35/01; [2001] VSC 503

SUPREME COURT OF VICTORIA

RACV INSURANCE LTD v ALAM

Balmford J

28 November, 19 December 2001

(2001) 35 MVR 399; (2001) 11 ANZ Insurance Cases 61-513

INSURANCE – POLICY TAKEN OUT – INSURED TOLD BY INSURER THAT NOT NECESSARY TO NOTE THAT ANOTHER PERSON WOULD ALSO BE A DRIVER OF MOTOR VEHICLE – POLICY OF INSURANCE EFFECTED – INSURED RECEIVED DOCUMENTS REFERRING TO THE INSURED'S DUTY OF DISCLOSURE – SUBSEQUENTLY OTHER PERSON FOUND GUILTY OF OFFENCES INVOLVING DISHONESTY – INSURER NOT NOTIFIED – OTHER DRIVER INVOLVED IN COLLISON WHILST DRIVING INSURED'S MOTOR VEHICLE – LIABILITY DENIED BY INSURER – FINDING BY MAGISTRATE THAT INSURER DID NOT INFORM INSURED CLEARLY OF DUTY OF DISCLOSURE – WHETHER MAGISTRATE IN ERROR: *INSURANCE CONTRACTS ACT* 1984, SS11, 13, 14, 21, 22, 28.

At the time of effecting a policy of motor vehicle insurance, A. indicated that her brother would also be a driver of the vehicle. Evidence was given by A. that at the time of completing the transaction in relation to the policy of insurance she was told by a person employed by the insurer that "it was not necessary to effectively note that" her brother would also be a driver of the motor vehicle. A. received from the insurer a Confirmation of Insurance form and a Policy Booklet which both contained material to inform the reader of the duty of disclosure imposed on the insured. Some months after effecting the policy, A's brother was found guilty of offences involving dishonesty. If the results of the offences had been disclosed to the insurer cover would have been excluded while A's brother was driving the vehicle. A. renewed the policy of insurance 12 months' later but there was no evidence to say whether A. had been sent the renewal certificate. When A's motor vehicle being driven by her brother was involved in a collision, the insurer denied liability on the ground that A. had failed to comply with her duty of disclosure. A. claimed a sum for damages in the Magistrates' Court. This claim was upheld. Upon appeal—

HELD: Appeal dismissed.

1. Section 22 of the *Insurance Contracts Act* 1984 ('Act') provides that an insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure. The onus of so proving is on the insurer. The insured is to be informed clearly. Both the purpose of s22 and its terms call for insistence on a proper standard of information giving.

***Suncorp General Insurance Limited v Cheihk* (1999) NSWCA 238; (1999) 10 ANZ Insurance Cases 61-442, applied.**

2. The information that A. received as to the duty of disclosure must be read in the context of the circumstances in which that information was given. A. was told that she was not required to disclose that her brother was to be a driver of the insured's vehicle. In those circumstances, it would follow that there was nothing for her to disclose about her brother. Accordingly, it was open to the magistrate to conclude that the insurer did not inform A. clearly in writing of her duty of disclosure.

3. Section 11(9)(b) of the Act equates a renewal with an original contract for the purpose of the requirement in s22(1). The effect of s11(10) of the Act is that if an insurer has complied with that requirement before the entering into of the original contract of insurance, it is deemed to have done so in respect of a subsequent renewal. In view of the magistrate's finding about the circumstances surrounding the original contract of insurance, the insurer could not rely on s11(10) to deem compliance with s22 before renewal of the policy. As there was no evidence that the insurer sent A. a renewal certificate of insurance, it was open to the magistrate to conclude that the insurer had not discharged the onus which it bore of proving that it met the requirement of s22(1).

BALMFORD J:

Introduction

1. This is an appeal under section 109 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") which provides that a party to a civil proceeding in the Magistrates' Court may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding. The final order the subject of the appeal was made on 17 August 2001 by the Magistrates' Court

at Melbourne, constituted by Mr Hardy, Magistrate, whereby:

> (i) there was judgment for the plaintiff ("Ms Alam") in the sum of $8300 together with interest of $954.24 and costs fixed in the sum of $4,261.
>
> (ii) the Court declared that the defendant ("the company") was liable to indemnify Ms Alam against claims made by the other two damaged vehicles.

2. On 17 September 2001 Master Wheeler ordered that the questions of law shown by the company to be raised by the appeal were:

> (a) Having regard to exhibit SAT 5 could a reasonable Magistrate properly instructed have held that [the company] did not inform [Ms Alam] clearly in writing of her duty of disclosure prior to the renewal of the relevant insurance contract or at all?
>
> (b) Did the Magistrate [err in law] in holding that upon renewal of the insurance contract, and having regard to the provisions of section 11(10) of the *Insurance Contracts Act* 1984 ["the Act"], [the company] was obliged by section 22 of the Act specifically to inform [Ms Alam] clearly in writing of her duty of disclosure with respect to the renewal of the relevant insurance contract?
>
> (c) Having regard to the whole of the evidence could a reasonable Magistrate properly instructed have held that [the company] waived the duty imposed upon [Ms Alam] by section 21 of the Act with respect to the renewal of the relevant insurance contract?

However, as to the form of the questions, see further [12] and following below.

3. The relevant provisions of the Act are sections 11, 13, 14, 21, 22 and 28, which read as follows, so far as relevant:

> **11. Interpretation**
> ...
> (9) Subject to subsection (10), a reference in this Act to the entering into of a contract of insurance includes a reference to:
> (a) in the case of a contract of life insurance—the making of an agreement by the parties to the contract to extend or vary the contract;
> (b) in the case of any other contract of insurance—the making of an agreement by the parties to the contract to renew, extend or vary the contract; or
> (c) the reinstatement of any previous contract of insurance.
>
> (10) Notwithstanding subsection (9):
> (a) ... where, after the commencement of this Act and at or before the original entering into, or the renewal, extension or reinstatement, of a contract of insurance, the insurer has given information to the insured as required by section 22 ... , the requirement by that section to give information to the insured shall be deemed to be satisfied at or before any subsequent renewal, extension or reinstatement of the contract; ...
>
> **13. The duty of the utmost good faith**
> A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
>
> **14. Parties not to rely on provisions except in the utmost good faith**
> (1) If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision. ...
>
> **21. The insured's duty of disclosure**
> (1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
> (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
> (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.
> (2) The duty of disclosure does not require the disclosure of a matter:
> (a) that diminishes the risk;
> (b) that is of common knowledge;
> (c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.
(3) Where a person:
(a) failed to answer; or
(b) gave an obviously incomplete or irrelevant answer to;
a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.

22. Insurer to inform of duty of disclosure
(1) The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure ...
(2) If the regulations prescribe a form of writing to be used for informing an insured of the matters referred to in subsection (1), the writing to be used may be in accordance with the form so prescribed.
(3) An insurer who has not complied with subsection (1) may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.

28. General insurance
(1) This section applies where the person who became the insured under a contract of general insurance upon the contract being entered into:
(a) failed to comply with the duty of disclosure; or
(b) ... ;
(2) If the failure was fraudulent ... the insurer may avoid the contract.
(3) If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract (whether under subsection (2) or otherwise) has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred ...

4. The facts appear from the transcript of the oral reasons for decision delivered by the Magistrate, and from the documents and transcript of the oral evidence before the Magistrate. Ms Alam is a graduate in mechanical engineering and currently employed as a risk engineer, which involves the assessment of risk in matters to do with technology. She insured a motor vehicle with the company and renewed that insurance twelve months later. The Magistrate found that at the time of the renewal, Ms Alam's brother, Mr Jack Alam, was a user of the vehicle on a regular basis, and was therefore describable as a regular driver of the vehicle. The relevant dates are not set out in the reasons, but it is apparent from the evidence before the Magistrate that the initial cover was from 22 December 1998 to 22 December 1999.

5. The Magistrate found that in the twelve month period intervening between the initial insurance and the renewal Mr Alam had "sustained criminal convictions in relation to matters of dishonesty". On the evidence, that is not quite accurate; Mr Alam was not in fact convicted, although nothing turns on this. A certified extract from the register of the Magistrates' Court at Melbourne shows that on 1 March 1999, without conviction, on one charge described as "handle/receive/dispose of stolen goods" and one charge of obtaining property by deception, a community based order for a period of six months was made against Mr Alam and he was ordered to pay $9500 compensation. Ms Alam was aware of the making of those orders.

6. The company called a Ms Quinn, an underwriter with Insurance Manufacturers of Australia, an associated company, as an expert in motor vehicle insurance. Her opinion was that if the orders made against Mr Alam had been disclosed to the company, cover would have been excluded while he was driving the vehicle.

7. While Mr Alam was driving the vehicle it was involved in a collision and sustained damage. Ms Alam sought indemnity for that damage under the policy of insurance, and the company denied liability on the basis that when renewing the policy she had failed to disclose the orders made against Mr Alam on 1 March 1999. The company was no doubt relying on section 28(3) of the Act.

8. The Magistrate, who had the advantage of seeing and hearing Ms Alam, found her to be a witness of truth and found that there was no evidence on which he could find that she acted fraudulently in the transaction. The appeal proceeded on that basis. He accepted her evidence that at the time she entered into the original contract of insurance in December 1998:

> ... she had initially done so by phone, but had then gone and purported to complete the transaction in person, and that at that time had been told by an operative of the company at the office that she

> believed was the RAC office in the vicinity of the intersection of Elizabeth and Bourke Streets in the city, when she indicated that her brother would also be a driver of the vehicle that it was not necessary to effectively note that he was such a driver.

The evidence was that the telephone conversation probably took place on 22 December 1998 and the visit to the office on 30 December 1998. The conversation as to whether it was necessary to notify the company formally that Mr Alam would be driving the vehicle was referred to several times in the evidence of Ms Alam.

9. As to the renewal, Ms Alam said that she had renewed the policy over the telephone on 22 December 1999. She could not find the renewal notice and had no documentary confirmation of the renewal.

10. The Magistrate concluded that he was not prepared to say that the duty of disclosure had been properly brought to the attention of Ms Alam, and in all of the circumstances he was not satisfied that her claim against the company should fail as a result of that. While he did not refer specifically to section 22(3) of the Act, he was clearly relying on that provision.

The questions

11. Both counsel, in the context of the first question, referred only to events prior to the entering into of the original contract of insurance, covered by the words "or at all" in the question as framed, leaving the issue of events at the time of the renewal to be considered in the context of the second question. This was clearly an appropriate method of dealing with the two issues.

12. In effect, the appeal was argued as though the first two questions read:

> (a) Having regard to the whole of the evidence, could a reasonable Magistrate properly instructed have held that [the company] did not inform [Ms Alam] clearly in writing of her duty of disclosure prior to entering into the original insurance contract?
>
> (b) Having regard to the whole of the evidence, could a reasonable Magistrate properly instructed have held that [the company] did not inform [Ms Alam] clearly in writing of her duty of disclosure after entering into the original insurance contract but prior to the renewal?

13. In *Popovski v Ericsson Australia Pty Ltd*[1], Ashley J had formed the view that the parties should not be shut out from making certain specific contentions which were not available under the order of the Master. His Honour continued at [30]:

> The way in which the issue(s) could be entertained appeared to be by my giving a direction under Rule 58.13. That was the course taken in *DPP v Hinch* (Supreme Court of Victoria, unreported, judgment 5 August 1994) where Mandie J said this:
>
> > Mr Graham submitted that Rule 58.13 broadly empowered the Court to deal with questions that arise at the hearing whether by way of amendment of the order or by simply directing that the matter be dealt with in the light of the arguments that had been advanced. I doubt that this power would extend to directing the amendment of the Master's Order having regard to the rules and practice in relation to the amendment of orders (see Rule 36.01(1) and Rule 36.01(9) and Rule 36.07). I am satisfied, however, that the Rule does empower the Court to direct in an appropriate case that the appeal be decided upon the questions of law identified and canvassed in the arguments advanced, where this is necessary to achieve the effective, complete and economic determination of the appeal and is otherwise just and convenient.

See also *Buckman v Barnawatha Abattoirs* (Supreme Court of Victoria, unreported, judgment 14 July 1994), where Smith J adopted the same course.

> … It was not suggested that the formal direction could not be given in the course of final disposition of the appeal.

14. I would, with respect, adopt that passage. Given the manner in which the appeal was argued before me, and being satisfied that no injustice would thereby be done to either party, I direct that this appeal be decided on the basis that the first two questions be read as set out in [12] above.

15. In *Spurling v Development Underwriting (Vic) Pty Ltd*[2] Stephen J said:

> In the case of decisions of magistrates the position in Victoria is well established by a line of decisions culminating in *Taylor v Armour & Co. Pty. Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring CJ in *Young v Paddle Bros. Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. The Chief Justice, in that case, adopted as the test whether "on any reasonable view of the evidence that decision can be supported"; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is "the only possible decision that the evidence on any reasonable view can support" (see at VLR p41).

I would, with respect, adopt that passage as the appropriate basis on which to consider this appeal.

The first question

16. Exhibit SAT5, referred to in the first question in the Master's order, and described in the affidavit of Mr Theodore as "the exhibits tendered at the hearing", contained copies of:

> • two almost identical versions of a Motor Vehicle Insurance Certificate covering the period from 22 December 1998 to 22 December 1999, one of them indicating that a premium of $620 had been paid;
>
> • a Confirmation of Insurance Form dated 30 December 1998;
>
> • a Policy Booklet setting out details of the cover under the policy of insurance and other matters.

17. On the Confirmation of Insurance form, Ms Alam disclosed that she had been convicted of speeding in 1998 and been fined $105.

18. Mr Donald, for the company, submitted that the Confirmation of Insurance form and the Policy Booklet both contained material to inform the reader of the duty of disclosure imposed on the insured by section 21 of the Act, so that they met the requirement imposed on the insurer by section 22 to "clearly inform the insured in writing of the general nature and effect of the duty of disclosure".

19. The Confirmation of Insurance Form contained the following passage:

> Your Duty of Disclosure
> Under insurance law, you are required to tell us everything you know which is relevant to our decision to insure you and the terms on which we insure you...
> You don't have to tell us things that:
> • reduce the risk
> • are common knowledge
> • we already know
> • we ought to know in the course of our business
> • or we indicate we don't want to know.
> If you fail to tell us everything you know which is relevant, we:
> • may refuse or reduce a claim
> • cancel your policy
> • or treat your policy as never having operated.

The Policy Booklet contained a passage in almost identical terms and a more detailed passage headed "What we require of you", which included the following:

> To keep your part of this agreement, you must:
> 1. Tell us as soon as possible if any of these things change: ...
> details of any offence with which you or any regular driver has been charged, convicted or found guilty.

20. Mr Donald submitted that the evidence showed that Ms Alam:

> • signed the Confirmation of Insurance form;
> • "most likely" read the passage in the Confirmation of Insurance form referring to the duty of disclosure;

- received the Confirmation of Insurance form after 22 December 1999, but before the making of the insurance contract on 30 December 1999;
- "probably did receive" the Policy Booklet;
- and had the Policy Booklet in her possession sometime soon after 22 December 1998.

Thus, on the evidence, Ms Alam had had both documents in her possession before entering into the contract of insurance in December 1998. She was, he submitted, an educated professional person and the Court could infer that she was intelligent and responsible.

21. The Magistrate found the case before him to be on all fours with *Suncorp General Insurance Limited v Cheihk*[3]. The court in that case was concerned with issues relating to a claimed fraudulent non-disclosure of serious driving offences, but its discussion of the duty of the insurer is equally relevant to the present case. Stein JA, with whom Meagher JA agreed, said at [14]:

> The requirement under s22(1) of the Act is for the insurer to 'clearly inform' the insured in writing of the nature and effect of the duty of disclosure. The onus of so proving is on the insurer, *Lumley General Insurance Limited v Delphin* (1990) 6 ANZ Ins Cas 60-986 at 76,565. I also accept that 'inform' means to 'make known', see at 76,571. The general nature and effect of the duty of disclosure must be 'clearly' made known to the insured in writing. The adverb 'clearly' is a plain English word and its ordinary meaning would convey the need for some precision in the making known of the relevant duty.

Giles JA, with whom Meagher JA also agreed, said at [40]:

> It will always be a question of fact and degree, but the purpose of s22 is to ensure that the insured is informed of the significant and important matters of his duty of disclosure and the consequences of failure to comply with the duty of disclosure, so that his insurance cover will not be imperilled by ignorance of those matters. The insured is to be informed clearly. Both the purpose of s22 and its terms call for insistence on a proper standard of information giving.

22. Mr Klempfner, for Ms Alam, referred to the letter of 22 December under cover of which the company sent to Ms Alam, after her conversation with the company on that day, the documents listed in [16] above. That letter concluded:

> If you have any further questions about your Motor Vehicle Insurance or would like to know more about other RACV Insurance products please call our MemberLine on 13 19 55. We'll be glad to be of service.

23. His submission was that the information which Ms Alam received as to the duty of disclosure must be read in the context of the circumstances in which that information was given. The passage cited from the letter indicated that it was anticipated by the company that the insured, receiving the documents in question, might seek oral clarification of her obligations.

24. He referred to the expression in section 21 "a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms", and pointed out that members of the general community did not necessarily know or understand what matters were relevant to that decision. This was indicated by the fact that in the Magistrates' Court the company had considered it necessary to call Ms Quinn as an expert to prove, among other things, that "moral risk" was a relevant matter. Thus the expression in the documents "everything you know which is relevant to our decision to insure you and the terms on which we insure you" did not necessarily convey to the reader that it was necessary to disclose offences which did not relate to the driving of a motor vehicle. Ms Alam had, as set out above, notified the company of her previous conviction for speeding.

25. Further, Mr Klempfner submitted that the conversation set out in [8] above, in which incorrect information was given to Ms Alam, was not consistent with the obligation imposed on an insurer by section 13 of the Act to act with the utmost good faith. That obligation meant that when an insured sought guidance as to the matters which the insurer regarded as relevant to the decision to accept the risk, it was incumbent upon the insurer to respond in a manner which did not place the insured's cover at risk. Ms Alam was told that she was not required to disclose that her brother was to be a driver of the insured vehicle, and if that were in fact the case, it would follow that there was nothing for her to disclose about her brother.

26. Having considered the question, I find, taking into account all of the circumstances surrounding the entering into the contract of insurance in December 1999, and noting the passages cited in [21] above from *Cheihk's* case, that there was, in terms of *Spurling's* case, cited in [15] above, evidence upon which the Magistrate might, as a reasonable magistrate, have come to the conclusion to which he did come, that at that time, the company did not inform Ms Alam clearly in writing of her duty of disclosure. Accordingly, the answer to the first question, as redrafted in [12] above, is Yes.

The second question

27. Section 11(9)(b) equates a renewal with an original contract for the purpose of the requirement in section 22(1). However, the effect of section 11(10) is that if the insurer has complied with that requirement before the entering into of the original contract of insurance, it is deemed to have done so in respect of a subsequent renewal. Mr Donald submitted that, as he had argued in the context of the first question, the evidence showed that the company had complied with section 22 in December 1998, and it was therefore deemed to have done so in respect of the renewal in December 1999.

28. However, in view of my finding as to the answer to the first question, the company cannot rely on section 11(10) to deem compliance with section 22 before the renewal of the policy. The issue then is, whether by any further documentation the company can be found to have met the requirement of that section before the renewal of the policy.

29. As stated in [9] above, Ms Alam told the Magistrates' Court that she could not find the renewal notice and had no documentary confirmation of the renewal. She had no recollection of receiving a second Certificate of Insurance or Policy Booklet. She said that she normally kept lapsed documents. Asked how she knew when to renew the policy, she said "I note down all the big bills in my diary".

30. There was before this Court a copy of a sample renewal notice addressed to a Mr Kendall which was agreed to have been before the Magistrate, although apparently not there marked as an exhibit. That document contained information under the heading Duty of Disclosure. Mr Donald, in cross-examination of Ms Alam before the Magistrate, stated:

> Evidence will be given that that is a sample of the standard form letter and motor vehicle insurance renewal certificate in standard form which are sent to personal insurers when their renewal, giving notice that their policy is up for renewal.

However, no evidence was given to that effect. Ms Quinn, the expert witness for the company, was not able to say whether or not Ms Alam was sent a renewal notice. There is no evidence on which the Magistrate could have found that the company, in that or any other document, met the requirement of section 22(1) after entering into the original insurance contract but prior to the renewal.

31. Accordingly, there was evidence upon which the Magistrate might, as a reasonable magistrate, have come to the conclusion to which he did come, that the company had not discharged the onus which it bore of proving that it met the requirement of section 22(1), (see the first passage from *Cheihk's* case cited in [21] above). The answer to the second question, as redrafted in [12] above, must therefore be Yes.

Conclusion

32. Section 22(3) of the Act provides that an insurer who has not complied with the requirement in section 22(1) may not exercise a right in respect of a failure to comply with the duty of disclosure imposed on the insured by section 21 unless the failure was fraudulent. The Magistrate found no evidence on which he could find that Ms Alam acted fraudulently in the transaction[4], so that the relevant right of the company appears in section 28(3). In view of the answers to the first two questions, the insurer, having been found not to have complied with section 22(1), is not entitled to exercise its right under section 28(3) to deny liability under the policy for the accident which occurred when Mr Alam was driving the car. Accordingly, no question of waiver arises, and it is not necessary to consider the third question in the Master's order.

33. The appeal will be dismissed. Counsel may wish to make submissions as to costs.

[1] [1998] VSC 61.
[2] [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19.
[3] [1999] NSWCA 238; (1999) 10 ANZ Insurance Cases 61-442.
[4] [8] above.

APPEARANCES: For the Appellant RACV Insurance Ltd: Mr AM Donald, counsel. Blake Dawson Waldron, solicitors. For the Respondent Alam: Mr DA Klempfner, counsel. Plotkins, solicitors.
