1976, 26

IN THE PRIVY COUNCIL NO. 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 RESPONDENT

CASE FOR THE RESPONDENT

SOLICITORS FOR THE RESPONDENT

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GREATER PACIFIC GENERAL INSURANCE LIMITED

Record

1. This appeal is brought by Marene Knitting Mills Pty. Limited against a verdict and judgment of the Honourable Mr. Justice Yeldham in favour of Greater Pacific General Insurance Limited in proceedings in the Supreme Court of New South Wales Common Law Division Commercial List wherein the appellant was plaintiff and the respondent was defendant.

Ex.A p.327

2. On 14th August 1973 the respondent issued to the appellant a Cover Note which held the appellant indemnified for a period of three months from 14th August 1973 against damage to stock in trade, machinery and plant, machinery parts and office machinery in premises at Corner Evans and Cranwell Streets, Braybrook, Victoria occupied as a knitting mill and which were insured for a sum of $563,800.

3. The following day 15th August 1973 a substantial fire at the said premises destroyed goods of the appellant within the terms of the Cover Note to the value of $130,583.89.

Ex.A p.329

4. By a letter dated 6th February 1974 the respondent avoided the Cover Note on the ground that neither the appellant

nor anybody on its behalf had disclosed to the respondent either at or prior to the issue of the Cover Note that the business had previously had four very serious and substantial fires, namely on 24th June 1958, 10th September 1960, 26th October 1961 and 2nd September 1965; and that the failure to disclose these four previous fires constituted non-disclosure of most material facts.

5. The appellant sued the respondent claiming $130,583.89. At the hearing the principal issue was whether the respondent was entitled to avoid the Cover Note.

6. His Honour after finding that the occurrence of the four previous fires had not been disclosed to the respondent (a finding against which no

appeal has been brought) made the following further ultimate findings of fact:-

p.195 11.21-25
p.196 11.7-16
p.198 11.13-23

(a) that the business which had suffered the four earlier fires was, in the relevant sense, the same business as that which suffered the fire on 15th August 1973.

p.194 11.12-13
p.202 11.9-12

(b) that in all the circumstances the facts not disclosed were material facts.

pp.209 1.15-211 1.12

7. By its Notice of Appeal Grounds 8-15 inclusive the appellant challenges the ultimate finding referred to in 6(a) above and certain of the findings of fact which led to it. These grounds of appeal necessitate a brief review of the evidentiary material before

His Honour upon which the findings complained of were based.

Foxall p.127 11.37-39

8. In or about 1947 Mr. Laib and his wife Mrs. Fela Herszberg caused to be registered under the provisions of the Business Names Act 1934 (N.S.W.) the partnership of "L. & F. Herszberg". 10

Foxall p.127 11.40-41

9. In or about 1949 the registered name of the partnership was changed to "Hornsby Knitting Company" ("Hornsby").

Ex.10 p.335 11.6-10

Shoobert p.13 11.7-13

Swanton p.17 11.13-19
p.27 11.37-39

Train p.44 11.7-9

10. On or about 24th June 1958 Hornsby was carrying on business as a manufacturer of knitwear at 2 James St. Hornsby, a suburb of Sydney. The premises were owned by 20 Laib and Fela Herszberg and consisted of a dwelling converted for use as a knitting factory.

Record

Ex.10 p.335 11.6-10

Shoobert p.13 11.26-27

Swanton p.17 11.13-19
p.27 11.37-41

Train p.44 11.7-11

Stanley p.105 11.23-32

11. On or about 24th June 1958 there was a fire at 2 James St. as a result of which Mr. and Mrs. Herszberg claimed from their Insurer the sum of $40,770. Mr. and Mrs. Herszberg continued the same business under the same name after the fire.

Ex.10 p.335 11.11-13

Shoobert p.13 11.26-27

Swanton p.17 11.24-38

Train p.44 11.7-11

12. On or about 10th September 1960 there was a second fire at 2 James St. Hornsby. On this occasion the fire was in an additional structure which had been erected at the rear of the converted dwelling-house. As a result of this second fire Mr. and Mrs. Herszberg claimed from their Insurer the sum of $227,863. Mr. and Mrs. Herszberg continued the same business under the same name after the second fire.

Ex.10 p.335 11.14-17

13. On or about 26th October 1961

Record

Swanton p.17 l.39 - p.18 l.9
p.27 ll.42-44

a third fire extensively damaged premises in James St. Hornsby also owned by Mr. and Mrs. Herszberg and adjacent to 2 James St. The premises, a two storey shop, had been occupied by James Knitwear Pty. Ltd. ("James"). As a result of this fire Mr. and Mrs. Herszberg and James claimed from their Insurer the sum of $121,364.

Ex.14 p.337 l.10 - p.338 l.14

Foxall p.128 ll.29-33
p.132 l.41 - p.133 l.10

14. James was incorporated on 18th November 1953. In substance the original shareholders were Mr. and Mrs. Herszberg until 1955 when shares were issued to their children as well. The issue of shares to the children was no doubt due solely to estate planning requirements. The executive directors were Mr. and Mrs. Herszberg. The registered office was at 2 James St. Hornsby.

Foxall p.123 11.2-5
p.128 11.29-33
p.132 1.41 - p.133 1.10

Ex.16 p.229 11.14-18

15. James acted as a retail outlet for some of the goods manufactured by Hornsby as well as certain other goods. Trading by James had the purpose and effect of splitting the profits made from the manufacture and sale of knitwear between a number of taxpayers.

Swanton p.28 11.2-7

Ex.1 p.226 11.3-20
p.227 11.4-7

Ex.16 p.229 11.3-18

Foxall p.128 11.25-28

16. After the third fire James moved its activities to 2 James St. Hornsby and thereafter carried on its business from that address.

Ex.10 p.335 11.18-20

Swanton p.18 11.10-18
p.28 11.2-7

Ex.1 p.226 1.3 - p.227 1.10

Ex.16 p.229 11.3-18

17. On or about 2nd September 1965 a fourth fire substantially destroyed the premises and contents at 2 James St. Hornsby. By this time the premises consisted of the converted dwelling, now used by James as a disposal bargain centre for the sale of reject garments manufactured by Hornsby and

used by Hornsby as an office and storage area; behind it was a structure used as the main store room and behind that again a two storey factory, both of which were utilized by Hornsby. As a result of this fourth fire Mr. and Mrs. Herszberg and James claimed from their Insurers the sum of $266,639.

Swanton p.19 l.10 - p.20 l.11
p.27 ll.27-33

Ex.5 p.265 l.23
p.267

Ex.7 p.288 ll.30-31

Ex.28 p.219

18. The insurance cover held by Hornsby included a Loss of Profits Policy. The premises at 2 James St. were too badly damaged to permit of any business being carried on. Mr. and Mrs. Herszberg desired to build new factory premises on the site but were obliged by the requirements of the Loss of Profits Policy to carry on business elsewhere in the meantime.

Interrogatory No. 4 p.121
ll.23-39

19. To enable manufacture to

Ex.17 p.245 11.19-22

resume, on or about 13th October 1965 James, as trustee for Mr. and Mrs. Herszberg who provided the necessary funds, purchased from the liquidator of Marene Knitting Mills Pty. Ltd. ("Marene") certain stock and plant for the sum of $17,100.

Swanton p.20 1.32 - p.21 1.5

20. Hornsby obtained space on 1st Floor, Mansion House, 182 Elizabeth St. Sydney (formerly occupied by Marene) and some time between 24th September and 25th October 1965 commenced manufacture of knitwear at those premises.

Cubbin p.51 1.39 - p.52 1.3

Foxall p.128 1.34 - p.129 1.17

Herszberg p.151 11.28-38
p.156 11.33-43

Ex.8 pp.283-286

Ex.6 p.261

Ex.3 pp.262-264

Ex.5 pp.265-268

Ex.4 p.290

21. At the time of the fourth fire Hornsby had outstanding orders and those which were not cancelled were fulfilled by delivery of goods manufactured at Mansion House. The proceeds were taken into account for the purpose of

determining the entitlement of Hornsby under the Loss of Profits Policy. Hornsby continued to use both its own name and that of Fela Knitting Co. for the purpose of trading, correspondence and general business activities until August 1966. Fela Knitting Co. was another business name used by Mr. and Mrs. Herszberg from 1953 although only registered in 1967.

Ex.14 p.336 l.14 - p.337 l.9

Foxall p.127 ll.25-26
p.129 ll.18-28

Ex.17 p.240 ll.13-20

Ex.20 pp.269-275

Ex.21 p.276

22. Marene had been incorporated in 1937 and on 20th September 1965 it was ordered to be wound up. The liquidator thereupon discontinued the business of knitwear manufacturer theretofore carried on by the company. Marene had been defunct for some nine months when on 29th June 1966 its shareholders sold the whole of the issued capital, one share to

Mr. Herszberg and the balance to Fela Investments Pty. Ltd. ("Fela").

Ex.14 p.338 l.16 - p.339 l.16
Foxall p.132 l.41 - p.133 l.10

23. Fela had been incorporated in 1959. At the time of the acquisition of the shares in Marene its only shareholders and directors were Mr. and Mrs. Herszberg. This position subsisted until 1971. In that year shares were issued to the children of Mr. and Mrs. Herszberg. Once again the issue of the shares was prompted solely by death duty considerations.

Foxall p.126 l.23
- p.127 l.12
p.129 l.42 - p.130 l.4
p.132 ll.14-22

24. The purpose of the purchase of the shares in Marene was to attempt to utilize the losses accumulated by that company in previous years by seeking to set them off against the liability to income tax payable in respect of profits to be generated in

future years trading under the management of Mr. and Mrs. Herszberg.

Foxall p.129 l.34 - p.130 l.9

25. On 31st August 1966 Hornsby sold all its assets to Marene. From that date Marene carried on the previous business of Hornsby together with any other business which it was able to obtain.

Foxall p.87 ll.4-5
p.122 ll.17-33

26. As Mr. Foxall, who at all relevant times had been the Auditor of Marene and the Accountant to Mr. and Mrs. Herszberg and who was called as a witness for the appellant, said:-

Foxall p.133 ll.11-25

Q. "But it was at all times the intention that the effective management of Marene Knitting Mills should remain with whoever had been the effective manager of the

Hornsby Knitting Mills business. When the Marene Knitting Mills Pty. shares were purchased in the name of Fela Investments Pty. Limited that was done purely in order to promote the death duty scheme?

A. Yes.

Q. And it was at all times intended so far as you knew that effective control of the activities of Marene Knitting Mills should be with whoever had been the effective controller, or controllers of Hornsby Knitting Company?

A. I presume that was Mr. Herszberg's idea.

Q. Well, this was your understanding of the position?

A. Yes."

Herszberg p.157 11.10-12
Stanley p.106 1.34 - p.107 1.14

27. The lease of space at Mansion House could not be extended

Record

Shoobert p.14 11.19-20

Cubbin p.48 11.19-21

Ex.14 p.337 11.15-16

and on a date which is not certain but was probably June/July 1966 the operations of Marene were moved to 68 Campbell St. Sydney. On 4th July 1966 the registered office of James was moved to 68 Campbell St.

Shoobert p.14 11.12-24
p.15 11.5-9

Train p.45 11.10-27

Cubbin p.51 11.9-21

Stanley p.107 11.21-28
p.108 11.12-21

Foxall p.133 11.26-39

28. It is submitted that His Honour made no error in finding that in all essential respects the business of Hornsby carried on at Mansion House and later at Campbell St. was the same business as that which had been carried on at James St. Hornsby. The business was always that of a knitwear manufacturer although over the years there was an improvement in quality of goods reflecting the general trend in the industry to meet competition from imported goods and the rising affluence in the community. There was

also a trend to satisfying the knitwear needs of bowlers but evolutions of this nature did not effect any departure in the identity of the business. It would have been more than somewhat surprising if there had been no change in products during the period under consideration in an industry such as knitwear manufacture necessarily dependent on changes in fashion, public demand and competition, as well as subject to technological changes.

29. The question of the identity of the business is of course posed in the specialised context of insurance and whether the measure of identity was such as to make the non-disclosure of previous fires a material fact. This inquiry requires no minute investigation of business methods.

Record

Judgment p.180 11.17-19
p.197 11.3-8
p.201 1.27 - p.202 1.4

Foxall p.124 11.2-4
p.131 11.16-23

Shoobert p.13 1.26 - p.14 1.24
p.14 1.35 - p.15 1.4

Train p.44 1.7 - p.45 1.3
p.45 11.28-38

Cubbin p.48 11.19-27
p.49 1.31 - p.50 1.7
p.50 1.30 - p.51 1.8
p.51 11.29-38

Stanley p.106 11.10-22
p.107 11.29-36
p.108 11.22-38

Herszberg p.139 11.2-7

Ex. 26 p.332 11.8-18

Ex. 5 p.265 11.23-28

30. At James St. Hornsby, at Mansion House and at Campbell St. Mr. Laib Herszberg was in charge of the office and sales side of the business; Mrs. Fela Herszberg was in charge of the manufacturing side of the business. Some of the employees were the same as were some suppliers and customers.

Ex.14 p.336 11.25-28

Herszberg p.136 11.17-18
11.24-25
p.137 11.10-19

31. Although Mr. Laib Herszberg died in 1971 and his place as a director in the various family companies was taken by Mr. Myer Herszberg, the evidence disclosed no change thereafter in any respect in the activities of Marene. In particular, Mrs. Fela Herszberg continued to be in charge of the manufacturing side of the business until about one month

before its removal to Braybrook in 1973. Again the evidence does not suggest any change in the manufacturing side of the business.

Judgment p.194 11.20-28

32. The competing contentions of the parties on this issue were whether or not in substance the plaintiff's business in August 1973 -

(a) was a continuation of that which had been conducted at 2 James St. Hornsby - a proposition espoused by the respondent; or

(b) was independent of it and either

(i) a continuation of the business which had been conducted by Marene prior to its liquidation; or

(ii) an entirely new business commenced in 1966 -

as submitted by the appellant.

Judgment p.198 l.23 - p.199 l.5

33. In accepting the submission of the respondent outlined in 32(a) His Honour recognised that the respondent bore the onus of proof on this issue but pointed out:

> "I cannot overlook the fact that the details of the organisation and operations of the plaintiff between 1966 and 1973 and of Hornsby Knitting Co. before that are matters which are substantially within its own knowledge."

Judgment p.195 ll.19-21

34. The Respondent called certain former employees of Hornsby and Marene to give evidence as to the nature of the business conducted by these entities and each of these was specifically accepted by His Honour as a witness of truth. They were strongly

corroborated by Mr. Foxall called by the appellant. The only witness who gave evidence seeking to establish the case for the appellant was Mr. Myer Herszberg of whom the Judge said:

Judgment p.195 l.26 - p.196 l.6

> "I should here indicate that I was not greatly impressed with the evidence of Mr. Myer Herszberg and I am not prepared to infer from his evidence that there was a substantial difference of identity between what had been done at Hornsby prior to 1965 and what was done under the name of the Plaintiff from 1966 onwards."

and

Judgment p.204 l.3-4

> "As I have already said I was not impressed with the evidence of Mr. Herszberg...."

35. It is submitted that an appellate Court will not

interfere with the findings of a primary Judge unless it is satisfied that any advantage enjoyed by the trial Judge is not sufficient to explain or justify his conclusion. It is not sufficient merely that the appellate Court would have differed from the trial Judge in the conclusion which, had that Court been trying the matter in the first instance, it would have drawn from the material available. The appellate Court should interfere only where it is satisfied that the findings of the primary Judge were clearly wrong. "The Glannibanta" (1876) 1 P.D. 283; Khoo Sit Hoh v. Lim Thean Thong (1912) A.C. 323; Mersey Docks and Harbour Board v. Procter (1923) A.C. 253; "The Hontestroom" (1927) A.C. 37; Watt v. Thomas (1947) A.C. 484;

Benmax v. Austin Motor Co. Limited (1955) A.C. 370; Dearman v. Dearman 7 C.L.R. 549; Federal Commissioner of Taxation v. Clarke 40 C.L.R. 246; Paterson v. Paterson 89 C.L.R. 212; Whiteley Muir & Zwanenberg Limited v. Kerr 39 A.L.J.R. 505; Da Costa v. Cockburn Salvage & Trading Pty. Limited 124 C.L.R. 192; Edwards v. Noble 125 C.L.R. 296.

36. The fact that the business was after 1966 carried on in a corporate name is of no assistance to the appellant. The respondent submits that the approach of Chapman J. in Arterial Caravans Ltd. v Yorkshire Insurance Co. Ltd. (1973) 1 Ll.L.R. 169 at p. 180 is appropriate:-

"I come, then, to deal with the crucial issues of law in the case. There are only

two basic issues. Was there non-disclosure of a material fact, the material fact relied upon being the fire sustained by Tenulite in 1965? That it was not disclosed is common ground. Was it a material fact? Was it something which would influence an underwriter asked to take this business? Would it influence his mind as to whether he should take it, and, if so, at what premium? That, basically, is the test as to what is material. On the history that I have recounted, it seems to me almost an inescapable conclusion that this was material. It is all the same business all the way through the history, although at one stage it was run by an individual, it was then run by one

company, and it was then run by another company - starting again, it is true, after a disastrous liquidation. It started again in a small way, but it was substantially the same business. It seems to me it was highly material that the insurers asked to cover this business against fire should be told that substantially the same business, its predecessor in the company history, had had a very serious and substantial fire some three years before. That is the first issue which arises in this case."

(emphasis added).

37. It is submitted that there is no basis shown for rejection of any of the findings of

fact relating to the identity of the business.

p.207 1.27 - p.209 1.14

38. It is further submitted that such a conclusion demands an affirmative answer to the other principal question posed by the Notice of Appeal in Grounds 1 - 7, namely, whether the earlier fires of 1961 and 1965 were material facts. Once it is accepted that the business which suffered these earlier fires was the same as that covered, it is submitted that it necessarily follows that these earlier fires were material facts.

39. His Honour so found on two bases:

p.202 11.9-12
p.205 11.3-6

(a) on his own view without any expert evidence.

Record

p.194 11.12-13
p.201 11.22-23

Hardy p.112 1.31 - p.114 1.13
p.118 1.27 - p.121 1.18

(b) based on the evidence of Mr. Hardy.

40. His Honour was entitled to come to the conclusion to which he came without any expert evidence. It is submitted that the present is an instance where the materiality is obvious. Glicksman v. Lancashire & General Assurance Co. (1927) A.C. 139 per Viscount Dunedin at p. 143; (1925) 2 K.B. 593 per Scrutton L.J. at p. 609; Babatsikos v. Car Owners' Mutual Insurance Co. Ltd. (1970) V.R. 297; Mayne Nickless Ltd. v. Pegler (1974) 1 N.S.W.L.R. 228 at p. 240; MacGillivray & Parkington on Insurance Law 6th Ed. par. 755.

Judgment p.194 11.12-13
p.201 11.3-23

Hardy p.112 1.31 - p.114 1.13
p.118 1.27 - p.121 1.18

41. Additionally His Honour had the evidence of Mr. Hardy to the effect that the previous

fires were material. This evidence His Honour was entitled to and did accept in preference to that of Mr. Best. It is submitted that as a matter of law His Honour dealt correctly with the submission based on Browne v. Dunn (1894) 6 R. 67 H.L. that Mr. Best's evidence required to be accepted.

Ex.19 p.305
Ex.23 p.310
Ex.23 p.312
Ex.24 p.314

42. It may be noted in respect of the cover in question that Mr. Myer Herszberg who completed each of the proposal forms (after the 1973 fire) thought it appropriate to make reference to the 1965 fire in each of them.

43. To determine materiality His Honour applied the test formulated by Samuels J. (as he then was) in Mayne Nickless Ltd. v. Pegler (1974) 1 N.S.W.L.R. 228 at p. 239:-

"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."

44. The respondent submits that the test so formulated accurately states the legal criterion in question. The advice of the Privy Council in Mutual Life Insurance Co. Of New York v. Ontario Metal Products Co. Ltd. (1925) A.C. 344 was concerned with the specific test in the Ontario Insurance Act.

45. The result of the proceedings would in any event have been the same had the test of materiality been applied in the terms propounded by the appellant.

46. There are minor matters raised by the Notice of Appeal:-

p.208 1.28 - p.209 1.5
Judgment p.204 11.14-22
Swanton p.22 11.22-33
Ex.16 p.230 11.8-10
Herszberg p.141 11.21-25
p.164 1.22
- p.165 1.35

(a) It is suggested (Ground 5) that His Honour was in error in holding that Myer Herszberg had knowledge of the 1961 fire. His Honour was entitled to and accepted the evidence of Mr. Swanton that after the 1965 fire Mr. Laib Herszberg in the presence of Mr. Myer Herszberg spoke to Mr. Swanton of the 1961 fire. Mr. Myer Herszberg denied hearing this but His Honour rejected his evidence.

p.209 1.26 - p.210 1.6

(b) If any point is sought to be made (Ground 10) of any alleged

difference between "Hornsby Knitting Company" and "Hornsby Knitting Mills Co.", this was not a matter which was raised at the trial and it is submitted should not now be permitted to be raised.

A.J. Rogers

D.K. Voss
Counsel for the Respondents