CASES DECIDED

IN THE

WITWATERSRAND LOCAL DIVISION.

S.A. LAW REPORTS (1914).

W.L.D. PART IV.

FINE v. GENERAL ACCIDENT FIRE AND LIFE ASSOCIATION LIMITED.

1914. *October* 6, 9, 12, 27. GREGOROWSKI, J.

Insurance.—Fire-policy.—Premature termination of prior policy.—Material non-disclosure.

Cancellation of a fire policy during its currency by an insurer under power to that effect in the policy is not a declinature of the risk.

Failure, however, to disclose such cancellation to a subsequent insurer, *Held*, a material non-disclosure avoiding a policy which expressly made an omission to state any fact material to the risk a ground of avoidance, *Semble*, such material non-disclosure would have avoided the policy apart from any such express stipulation.

Action upon a fire insurance policy.

The facts appear from the judgment.

C. F. Stallard, K.C., with him *J. van Hoytema*, for the plaintiff:

The first question is whether the answer "no" to the question in the proposal form "has the insurance now proposed been declined by any other office" is false. We submit not; the termination of a policy during its currency after notice is not a declinature. Declinature means a refusal even to accept. Cancellation is not a refusal of a risk. Companies are aware of cancellations; if they want specific answers they should ask specific questions. A can-

cellation is simply the taking advantage of a clause in the contract to vary the period. Questions must be construed *contra proferentem;* see *Joel* v. *Law Union and Crown Ins. Co.* (24 T.L.R. 898, at p. 905 *per* FLETCHER-MOULTON, L.J.).

In any case plaintiff disclosed the cancellation. The defendant had the information through the clerk of its agents. For the law as to the authority of agents and their clerks to bind their principals in such circumstances: see Story's *Agency,* sec. 14; *Drysdale* v. *Union Fire Insurance Company* (8 S.C. 63); *Simon* v. *Equitable, etc., Company* (9 S.C. 455); *Arff* v. *Star Insurance Company* (10 L.R.A. 609); *Steele* v. *German Insurance Company* (18 L.R.A. 85); *Good & Co.* v. *Georgia, etc., Company* (30 L.R.A. 842); Welford and Otter-Barry on *Fire Insurance* (p. 149).

J. Stratford, K.C., with him *R. Honey,* for defendant: Plaintiff's answer was false. A refusal to continue a risk is a declinature. There is no difference in principle between declining to continue after a period and an original refusal. The object of the question is to discover whether other companies liked the risk. A refusal to continue a risk indicates a stronger reason for declining than an original refusal. The point of the question is to put the new insurer upon enquiry whether the discontinuance had an innocent explanation or otherwise. Secondly the non-disclosure was material: see *London Assurance Company* v. *Mansel* (11 Ch. D. 363, at p. 370). Thirdly, was there a disclosure to the defendant in fact? The reply being false, the agent who takes it down becomes the agent for the applicant; see *Biggar* v. *Rock Life Insurance Company* (1902, 1 K.B. 516, at p. 525, *per* WRIGHT, J.). The agency for the company ceases where there's an infringement of duty by a proposer, whether by not reading the proposal form or by giving false answers; *Fletcher's* case (20 L.R.A. 286). It is the applicant's duty to read the proposal form and to see whether the answers noted down are correct; Bunyan's *Fire Insurance* (pp. 175 *seq.*) distinguishing *Lloyd* v. *Grace Smith* (1912, A.C. 716). A plaintiff therefore cannot shelter behind the agents' authority where the answer is false.

Stallard, K.C., in reply: On the question of materiality see *Rilhards* v. *Murdoch* (109 Eng. Rep. 546); Welford (*supra*) p. 135; *Re General Provident Life Assurance Company* (18 W.R. 396); *Goodwin* v. *Lancashire Fire Insurance Company* (Welford (*supra*) p. 135). An insurer's agent is its agent for seeing the

proposal put into proper shape; see *Bawden* v. *London, Edinburgh and Glasgow, etc., Company* (1892, 2 Q.B. 534); and Welford (*supra*) p. 152.

Honey cited Arnold on *Marine Insurance* (7th ed.) p. 514.

Cur. adv. vult.

Postea (October 27.)

GREGOROWSKI, J.: This is an action to recover the sum of £1,000, with interest *a tempore morae*, under a fire insurance policy issued by the defendant company on the 17th July, 1913, in favour of the plaintiff in respect of certain premises situate on Lot A of portion 3 of Erf No. 122, King Edward Street, Potchefstroom. The fire risk under the policy had to run from the 11th July, 1913, to the 11th July, 1914. The plaintiff was mortgagee of the premises, and the premises were consumed by fire on the 28th December, 1913, while the policy was in force, and the question which has to be decided is whether the policy is a valid and enforceable one. There was a dispute as to the value of the buildings which were destroyed, but the parties agreed that the value for the purposes of this case should be taken to be £920.

There was a preliminary plea that the plaintiff at the date of the fire had no insurable interest, but this plea was withdrawn.

The first ground of defence is that the answers to questions in the proposal form, dated 23rd June, 1913, and signed by the plaintiff and her husband, were the basis of the contract upon which the policy was issued, and that in reply to question 18 in the proposal form "Has the insurance now proposed been declined by any other office?" the plaintiff had replied "No," and that this answer was untrue, inasmuch as the Law Union and Rock Insurance Company, with which "the plaintiff had on the 14th February, 1913, taken out a policy of fire insurance for £1,000 over the said property for a period of one year as and from the 14th February, 1913, did by letter dated the 11th June, 1913, return to plaintiff the rateable proportion of the premium paid for the unoccupied term of the said policy and cancelled the said policy and declined to continue insuring the said risk during the remainder of the said period or at all."

The second ground of defence is in the alternative that under clause I of the condition on which the said policy was issued it was

provided that, should there be any misrepresentation or wrong fact material to be known for estimating the risk, or any omission to state such fact, the defendant company should not be liable upon the said policy so far as it related to property affected by such misrepresentation or omission. The material fact which the plaintiff had omitted to communicate is then stated to be that the Law Union and Rock Insurance Company Limited, as already alluded to, had thrown up their policy during its currency, and that the defendant company, as soon as it became aware of the non-disclosure of this material fact—namely, on the 2nd February, 1914—repudiated all liability under the said policy.

The amended replication states that the plaintiff showed one Bosch, a clerk of Messrs. Van der Hoff and du Toit, the agents of the defendant company for effecting insurances, the policy issued by the Law Union and Rock Insurance Company and the letter dated the 11th June, 1913, by which this company gave notice cancelling the policy, and that the said Bosch informed the plaintiff that the answer to the proposed question No. 18 was correct, and the plaintiff denies that there was any wrong answer given or any concealment on her part.

With regard to what occurred when the proposal form of the policy in suit was signed, there is a most extraordinary diversity in the evidence given by the witnesses called on the two sides. [His Lordship then reviewed the evidence on this point.]

It has first to be decided whether the answer to question 18 is untrue by reason of the peculiar circumstances of this case.

In the policies of both the defendant company and of the Law Union and Rock Company, there is a provision that the company can cancel the policy during its currency at any time by giving notice and by returning a proportionate amount of the premium. Such a termination of the policy was thus a procedure known to both these companies.

The policy makes the answers to the questions in the proposal form the basis of the contract between the parties, and it is the duty of the insurance company to make the questions as explicit as possible, so that the answers can be readily given. In this instance the question is "Has the insurance now proposed been declined by any other office?," and this is a question which can be answered by a categorical "Yes" or "No," and does not look for a discursive or explanatory answer. What had happened was that the Law

Union and Rock Insurance Company had accepted the insurance and had issued a policy, but had prematurely terminated the risk. This seems to me different from refusing a proposed insurance, and in any case the scope of the question is not clear, and the company cannot complain if the answer given does not cover all the ground that the company might wish it to cover, and it cannot be said that under the circumstances a false answer was given to the question.

This view renders it unnecessary to decide whether, if plaintiff had informed Bosch (the clerk of plaintiff's agents), of the letter of the Law Union and Rock Insurance Company and of the premature cancellation of the policy, this would have excused the writing down of the wrong answer by Bosch as far as the plaintiff was concerned. As a rule the proposer is responsible for the answer to the questions on the proposal form, and the proposer cannot throw the responsibility of a wrong answer on the agent of the company, whose authority and functions are limited to getting the proposal form signed and to receiving such other information as it is necessary for the proposer of insurance to communicate to the company.

Under these circumstances it is necessary to consider the alternative plea, whether the plaintiff was bound to inform the company of the premature termination by the Law Union and Rock Insurance Company of its policy, and whether as a fact this disclosure, if necessary to be made, was made or not. It is admitted that, if the disclosure was made to Bosch, this would be sufficient notice to the company.

As already indicated, the evidence as to what occurred when the proposal form was signed is very conflicting. The conclusion I come to is that the evidence of the defendant's witnesses is the more probable and the more worthy of credence.

Then the replication as first filed throws great suspicion on the story now told by the plaintiff and her witnesses. I am satisfied that Bosch's version of what occurred is the correct one, and that the plaintiff did not disclose to him that the Law Union and Rock Insurance Company had terminated the policy by notice during its currency, and that she did not show him the policy and the letter.

The next question is whether this information should have been given to the defendant company? or in other words whether the information was material?

It appears that insurance companies make provision in their policies for summarily ending their policies at any time during their currency by notice, and it is obvious that, as the business of an insurance company is to earn premiums, an insurance company is not likely to return premiums any more than to refuse premiums unless for some good cause, and this good cause must *prima facie* be connected with the character of the risk. If this is so, then the premature discontinuance of a pre-existing policy must necessarily be material, and should have been disclosed. It is settled law that insurance policies of all kinds are *uberrimae fidei*, and there is an implied contract by the applicant for a policy to make full disclosure of all facts known to him material to the risk. In the present case there is in addition, as is usually the case, an express contract which is referred to in the alternative plea to disclose all material facts.

The premature termination by notice of a policy is such an unusual occurrence, that not only is it an obvious inference that the company adopting such a course considers the risk undesirable, but the insured on the other hand must be conscious that the company has come to the conclusion that the risk is not a good one or that he is not a desirable client, and he ought to know that if he tries to get another company to take up the insurance, he should disclose, in connection with his application for the insurance, the unusual fate which has befallen his previous policy.

The question what is material to be disclosed is a matter of fact depending on the circumstances of each case, and the test is what a reasonable man under the given conditions would deem material. If it were proved that the Law Union and Rock Insurance Company had cancelled the policy because it was withdrawing its business from the Union, or was going into liquidation, or because a mistake had been made in the premium charged, or from some similar cause entirely unconnected with the risk, the ordinary individual if he knew the circumstances, might perhaps consider that there was no reason to disclose the unusual occurrence which could be explained in this way, and the unusual occurrence would not as a matter of fact be material to be disclosed, but in the present case there was no evidence brought as to why the Law Union and Rock Insurance Company terminated the policy, and the plaintiff said in her evidence that she did not know why this company had acted in this way; no reason was given in the letter of the 11th June, 1913,

and her solicitors were to have enquired what the reason was and were to have told her, but they never did tell her. Such being the state of mind of the plaintiff and such being the circumstances, she was in my opinion required to disclose what had occurred, leaving the defendant company to make its own inquiries. Until inquiry had been made, or an explanation given, the ordinary individual ought to be and would be conscious that the cancellation of the policy was a circumstance adverse to the risk and one which should be disclosed.

It was suggested that the lowness of the rate of the premium might have been the reason for the cancellation of the policy. It was admitted that 10s. per £100 was a very low rate for a produce business, but there is no evidence that this was the reason for the cancellation, and there was no reason for attributing the cancellation to this cause.

What is material to disclose, does not depend upon what the insured even *bona fide* thinks is material, but upon what is in fact material under the particular circumstances, and it seems to me that the unexplained cancellation of this previous policy is a material circumstance which should have been disclosed, and, as there was no disclosure made—as proved by the evidence given for the company which I accept, I come to the conclusion that the policy cannot be enforced, and that there must be judgment for the defendant company, with costs.

Plaintiff's Attorney: *E. Gluckmann;* Defendants' Attorney: *G. W. J. Macfarlane.*

[G. H.]

EX PARTE TRANSVAAL VOLUNTEERS' SUSTENTATION FUND, TRUSTEES OF

1914. *October* 22. WARD, J.

Trust.—Failure of objects.—Addition to objects.—Cy pres *doctrine.*

Where the objects of a trust fund were to afford relief and sustenance to members of the Volunteer or Irregular Forces of the Province, and such forces ceased to exist by the act of Legislature and were replaced by the Defence Forces, and the trust deed empowered the trustees to apply to the Court, in case the objects of the trust became impossible of execution, for leave to vary or alter