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BRIJ BUSHAN LAL

v.

QUEENSLAND INSURANCE CO. LTD.

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[COURT OF APPEAL, 1967 (Gould V.P., Adams J.A., Marsack J.A.), 27th November, 5th, 19th December]

Civil Jurisdiction

C *Insurance—proposal—untrue answer in—truth of answer made by term of policy condition precedent to liability.*
Insurance—"Marine Certificate"—evidencing unconditional contract at common law—non-disclosure of fact by insured—whether material—test of materiality—Marine Insurance Ordinance 1961.

In September 1965, and March 1966, the appellant signed proposals to the respondent company for comprehensive insurance over two motor
D vehicles. In each he answered in the negative the question whether he had ever had an insurance cancelled. He had in fact had a motor vehicle policy and a marine open policy cancelled by the United Insurance Co. Ltd. in October, 1964, and August, 1964, respectively and his answer to the question abovementioned was to his knowledge false. The policies issued pursuant to the proposals contained a proviso that the truth of the answers in the proposal should be a condition precedent to any liability of the
E respondent company to make any payment under the policy.

In June, 1966, the appellant insured with the respondent company merchandise (to be loaded onto the two motor vehicles abovementioned) against road risks and in relation thereto the respondent company issued documents called Marine Certificates. The fact of the earlier cancellations by the United Insurance Co. Ltd. was not disclosed to the respondent
F company.

Held: 1. The truth of the answers to the questions in the proposals for the motor vehicles having been made a condition precedent to the respondent company's liability the company was entitled to disclaim liability by reason of the untrue answers made by the appellant.

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2. On the basis that the Marine Certificates evidenced unconditional contracts of insurance governed by common law principles the appellant was under a duty to make disclosure of every material fact.

3. Materiality is a question of fact and in the circumstances of the case the non-disclosure of the earlier cancellations was clearly material.
H (Per Marsack J.A.: to determine materiality in such a case the test may be applied whether or no a prudent underwriter would take the fact into consideration in estimating the premium or underwriting the policy.) (Per Gould V.P.: the cancellations were not so remote in time that they would have ceased to influence a reasonable insurer.)

4. The respondent company was therefore entitled to avoid the contracts.

Cases referred to: *Newcastle Fire Insurance Co. v. Macmoran & Co.* (1815) 3 Dow. 255; 3 E.R. 1057: *Macdonald v. Law Union Fire & Life Insurance Co.* (1874) L.R. 9 Q.B. 328; 30 L.T. 545: *Mutual Life Insurance of New York v. Ontario Metal Products Co. Ltd.* [1925] A.C. 344; 132 L.T. 652: *Newsholme Bros. v. Road Transport & General Insurance Co. Ltd.* [1929] 2 K.B. 356; 141 L.T. 570: *Ewer v. National Employers' Mutual General Insurance Association Ltd.* [1937] 2 All E.R. 193; 157 L.T. 16: *Tate v. Hyslop* (1885) 15 Q.B.D. 368; 53 L.T. 581: *Locker and Woolf Ltd. v. Western Australian Insurance Co. Ltd.* [1936] 1 K.B. 408; 154 L.T. 667: *Yager v. Guardian Assurance Co. Ltd.* (1912) 108 L.T. 38; 29 T.L.R. 53.

Appeal from a judgment of the Supreme Court dismissing an action on four insurance policies.

A. D. Patel for the appellant.

M. J. C. Saunders for the respondent company.

The facts sufficiently appear from the judgments.

The following judgments were read: GOULD V.P.: [19th December, 1967]—

This is an appeal from a judgment of the Supreme Court dismissing an action in which the appellant claimed from the respondent the sum of £1,971 under four insurance policies issued by the respondent company.

On the appeal the facts were not in dispute. On the 3rd September, 1965, and the 19th March, 1966, respectively, the appellant signed two of the respondent company's proposal forms to effect comprehensive insurance over his two motor vehicles registered numbers D895 and C921 respectively. Policies were duly issued on each proposal. In each of the proposal forms the appellant inserted the answer "No" to the following question —

> "Have you . . . . (g) Ever had an insurance declined or cancelled, renewal refused, or an increased premium demanded on renewal thereof? If so, give particulars."

This answer was, to the knowledge of the appellant, untrue. Prior to the 3rd September, 1965, the appellant had been insured under Motor Vehicle Policy No. A945 with the United Insurance Company Ltd. (covering one of the same vehicles, No. D895) and Marine Open Policy No. MF/101, both of which policies had been cancelled by the United Insurance Company Ltd. Notice of the cancellations had been given to the appellant by letters which he admittedly received dated respectively the 28th October, 1964, and the 23rd August, 1964.

On the 9th June, 1966, the appellant signed two requests to the respondent company to insure merchandise to be loaded onto the two motor vehicles abovementioned for a journey "around Viti Levu" and in respect of each request the respondent company issued a document called a Marine Certificate purporting to insure the merchandise against road risks. On the 14th June, 1966, both the motor vehicles in question and the merchandise were destroyed by fire and the appellant subsequently brought the action now under appeal against the respondent company, which relied in its defence, in relation to the motor vehicle policies, upon the terms of the policies and the untrue statements in the proposals, and, in relation

to the Marine Certificate, upon fraudulent concealment of the earlier cancellations. In his judgment, having decided a disputed question of fact
A against the appellant, the learned trial Judge upheld both of these defences and found that the respondent company was entitled to repudiate all four contracts of insurance.

So far as the two motor vehicle policies are concerned the case is quite clear. The policies contain the following proviso —

B "PROVIDED ALWAYS that the due observance and fulfilment by the Insured of the terms provisions conditions and memoranda contained in endorsed on or attached to this Policy in so far as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the said Proposal together with all statements made in writing by the Insured or anyone acting on behalf of the Insured for the purposes of this Policy shall be conditions pre-
C cedent to any liability of the Company to make any payment under this Policy."

The learned trial Judge found that the untrue statement as to cancellation was of a "most material fact' but its truth has in any event been made an essential term of the contract, which therefore applies whether it is material or not: *Newcastle Fire Insurance Co. v. Macmorran* & Co. (1815)
D 3 Dow 255; 3 E.R. 1057. It is also unnecessary to consider whether the untrue statement was made fraudulently or innocently: *Macdonald v. Law Union Fire & Life Insurance Co.* (1874) 9 Q.B. 328. Therefore, as the question in the proposal was in fact answered untruly, the respondent company was by virtue of the express provisions of the contract under no liability to make any payment under the policies.

E Counsel for the appellant submitted that cancellation was not material unless it involved some default on the part of the insured. Counsel also referred to Condition 6 of the policies whereby the insured may "terminate" the policy and the company may "cancel' it, suggested that the words meant the same thing and that there was nothing in the termination of the United Insurance Company's polices which would increase the moral hazard for the Queensland Insurance Company. I am unable to attach any
F weight to these arguments. The cancellation of the United Insurance Company's policies was clearly proved in the Court below, and, on the law as I have stated it, no question of what caused the cancellation appears to arise.

I turn now to the question of the two "Marine Certificates" which the learned trial Judge held were not marine policies but unconditional contracts of insurance governed by general common law principles of insur-
G ance. Subject to the comment which I will make later I will deal with the matter on this basis. It is an elementary principle of insurance law that if the utmost good faith is not observed by either party the contract may be avoided by the other party. The application of this principle gives rise, among other things, to a duty by each party to make disclosure of every material fact. In the present case it was common ground that, when the Marine Certificates were applied for and granted, in June, 1966, the
H appellant failed to disclose that in October and August 1964 the United Insurance Company Ltd. had cancelled a Motor Vehicle policy and a Marine Open policy effected by him. The short question therefore, upon the answer to which the right of the respondent company to repudiate liability depends, is whether the fact of the cancellations was a material fact.

The learned Judge found it was so in the following passage —

> "That two previous policies of insurance had been cancelled by his previous insurers were most material facts which were not disclosed but should have been disclosed. Disclosure of such would have affected the moral hazard. On the evidence before me I am quite satisfied that no prudent insurer would, if such disclosure had been made, have agreed to insure the Plaintiff before making further enquiries of the circumstances under which the previous insurer had cancelled the Plaintiff's policies."

It is not quite clear how far the learned Judge intended to go in this finding but it would appear that the reference to the insurer making further inquiries does not take the matter quite far enough. If the result of the inquiries would be no more than delay in issuing the insurance, and would not have affected a reasonable insurer in any other way, the non-disclosure would not be material. This appears to result from what was said in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.* [1925] A.C. 344 at p.351-2—

> "Faced with a difficulty of this kind, the appellants' counsel frankly conceded that materiality must always be a question of degree, and therefore to be determined by the Court, and suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted Dr. Fierheller. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium."

If, however, the learned Judge had directed his mind to what would have happened had the cancellations been disclosed and inquiries made I am satisfied that on the evidence he would have maintained his conclusion that the non-disclosure was material. The reason given by the Manager of the United Insurance Company Ltd. for the cancellation and contained in one of his letters to the appellant was the appellant's "unsatisfactory claims record with this company". The Manager of the respondent company said that he would not issue a Marine Certificate to anyone unless he were satisfied about the proposer's integrity; he said further —

> "If I had known this I would not have agreed to issue these policies to the Plaintiff without making further enquiries. I would not in fact have issued any policies to the Plaintiff at all."

I think this evidence, which was not challenged, is sufficient to show that the result of disclosure in this case would not in the case of a reasonable insurer, have been limited to mere delay in issuing the policies.

Counsel for the appellant emphasised that there were no questions to be answered in the case of the applications for marine certificates and relied upon a statement in *Preston and Colinvaux* on *Laws of Insurance*

(1950) to the effect that by not asking questions about a matter the insurers run a greater risk of the contention being pressed home that such matter is not material. The passage from the judgment of Scrutton L.J. in *Newsholme Bros. v. Road Transport & General Insurance Co. Ltd.* [1929] 2 K.B. 356, 363, cited in the footnote in the text book, indicates however, that the reference is to the case in which some questions are in fact asked. Also it is fair to note that the Manager of the respondent company said that when deciding whether or not to give marine cover all proposals put in by the insured were considered and they had already the appellant's proposals for the motor vehicle policies which contained the untrue answer to the question concerning previous cancellations.

Counsel for the appellant relied substantially upon the case of *Ewer v. National Employers' Mutual General Insurance Association Ltd.* [1937] 2 All E.R. 193 in which it was held that in the absence of direct questions a person proposing insurance is not bound to disclose every claim he has had upon other policies with a different subject matter. The policy in question was a fire policy on certain premises and the claims which it is alleged the insured should have disclosed were claims on a policy on goods in transit all over the country. The fire policy had been in force for six years and during its earlier currency a small claim had been paid on it. The learned Judge said, at p.197 —

> "The proposition relied upon by the defendant company is that, whenever any assured, through his broker or personally, makes any proposal for a fire insurance policy, he is bound to disclose, without any question being asked about it, the fact of his ever having had any claim on any other insurance policy of any sort for, as I gather, the whole of his life."

The learned Judge considered this to be a grave and serious contention and he rejected it, but did not attempt to lay down any test as to the exact limits of necessary disclosure.

I do not think this case materially assists the appellant. Materiality is a question of fact and may involve matters of degree, as was indicated in the passage in the judgment in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.* which I have quoted above. In the present case the Marine Certificates had not been in force for a long period but were designed to cover one specific journey. The cancellation of the United Insurance policies took place nearly two years before the date of the Marine Certificates but I do not consider that to be so remote in time that the cancellation would have ceased to influence a reasonable insurer. One of the cancelled policies had covered a lorry upon which the merchandise insured by one of the Marine Certificates was to be loaded and the other, the Marine Open policy, was shown by the evidence to have covered merchandise. I think it follows that they were not of a different category from the Marine Certificates but were sufficiently comparable in nature and purpose to make their cancellation material. In my judgment *Ewer's* case is clearly distinguishable.

As I mentioned earlier, the learned trial Judge treated the Marine Certificates as common law contracts of insurance, though it had been argued before him that they were in fact and law contracts of marine insurance and subject to the Marine Insurance Ordinance, 1961. It would appear that the copies of the Marine Insurance Certificates put in in the Supreme Court were not complete and the learned trial Judge was thereby misled

in one material particular which may well have influenced his finding. I have been unable to discover in the particular circumstances of the case that the respondent company would have derived any particular advantage had the learned Judge considered the Ordinance to be applicable, and I would therefore prefer to leave this as an open question.

On the case as a whole, it is my opinion that no sufficient ground has been shown to induce this Court to differ from the conclusions reached by the learned trial Judge and I would therefore dismiss the appeal with costs.

MARSACK J.A. —

I have had the advantage of reading the careful judgment of the learned Vice President and I agree that the appeal must be dismissed upon the grounds set out in that judgment. At the same time I would like to add some brief observations of my own.

It is clear that there are two aspects of the case requiring consideration. The first relates to the comprehensive insurance policies over the two motor vehicles concerned. I am in full agreement with the learned Vice President that the claim under these policies must necessarily fail. The appellant gave a knowingly false answer to question 8 (g) in each of the proposal forms upon which the respective insurance policies were based. Under the terms of the policies themselves the truth of those answers is made a condition precedent to the respondent Company's liability. Consequently the Company was fully entitled to disclaim liability under the policies in question.

The second aspect refers to the "marine certificates" covering the goods in transit. The finding of the learned trial Judge that these "marine certificates" were "unconditional contracts of insurance", governed by general common law principles of insurance, is, in my opinion, not open to challenge. It is true, as is pointed out in the judgment of the learned Vice President, that the trial Judge was misled by the fact that the copies of the certificates exhibited in the Court below were incomplete. The particular omission to which reference is there made is that of the name of the insurer, which is clearly shown on the original certificates. Whether the correction of this error would have caused the learned trial Judge to come to a different conclusion as to whether or not the certificate could be held to be a Marine Insurance Policy, does not appear to me to affect the real point in issue. That is, was this a true contract of insurance? I am satisfied that the trial Judge was right in holding that it was.

Accordingly the question arises as to what obligation of disclosure is undertaken by the applicant for insurance when no formal proposal is required to be signed. The principles of law to be applied are, in my respectful opinion, adequately and correctly set out in the judgment in one of the cases cited by counsel for the appellant, *Tate v. Hyslop* (1885) 15 Q.B.D. 368, per Bowen L.J. at p.379:

> "It is established law that a person dealing with underwriters must disclose to them all the material facts which are known to himself and not to them, or, at all events, are facts which they are not bound to know. What are material facts, has been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance, or as to the premium on which he would take it. The materiality of the fact depends upon whether or no a prudent underwriter would take the

fact into consideration in estimating the premium, or in underwriting the policy. The rule has been clearly laid down over and over again, and is to be found in *Ionides v. Pender* and other cases."

The learned Vice President in the course of his judgment has pointed out that the determination of the issue in respect of the marine certificates depends upon the answer to the question whether the failure of the appellant to disclose the cancellation of his policies with the United Insurance Company was a material fact entitling the insurers to disclaim liability. To determine materiality in such case one can well apply the test laid down by Bowen L.J., namely: whether or no a prudent underwriter would take the fact into consideration in estimating the premium, or underwriting the policy.

The answer to that question in the present case is not hard to find. It has been made abundantly clear that the respondent Company regards the matter as material, in that a direct question on the subject is included in the proposal form which every applicant for motor car insurance is required to sign. Moreover the cancellation of previous insurance policies with another company is not a fact which, to use the words of Bowen L.J., the respondent is bound to know. The Company was already in possession of the signed statement by the appellant that he had never had any previous policies cancelled. The manager of the respondent Company stated in evidence that among the matters taken into consideration by the Company when deciding whether or not to give marine cover were all proposal forms put in by the insured; and further that he had actually considered the proposal forms in respect of the motor car insurance when deciding whether or not to issue the marine certificates. The evidence of the manager of the respondent Company was accepted as truthful by the learned trial Judge.

It is for the Court to rule as a matter of law whether a particular fact is capable of being material, and to give directions as to the test to be applied; but the decision ultimately is one of fact depending on the circumstances as proved in evidence: 22 *Halsbury's Laws of England* 3rd Ed. p.187 para. 357. The question of materiality of cancellation of previous policies, and the like, has been considered in a number of reported cases, as for example *Locker and Woolf Ltd. v. Western Australian Insurance Co. Ltd.* [1936] 1 K.B. 408, and *Yager v. Guardian Assurance Co. Ltd.* (1912) 108 L.T. 38. The principle laid down by those cases may be shortly stated thus: a previous refusal by an insurance company to issue an insurance policy to the applicant, or the cancellation of a policy held by him, is a material fact which must be disclosed on an application for insurance.

With regard to the case of *Ewer v. National Employers' Mutual General Insurance Association Ltd.* [1937] 2 All E.R. 193 upon which counsel for the appellant strongly relied, I can find nothing in the judgment of MacKinnon J. which is at variance with the principles enunciated by Bowen L.J. in *Tate v. Hyslop* (supra) which I have endeavoured to apply in this judgment. The facts in Ewer's case were unusal and bore little resemblance to the facts in the case before this Court.

In my view the legal principles to be applied to both aspects of the case involved in this appeal are clear and, as I have stated, I am in full agreement with the learned Vice President that the appeal must fail.

ADAMS J.A. —

Having read the judgments delivered by my learned brethren, I need say little more than that I agree with them entirely. A

There is only one point that has troubled me a little, namely the lapse of time between the cancellations by the United Insurance Company Ltd. in August and October 1964 and the issue of the marine certificates in June 1966. I think there might well be circumstances in which a person taking out such certificates, in the casual way that appears to be followed and with no questions asked by the insurance company, might, after an interval of time, fail to recall, or fail to appreciate the relevancy of, an earlier cancellation of a policy or policies by a different insurance company. In the present case, however the second cancellation was in writing, and referred expressly to the appellant's "unsatisfactory claims record with this company" — something that would not readily fade into insignificance in the appellant's mind; and there is the further fact that, in the interval between the cancellations and the marine certificates, the appellant had twice signed proposals for insurance with the respondent company (September 1965 and March 1966), in both of which he had stated that there had been no cancellations. In these circumstances, I have no hesitation in holding that it was incumbent on the appellant, when taking out the certificates, to inform the company of the cancellations; and, while it is unnecessary to go so far in order to entitle the respondent to succeed, I have no doubt that the result of a proper disclosure on his part would have been a refusal to issue the certificates. B C D

The word "fraudulently" is used in the statement of defence, but is inappropriate. Non-disclosure, whether fraudulent or not, is all that is required.

The Court being unanimously of opinion that the appeal must fail, the appeal is dismissed with costs. E

Appeal dismissed.