A

K. W. MARCH LTD. AND ANOTHER

v.

SOUTHERN PACIFIC INSURANCE CO. LTD.

B

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 5th, 6th February, 27th March]

Civil Jurisdiction

Insurance—fire insurance policy—insurable interest—retailer indebted to supplier for goods sold and delivered—supplier having no mortgage or lien over the goods insured—bare debt does not give rise to insurable interest—Rules of the Supreme Court (1934) (applied) 0.19 rr.17-20.

C

Insurance—lapse of fire insurance policy—agreement to revive policy—agreement following non-disclosure by policy holder of material relevant information—avoidance of revival.

D

A company which has sold stock in trade to a retailer over a period of years and is owed money by the retailer in respect thereof, but has no mortgage or lien over the stock in trade or the premises, has no insurable interest therein. To give rise to an insurable interest there must be some right against the insured property itself and a bare debt is not sufficient.

E

A lapsed fire insurance policy may be revived but, as a contract of insurance is one *uberrimae fidei*, if the insurer agrees to revive it as a result of the failure of the policy holder to disclose to the insurer material relevant information, the revival may be avoided.

Action in the Supreme Court on a claim under a policy of fire insurance.

K. C. Ramrakha for the plaintiffs.

F

D. N. Sahay for the defendant company.

The facts are stated in the judgment.

THOMPSON Ag. P.J.: [27th March 1969]—

G

The first plaintiff is a company carrying on business in Suva. The second plaintiff is a businessman who in the years 1960-1962 was the owner of a retail shop business at Tovu, Totoya, Lau. The defendant is an insurance company which on 28th November, 1960, issued a policy of fire insurance in respect of the buildings where the second plaintiff carried on his business and in respect of the stock-in-trade of that business. That policy, which was tendered as Exhibit '1', purports to show that the plaintiffs were both insured under it. Their claim arises out of a fire which destroyed the shop and its contents on 24th September, 1962.

H

It is not in dispute that on 21st September, 1960, following a telephone conversation between the managing director of the first plaintiff company,

Mr. March, who gave evidence as P.W. 1, and the branch manager of the defendant company, Mr. Rolls, who gave evidence as D.W. 1, the secretary of the first plaintiff company, Mr. Ernest, who gave evidence as P.W. 3, went to the office of the defendant company in Suva with the second plaintiff and there, at their request, Mr. Rolls completed a proposal form with details supplied by them; it was signed by Mr. Ernest on behalf of both insured. That proposal form was tendered as Exhibit 'A' in this action.

The first plaintiff company alleges in its Statement of Claim that it had an insurable interest in the second plaintiff's business. It is not disputed that the second plaintiff was indebted to the first plaintiff company to the extent of several thousand pounds in respect of shop goods supplied over a number of years. It is not disputed also that the first plaintiff company had no mortgage or lien over the premises or the second plaintiff's stock-in-trade. It, therefore, did not in fact have an insurable interest in respect of this property since a bare debt does not by itself give a creditor an insurable interest in his debtor's property. To have an insurable interest the creditor must have some right against the property itself in order to support an insurance of it.

Although Mr. March in the course of his evidence said that he insured the second defendant's stock-in-trade because "we were thinking of taking a mortgage over the property" and admitted that his company had no insurable interest in it, learned counsel for the plaintiffs has submitted that the defendant company cannot raise this defence. He has submitted that the plaintiffs' statement in paragraph 3 of the Statement of Claim that they were interested in the property was not properly traversed in the defence; and further that the defendant company is estopped by its conduct from denying that the first plaintiff company had an insurable interest.

Dealing with the first of these submissions learned defence counsel drew attention to the provisions of Order 19 Rules 17 to 20 (of the Rules in force at the time of the hearing); and to the fact that in paragraph 3 of the defence the defendant company has not specifically denied the plaintiffs' interest in the property but has simply stated that, if the plaintiffs were interested in the property, it was unaware of the amount of their respective interests and put them to the proof of it. Paragraph 3 of the defence is carelessly worded; there should have been either a formal denial of the first plaintiff's interest or a firm statement that the first plaintiff's interest was not admitted, before it was pleaded that the first plaintiff should be put to the proof.

It would be unsatisfactory for the Court to make a finding that the first plaintiff company had an insurable interest when its managing director has admitted in evidence that it had none. I should, therefore, be reluctant to uphold Mr. Ramrakha's first submission unless I felt absolutely bound to do so by the rules relating to pleadings. The plaintiffs should not have been misled by the defendant's pleadings, unsatisfactory though they are. Injustice would result from too narrow a view being taken of the need for traverses to be properly phrased. Paragraph 3 of the defence made it sufficiently clear that the defendant company required

the first plaintiff company to prove its interest. I therefore reject the first submission.

A

With regard to the second submission, that the defendant company is estopped from denying the first plaintiff company's insurable interest, evidence of what took place before the policy was issued was given by Mr. March, Mr. Ernest and Mr. Rolls. Further there is the documentary evidence, the proposal form and the insurance policy itself. Mr. March gave evidence that he asked the defendant company to insure the second plaintiff's stock in trade at Totoya. He said he had a discussion by telephone with Mr. Rolls and that subsequently Mr. Ernest went to see Mr. Rolls to fill in the proposal form. He said "we explained our situation fully to the defendant company" but he did not amplify that. Mr. Ernest said that, when he went to the defendant company's office, he spoke either to Mr. Rolls or his clerk and the person to whom he spoke filled in the proposal form. He said that that person asked him what interest the first plaintiff had in the second plaintiff's business and that he replied that the second plaintiff owed the first plaintiff a lot of money. He said that he told that person the whole truth and that that person filled in the proposal form and presented it to him for signature.

B

C

Mr. Rolls gave evidence that, when he came to the question in the proposal form relating to whether or not any of the property was in any way mortgaged or under a bill of sale or subject to hire-purchase agreement or otherwise encumbered, Mr. Ernest replied "K. W. March Ltd.". It appears from Mr. Rolls' evidence that he did not pursue further the matter of how the first plaintiff's interest arose. Mr. Rolls' evidence is not altogether inconsistent with Mr. Ernest's. I have no doubt that Mr. Rolls asked Mr. Ernest whether the property was encumbered and that Mr. Ernest replied in the affirmative and said that the second plaintiff owed a large amount to the first plaintiff. I have no doubt that if Mr. Ernest had said that the property was not charged or encumbered in any way or if he had not answered affirmatively the question whether it was encumbered, Mr. Rolls would not have completed the proposal form in the manner in which he did. It is quite likely that Mr. Ernest had no intention of misleading Mr. Rolls but it is clear that he did in fact do so; the first plaintiff had no interest which could be insured. I find that the defendant company is not estopped by its conduct from denying that the first plaintiff company had an insurable interest. I find also that the insurance policy was issued, insofar as the first plaintiff company was concerned, as a result of a misunderstanding between Mr. Ernest and Mr. Rolls and that it was issued only on the basis that the first plaintiff company did have an insurable interest; in fact it had none and insofar as the first plaintiff company is concerned it is null and void. The first plaintiff company's claim under it must, therefore, fail.

D

E

F

G

As far as the second plaintiff is concerned, however, the policy was effective. It is not disputed that Mr. Rolls agreed that payment of premiums in respect of the policy should be received from the first plaintiff company which was to be afforded the facility of having the premium charged to an account. I accept Mr. Rolls' evidence that statements of account were rendered to the first plaintiff company and that he expected the company to pay the premium upon presentation of the first account. The policy ran for one year from 21st September,

H

A 1960, to 21st September, 1961, but payment was not in fact made until January, 1962.

On 15th November, 1961, Mr. Rolls wrote to the first plaintiff company referring to a conversation which he had had with Mr. March about the policy, informing the company that the policy was no longer current and asking for it to contact his company as soon as possible. Following further correspondence and the payment of the premium for the B first year part way through the second year, Mr. Rolls agreed that the policy would be revived for the second year. Approximately three weeks before 21st September, 1962, the defendant company sent out to the first plaintiff company a renewal notice informing it that the policy would expire on that date. On 8th September, 1962, following a conversation with Mr. March, Mr. Rolls sent him a letter informing C him of the amount outstanding in the account; he had earlier, in June, asked for payment "as soon as possible".

It is clear from these facts that at the beginning of September, 1962, the defendant company was pressing the first plaintiff company for payment of the premium for the second year of the policy but that it was willing to renew that policy for a third year. Mr. March gave evidence D that, when he arranged the policy, he intended it to be renewed from year to year. Clearly, however, the terms of the policy are such that it runs for only a year at a time. The company or the insured can then decline to renew it. The company by sending out its renewal notice indicates its own willingness to renew it. But there can be no renewal until the insured has agreed to it. That the first plaintiff company, as agent for the second plaintiff, recognised that fact is evidenced by its having re- E turned the renewal form duly completed. That renewal form bears the defendant company's date-stamp of 25th September. Neither Mr. March nor Mr. Ernest gave evidence of the date on which it was despatched. Mr. Rolls has given evidence of the practice adopted in his office for date-stamping incoming mail. I have no doubt that the renewal certificate was not received by the defendant company until 25th September. I therefore find that the policy had lapsed on 21st September.

F A lapsed policy may be revived but, if the insurer agrees to revive it as the result of failure on the part of the insured to disclose to him material information relevant to the question whether or not it should be revived, the revival may be avoided by the insurer, since a contract of insurance is one *uberrimae fidei*. The defendant company alleges in this case that the first plaintiff company, on its own behalf and as agent G for the second plaintiff, withheld from it the information about the fire which had already taken place before the first plaintiff company took steps to obtain the revival of the policy.

Mr. Ramrakha has referred to the letter dated 29th January, 1963, sent to him by the defendant company (Exhibit 2 (d)), of which the first paragraph reads "Would you kindly advise us when this has been done so that we can cancel our policy." He has submitted that this H shows that the defendant company regarded the policy as having been effectively revived and as subsisting in January, 1963. I am satisfied that it does not amount to an admission that the policy had been effectively revived or to a waiver of the right to repudiate the revival on the ground of the plaintiffs' breach of good faith.

On 26th September, 1962, the defendant company issued to the first plaintiff company a receipt for the premium in respect of the second year. It is not disputed that the premium was received by the defendant company together with a letter from the first plaintiff company which bears the date 21st September. The letter bears the first defendant company's office date stamp for 25th September. Mr. Rolls refused to accept a suggestion put to him by Mr. Ramrakha that the letter might have been lying in the office for some time before it was stamped and gave an account of the practice followed for date-stamping all incoming mail.

In the period between 21st September and 25th September the fire took place. Mr. March has admitted that he was told about it early on the morning of 24th September by the second plaintiff. The defendant company asserts that in fact the letter bearing the date 21st September was not written until after Mr. March knew that there had been a fire. The first plaintiff company did not report the fire to the defendant company until some days later when it sent a letter bearing the date 28th September, which the defendant company alleges it received on 1st October. Learned defence counsel has submitted that the inference which is to be drawn from these facts is that the first plaintiff company, through its managing director, Mr. March, and as agent for the second defendant, deliberately withheld information about the fire until the premium for the previous year had been paid and a receipt issued and that they in fact paid that premium after they knew about the fire.

Under the provisions of clause 6 of the policy, the plaintiffs were obliged "forthwith" to give notice in writing to the defendant company if the goods insured were damaged or destroyed. Mr. March knew early on 24th September that the goods had been destroyed; he said that he did not know all the details and had to send a cable to find out. He made no report to the defendant company that day but, according to the defendant company's date-stamp on the first plaintiff company's letter, on the following day the renewal notice and the cheque in payment of the previous year's premium were received in the defendant company's office. Mr. March agreed in evidence that the defendant company's offices were so near those of his company that letters would be delivered by messenger and not sent through the post. He may possibly have prepared on 21st September the covering letter sent with the cheque but I find as fact that he did not send it until after he knew about the fire. I have no hesitation in this regard in accepting as true Mr. Rolls' evidence about the date-stamping practice in his office. On 25th September the defendant company did not know of the fire; it had no reason to put a false date-stamp on the letter. I am satisfied that, if the letter and the cheque had been delivered before 25th September, the letter would have been date-stamped with the correct date of delivery.

I find as fact, therefore, that the first plaintiff company did deliberately keep the defendant company in ignorance of the fire while it attempted to get the policy renewed or revived. This was a serious breach of the good faith required in all dealings relating to contracts of insurance. I find, therefore, that the defendant company is entitled to repudiate the revival of the lapsed policy and is not liable to indemnify the plaintiffs in respect of any loss which occurred after 21st September, 1962.

A I propose to deal with the question of the value of the property destroyed by the fire even though on the findings I have already made the plaintiffs' claim must fail completely. They allege that the value of the stock-in-trade burned was £3,549.14.9d. The second plaintiff gave evidence that immediately after the fire he travelled to Suva and provided information about the stock to enable Mr. March to prepare a complete list as the basis for the plaintiffs' joint claim.

B

The defendant company has called one witness, Mr. Seini, who was living in Totoya at the time of the fire and gave evidence that he was a friend of the man who previously managed the shop for the second plaintiff and knew very well the extent to which it was stocked with trade goods. He said that it was very nearly empty. The second plaintiff admitted that he went to the island to take back the control C of the shop from the manager because he had not looked after the business well. The plaintiffs produced in evidence the account sheets maintained by the first plaintiff company in respect of the second plaintiff's account over a period of six years. It is significant that between April, 1961, when goods valued at £1,212 were sold to the second plaintiff and three weeks before the fire there was no sale of any appreciable quantity of goods to the second plaintiff. In September, D 1962, the month of the fire, there were apparently sales of goods to the value of £462. The picture given by this account is hardly that of a thriving business with a well-stocked store-room. Having given careful consideration to the evidence of the plaintiffs and that of Mr. Seini, I am satisfied that there were few goods in the shop at the time when the fire occurred and that the list prepared in support of the claim was E grossly exaggerated.

For the reasons I have given I dismiss the claim of both the plaintiffs and I order them jointly and severally to pay the costs of the defendant company, to be taxed if not agreed.

Judgment for defendant company.