Privy Council Appeal No. 15 of 1976

Marene Knitting Mills Pty. Limited – – – – *Appellant*

v.

Greater Pacific General Insurance Limited – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JULY 1976

Present at the Hearing:

LORD DIPLOCK
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SALMON
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON

[*Delivered by* LORD FRASER OF TULLYBELTON]

This is an appeal from a judgment of Yeldham J. given in the Common Law Division of the Supreme Court of New South Wales. The appellant, who is the plaintiff, sues the respondent in respect of a loss by fire which is alleged to be the subject of an indemnity under a cover note issued by the respondent to the appellant on 14th August 1973. The fire occurred on the following day, 15th August 1973. The amount of the loss is agreed at $130,583·89. The respondent was originally the first of two defendants but the action against the second defendant, a firm of insurance brokers, was settled before the trial and the second defendant was dismissed from the action. The respondent denies liability under the cover note "upon the ground that neither the plaintiff nor anybody on its behalf disclosed to the said defendant either at or prior to the issue of the cover note that the business had previously had four very serious and substantial fires."

The appellant has never disputed that the four fires referred to by the respondent occurred. At the trial it maintained that some disclosure about the previous fires had been made by the brokers to the respondent, and it maintained further that its managing director in August 1973, who was still its managing director at the date of the trial, was not aware in August 1973 of any of the previous fires. But the trial judge decided both these matters adversely to the appellant, and the appellant now accepts these findings by the learned judge. The question in dispute is whether the fires were material facts which ought to have been disclosed to the respondent and whether the non-disclosure entitled the respondent to avoid the cover note. The fires referred to occurred in 1958, 1960, 1961 and 1965. Yeldham J. held that they were material facts, that the appellant's managing director was aware of the two latest fires, those in 1961 and 1965, and as they had not been disclosed he held that the

respondents were entitled to avoid the cover note. Their Lordships are in complete agreement with the learned judge's conclusion and with the reasoning by which he reached it and they can therefore deal with the matter quite briefly.

The fires in 1961 and 1965 did not affect any property of the appellant company but the respondent contends that the business which suffered those fires was the same business as that which suffered the fire on 15th August 1973. In order to appreciate that contention it is necessary to refer to some matters of history. The appellant was incorporated in 1937 and in September 1965 it was ordered to be wound up. September 1965 was the month in which the last of the four fires referred to by the respondent occurred. It substantially destroyed premises owned by a Mr. Laib Herszberg and his wife Mrs. Fela Herszberg and occupied by three firms in which they were interested. Two of the firms were partnerships, Hornsby Knitting Co. (" Hornsby ") and Fela Knitting Co. (" Fela ") in both of which the partners were Mr. and Mrs. Herszberg and both of which carried on business as manufacturers of knitted goods. The third firm was a limited company James Knitware Pty. Ltd. (" James ") which carried on a retail business and sold mainly goods made by Hornsby and Fela Knitting Co. but also some goods made by other manufacturers. The share capital of James was then owned by Mr. and Mrs. Herszberg and their four children. After the fire in September 1965 the premises could not be rebuilt because of town planning restrictions and it is at that stage that the appellant enters the story. In October 1965 James bought from the liquidator of the appellant its stock and plant. The money for the purchase was provided by Mr. and Mrs. Herszberg and James bought as trustee for them. Also in October 1965 Hornsby and Fela took over the premises in Sydney where the appellant had previously carried on its business, and resumed manufacturing there, using the plant bought by James from the liquidator. From October 1965 until about June 1966 the business was carried on under the name of Fela. On 29th June 1966 the whole share capital of the appellant was bought by a family company of the Herszberg family called Fela Investments Pty. Ltd., except one share which was bought by Mr. Herszberg. On 28th June 1966 the winding-up of the appellant was stayed. About the same time the appellant was revived and Hornsby and Fela ceased to trade. James did not trade after the date of the fire in 1965. In August 1966 Hornsby sold all its assets to the appellant. One reason, probably the main reason, for using the appellant was that it had accumulated tax losses which it was thought could be set against future profits. At some time in 1966 the manufacturing activities were moved from the premises formerly occupied by the appellant to other premises in Sydney. Their Lordships did not understand it to be seriously disputed that for at least some years after 1966 the appellant was carrying on the same business as had been carried on by Hornsby, Fela and James at the time of the fire in 1965 and also at the time of the previous fire in 1961. In any event the circumstances which have been summarised above leave their Lordships in no doubt that such was the position.

After the events of 1965 and 1966, but before the fire of 15th August 1973, certain changes occurred and it was on these changes that the appellant mainly relied to support the contention that the business at the time of the fire in August 1973 was not the same business as at the time of the 1965 fire. Firstly Mr. Laib Herszberg died in 1971. He had been the manager of Hornsby (and presumably also of Fela) and managing director of James, and also of the appellant, until his death. He was succeeded as managing director by his son Mr. Myer Herszberg who had been in the business in a subordinate capacity for several years and had been employed by Hornsby at the time of the fire in 1965. Secondly, Mrs. Fela Herszberg who had been employed in the business of Hornsby

for many years and who continued with the appellant after the fire of 1965 retired about a month before the fire of 15th August 1973. She had worked as a forelady in charge of the female workers. The judge thought that that description " considerably understates her activities " but their Lordships are content to proceed on the basis that it correctly states her position in the business. In July 1973 she ceased work and retired from the business. Thirdly perhaps the most important change was that in August 1973 a day or two before the fire the appellant moved all its activities from Sydney to Melbourne. The fire of 15th August 1973 therefore took place in different premises from any of the previous fires, and the Melbourne premises had been surveyed by a representative of the respondent before it issued a cover note. Associated with that change was the fourth change which was that the labour force in Melbourne was almost entirely different from that which had been employed in Sydney.

These are undoubtedly important charges but they do not in the opinion of their Lordships alter the fact that on 15th August 1973 the appellant was carrying on the same knitwear manufacturing business as had been carried on under the names of Hornsby, Fela and James in September 1965. It was still a knitwear manufacturing business making the same class of goods. It still remained the Herszberg family business and the managing director was the senior male member of the family. At the trial the respondent called a number of former employees of the appellant whose evidence was in substance accepted by the learned judge. He expressed his conclusion thus—

> " I find as a fact that notwithstanding some differences in brand names and in customers there was a substantial identity between the business conducted at Hornsby and that which thereafter was conducted under the name of the plaintiff. . . .
>
> " I therefore conclude that after the fire in 1965 and until that which occurred in 1973 the business carried on by the plaintiff, apart from a period of about nine months after the liquidation when it carried on no business at all, was basically that which was previously carried on at Hornsby in the premises where the four fires had occurred, with the addition of the manufacture of some garments, especially those worn by bowlers, which had previously been a specialty of the plaintiff when under different management. In particular, I find that Mr. Herszberg (until his death) and Mrs. Herszberg continued to perform in the business the general duties which they had previously undertaken at Hornsby . . .
>
> " I think that the situation was, as Mr. Rogers, senior Counsel for the defendant, submitted, that the business of Hornsby Knitting Company was carried on from October 1965 in the name, in the premises and with the equipment of the plaintiff, which had lain dormant for some nine months, and that such business continued to be carried on by it until August 1973 together with whatever could be salvaged or acquired from the business previously carried on in the name of the plaintiff."

Their Lordships see no reason to differ from that conclusion.

In that state of affairs it is really too plain for argument that the fires in 1961 and 1965 were material facts which ought to have been disclosed to the respondent when the insurance cover of August 1973 was being arranged. There was evidence from one expert insurance witness to that effect, and his evidence was preferred by the judge to that of another expert who was called by the appellant and whose evidence was to the opposite effect. After considering the evidence of these two witnesses, the learned judge added:

> "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."

Their Lordships agree.

In considering this aspect of the case the learned judge followed and applied a judgment of Samuels J. in *Mayne Nickless Ltd. v. Pegler and Another* (1974) 1 N.S.W.L.R. 228 from which he quoted the following passage:

> "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."

Counsel for the appellant criticised that passage on the ground that it was said to be inconsistent with the statement of law by this Board in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.* [1925] A.C. 344, 351–2. The test stated in the Ontario case is expressed in somewhat different words from those used in *Mayne Nickless* and the difference may be due to the fact that the former case was concerned with a policy which was governed by the Ontario Insurance Act (R.S.Ont. 1914 C. 183). But their Lordships do not find it necessary to pursue this matter further because the test which was adopted by Yeldham J. in the present case is substantially in accordance with that which has been applied in many previous cases and their Lordships are satisfied that it was the appropriate test for the present case. In any event, once it is established that the business which suffered the fire in August 1973 was the same business as that which had suffered at least two of the earlier fires in 1961 and 1965, the occurrence of those earlier fires is obviously material whatever may be the precise words in which the test of materiality is formulated.

Their Lordships have humbly advised Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

MARENE KNITTING MILLS PTY. LIMITED

v.

GREATER PACIFIC GENERAL INSURANCE LIMITED

DELIVERED BY

LORD FRASER OF TULLYBELTON

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