

45/84

SUPREME COURT OF VICTORIA

PALMDALE INSURANCE LTD (IN LIQ.) v BRIAN MOTTON PTY LTD

Hampel J

11 September 1984

INSURANCE – WORKERS COMPENSATION – EFFECT OF RENEWAL OF POLICY – PART PREMIUM PAID TO EMPLOYER'S AGENT – NOT FORWARDED TO INSURANCE COMPANY – LIQUIDATION OF INSURANCE COMPANY – EFFECT OF LIABILITY ON EMPLOYER TO PAY PREMIUM: WORKERS COMPENSATION ACT 1958, S72.

Through its agent, BM Pty Ltd renewed its Workers Compensation Indemnity Insurance policy with PI Ltd by forwarding a cheque to the agent. However, the agent did not send the renewal premium to PI Ltd. When PI Ltd went into liquidation some four months later, the agent effected insurance with another Insurance Company. Subsequently the liquidator on behalf of PI Ltd sued BM Pty Ltd for the annual premium, notwithstanding that the premium up until the time of the liquidation had been paid to the employer's agent, and the premium subsequent to the liquidation had been paid to another Insurance Company. The Magistrate ordered that the employer pay the pre-liquidation premium which its agent had failed to forward, but held that the employer was not bound to pay the premium in respect of the post-liquidation period. Upon order nisi to review—

HELD: Order absolute.

(1) Once a policy of Workers Compensation Indemnity Insurance is effected, there is an obligation on the insured to pay the premium for the period of one year.

(2) This obligation continued in the present case notwithstanding the appointment of the liquidator and that the risk was assumed thereafter by the Supplementation Fund.

(3) Neither the Treasurer's direction preventing PI Ltd from issuing or renewing policies nor that it could no longer meet its obligations invoked the operation of the doctrine of frustration or amounted to repudiation.

HAMPEL J: [1] This is the return of an order nisi to review the decision of the Stipendiary Magistrate sitting at Melbourne delivered on the 7 March 1983. In those proceedings the complainant (the present applicant) Palmdale Insurance, claimed \$2,467.16 from the defendant (respondent) for monies due under a Workers Compensation Employers Indemnity Policy for the year ending 9 September 1980.

The applicant obtained an order nisi to review on the 17 May 1983 on a number of grounds which are set out in the order of Master Barker. For the present purposes it is sufficient to refer to grounds one and two which, in effect, raise the same issue, namely whether the Magistrate erred in law by holding that the applicant was not entitled to that part of the premium which represented the period of the policy between the 9 January 1980 and 9 September 1980.

[2] The events relevant to this issue can be briefly summarized. On the 17 July 1978, the respondent, by its broker Tew-Baruday Insurance, completed a proposal for a Workers Compensation Indemnity Insurance Policy for the period 9 June 1978 and 9 September 1979. The policy issued and on the 9 September 1979 was renewed. In relation to the last period the premium before adjustments was \$3,322.38. On the 18 September 1979 the respondent forwarded a cheque to its broker in relation to the last period ending 9 September 1980 but that cheque was not received by the applicant. On the 4 January 1980 pursuant to s62(2) of the *Insurance Act* 1973 (Cwth) the Treasurer issued directions to the effect that the applicant was prevented from issuing or renewing policies of insurance or undertaking liability under contracts of insurance. Four days later on the 8 January a provisional liquidator was appointed. The applicant gave an indemnity to the Victorian Insurance Commissioner on the 15 January 1980 pursuant to s104 of the Act. Subsequently, on the 28 of January 1980, Mr Niemann was appointed liquidator. A day later the broker advised the applicant that it effected workers compensation insurance with CE Heath. On the 8 September 1980 the respondent completed a wages declaration in accordance

with the terms of the policy, and the Act, and on the 7 January 1981 the broker requested the respondent to pay the adjusted premium in the sum of \$422.21. On [3] the 21 January 1981 the applicant forwarded an account to the broker seeking the sum of \$422.21 following the perusal by the applicant of the wages declaration. On the 16 February 1981 the respondent paid the broker the \$422.21, which amount was not in fact received by the applicant. Subsequently, on the 28 November 1981, the applicant issued proceedings in the Magistrates' Court claiming the sum of \$2,467.16 by way of premium in respect of workers compensation insurance.

The matter came on for hearing and the Magistrate delivered his reasons on the 7 March 1983. After summarizing the facts and referring to a number of the relevant documents and legislative provisions, His Worship set out counsel's arguments. When summarizing Mr Jopling's contentions on behalf of Palmdale, he said that if they were right they meant that:

"(a) Palmdale seeks premiums in respect of a period when it was unable to meet any claims;

(b) Palmdale seeks premiums in respect of a period when the risk was in effect taken by the Insurers Guarantee and Compensation Supplementation Fund:

(c) If the insured were to be ordered to pay an amount by way of premium for the period January 1989 to 9 September 1980 then Palmdale is, in effect, seeking to enforce a claim for and on behalf of the Commissioner and as such would be unjustly enriched."

His Worship went on to say:

"Despite Mr Jopling's contention, I think that the claim on behalf of Palmdale for the period 9 January to 9 September 1980 should be disallowed and that the sum claimed, accordingly should be reduced. This means that the question remaining is whether the insured is liable to [4] to pay premium to Palmdale in respect of the period 9 September 1979 to 9 January 1980."

His Worship then considered the question of agency in respect of the broker and found on the evidence before him that the payment by the insured to the broker was not a payment of premium to Palmdale as the broker was not Palmdale's agent. Accordingly, as the premium had not been paid to Palmdale for the period when it assumed the risk under the policy, namely from 9 September 1979 to 9 January 1980, then a *pro rata* amount only was due and payable by the insured. Mr Chernov of Queen's Counsel who, with Mr Jopling appeared for the applicant before me, referred me to the scheme of the *Workers Compensation Act* and the *Insurance Act*. He submitted by reference to specific provisions of the Act and the Regulations that the scheme of the *Workers Compensation Act* is to provide certainty of protection to employees in return for a premium paid by the employer to the insurer. This protection, it was argued, comes from two sources which are activated when the policy is issued. One source is the insurer and the other is the Fund which for all practical purposes steps into the shoes of the insurer if and when the insurer is unable to meet its obligations. Mr Chernov emphasized the effect of s72 which creates what he referred to as the full indemnity. He submitted that the mandatory direction for [5] payment out of the Fund under s98 creates a situation in which once the policy issues there is complete protection available to the insured, because any shortfall in a claim under the policy can be recovered against the Fund. In this respect, it was said that a workers compensation policy was different from other policies of insurance.

Mr Chernov submitted that in the light of the scheme of the Workers Compensation legislation, the circumstances of this case and the findings of the Magistrate, the following propositions were valid: first, that the policy once issued could not be cancelled unilaterally by the insured; second, if the policy could be cancelled unilaterally by the insured, then on the facts before the Magistrate he could not have reasonably concluded that the policy was so cancelled; third, that the policy could not be discharged by breach nor could it be discharged by the operation of the doctrine of frustration; fourth and in the alternative, if the policy could have been discharged by breach, there was not an acceptance of repudiation, or fifth, in the alternative, the respondent waived its right, if it had any, to act upon such repudiation.

Mr Fraser of counsel who appeared for the respondent supported the Magistrate's decision although he submitted that it was a difficult one to analyse because the Magistrate did not expressly deal with the questions of repudiation, frustration [6] or cancellation but rather came to the overall conclusion that Palmdale could not claim that portion of the premium which

related to the period after which it ceased to be able to honour its obligations under the policy. Mr Fraser submitted that however the Magistrate's conclusions were interpreted they were based on the concept that as the risk for that period had been assumed by the Insurance Commissioner because of the operation of the Act, Palmdale would be unjustly enriched if it were allowed to recover that portion of the premium which related to the period after the 9 January 1980. Mr Fraser contended that the Magistrate was entitled to make that finding on the evidence before him and that he was entitled to find that Palmdale was, in effect, seeking to enforce a claim on behalf of the Insurance Commissioner which it was not entitled to do.

I am unable to agree with those submissions essentially for the reasons advanced by Mr Chernov in his primary submission as to the effect of the legislative scheme of the *Workers Compensation Act* and the *Regulations*. In my opinion, the correct view is that the legislation provides a scheme for complete indemnity in all circumstances including the eventuality that the insurer will cease to fulfil its obligations under the Policy. The Supplementation Fund in Part V of the Act is built up for this purpose and although it appears that since 1977 the Fund [7] did not in fact require further contributions, that does not, in my view, change the nature of the scheme which contemplates that once the contract of insurance is entered into and liability to pay the premium incurred the insurer, or in the event of his inability to do so, the Insurance Commissioner assumes the risk and so complete protection under the policy is provided.

My attention was drawn to the decision of Gobbo J in *Re Palmdale Insurance Ltd* [1982] VicRp 93; [1982] VR 921; (1981) 1 ANZ Insurance Cases 60-436 in which His Honour answered a number of questions on a summons for directions under s273(3) of the *Companies Act* 1961. It was common ground in that case that all policies, except workers compensation policies, gave each party the right to cancel without specifying a ground for cancellation. His Honour was of the view that the insurer's inability to perform its obligations by reason of the Treasurer's direction under s62(2) of the *Insurance Act* can amount to a repudiation of a contract of insurance which affords a policy holder the right to elect to terminate the policy for breach and sue for damages. Further, His Honour found in the case before him, that he did not have to decide whether the Treasurer's direction was an event that brought about a frustration (in the common law sense) of Palmdale's contracts of insurance. He did not, however, accept the view that where a policy is issued, the risk attaches and the premium is agreed upon on an annual basis, there is still a total failure of consideration.

[8] A policy such as the one now under consideration effected under the provisions of the *Workers Compensation Act* is, in my view, in a different category to other policies of insurance which were the subject of the decision of Gobbo J. Once such a policy is effected there is, in my opinion, an obligation by the insured to pay the full premium for the period of one year, in this case 9 September 1979 to 9 September 1980. That obligation in this case was not discharged because the premium paid to the agent by the insured did not find its way to Palmdale. The obligation to pay the premium continued irrespective of the events which culminated in the appointment of the liquidator in early January and the fact that the risk was thereafter assumed by the Fund pursuant to the Act. In my view, neither the Treasurer's direction nor the fact that Palmdale could no longer meet its obligations, invoked the operation of the doctrine of frustration or amounted to repudiation, so as to entitle the respondent to avoid paying the whole of the premium due, pursuant to the policy effected for the year ending 9 September 1980. It becomes unnecessary, therefore, to consider the question as to whether there was acceptance of repudiation or whether there was waiver by the respondent [9] of any rights which it may have obtained. The orders nisi in those circumstances will be made absolute on grounds one and two.

APPEARANCES: Mr Chernov QC, with Mr PJ Jopling of Counsel appeared on behalf of Palmdale Insurance Ltd (in liq.). Mr HW Fraser of Counsel appeared on behalf of Brian Motton Pty Ltd.