

A

VISHNU DEO SHARMA

v.

B

UNION ASSURANCE SOCIETY OF AUSTRALIA LTD.

[SUPREME COURT, 1975 (Mishra J.), 18th July]

Appellate Jurisdiction

C

Agency—insurance proposal form signed in blank by proposer and completed by agent—non disclosure of material facts—whether insurer able to deny liability—whether agent acting on behalf of insurer or insured.

Insurance—proposal form signed in blank by proposer and completed by agent—non disclosure of material facts—whether insurer able to deny liability—whether agent acting on behalf of insurer or insured.

D

The appellant approached the respondent insurance company's agent and signed a blank proposal form. No questions were asked and no information provided by the appellant and any answers on the form were inserted by the agent. The premium was paid and a cover note issued by the agent in contravention of the respondent's instructions that a proposal form must first be completed.

E

During the period of the cover note, the appellant's stock in trade was damaged by fire, but the respondent denied liability on the ground that the appellant had failed to disclose on his proposal form the fact that he had made a successful claim to another insurance company when his stock in trade had been damaged on an earlier occasion.

It was contended by the appellant that the agent was acting on behalf of the respondent and that his acceptance of a blank proposal form must be imputed to the respondent who must have waived the need for the necessary information.

F

Held : 1. The agent had no authority to accept a blank proposal form, and in filling in any necessary information later, he would be acting as agent of the appellant and not of the respondent.

2. A cover note was not a policy of insurance. In construing the cover note, the conditions of the respondent must be read into it.

Cases referred to :

G

Queen Insurance Co. v. Parsons (1881/2) 7 A.C. 96.

Mayor of Auckland v. Mercantile & General Insurance Co. Ltd. [1930] N.Z.L.R. 385.

Newsholme Bros. v. Road Transport & General Insurance Co. Ltd. [1929] 2 K.B. 356.

Anglo-African Merchants Ltd. v. Bayley [1969] 2 W.L.R. 686 ; [1969] 2 All E.R. 421.

H

Appeal against the decision of the Magistrate's Court dismissing the appellant's claim against his insurance company under a contract of fire insurance.

H. M. Patel for the appellant.

P. Knight for the respondent company.

MISHRA J. : [18th July 1975]—

This is an appeal from the decision of the Magistrate's Court, Suva dismissing the plaintiff's claim against the defendant company under a contract of fire insurance. A

The plaintiff's claim was for \$700 representing the damage allegedly caused by fire to some watches and furniture in his shop at Lautoka. The defence filed by the company denied liability on two grounds, firstly, non-disclosure of material facts on the proposal form and secondly, fraudulent nature of the plaintiff's formal claim relating to the extent of the loss. To this defence the plaintiff did not file any reply. At the trial, however, he contended that under the circumstances of the case the company must be deemed to have waived the need for the information not supplied by the plaintiff. Waiver had not been pleaded by the plaintiff but no objection was taken by the defendant to its being raised at the hearing. The plaintiff also contended at the hearing the extent of damage claimed by him was genuine and not fraudulent. B

The learned Magistrate found that the non-disclosures complained of were material and had not been waived by the defendant. C

The plaintiff's shop had earlier been insured by the United Insurance Company Limited, a company which has nothing to do with the defendant company. In June 1971, the plaintiff received an expiry notice from the former company to say that his then current policy would expire on 24th June 1971. On 23rd June 1971 the plaintiff made out a cheque payable to the United Insurance Company Limited and went with the expiry notice to look for the company's agents in Lautoka. According to his evidence, he was advised to see one Prem Chandra who managed the firm of South Seas Real Estate Agency at Lautoka and who also acted as agent for the defendant company. The plaintiff's own evidence as to what exactly happened in Prem Chandra's office is not very clear. According to him Prem Chandra told him that the defendant company and the United Insurance Company were one and the same. The plaintiff, however, also says that he wanted to remain insured with the United Insurance Company but that Prem Chandra told him that company had no agent at Lautoka. In any case Prem Chandra persuaded the plaintiff to cross out the word "United" on the cheque and substitute for it the word "Union" and initial it. He then gave the plaintiff a cover note on behalf of the defendant company insuring his stock-in-trade against fire for the sum of \$3,000 until 23rd June 1973. This cover note is specifically stated to be subject to the current conditions of the defendant company. Condition 1 of the company's printed fire policy states: D

" 1. This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular. " E

According to the plaintiff's evidence which is not contradicted, Prem Chandra also gave him a proposal form (Ex. 3) to sign. He was asked no questions and he furnished no information whatever. Answers which appear on the form must, according to the plaintiff, have been inserted by Prem Chandra himself after the plaintiff had left the office. Item 5 and 6 on the proposal form are: F

" 5. State other insurances of any of the property proposed giving name of company and amount. " G

6. Has proponent, or husband or wife of proponent, ever had any property damaged or destroyed by fire? " H
If so, state each occasion, whether insured, and name of company. "

A No information was furnished in respect of those items. At the trial the plaintiff admitted that his stock-in-trade had been damaged by fire on a previous occasion when he had successfully made a claim against another insurance company. He maintained that, if asked, he would have furnished all the information correctly but that Prem Chandra had advised him that he had access to the proposal form the plaintiff had submitted to the United Insurance Company and that he himself would obtain all the relevant information from it.

B Counsel for the plaintiff at the trial submitted that Prem Chandra's negligence in accepting a blank form from the plaintiff is imputable to the defendant company and that the defendant must, therefore, be deemed to have waived the need for that information.

C At the hearing of this appeal the main issue raised by the appellant's counsel is whether the defendant can, having received the premium and issued the cover note through its agent, deny its liability on the ground of non-disclosure particularly when the alleged non-disclosure was entirely due to the conduct of the defendant's own agent.

D The cover note is, of course, not a policy of insurance. Its sole purpose is to keep the assured covered while his proposal offered for acceptance at the time of the issue of the cover note is being considered by the company. If the proposal is accepted a policy of insurance is issued. If the proposal is rejected the premium is returned and there is no policy of insurance. It is common ground that, in this case, the proposal was rejected by the defendant but that damage to the plaintiff was caused while the plaintiff was still covered by the interim agreement effected by the cover note. In all such cases, in construing the cover note, conditions of the defendant company must be read into it (*Queen Insurance Co. v. Parsons* [1881-2] 7 A.C. 96 at 124-5).

E Prem Chandra issued the cover note about the same time as he obtained the plaintiff's signature on the proposal form. When a company's agent fills a proposal form on behalf of a person intending to take out an insurance policy, he is, generally speaking, acting as an agent of the proponent and not the company. He would certainly not be the company's agent if, in filling the proposal form, he is acting beyond the scope of his authority (see *Mayor of Auckland v. Mercantile & General Insurance Company Limited* [1930] N.Z.L.R. G.L.R. p.385 at 390-1). In the present case Lawrence Feather, the manager of the defendant company, said in his evidence :

F "Cover note may have been issued before or after proposal form. A proposal form must first be completed by agent and cover note issued same time."

G It is clear from this that the agent Prem Chandra had no authority to accept a blank proposal form signed by the plaintiff. In undertaking, with the plaintiff's consent, to insert all the necessary information afterwards, he would be acting as an agent of the plaintiff, not of the defendant company. In saying that he signed a blank proposal form, the appellant would appear to be denying that it was his contract. This could conceivably be a ground on which he might repudiate the contract effected by the cover note but could not, on the basis of his signature, sue on it and, at the same time, escape the consequences of any non disclosure arising from it.

H The appellant would appear also to suggest that in getting him to sign a blank proposal form, Prem Chandra was acting fraudulently, and as he was then acting as the company's agent, the company should be held responsible for his action and be deemed to have waived the need for the information which is now the subject of the alleged non-disclosure. This is a curious argu-

ment, for if Prem Chandra was acting in fraud of the appellant, he was also acting in fraud of the company by deliberately withholding material information from it. It is possible that he may have done so to earn his commission but a fraud of this nature cannot be imputed to the company.

“ If the answers are untrue and he (the company’s agent) knows it he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are true, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statement in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.” (*Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356 at 375.)

This statement is equally applicable to a case of non-disclosure where the assured pleads waiver of information on the part of the insurance company.

In the present case, if Prem Chandra knew the correct answers and did not put them on the proposal form, he, as an agent of the plaintiff, was deliberately withholding from the company a vital piece of information which might have affected the company’s decision with regard to the plaintiff’s proposal. There is, however, no evidence to suggest that he did have such knowledge. If he did not know the answers to the questions on the proposal form there is no knowledge of his that could be imputed to the company and unless there is some knowledge of the alleged information which would put a careful insurer on inquiry the question of a waiver cannot arise (*Anglo-African Merchants Ltd. v. Bayley* [1969] 2 W.L.R. 686).

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.