Ackerman v Loubser
1918 OPD 31

Orange Free State Provincial Division
1918. April 15; May 1.
WARD, J.

Flynote

Insurance. --- Accident policy.--- Damages from wrongdoer. --- Subrogation.

Headnote

A person insured against accidents has the right to recover damages from a wrongdoer for any wrong done to him although he has already been compensated in respect of such wrong by the insurers, but, as the principle of subrogation is applicable in our law, the insured, if fully compensated by the insurer, becomes a trustee for any compensation paid him by the wrongdoer and is bound to hand over to the insurer whatever money he receives from the wrongdoer over and above the actual loss he has sustained after taking into account the amount he has received under the contract of insurance.

Semble: An insured who has been fully compensated by the insurer may cede his right of action against the wrongdoer to the insurer and the insurer may then sue in the name of the insured.

Case Information

The facts appear sufficiently from the judgment.

C.L. Botha (for the appellant): During the hearing plaintiff admitted that he had been compensated by an insurance company for the damage to his car. Plaintiff must show further loss before he can sue: he has a cause of action against defendant, but he cannot recover mere nominal damages. See *Edwards v Hyde* (1903, T.S., p. 384.) Plaintiff cannot under any law of agency sue on behalf of the company without a power of attorney.

1918 OPD at Page 32

P.U. Fischer (for the respondent): The extent of defendant's liability is not affected by the fact that in consequence of his conduct a sum of money is paid to the plaintiff under a policy of insurance --- *Halsbury's Laws of England,* vol. x., par. 599; Porter on *Insurance* (5th edition), p. 258, Mayne on *Damages* (6th edition), pp. 115, 475 and 538; *Bradburn v Great Western Railway* (1874, 10 Ex., p. 1); *Yates v White* (44, Rev. Reps, 708.) An action is allowed without any cession, and plaintiff would become trustee for the additional payment --- see *Cullin v Butler* (1816, 5 M. and S., 461). Suing for damages is suing for compensation --- Pollock on *Torts,* p. 1885. In our law, when a tort is committed the result is merely a debt incurred, which is payable by the debtor or by someone on his behalf --- see *De Groot,* 3, 9, 10; *Digest,* 46, 3, 17; Pothier on *Obligations,* par. 499.

Botha, in reply: Special damage has to be proved --- see Nathan's *Common Law of South Africa,* vol. ii., p. 741 *et seq.* and vol. iii., par. 1547 *et seq.*

Cur. adv. vult.

Postea, 1st May.

Judgment

WARD J.: In this case the respondent sued the appellant in the magistrate's court of Bethlehem for damage done to his motor-car through a dog belonging to defendant coming in contact with the car and causing damage amounting to £57 15s. 11d. reduced to £50 0s.0d., to bring it within the jurisdiction of the magistrate's court. The magistrate gave judgment for the amount claimed with costs, and against this judgment the defendant appealed.

The position taken up by Mr. *Botha,* who appeared for the appellant was this, that the *respondent* having

already been compensated for the damage done to his car by the insurers having paid the bill for putting it in order, no action for damages against the wrongdoer exists as the respondent has already been fully compensated for the wrong done to him. The plaintiff (now respondent) admits the car was, at the time it was damaged, insured against accident in the insurance company above referred to, and that the company paid to A. Ross & Co., Ltd., the bill for repairing the damage caused by the defendant's dog to the car. The only part of the policy of insurance which has any bearing on this appeal appears to be condition 15 which provides *inter alia* "The company shall not be liable under this policy if the assured

1918 OPD at Page 33

shall, without the written authority of the company, do anything to incur any liability in respect of . . . any claim or loss or injury or damage for which the assured may claim indemnity under this policy." 16. "The company shall in respect of anything insured under this policy be entitled to use the name of the assured to enforce for the benefit of the company any order made for costs or otherwise, or to make or defend any claim for indemnity for damages against any person or company or for any other purpose connected with this policy."

The plaintiff in his evidence states: "I am bringing the action to recover the amount of damage sustained. The account has been paid by the African Guarantee and Indemnity Company with whom the car was insured. I produce the policy. By condition 16 I am compelled to take action if requested by the company. The company have requested me to take action." In cross-examination he states: "The claim I bring before the Court to-day has been paid on the understanding that I take action against defendant. I bring the action on my own behalf. I have no power of attorney from the Insurance Company. . . . . The Insurance Company did not pay me. They paid the accounts. There was no cession given of the accounts so far as I know. The accounts handed in have been paid by the company. The money I claim for the purpose of handing it over to the company."

On the evidence Mr. *Botha,* for the appellant, takes up the position that the respondent having already been compensated for the damages to his car cannot claim further damages from the appellant.

Mr. *Fischer* for the respondent admits that if the insurance company had paid the account for repairing the car for the purpose of releasing the appellant from his liability for the wrong done by him, that would be a good answer to the respondent's claim, even if payment was made without the knowledge or consent of the appellant, so long as it was made in his name. And I think that the correctness of that position cannot be doubted.

The evidence however is clear that when the Insurance Company paid for the damaged car, they did so to discharge their own liability under their contract with the respondent and not with any intention of releasing the appellant. The matter was *res inter alios acta* and can in no way affect the liability for the wrong done by the appellant to the respondent.

1918 OPD at Page 34

Mr. *Botha's* argument that because the Insurance Company has already compensated the respondent the judgment appealed against awarded him damages in effect compensated him twice for the same damage, seems to me fallacious. For the payment already made by the insurance company was only made to the respondent (the assured) on the understanding that he would fulfil his obligation under condition 16 of the contract, and use his right of action for the benefit of the company. The company, if the respondent had refused to comply with the request to allow his name to be used, could have sued him for damages arising from his refusal to fulfil his contract.

Mr. *Botha* admits that if the respondent had ceded his right of action the insurance company could have recovered, and this seems to me to imply that the respondent until he did so cede his right had a valid right of action vested in him which he was entitled to exercise against the appellant.

There is another consideration, which shows that apart altogether from Condition 16 of the policy the respondent could not under any circumstances obtain for his own benefit double compensation. An accident policy is a contract of indemnity and from that it follows that the insurers who have indemnified the insured are entitled upon the principle of subrogation to the advantage of every right vested in the latter whether such right exists as stated by Lord ESHER, M.R., in *Castellam v Preston* (11 QBD 380) in contract fulfilled or unfulfilled or in remedy for tort capable of being insisted upon "or already insisted upon."

From this it follows that the amount recovered by the respondent in this case, must, when paid to him be handed over to the insurance company and so it has been held in several English cases. So true is this that in the English law, if the insured refuse to sue the wrongdoer, the Court will allow the insurer to sue such wrongdoer in the name of the insured whether the latter likes it or not. *Dufourcet v Bishop* (18 QBD 378), *Law Fire Insurance Company v Oakley* (4 TLR 309).

This principle of subrogation is not peculiar to the English law nor is it confined to the matter of insurance. The Privy Council in the case of the *Quebec Fire Assurance Company v St. Louis* (7 Moore at p. 303) states "The distinction of the different kinds of subrogation is by no author so clearly pointed out as by *Pothier* but it is recognized by *Merlin* . . . . . now that an insurance company after paying for the damages done has a right to be

1918 OPD at Page 35

subrogated as against the party causing the damage is laid down in every French Text Book on *terrestrial insurance*. . . . . Our own law has recognized the same principle in *Randal v Cockran* (1 Vesey, sen., 98)."

The only South African case, so far as I have been able to discover in which this subject is referred to is that of *Weber and Others v The Africander G.M. Company* (5 O.R. at p. 25.) In that case GREGOROWSKI, C.J., in giving judgment says: "The position of a plaintiff who has been indemnified by an insurance company is this: 'I have suffered damage; it is true that the insurance company has indemnified me but this defendant has nothing to do with that. I demand the damages which defendant has actually caused me. On the date of the breach of the contract (and the same would apply to tort) my right to recover compensation from the defendant was established, and this right has not been destroyed by the fact that an insurance company subsequently indemnified me.'"

Although authority on this matter is scanty in South Africa there is a long and unanimous series of English decisions which establish the right of the insured to recover from the wrongdoer damages for any wrong done to him although he may have been already compensated by the insurers; I need only mention *Randal v Cockran* (1 Vesey, sen., 98, referred to in Privy Council case), *Mason v Sainsbury* (3 Doug. 64), *Bradburn v G.W.R.* (L.R. 10 Excheq. 1), and *Clark v Blything* (2 B. & C., 254), a case in which the arguments used by counsel were singularly like those addressed to the Court in the present case.

As regards the objection that the respondent sued for the benefit of the insurance company without any power from them that was not seriously urged and does not appear to have any substance. There is no doubt but that in South Africa the respondent could have ceded his rights of action and, as I have already mentioned, Mr. *Botha* admits that the insurance company could then have properly sued, but in that case only in the right of respondent, and every defence available to the appellant against the respondent would have been equally available against the insurance company. But I cannot see how the fact that cession of action might have been resorted to deprives[6] the respondent --- the person whose property was injured --- of the right to bring an action which was certainly vested in him though he might have to hand over to the insurers the fruits of that action. In England the insurer can

1918 OPD at Page 36

only obtain compensation from the wrongdoer by means of an action brought in the name of the insured, and in my opinion he is not deprived of this remedy merely because in South Africa he may avail himself of another mode of procedure.

Mr. *Botha* has taken his stand not on the law of insurance but on the law of torts, and in conclusion I would like to refer to a passage from a standard work on that subject, namely Addison on *Torts*. The quotation is a rather long one but it contains a comprehensive statement of the law which, as provided by Ordinance No. 5 of 1902 combined with Act 8 of 1879 of the Cape, is the law of this Province. The passage from Addison reads: "The recovery by the plaintiff of full compensation for the loss or damage his property has sustained under a contract with insurers, cannot be given in evidence in reduction of damages in an action against the wrongdoer who has done the mischief. The plaintiff's contract with the underwriters or insurers is *res inter alios acta* of which the defendant cannot avail himself. If it were not so the wrongdoer would take the benefit of a policy of insurance without paying the premium. Thus, in an action for an injury done to the plaintiff's vessel from negligence in running it down at sea, the fact of the plaintiff having received from the underwriters the amount of the loss was held to be no answer to the plaintiff's

claim for damages. *Yates v Whyte* (4 Bing. N.C. 272.) So, in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accident insurance policy cannot be taken into account in reduction of damages. *Bradburn v Great Western Railway Company* (L.R. 10 Ex. 1.) A plaintiff, however, who has received a full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrongdoer, is not entitled to a double satisfaction; but, as soon as he has received from the underwriter or insurer the amount for which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable by the wrongdoer, and is bound to hand over to the insurer whatever money he receives from the wrongdoer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer, moreover, who has paid the loss is entitled to sue in the name of the insured, for the purpose of recovering from the wrongdoer full compensation for the injury. *Randal v Cockran* (1 Ves. Sen., 97.) Thus

1918 OPD at Page 37

when certain insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, it was held that they might maintain an action in the name of the insured against the hundred, under the statute, to recover compensation for the injury. *Mason v Sainsbury* (3 Doug. 64) and *Clark v Blything* (2 B. & C. 254.) But the right of the insurer is merely to make such claim for damages as the insured could have made; and, when the latter cannot assert a claim for damages against the wrongdoer, neither can the insurer do so. *Simpson v Thompson* (L.R. 3 App. Cas. 279), *Midland Insurance Company v Smith* (6 QBD 561)."

The appeal is dismissed with costs.

Appellant's Attorneys: *Marais & de Villiers;* Respondent's Attorney: *Gordon Fraser.*

Footnotes

5 [R3]Repeated word?

6 [R4]Deprive?

Clifford v Commercial Union Insurance Company of South Africa Ltd [1998] JOL 2374 (A)

Reported in (Butterworths)	Not reported in any Butterworths printed series.
Case No:	302 / 96
Judgment Date(s):	22 / 05 / 1998
Hearing Date(s):	04 / 05 / 1998
Marked as:	Reportable
Country:	South Africa
Jurisdiction:	Supreme Court of Appeal
Division:	-
Judge:	Schutz JA; Marais JA; Nienaber JA
Bench:	Van Heerden DCJ, Schutz, Nienaber, Marais, Howie JJA
Parties:	JD Clifford (A); Commercial Union Insurance Company (R)
Appearance:	N Lazarus, Edward Nathan & Friedland Inc (A); R Wise, James Troward Mabin (R)
Categories:	Appeal - Action - Civil - Substantive - Private
Function:	Sets New Precedent

Key Words

Insurance Act 27 of 1994 - Insurance - Indemnity policy - Indemnity policy - repudiation - Repudiation of indemnity policy - incorrect information provided by insured - Insurance - misrepresentation by insured

Mini Summary

Appeal against decision of court a quo in upholding insurance company's repudiation of claim of insured on grounds of incorrect information provided in proposal form.Held that for the insurance policy to be repudiated, Commercial Union had to prove that the incorrect information materially affected the assessment of the risk under the policy. A comparison had to be made between how the risk would have been calculated had the insurer been aware of the true facts, as opposed to the assessment based on the misrepresentation. The standard is an objective one, being whether a reasonable man would consider that the relevant information should have been disclosed to the insurer. The "new for old" clause in the proposal was held to be decisive of materiality as if the insurer had known the true facts, its assessment of the risk would have been different.Application dismissed with costs.

Page 2 of [1998] JOL 2374 (A)

SCHUTZ JA: On 5 May 1994 the respondent ("Commercial Union") repudiated an indemnity policy taken out by the appellant (Mrs JD Clifford - "Clifford") on the ground of incorrect statements made in the proposal form. The issue is whether the admitted flaws in the form justified repudiation.

Clifford claimed that a car covered by the policy had been stolen on 30 January 1994. The car was expensive, a Mercedes Benz 500 SL A/C with an estimated value of R530 000. Her claim for indemnification was dismissed by Levy AJ, who described the history of the car as a chequered one. Indeed that is so, and in that history is to be found the origin of the later dispute.

Page 3 of [1998] JOL 2374 (A)

The car had been manufactured prior to July 1991, in which month it was imported into South Africa from the UK as a new car by a motor dealer RDM Vehicles (Pty) Ltd trading as Executive Cars. The latter sold it to one Krottenberger, the Austrian Consul-General, who took delivery together with the bill of entry and a transfer form signed by Executive Cars as transferor. The name of the transferee was left blank. This brace of documents was thereafter treated as if a bearer instrument, to be handed from holder to holder - betokening title and empowering registration in the hands of the last holder. Krottenberger did not register the car in his name, as the law required. The reason for delaying registration after this and subsequent transactions was to obtain as late a registration date and as late a number plate as possible, matters which were considered to dictate the "model" and therefore the value of the car.

Early in 1992 Krottenberger and one Wilshire exchanged their 500 SL's, both "out of the box", and that is how Wilshire acquired Krottenberger's car.

Page 4 of [1998] JOL 2374 (A)

Together with it he received the bill of entry and the transfer form, the latter still in blank. He also "borrowed" trade plates from a company in Krottenberger's group of companies, Weisemberg Investments (Pty) Ltd, a motor dealer. He was authorised to use them by Weisemberg's director, notwithstanding that that company had no interest in the car. Trade plates are intended to be used by motor dealers in the course of their legitimate activities, not as a means of allowing others to evade the registration and licensing requirements of the law. Not that the car was driven around much during Wilshire's tenure. He was an accountant and had acquired it, as also its predecessor for which it had been exchanged, as an investment. These cars were in short supply and he hoped that they would appreciate in value. In order that the new condition should be maintained, the car was occasionally driven round the block and little more. The mileage (of this right hand drive vehicle calibrated in Imperial measure) was very low when he took delivery from Krottenberger, and it remained so.

Page 5 of [1998] JOL 2374 (A)

In September or October 1992 Wilshire sold the car to one Ramsay for R650 000 and delivered it together with the bill of entry, the still uncompleted transfer form and the "borrowed " trade plates. Due to Ramsay's lack of garage space it remained in Wilshire's garage. As Ramsay also had bought it as an investment, it was driven infrequently to keep the mileage low.

Late in 1993 the market for valuables had weakened due to pre-election nervousness and Ramsay, having decided to liquidate the car at a loss, commissioned Wilshire to sell it for R500 000. Anything he would obtain in addition he could keep as commission. At this point Clifford enters the history. Wilshire knew her socially. The availability of the car was mentioned. He did not disclose that Ramsay was the owner and acted as if he himself was. Clifford bought the car for R530 000, by means of trading in a Mercedes Benz 450 SL at an agreed value of R130 000, the rest to be paid in cash. On 24 November 1993 the trade-in vehicle was handed to Wilshire who at the same

Page 6 of [1998] JOL 2374 (A)

time delivered the 500 SL. Together with it came the bill of entry, the transfer form and the trade plates. Clifford was not made aware of the full history of the car, but from what was handed over it was apparent that the car had not been registered, that the number plates consisted of a trade plate on the back window shelf and another in the boot and that the bill of entry (if one examined it) showed that the car had been imported in July 1991. Clifford saw nothing untoward in all this. Her father had been in the motor trade and from him she had learned that the model was dictated by the date of first registration. The stage was now set for the proposal form that has given rise to this case. The cash balance was paid. On 13 January 1994 the car was registered as a new car in Clifford's name. In the meantime she had driven it, using the one trade plate on the window shelf.

Already on 30 November 1993 the Commercial Union's proposal form had been signed by Clifford's common law husband, Kotzé. Acting with her

Page 7 of [1998] JOL 2374 (A)

authority he was the one who gave the requested information and effected the insurance. The proposal form included the usual type of warranty, in this case to the effect that all statements and particulars were true, correct and complete, and contained all information known to the proposer affecting the risk to be insured, and that the proposal form would be the basis of the contract and would be incorporated in it.

Four statements in the proposal deserve mention. The *first* was that the "year of manufacture" was 1993. In the light of the history, this was incorrect. The car was manufactured by July 1991 at latest. The *second* was that the "registered letters and numbers" were AGP 434 T. These are the particulars that appeared on the trade plates already referred to. They do not constitute a registration number. The *third* was the

positive answer given to the question "Is [the car] registered in your name?" This was also an incorrect answer. The *fourth* was the positive answer to the question "are you the owner of the car?"

Page 8 of [1998] JOL 2374 (A)

The Court *a quo* resolved the question as to the last answer's correctness in Clifford's favour, holding that she was the owner. This finding was no longer contested on appeal, in my opinion correctly. The evidence shows a delivery accompanied by the requisite respective intentions to transfer and receive ownership. That leaves the first three statements, all of which are incorrect.

The fact that incorrect answers were given did not in itself justify repudiation, even though their correctness had been warranted. Since 1969 section 63(3) of the Insurance Act 27 of 1943 has provided:

> "Notwithstanding anything to the contrary contained in any domestic policy or any document relating to such policy, any such policy issued before or after the commencement of this Act, shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited and the obligations of the owner thereof shall not be increased, on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless

Page 9 of [1998] JOL 2374 (A)

> the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue or any reinstatement or renewal thereof."

The onus of proving the requisites of the qualification ("unless ...") rests on Commercial Union: *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) at 74C. Only risks undertaken on the strength of "significant", as opposed to "inconsequential" or "trivial" misstatements may upon their realisation be repudiated (at 75A, 74B). A comparison has to be made between how the risk would have been assessed had the insurer known the true facts as opposed to an assessment distorted by the falsehood. A disparity is significant if the insurer, had he known the truth, would probably have declined the risk, or would probably have undertaken it on different terms (at 75G–H), or, I think one should add, would probably have made further enquiries before reaching a decision (see 76A–B).

What occasions comment about this decision and its successor *Theron*

Page 10 of [1998] JOL 2374 (A)

v AA Life Assurance Association Ltd 1995 (4) SA 361 (A) at 376E–F, is that section 63(3) was interpreted as imposing a subjective test. Concepts of reasonableness were held not to enter the picture (*Qilingele* at 74F). One looks at the particular insurer (usually in his manifestation as the particular underwriter) and seeks to determine as a fact how he would probably have reacted had he known the truth. General considerations affecting assessment of the risk are not relevant in themselves, only possibly relevant in determining how the particular underwriter would have behaved (at 75D–E). This subjective test stands in stark contrast to the objective test of the reasonable man laid down in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 435G–I as applying to the weighing of the materiality of a non-disclosure. This contrast was recognised in *Qilingele*, but the distinction between the tests was justified on the basis of the *Oudtshoorn Municipality* case being concerned with common law non-disclosure, whereas

Page 11 of [1998] JOL 2374 (A)

Qilingele was concerned with positive misstatement. The point was that the decision in *Qilingele* was said to flow from a statute worded in a certain way, whereas the *Oudtshoorn* decision, in a situation unaffected by the statute, was based on the common law.

However the distinction has arisen, it is an extraordinary one in a system of law which gets by without drawing artificial distinctions between falsity by silence and falsity by express statement (*suppressio veri*

and *expressio falsi*, to employ the traditional terminology). The distinction once introduced must open a fertile field for the subtle pleader, adroit to conjure the positive into the negative and *vice versa*, as is indicated by Havenga in *Materiality in Insurance Law: The Confusion Persists* (1996) 59 THR–HR 339 (in which article a reference to much of the literature may be found).

If I, as a member of this Court, were asked to interpret section 63(3) for the first time, I would not interpret it as Kriegler AJA did in *Qilingele*. To my mind his

Page 12 of [1998] JOL 2374 (A)

interpretation does not give effect to the purpose or import of the subsection; nor does it differentiate clearly the concepts of materiality and inducement. At common law an insurer relying upon being misled must prove both things. He must prove, in the first place, materiality. This is, of course, also an aspect of wrongfulness in a delictual setting. The standard is an objective one, that of the average prudent person or reasonable man: the *Oudtshoorn* case at 435H–I. The test is not, however, whether in the reasonable man's view the evaluation of the risk is affected by the falsity, but whether a reasonable man would consider that that particular information should have been disclosed to the insurer, so that the latter could form his own view as to its effect: *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n ander* 1989 (1) SA 208 (A) at 216F–G. The second thing that the insurer must prove is inducement, in other words causation, also in a delictual context. Notwithstanding that the word materiality has been used (or misused) in some

Page 13 of [1998] JOL 2374 (A)

decisions to convey inducement, the two concepts are distinct and must not be confused. Thus it is possible that an insured guilty of material non-disclosure or misrepresentation may be able to show that it had no effect on the underwriter: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL) at 551C. (Nonetheless, as Lord Mustill points out in the passage immediately following, once materiality has been established, the insured is likely to face an uphill struggle in trying to demonstrate that his non-disclosure or misrepresentation bearing this stamp had no effect.). The materiality or otherwise of a circumstance should be a constant: something apart from the subjective characteristics, actions and knowledge of the individual underwriter which may be relevant to inducement in a particular case: at 533H–534A.

Long ago insurers discovered a way of lightening the load of this double onus. The method used was to exact a warranty from the prospective insured,

Page 14 of [1998] JOL 2374 (A)

in which he warranted the truth and materiality of his representations and assented to their inclusion as essential terms of the policy. The effect of this was that all the insurer had to prove was the incorrectness of the insured's statement. That done, there was a breach of warranty, giving the insurer a contractual right to repudiate liability. Once the insured had warranted that the answers to questions in the proposal form would be the basis of the insurance contract there was no question of materiality left, because the parties had contracted that there should be materiality in the questions and answers; *Jordan v New Zealand Insurance Co Ltd* 1968 (2) 238 (E) at 241E–F. The use of a warranty therefore obviated the need for the insurer to show that the misstatement was material and that the misstatement induced it to take on the risk in the terms which it did. The effect in law was to allow trivialities to be promoted to materialities – to allow an insurer to exploit even a trivial misstatement by the insured which in fact had no bearing on the assessment of

Page 15 of [1998] JOL 2374 (A)

the risk or in inducing the issuing of the policy on the terms on which it was issued and escape liability as if it had been a material misstatement which did in fact induce the issuing of the policy on those terms. The potential for abuse was obvious and unscrupulous insurers took advantage of the opportunity.

It was against this background that section 63(3) was enacted in 1969. To my mind its purpose was simply to detoxify the warranty by removing its potential for abuse, without outlawing its legitimate use.

In other words, materiality would regain its true meaning and that meaning would be protected from being stifled by contract. On the other hand, the warranty would not be deprived of all value. Where a misstatement was indeed material the deeming effect of the contract ("the proposal form shall form the basis of the contract") would relieve the insurer of having to prove inducement. However, what the *Qilingele* decision does is to conflate the concepts of materiality and inducement. It treats the materiality mentioned in the subsection as relating to the significance that

Page 16 of [1998] JOL 2374 (A)

the particular underwriter would have attached to the difference between the facts as represented and the true facts, had they been known to him (at 75A and 75G–H) and the effect that his view of that difference had on his decision to insure . This means that the inducement of the underwriter is treated as a matter of fact, ie subjectively. I have no quarrel with that as a concept, but whether the subsection is indeed concerned with inducement is another matter. *Inducement* so plainly entails a subjective enquiry that there seems to be no need to state, even less to emphasise that fact. However all this may be, the concept of *materiality* in its traditional, objective sense, has vanished. Indeed *Qilingele* expressly states that the "value judgment" postulated in the *Oudtshoorn* decision has nothing to do with the case (at 74F). Why the legislature might have decided to cast the well-tried common law concept of materiality out of the window is not addressed. There is a presumption against such conduct. Moreover, the result achieved is the unlikely one already

Page 17 of [1998] JOL 2374 (A)

mentioned, of two forms of misleading, one by silence and one by statement, that once were as one, being separated and subjected to inconsistent tests. This is exemplified by the majority decision in *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A), where the divergent tests in *Qilingele* were adopted and both applied (at 376E–F and 377D–J). In addition, what was before a matter for objective determination, something which the reasonable man and particularly the reasonable prospective insured might not have found it difficult to weigh, becomes a credibility issue relating to something of which the prospective insured could never have known, namely, the subjective approach of the particular insurer to questions of materiality. In other words, the question now becomes, is the underwriter being truthful when he describes what the peculiar vagaries are which govern the decisions of himself or his company? There would have to be substantial reasons for concluding that the law was changed so drastically in so subtle and inconspicuous a manner. Are

Page 18 of [1998] JOL 2374 (A)

there such reasons?

Qilingele finds them in the text of section 63(3). On one thing I would agree with Kriegler AJA, and that is that the subsection is no model of clarity. I would agree also on another, that the Afrikaans text leans more towards his interpretation than does the English (for what that matters the English text was signed). For the rest I disagree with his interpretation. He places particular emphasis on the reference to "*the* assessment of the risk under the *said* policy" as showing, if not very obviously, that the materiality relates to the assessment of the particular risk in the specific policy under consideration (at 75B–C). The emphasised words are, in my view, used for a far more obvious purpose entirely consistent with the traditional common law test of materiality; they recognise that what is material to the assessment of risk attaching to one *kind* of policy (eg life insurance) is not necessarily material to the assessment of risk attaching to another kind of policy (eg fire insurance). There is little, if any, justification

Page 19 of [1998] JOL 2374 (A)

for reading the emphasised words as if they were intended, not to achieve that purpose, but to achieve a purpose in conflict with the common law, namely, the setting up as sole arbiter of materiality the particular insurer in the particular policy under consideration. The key seems to me to lie in the expression "such representation if of *such a nature* as to be likely to have *materially* affected ...". In this context I think that the use of "materially" amounts to an admittedly inept, shorthand, maintenance of the common law concept of materiality. And even if there be such ambiguity that there is nothing to choose between

Kriegler AJA's linguistic interpretation and mine, I would think that the presumption against altering the common law, plus the other factors which I have mentioned and the one immediately to be mentioned, should carry the day. The manifest purpose of the provision is to improve the lot of the insured, not to worsen it or to give with the one hand and take away with the other. An interpretation of the provision which involves an apparent amelioration of the

Page 20 of [1998] JOL 2374 (A)

insured's position but brings with it a benefit for the insurer which the common law steadfastly refused to give him is, in my view, inherently suspect. For these reasons I consider that the decision of Didcott J in *Pillay v South African National Life Assurance Co Ltd* 1991 (1) SA 363 (D) at 367A–E, conferring the common law meaning on the materiality referred to in the subsection, is correct.

I propose to leave the question of law there without deciding it. It has not been fully argued before us, and neither counsel regards its determination as possibly decisive in this case. But I would suggest that if *Qilingele* is to stand, the legislature should consider putting right not merely a discordancy, but even a serious inequity, which was initiated by imprecise legislation. The extreme results to which a subjective assessment of materiality may lead may be demonstrated by means of an example. Postulate an underwriter who, on finding that a car which was warranted as green is actually blue, claims, honestly and sincerely, hard though that may be to believe, that he would not

Page 21 of [1998] JOL 2374 (A)

have insured it had he known the truth, because blue cars are unlucky. Unless some way can be found, which I cannot immediately perceive, to avoid the remedial section 63(3) leading to such a result, it seems to me that his repudiation would have to stand.

To return to the facts, the Commercial Union employee who approved the grant of cover was Mr Morton, who has since died. He was a careful and experienced underwriter. In his place Commercial Union called Mr Oates, an underwriter employed by Hollandia Reinsurance Company and a Mr Fermor, one of its own underwriters. Broadly speaking they gave evidence as to what they thought Morton had thought and done and as to how he would have reacted had he known the whole truth as opposed to what it is supposed he did or did not know. Their views are of assistance in some respects but are by no means decisive of the case. The same may be said of Mrs Lourens, a one-time underwriter called on behalf of Clifford. The three of them cannot replace

Page 22 of [1998] JOL 2374 (A)

Morton.

I shall deal first with the probable consequences of the incorrect statement of the year of manufacture as 1993, instead of 1991 or earlier. Mr Lazarus, for Clifford, accepted that Morton took the statement in the proposal form at face value (ie inducement had been proved). The argument was that the misstatement was not material. I shall mention its potential materiality in a general way later. More specifically, there is a special "new for old" clause in the insurance contract, extension clause 3, which I think is decisive. It reads:

> "If the motor car is within one year of its first registration and before it has been driven for more than 30 000 kilometres
>
> (a) stolen and not recovered or
>
> (b) damaged to the extent that the cost of repairs exceeds 70% of its list price plus taxes when new
>
> the basis of indemnity will be the current cost of a new motor car of the same or similar model subject to a limit of 120% of the maximum indemnity (less the First Amount Payable)."

Clifford's claim was based on this clause and she alleged and proved the

Page 23 of [1998] JOL 2374 (A)

facts which would bring it into operation, namely a theft and a mileage of less than the equivalent of 30 000 kilometres at the date of the theft, which took place less than a year after the first registration. The "maximum indemnity" was R530 000, so that she claimed R636 000, which was 120% thereof.

Late in the hearing in the Court *a quo* an alternative claim, which had not been pleaded, was put forward. It was based on extension clause 3 not bearing on the issue of materiality at all because, so it was argued, it applied to new cars, whereas the 500 SL was not "new". When the appeal commenced Mr Lazarus abandoned the pleaded claim for R636 000 and abandoned reliance on clause 3 entirely. The alternative claim was now the only claim. It was based on the general indemnity provision, which allows for an indemnity based on the market value of the 500 SL up to a maximum of R530 000, which was the amount now claimed.

The reasons for Mr Lazarus's ultimate abandonment of clause 3 are clear

Page 24 of [1998] JOL 2374 (A)

enough. He accepted that Mr Morton believed he was insuring a new car in the particular sense of one manufactured in the year in which cover was granted, 1993. That year was reflected in the schedule to the policy, so that the cost of the new car which Commercial Union had to pay in replacement of the 500 SL in the event of its being stolen, was that of a 1993 model, subject to the maximum of R636 000. The whole attractiveness of clause 3 is that it is not concerned with the value of the insured car, a value likely to take a sharp drop immediately after it ceases to be brand new, but with the cost of a new car of the same model. On the evidence, the value of a new 1993 model was greater than that of a new 1991 model. Thus it does not avail Clifford to argue, as at one stage her counsel did, that R530 000 was not an overstatement of the value of the 1991 car in question. That was not the value in issue, even if it be accepted that the correct figure was R530 000. Nor does it avail her to argue that Clifford would not have claimed more than the value of a 1991 model. A

Page 25 of [1998] JOL 2374 (A)

reasonable underwriter would not have left such a matter to the insured's propriety whilst committing his employer to compensate on the basis of a 1993 model. Whichever test of materiality one adopts, objective or subjective, it is clear that had Morton known the true facts he would not have issued a policy reflecting the car as a 1993 model.

Mr Lazarus's only basis for contending that extension clause 3 has no relevance was the construction which he sought to place on it. The "first registration" referred to in the clause actually meant "when it should first have been registered". This, it was common cause, was in 1991, whereas the car was in fact first registered on 13 January 1994. This construction involves a reading of the clause for which no justification is to be found. Moreover, I think that the construction is contrary to the sense and purpose of the clause. Take the case of a person who buys a new car but asks the dealer to keep it unused on his shop floor for 9 months, during which time the buyer intends to be overseas.

Page 26 of [1998] JOL 2374 (A)

When he registers the car only on his return and then insures it comprehensively, stating its true year of manufacture, he would be entitled to expect, I would have thought, to be treated as having first registered it then, and as entitled to the "new for old" extended indemnity, relying both on a literary and on a purposive reading . The reference to first registration to my mind includes an implication that the car is new, as does the provision for indemnification on the basis of a new car. The choice of the date of first registration seems to be dictated by its normally being a certain, easily ascertainable and uncontentious date on which the one year period may reasonably be allowed to commence running. I am of the view that clause 3 is decisive of materiality, which leaves Clifford's claim faced with the insuperable obstacle already correctly conceded by her counsel.

Even had there had been no "new for old" clause, the misstatement accepted by Morton as to the year of

manufacture may have barred her claim,

Page 27 of [1998] JOL 2374 (A)

because in the years following the first, when the car itself may after, say its theft, have disappeared without trace, the ordinary indemnity, based on its current market value, would have been likely to have been increased by the misstatement as to the year of manufacture. Again I do not think that a reasonable underwriter would have exposed his employer to a later model in the policy, leaving it to the good faith of the insured to claim on the actual model of earlier date. However, as there is a "new for old" clause, it is unnecessary to enquire further what conclusion would have been reached had it been absent.

Various further grounds were argued on Commercial Union's behalf as justifying repudiation. I do not propose discussing them, because of the conclusion adverse to the success of Clifford's appeal that I have reached without reference to them.

The appeal is dismissed with costs.

Page 2 of [1998] JOL 2374 (A)

MARAIS JA: I have had the benefit of reading the judgment of my brother Schutz. But for one reservation, I agree with it. It is this. Whatever else clause 3 may be able to accommodate, I hesitate to conclude that it can fairly be said to accommodate a car with a history as remarkable as this. I am therefore reluctant to concur in the view that the clause was applicable to this car. However, even if it was not, I think that the very fact that controversy could arise as to whether or not it was applicable in the peculiar circumstances of the case made it necessary for the insurer to be given reasonably accurate information regarding the year of manufacture of the car. The first registration of the car had taken place almost three years after the date of manufacture and only after it had passed through the hands of three previous owners. That is a most unusual situation which, if known to an insurer

Page 3 of [1998] JOL 2374 (A)

invited to go on risk, would at least have prompted further enquiries. The incorrectness of the information given to the insurer was, in my view, "of such a nature as to be likely to have materially affected the assessment of the risk under the policy ...". Correct information might well have resulted in a reluctance to insure the vehicle at all, but assuming that a decision to do so was not entirely out of the question, the likelihood is that further enquiries would have been made and that after the garnering of further information, the policy would not have been issued without deleting clause 3, and without correcting the year of manufacture. To have left the clause in the policy would have exposed the insurer to a potential claim under the clause in circumstances in which the insurer would not have been prepared to confer the enhanced cover it provides. Indeed, that was precisely the claim with which it was later faced and which was pursued in litigation until ultimately abandoned in this Court. Whatever test of materiality be applied, I consider

Page 4 of [1998] JOL 2374 (A)

that it was satisfied both for this reason and for the further reason suggested in the penultimate paragraph of Schutz JA's judgment.

(Howie JA concurs in the judgment of Marais JA.)

Page 2 of [1998] JOL 2374 (A)

NIENABER JA: The correctness of the approach of this Court in *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) as to the proper interpretation of section 63(3) of the Insurance Act 27 of 1943, was never an issue in this appeal. Whether, on the facts of this case, the correct test was objective or subjective and whether the distinction drawn in *Qilingele's* case between misrepresentational *omissiones* and *commissiones* was sound or unsound, mattered little to the arguments advanced on either side. The issue was accordingly not debated at all and for the resolution of this appeal the disputation is

not material. In those circumstances I am disinclined to either endorse or express disagreement with the instructive points made by my brother Schutz in his *excursus* on the topic. I agree with him that the appeal should be dismissed, broadly for the reasons stated by him. I would add the following supplementary reason.

According to counsel for the appellant extension clause 3, the "new for old"

Page 3 of [1998] JOL 2374 (A)

clause quoted in my brother's judgment, is a standard clause in the policy. It is also a conditional one. If the conditions were fulfilled the clause would apply. The one condition, that the car should not have been driven for more than 30 000 kilometres when stolen, had been fulfilled. The other condition material to this appeal was that the car should have been stolen and not recovered "within one year of its first registration". The car was registered for the first time with the registration authorities on 13 January 1994. On 30 January 1994 it was stolen after which it was not recovered. If "first registration" in the clause is taken at face value to mean its first registration with the appropriate licensing authorities, the clause would accordingly apply. In that event the Commercial Union would be liable in terms of the policy for the payment of the R636 000. That was indeed the argument advanced in the Court *a quo* and developed in the appellant's heads of argument before this Court. On that basis, however, the appeal was doomed to failure. The reason is that the sum of R636 000 which would have been payable

Page 4 of [1998] JOL 2374 (A)

if extension clause 3 were applicable, was well in excess of the market value of the vehicle. It was manufactured in 1991 and the evidence was that the 1993 model was significantly more valuable than the 1991 model. In respect of a car manufactured in 1993 and which had been registered before the date of the proposal form (when part of the period of the twelve months referred to in extension clause 3 would already have elapsed), the risk assumed by the company in terms of that clause would have been of the kind the clause was designed to cover. In respect of a car manufactured in 1991 which was yet to be registered, it was not. The misrepresentations contained in the proposal form, both as to the year of manufacture and as to the registration of the car, therefore affected the basis of the Commercial Union's indemnity and its exposure to the risk that it might be liable in terms of extension clause 3 for an increased sum (compared to market value) and for a longer period (compared to an earlier registration). And if the exposure to the risk was increased, it obviously would have affected the

Page 5 of [1998] JOL 2374 (A)

assessment thereof for the purpose of section 63(2) of the Act. If the truth had been told in the proposal form the Commercial Union would not have assumed the risk that extension clause 3 could be enforced against it. It would have recast the risk by deleting or revising the clause or, at best for the appellant, by insisting that the vehicle be registered before indemnification would be considered.

It is doubtless for that reason that counsel for the appellant adjusted his stance and strove to argue that words "first registration" in extension clause 3 did not mean what it said but meant "when it should first have been registered". On that reading extension clause 3 would not have been applicable and consequently the Commercial Union would only have been liable for the reasonable market value of the car as at the time of the theft. I agree with Schutz JA that this interpretation is so forced as to be untenable. On that ground alone the appeal must fail.

I accordingly concur in the order proposed by Schutz JA.

Page 6 of [1998] JOL 2374 (A)

(Van Heerden DCJ concurred in the judgment of Nienaber JA.)

DICKS v SOUTH AFRICAN MUTUAL FIRE AND GENERAL INSURANCE CO LTD
[1963] 4 All SA 303 (N)

Division:	Natal Provincial Division
Judgment Date:	22 July 1963
Case No:	not recorded
Before:	Miller J
Parallel Citation:	1963 (4) SA 501 (N)

• Keywords • Cases referred to • Judgment •

Keywords

Agency - Authority - Ostensible - Insurance agent - Acceptance of premium on signature of proposal form

Estoppel - Agent - Power to act on behalf of principal - Effect of internal rules and regulations

Estoppel - Representation - Insurance agent - Authority to conclude contract - Causal relationship

Insurance - Agent - Authority to accept proposal for insurance - Implied authority - Interim cover - Nature of agent's authority

Cases referred to:

Baumann v Thomas 1920 AD 428 - Referred to

Bushby v Guardian Assurance Co Ltd 1916 AD 488 - Referred to

Citizens Insurance Co of Canada v Parsons, Queen Insurance Co v Parsons (1881) 7 AC 96 - Referred to

Clark v African Guarantee and Indemnity Company Ltd 1915 CPD 68 - Compared

Cornelissen v Equitable Fire Insurance Company (1861) 4 Searle 35 - Considered

Fortlaide Garages (Edms) Bpk v Schoeman 1959 (4) SA 533 (E) - Referred to

Haine v Pattrick 1917 TPD 110 - Applied

Kahn v African Life Assurance Society Ltd 1932 WLD 160 - Applied

Linford v The Provincial Horse and Cattle Insurance Company 55 ER 607 - Compared

Lloyd v Grace Smith and Co [1912] AC 716 (HL) - Applied

Mackie v European Assurance Society 21 LT 102 - Considered

Monzali v Smith 1929 AD 382 - Referred to

Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (AD) - Applied

Murfitt v Royal Insurance Co 38 TLR 334 - Discussed

National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (AD) - Distinguished

Quinn and Co Ltd v Witwatersrand Military Institute 1953 (1) SA 155 (T) - Referred to

Royal British Bank v Turquand [1843 - 1860] All ER Rep 435 (ExCh) - Applied

Strachan v Blackbeard and Son 1910 AD 282 - Referred to

The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling 1948 (3) SA 831 (AD) - Referred to

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Judgment

MILLER, J.: The defendant, which carries on insurance business of the type suggested by its name, has its head office in Johannesburg and branches in several other towns in South Africa. I shall refer to it as "the Fire and Accident Company" whenever it is necessary to distinguish it from the South African Mutual Life Assurance Company Ltd., to which I shall refer as "the Life Company". The Life Company is the main shareholder of the Fire and Accident Company but the two companies function independently. In the Province of Natal the defendant has a control branch in Durban, with inspectorates in Pietermaritzburg and Vryheid. There is no branch or inspectorate of the defendant in Newcastle, where defendant makes use of the offices of the Life Company for the purpose of its business in that town. The Life Company in Newcastle employs as a clerk one Mrs. Hawthorne who, by arrangement between the two companies, also acts on behalf of the defendant in regard to matters concerning fire and accident insurance. She receives a commission in respect of policies issued by defendant pursuant to proposals made through her. It appears that she is in possession of proposal forms, receipt books, deposit books, claim forms, accident forms and third party insurance tokens for the purposes of the defendant's business. *The modus operandi* appears to be that whenever she receives a proposal for fire and accident insurance she transmits it to the appropriate branch of the defendant. If the premium is paid to her together with submission of the proposal, she is authorised to accept such payment for transmission to defendant's branch and in fact does so. In due course, if the defendant decides to accept the proposal, it issues a policy, usually about three weeks after the date of proposal.

Plaintiff, who had then very recently attained his majority, purchased an Alfa Guiletti motor car on the 29th or 30th August, 1962. Soon after he acquired it his work took him away from Newcastle where he resided. but on his return about a week later, on the 8th September, he went to the offices of the Life Company for the purpose of insuring the car. He was accompanied by his mother. They were attended by Mrs. Hawthorne who, in her capacity as the agent for the Fire and Accident company, took out a proposal form appropriate to private motor car insurance and proceeded to complete it according to information given to her by the plaintiff. Having inserted the information which she apparently regarded as necessary she handed the proposal form to the plaintiff who signed it and returned it to her. She informed plaintiff that the annual premium was R35.35 but that it was not essential that he pay it forthwith; he could pay later. Upon the insistence of his mother, however, plaintiff paid the full amount of the premium to Mrs. Hawthorne who accepted it. Their business transacted, plaintiff and his mother were about to leave the office when Mrs. Dicks directly asked Mrs. Hawthorne whether the plaintiff was now covered, to which Mrs. Hawthorne answered "yes". All this took place on a

Page 305 of [1963] 4 All SA 303 (N)
View Parallel Citation

Saturday morning. On the following day the motor car in question overturned while plaintiff was driving it and was very severely damaged. It is common cause that the damage amounted to R998. During the afternoon of the day on which the accident occurred, Mrs. Hawthorne, who was a friend of plaintiff's mother, visited the plaintiff and discussed with him the steps which he should take in order to make a proper claim for payment by the defendant of the damage suffered by him. It was apparently accepted by Mrs. Hawthorne that plaintiff, by virtue of the business transacted on the previous day, was covered and entitled to claim compensation from the defendant. On the Monday, plaintiff proceeded to the office of the Life Company in Newcastle where he signed a claim form and an accident report form which he was told by the gentleman who attended to him were necessary for the purposes of presenting his claim.

The defendant repudiated liability intimating in its letter of repudiation that the plaintiff's application for insurance was not acceptable and that no insurance cover was provided. This letter was dated 11th October, but it had been preceded by a letter dated 18th September, in which the defendant notified plaintiff of its non-acceptance of his proposal for insurance and sent him its cheque for R35.35, being a refund of the premium paid by plaintiff, and which had meanwhile been deposited to the credit of defendant's banking account.

In these circumstances plaintiff instituted action against the defendant for an order declaring that a valid contract of insurance for one year was entered into and for payment of the amount of his damage. It was alleged in the declaration that the contract of insurance was duly completed on the 9th September, as a

result of the verbal acceptance by Mrs. Hawthorne, acting as defendant's duly authorised agent, of the written offer made by plaintiff and contained in the proposal form to which I have referred. (The proposal form was actually signed on the 8th September, but nothing turns on the discrepancy in dates). Defendant, while admitting in its plea that Mrs. Hawthorne assisted plaintiff in filling in the proposal form, denied that the alleged contract of insurance was concluded and, in an amendment to its plea, added a denial that Mrs. Hawthorne had authority to conclude the alleged contract of insurance or any contract on behalf of the defendant. In his amended replication plaintiff denied that Mrs. Hawthorne had no authority to conclude a contract of insurance with him and, alternatively, said that defendant was estopped from denying that she had "no authority to conclude the alleged contract of insurance on behalf of plaintiff". (It is clear that what plaintiff intended to say was that defendant was estopped from denying that Mrs. Hawthorne had authority to conclude the contract on defendant's behalf).

It will be observed that plaintiff did not, in the pleadings, specifically make the case that interim cover had been given by Mrs. Hawthorne, pending consideration of the proposal by the defendant; his case was that Mrs. Hawthorne had concluded a contract of insurance for one year, binding on the defendant. This notwithstanding, it was conceded by Mr. *Schreiner*, for defendant, that since the issue had been canvassed, it would be proper to consider not only whether plaintiff had

Page 306 of [1963] 4 All SA 303 (N)
View Parallel Citation

established the contract alleged in his declaration but also whether he had established a lesser contract; viz., a contract for interim insurance cover, pending acceptance or rejection of the proposal by the defendant. This concession was fairly and rightly made, for the substantial dispute is whether the defendant is obliged to indemnify the plaintiff in the circumstances revealed by the evidence and the basic question is whether Mrs. Hawthorne had authority to conclude any contract which would have that effect.

There is no evidence to justify a finding that Mrs. Hawthorne had express authority to enter into any contract of insurance on behalf of the defendant. She was not called as a witness and the only direct evidence concerning her duties and the scope and extent of her authority was that of Mr. Ellis-Cole, the secretary of the Durban Branch of the defendant. He was emphatic in his denial that she had authority to conclude any such contract on behalf of the defendant and his evidence is the source of the brief summary I have already made of her duties and functions as the local agent or representative of the defendant in Newcastle. But it was contended on behalf of plaintiff that even if she had no express authority to conclude a contract of insurance on defendant's behalf, Mrs. Hawthorne had implied authority to do so and that such implied authority flowed from her admitted authority to receive proposals and the premiums in respect thereof. The contention was, firstly, that she had implied authority to accept the proposal and thus bind the defendant to issue a policy in due course and, secondly and alternatively, that she had implied authority to grant interim cover pending the defendant's final decision on the proposal for insurance. Regarding the first of these contentions, I have not been referred to any authority nor am I aware of any, which lays down that an insurance agent must necessarily be taken to have authority to conclude a contract of insurance merely because he is empowered by his principal to receive proposals and premiums; nor have I heard any evidence which shows that that is the customary authority extended to agents or representatives of insurance companies. The function of an insurance agent is generally to canvass insurance business for his principal and to this end he is normally supplied with proposal forms and authorised to receive duly completed and signed proposals for transmission to the appropriate office of his principal. A proposal for insurance is an offer which must be accepted by the offeree before a contract can result and the proposal form signed by plaintiff in this case makes it clear that the offer is made to the defendant company for its acceptance or rejection. The mere fact that the agent by whom the proposal is received is also empowered to accept payment of the premium in respect of the insurance contemplated by the proposal does not necessarily extend his authority, for acceptance of the money tendered in payment of the premium is not inconsistent with the company's right to reserve its decision whether to accept the proposal or not; if it decides to accept the proposal it will retain the money and whether it issues a policy or not a valid contract of insurance will have been concluded by its acceptance of the proposal. (*Kahn* v. *African Life Assurance Society Ltd.*, 1932 W.L.D. 160). If it declines

Page 307 of [1963] 4 All SA 303 (N)
View Parallel Citation

the proposal it will be obliged to refund the premium which was paid to it in anticipation of acceptance of

the proposal. The facts and circumstances of any given case may show that acceptance of the premium was in fact the means by which acceptance of the proposal was to be expressed, but in the absence of special circumstances or evidence of what is customary in the business and in the area concerned, that is not an inference which will be lightly drawn, having regard to the terms and nature of the proposal and the general functions of an insurance agent. (*Cf. Linford* v. *The Provincial Horse and Cattle Insurance Company*, 55 E.R. 607 at p. 648). Such an approach to the problem of the implied authority of an insurance agent is consistent with the general approach to the question of implied terms in a contract; a term will only be implied if it is necessary to do so in order to give business efficacy to the contract. (*Mullin (Pty.) Ltd.* v. *Benade*, 1952 (1) S.A. 211 (A.D.); and *cf. Haine* v. *Pattrick*, 1917 T.P.D. 110 at p. 114). I cannot find justification, on the facts of this case, for holding that Mrs. Hawthorne had implied authority to accept the proposal for insurance made by the plaintiff.

This conclusion does not, however, necessarily dispose of the further question whether Mrs. Hawthorne had authority to give the plaintiff interim cover, pending the defendant's acceptance or declinature of the proposal. Usually, such interim cover is granted by the issue of a formal cover note

> "by which the insurers undertake to insure the proposer against loss from the time of its issue until they have arrived at a decision, and until, if they have accepted the risk, the policy can be prepared".

(Welford and Otter-Barry *Fire Insurance*, 3rd ed. at p. 76; and see *Queen's Insurance Company* v. *Parsons*, 7 A.C. at p. 24; *Bushby* v. *Guardian Assurance Co. Ltd.*, 1916 A.D. 488 at p. 493; *Fortlaide Garages (Edms.) Bpk.* v. *Schoeman*, 1959 (4) S.A. 533 (E) at p. 536). The authority of an agent to extend such limited cover on behalf of his principal will, I think, be more readily implied than authority to make a final and binding decision to accept the proposal, for an insurance agent's potential as a canvasser for insurance business is considerably enhanced when he is empowered to grant proposers interim cover. This is a fact of which insurance companies may safely be presumed to have knowledge but it does not follow that, because the grant of such authority to agents would give greater effectiveness to their efforts to canvass insurance, their principals necessarily authorise them to grant interim cover. It is said in Halsbury's *Laws of England*, 3rd ed., vol. 22 para. 391, that

> "the issue of such interim insurance falls within the authority of an insurance agent unless he is excluded, expressly or impliedly, by the terms of his authority, from committing his principal in that way".

But I think that this general statement is too widely and too positively formulated; the multiplicity of possible combinations of factors relevant to the determination of the scope of an agent's authority, defies the formulation of a general rule or presumption. Moreover, the cases cited in *Halsbury, supra*, in support of the proposition I have quoted, do not appear to me to justify its positive terms. In *Mackie* v. *European Assurance Society*, 21 L.T. 102, it appears that the agent was supplied by his principal with a book of printed cover notes which he issued

Page 308 of [1963] 4 All SA 303 (N)
View Parallel Citation

to proposers and this seems to have been the basis of the inference that he had implied authority to contract on behalf of his principal. (*Cf. Clark* v. *African Guarantee & Indemnity Co. Ltd.*, 1915 C.P.D. 68 at pp 81-83.) In *Murfitt* v. *Royal Insurance Co.*, 38 T.L.R. 334, there was evidence that the agent had been in the habit of giving oral cover to proposers for some two years before the occasion in question and that he had done so with the knowledge and approval of his superiors. There was also evidence to the effect that it was impossible to carry on the business of fire insurance without giving oral cover. In these circumstances, MCCARDIE, J., held that the agent had implied authority to grant interim cover but took care to add that he found for plaintiff "on the special facts of the case". The general trend of the decisions is reflected by MacGillivray *Insurance Law*, 4th ed., para. 621, who makes the point that an agent entrusted with forms for interim insurance would have apparent authority to bind the company in terms of the printed form, but that the mere acceptance of a premium by an agent does not necessarily bind the company.

Not only was Mrs. Hawthorne not entrusted with cover notes but there was direct and undisputed evidence that she was, in effect, a conduit pipe for the conveyance of proposals and money to the responsible department of the defendant. She was issued with printed receipt forms on which it is plainly stated "The issue of this receipt is not an acceptance of the insurance". She did not in fact issue such a receipt to plaintiff but according to Mr. Ellis-Cole she ought to have done so and knew or ought to have known that her authority did not extend to the concluding of a contract of insurance or the granting of interim cover. Subject to the evidence of Mr. Coetzee, to which I shall refer presently, there was no evidence to suggest

that it was customary for employees or agents occupying positions similar to the position held by Mrs. Hawthorne, to be vested with authority to grant interim or any cover; on the contrary, it was said by Mr. Ellis-Cole that it was a routine instruction to all representatives to tell proposers that they were not covered until acceptance of the proposal, although he could not say that such instruction had been specifically given to Mrs. Hawthorne.

The facts and circumstances of this case do not, in my judgment, entitle me to conclude that Mrs. Hawthorne had implied authority to grant interim cover to the plaintiff. In coming to this conclusion I have not overlooked the majority decision of the Court in *Cornelissen* v. *Equitable Fire Insurance Co.*, 4 S.35, upon which Mr. *Will*, for the plaintiff, relied. Apart from the material differences between the facts of that case and the facts now under consideration, it is not clear to me that the basis of the judgment in favour of plaintiff was that the agent had implied authority to bind his principal; on the contrary, it appears to have been accepted that the agent may have exceeded his authority, but it was held that the company was nevertheless bound, although the precise legal basis for its liability was not defined.

The question of estoppel remains.

For an estoppel to operate against defendant, it must be shown that defendant represented by words or conduct that Mrs. Hawthorne

Page 309 of [1963] 4 All SA 303 (N)
View Parallel Citation

had the necessary authority and that plaintiff acted, to his prejudice, on the faith of such representation; it is insufficient to show that Mrs. Hawthorne represented that she had authority (*Monzali* v. *Smith*, 1929 A.D. 382; *Quinn and Co. Ltd.* v. *Witwatersrand Military Institute*, 1953 (1) S.A. 155 (T) at p. 159; de Villiers and Macintosh on *Agency*, 2nd ed., at pp. 214-216 and authorities there cited). Mr. *Will* argued that it was necessary to take a broad and comprehensive view of the facts and probabilities and that if one did so, one could not escape the conclusion that Mrs. Hawthorne, as evidenced by the readiness with which she assured plaintiff that he was covered, must have been in the habit of granting interim cover to proposers and that the defendant must have known this, and, at least tacitly, approved thereof. This, he said, was a holding out by the defendant that she was vested with the necessary authority and was sufficient to found an estoppel. In addition, reliance was placed on the evidence of Mr. Coetzee who was previously employed, for some four years, by the Life Company at Springs and Nigel, in the Transvaal, and who testified to the general *modus operandi* in those areas relative to the canvassing of fire and accident insurance by employees of the Life Company. He said that he had once been told by a senior official that if a proposal for insurance was submitted together with the premium, cover could be given forthwith and he remembered that a customer had been similarly informed on one occasion. His view based on his experience as an employee of the Life Company, was that agents for the Fire and Accident Company had authority to grant interim cover if the proposal was a "straightforward case" and if the facts were honestly given by the proposer. Not surprisingly, he found it difficult to explain by whom, and when, it was to be decided whether the case was straightforward or not and at one stage in his evidence explained that what he meant by saying that an agent could give temporary cover was that the cover was conditional upon the company's acceptance of the proposal.

Whatever the plaintiff and his mother may have believed concerning Mrs. Hawthorne's status in the defendant's organisation and the scope of her powers and authority, it appears to me that the evidence falls short of establishing that such belief was induced by anything done or said by the defendant. The facility and assurance with which Mrs. Hawthorne purported to grant cover to the plaintiff may conceivably indicate that she had done so before, but it does not justify an inference that the defendant knew that she had done so. In the absence of any claim for payment, pursuant to any previous verbal cover given by Mrs. Hawthorne, the company would in all probability be and remain unaware of the fact that she had told other proposers that they were covered, assuming that she did in fact tell them so. There was a suggestion in evidence that the North British Insurance Company, which the plaintiff first approached for insurance, was apparently under the impression that immediate cover could or would be given by defendant's local representative in Newcastle, but this cannot assist plaintiff to establish a holding out or representation by defendant. Nor does the evidence of Mr. Coetzee materially advance plaintiff's case, for even on the assumption that his evidence shows that the defendant company

Page 310 of [1963] 4 All SA 303 (N)

View Parallel Citation

indicated some time ago that its local agents in Springs and Nigel could grant interim cover, on certain vague conditions, it does not remotely suggest that there was a holding out by the company that that authority was vested in all its agents and representatives, where ever they might be and whatever their status or standing in the organisation might be; nor is there any suggestion that plaintiff or his mother knew of the procedure in the Transvaal. The argument for plaintiff was based very largely on considerations of fairness and equity; it was said that popular opinion was that once the proposal had been signed and the premium paid, the proposer was covered, and that insurance companies should not be permitted to exploit such popular belief at the cost of the public. Not only did the evidence not establish such popular belief but it failed to show that the public's belief, whatever it might be, as to the rights of proposers, was one induced by the defendant. It was admitted by Mr. Ellis-Cole that in the case of an acceptable proposal, the defendant might well indemnify the proposer for loss sustained prior to actual acceptance of the proposal, although no interim cover had been granted by any authorised person. This would be done as a matter of policy and not on the ground of legal liability. It may be that if the defendant habitually paid the claims of proposers in such circumstances, its conduct in doing so might amount to a representation that the local agent who received the proposal had authority to bind the company in respect of interim cover, for the public would not necessarily know that such claims had been paid *ex gratia* and not on the ground of legal liability. But the argument is untenable in this case, because not only is there no evidence to show that defendant has habitually, or sufficiently frequently to influence public belief, made such gratuitous payments in the past, but there is no suggestion whatever that plaintiff had any knowledge thereof. And where the party setting up estoppel had no knowledge of the representation there can clearly be no causal connection between such representation and the alteration of his position to his detriment; without such causality there can be no estoppel. (*Strachan* v. *Blackbeard and Son*, 1910 A.D. 282 at pp. 288-289; *Baumann* v. *Thomas*, 1920 A.D. 428 at p. 436).

Closely allied to any consideration of the plea of estoppel, is the question whether the rule in *Royal British Bank* v. *Turquand*, 119 E.R.132, may be successfully invoked by the plaintiff in the circumstances of this case. Although counsel for plaintiff did not advance any specific argument on the point, I was invited to consider it. In *National and Overseas Distributors Corporation (Pty.) Ltd.* v. *Potato Board*, 1958 (2) S.A. 473 (A.D.), the Court applied the rule where the manager of the respondent Board had erroneously informed the appellant that his tender was accepted by the Board. In fact, another's tender had been accepted by the Board. The *ratio* of the decision was that the manager was the very person who had authority to convey the Board's decisions to third parties and that being so, the outside world was entitled to regard the Board as bound by communications of that sort made by its manager. The party to whom such communication was addressed was entitled to assume that the Board had passed

Page 311 of [1963] 4 All SA 303 (N)
View Parallel Citation

an appropriate resolution and that the manager had correctly conveyed the terms thereof to him; in other words, that the internal rules and regulations of the Board had been observed. (Cf. *The Mineworkers' Union* v. *Prinsloo*, 1948 (3) S.A. 831 (A.D.) at pp. 844-845). But where, as in this case, a person occupying a position which does not apparently qualify him to enter into contracts on behalf of the company, purports to do so, there is not, to my mind, room for the application of the principle enunciated in the *Turquand* case. Where such a person purports to contract on behalf of the company, the third party is necessarily put upon his enquiry and in the absence of representations made by the company itself, or negligence on the part of the company, such third party, if he acts upon the assurances of such unauthorised employee or agent, does so at his peril. This is so even if it was the fact of the agent's employment as such which gave him the opportunity to perform the unauthorised act. The position is different, of course, if the act done by the agent is of the class or type which falls within the scope of his authority, for then he would be acting within the scope of his authority and the fact that, while acting in the scope of his authority in that sense, he does an act which he ought not to do would not necessarily absolve the principal from liability for such act. This is well-illustrated by the decision in *Lloyd* v. *Grace, Smith and Co.*, 1912 A.C. 716, where the principal was held liable for the agent's fraud in concluding an authorised transaction on the principal's behalf. Although the agent was not authorised to act fraudulently, his principal had "put the agent in his place to do that class of acts". (See also an article by Mr. A. Stiebel in 49 L.Q.R. at pp. 349-355). In the present case Mrs. Hawthorne, in purporting to contract on behalf of the defendant, entered a sphere in which she was not authorised to operate and unless the defendant made it appear that she was so authorised, or ratified what she did in that sphere, it is not bound by her

acts.

In my judgment the plaintiff has failed to establish an estoppel against the defendant; nor has it been shown that the defendant is bound by any contract for insurance, or for temporary insurance cover, which may have been concluded between Mrs. Hawthorne, purporting to act for the defendant, and the plaintiff.

This conclusion makes it unnecessary to consider the further defence raised by the defendant in a late amendment to its plea, to the effect that plaintiff could not recover in any event because of his failure to disclose certain facts in his proposal which it was his duty to disclose. When the amendment was sought, Mr. *Will* reserved the right to ask for wasted costs to be awarded to the plaintiff because of the lateness of the amendment. The wasted costs, if any, are trivial, and in any event, the additional defence arose directly out of the evidence given by plaintiff and his mother. Until they had disclosed, in their evidence, the fact which Mr. *Schreiner* said ought to have been disclosed in the proposal, defendant could not reasonably have been expected to be aware of the availability of the defence which it added by the amendment. I do not think the circumstances warrant any special order as to costs.

Page 312 of [1963] 4 All SA 303 (N)
View Parallel Citation

Having regard to the fact that my conclusion is that plaintiff has failed to establish a contract of insurance binding on defendant, it seems to me that it would not be proper to enter judgment for defendant. Where a plaintiff fails to establish his plea that defendant is estopped from denying the authority of an agent to contract on his behalf, it is a nice point whether a judgment for absolution is competent, for there is much to be said for the view that estoppel having failed, the defendant's plea of absence of authority is upheld and the defendant should be entitled to judgment. But here the matter goes further for, independently of estoppel, the plaintiff set out to establish actual authority, whether expressed or implied, but did not discharge the *onus* of establishing it.

In the result, the defendant is absolved from the instance, with costs.

Appearances

DD Will, SC - Advocate/s for the Plaintiff/s

Tatham, Wilkes and Co - Attorney/s for the Defendant/s

DL McGilleivie and Co - Attorney/s for the Plaintiff/s

WHR Schreiner - For the defendant/s

JORDAN v NEW ZEALAND INSURANCE CO LTD
[1968] 1 All SA 11 (E)

Division:	Eastern Cape Division
Judgment Date:	23 November 1966
Case No:	not recorded
Before:	Munnik J
Parallel Citation:	1968 (2) SA 238 (E)

• Keywords • Cases referred to • Judgment •

Keywords

Insurance - Warranty - Age - Inaccuracy - Incorrectness not material - Substantial performance - Breach - Repudiation of policy - Substantial performance of requirement in regard to truthfulness - Substantial performance - Truthfulness of answers In regard to age

Cases referred to:

Beyers' Estate v Southern Life Association 1938 CPD 8 - Applied

Glicksman v Lancashire and General Assurance Co Ltd 1927 AC 143 (HL) - Referred to

Heslop v General Accident, Fire and Life Assurance Corporation Ltd 1962 (3) SA 511 (AD) - Applied

Roome NO v Southern Life Association of Africa 1959 (3) SA 638 (D) - Referred to

Yorkshire Insurance Co Ltd v Ismail 1957 (1) SA 353 (T) - Referred to

Page 12 of [1968] 1 All SA 11 (E)
View Parallel Citation

Judgment

MUNNIK, J.: The applicant is the plaintiff in a trial which commenced before me on Tuesday, 8th November, 1966, and the respondent the defendant.

Page 13 of [1968] 1 All SA 11 (E)
View Parallel Citation

In the declaration the applicant alleged that he had on 20th August, 1964, entered into a written policy of insurance with the respondent in respect of his motor car and paid the premium, and thereafter the policy was renewed and the premium on the renewed policy paid for the year commencing on 28th July, 1965. The applicant further alleged that the respondent had in terms of the policy undertaken to indemnify him against loss or damage to the insured vehicle and to indemnify him in the event of certain claims arising out of accidents caused by, or to, or in connection with the motor car being brought against him and to pay certain medical expenses up to a specified amount—that is, medical expenses arising out of injuries caused by the driving of the car. The applicant went on to allege that the car had in fact been involved in a collision and damaged beyond repair and that certain passengers had sustained injuries. He alleged that a dispute had now arisen between him and the respondent since he contended that the respondent was liable to pay to him the market value of the car which he alleged to be R1,400 (but which the parties subsequently agreed before the trial commenced to be R1,350) and to indemnify him in respect of a claim made against him by his passengers and to pay him the medical expenses provided for in the policy, and he further alleged that respondent disputed liability for his claims.

Respondent, after admitting the existence of the policy, pleaded as follows:

> "3. The defendant admits the dispute alleged in this paragraph and states the contention is correct for the following reasons:
>
> (*a*) the said contract of insurance arose by virtue of proposals in writing submitted by the plaintiff to the defendant on 28th July, 1964.

> (*b*) It is agreed between the parties thereto, that the said proposals should be on the basis of and incorporated in the contract between them and shall be promissory.
>
> (*c*) Further in terms of the said proposals
>
> (I) plaintiff declared that the particulars and statements therein are true and correct and complete and contain all information known to him affecting the risk to be insured."

Then followed certain allegations which are not relevant to the present enquiry. On 20th October the respondent gave notice of the intention to amend this plea as follows:

> "(*a*) The present sub-para. 3 (*f*) to be 3 (*h*).
>
> (*b*) The following three sub-paragraphs be inserted between paras. 3 (*e*) and 3 (*h*).
>
> '3. (*f*) Further in the said proposal which was signed by the plaintiff on 20th July, 1962, stated his age next birthday would be 22.
>
> 3. (*g*) The said particulars in the statement were untrue in that the plaintiff was in fact born on the 24th of May, 1942.'"

A simple arithmetical calculation reveals that in fact therefore the applicant's correct answer to the question which he filled in on the proposal form on 28th July, 1964, should have been "age next birthday, 23".

When the proceedings commenced in this Court the 14 days allowed for in terms of the Rules in connection with the amendment had not yet elapsed and Mr. *Rein*, for the respondent, formally applied for an amendment to the plea in terms of the notice of amendment. Mr. *Smalberger*, for the applicant, did not object. He then sought leave to amend his application on the following terms:

> "*Plaintiff replicates as follows to the amended plea.*
>
> *Ad* paras. 3 (*f*) and 3 (*g*): The plaintiff admits that in the said proposal his

Page 14 of [1968] 1 All SA 11 (E)
View Parallel Citation

> age next birthday was incorrectly stated to be 22 instead of 23, but denies that the incorrectness thereof was material to the contract of insurance and that it constituted a breach of any of the conditions of the policy on which defendant can rely to repudiate liability under the contract of insurance."

To this Mr. *Rein* objected on the ground that in law, having regard to the admission contained in the first three lines, namely that

> "the plaintiff admits that in the said proposal his age next birthday was incorrectly stated as 22 instead of 23",

the words following the figure "23" constitute no answer to the respondent's plea and are therefore irrelevant. I can find nothing in the new Rules to suggest that the principles dealing with an objection to amendments which render the pleading as amended either excipiable or subject to striking out procedure are no longer applicable. It seems to me therefore that, if I find Mr. *Rein's* objection to be well founded, I am entitled in terms of Rule 28 (8) of the Uniform Rules of Court to make such order as I deem necessary.

I may add that by consent counsel handed in the original proposal form and policy, and that these are before me as part of the pleadings and it was agreed that I could have recourse to them to decide upon the merits of the application now before me.

The basis of Mr. *Rein's* argument was that, having regard to the wording in the proposal form and the policy, the applicant's statement as to his age next birthday constituted a warranty and, once the applicant admitted that his answer was false, it was irrelevant whether or not the answer was material nor could he allege that such false answer did not constitute a breach of warranty upon which the defendant is entitled to rely to repudiate the contract. At the foot of the proposal form the following declaration appears:

> "I hereby declare that the above particulars in the statement are true, correct and complete and contain all the information known to me affecting the risk to be insured and that this and any other written agreement made by me or on my behalf for the purpose of the proposed insurance shall be the basis of the contract by me and the New Zealand Insurance Co. Ltd. and shall be promissory."

Then after some words which are not pertinent to the present enquiry the following sentence appears:

> "I further agree to accept the insurance and the terms and conditions set forth in the company's policy."

In the policy itself its preamble recites that the proposal and declaration

> "shall be the basis of this contract and it is deemed to be incorporated herein"

and condition 9 of the policy, appearing on the reverse side thereof provides, *inter alia*, that:

> "the truth of the statements and the answers in the said proposals will be conditions precedent to any liability of the Company to make any payment under this policy."

Now while it is true that the respondent has not specifically pleaded the proviso to condition 9, it seems to me that I am entitled to look at this condition in conjunction with the declaration at the foot of the proposal form and the preamble to the policy both of which I have set out in coming to the conclusion that the applicant has in regard to the answers in the proposal form given what has come to be known as a warranty.

Reference to the judgment of the CHIEF JUSTICE in *Heslop* v. *General Accident, Fire and Life Insurance Corporation Ltd.*, 1962 (3) S.A. 511 (A.D.), reveals that the wording of the declaration, the preamble to the policy and the condition there referred to, are in practically

Page 15 of [1968] 1 All SA 11 (E)
View Parallel Citation

identical terms to their counterparts which I have set out above and learned CHIEF JUSTICE concluded that, in regard to "some of the answers at any rate", the appellant had given "what has come to be known as a warranty". The CHIEF JUSTICE'S qualification in regard to "some of the answers at any rate" probably arose from the fact that in that case the questions may well have included some of the type referred to by KUPER, J., in *Yorkshire Insurance Company* v. *Ismail*, 1957 (1) S.A. 353 (T), in which question and answer were,

> "of such a nature that the parties could manifestly not have intended to include the answer amongst those of which the truth and correctness is a condition of liability",

as the CHIEF JUSTICE put it.

In the *Yorkshire Insurance* case KUPER, J., cites two examples at p. 357G-H of such questions and answers.

In the instant case I am satisfied that there is not a single question in the proposal form which falls into this category, but, even if I am mistaken in this view, I am satisfied that the question as to the applicant's age next birthday is not one of those of which it can be said that the parties could not have intended the answer to be subject to the warranty.

Mr. *Rein* in quoting authorities for the proposition that once a warranty is given the materiality of the answer warranted is irrelevant heaped Pelion upon Ossa. I do not propose to increase the length of this judgment by re-iterating all the authorities quoted by Mr. *Rein*. The position is perhaps best summarised by the following statement by Lord DUNEDIN in *Glicksman* v. *Lancashire and General Assurance Co.*, 1927 A.C. at p. 143 (quoted with approval by DAVIS, J., in *Beyers' Estate* v. *Southern Life Association*, 1938 C.P.D. 8):

> "It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance and if that is done then there is no question as to materiality left because the persons have contracted that there should be materiality in those questions",

to which DAVIS, J., added the words, "that is to say they are warranties".

Mr. *Smalberger* contended that the Court could not at this stage decide whether or not the answer in question was material and therefore the amendment should be allowed and the point be decided after evidence has been heard. In support of his contention he sought to rely upon the *dicta* of KUPER, J., in the *Yorkshire* case when dealing with certain answers which KUPER, J., described as answers which the parties did not intend to include among those of which the truth and correctness was a condition of liability. In my view there is, in the light of the authorities to which I have refererred, no room for this contention in the present case. The second argument raised by Mr. *Smalberger* is that the answer of "24 years" instead of "23 years" is substantially true as it was so close to correct. In my view there is no room for the application of the doctrine of substantial performance in considering the truthfulness or otherwise of the answer to the insurance proposal form. There can be no relative degrees of truth. An answer is either true

or untrue.

In this regard I would refer to the case of *Roome, N.O.* v. *Southern Life Assurance of Africa*, 1959 (3) S.A. 638 (D). In this case the applicant's admission that the age given is untrue is to my mind the

Page 16 of [1968] 1 All SA 11 (E)
View Parallel Citation

end of the matter. In any event the amendment to the application does not allege that the answer was substantially true but admits that it is false.

Then Mr. *Smalberger* contended that the reference to promissory warranties in the declaration and at the foot of the proposal form indicated that it is only the promissory warranties that are made the basis of the contract. Now, it is true that some of the questions relate to future conduct, for example the purpose for which the car will be used. In others which are no less material to the assessment of the risk, for example, the question: "Has any company cancelled a policy or required an increased premium" are questions the positive answers to which constitute affirmitive warranties, and I cannot conceive of any insurance company not making such answers the basis of the contract, and restricting the declaration to promissory warranties. Careful reading of the declaration in fact reveals that there is no substance in Mr. *Smalberger's* argument on this point. All that is achieved by use of the words "and shall be promissory" is to restate in specific terms the common law in relation to the warranties which relate to performance in future.

Mr. *Smalberger* further advanced, somewhat tentatively I felt, the argument that, at the time the renewal of the policy took place, the plaintiff's age was in fact "24 next birthday". A reference to the policy reveals however that the period of the insurance is

> "(*a*) from 28th July, 1964, to 27th July, 1965, both made inclusive, and (*b*) any subsequent period for which the company may accept payment for the renewal of this policy".

I am satisfied that this is not a case akin to lease where there is tacit renewal by payment of further rent. The period of cover is in fact an indefinite one, subject only to payment and acceptance of the premium annually. That being so it is the original policy which is in force throughout. That original policy is based on the original proposal form. The fact therefore remains that the original proposal form contained an untrue answer and it is therefore irrelevant that the applicant at a later age became 24 years old. If one analyses the position, it is in fact that the applicant warranted on 28th July, 1964 that his age next birthday would be 24 years, which it was not. Had he rectified this statement before renewal and renewal had then been affected different considerations might well have applied.

Mr. *Smalberger* in conclusion pointed out the hardship which will be suffered by insured who made careless and in this case probably irrelevant mistakes, if respondent's contentions were upheld. While I have a great deal of sympathy with the plaintiff I cannot in the words of Lord HALDANE in *Dawson's* case allow "hard cases to make bad law". It is said in Preston and Colyvaux's useful work on the *Law of Insurance*, 2nd ed., at pp. 106 and 107, in dealing with this question of answers and proposals:

> "The general scheme now used is that there is a proposal form signed by the insured containing various particulars and answers which are the basis of the contract."

Then at p. 105 the authors say the following after setting out certain advantages attaching to warranties:

> "The great advantage of warranties to insurers is that their breach entities them to repudiate quite irrespective of their materiality. Misrepresentation in

Page 17 of [1968] 1 All SA 11 (E)
View Parallel Citation

> order to entitle the insurer to avoid must not only be untrue but must be material. Breach of warranty entitles them to repudiate whether it is material or not."

That of course is our law. Then other advantages are quoted as being that the insurer need not, if they are untrue, avoid the whole contract, but can simply deny liability on it while still relying on other clauses such as, e.g., the arbitration clause. The authors state:

> "He will have no difficulty in proving that an insured made a misrepresentation if the contract containing the warranty is resolved into writing."

They go on to say:

> "Having regard to these advantages it is not surprising to find the insured's answers to a proposal form being given the force of warranties in the case of most forms of insurance. This practice might operate unfairly to the insured and has been condemned by the judiciary from time to time (i.e. the English Judiciary), but their condemnation has not prevented their development in this country (i.e. England). Legislation has however proved unnecessary as no reputable English insurer will normally rely on a purely technical defence to meet an honest claim, and insurers will generally accept counsel's opinion on its merits as opposed to technical considerations."

I am in no position to comment on the practice of insurers, English or otherwise, and it would therefore be wrong of me to do so. (I may add that the quotation in regard to the "reputable English insurers" not normally relying on technical defences comes from the English Board of Trade Committee's fifth report issued in 1957).

Considerations of hardship are unfortunately for the applicant entirely irrelevant to the present enquiry. People are presumed to enter into agreements with open eyes; they sign agreements and they are presumed to read them before they sign them. There is no trick question in the present case which would evoke any specific degree of further enquiry, as has been suggested in some cases, e.g. in the case of multiple questions, nor was anything else but a straightforward answer called for and that answer was certainly within the knowledge of the applicant. If it was not within his knowledge he should have taken steps to obtain his birth certificate before answering the question.

In these circumstances the objection must be sustained to the extent that the amendment is allowed up to the figure "23" where it appears in para. 1 of the amendment but all the words appearing thereafter are not allowed as part of the amendment.

Postea (after discussion between the Court and counsel).

As Mr. *Smalberger* for the applicant has advised me that his client is unable to continue with his action in these circumstances, leave is given to plaintiff to withdraw his action, subject to such order as I may make as to costs, after having heard argument thereon. It is noted that plaintiff withdraws his action.

Postea (23rd November, 1966).

In this matter, after I had given judgment in regard to the plaintiff's amendment to his application, Mr. *Smalberger* for the plaintiff, withdrew the plaintiff's action and consented to judgment in favour of the defendant. The question of costs was then argued. After hearing argument I reserved judgment until today.

In my judgment on the application I dealt with the pleadings and issues involved and do not propose to set them out again. What is necessary however is to refer to correspondence between the parties' attorneys

Page 18 of [1968] 1 All SA 11 (E)
View Parallel Citation

which was handed in by consent during the course of the argument on costs.

From the correspondence it appears that on 14th October, 1966, the defendant's attorneys notified the plaintiff's attorneys of their intention to rely on the incorrect answer given by plaintiff to the question as to his age next birthday for its declination of liability under the policy. On 20th October the plaintiff's attorneys replied as follows:

> "We refer to your letter of 14th inst., the statement wherein will apparently necessitate amendments to your client's plea and our client's replication. We refer you to the relevant Rules of Court in regard to amendments and shall be pleased to hear your proposals for complying therewith in view of the impending trial date."

The rest of the letter is irrelevant, save that it refers to the statement that the discovery affidavit would be served shortly.

The Rules of Court referred to in regard to the amendment of pleadings make provision for a time of 14 days to elapse from the date of service of the notice, that is 14 Court days. On 21st October defendant's attorneys replied to this letter in the following terms:

> "The notice of amendment was filed yesterday. If you advise us that no objection is raised to the application and if you will file the amendment to the replication there seems to be no reason why the trial should not proceed on

> the reserved dates."

(The reserved dates were the 8th, 9th and 10th days of November, 1966).

> "Please advise us as soon as possible of your client's attitude as the trial brief must be forwarded to counsel."

Thereafter on 25th October the plaintiff's attorneys dealing with this letter wrote the following:

> "We confirm further that our client will not object to the proposed amendment to your client's plea of which notice was given on 20th inst."

Thereafter, on 27th October, the plaintiff's attorneys wrote a further letter, reading as follows:

> "We refer to the interview which writer had with your Mr. Kaplan on 25th instant and to the fact that the South African Mutual and Fire General Insurance Co. Ltd. have informed us that they made available to your clients photostat copies of our client's proposal to them, a memo from Johannesburg to the East London office, dated 23rd July, 1964, and the letter sent to our client by the East London office on 28th July, 1964. We think you will agree that it would be to the mutual benefit of both of our respective clients if the issues in this matter can be limited as far as possible so as to lessen the number of witnesses to be called and thus shorten the proceedings. We shall therefore be pleased if you would advise us as soon as possible whether your client will now, in the light of the information made available to it, admit that the declination of our client's proposal for insurance to the S.A. Mutual and Fire Insurance Co. Ltd. was as a result of a policy of that company and not personal to our client."

From these extracts of the correspondence it is clear that the plaintiff's attorneys were advised before counsel was briefed on trial that the defendant intended to take what I may call "the wrong age point". Plaintiff could at that stage have requested defendant to file a notice of amendment in the usual form and have advised defendant that, as the 14 days permitted for objections would not have elapsed by the time the trial date arrived, he would apply for a postponement of the trial and wasted costs in order to take full advantage of the 14 days for considering the position. It is clear however from the letter of 25th October that plaintiff chose not to do so. It is also clear from the letter of 27th October that plaintiff intended preparing for trial.

Defendant no doubt also prepared for trial in the same way. When defendant moved for its amendment plaintiff did not object and, when

Page 19 of [1968] 1 All SA 11 (E)
View Parallel Citation

the amendment was opposed by the defendant, plaintiff argued the matter and lost. Plaintiff then as it were threw in the towel and consented to judgment against him.

Mr. *Smalberger* in arguing the matter of costs endeavoured to persuade the Court to either make no order as to costs or to allow the defendant costs as on exception. In the course of this argument he raised the contention that defendant could have taken the "wrong age point" by way of plea *ab initio*.

I do not think that there is any substance in this argument. The plaintiff certainly did nothing with the intention of putting defendant on his guard, all he did was to fill in a claim form. But even if it should have put the plaintiff on his guard the fact remains that, after defendant had given notice of his intention to take the point at a stage when there had been little or no preparation for trial and counsel had not yet been briefed for trial, the plaintiff chose to proceed with the trial as I have already indicated. Another course of action was open to him. Thereafter the point was in fact argued and plaintiff persisted in his defence to the point raised.

The general rule in these cases is that the costs follow the result although the Court has a discretion which must however be exercised judicially.

I am unpersuaded in this matter that the defendant should be penalised in any way by being deprived of any portion of the costs in preparing to come to Court to meet what was in fact the plaintiff's sustained challenge.

In the result, exercising my discretion, I can find no reason why the costs should not follow the result and the plaintiff is ordered to pay defendant's party and party costs.

Appearances

SG Rein - Advocate/s for the Defendant/s

JW Smalberger - Advocate/s for the Plaintiff/s

Marshall and Kaplan, East London - Attorney/s for the Defendant/s

Randell and Bax, East London - Attorney/s for the Plaintiff/s

KLIPTOWN CLOTHING INDUSTRIES (PTY) LTD v MARINE AND TRADE INSURANCE CO OF SA LTD [1961] 1 All SA 385 (A)

Division:	Appellate Division
Judgment Date:	7 November 1960
Case No:	not recorded
Before:	Schreiner JA, Van Blerk JA, Ogilvie Thompson JA, Botha AJA and Van Winsen AJA
Parallel Citation:	1961 (1) SA 103 (A)

• Keywords • Cases referred to • Judgment •

Cases referred to:

Cairns (Pty) Limited v Playdon and Co, Limited 1948 (3) SA 99 (AD) - Referred to

Norwich Union Fire Insurance Society Ltd v South African Toilet Requisite Co Ltd 1924 AD 212 - Applied

Papas v The General Accident, Fire and Life Assurance Corporation, Ltd 1916 CPD 619 - Referred to

Poynton v Cran 1910 AD 205 - Referred to

Smith v Accident Ins Co (1870) LR 5 Exch 302 (Exch) - Referred to

Page 386 of [1961] 1 All SA 385 (A)
View Parallel Citation

Judgment

SCHREINER, J.A.: This is an appeal from a judgment of SNYMAN, A.J., sitting in the Witwatersrand Local Division, in favour of the defendant insurance company in an action brought by the plaintiff, a trading company, on a burglary policy issued on the 29th January, 1958. I shall retain the terms "plaintiff" and "defendant". In the second half of December 1957, the plaintiff commenced business as a retail general dealer, selling mainly clothing, at the corner of Union and East Roads, Kliptown, a native area on the South-Western outskirts of Johannesburg. The business was, with insignificant exceptions, a cash business with the local inhabitants. It had substantially one supplier, an associated company. Two burglaries took place at the plaintiff's shop, on the nights of the 10th April, 1958, and the 24th May, 1958, respectively. The plaintiff alleged that goods were stolen to the value of £2,229 5s. 3d on the first occasion and to the value of £112 19s. 8d. on the second. The present proceedings do not involve any question of proof of the amount of loss, that issue, in terms of the policy, having to be decided by arbitration, if the defendant is liable. The plaintiff is at present seeking a declaration that the defendant is obliged to make good to the plaintiff the loss suffered by it in the burglaries.

The ultimate issue at the trial and on appeal was whether the plaintiff had breached a warranty in the policy which reads:

Page 387 of [1961] 1 All SA 385 (A)
View Parallel Citation

> "Warranted that the insured keeps, and during the whole of the currency of the policy shall keep, a complete set of books, accounts and stock sheets or stock books, showing a true and accurate record of all business transactions and stock in hand, and that such books, accounts and stock sheets or stock books shall be locked in a fire-proof safe or removed to another building at night and at all times when the premises are not actually open for business."

In its plea the defendant elaborated its allegation of breach of warranty by the following particulars:

> "(i) There was no or alternatively no complete or accurate record of the articles or goods sold by the plaintiff or the cost thereof;
>
> (ii) The plaintiff failed to keep stock sheets or stock books showing a true and accurate record of stock in hand;
>
> (iii) The plaintiff failed to keep a true or accurate record of all business transactions."

Upon an application to Court by the plaintiff the defendant was ordered to furnish further particulars for the purposes of trial. In fulfillment of the order the defendant alleged (*a*) that the plaintiff kept no stock book or stock sheets before a date subsequent to the 11th April, 1958, when sheets, referred to as a stock list, were furnished, which the defendant alleged, were incomplete and inaccurate; (*b*) that there was throughout the relevant period no record at all of the goods sold for cash, the cash slips produced not providing a description of the articles sold sufficient to enable proper and accurate "stock lists or stock sheets or stock records" to be compiled; and (*c*) that the stock list furnished after the 11th April, 1958, was incomplete or inaccurate in respect of (I) the stock of watches and clocks, and (II) the omission of certain pieces of gingham and pocketing. The complaint about the watches and clocks was abandoned. The complaint about gingham and pocketing was supplemented by an amendment granted during the trial, at the close of the defendant's evidence, in these terms,

> "that the plaintiff's books did not correctly reflect the goods purchased and delivered, in particular they contain a record of invoice 82 in regard to gingham and pocketing not delivered."

In this form the complaint was supported before this Court.

It was not in dispute at the trial that the burden rested upon the defendant to prove a breach of the warranty. It led the evidence of an assessor, Scott, and of two accountants, Shamos and McEvilly. The plaintiff called one witness, an accountant named Lewis.

There was no dispute as to the facts, and there was substantial though not complete agreement in the opinions of the experts. The appeal must be decided upon the interpretation to be given to the warranty and its application to the facts. Once the interpretation of the warranty is established, strict observance of its terms is a condition precedent to liability. (*Norwich Union Fire Insurance Society Ltd.* v. *S.A. Toilet Requisite Company Ltd.*, 1924 A.D. 212 at p. 216).

The warranty must be interpreted in the same way as any other conditions of the policy (*ibid*). In interpreting those conditions not only may the rule *verba fortius accipiuntur contra proferentem* operate against the company, but there is the further rule that the Court should incline towards upholding the policy and against producing a forfeiture. So KOTZE, J.A., in the *Toilet Requisite* case, *supra* at p. 222, said,

> "The construction of a warranty is generally taken in favour of the assured and against the insurer; and this is particularly the case when the warranty is expressed in doubtful or ambiguous language. It is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that

Page 388 of [1961] 1 All SA 385 (A)
View Parallel Citation

> end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract."

For this statement of the position May on *Insurance* (secs. 174-175) was cited. The opening words of sec. 175 in the 4th ed. are worth quoting—

> "No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured. so as not to defeat without a plain necessity his claim to the indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted."

The same approach is found in MacGillivray on *Insurance Law* (4th ed.) sec. 708, where after referring to the *contra proferentem* rule the learned author says,

> "But whichever party is responsible for the language there should be a tendency in all cases to hold for the assured rather than for the company. It is for the benefit of trade that policies should be construed in favour of protection and against forfeiture."

MacGillivray cites *Smith* v. *Accident Insurance Company*, L.R. 5 Ex. 302, where at pp. 308-309 KELLY, C.B., says,

> "Now, I entirely agree with the observation of WILLES, J., in *Fitton's* case, that it is extremely important with reference to insurances that there should be a tendency rather to hold for the assured than for the company, where any ambiguity arises on the face of the policy; and I will add that it appears to me to be equally important that where an insurance company think fit to introduce an exception to a liability which they have contracted to bear, they should express that exception in clear and unambiguous terms."

I shall deal presently with the factor of ambiguity or unclearness. For the present it is sufficient to say that these citations support the view that in regard to the interpretation of a condition the insurance company is at a disadvantage in two respects and not only in one.

Both the *contra proferentem* rule and the rule favouring the assured are of the type of wide, general rules called secondary rules in the *American Restatement* (Contracts sec. 236) and described as "sounds in the air" by *Bacon* (*Poynton* v. *Cran*, 1910 A.D. 205 at p. 213). Sounds in the air though they be they may decide cases. The application of such rules to particular problems of interpretation is often difficult. And it is even more difficult to assess the effect to be given to a combination of two or more of them, pointing in the same direction. Where two such rules point in opposite directions there may be a further rule according preference to one of them. Such a situation was mentioned by DAVIS, A.J.A., in *Cairns* (*Pty.*) *Ltd.* v. *Playdon & Co. Ltd.*, 1948 (3) S.A. 99 (A.D.) at p. 122 *ad fin.* When the rules point in the same direction their total weight is presumably greater than that of either taken alone, but nothing more precise can, I apprehend, be said upon the subject.

In relation to all such rules it seems that their use is directed to the ascertainment, not of the meaning of the language as understood by the Court, but of the meaning which the law says ought in the circumstances to be given to it. The understood meaning must be given effect if it is quite clear, both in the abstract and when applied to the facts, but if it is unclear the appropriate secondary rules must be brought into operation. Although WILLES, J., in the passage mentioned by KELLY, C.B., referred to an ambiguity arising on the face of the policy, I do not understand the word "ambiguity" to be used in this connection

Page 389 of [1961] 1 All SA 385 (A)
View Parallel Citation

as restricting the rule of favouring the assured to cases where there is an ambiguity or an uncertainty such as to let in oral evidence, despite the parol evidence rule. For that rule and its exceptions relate only to the ascertainment of what I have called the understood meaning. Nor do I read "on the face of the policy" as excluding cases where the difficulty is created by the application of the condition to the facts. It is not easy to see upon what principle such an exclusion could be justified. Working *a fortiori* from the distinction sometimes drawn between latent and patent ambiguities in relation to the parol evidence rule, one could expect that difficulties which only show themselves when the condition is applied to the facts would, if anything, more readily be met by one of the secondary rules than difficulties which are patent when the policy is read. I conclude therefore that the *contra proferentem* rule and the rule that the assured should be favoured ought to be taken into account wherever there is a real and not a manufactured difficulty in ascertaining the true interpretation of the condition, whether that difficulty is apparent on the face of the policy or is only made to appear when it is sought to apply the condition to the facts.

I now return to the language of the warranty. The first expression that has to be examined is contained in the words,

> "keeps, and during the whole of the currency of the policy shall keep".

At first sight it might seem to follow from these words that the warranty is breached if at any moment during the period from the issue of the policy to the loss there are not in existence (*a*) a complete set of books, (*b*) accounts, and (*c*) stock sheets or stock books. But upon further consideration it becomes clear that this is not so. Most obviously is this shown by the inclusion of (*b*) accounts. It is not in dispute that these are the balance sheet and profit and loss accounts which are first brought into existence at the end of an accounting period. In the present case since the plaintiff commenced business in December, 1957, its first accounts would be those of the 30th June, 1958, when its year ended, and at the dates of the policy and of the burglaries there were not and could not have been any such accounts.

Substantially the same position obtains in relation to (*c*) stock sheets or stock books. The latter are only the former bound together. There was at one stage in the expert evidence called for the defendant some support for the view that "stock sheets or stock books" could be given an extended meaning so as to include a continuous or progressive record of stock kept by card index or equivalent system. One witness even said that he took a stock sheet to include the relative purchases and sales invoices. The plaintiff's expert was clear that stock sheets mean the recording of the annual, or other, stock taking, and eventually the defendant's experts conceded that this was the ordinary meaning. Although there may be a stock taking at other times of the year stock sheets normally come into existence at the end of the

financial year. It was nowhere suggested in the evidence that it was normal or proper practice to do a physical stocktaking when a trader commenced business or when he took out an insurance policy over the contents of the shop. There is in my view no doubt that the requirement in the warranty is satisfied if stock is only taken at the end

Page 390 of [1961] 1 All SA 385 (A)
View Parallel Citation

of the financial year and if the relative stock sheets when they come into existence are kept at least during the following year. The warranty does not require the keeping of a continuous stock record. This conclusion is reinforced by the fact that whatever has to be kept has to be kept in a fire-proof safe or removed to another building during non-business hours. Clearly it could never have been intended that card indexes or the like should be so dealt with.

It follows that until the end of the first year the warranty is not breached merely because there are as yet no accounts or stock sheets to keep in the fire-proof safe.

A similar situation exists in regard to the books. Books must be kept reasonably up to date in accordance with proper practice for a business of the kind in question. It was not in dispute that according to such practice some books ought to be written up daily, while in the case of others it may be sufficient if entries are made at weekly, monthly or even longer intervals. It is always possible that a burglary may occur before a book has been written up. A complete set of books is of course not merely a full set of volumes with the correct labels on them. It is their contents that matter. But because absolute contemporaneity between transactions and the relative entries is not attainable in practice and because, as will appear later, it would be wrong to interpret the warranty as requiring more than reasonable contemporaneity in accordance with normal and proper practice, there must always be the possibility of a burglary taking place before the books have been written up and, at the beginning stages of a new business, the possibility of some at least of the books having no entries in them at all, although transactions of the kinds that would be entered therein have already taken place. In such a case the warranty would not have been breached merely because the relative entries had not yet been made.

From these considerations it follows that what the assured warrants is that books, accounts and stock sheets or stock books are being and will be kept in accordance with normal and proper practice. The expression "keeps . . . and shall keep" states the assured's present and future practice, not that at the moment of issue of the policy there exist books, entered up to date, annual accounts and records of a physical stock taking, and that these will be preserved. It states that the assured's practice is to bring them into existence, if they do not already exist, and that, having come into existence in accordance with that practice, they will be kept in a fire-proof safe, or removed to another building at night and whenever the shop is not open for business.

By a complete set of books is meant, in my view, a set of financial books, such as would be required for the type of business in question in accordance with proper accountancy practice. Different kinds of business would, within the generally accepted book-keeping system, require different books. The books, for instance, of a wholesale business, selling only on credit, would have to record the details of the goods sold to the respective purchasers, so that payment therefor could be duly recovered, while different considerations would apply in the case of the books of a retail cash business.

Not all documentary records of stock or of transactions are books

Page 391 of [1961] 1 All SA 385 (A)
View Parallel Citation

within the meaning of the expression "a complete set of books". Just as stock sheets are not books (see *Papas* v. *General Accident Etc. Assurance Corporation*, 1916 C.P.D. 619) so invoices and vouchers of various kinds, though they record transactions, are not books. The contrast is brought out clearly in condition 8 of the present policy, the material part of which requires the assured, when a loss has occurred, to

> "produce to the company . . . all such estimates, deeds, books of account, vouchers, invoices, copies thereof, documents, proofs and explanations . . . as they may reasonably require. Unless expressly accepted by the company, the evidence of the insured himself, uncorroborated by other material evidence in support of any claim, shall not be sufficient evidence to the company of loss or damage under this policy".

Books of account, it will be noted, are distinguished from other documentary records like vouchers and invoices. This accords with ordinary usage. In particular, books are different from the cash slips or dockets which may be handed to cash purchasers when they receive their goods and pay their money. This conclusion might not prevent a court's holding in a proper case that what an assured kept in a fireproof safe was a complete set of books so as to prevent forfeiture of the policy, even though what was kept in the safe was rather the material for writing up the books than the books themselves. But when the company seeks to prove a breach it must establish that the very things it listed were not kept and not that other kinds of records that might have supplemented the books usefully were not kept, or kept in the safe.

I next examine the words—

> "Showing a true and accurate record of all business transactions and stock in hand."

This, it will be observed, is not grammatically an independent warranty. It states a quality of the books, accounts and stock sheets or stock books already mentioned. Those, as I have already stated, are the only things that the warranty requires the assured to keep, and anything that is not one of those things falls wholly outside the warranty. The obligation in terms of the warranty is not to keep all such books, documents or other records as are necessary to provide a true and accurate record of all business transactions and stock-in-hand. It is to keep such a record, being true and accurate, of business transactions and stock-in-hand as is furnished by a complete set of books, accounts and stock sheets or stock books. Nothing turns on the words "true and accurate" in the absence of errors of commission or omission. Even without those words truth and accuracy would be an implied requirement. In particular circumstances, as where for instance the loss occurs shortly after the commencement of business, and there are neither accounts nor stock sheets or stock books, and even the books have not yet been fully written up, the record of all business transactions and stock-in-hand provided by them may be very imperfect. Nevertheless the warranty does not require that the imperfection is to be met by adding, to what in terms the assured is obliged to keep, other forms of record not mentioned in the warranty. Nor do the words "showing a true and accurate record etc." require the assured to keep books, accounts and stock sheets or stock books that are abnormal in the sense that they contain more details or are more strictly contemporaneous

Page 392 of [1961] 1 All SA 385 (A)
View Parallel Citation

than is required by proper accountancy practice. If it be suggested that accountancy practice, not being mentioned expressly, cannot be imported into the interpretation if it has the result that the insurance company is not as fully protected in the first year of the currency of the policy as it would be in subsequent years, the sufficient answer is that there is no reason to interpret the policy as leaving the assured without any indemnity in the first year unless he resorts to unusual methods of book-keeping. If that is what is required the warranty must in my view expressly provide therefor.

Naturally it is desirable from the point of view of an insurance company faced with a claim that the records of transactions should be as detailed as possible and as contemporaneous as possible. But that is no reason for interpreting the warranty as requiring more of the assured than it in terms requires. It will be noted that while the set of books must be complete it is not stated that the record must be such. It must be true and accurate but need not be full or particularised. There is no provision that it must contain details of any named kind or, indeed, of any kind at all. In particular it is not expressly stated, nor is it a necessary implication from the language, that in a cash retail business the books must record each transaction separately and set out the nature of the goods covered by the transaction. If the records are insufficiently detailed the assured may have difficulty in proving the loss, but that is very different from saying that the absence of book recorded details involves a breach of this warranty.

The word "all" does not import that details are required. It has the effect of forbidding the omission of any transactions but it does not say that all the elements of a transaction must be recorded. It does not require the goods sold to be described or the name of the customer to be stated. If that was the intention it should have been clearly expressed. On the wording as it stands even if all cash transactions are shown only by a single correct total figure for all the takings of a day, this is a true and accurate record of all the transactions and the requirement is met.

In regard to the words "and stock in hand", it must be appreciated that stock sheets and stock books do not provide a record of the stock-in-hand except as at the time of the stock-taking. As soon thereafter as goods are added by purchases or removed on sales the stock sheets or stock books cease to provide a

true and accurate record of the stock-in-hand. Where the books of a buying and selling business show the details of the goods purchased and sold, it is possible by using them in conjunction with the record of the last stock-taking to work out the stock that ought to have been in hand at the time of the loss. But the goods actually in hand can only be proved by a physical stock-taking. The goods purchased will normally appear in the books, whether the business is a credit or a cash one, but on the sales side the evidence shows, and this accords with what seems obvious, that it would be impracticable to record in the books in respect of every sale what the nature of the goods is, so as to be able to relate them to the stock existing before each such sale. It is true that a record can generally be kept, in the form of the counterfoil of a cash docket or slip. Such counterfoils, especially if they record the nature of the goods

Page 393 of [1961] 1 All SA 385 (A)
View Parallel Citation

sold, may be invaluable to the assured in proving his loss under condition 8, quoted above, but they do not constitute a book within the meaning of the warranty. Accordingly the warranty does not require that they should be kept, or, if kept, that they should be kept in a fireproof safe. Complaints that cash slips were not always issued for cash sales, or that in some or all cases they did not record the nature of the goods sold, are irrelevant to the question whether the warranty was breached.

Even where only the total daily cash takings are recorded in a book, some approximation to the stock that should have been in hand before the loss can be reached by using the last stock sheets, by working backwards from the total of cash received from sales, and by deducting the profit or "mark-up", thus reaching the quantity of goods represented by the money. Where the nature of the goods does not appear on the cash slips and where the percentage of profit varies—as one would have thought it inevitably must in a retail shop selling different lines—this method must be a very uncertain one. But it matters not whether it is certain or not and whether it could be made more reliable if cash slips recorded the nature of the goods sold and if the profit percentage were uniform and ascertainable, for none of those factors touch the scope of the warranty. The cash slips are, as I have indicated, not a book, and in relation to the warranty it makes no difference whether they are kept or not, whether if kept, they show details, or whether, if kept, they are kept in a fire-proof safe.

Nothing that is required to be kept in the fire-proof safe could, in relation to a retail cash business, provide a record of the stock-in-hand unless it compelled the contemporaneous recording of all cash purchases in a book of account, with details of the nature of the goods sold. The language of the warranty does not show that it requires the keeping of such a book or record. It would involve an abnormality—a wide departure from what the evidence shows is normal practice—and it could not have been intended by the parties when the contract of insurance was entered into.

In the case of an assured who has commenced business during the financial year of the loss there is the further obstacle to the obtaining of a proper picture of the stock-in-hand that there will as yet be no stock sheets or stock books.

These factors may make it extremely difficult to find out the stock-in-hand before a loss occurring in the first year, in the absence of more material than the warranty requires should be kept. But that, as I have indicated, is not a reason for interpreting the warranty as covering more than it does.

I conclude therefore that the proper interpretation of the warranty is (*a*) that the assured guarantees that his practice is and will continue to be to keep a complete set of books, annual accounts and annual stock sheets or stock books, (*b*) that he is not obliged because of the insurance to bring into existence such books etc. at any earlier date or in any different form, whether in respect of contemporaneity or in respect of the details recorded, than is required by proper accountancy practice, and (*c*) that he is not obliged to keep, in a safe or at all, any records other than those expressly mentioned in the warranty.

Page 394 of [1961] 1 All SA 385 (A)
View Parallel Citation

It remains then to apply the above conclusions as to the scope of the warranty to the facts. The plaintiff kept a ledger, a journal, a cash book and a rough cash book. Into the last named was entered each day the total of the sales, which were all for cash. The other books were entered up less frequently. No complaint was levelled against the completeness of the set of books nor, with the exception of the items of gingham and pocketing to which I shall refer presently, against their truth and accuracy. It was not

disputed that on the purchases side the books revealed all that was required. The general complaints (i.e. apart from that relating to the gingham and pocketing) were that there were no stock sheets or stock books, and that there were in the books no records of the cash sales other than the record in the rough cash book of the daily cash totals. It appears from what has already been said that the plaintiff did not breach the warranty in respect of the stock sheets or stock books by not having them in existence at any time before the end of the plaintiff's financial year. It also follows from what has been said that there was no breach in respect of the recording of the cash sales, it being sufficient that the totals of cash received were recorded daily in the rough cash book.

I turn now to the items of gingham and pocketing. After the first burglary on the 10th April, 1958, the plaintiff drew up two lists of goods —exh. "B", which purported to record the goods stolen in the first burglary, and exh. "C", which was a list of stock on hand as at the 14th or 15th April, 1958. In neither exh. "B" nor exh. "C" are there items of gingham or pocketing. After the second burglary on the 24th May, 1958, the plaintiff drew up a list (exh. "H") of goods said to have been stolen in the second burglary. Exh. "H" contained the following items—

> "9 pieces gingham X 30 yds. 270 yds. at 1s. 5d. — £19 2s. 6d.
>
> 1 piece pocketing 40 yds. at 1s. 5d. — £2 16s. 8d."

As I have indicated the particulars furnished under the order of Court only registered a complaint that the stock list, exh. "C", included no gingham or pocketing, the basis of the complaint being that there were the above two items in exh. "H". The obvious explanation of the absence of gingham and pocketing from exh. "C" and their presence in exh. "H" was that some gingham and pocketing had been acquired during the interval between the burglaries. In any event even if there was a mistake in exh. "H", in including both, this would not support the defence that there had been a breach of the warranty, since neither exh. "C" nor exh. "H" was one of the stock sheets or stock books that had to be kept in a fire-proof safe.

But the amendment granted at the close of the defendant's evidence raised an entirely new point in connection with the gingham and pocketing, the complaint being that the plaintiff's books did not correctly reflect the goods purchased, in that they contained a record of "invoice 82" in regard to gingham and pocketing not delivered. What is called "invoice 82" is exh. "I". It is dated 2.4.58, is headed "Order" and is addressed to the plaintiff's supplier. Among other items it records:

> "30 P/S Gingham 30 x 30 = 900 yds. 1s. 5d. — £63 15s. 6d.
>
> 6 P/S Pocketing 6 x 40 = 240 yds. 1s. 5d. — £17."

Three other documents bearing on the gingham and pocketing were

Page 395 of [1961] 1 All SA 385 (A)
View Parallel Citation

produced. Exh. "F", also referred to as "credit note No. 50", is headed "credit note", is dated 31st March 1958 and purports to record overcharges and under-charges made by the plaintiff's supplier. It does not refer to Invoice 82 or to gingham or pocketing. Exh. "J" is an undated document headed "a copy of credit note 50", and Scott, the defendant's assessor, stated that he received it at the office of the plaintiff's supplier when he was carrying out his investigations. In fact exh. "J" is very different from exh. "F". It shows the figure £80 15s. 6d. (being the total for gingham and pocketing in exh. "I") against the item "Goods not delivered (in 82)", but as stated above no such item appeared in exh. "F". Several of the figures in exh. "F" and exh. "J" correspond but the item of £80 15s. 6d. appears to have been inserted in exh. "J" without any justification. In the absence of explanation, and none was given in the evidence, it must be taken that exh. "J" was a false document. It was presumably known to be false by the person, one Ruch, a director of the plaintiff as well as of the supplier, who handed it to Scott, or at least it must have been known to be false by the person, apparently the bookkeeper, who composed it. But fraud was not originally pleaded and no amendment alleging fraud was at any time sought by the defendant. The fact, if it be a fact as I assume it to be, that exh. "J" was a false document does not show that exh. "I" ,the invoice or order No. 82, was a false document. It was that order that was entered in the journal and the ledger, though at what date does not appear. The plaintiff's witness, Lewis, said that purchases shown in the journal could properly reflect purchases which had not yet been delivered, though if they were not delivered during the financial year adjustments would have to be made at the end of the year. SNYMAN, A.J., made no finding on the acceptability of the expert evidence, even where the witnesses disagreed, and I see no reason for not accepting the evidence of Lewis.

The third of the three documents mentioned above is exh. "P" which is headed "Order", is dated the 28th

May, 1958 and purports to be an order by the plaintiff on its supplier for the same quantities of gingham and pocketing as are shown in exh. "I". It bears a note,

> "Goods not delivered with inv. 82 dated 2.4.58. and credited credit note No. 50."
>
> "Since delivered hence debit."

The reference to credit note No. 50 (exh. "F") appears to be without justification. How exh. "P", which appears to be a re-invoicing of the order in exh. "I", came to refer to exh. "F" was not explained. But, as in the case of exh. "J", exh. "P" does not show that exh. "I" was false in so far as it recorded a purchase of the gingham and pocketing.

I conclude that, although there is room for suspicion in relation to the gingham and pocketing, the defendant failed to show (1) that at the dates of the burglaries the books contained entries showing the two items as having been purchased, or (2) assuming that on those dates the books did contain those entries, that they were false.

The defendant, in my view, failed to prove either a general breach of the warranty arising out of what the plaintiff failed to keep in the safe or a particular breach based on the recording in the books of the purchase of the gingham and pocketing.

Page 396 of [1961] 1 All SA 385 (A)
View Parallel Citation

The appeal is allowed and the order of the Witwatersrand Local Division is altered to one declaring that the defendant is obliged to indemnify the plaintiff in respect of such amounts as it lost through the burglaries. The plaintiff is entitled to its costs in both Courts.

VAN BLERK, J.A., OGILVIE THOMPSON, J.A., BOTHA, A.J.A., and VAN WINSEN, A.J.A., concurred.

Appearances

OI Frankel, QC, and L Lawrence - Advocate/s for the Appellant/s

W Oshry, QC and H Rothschild - Advocate/s for the Respondent/s

Mendelow, Browde and Moss Cohen, Johannesburg; Lovius and Block, Bloemfontein - Attorney/s for the Appellant/s

Van den Bergh, Melamed and Nathanson, Johannesburg; Naudé and Naudé, Bloemfontein - Attorney/s for the Respondent/s

LAKE AND OTHERS, NNO v REINSURANCE CORPORATION LTD AND OTHERS
[1967] 3 All SA 225 (W)

Division:	Witwatersrand Local Division
Judgment Date:	5 May 1967
Case No:	not recorded
Before:	Galgut J
Parallel Citation:	1967 (3) SA 124 (W)

• Keywords • Cases referred to • Judgment •

Keywords

Contract - Executory - Reciprocal obligations

Contract - Performance - Reciprocal obligations - Executory contract

Insurance - Nature of contract - Executory - Premium unpaid

Insurance - Premium - Non-payment - Effect

Practice and Procedure - Exceptions - Evidence - Interpretation of contract - Clarification of uncertainty only possible at trial

Cases referred to:

British Oak Insurance Company Ltd v Atmore 1939 TPD 9 - Referred to

Cairns (Pty) Limited v Playdon and Co, Limited 1948 (3) SA 99 (AD) - Referred to

Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (AD) - Referred to

Ex Parte Liquidators of Parity Insurance Co Ltd 1966 (1) SA 463 (W) - Distinguished

Hollet v Nisbet and Dickson (1829) 1 Menzies 391 (C) - Referred to

Laws v Rutherford 1924 AD 261 - Considered

Mothle v Mathole 1951 (1) SA 785 (T) - Referred to

Roberts v Security Co (1897) 1 QB 115 (QB) - Referred to

Tangney and Others v Zive's Trustee 1961 (1) SA 449 (W) - Applied

Van Zyl v Nieman 1964 (4) SA 661 (AD) - Referred to

Ward v Barrett NO and Another NO 1963 (2) SA 546 (AD) - Applied

Wolpert v Steenkamp 1917 AD 493 - Applied

Page 226 of [1967] 3 All SA 225 (W)
View Parallel Citation

Judgment

GALGUT, J.: This is an exception taken by the defendants to plaintiffs' claims. The plaintiffs are the joint liquidators of Parity Insurance Co. Ltd. (Parity), now in liquidation. The provisional winding-up order is dated 25th November, 1964, and the final order was granted on 15th December, 1964.

The four defendants, by separate treaties, reinsured the liability of Parity in respect of its motor vehicle insurance business. In terms of the treaties of reinsurance (which form part of the pleadings) each defendant agreed to pay Parity certain amounts in respect of the ultimate net loss to Parity in connection with motor vehicle policies underwritten by it. These treaties cover the years 1961, 1962, 1963 and the

first half of 1964. The premium payable by Parity to the defendants is a percentage of Parity's gross premium income, but deposit premiums are payable by Parity quarterly in advance. In all save one of the treaties the reinsurer has the right to deduct from any payment due by it to Parity such amounts as were due to it by Parity for premiums.

During 1964 disputes arose between Parity and each of the defendants in respect of the liability of the defendants to Parity under their respective treaties of insurance. On 13th November, 1964, an agreement, upon which the plaintiffs found their cause of action and referred to in the papers as the "Goldberg Settlement" was concluded in London between Parity on the one hand and the four defendants on the other.

This agreement reads:

"1. All treaties in respect of 1961, 1962, 1963 and 1964 (half-year) to be of full force and effect and any rights to cancellation, rescission, damages or the repudiation of any claims are waived, as at this date.

2. 'Parity' pays an additional premium of R400,000 to be apportioned between the various reinsurers as may be agreed upon between them.

3. In respect of the years 1963 and 1964 'The Reinsurance Corporation' to implement its obligations in terms of the contracts so that the treaties rank as 'approved reinsurance'.

4. The reinsurers to pay amounts now due to Parity which in turn is to pay premiums now due at the maximum rate stipulated in the treaties.

5. Brokers to draw reconciliation account.

6. This agreement is subject to confirmation by the Board of 'Parity' and remains open for a period of 14 days from the date hereof.

7. In the event of a failure to carry out the terms of this agreement within one month of confirmation by 'Parity' the aggrieved party shall be entitled to cancel this agreement, in which event all rights are reserved."

It will be seen that in terms of the "Goldberg Settlement" the parties agreed to honour their treaties, but Parity had to pay an additional premium of R400,000 in addition to the premiums already due. The amounts due by the defendants on the one hand and by Parity on the other will be set out below.

So far as this judgment is concerned, nothing turns on clauses 3 and 5 above and no steps have been taken in terms of clause 7 to cancel the agreement. Pursuant to clause 6, the plaintiffs allege that the agreement was duly confirmed within the required period of 14 days by the provisional liquidators of Parity acting under the authority of an order of this Court.

The period of one month referred to in para. 7 was extended by agreement to 28th February, 1965. Plaintiffs further allege that they carried out the terms of the agreement within the extended period as required by para. 7. These allegations appear from paras. 10 (*a*), 10 (*c*) and 13 of the particulars of claim. These read as follows:

Page 227 of [1967] 3 All SA 225 (W)
View Parallel Citation

"10. (*a*) On 26th February, 1965, the plaintiffs tendered performance of Parity's obligations under the said agreement to the defendants.

10. (*c*) The plaintiffs on the said date tendered performance of Parity's obligations by acknowledging Parity's liability to the defendants in the said sum of R1,002,111.85, by tendering to recognise the claim of the defendants in the liquidation in such amount and by tendering to pay to the defendants the liquidation dividend in respect of such claim as soon as such dividend should be determined.

13. The plaintiffs contend that the said agreement is valid and have continued to tender performance of Parity's obligations in the terms set out above."

The amount, in terms of clause 4 above, payable by the defendants adds up to R694,039 whereas the amount payable by Parity in terms of the said clause 4 is said to be R602,111.85 which together with the additional premium of R400,000 mentioned in clause 2 made Parity's total liability to the defendants R1,002,111.85. Thus the amount payable by the defendants is less than the amount payable by Parity.

The plaintiffs claim:

(*a*)
An order declaring that each of the defendants is bound by the agreement of 13th November,

1964.

(*b*) An order declaring that the plaintiffs have validly tendered to perform their obligations in terms of the said agreement.

(*c*) Payment of R684,039.

(*e*) Costs of suit.

Even though prayer (*a*) asks for an order that the defendants are bound by the agreement, the true issue is: must the defendants pay to the plaintiffs R694,039 against a tender by the plaintiffs

"to recognise the claim of the defendants (for R1,002,111.85) in the liquidation"

and

"to pay to the defendants the liquidation dividends in respect of such claim as soon as such dividend should be determined"?

The defendants except to the plaintiffs' claims

"as being bad in law and/or disclosing no cause of action in one or more of the following respects:

(*a*) It is not in law competent for the plaintiffs to claim from the defendants performance in full of the 'Goldberg Settlement' referred to in the particulars of claim without themselves tendering to perform in full. The tender referred to in paras. 10 (*a*) and (*c*) and 13 of the particulars of claim is not a tender by the plaintiffs to perform in full.

(*b*) The purported confirmation of the 'Goldberg Settlement' by the provisional liquidators referred to in para. 8 of the particulars of claim was incompetent and invalid in law".

In other words, in the first exception the defendants challenge plaintiffs' right to claim specific performance in full of defendants' obligations under the "Goldberg Settlement" against a tender, not of the full amount of R1,002,111.85, but only of the liquidation dividend which may become payable on the said claim.

This exception is based on the principle that a trustee who wishes to enforce a contract entered into prior to insolvency by the insolvent

"cannot demand performance of any remaining obligation under the contract by such other party, unless he himself tenders complete performance of all the insolvent's obligations, including unfulfilled past ones, under the contract".

See *Tangney and Others* v. *Zive's Trustee*, 1961 (1) S.A. 449 (W) at p. 453 and *Ward* v. *Barrett, N.O. and Another, N.O.*, 1963 (2) S.A. 546 (A.D.) at p. 554. This principle is merely an extension of the principle applicable in all bilateral contracts, viz. that the party who seeks to enforce specific performance must first fulfil or be ready and able to fulfil his own obligations. See *Wolpert* v. *Steenkamp*, 1917 A.D. 493 at p. 499.

Page 228 of [1967] 3 All SA 225 (W)
View Parallel Citation

Mr. *Welsh*, for the defendants, urged that the treaties of insurance were clearly bilateral contracts which imposed obligations upon the insured as well as the insurers; this being inherent in an insurance contract, which is defined by Lee and Honore in *South African Law of Obligations*, p. 149, para. 586, as:

"A contract between an insurer (or assurer) and an insured (or assured), whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest."

It was urged that even if the Goldberg Settlement was not a novation of the reinsurance treaties, the plaintiffs could not demand specific performance from the defendants without tendering to perform in full the reciprocal obligations of Parity. It was also urged that the Goldberg Settlement was a compromise or *transactio* and was thus a form of novation and thus had the effect of novating the basic obligations under the reinsurance treaties and altered the nature of the parties' rights and obligations. Reliance was placed on *Mothle* v. *Mathole*, 1951 (1) S.A. 785 (T) at pp. 789-790, and *van Zyl* v. *Niemann*, 1964 (4) S.A. 661 (A.D.) at pp. 669-670.

Mr. *Rathouse*, for the plaintiffs, agreed that in all executory contracts and contracts where there were

mutual (i.e. not independent) obligations, the trustee was obliged to tender complete performance of all the insolvent's obligations. He stated that, in the absence of a specific provision to the contrary, an insurer may be sued on a policy of insurance even though the premium has not been paid, as it is a basic principle of the law of insurance that the insurer assumes the risk upon the conclusion of the contract even if. the premium is not paid. See *British Oak Insurance Co., Ltd.* v. *Atmore*, 1939 T.P.D. 9 at pp. 13-14 and *Halsbury*, 3rd ed., vol. 22, p. 238, para. 453. It was pointed out that once the insurer has gone on risk he has undertaken a definite, albeit contingent, obligation. His obligation, it was urged, is a completed and not an executory one. See *Ex parte Liquidators of Parity Insurance Co.*, 1966 (1) S.A. 463 (W) at p. 471. It was thus urged that, in as much as the payment of premiums is neither a condition precedent nor a contemporaneous obligation, the promises in insurance (and reinsurance) contracts are independent and the insured could thus demand performance without tendering the premium. Put another way, it was said that, at the date of the liquidation, Parity had a vested right, under the reinsurance treaties, to payment. This right remains vested in the company under liquidation. The reinsurers had a concurrent but independent right to the payment of the premium. It was said also that set-off could not operate in that the liability of the reinsurer was an unliquidated one and that in any event set-off is a matter for plea.

There is no doubt that in insurance contracts, in the absence of a provision that the policy is not to attach until payment of the premium, such a provision will not be implied. This appears from the Roman-Dutch authorities. (See for example *Grotius*, 3.24.2, and van der Linden, *Institutes of Holland*, 4.6.7., *Juta's* translation, p. 459). See also *Lee and Honore*, *supra* at pp. 149-150, para. 587, and *Hollet* v. *Nisbet and Dickson*, (1829) 1 Menzies 391. This principle also appears from a

Page 229 of [1967] 3 All SA 225 (W)
View Parallel Citation

passage in *Halsbury*, 3rd ed., vol. 22, p. 238, para. 453, to which I was referred.

Thus the plaintiffs contend that the reinsurance contracts, as also the Goldberg Settlement on the basis that it did not bring about a novation and is thus an insurance contract, were not executory and the obligations were not reciprocal but independent and hence the liquidators were not obliged to make any tender and, in offering to admit the reinsurers' claims to proof, they offered all that could be legally required of them.

As I read the Roman-Dutch authorities and those cases cited in *Halsbury*, *sup. cit.*, which I have read, all that is said is that the contract of insurance is validly made and complete even though the premium of insurance is not paid. I do not understand any of the cases or any of the older authorities to hold or say that the insured may require the insurer to perform his obligations under that policy without himself performing his own obligation to pay the premium. The passage in Williston on *Contracts*, vol. 3, sec. 888, which deals with independent promises in insurance contracts does not in my view detract from what I have just stated. Where a premium is by the contract to be paid at some fixed future date and the event insured against happens prior to that date a different situation arises. Such a situation does not arise in the present reinsurance treaties and for that matter rarely arises. Support for what I say above is to be found in the language used by the learned Judges in one of the cases cited in *Halsbury* in support of the above passage, viz. in *Roberts* v. *Security Co.*, (1897) I Q.B. at p. 115, *per* LORD ESHER, M.R.; at p. 116 *per* RIGBY, L.J. As I read these passages the insured could claim payment of his loss but he would then have to tender payment of the premium or the insurer could deduct it from the amount of loss payable. The *dicta* of LOPES, L.J., at p. 116, although not as explicit, are to the same effect.

In the vast majority of cases the amount payable by the insured by way of premium is very small whereas the amount payable by the insurer on the happening of the event is often very substantial. Because of this the present problem does not arise in practice. The present case is very exceptional in that the premium payable far exceeds the amount due by the insurer. The dictates of logic and equity demand that the insured should pay or tender to pay the premium against payment by the insurer of the loss. This also accords with the definition of an insurance contract set out above and set out in all the old authorities. See van Leeuwen, *Roman-Dutch Law*, 4.2.1 (*Kotze's* translation, vol. 2, p. 89); Grotius, *Jurisprudence of Holland*, 3.24.1 (*Lee's* translation, p. 419); van der Keessel, *Select Theses* 712 (*Lorenz's* translation, 2nd ed., p. 255). These indicate that insurance is a contract whereby in consideration for a price, i.e. the premium, the insurer undertakes to make good the losses from the unforeseen danger. This price or premium is payable to the insurer not merely for his going on risk but also because it is expected he will pay the unforeseen loss if it occurs. I can see no basis for saying that payment for the loss can be demanded without paying or tendering to pay the premium.

It follows from what has been said above that I am of the view that,

Page 230 of [1967] 3 All SA 225 (W)
View Parallel Citation

In terms of the reinsurance treaties, Parity would have had to tender the premiums then due by it when claiming payment of the losses claimed. To the extent that the Goldberg Settlement can be said not to be a novation of the treaty obligations, what I have said above applies also to it. I will revert to the Goldberg Settlement later.

I was referred to passages in *Ex parte Liquidators of Parity Insurance Co.*, 1966 (1) S.A. 463 (W). It was said that VIEYRA, J., held (see pp. 471-473) that once the insurer has gone on risk his obligation is regarded as a completed and not an executory obligation. Whilst I find myself in full agreement with the result of that judgment I wish to say, with great respect, that I am not sure that the learned Judge did not go too far when he said that once the insurer has gone on risk his obligations are no longer executory. It may well be that, whilst the obligation to pay a sum in the event of loss remains, the contract from that fact alone remains executory. I am, however, also of the view that, if the insured has not paid the premium, then, as far as he is concerned, the contract remains an executory one. If I am right in this latter view then such an insured would be bound by the principles set out in the *Tangney* (cited above) line of cases and so too his trustee.

As mentioned earlier it was said by plaintiffs that the Goldberg Settlement did not novate the rights and obligations of the parties under the reinsurance treaties. I was referred to *Wessels*, 2nd ed., vol. 2, paras. 2396 and 2398, and the presumption against novation was stressed. Be that as it may it seems to me that the Goldberg Settlement is clearly a compromise or *transactio*. Each reinsurer waives his rights to cancel or repudiate; for this Parity had to pay an additional premium of R400,000 to be apportioned and also premiums at the maximum rates stipulated. The liquidators base their action on this contract. It requires them to pay premiums which total R1,002,111.85. From their side the contract is in my view still executory. The reinsurers must pay R694,039. From their side also it is still executory. That being so, the principle enunciated in the *Tangney* case, cited above, applies. The liquidators are therefore obliged to do all that Parity was obliged to do. Parity, as I have found, would have to tender to pay the premiums when claiming the amounts due by the reinsurer. Hence the tender made by the plaintiffs is not adequate and the first exception must succeed.

I have dealt with the matters raised in argument rather fully because the parties may wish to take the matter further. Because of the view which I have formed it is not really necessary for me to deal with the second exception but again because the parties may wish to take the matter further it may be advisable to state my views.

Mr. *Welsh* argued that the provision in clause 6 of the agreement, that the agreement was subject to the confirmation by the board of Parity and remained open for a period of 14 days, was a condition precedent to the agreement ever coming into operation. Alternatively it could be regarded as an option to Parity which had to be accepted in a particular manner, namely by the board of Parity. Relying on *Laws v. Rutherfurd*, 1924 A.D. 261 at p. 262, he said,

> "when the acceptance of an offer is conditioned to be made within a time or in a manner prescribed by the offeror, then the prescribed time and manner should be adhered to".

Page 231 of [1967] 3 All SA 225 (W)
View Parallel Citation

In these circumstances, so it was said, the purported confirmation by the provisional liquidators was not a confirmation by the board. He stressed that it must be clear that the reinsurers would never have contracted with a concern which might well be unable to perform its obligations. In order to uphold this exception I would have to find that clause 6 is clear and unambiguous. I would have to exclude an interpretation which to me seems very possible and which could be cleared up by evidence of the surrounding circumstances. These circumstances may show that the reinsurers were not sure that the Parity representative had full power to bind Parity to the extent that he sought to do; that the use of the words "board of Parity" merely indicated the machinery which the parties thought would be used to confirm because in the ordinary course this would be done by the board; that all that was aimed at was that a binding confirmation should be conveyed within the period. I can hardly believe, for example, that,

if a valid resolution could be and was taken by the shareholders in general meeting confirming the settlement, the reinsurers would have rejected or been entitled to reject such a confirmation. If that is so then the liquidators who act for the company could confirm. As stated it is a problem of interpretation which might be cleared up by evidence of the surrounding circumstances. This being so the second exception must fall, as the uncertainty can only be cleared up at a trial. See *Cairns (Pty.) Ltd.* v. *Playdon and Co. Ltd.*, 1948 (3) S.A. 99 (A.D.) at pp. 125-126 and *Delmas Milling Co. Ltd.* v. *du Plessis*, 1955 (3) S.A. 447 (A.D.) at pp. 453-455.

As far as costs are concerned the paper work was not increased by the taking of the second exception and I do not think that the hearing costs were much increased thereby.

In the result I find that the allegations in paras. 10 (*a*), 10 (*c*) and 13 of the particulars of claim do not disclose a cause of action in respect of claims (*b*) and (*c*). These claims are thus bad in law. The plaintiffs are to pay the costs of the exception. The fees of two counsel are allowed. The plaintiffs are given leave to amend the particulars of claim within six weeks from the date hereof if they desire so to do.

Appearances

O Rathouse, QC; S Kentridge, SC and WHR Schreiner - Advocate/s for the Defendant/s

RS Welsh, QC and CJM Nathan - Advocate/s for the Excipient/s

Webber, Wentzel, Hofmeyr, Turnbull and Co, and Philip Hilewitz - Attorney/s for the Defendant/s

Bowen, Sessel and Goudvis - Attorney/s for the Excipient/s

Littlejohn v Norwich Union Fire Insurance Society
1905 TH 374

Witwatersrand High Court
1905. November 15, 16 and 24.
WESSELS, J.

Flynote

Insurance. --- Husband and wife. --- Husband's insurable interest in the property of the wife. --- Whether husband may sue. --- Interpretation of insurance contract.

Headnote

Where a husband and wife married out of community of property carried on their joint household from the profits derived from a business belonging to the wife, which was under the entire control and management of the husband, *Held*, that the husband had an insurable interest in such business.

A husband who has in his own name insured property belonging to his wife, in which he has an insurable interest, may sue in his own name on the policy.

The conditions of an insurance policy provided that the policy should be void if the insured fail to give notice of a change in the nature of the occupation either of the premises or of the adjacent premises."

1905 TH at Page 375

Held, in view of an American decision, that the fact of the adjacent premises having become vacant did not amount to a change in the nature of the occupation of such adjacent premises, and that consequently no notice was necessary.

Case Information

This was an action for the recovery of £1500, alleged to be due under a certain policy of insurance against loss by fire effected by the plaintiff with the defendants with regard to certain goods.

The defences raised by the defendants were: (1) That the plaintiff had no insurable interest in the goods, and was not entitled to sue on the policy. (2) That if he had an insurable interest the value thereof was not £1500. (3) That the policy was void by reason of a breach on the part of the plaintiff of the following conditions: (a) By clause 1 of the conditions of the policy it was *inter alia* provided that "the applicant shall state his name, residence, occupation and the nature of his interest." In breach of this condition the plaintiff did not disclose the nature of his interest; but fraudulently or otherwise wrongfully held himself out to be the owner of the goods, whereas a certain partnership called Broekhuizen & Campbell were the real owners. (b) By clause 2 of the conditions of the policy it was *inter alia* provided that "in case any additions or alterations shall be made in or to any risk on which an insurance has been effected, on the building itself or on the goods, wares or merchandise deposited therein . . . . . or if a change in the nature of the occupation either of the premises or of the adjacent premises this policy shall be void, unless the assured shall have given notice to the society. . . . ." In breach of this condition the plaintiff omitted to give notice to the defendants that the occupation of the adjacent premises had become changed inasmuch as the said adjacent premises, being portion of the same building in which the insured goods were, had become some time prior to the fire and were at the time of the fire unoccupied, and the risk had by reason of the said non-occupation become increased. (c) By clause 11 of the conditions of the policy it was *inter alia* provided that "if there appear to be any fraud, overcharge, imposition or misrepresentation" the claimant shall be excluded from all benefit under the policy. In breach of this condition the

1905 TH at Page 376

plaintiff fraudulently misrepresented the value of the goods at the time of the fire, and had fraudulently overcharged and claimed in excess of the true value of the goods by claiming that the goods destroyed were of the value of £1670 at the time of the fire or immediately anterior thereto, whereas in fact the value of the said goods, at the time did not exceed £600, as the plaintiff well knew. (d) The defendants

were induced to issue the said policy of insurance by the false and fraudulent statement by the plaintiff that the cost value of the stock at the stocktaking in July, 1904, was £1900, whereas in fact the cost value of the stock at that time did not exceed £1420, as the plaintiff well knew.

The facts as also the arguments of counsel and the cases cited by them appear from the judgment delivered.

F.E.T. Krause (with him *J. van Hoytema*) appeared for the plaintiff.

J.W. Leonard, K.C. (with him *J.B. Williamson*), appeared for the defendants.

Cur. adv. vult.

Postea (November 24): ---

Judgment

WESSELS, J.: The plaintiff is in possession of a policy over certain goods that were situated in a store at Zuurfontein. The store and goods were burnt down, and now plaintiff claims the amount of the policy, viz., £1500. The defences raised by the insurance company are: ---

(1) That the plaintiff had no insurable interest in the goods.

(2) If he had an insurable interest it did not amount to £1500.

(3) That the policy is void inasmuch as plaintiff has been guilty of a breach of certain conditions: (a) in not disclosing his interest, *i.e.* in holding himself out as the owner when the real owners were Broekhuizen & Campbell; (b) in not giving notice that the adjoining premises had become vacant; (c) in fraudulently making an exaggerated claim; (d) in making the fraudulent statement that the goods were worth £1900.

1905 TH at Page 377

From the evidence adduced before me I find (1) that the defendants have failed to prove that the insured merchandise belonged to the firm of Broekhuizen & Campbell. I find that the firm was dissolved before the policy was issued, and that the goods insured under the policy belonged to Mrs. Littlejohn, the wife of the plaintiff. (2) That the representation of Mr. Littlejohn, the proposer, that the goods were worth £1900 may have been somewhat exaggerated, but that it was made *bonâ fide*, and that the value of the goods was something between £1700 and £1800. I do not think that the exact value could be got from the books; but I think that the estimate of Mr. Hays is nearer the mark than that of Mr. Hine, and I also think that the possibility is that the true value was greater than the value as estimated from the books. (3) That the claim as made was never fraudulent nor grossly excessive, but represented fairly the actual loss. (4) That the adjoining property was occupied as a private hotel until 15th January, 1905. That after that it was occupied by Mr. Wolf until about the 24th January. That the possession of the property after that was in Mr. Wolf's trustee, and that it was vacant until the occurrence of the fire. (5) That I do not attach the slightest weight to the evidence of Dalton, and when he is contradicted by Mr. or Mrs. Littlejohn I accept their testimony, and not Dalton's.

The questions which I have to decide are: ---

(1) Whether the plaintiff had an insurable interest.

(2) Whether if he had an insurable interest he can sue in his own name.

(3) Whether he should have disclosed the fact that the ownership in the goods lay in his wife, and whether his failure to disclose this fact avoids the policy.

(4) Whether his failure to disclose the fact that the adjoining premises were left vacant avoids the policy.

Inasmuch as I find that there was no fraudulently exaggerated claim, and that there was no fraudulent or gross misrepresentation as to the value of the goods at the time of insurance, it is not necessary for me to decide what the effect of such a claim or of such a statement of value would have been.

(1) Had the plaintiff an insurable interest? I find that Mr.

1905 TH at Page 378

Littlejohn was married out of community of property with Mrs. Littlejohn, and that the ownership in the goods in the store at Zuurfontein lay with Mrs. Littlejohn. The plaintiff had, however, the entire control of the business, and he was the sole manager of the concern. After her marriage with plaintiff Mrs. Littlejohn had very little to do with the business. Mrs. Littlejohn informed the merchants that Mr. Littlejohn's signature was effective authority. The plaintiff and Mrs. Littlejohn lived on the profits of the business, and what plaintiff did was for the joint interest of himself and his wife. Plaintiff had possession of the goods and a free hand to buy and sell. Do these facts give the plaintiff an insurable interest in the goods? Mr. *Leonard* contended that the plaintiff had no insurable interest in the goods, because he was not the owner and had no estate in them, nor was he in the same position as a bailee or carrier inasmuch as he had no responsibility as over against his wife. The authorities show that an insurable interest is *sui generis*, and does not depend either upon a *jus in re* or a *jus ad rem*. Our Roman-Dutch law books, as far as I can see, throw but little light upon the subject, and therefore we must have recourse to English and American decisions.

Now the leading case on insurable interest is *Lucena v Crawford* ([1802-1806] R.C. vol. 13, p. 150; 3 Bos. and P. 75-106; 6 RR 625). In this case the question to be decided was whether an insurance on Dutch ships seized before declaration of war and effected by commissioners as agents for the King was good. This involved the question whether the King had an insurable interest in these ships. If insurable interest meant title, the King had none, for "if a ship be taken by hostile force the title to that ship as against foreigners cannot be changed by any act of local legislation, but the ship must be condemned in a court proceeding according to the law of nations on rules binding not only on the subjects of the country where the court is held, but on foreigners who are not so" (*per* Lord ELDON, R.C. p. 191). The ships were seized prior to hostilities, so that the King's possession was really of the nature of physical detention *vi et armis*. When hostilities commenced the ships were declared lawful prize, but as the insurance was effected prior to the

1905 TH at Page 379

declaration of hostilities it was effected upon property in which the King had no title, but of which he had physical detention *vi et armis*. Because, however, there was a probability that the King's physical detention would upon the declaration of war be changed to a right of ownership, it was held by the House of Lords that the King had an insurable interest in the ships.

CHAMBRE, J. (R.C. p. 177), cites the case of *Fitzgerald v Pole* to show that it had been determined by Lord WILLES that want of property was not enough to prove that there was no insurable interest, and says: "That a man must somehow or other be interested in the preservation of the subject-matter exposed to perils follows from the nature of the contract, ... but to confine it to the protection of the interest, which arises out of property is adding a restriction to the contract which does not arise out of its nature. . . . . A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; *in quantum mea interfuit, i.e. quantum mihi abest quantumque lucrari potui* (*D.* 46, 8, 13) — ('To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction'). On these grounds it seems to me that the contract of marine insurance may extend to protect every kind of interest that may subsist in or be dependent upon things exposed to the dangers to which maritime adventures are subjected; and I am not aware that by the laws of this country it has been reduced within narrower limits."

In the American case *Trade Insurance Co. v Barracliff* (46 Amer. Rep. 792) the question of the insurable interest which a husband has in the property of his wife was fully discussed; and though the American law as to the relation of a husband to the property of his wife differs from ours, the decision goes to show that insurable interest is not based on legal or equitable title. After commenting upon the case of *Lucena v Crauford* the American court said: "Other excerpts from the opinion of the learned judges in this cause might readily be made showing that an insurable interest is a much broader thing than title either legal or equitable, but the judgment itself suffices. If it be said that this was a maritime insurance, *it is also true that there is*

1905 TH at Page 380

no distinction between marine and fire policies as to the kind of degree of interest necessary to constitute the basis of the policy."

Judge STORY in *Hancox v Fishing Insurance Co.* (3 U.S. Cire. Ct p. 132) said: "An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property or *jus in re* or *jus ad rem*."

In *Hooper v Robinson* (98 US 528) it was said: "*Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient*, and a contingent interest thus arising may be made the subject of the policy."

It is only by placing it so wide that insurers may reinsure property they have once insured, for they have neither a *jus in re* nor a *jus ad rem* in such property. Yet that such reinsurance gives right to a valid claim is well known. "A contract to insure," says Porter (p. 290), "gives the insurer an insurable interest which will support a reinsurance to the full amount of his liability on the original policy." Porter (p. 75) quotes an American case where it was held that a right to royalty from a manufacturing business gives an insurable interest in the factory.

In Canada it was held according to Porter (p. 73) that the purchaser of barrels of oil not yet actually identified and separated from the other barrels of oil stored in the same place has an insurable interest in the number of barrels he has bought. Here the purchaser had neither a *jus in re* in the oil nor even was he subjected to a *periculum rei venditae*.

In the case of *Goulston v Royal* (1 F. & F. 276) the English court decided that a husband has an insurable interest in property settled to his wife's separate use, they residing together and sharing in the use of the property. Now although the English law relating to husband and wife differs materially from ours, this case shows that a husband has an insurable interest in his wife's property even though he has no legal estate in that property.

The principle to be deduced from these cases appears to be this: If the insurer can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a *jus in re* nor a

1905 TH at Page 381

jus ad rem to the thing insured his interest will be an insurable one.

In *Inglis v Stock* (12 QBD 571) Lord ESHER said that it is the duty of a court to lean in favour of an insurable interest if possible, "for after the underwriters have received the premium the objection that there was no insurable interest is often as nearly as possible a technical objection, and one which has no real merit as between assured and insurer."

Applying these principles, I ask myself the question whether the husband was in a worse position after his wife's property insured by him had been burnt, and whether he has suffered loss thereby. He was the manager of the property, it was almost entirely under his control, and from the profits he and his wife carried on the joint household. It is to his interest that the property should be replaced exactly as it was before the fire. In the words of CHAMBRE, J., he is interested in the preservation of the property because he has a benefit from its existence and a prejudice from its destruction. It is to his interest that the business should be conducted in the future as it has been in the past, and therefore I think he must be held to have had an insurable interest in the goods insured by him.

(2) The next question is whether the plaintiff, having an insurable interest, can sue in his own name, or whether the action should have been brought by Mrs. Littlejohn. It is clear that the proposer did not insure *ex facie* the proposal as the agent of his wife. He insured in his own name. As he had an insurable interest, he was entitled to insure that interest. The insurance of his interest is a matter with which his wife has nothing to do. If a husband has an insurable interest it would be illogical to require him to have the consent of his wife. If he need not have the consent of his wife to insure, and if he insured for his own pecuniary advantage, it seems to me illogical to say that he cannot at his own discretion recover the money in his own name from the insurance company. The rights which the wife may or may not have to the money when recovered is a *res inter alias acto* as far as the insurance company is concerned. This action appears to me therefore to have been rightly brought by Mr. Littlejohn in his own name.

1905 TH at Page 382

(3) Was it the duty of the plaintiff to have disclosed the fact that the ownership in the goods insured lay with Mrs. Littlejohn? It is true that the completed policy as issued (clause 1) requires that the interest of the assured should be disclosed; but this policy was given by the defendant company after it asked and obtained certain information from the proposer. The plaintiff claims that he did inform the company's agent that the ownership in the goods belonged to his wife. He says he distinctly informed Mr. Handfield, the clerk who took down his answers, of this fact. Mr. van Leggelo, who was present, bears this out. On the other hand, Mr. Handfield is quite positive that he was not told that the goods belonged to Mrs. Littlejohn. Now the written proposal signed by Mr. Littlejohn makes no mention of the ownership of the goods. There is no question in the proposal form which refers to the ownership of the merchandise. Under these circumstances it appears to me safer to consider the parties bound by the written proposal alone, and to hold that the plaintiff has not proved that he informed Handfield of the fact that Mrs. Littlejohn was the owner of the goods. I think the possibility is that Mr. Littlejohn and Mr. van Leggelo discussed the ownership of the goods between themselves, but not in the presence of Mr. Handfield. There is no question in the proposal form as to the ownership of the goods. I do not think, therefore, that this question was asked of the plaintiff, nor do I think he volunteered the information. As this question does not appear in the form signed by Mr. Littlejohn. I do not think it was considered by the company as a material matter to be informed upon. All that the company asked of Mr. Littlejohn was whether he was the proposer, what the nature of the goods were, where they were situated, the occupier's name and the trade carried on on the premises. The other questions as to how the books were kept, &c., were all answered with sufficient accuracy by the proposer. Mr. *Leonard* contends that the Court should regard the whole tenor of the proposal form, and infer from it that the proposer in his answers has practically asserted that he is the owner. Now there is nothing clearer from the decisions of the English and American courts than that the contract of insurance has to be construed, where any doubt exists, rather

1905 TH at Page 383

against the insurer than the insured. The reason for this is that the policy is prepared by the insurer and handed by him to the insured. The language of the policy is the language of the company.

Insurance policies are crowded with so many onerous conditions that it has often been a matter of surprise to me that the insured ever recover anything from the insurer. The vigilance that is exacted from an insured is something phenomenal. There are very few policies in which some trivial condition has, not at some time or other been overlooked by an insured. It is true that as a rule insurance companies do not avail themselves of the breaches of insignificant conditions, yet the fact remains that they can if they choose. These are the reasons why law courts have always been more indulgent to the insured than to the insurer. If the insurer wishes to exact his pound of flesh the courts will hold him strictly to his bond; see *Anderson v Fitzgerald* (4 HLC 484); *Frost's Works v Miller's Insurance* (5 Amer. Rep. 846).

If then the proposer has been asked no direct question about the ownership of the property it must be considered that the insurance company has not required that information as a condition precedent to the validity of the policy. The proposal form contains all that the insurer requires to know preliminary to issuing a policy, and if questions therein are honestly answered and a policy issued the insurer cannot afterwards say that the insured has not sufficiently declared his interest in the goods or property which he has insured. It must be considered under such circumstances that the insurer has waived the necessity of requiring fuller information about the nature of the interest of the insured in the property.

For the above reasons I do not think that the defendants are entitled to say that the policy is void because the plaintiff, who had an insurable interest in the merchandise, did not declare in whom lay the ownership of the goods.

But then it has been said that the plaintiff led the insurance company to believe that he was the occupier and therefore the owner. Even if he did say he was the occupier (which he does not), it does not follow that he therefore led the defendants to

1905 TH at Page 384

believe that he was the owner. Can he be said to have been the occupier? For the purposes of this policy I think he can. He had possession of the goods in the store, he had full power to deal with them as he

thought fit, and he was dealing with these goods as much for his own benefit as for that of his wife. He was therefore as much the occupier of the store as his wife was. The case, however, which the defendants made upon the pleadings is not that he acted wrongfully or fraudulently in declaring himself the occupier, but that he acted wrongfully and fraudulently in not disclosing that the goods belonged to a certain partnership of Broekhuizen & Campbell, who, the defendants alleged, were the real owners. This the defendants have wholly failed to prove, for, as I have said above, I accept the testimony of plaintiff and his wife that this partnership was dissolved before the insurance was effected. Defendants' case is that plaintiff had no interest in the goods, because they belonged to a partnership of which he was not a member. The fact, therefore, that plaintiff did not declare that the goods belonged to his wife is not raised on the pleadings, and in the defence that was raised the defendant has wholly failed.

(4) The next question is whether the policy has been rendered void for want of notice to the company that the adjoining premises were vacant during the months of January and February of 1905. It is a condition of the policy that any addition or alteration of the risk will render the policy void, and one of the ways in which such addition or alteration of the risk may occur is by not giving notice of "a change in the nature of the occupation either of the premises or of the adjacent premises." Does this mean that if the adjoining premises become vacant the policy-holder must give notice of that fact? In other words, is vacancy a change in the nature of the occupation?

In the case of an insurance of buildings there is no addition or alteration of the risk unless the building has been vacant for more than two months. It would therefore appear that vacancy in itself is not an increase or alteration of the risk, and that it only becomes so in the case of buildings if the vacancy is more than two months. It is difficult to see therefore why in the case of an insurance on merchandise the vacancy of adjoining premises

1905 TH at Page 385

should immediately operate as an addition or alteration of the risk. Mr. *Leonard* says we need not inquire why; it is sufficient answer that the parties so contracted. To that Mr. *Krause* answers that it is not clear that vacancy is a change in the nature of the occupation of the premises. If the defendant company had wished for notice of vacancy it should have specially stipulated to that effect, as it did in the case of an insurance on buildings. In other words, that here also the rule should apply that the contract must be strictly interpreted against the insurer. In support of his view he has referred me to the American case of *Somerset County Mutual Fire Insurance v Usaw* (mentioned on p. 26 of Ruling Cases, vol. 14). I have obtained from Pretoria the full report (56 Amer. Rep. 307), and I find it bears out Mr. *Krause's* contention. In that case a building was insured, and the policy contained a condition that it would be void unless notice were given "of any change made as to tenants or occupancy." The premises became unoccupied. There was no alteration or change of use after the date of insurance. The court said: "Perhaps the risk was increased when the house became tenantless, but it was not agreed that the policy should cease when use or occupancy of the premises ceased." When the property became vacant the court found that there was no change in the occupancy. It is true that this case was not an insurance on goods, but an insurance of a building; but I cannot see how logically the two can be distinguished. If vacancy is no change of occupancy in the case of a building insured, I fail to see how it can be a change in the case of the occupation of adjoining premises. This Court is not bound by the decision, for the decision is one of the Supreme Court of Pennsylvania. At the same time it was an appeal to the court of last resort of the State of Pennsylvania, and that court upheld in this respect the judgment of the lower court. I admit that I had grave doubts whether this view was correct, and whether vacancy is not really a change in the nature of the occupation, but as this very clause in a policy has received judicial interpretation in an American court of high authority I should feel great diffidence in taking another view.

The American courts have had a great experience in insurance

1905 TH at Page 386

cases, and even English text-book writers on insurance of wide reputation, such as Porter, are constantly citing American cases with approval. The editors of *Ruling Cases* cite this case apparently with approval, so that any judge sitting in this Court must have, to say the least of it, a doubt in his own mind whether this interpretation is not the right one. Now, as I have shown above, it is an accepted principle of insurance law that policies of insurance must be interpreted against the company. No other case has been quoted to me expressing a different view either from the South African courts, the English courts or indeed from any other court. I feel therefore constrained sitting here as a single judge to adopt the view of the

Supreme Court of Pennsylvania, and to hold that vacancy was not contemplated as such a change of occupation that it required notice from the insured to the insurer. There must therefore be judgment for the plaintiff as prayed for with costs.

Plaintiff's Attorneys: *Booth & Savory*; Defendants' Attorneys: *Steytler, Beyers & Grimmer*.