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MUNI DEO

v.

AUTOMOTIVE SUPPLIERS CO. LTD.

[SUPREME COURT, 1975 (Stuart J.), 19th December] B

Civil Jurisdiction

Insurance—Bill of Sale over motor car containing covenant by owner to insure the vehicle—policy taken out by mortgagee initially for full insurable value of car—subsequent renewal by mortgagee for proportion only of its value—whether mortgagee had power to continue insurance for anything less than full insurable value—Property Law Act 1971 *s.* 5 (*Schedule*). C

Bill of Sale—insurance clause therein containing covenant by owner to insure motor vehicle—policy taken out by mortgagee initially for full insurable value of car—subsequent renewal by mortgagee for proportion only of its value—whether mortgagee had power to continue insurance for anything less than full insurable value—Property Law Act 1971 *s.* 5 (*Schedule*).

The plaintiff entered into a Bill of Sale in respect of a motor car with the D defendant. One of the terms of the Bill of Sale was that the plaintiff should insure the car for its full insurable value. The policy was taken out by the defendant who charged the premium to the plaintiff. On subsequent renewal the defendant unilaterally reduced the insured value of the car to $500.00 without reference to the plaintiff. The car was involved in an accident whereby damage was caused amounting to over $1400.00, and the plaintiff sued the defendant for the difference between that sum and the insured value. E

Held : There was an obligation imposed by the Bill of Sale on the plaintiff to insure and keep the car insured for its full insurable value during its continuance. The defendant had no power to continue the insurance for anything less than the full insurable value for which the car had originally been insured.

Cases referred to : F

Small v. United Kingdom Marine Mutual Insurance Association [1897] 2 Q.B. 311.

Jackson v. Mayfair Window Cleaning Co. [1952] 1 All E.R. 215 ; [1952] 1 T.L.R. 175.

Jarvis v. Moy, Davies, Smith, Vandervell & Co. [1936] 1 K.B. 399 ; 154 L.T. 365.

Action in the Supreme Court for damages arising out of the defendant's G interference with a contract between the plaintiff and the insurance company.

Jay Raj Singh for the plaintiff.

J. R. Reddy and Ram Krishna for the defendant company.

STUART J. : [19th December 1975]—

The plaintiff in 1972 bought a motor car from the defendant company. He could not pay the full amount of the purchase price, and so he paid a deposit H of $980 and gave a Bill of Sale for $1943. One of the terms of the Bill of Sale was that he should insure the vehicle and a policy was taken out by the defendant with the Queensland Insurance Company Limited who are the defendant company's insurers, for $2,900 which was the full insurable value

of the car. The plaintiff signed the proposal for insurance and in due course was charged with a premium of $201.68 which he paid. He covenanted by his Bill of Sale that he would reduce his indebtedness by $65 a month, but in fact he did more than this. He paid $1000 in December 1972 and a further $500 in May 1973 and by 29th June he owed only $579.25. His insurance cover expired on 9th November 1973 and the plaintiff did nothing about it, but the cover was renewed by the defendant and plaintiff was debited in his car account with the defendant company with a premium of $73.52. In July 1974 while he still owed $135.12 to the defendant company on the vehicle, it was involved in an accident and damaged to the extent of $1404.35. Plaintiff told the Court that he was surprised to find at that stage that the insurance on his vehicle had only been renewed to cover $500, and he now sues the defendant for the balance of $904.35 which he was required to pay for repairs to the vehicle.

The action was begun in the Magistrate's Court at Lautoka in November 1974 but because of the congestion in that court has been transferred to this Court.

The way the plaintiff puts his case is that the defendant having insured his car for the full insurable value of $2,900, is obliged to continue to insure for the same figure, and cannot unilaterally reduce the insurance. He does, as I understood him, concede that the defendant is entitled to reduce the insurance as the car depreciates in value, but he contends that at the end of 1973 the car was worth at least $2000 and the insurance should not have been for a lesser sum. The defendant admits that in November 1973 it renewed the insurance on the vehicle for only $500 but says first of all that plaintiff knew all along that the insurance on the vehicle had been so reduced and says further that even if that were not the case, the insurance clause in the Bill of Sale on its true construction, permits the defendant to renew the insurance from time to time not for the benefit of the owner of the vehicle, but to protect its own interest as mortgagee in the vehicle, that its interest in the vehicle at the end of 1973 was only $500 so that, in the absence of instructions from the owner, it was entitled to reduce the insurance to that amount. Indeed, as I understood the argument, it is the defendant's contention that, whatever may have been the plaintiff's wishes in the matter, it was concerned only to protect its own interest.

Only two witnesses gave evidence, the plaintiff for himself, and one Padmanadan Nair, the defendant's credit manager in Suva, for the defence. Although I formed the impression that the plaintiff was concerned to make out the best case he could for himself, he appeared to me quite reliable as a witness, while I felt that the defendant's credit manager had little regard for accuracy, and that although what he told the Court might be broadly true, little reliance could be placed upon him for detail. After consideration of the evidence I have come to the conclusion that the plaintiff's position concerning the renewal of the insurance in November 1973 was that he did nothing about it and in due course received the debit for insurance and paid it without applying his mind to the question of reduction nor did he, I think, realise that the reduction in premium connoted a corresponding reduction in the amount of the insurance cover. When he had his accident he realised that over $1000 had to be paid for damage, rang the credit clerk who gave evidence and found that he was insured only for $500. He then attempted to have the insurance increased, and had the credit clerk represent to the insurance company that an error had been made. I think that he may very well have told the credit clerk why he wanted the insurance increased, and that that explains the phrase ' in error ' used in the credit clerk's letter to the insurance company. So finding, I reject the

defendant's defence that the plaintiff knew at all material times that his insurance cover had been reduced to $500. Had the defendant or the insurance company written to the plaintiffs or sent him a copy of the renewal certificate, a different state of affairs might have existed.

I turn then to defendant's second leg of defence—that it is entitled to rely on the insurance clause in its Bill of Sale. That clause reads :

> " THE GRANTOR HEREBY COVENANTS with the Grantee that the Grantor will forthwith insure and during the whole term of this security keep insured against fire and accident in such Company to be approved by the Grantee in the name of the Grantee for the amount of the full insurable value thereof the property and will duly and punctually pay all premiums in respect of such insurance and will produce and deliver whenever required the policy or policies and receipts for such insurance and premiums unto the Grantee AND it is agreed and declared that in case of default by the Grantor in the making or continuance of such insurance as aforesaid (of which default the non-production of the policy or policies or any receipt shall be sufficient evidence) it shall be lawful for but not obligatory upon the Grantee to effect any such insurance and to continue the same and to make any necessary payment or payments in respect thereof and all such payments respectively shall be a charge upon the property and shall bear interest at the rate of ten dollars per centum per annum from the date of payment by the Grantee to the date of repayment by the Grantor. "

Before I go on to consider the construction of the clause I will look at the insurance policy. There was, as I have said, a proposal for insurance signed by the plaintiff wherein he asked for insurance of the vehicle in his name as owner and that of the defendant as mortgagee, and in due time a policy was issued in pursuance of that proposal. The vehicle was described as being insured for the period stated in the schedule to the policy and there the period is stated thus :

> (*a*) 12 months to 4.00 p.m. 9th November 1973.
> (*b*) any subsequent period for which the insured shall pay and the company shall agree to accept a renewal premium.

Under the policy the Insurance Company agreed to pay loss or damage not exceeding the market value of the motor vehicle at the time of such loss or damage, and the policy goes on " but in no such event shall the company " (the insurance company) " be liable for a greater sum than the amount insured as stated in the schedule or if the policy shall have been renewed the amount stated in the current renewal certificate issued by the company in respect of this policy ". Attached to the policy is a renewal certificate in respect of the policy for a sum of $500 again in the name of the plaintiff as owner and the defendant as mortgagee. The policy bore an indorsement that it would be terminated as from the date the Bill of Sale over the vehicle was discharged, and the gist of that indorsement was notified to the insured by letter, and in October 1974 plaintiff was notified by the insurance company that the policy would not be renewed. However, my attention was drawn to nothing which might empower any person other than the proposer to reduce the amount of the insurance, nor was it suggested that the insurance company had refused to accept an insurance for the original amount when the policy came to be renewed in November 1973. On 4th December 1972 the insurance company sent the plaintiff a letter wherein the renewal is dealt with in this way :

> " If the policy is renewed and the vehicle is still under Bill of Sale the renewal certificate will also be held by the Bill of Sale holder and will be available for inspection by you."

When the policy was renewed, the plaintiff did not take the trouble to inspect the renewal.

It is to be remembered that, as has been pointed out in numerous cases of which *Small v. United Kingdom Marine Mutual Insurance Association* [1897] 2 Q.B. 311 is merely one example, the interests of the owner and the mortgagee are separate insurable interests. At p. 313 Lord Esher said :

> " . . . the interests of the mortgagor and mortgagee are distinct interests : the mortgagee does not claim his interest through the mortgagor but by virtue of the mortgage which has given him an interest distinct from that of the mortgagor "

In that case Small was the mortgagee of Wilkes the master and part owner of a ship which with its cargo he wilfully cast away. It was held that the fact that Wilkes had wilfully cast away the ship in which he had mortgaged his share to Small, was no defence to the insurance company and that Small was entitled to recover. In the Commercial Court, at first instance, Mathew J. at [1897] 2 Q.B. 42, 46 points out that the position of mortgagor and mortgagee is analogous to that of co-owners. In this case, of course, the defendant did not in fact merely renew the insurance for its own interest as mortgagee. It renewed the insurance cover both for its own and for the plaintiff's insurable interest. Hence, even if Mr Reddy's submission that the defendant was entitled to protect its own interest to the exclusion of that of the plaintiff, be well founded as a matter of law, and I do not think it is, as I will endeavour to show, the defendant has still done something other than it claims to be entitled to do.

The first thing to be noted about the insurance clause in the Bill of Sale is that the plaintiff has an obligation to insure the vehicle and keep it insured in its full insurable value so long as the Bill of Sale remains undischarged, so that if the plaintiff had desired to insure to a lesser amount than the full insurable value of the vehicle he would have been in breach of his covenant. There is a further obligation upon the plaintiff to duly and punctually pay all premiums in respect of such insurance—and I pause here to observe that these words ' such insurance ' can only refer to the insurance which the plaintiff has covenanted to effect—and to produce receipts for premiums for such insurance and here again, the words ' such insurance ' must refer back to the original insurance made by the grantor. The clause then goes on to provide that in case of default by the grantor in the making and continuance of such insurance as aforesaid, and again that can only refer to the insurance covenanted for by the grantor, it shall be lawful but not obligatory upon the grantee to effect any such insurance and to continue the same. Here again, in my view, the words ' such insurance ' can, as a matter of grammar, refer only to the insurance which should have been effected by the grantor and that is an insurance for the full insurable value of the vehicle. It is perhaps interesting in this connection although bearing in mind that one is a deed, and the other a statute, to compare this clause upon which the defendant relies with the provision as to insurance contained in section 5 of the schedule to the Property Law Act 1971 which reads :

> " That if the mortgagor fails to insure or keep insured the said buildings and erections, or to pay the said rates, taxes and charges, or to repair the said buildings and improvements, or to keep them in good and substantial repair and conditions, as aforesaid, then and in any such case, and as often as the same shall happen, it shall be lawful for but not obligatory on the mortgagee, at the cost and expense in all things of the

mortgagor, to insure the said buildings and erections or any of them in the amount of their full insurable value or in any less amount, or to pay any such premium, or to pay the said rates, taxes and charges, or to repair the said buildings and improvements and keep them in good and substantial repair and condition. ''

There the mortgagee is given explicit power to insure for a lesser amount if it becomes necessary for him to exercise the power to insure. Here there is no doubt that the plaintiff made default in continuing his insurance, but in my view the defendant had no power to continue the insurance for anything less than the full insurable value for which the vehicle had originally been insured.

Here again the fact that the defendant had no power under its Bill of Sale to insure for anything less than the full insurable value does not necessarily mean that the plaintiff can recover, for the Bill of Sale imposes no obligations upon the defendant, although it does give it certain powers. I return again then, to plaintiff's claim. Mr Reddy complained that he could not ascertain from the Statement of Claim whether the claim was founded in contract or in tort. Mr Jay Raj Singh described it as a tort arising out of a contract. It is in truth, I think, a tort for the essence of it is that the defendant wrongfully interfered with a contract between the plaintiff and the insurance company, thereby causing the plaintiff loss. The distinction is clearly pointed out in *Jackson v. Mayfair Window Cleaning Company* [1952] 1 A.E.R. 213 where Barry J. cites a passage from the judgment of Greer L.J. in *Jarvis v. Moy Davies Smith Vandervell & Co.* [1936] 1 K.B. 399, 405 :

'' The distinction in the modern view, for this purpose, between contract and tort may be put thus : where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract. ''

I accept Mr Jay Raj Singh's description. That being the case, of course, the plaintiff is entitled to damages, but he has quantified his damages in the sum of $904.35 for which sum he is therefore entitled to judgment. The plaintiff will also be entitled to his costs, and since this is an action transferred from the Magistrate's Court I fix the costs, by consent of the parties, at $70 plus disbursements.

Judgment for plaintiff.