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SUPREME COURT OF VICTORIA

JIMACO CLOTHING PTY LTD v NORWICH WINTERTHUR INSURANCE (AUSTRALIA) LIMITED

Murray J

3 June 1985 — (1985) 3 ANZ Insurance Cases 60-640; (1985) 3 MVR 150

INSURANCE – POLICY OF INDEMNITY – MOTOR VEHICLE – INSURANCE BROKER – MOTOR VEHICLE ACCIDENT – INSURER NOT NOTIFIED – NO CLAIM LODGED – WHETHER INSURER PREJUDICED BY FAILURE TO COMPLY WITH CONDITIONS OF POLICY: *INSTRUMENTS ACT* 1958, S27.

JC P/L took out a comprehensive insurance policy in respect of its motor vehicle with T., an insurance broker and agent of Norwich Ltd. When the vehicle was subsequently involved in an accident, JCP/L failed to give written notice of the accident and forward a claim to Norwich. When the car was later disposed of and JCP/L issued proceedings claiming an indemnity from Norwich in respect of the damage, Norwich claimed that due to the failure of JCP/L to comply with the conditions of the policy, Norwich had suffered prejudice and was not liable. The Magistrate agreed and dismissed the claim. On order nisi to review—

HELD: Order nisi discharged.
(1) Section 27 of the *Instruments Act* 1958 allows a claim to proceed if the failure to give written notice of the accident and the claim was due to accident, mistake or other reasonable cause.

(2) However, the section does not apply if the insurer has been so prejudiced by the failure of the insured to give the required notice that it would be inequitable if the failure were not a bar to the maintenance of the proceedings.

(3) It must be demonstrated by evidence that the insurer has in fact been prejudiced by the failure to comply with the conditions of the policy. Mere conjectures put forward in argument are insufficient.

(4) In the present case, the fact that the insurer had no opportunity of inspecting the vehicle involved in the collision, and that the insurer was precluded from carrying out its usual practices following lodgment of a claim, it was sufficient to enable the Magistrate to conclude that the insurer suffered prejudice by the failure to comply with the conditions of the policy.

MURRAY J: *[After setting out the nature of the proceedings and discussing the affidavit filed on behalf of each party, His Honour continued]*: … **[3]** In very broad outline the evidence led on behalf of the applicant was to the effect that Mr Konstantos, an accountant and a director of the applicant, said that his office was in the same building as the office of an insurance broker, Mr Tsoukas. Mr Konstantos said that he arranged all the insurances required by the applicant through Mr Tsoukas. He said that on or about 22nd January he went to Mr Tsoukas' **[4]** office and asked Mr Tsoukas to arrange comprehensive insurance over a Ford motor car owned by the applicant company and that Mr Tsoukas agreed to do this and a few days afterwards delivered to him an insurance policy document. He said that he did not complete any proposal form as Mr Tsoukas did not require him to do so. Mr Konstantos said that he wrote out a cheque for $139 on 16th April in payment of the premium in respect of the policy. Mr Konstantos said that on 1st July he was informed by another director of the applicant of the happening of the accident and that he informed Mr Tsoukas of it. There is nothing to suggest that he had knowledge of any of the circumstances of the accident or of the identity of any other vehicles involved. He did not fill in any notice in writing of the accident, nor did his company ever forward a claim to the respondent. According to the affidavit of Mrs Cardassis, Mr Konstantos said that Mr Tsoukas told him that he would deal with the matter. However, according to the affidavit of Miss Sexton, which I accept, Mr Konstantos said that he told the broker of the accident and told him that he was not sure who was at fault. He said that Tsoukas told him to find out who was at fault. Mr Konstantos then apparently went to his solicitors but did not inform them of the policy with the respondent and did not in fact get the policy document out of his file until some months later.

He said that his solicitor issued a summons against one of the other drivers and that he did not discuss with his solicitor the making of an insurance claim before issuing the summons. He said that he instructed his solicitor to continue with that course of action. He said that later he received a letter from an insurance company and solicitors representing the other **[5]** parties to the action, but that he did not forward these on to the respondent. He said that the applicant's car was not repaired but was sold in a damaged state in October or November 1981, and, as far as he was aware, the respondent was not notified regarding inspection of the vehicle. From other evidence called, it appears that a proposal for insurance over the same vehicle was received by Manufacturers Mutual Insurance Limited on or about 8th July and it was observed that the period of insurance sought was from 16th April 1981, which apparently as a matter of coincidence was the same date as the cheque butt for $139 drawn by Mr Konstantos. Manufacturers Mutual altered the proposed date of the commencement of cover to 8th July and accepted the proposal as from that time. In due course a claim was received by Manufacturers Mutual from the applicant and this was rejected because the policy ran from a date later than the date of the accident. After the lapse of several months, proceedings were issued by the owners of the other vehicles involved in the accident and the applicant joined the respondent in third party proceedings claiming indemnity under the policy which it claimed had been issued by Tsoukas as broker for the company in January.

The respondent called evidence before the Magistrate of its practice when receiving notice of accidents from its clients. This evidence showed that the insured vehicle was inspected as soon as possible by an assessor to see whether the damage was consistent with the accident referred to and to see whether any of the damage appeared to be old. Negotiations would also be conducted in relation to other vehicles damaged in the accident and attempts would be made to arrive at **[6]** knock-for-knock agreements with any other insurers involved. Witnesses employed by the respondent swore that there was no trace of the alleged policy to be found in the records of the respondent and nor had any notices of accident or claim been received in respect of the accident. In these circumstances, it was said that the failure of the applicant to give notice of accident and to make any claim had seriously prejudiced the respondent. The foregoing is a very very brief account of a considerable amount of evidence which was led before the Magistrate, but in view of the conclusion to which I have come I think it will suffice.

In his written reasons, the Magistrate set out the proposition that where a person employs a broker to arrange insurance cover on his behalf, the broker is ordinarily the agent of the assured and not the insurer and that once the relationship has been established between the insurer and the insured, the broker no longer has any part in it. His Worship referred to *Re Colin Williams (Insurance) Pty Ltd* [1975] 1 NSWLR 130 at 135 per Helsham J. He went on to state that in his view the evidence in this case went far beyond the normal role of a broker and that the respondent had armed the broker with all the necessary forms leading up to the completion of a policy and had permitted him to enter policies on its behalf. His Worship found that in this case the broker had express authority and was the agent of the respondent. He referred to the decision in *Norwich Fire Insurance v Brennans Pty Ltd* [1981] VicRp 89; [1981] VR 981; (1981) 1 ANZ Insurance Cases 60-446. No doubt because of the evidence that the employment of Tsoukas had been terminated by the respondent in April 1981 and other evidence which indicated **[7]** certain shortcomings in Tsoukas' conduct, His Worship referred to the proposition that where, as between the proponent and the insurer, both parties have been deceived by the agent, it is more reasonable that the insurer who had employed the agent should be the loser rather than the person who trusted him. He therefore found that the policy was afoot and I assume by this finding and by what he had previously said that His Worship found that Tsoukas did in fact issue a policy to the applicant, although in doing so he was acting contrary to his instructions from the respondent. His Worship then found that the applicant had given oral notice of the accident to Tsoukas but that this was not sufficient according to the terms of the policy. His Worship referred to condition 1 and condition 8 of the policy, and commented that for some unknown reason there had been no claim on the respondent until seven months after the accident and in the meantime the other vehicles involved had been repaired and the vehicle belonging to the applicant had been sold. His Worship then said that under s27 *Instruments Act* he found that the insurer had been so prejudiced by the failure of the applicant to give the required notice as soon as possible that it would be inequitable to find that such failure was not a bar to the maintenance of the proceedings. His Worship thereupon dismissed the claims under the third party notices.

Condition 1 of the policy reads as follows:

> "The insured or his legal personal representatives shall give notice in writing to the Company of any accident damage or loss as soon as possible after the occurrence thereof. Every letter claim writ summons or process shall be notified or forwarded to the company immediately on receipt thereof. Notice shall also be given in writing to the company immediately the insured or his legal personal representatives shall have knowledge of **[8]** any impending prosecution or inquest in connection with any accident for which there may be liability under this policy."

Condition 8 reads as follows:

> "The liability of company shall be conditional upon –
> (i) The person claiming indemnity observing the terms of this policy; and
> (ii) The truth of the statements and answers to 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."

The issues before the Magistrate were primarily as to whether a policy had in fact been issued and secondly, as to the consequences of the applicant's conduct in not making any claim and pursuing an inconsistent course after the accident had occurred. In relation to the question whether a policy had in fact been issued, the Magistrate accepted the evidence of Konstantos and took the view that Tsoukas had been held out by the respondent as having authority to enter into policies on its behalf and that the respondent was bound thereby. Having regard to the failure of the applicant to call Tsoukas or to give any explanation for failing to call him and having regard to the evidence in relation to the apparent attempt to obtain a back-dated policy from Manufacturers Mutual Insurance in respect of the same vehicle, one may be forgiven for thinking that the applicant was lucky to persuade the Magistrate of the existence of the policy in the first place. Having come to that conclusion, in my opinion the Magistrate was entirely justified on the evidence in finding that the respondent had held Tsoukas out as authorized to act as its agent in a fairly general capacity, and this appears to be so even though the evidence showed that the respondent terminated its employment of Tsoukas in April 1981. See **[9]** *Marsden v City & County Assurance Co* [1865] LR 1 CP 232. It follows that the Magistrate was entitled to take account of the fact that oral notice was given of the accident by Konstantos to Tsoukas.

In the argument before me, I suspect that the submissions made were somewhat different from those made before the Magistrate. Mr Kennon, who appeared for the applicant, first submitted that this was a case of estoppel in that the insured had been issued with a policy in circumstances when he had not entered into a written proposal and that the respondent was thereby estopped from relying upon the requirement of notice in writing of any claim. Mr Kennon submitted that by allowing the insured to enter into a policy without first submitting a proposal in writing, the insurer impliedly agreed to accept oral notices of accidents. He referred to *Craine v Colonial Mutual Fire Insurance Co Ltd* [1920] HCA 64; (1920) 28 CLR 305 and the discussion in that case distinguishing the doctrines of waiver and estoppel.

Mr Kennon next submitted that the failure of the applicant to give written notice of the accident and the claim was due to accident mistake or other reasonable cause within the meaning of s27 *Instruments Act* 1958, and he referred to a number of decisions both under the *Limitation of Actions Act* 1958 and under the Workers' Compensation Legislation. See for example *Melbourne and Metropolitan Tramways Board v Witton* [1963] VicRp 59; [1963] VR 417; *Dietrich v Dare* [1978] 21 ALR 210; *Stevenson v Metropolitan Meat Industry Commission* [1937] 37 SR (NSW) 109; 54 WN (NSW) 52. Mr Kennon then submitted that it had not been shown that the respondent had suffered prejudice by reason of the failure of the applicant to give the required notice and that s27 *Instruments Act* 1958 should operate to allow the claim to **[10]** proceed. Finally, Mr Kennon relied on the doctrine of estoppel and submitted that the evidence demonstrated that when Konstantos orally reported the accident to Tsoukas, the latter said that he would attend to the matter. This piece of evidence however comes from the affidavit of Mrs Cardassis and is not borne out in the affidavit of Miss Sexton. Miss Sexton's affidavit appears to me to be a full account of the evidence, and as I have previously mentioned, I accept it in preference to the affidavit of Mrs Cardassis. In addition, the evidence of what Mr Konstantos did after seeing Tsoukas strongly indicates in my view that he was not relying on Tsoukas attending to the matter or even upon the existence of the insurance policy. By going to his solicitor, but not referring to and drawing his solicitor's attention to the policy, by instructing his solicitor to institute proceedings and to make claims

against another party it appears to me that the evidence indicates very clearly that Konstantos was not relying upon anything that Tsoukas said in relation to the policy with the respondent. Furthermore, it is not without some significance that some effort was made by some person to obtain a back-dated insurance policy over the same vehicle with the Manufacturers Mutual company.

In relation to Mr Kennon's first submission, namely that the action of Tsoukas in issuing a policy without requiring a written proposal led to an estoppel arising which prevented the insurer requiring any written notice thereafter, I need only say that I can see no substance in such an argument. It follows that in my view, the respondent is not estopped from endeavouring to rely upon the failure of the applicant to comply with the conditions of the policy. **[11]** The question then arises as to whether the Magistrate was correct in finding that it would not be equitable if the failure of the applicant to comply with the policy were not a bar to the maintenance of proceedings. In relation to this aspect of the case, Mr Kennon relied on *McLaren v Victorian Stevedoring Co Pty Ltd* [1960] VicRp 69; [1960] VR 449. However, in that case Herring CJ and Barry J in their joint judgment, referred to what was said by Lord Parker of Waddington in *Hayward v Westleigh Colliery Co Ltd* [1915] AC 540 at 546 where His Lordship said:

> "The question is whether as a matter of fact there was any prejudice arising to the company by reason of notice not having been given at the time and in the manner mentioned by the Act. The arbitrator found that there was no such prejudice. In acting as a Court of Appeal from that decision it is absolutely impossible to set it aside unless the circumstances be such that no reasonable man could from the evidence before the arbitrator have come to that conclusion."

Their Honours also referred to *Halsbury* (2nd Edition) Vol 34 para 1197 in relation to the burden of proof where the learned author said:

> "The burden of proof rests in the first place upon the applicant for compensation, but the onus is not that of establishing the negative proposition that the employer has not been prejudiced; if the natural inference from the applicant's story is that there has been no prejudice, it is for the employer to show in what way he has in fact been prejudiced, and this he must do by evidence, and not by mere conjectures put forward in argument."

It follows that the question to be determined is whether upon the evidence it was open to the Magistrate to find that the respondent had been prejudiced by the failure of the applicant to give notice. While it may be true that in some cases all that could be said is that a party might have suffered prejudice but that the matter was purely one of conjecture, in the present case in my opinion there was abundant evidence to **[12]** demonstrate that the respondent had in fact suffered prejudice. The respondent called evidence to show its practice and this evidence indicated that, in the ordinary course of events, the respondent was able to save a considerable amount of money by an early investigation of claims and the obtaining of reasonable quotes for repairs and negotiations for settlement and knock-for-knock agreements with other insurers. In my opinion, it is not necessary for the respondent to prove as a fact that had notice been given a particular sum of money would undoubtedly have been saved. What the respondent lost by the applicant's failure to give notice was the opportunity to follow its usual practices which it found to be beneficial in the conduct of its business. The fact that the insured's car had been disposed of precluded it from deciding whether the damage to it was consistent with the insured's account and the fact that it was not notified of the damage to the third party vehicles precluded it from an examination of the damage investigation and settlement of any claims. In my opinion, it would be quite unreal to say that no prejudice had been established because the respondent had not been able to prove that had notice been given certain specific advantages would have accrued. The inability to advance such proof flows entirely from the failure of the applicant to comply with the conditions of the policy.

For the above reasons, in my opinion, the Magistrate was quite right in reaching the conclusion that he did and the orders nisi will consequently be discharged with costs to he taxed.
