ISHWARLAL VAGH

v.

ALBION INSURANCE COMPANY

[SUPREME COURT, 1965 (Hammett P.J.), 24th, 25th, 28th June, 7th October]

Civil Jurisdiction.

Insurance—fire policy—term avoiding policy if risk increased—storage of kerosene in quantity beyond that permitted by policy.

On the 9th March, 1962, the plaintiff signed a proposal for fire insurance over stock-in-trade furniture and fittings with the defendant firm pursuant to which a policy was duly issued. On the 22nd December, 1962, a fire at the premises damaged the contents of the shop, and, the defendant firm having denied liability, the plaintiff brought action. The policy contained a condition that it should be avoided with respect to any item thereof in regard to which "there be any alteration after the commencement of this insurance . . . (b) whereby the risk of destruction or damage is increased." There was also endorsed a warranty that not more than ten gallons of kerosene (in various forms of containers and with some exceptions not relevant) be at any time in or on any portion of the premises. Shortly before the fire the plaintiff commenced on the premises a grocery business in addition to his drapery business and acquired a 44 gallon drum of kerosene which he kept in an opened drum for sale in small quantities to customers.

Held: The storing on the premises of 44 gallons of kerosene did materially increase the risk of destruction or damage under the policy. This amounted to a breach of the terms of the policy which was thereby avoided.

Action to enforce claim under fire insurance policy.

J. N. Falvey and *A. Lateef* for the plaintiff.

H. J. H. Henchman and *S. M. Koya* for the defendant firm.

The facts appear sufficiently from the judgment.

HAMMETT P.J.: [7th October, 1965]—

The Plaintiff lived at Lautoka and at all material times carried on a business in a shop in Vitogo Parade under the name and style of "Mangu and Sons".

On 9th March 1962 he signed a proposal for Fire Insurance to the Defendant Insurance Company on the basis of which a policy of Fire Insurance was issured to him by the Defendant Company dated 5th

April 1962. This policy insured his stock-in-trade for £3,000 and his business furniture and fittings for £500 for a period of 12 months from 9th March 1962 against the risks of destruction or damage by fire.

A On 22nd December 1962 the Plaintiff lodged a claim under the policy that at about 11.30 p.m. on the night of 28th November 1962 there was a fire at his shop in which the stock and contents of the shop were destroyed or substantially damaged to the extent of £2,625.16.7. This claim was not met by the Defendant Insurance Company and the Plaintiff issued the writ in this action on 5th November 1964, claiming the sum of £2,625.16.7 under the policy.

B The policy is admitted by the Defence but the claim is defended on a number of grounds, some framed in the alternative, of which the following is a brief summary:

Firstly: That the Plaintiff wilfully set fire to his own shop and destroyed his goods with the intention of making a fraudulent claim under the policy;

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Secondly: The Plaintiff in his proposal said that the building was occupied as a drapery shop in which no hazardous goods were stored and the policy was issued on that basis, whereas at the time of the fire the building was occupied as a "Drapery and Grocery Store" in which *interalia* 44 gallons of kerosene were stored in an opened drum for sale to the

D public. It is contended that the Plaintiff was either guilty of misrepresentation in his proposal for insurance or else the the policy was avoided by reason of the change of user whereby the risks undertaken by the insurers were increased.

Thirdly: That the policy is void on the grounds that there were 44 gallons of kerosene on the premises in an opened drum in

E direct breach of a warranty in the policy limiting the amount of and conditions under which kerosene could be kept on the premises.

Fourthly: That the Plaintiff has failed to prove the extent of his loss and has falsely and fraudulently exaggerated his claim of the value of the goods destroyed in the fire and that he is thereby in breach of a condition of the policy which is, as a

F result, void.

Much of the evidence before me on some of the issues raised by the pleadings was either not seriously challenged in cross-examination or else was not contradicted by other testimony. On certain of this evidence, which I accept and which I do not propose to review in detail, I have no hesitation in arriving at the following findings of

G fact:

The Plaintiff, when he signed the proposal for this policy on 9th March 1962, was in fact carrying on business as a draper in this shop in Lautoka. His business did not prosper and he had considerable difficulty in both paying his trade debts as they fell due and in persuading his several creditors to allow him to defer payment of

H their accounts or to pay them by instalments. He also fell considerably in arrear with his rent, and his bank account was closed in June 1962.

According to the Plaintiff about two weeks before 28th November 1962 he began to trade as a grocer as well as a draper.

On 26th November 1962 he bought 44 gallons of kerosene, which he kept in an opened 44 gallon drum just behind the partition in the shop.

On Wednesday, 28th November 1962 the Plaintiff closed his shop at about midday, it being the day on which the shop was closed for the half-day holiday. At about 2.30 p.m. he called to see Mr. J. J. Prasad, the Lautoka Agent of the Defendant Insurance Company and told him, in the course of conversation, either that he was, or that he would be stocking groceries in his shop. He did not mention that he already had in his shop 44 gallons of kerosene in an opened drum.

According to the Plaintiff that evening at about 6.00 p.m. he called at his shop to pick up some toilet articles and then he went to his residence living his shop locked up.

At about 11.30 p.m. the same night the premises caught fire. The fire brigade was quickly on the scene and extinguished the fire, but considerable damage was done to the premises and their contents.

In alleging that the Plaintiff set fire to his own shop in order to make a fraudulent claim on his insurers the onus of proof rests on the Defendant Company and the standard of proof required is the same as in criminal proceedings, i.e. proof beyond reasonable doubt. I consider that little would be gained by reviewing in detail the evidence on this issue, since I have not the slightest hesitation in holding that whilst there may well be grounds for suspicion, the Defendant's case in this respect falls far short of proof beyond reasonable doubt and cannot be sustained.

The second line of defence is framed in the alternative. It first complains of misrepresentation by the Plaintiff, at the time he signed his proposal, that he was carrying on business as a draper, whereas he was in fact carrying on business as a grocer as well. There is no evidence at all before me that this was so. On the contrary there is ample evidence that at the time of the proposal he was merely trading as a draper and doing some tailoring work in his shop. I hold as fact that he was not trading as a grocer at the date of the proposal, i.e. 9th March 1962 and that he was not therefore guilty of any misrepresentation in this respect in his proposal. It is then alleged in the alternative that there was a change of user from that of a draper's shop in which no hazardous goods were stored to that of a draper and grocery shop in which hazardous goods, to wit: 44 gallons of kerosene in an opened drum, were stored after the issue of the policy.

The Plaintiff does not deny, and I hold as fact, that there was a change of user from that of a draper's shop to that of a draper and grocery shop in which 44 gallons of kerosene were stored in an opened drum. It next has to be considered whether, as a result of this change of user, the insurer's risk was increased and that the Plaintiff was thereby in breach of a condition of the policy.

The Proposal Form was filled in by Mr. J. J. Prasad, the Agent of the Defendant Company, from information given him by the Plaintiff. In the declaration at the foot of the Proposal Form signed by the Plaintiff appear the words "I agree that the person filling up this Proposal Form either wholly or in part does so as my agent and not that of the Company". In addition, it is well established that in the circumstances obtaining in this case Mr. J. J. Prasad was the agent of the Plaintiff in filling up this form and I do so hold. In order to avoid referring to this matter in detail again, I shall refer to the entries on the Proposal Form as having been made by the Plaintiff.

In his proposal the Plaintiff gave his "Profession or Occupation" as "Tailor and Draper". In the appropriate column dealing with the building, opposite the words "Occupied as" the Plaintiff entered the words "Drapery Shop". In reply to Question No. 6 which reads:

"Are any hazardous goods stored?"

the Plaintiff gave the answer "No". I accept the evidence of Mr. J. J. Prasad that he explained at the time to the Plaintiff that "hazardous goods" included such items as petrol and kerosene. I note that this question is framed in the present tense and there was no enquiry of whether it was intended to store any hazardous goods in the future, but I do not think this really affects the position.

In the policy itself the schedule at the appropriate place reads :—

"The Building being occupied as Drapery Shop".

The material part of the face of the policy reads :—

"Now it is hereby agreed (subject to the terms exclusions and conditions contained herein or endorsed hereon which shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the Insured to recover hereunder) . . . . . "

At the head of the page on the reverse side of the face of the policy the word "Conditions" is printed in large and heavy type and the relevant part of Condition No. 2 reads :—

"2. The Policy shall be avoided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance . . . . . (b) whereby the risk of destruction or damage is increased . . . . . ."

I accept the evidence before me that kerosene is a petroleum product and is an inflammable liquid. It is my opinion, and I hold, that kerosene as such falls within the meaning of the term "hazardous goods" used in its context in the policy. Different considerations may however apply under the terms of this policy according to the manner in which the kerosene was stored.

I consider it is pertinent to observe that it was obviously within the contemplation of the insurers that some kerosene would be or might properly be kept on the premises since the policy is endorsed with four warranties of which the first concerns kerosene and is framed in the following terms :—

"Warranted not more than 10 gallons of kerosene all in original unopened tins, or in steel drums or containers fitted with an approved pump for withdrawal of such Spirit, be at any time in

or on any portion of the premises in the occupation or control of the Insured, except that contained in an approved storage system, in a place of storage approved by the Company, or in the tank of any Automobile, Engine, Lighting or heating System."

If kerosene to the extent of 10 gallons was permitted to be stored on the premises in original unopened tins, it would appear that such kerosene would be intended for use on the premises, for the purpose of decanting, immediately after being opened, into a place of storage approved by the Company or into the tank of an engine or lighting or heating system, etc. I say this because otherwise, immediately upon opening a tin the warranty would be broken.

It appears to me, therefore, to be doubtful if the insurers did consider kerosene to fall within the meaning of the term "hazardous goods" used in its context in the policy if it was not more than 10 gallons in volume and was contained in sealed tins or stored in one of the places or by one of the methods indicated in the first warranty endorsed on the policy.

The 44 gallons of kerosene on the premises were supplied by a well-known and responsible firm dealing with petroleum products which also supplied the container in which it was stored and the means of withdrawing the kerosene therefrom. I am not at all sure that kerosene so stored, even to the extent of 44 gallons, falls within the meaning of the term "hazardous goods", used in its context in this policy. I concede this is arguable and I think it may well be a borderline case, but I am doubtful if kerosene so stored does fall within the meaning of the term "hazardous goods" used in its context in this policy.

But even so, it still has to be considered whether this change of user, i.e. from that of a drapery shop in which up to 10 gallons of kerosene kept on the premises within the conditions prescribed by the first warranty, to that of a drapery and grocery shop in which 44 gallons of kerosene were stored in an opened drum from which small quantities would be drawn and sold to the public, was an alteration of user whereby the risk of damage was increased.

It is not merely a question of considering whether there was an increased risk between a drapery shop and a grocery shop in which kerosene was stored in an opened drum for sale to the public in small quantities; it is whether there was an increased risk between the storage of 10 gallons of kerosene under the conditions permitted by the first warranty and the storage of 44 gallons under different conditions, i.e. in an opened drum for sale to the public in small quantities by a shop which now sold "groceries". I would add that it appears to have been accepted by both sides in this case that grocery shops in Fiji do sell kerosene to the public in small quantities.

I am of the opinion and hold as fact that the change of user in this case by the Plaintiff carrying on the trade of a grocer in the course of which he stored on the premises 44 gallons of kerosene in an opened drum for the purpose of sale to the public of lesser quantities drawn from the drum did materially increase the risk of destruction or damage under the policy. This amounted to a breach of the terms of the policy which, by virtue of Condition No. 2, was thereby

avoided, subject of course to the Plaintiff's submission that the Defendant Insurance Company waived the breach of this Condition.

Before considering the question of whether the Defendant Company waived this breach and cannot therefore now rely upon it, it may be convenient if I next deal with the other points raised in the defence.

The Defendant Company relies on the terms of the first Warranty which has, as I have already held, clearly been broken. Whilst this part of the policy calls itself a "Warranty" and a Warranty is an Insurance Policy is deemed to be a condition, it might well be considered to be worded in the form of a permit by the Insurers to the storage of limited quantities of kerosene for use on the premises. It is not, however, open to the construction that it permitted the storage of kerosene in an opened drum for sale to the public in the course of trade. This Warranty is endorsed on the back of the policy and I consider that the reference on the face of the policy to the "terms exclusions and conditions endorsed on the policy" was sufficient to draw them to the attention of the insured and thus bind him.

In my view it is sufficiently clearly worded and amounts to a warranty or condition, and was so intended. The keeping of 44 gallons of kerosene on the premises is clearly a breach of a warranty or condition that not more than 10 gallons of kerosene were to be kept on the premises.

I hold that the Plaintiff was in breach of this "Warranty", and that this was a very material breach which, materially, increased the risk of damage and destruction. As a result the policy was avoided.

In reaching this conclusion I have considered the contentions of the Plaintiff that Mr. J. J. Prasad, the Defendant Company's local agent, waived the condition as to user when the Plaintiff spoke to him on the afternoon before the fire. I accept the evidence of Mr. J. J. Prasad and I am quite satisfied that he did not so waive the relevant condition in the policy and that, in any event, he had no authority so to waive it.

The last issue raised by the Defence concerns the quantity and value of the goods damaged or destroyed in the fire. The onus of proof rests on the Plaintiff to prove the extent of the damage and its value and the standard is the balance of the probabilities. I am abundantly satisfied that some goods were damaged and destroyed by this fire. The evidence of the value of these goods depends almost entirely on the testimony of the Plaintiff himself, which on the issue of value is not corroborated. Corroboration is not, of course, necessary in law, but any decision in favour of the Plaintiff must be based upon findings of fact and fiindings of fact which are not admitted cannot be made by default, as it were, but only after the acceptance by the Court of evidence before it, which satisfies it that the onus of proof has been discharged.

The Plaintiff was not an impressive witness. He was at times evasive and he prevaricated as he gave his testimony. He did not appear to me to be a witness of truth and I did not feel able to place any confidence in his testimony or to accept it as the whole truth of

the matters to which he deposed save where such testimony was corroborated in some way. His evidence that the value of his stock and fittings damaged or destroyed by the fire was £2,266.12.3 is not corroborated in any way.

He has produced no balance sheets showing what his stock was valued at for the years before the fire in September 1962. He says he had an accountant who helped him with the accounts he must have had to prepare for Income Tax purposes, but he did not call him to give evidence. His daily cash sales book and the sales dockets produced in evidence do not really assist me in making any assessment of the value of his stock. After the fire he says the sale of the stock he salvaged realised £92.14.9. From the photographs in evidence it is clear that a number of shelves in the shop were empty and had been covered by articles of clothing such as shirts, hanging in front of them on clothes hangers.

I am not satisfied on the evidence before me that the value of the stock and fittings damaged or destroyed in this fire did amount to £2,266.12.3 as deposed by the Plaintiff.

In these circumstances I am left in the position that the Plaintiff has failed to satisfy me what precisely was the extent of his loss as a result of this fire.

The Defendant Company has alleged that the Plaintiff has fraudulently exaggerated his claim. This is alleged to be in breach of Condition No. 6 of the policy, which reads :—

> "If the Insured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise this Policy shall become void and all claims thereunder shall be forfeited."

The burden of proof of such a breach and such allegations of fraud rests on the Defendant Company and the standard required is proof beyond reasonable doubt. The Defendant Company has failed to prove this allegation in any way. It has not proved what was the value of the stock and it is not possible for me to held that it has been proved beyond reasonable doubt that the claim has been made falsely or has been fraudulently exaggerated to the knowledge of the Defendant. There are merely grounds for suspecting that this is the case.

After any fire in a shop it must be almost impossible to prove the exact value of the stock destroyed. To a large extent this must be the subject of assessment. It seems to me that there is a duty on the Court to make some attempt to assess what the minimum extent of the loss must have been. After all, it is clear there was some stock in the shop before the fire and that much of it was destroyed. The extent of the damage shown by the photographs indicates that almost the entire contents of the shop were substantially damaged or destroyed. In my opinion the quantum of the loss, if it should be necessary to assess it, should be referred to a Referee, appointed by the Court for enquiry and report.

I now turn to the issue raised by the Plaintiff that the investigations after the fire by Mr. Evans, the General Manager of the Defendant

Insurance Company, were directed to the issue of quantum only and not to the issue of breaches of any warranty or condition of the policy. As a result, it is submitted that the Defendant Company has waived any right to relief under any alleged breach of warranty or condition as to change of user or the storage of kerosene on the premises.

In my view, there is no evidence before me that Mr. Evans did either expressly or by implication waive any condition or warranty in this policy at any time. He was engaged in enquiring into the fire and the claim which was obviously expected to be lodged by the Plaintiff under the policy. Even if his enquiries had been solely connected with the issue of the quantum of the claim, which is not in fact the case, I do not consider that he thereby waived all other conditions and warranties in the policy. He clearly made as thorough and complete an investigation as he could, on the spot, as he was not only entitled to do, but as his duty to the Defendant Company required him to do. In my view no question of waiver arose as a result of his enquiries or because he did not immediately repudiate liability because of any breach of warranty. In this connection it is relevant to note that the Plaintiff's claim was not in fact lodged until 22nd December, 1962, i.e. over three weeks after the fire. That was some time after the Plaintiff had declined to reply to the further questions Mr. Evans wished to put to him on the ground that he, the Plaintiff, had already given all the information he had. It is clear from the fact that Mr. Evans still wanted to put more questions and wanted more information that he was still investigating the claim. It is hardly likely that the Defendant Company would have intended to waive any condition or warranty under the policy until it had completed its own enquiries and I am quite satisfied that it did not do so.

In these circumstances I am of the opinion that the claim of the Plaintiff must fail because :—

(1) He was in breach of Condition No. 2 of the policy by the the change of user of the premises from that of a drapery shop to that of a drapery and grocery shop in which he kept an opened drum containing 44 gallons of kerosene thereby increasing the risk of destruction or damage and the policy was thereby avoided; and

(2) he was in breach of the first warranty endorsed on the policy by keeping on the premises kerosene in excess of 10 gallons and stored in a manner in breach of the terms of that warranty.

There will therefore be Judgment for the Defendant Insurance Company with costs to be taxed.

Judgment for the defendant.