1976, 26

IN THE PRIVY COUNCIL 15 OF 1976

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

IN TERM NO. 8276 of 1974

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant (Plaintiff)

AND:

GREATER PACIFIC GENERAL INSURANCE LIMITED

Respondent (Defendant)

CASE FOR THE APPELLANT

SOLICITORS FOR THE APPELLANT

Reid & Vesely,
85 Bondi Road,
BONDI

By their City Agents:

Greaves, Wannan & Williams,
109 Pitt Street,
SYDNEY

London Agents
CHARLES RUSSELL & CO.,
Hale Court, Lincoln's Inn, London, WC2A 3UL

SOLICITORS FOR THE RESPONDENT

Dawson Waldron,
60 Martin Place,
SYDNEY

Prepared by Young & Cooke, 70-70a Castlereagh St., Sydney.

IN THE PRIVY COUNCIL

15 OF 1976

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

IN TERM NO. 8276 of 1974

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant (Plaintiff)

AND:

GREATER PACIFIC GENERAL INSURANCE LIMITED

Respondent (Defendant)

CASE FOR THE APPELLANT

SOLICITORS FOR THE APPELLANT

Reid & Vesely,
85 Bondi Road,
BONDI

By their City Agents:

Greaves, Wannan & Williams,
109 Pitt Street,
SYDNEY

London Agents
CHARLES RUSSELL & CO.,
Hale Court, Lincoln's Inn, London, WC2A 3UL

SOLICITORS FOR THE RESPONDENT

Dawson Waldron,
60 Martin Place,
SYDNEY

IN THE PRIVY COUNCIL 15 OF 1976

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION COMMERCIAL LIST IN
NO. 8276 of 1974

BETWEEN:

MARENE KNITTING MILLS PTY. LIMITED

Appellant

AND:

GREATER PACIFIC GENERAL INSURANCE LIMITED

Respondent

CASE FOR THE APPELLANT

Record

INTRODUCTION

1. This is an appeal by leave of the Supreme Court of New South Wales finally granted under the Order in Council of 1909 on the 2nd day of March 1976, from a judgment given on the 12th day of December 1975, by his Honour Mr. Justice Yeldham in favour of the Respondent in an action brought by the Appellant as Plaintiff against the Respondent as Defendant. p.216 p.179

2. The Appellant's action was brought in respect of a loss by fire alleged to be the subject of indemnity under a cover note issued by the Respondent to the Appellant. The amount of the loss was agreed at $130,583.89 but the Respondent alleged in defence of the claim that the Appellant's "business" had previously suffered four very serious and substantial fires which were material to be disclosed and were not disclosed. The principal question which arises in this appeal is whether these fires (or in particular two of them on the basis of which his Honour dismissed the Appellant's action) were material and so ought to have been disclosed by the Appellant's broker or by the Appellant itself. It is not proposed to challenge his Honour's p.1 p.327 p.11 Ll.22-24 p.6 p.7 Ll.10-14 p.205 Ll.22-23

finding that none of the said fires was disclosed by the broker (or indeed anyone else on behalf of the Appellant).

HISTORY

3. The cover note in question in the action was taken out on 14th August 1973, immediately upon arrival of the stock, machinery and plant to which it related from the Appellant's previous factory in Sydney at its recently acquired factory in Melbourne. It covered loss by fire at that new situation, to which the Appellant was in the process of moving its entire operation as a manufacturer of certain types of knitted garments. At that time the Directors of the Appellant were Chil Myer Herszberg (herein called Myer Herszberg) who acted as managing director, and his mother Fela Herszberg. Apart from one share held in the name of the estate of the deceased father of Myer Herszberg, Laib Herszberg, the shares in the Appellant were held by Fela Investments Pty. Limited, a company the substantial shareholding in which was held by Myer Herszberg and his brothers and sisters.

p.179 Ll.15-16
pp.190-191
pp.63-64
p.67 Ll.38-39
p.327
p.185 L.17
p.136 Ll.19-26
p.336 L.23-28
p.185 Ll.20-24
p.337 Ll.3-9
pp.338-339
pp.331-332

4. Towards the beginning of 1973, Fela Herszberg, in the course of the discussions which led to the move of the Appellant's operation from Sydney to Melbourne, stated that she did not wish to be involved any more. In fact, she ceased doing work in connection with the Appellant about a month before the Appellant's operation was moved to Melbourne, in August 1973.

p.197 Ll.7-8
p.202 Ll.20-22
p.137
p.138 Ll.28-29
p.148 L.38
p.149 Ll.2-13
p.169 Ll.4-7
p.175 Ll.29-31

5. The four fires upon which the Respondent relied occurred over the period 1958-1965 at Hornsby near Sydney where the abovementioned Laib Herszberg, who died in 1971, and Fela Herszberg, then carried on the business of knitted garments manufacturers in partnership under the name Hornsby Knitting Company and where a company James Knitwear Pty. Limited which they had formed carried on a retail shop dealing in knitwear, toys, and other goods. Hornsby Knitting Company and James Knitwear Pty. Limited made substantial insurance claims arising out of these fires. There was no suggestion that there was any suspicious circumstance in relation to any of these fires or claims.

pp.180-181
p.28
p.56 Ll.1-12
pp.41-42

Record

6. Myer Herszberg was born in 1948 and was not involved in Hornsby Knitting Mills or James Knitwear Pty. Limited at the times of the first three of the said fires, but was was employed to help the factory's mechanic over a period of eighteen months to two years up to the date of the last of the said fires which was on 2nd September 1965, when he was seventeen years old. p.203 L.21 p.204 p.50 Ll.13-20

7. The 1965 fire destroyed the factory at Hornsby. Thereupon Laib and Fela Herszberg arranged for James Knitwear Pty. Limited to purchase on 13th October 1965, in trust for them the machinery of the Appellant, which had been ordered to be wound up on 20th September 1965. The Appellant was an old company with a well-established reputation as a manufacturer of good quality knitwear and particularly bowlers' garments. Until this purchase, it had had no connection with the Herszberg family. p.181 pp.182-183 p.256 p.245 Ll.13-22 p.52 Ll.28-35 p.111 Ll.15-23 p.331 Ll.30-35 pp.336-337

8. Between 13th October 1965, and 29th June 1966, Laib and Fela Herszberg carried on the manufacture of knitted garments at the factory of the Appellant under the name Fela Knitting Co. which made (but in limited quantities) garments both of the kind formerly made by Hornsby Knitting Co. and the kind formerly made by the Appellant. Laib and Fela Herszberg made application to the local Council for permission to rebuild the factory at Hornsby, but this was refused on 12th April 1966. A possible appeal was considered but there is no suggestion it was proceeded with. p.183 p.189 p.38 Ll.24-50 p.39 pp.267-268 pp.50-58 p.219 pp.36-37 p.185 Ll.3-6 p.36 Ll.36-37

9. On 29th June 1966, the shareholding of the Appellant was purchased by Fela Investments Pty. Limited, with the exception of one share which was acquired by Laib Herszberg. The winding up of the Appellant was stayed and on 31st August 1966, Hornsby Knitting Company sold back to it the machinery which had been purchased as mentioned in paragraph 7 above together with any other assets of Hornsby Knitting Company. p.185 Ll.7-10 p.129 Ll.22-25 p.337 Ll.1-10 p.336 Ll.19-20 p.135 Ll.28-35

10. From 1966 to 1971, when Laib Herszberg died, the Appellant carried on business as a manufacturer of knitted garments with Laib and Fela Herszberg as its directors. Upon the death of his father, Myer Herszberg became its managing director. p.185 Ll.12-19 p.125 Ll.21-23 p.136 Ll.10-26 p.336

Record

HEARING IN SUPREME COURT OF NEW SOUTH WALES

11. The action was heard by Mr. Justice Yeldham on 18th, 19th, 20th and 21st November 1975, and 10th December 1975, and judgment was given on 12th December 1975. p.179 His Honour rejected evidence relating to disclosure by an employee of the broker through whom the insurance was arranged, and held that the Respondent was entitled to avoid the contract of insurance "assuming there to have been a non-disclosure of material facts." p.192 L.26 p.193 L.12 p.193 Ll.19-20 On the question of materiality, his Honour referred to a decision of Samuels J. in Mayne Nickless Ltd. v. Pegler & Anor. (1974) 1 NSWLR 228 and said: p.199

"In particular I propose to follow and apply what was said at page 239, namely: p.200 Ll.8-19

'Accordingly, I do not think that it is generally open to examine what the insurer would in fact have done had he had the information not disclosed. The question is whether that information would have been relevant to the exercise of the insurer's option to accept or reject the insurance proposed. It seems to me that the test of materiality is this: a fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions'."

12. Applying the test adopted by him, his Honour preferred the evidence of Mr. Hardy, an expert called by the Respondent, to that of Mr. Best, an expert called by the Appellant. His Honour said: p.201 Ll.22-28 p.202 L.8

"In any event I prefer the evidence of Mr. Hardy and I do not think it is correct to assert, as Mr. Burchett did, that his evidence should be disregarded because he was not asked to assume that Mrs. Herszberg was not connected with the management of the Melbourne factory. On the finding which I have made she was closely related to the manufacturing side of the business both at Hornsby and in Sydney until at least a short time before the fire. I conclude that there was such identity of management, pp.201-202

control, product and overall business structure at Hornsby and in the new premises at the date of the cover note that the opinion of Mr. Hardy is to be preferred to that of Mr. Best. In any event without any acceptable expert evidence I myself would have concluded that the previous fires and each of them were material matters which should have been disclosed. This conclusion would flow largely from the fact that the ultimate control of the plaintiff, making due allowance for the death of Mr. Laib Herszberg, was really substantially the same as the control of the businesses at Hornsby and the day to day management of the manufacturing side of the business at its new premises in Victoria at the date of the fire would still have been markedly affected by the fact that Mrs. Herszberg was in charge of that side of the company's activities until shortly before the move to Melbourne."

13. His Honour held that, in view of the way the case had been pleaded by the Respondent it was necessary for the Court to determine whether or not the Plaintiff's business in August 1973 was a continuation of that which had been conducted at 2 James Street, Hornsby, up to 1965 (as the Respondent alleged) or whether in substance it was independent of it and either a continuation of that which the Appellant, prior to its going into liquidation, had carried on in Sydney or alternatively an entirely new business commenced in 1966. In fact the Respondent's Counsel had so limited his case in answer to a specific question from his Honour during his opening and the case was conducted on this footing. His Honour held that "there was a substantial identity between the business conducted at Hornsby and that which thereafter was conducted under the name of the plaintiff."

p.194 L1.17-28

p.195 L1.22-25

14. His Honour further held that the Appellant's managing director Myer Herszberg who instructed the broker to arrange the insurance knew of the latter two of the said four previous fires. As his Honour had held each of these material he reached no conclusion as to whether the earlier two fires should be regarded as known to the

p.204 L1.21-23

p.205 L1.9-12

Appellant because they were known to Fela Herszberg as a director not involved in the arranging of the insurance.

15. His Honour therefore rejected the Appellant's claim. p.205 Ll.20-28

SUBMISSIONS

16. The Appellant submits that on a proper application of the law of materiality none of the previous fires was or could be regarded as material.

17. The Appellant submits that the test of materiality is contained in the judgment of the Privy Council in Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd. 1925 AC 344 at 351-2 in the passage:

"The appellant's counsel ... suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted Dr. Fierheller. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

Applying this test ... had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium."

18. The test in the Mutual Life Insurance Co. of New York case has been adopted in England and Australia as correctly stating the common law: see Lambert v. Co-operative Insurance Society Ltd. (1975) 2 Lloyd's LR

485, per MacKenna J. at 487, per Lawton LJ. at 492, and per Cairns LJ. at 493; Zurich General Accident and Liability Insurance Co. v. Morrison (1942) 2 KB 53, per Lord Greene at 59; Southern Cross Assurance Co. Ltd. v. Australian Provincial Assurance Association Ltd. 39 SR (NSW) 174, per Jordan CJ. and Nicholas J. at 187-8; Kazacos v. Fire and All Risks Insurance Co. Ltd. 92 WN (NSW) 397 at 401-3 and Club Development Finance Corporation Pty. Limited v. Bankers & Traders Insurance Co. Limited (1971) 2 NSW LR 541, per Macfarlan J. at 545. The law is similarly stated by Isaacs ACJ. (as he then was) in Western Australian Insurance Co. Ltd. v. Dayton 35 CLR 355 at 379. In Canada the test has since been applied by the Supreme Court in Gauvrement v. Prudential Insurance Co. (1941) 2 DLR 145 (see per Rinfret and Crocket JJ. at 157 and 159-160 and per Kerwin J. at 162-3), and Henwood v. Prudential Insurance Co. of America (1967) 64 DLR (2d) 715 (see penultimate paragraph of majority judgment at 722 and per Spence J. (dissenting as to the result) at 731). In the U.S.A. a similar test prevails: "A material matter is one which probably will affect the decision of the company as to the making of the contract or as to its terms" ("Corpus Juris Secundum" Vol. 45 sec. 473(4) at page 177).

19. It is submitted that the above cases show that the matter not disclosed must be one which would at the least have had an effect on the ultimate decision of the insurer - as Atkin J. (as he then was) put it in Associated Oil Carriers Ltd. v. Union Insurance Society of Canton Ltd. (1917) 2 KB 184 at 191-2 a "real influence". Mere relevance is not enough as is shown by the reasoning in the Mutual Life Insurance Co. of New York case itself dealing with the contention that the fact not disclosed would have been relevant enough to lead to further inquiry though it would not have affected the ultimate decision, and also by the cases dealing with false answers to questions in proposal forms which are likely to be relevant but may yet not be material.

Record

20. In the present case it is submitted that the expert evidence of Mr. Hardy accepted by his Honour falls into the same error which was exposed in the Mutual Life Insurance Co. of New York case. Mr. Hardy, on assumed facts which did not include either the death of Mr. Laib Herszberg or the retirement from active work of Mrs. Fela Herszberg said: "I would regard those as most material facts that a prudent underwriter would make the assumptions that fires having taken place previously that it would behove him to make very careful inquiry of the circumstances of those fires and all relevant facts." He accepted his Honour's summation of his view as being "those matters you would want to know about," asserting this was so whether the business of the Appellant was the same business which had had the fires or not, and he said the death of Laib Herszberg (when he was asked to assume that fact) "would not make any effect at all." Such answers it is submitted cannot reflect an application of the law of materiality. If the witness had considered, not whether the facts called for further inquiry, but whether they would have "influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium", he could not have said that the death of Laib Herszberg "would not make any effect at all" on this question. Nor could he have failed to draw any distinction between a case where the proposer was in fact, at least in some sense, conducting the same business as that which had suffered the previous fires, and a case where the previous fires were neither suffered by the proposer nor by a business which could be identified with that of the proposer. In cross-examination he made it even clearer that he was not applying the correct test. Pressed concerning the basis of his opinions on the subject of materiality he used, inter alia, the following expressions: "you accept it as a material factor and may either act on it or may not act on it"; "you would want to know all the facts of the fires"; "your Honour, the question has been raised here about which I know nothing, about removal of premises. I was merely asked to predicate here on the hypothesis that I would require, as an underwriter, to know all facts about previous fires."

p.201 L1.22-23
p.202 L1.7-8
pp.112-121
p.113 L1.20-25
p.113 L1.31-37
p.114 L1.6-12
p.117 L1.43-44
p.118 L1.10-11
p.118 L1.33-37

Record

The Appellant also relies on his answers in cross-examination generally.

21. It is further submitted that Mr. Hardy's opinion:

(a) proceeded on the false assumption that Fela Herszberg was "still carrying on the self-same activity"; p.114 Ll.9-10

(b) could only be supported by an assumption of some sufficient persistence in the situation at the time of the insurance of risk factors present at the times of the earlier fires, and that this assumption was either negatived by the circumstances, or at least not shown to be probably correct. In particular, both the moral and material hazards were different. The management, staff, and premises were different. As regards the "set-up" of the new factory, the evidence is that the Respondent had had the factory surveyed by its own Melbourne office and was prepared to give fire cover. There was no suggestion in the evidence that any employee of the 40-60 employees of Hornsby Knitting Co. was or would be involved with the organization or working of the new factory in Melbourne, except that Myer Herszberg who was now the managing director had been a seventeen years old assistant to the mechanic at the time of the 1965 fire at Hornsby. pp.117-121 p.67 Ll.24-39 p.54 Ll.33-38 p.50 Ll.16-20 p.136 Ll.7-18 p.139 Ll.15-16

22. In contrast to the expert evidence of Mr. Hardy, the expert evidence of Mr. Best, called for the Appellant, and not cross-examined, was clearly based on what it has been submitted is the correct view of the law, and on the relevant facts. It is submitted that in the circumstances there was no ground to reject that evidence which was that if a prudent insurer had known the facts they would have been too remote to have affected his mind. pp.176-178

23. In the passage from his Honour's judgment cited in paragraph 12 of this Case, his Honour gave reasons for concluding "without any acceptable expert evidence" p.202 Ll.9-10

Record

that the fires were material. Firstly, his Honour stated that "the ultimate control of the plaintiff, making due allowance for the death of Mr. Laib Herszberg, was really substantially the same as the control of the businesses at Hornsby." With respect, it is submitted this cannot be sustained. On the evidence, the ultimate control in his lifetime was exercised by Laib Herszberg, and at the time of the insurance it was exercised by Myer Herszberg. His Honour's second reason was that the day to day management of manufacturing at the new premises in Melbourne would still have been markedly affected by the fact that Fela Herszberg was in charge of that side until shortly before the move to Melbourne. It is respectfully submitted that the postulated marked effect was at most a possibility as to which there was no evidence, and that there was no basis to conclude that a prudent insurer, if he had inquired into it, would have found anything to influence his decision. It is submitted that the true view is that the Appellant's day to day management in a new factory in another State would have depended on the lay-out of that factory (which the insurer had surveyed) and the foreman or other person in charge to be employed there. In any case, upon the evidence including that of former employees whom his Honour accepted, Fela Herszberg's role had never been a dominant one.

pp.136-138
p.202 Ll.13-16
pp.221-225
p.222 Ll.4-8
p.13 Ll.28-34 pp.19-20
p.44
p.49 Ll.31-39
p.109 Ll.26-32
p.123 Ll.6-39
p.202 Ll.17-22
p.67 Ll.24-25 p.136
pp.221-225
p.222 Ll.4-8
p.42 Ll.26-42
p.123
p.13 Ll.28-36
p.14 Ll.2-9
p.14 Ll.37-39
p.19,
p.50 Ll.6-7
p.109 Ll.26-34

24. It is further submitted that his Honour was in error when he held that the principle of Browne v. Dunn (1894) 6 R. 67 H.L., Reid v. Kerr (1974) 9 S.A.S.R. 367, and Precision Plastics Pty. Limited v. Demir 49 ALJR 28 1 did not have any application to the failure of the Respondent's Counsel to cross-examine Mr. Best, the Appellant's expert witness. The Appellant submits in the light of that principle his Honour should in this case have accepted the evidence of Mr. Best, and should not have acted on a view of his own contrary to it. It is submitted that the principle applies to the case of expert evidence, as in other cases, and that the decision in

p.201 Ll.9-22

Record

Reid v. Kerr (supra) supports this and is correct. If this were not so, it is submitted that the proper evaluation by Courts of expert evidence would be seriously jeopardized. It is submitted that it was essential, if Mr. Best's testimony were to be attacked, that he should be given an opportunity to make his answer to that attack.

25. It is also submitted that his Honour erred when he held that there was a substantial identity between the Appellant's business and that conducted at Hornsby at the time of the previous fires. It is submitted that the evidence including the evidence of the Appellant's former employees (whom his Honour accepted) showed that the Appellant sold substantially different qualities and lines (though still knitted garments), using a different brand with a different reputation, aiming at a different marking and selling to different customers, and using a different staff and location. It was intended to utilize the tax losses of the Appellant (which could only be done if the business was really the same business which the Appellant had conducted before the purchase of its shares by Fela Investments Pty. Limited - see Avondale Motors v. Federal Commissioner of Taxation 124 CLR 97 at 105). There were also business reasons to pursue its established business. It was differently owned, except as to one share by a holding company the shares in which were substantially held by the children of the partners in Hornsby Knitting Company. At the relevant time the management was in a new managing director. The fact that what remained after the 1965 fire of the business of Hornsby Knitting Company, and could be utilized, was taken over by the Appellant does not, it is submitted, detract from the Appellant's case. A company is not to be identified with every business it purchases or takes over or which is merged in it. There is no evidence that the retail business which had been conducted by James Knitwear Pty. Limited was ever taken over by the Appellant.

p.195 L1.23-25
p.195 L1.19-20
p.33 L1.10-25
p.45 L1.10-38
pp.46-47
pp.52-56
pp.109-112
p.126 L1.1-16
pp.141-146
pp.126-127
p.127 L1.20-22
p.147
p.185 L1.7-11
p.185 L1.20-24
pp.38-39
pp.51-52
pp.128-130
p.135

26. It is therefore respectfully submitted that this Appeal should be allowed

and judgment ordered to be entered for the Appellant for $130,583.89 together with costs for the following (amongst other) :

REASONS

(1) Because his Honour erred in holding that each of the said previous fires was a material matter;

(2) Because his Honour erred in holding that there was a substantial identity between the business conducted at Hornsby and that which was thereafter conducted under the name of the Appellant; 10

(3) Because his Honour should have held that the Respondent had not established the Defence alleged by it.

J.C.S. BURCHETT

A.R. ABADEE