handed over the form, unopened, to him. According to the case for the Defendant Company no effective claim was lodged until a claim form duly sworn and containing by annexure particulars of the items destroyed and their values was sent in with a letter written by F Mr. Ramrakha to Mr. Gould, the Company's Assessor, on the 5th February, 1963. As the 15 days allowed by the Company expired on the 11th January, without, as the Company say, any waiver or extension of time having been granted, the claim was out of time.

It is accepted that the Company's officials were orally informed of the fire within a matter of hours on the day of the fire, when the G Plaintiff's son attended the Company's office to report it and there saw first the Assistant Manager and then Mr. Quartermaine, but the Company contends that by virtue of Condition No. 21 written notice was required. According to the case for the Plaintiff, as appears above, a claim in writing, albeit without particulars at that stage, was lodged on the day of the fire and, later in the day Mr. Quarter- H maine orally waived strict compliance with Condition No. 11 in so far as it required particulars to be delivered within 15 days. The Defendant Company relies upon the strict letter of Condition No. 11

and contends that written notice was no given 'forthwith'; the claim form taken away by Mr. Ramrakha two or three days after the fire, had not been delivered forthwith and as the Company says, when it was taken away it had not even been unfolded. As regards the alleged waiver or extension of time, the Company not only denies it but relies upon Condition No. 20 which provides:

> "20. No provision or requirement of this Policy requiring any matter or thing to be done, or to be written or endorsed hereon, shall be deemed waived by reason of any alleged notice or waiver which has not been expressly written or endorsed hereon; nor shall the Company be deemed to have waived any provision or condition of this Policy, or any forfeiture thereunder, by any requirement, act, or proceeding on its part relating to the appraisement of any alleged loss, unless such provision, condition, or forfeiture be expressly stated in writing to be waived by the Company."

Pursuant to leave granted during the interlocutory stages of the action, the Defence was amended to plead further that the Plaintiff had given false information in oral answers to certain questions in the Proposal leading to the issue of the Insurance Policy. The Statement of Defence refers to this as a non-disclosure, but the facts pleaded, if established, clearly amount to (oral) false representations. Upon these grounds the added plea sought to 'avoid the Policy'. By a further amendment allowed during the hearing, the alternative plea of repudiation of the claim was added.

The facts pleaded are that in answer to the question whether the Plaintiff had ever had any property damaged or destroyed by fire, she answered in the negative when, in the preceding month, December, 1961, she had had a motor car, insured with another company, the Southern Pacific Company, destroyed by fire; and that in answer to the question whether she had ever had any insurance cancelled, she replied in the negative when in fact the property then about to be insured with the Defendant Company had previously been insured with the Southern Pacific Company and that Company had, on the very day of the Proposal made to the Defendant Company, cancelled the insurance. It is admitted by the Plaintiff that she had previously made a claim in respect of the destruction of a motor car by fire but, as she says, when the question appearing in the Proposal was put to her by the clerk of the Defendant Company, Mr. Vijay Lal, she informed him fully of that occurrence, and her case is that if the clerk chose to put a "dash" in the space provided for the answer to the question on the Proposal form it is not her responsibility. She is illiterate and without knowledge of the English language, and, as she says, having answered truly, she merely affixed her thumb print to the Proposal as the clerk invited her to do. With regard to the question whether she had ever had any insurance cancelled, the Plaintiff acknowledges that she had previously been insured with the Southern Pacific Company and that the policy had been cancelled that very day but, she says, it was she, not the Southern Pacific Company, who cancelled the policy. Further, as she says, she disclosed this to the Defendant Company's clerk as he made out the Proposal for her to sign. Again, therefore, if the clerk chose to put a "dash"

in the space provided, rather than to insert her actual statement to him, it is not her responsibility. The evidence for the Defendant Company is that the Plaintiff orally answered 'no' to both questions, and therefore falsely, and the "dash" in the space provided in the form was, in the case of each question, intended to represent her negative answer; in fact, as the Defendant Company says, it was the Southern Pacific Company who cancelled the policy, not the Plaintiff.

The case involves not only a direct conflict of evidence on material facts but also a consideration of the provisions of the Policy under which the present claim is made, in the context of the law applicable to fire insurance.

As it appears to me, the opening provision of Condition No. 11 requiring immediate notice of the fire, was in fact complied with. Mr. Quartermaine had been orally informed of the fire and had visited the scene on the day of the occurrence, and, on his evidence, a claim form was actually delivered to the Defendant Company's office sometime within the next two or three days. Mr. Quartermaine could not say precisely when it was delivered and therefore could not contradict the evidence for the Plaintiff that it was delivered on the day of the fire. Accepting for the moment that Mr. Ramrakha did, as alleged on behalf of the Defendant Company, take away the form two or three days after the fire, and before Mr. Quartermaine had an opportunity to examine it, there was, in my view, no such unequivocal withdrawal or abandonment of the claim as to enable the Defendant Company to say that it failed or ceased to have effect as a simple notice of the occurrence in accordance with the conditions. Whether there was compliance with the requirement of the delivery of a particularised claim within the 15 days is a different matter, to which I shall advert later.

Turning to the question of the alleged non-disclosure or misrepresentation in the Proposal, it is necessary to refer to other provisions of the Policy. First, there is Condition No. 1 to the effect that if there be any misrepresentation as to a material fact, or any omission to state such a fact, the Company is not to be liable. Secondly, there is the 'proviso' prominently appearing on the face of the Policy, to the following effect:

> "PROVIDED ALWAYS that this Insurance shall at all times and under all circumstances be subject to the particulars in the Proposal for this Insurance (which shall in all cases be deemed to be inserted or furnished by the Insured), and to the Conditions and Stipulations printed on the back hereof, which Proposal, Conditions and Stipulations constitute the basis of this Insurance, and are to be considered as relevant to and incorporated in and forming part of this Policy."

The implications of this provision are of considerable importance in more than one respect. First, it disposes entirely of one question which commonly arises under the ordinary law of contract regarding false representations, namely whether the representation was made with respect to a material fact. In the presence of such a provision it is no longer a question whether the representation is material in

the sense that a prudent insurer would be affected, either in the taking of the risk or in the fixing of the premium, by knowledge of the particular fact with regard to which there has been a misrepresentation, if it had been disclosed (*Thomson v. Weems* (1884) 9 App. Cas. 683, 684). Secondly, it disposes of the further question which might arise in the case of an ordinary contract, namely whether the representation operated merely as an inducing factor, that is to say a factor inducing the other party to enter into the contract, or, on the other hand, became part of the contract as a term thereof. Under the proviso the representation becomes, *pro tanto*, contractual (*Dawsons Ltd. v. Bonnin* [1922] 2 A.C. 413). Thirdly, where the Proposal is made the basis of the policy, the insurers are entitled, in the event of the inaccuracy of a representation or a non-disclosure, to repudiate liability under the policy, not merely to take steps to avoid it (Ibid., *Glicksman v. Lancashire and General Company* [1927] A.C. 139; and *Thomson v. Weems* (supra)). Fourthly, in the face of such a provision, it becomes unnecessary to consider whether an inaccurate statement or suppression of the truth was made fraudulently or innocently: (*Thomson v. Weems* (supra) at p. 689; *22 Halsbury* para. 371). Fifthly, the words appearing in parenthesis in the proviso in question, namely "(which shall in all cases be deemed to be inserted or furnished by the Insured)", must go some way to dispose of any suggestion that responsibility for the completion of the Proposal rests on the insurer: (*22 Halsbury*, paras. 386-387).

The Plaintiff's account in her evidence of the manner in which her previous policy with the Southern Pacific Company came to be cancelled was as follows: She asked a friend and neighbour, Inderjit Singh, to accompany her to the Defendant Company's office for the express purpose of herself cancelling the policy. Her reason for doing so was that that Company had refused to make a payment, or was delaying payment, to her son, Prem Singh, in respect of personal injuries caused to him by the driver of a motor vehicle who was insured against third party risks with the Company. It is a fact that the son had sustained such an accident and that a claim had been made against the driver, and that for some reason the Company had not made payment although some 12 months had elapsed since the accident; a settlement was not arrived at with the son until some months after the cancellation of the Plaintiff's fire policy with the Company. Inderjit Singh purported to corroborate a number of visits paid by the Plaintiff to the Southern Pacific Company when, as he and the Plaintiff say, the Plaintiff was insisting upon cancellation of her fire policy and eventually this was accepted by the Southern Pacific Company and she was repaid part of the premium in respect of the unexpired period. But the evidence of Mr. Rolls, the Manager of the Southern Pacific Company, and of its clerk, Mr. Ram Shankar, was to an entirely different effect, namely that it was the Company and not the Plaintiff who had cancelled the policy. Mr. Rolls deposed that when the Plaintiff made her claim in respect of destruction of the motor car in December, 1961, he made it his business shortly after to go and examine the house property insured with his Company by the Plaintiff, and having done so came back to his office and gave instructions that the policy in respect of the house property was to be cancelled. He was present when the Plaintiff attended at

the office and was interviewed by Mr. Ram Shankar, who dealt with the amount repayable to her. Mr Rolls was not, however, familiar with the Hindustani language in which the Plaintiff and Mr. Ram Shankar conversed. But he was able to say that Inderjit Singh was not present and that the Company acts on a different principle when it itself cancels a policy than that on which it acts when the insured makes the cancellation. In the former event full repayment on a pro rata basis for the unexpired period is made; in the latter event the amount repayable is less, according to a formula adopted by the Company. In the present case a full pro rata payment was made as is apparent from the actual figure acknowledged by the Plaintiff as having been repaid to her. The evidence of Mr. Rolls was cogent and convincing, as likewise was that of the clerk Mr. Ram Shankar, and I accept as a fact that it was the Company and not the Plaintiff who cancelled the policy. On this issue it follows that there was a misrepresentation in the Plaintiff's oral answer to the question in the Proposal; an answer which must have been consciously false having regard to the admitted fact that it was on that very day that the Southern Pacific Company Policy was cancelled. Once it is accepted that the Plaintiff herself cancelled the Policy there can be no question that she stated the true position to the Defendant Company's clerk, Mr. Vijay Lal, when she signed the Proposal; it is her case that she cancelled the insurance herself and informed the clerk to that effect.

A B C D

As to the matter of the destruction of her car by fire, the Plaintiff said in evidence that she distinctly informed the clerk, Mr. Vijay Lal, that she had made a claim in respect of a motor car but he gave her to understand that this was not material as the question now was whether she had ever had any house property destroyed by fire. Here the conflict of evidence is one between that of the Plaintiff herself alone and that of the clerk, Mr. Vijay Lal, alone. The only extraneous circumstance which it is suggested might throw light on where the truth lies is the inevitable notoriety, as it is suggested, which would follow the destruction of a car by fire in the area where the Plaintiff lives; the implication being that it was hardly a matter which she could hope to conceal and therefore it was more than likely that she disclosed it. Mr Vijay Lal denied that the Plaintiff informed him of the destruction of the car; she answered in the negative, and he was not otherwise aware of the fact. I prefer his evidence to that of the Plaintiff and accept him as a witness of truth. I do not regard the suggestion referred to above as throwing doubt on his evidence. Accordingly I find as a fact that the Plaintiff made a second material misrepresentation, in her oral negative answer to the question in the Proposal whether she had ever had any property destroyed or damaged by fire. There is no reason to regard the question as restricted to any particular form of property and I do not think that the Plaintiff was in any way misled as to the scope of the question. An insurance company is entitled to take into account not only the physical risk in respect of which insurance is proposed but also what has been referred to as a 'moral risk'.

E F G H

In my judgment the defence succeeds on the grounds of misrepresentations orally made in answer to both questions.

It was suggested by counsel for the Plaintiff that in any event it is to the writing in the Proposal that attention should properly be paid. The space for the answer in the case of each of the questions was completed by the insertion of a mark in the nature of a 'dash'. Earlier in the Proposal where similarly a positive 'yes' or 'no' answer had been called for, the word 'no' had been inserted. It was to be inferred, counsel submitted, that the 'dash' meant 'not applicable'. But even accepting counsel's premise I do not think that this can avail the Plaintiff. The reasonable inference would be that there was nothing to be disclosed: (*22 Halsbury* para. 380 (e)); and by signing the Proposal in the form prepared by the clerk the Plaintiff, notwithstanding her illiteracy in the circumstances of this case, adopted it and accepted responsibility for that reasonable inference: (*Newsholme Bros. v. Road Transport and General Insurance Co.* [1929] 2 K.B. 356). It was not objected that the evidence of the clerk was inadmissible to explain the manner in which the Proposal was completed. The Plaintiff was equally anxious to give her account of how the form came to be completed. In any event, as it appears to me, the circumstances would not fall within the rule as to the inadmissibility of oral evidence to contradict, vary or explain a written instrument. The Proposal was not the contractual document finally determining the legal relationship of the parties, and, in any event, if the 'dash' represented an ambiguous answer, or even meant 'not applicable' it amounted to a material non-disclosure. On this basis also, the defence, in my judgment, would be entitled to succeed.

As to the allegation on the part of the Plaintiff that the Defendant Company, through their Manager Mr. Quartermaine, acknowledged that a claim had been lodged and that the Plaintiff or her agent could take time to lodge the necessary particulars, it is necessary to consider Conditions Nos. 11 and 20.

Condition No. 11 concludes with the provision: "No claim under this Policy shall be payable unless the terms of this condition have been complied with". A similar provision was considered in the case of *Welch v. Royal Exchange Assurance* [1939] 1 K.B. 294 where the insured failed to recover on the ground that "unless" could not be construed as meaning "until", and, by a majority of the court, that the requirement was a condition precedent which had not been complied with. As it appears to me, whether such a condition be described as a condition precedent to the maintenance or enforcement of a claim, or as a condition subsequent affecting recovery under the policy, it operates to enable an insurer to repudiate liability in the absence of strict compliance therewith, except, that is to say, where the condition is waived. With regard to waiver, Condition No. 20 provides as follows:

> "20. No provision or requirement of this Policy requiring any matter or thing to be done, or to be written or endorsed hereon, shall be deemed waived by reason of any alleged notice or waiver which has not been expressly written or endorsed hereon; nor shall the Company be deemed to have waived any provision or condition of this Policy, or any forfeiture thereunder, by any requirement, act, or proceeding on its part relating to the

appraisement of any alleged loss, unless such provision, condition, or forfeiture be expressly stated in writing to be waived by the Company."

Counsel for the Plaintiff argues that a condition against waiver may itself be waived and in *Marcovitch v. Liverpool Victoria Friendly Society* (1912) 28 T.L.R. 188 it was so held. There are, however, American authorities to the effect that the object of such a condition as Condition No. 20, is to provide, as a matter of contract, that an informal waiver is ineffective (*vide MacGillivray on Insurance Law* (5th Edn.) para. 965). In the circumstances of the present case I do not find it necessary to make a decision on the point. The onus of proving a waiver rested on the Plaintiff and I do not find the evidence given on her behalf sufficiently convincing to lead me to conclude, on the balance of probabilities, that any such waiver was in fact made. There is nothing in writing to confirm it. Mr. Ramrakha's reference in his letter dated the 2nd January, 1963 (misdated 1962) to a claim having been made could equally well mean that the Company had been notified that a fire had occurred and that a formal claim would be forthcoming. The assertion that Mr. Quartermaine sent the Plaintiff and her son to fetch Mr. Ramrakha to his office does not appear reasonable, if, as is alleged, Mr. Quartermaine only wanted to tell Mr. Ramrakha that particulars must be supplied; Mr. Quartermaine could have told the son Prem Singh so; Prem Singh has a perfectly adequate command of English and is obviously a capable businessman. Nor, on the Plaintiff's own case, is it clear what exactly was Mr. Ramrakha's status on the day of the fire; whether he was acting as a friend of the Plaintiff or as her lawyer. He first appears on record in his letter of the 2nd January, 1963, which is more in keeping with Mr. Quartermaine's evidence that he did not see him until two or three days after the fire. Mr. Gould's reply dated the 3rd January in which he said he awaited the completed claim form is, if anything, more in keeping with Mr. Quartermaine's evidence that Mr. Ramrakha had taken the form away. And when the particularised claim was sent in, Prem Singh first took it to the Defendant Company's office, then to Mr. Gould's office, and only finally to Mr. Ramrakha's office. I accept that this is a case where, for reasons of its own, the Defendant Company is prepared to take advantake of every available means of defence, but not in my view to the extent of relying on dubious means. It is also not without significance that the claim form was re-sworn on the 11th January, 1963, the very day on which the 15 days expired. It could be that this was a coincidence; but it could also go to show that the Plaintiff or her son was aware of the 15 days' time limit and, as Prem Singh's activities on that day might be construed as indicating, regarded it as the ruling time limit, which would go to negative the allegation that time had been previously waived.

In the result I give judgment for the Defendant Company, dismissing the Plaintiff's claim with costs.

Judgment for the defendant company.