1958 *Present :* **Pulle, J., and Sansoni, J.**

VANGUARD FIRE AND GENERAL INSURANCE CO., Appellant, *and* LIYANAGE, Respondent

*S. C. 561—D. C. Colombo, 26981/M*

*Fire insurance—Non-disclosure of material facts—Distinction between a new policy and renewal of an old policy.*

Where a fire insurance policy in respect of the stock-in-trade of the insured person expired on 28th November 1950 and, after the expiry of about three months, another policy was issued on 19th March 1951—

*Held*, that the second policy was not a renewal but a fresh policy and that the Proposal Form of the earlier policy could not be regarded as its basis.

APPEAL from a judgment of the District Court, Colombo.

*M. M. K. Subramaniam*, with *H. D. Tambiah*, for the defendant-appellant.

*H. W. Jayewardene, Q.C.*, with *V. Arulambalam*, for the plaintiff-respondent.

*Cur. adv. vult.*

July 14, 1958. PULLE, J.—

The plaintiff in this action sought to recover a sum of Rs. 100,000 on a fire insurance policy dated the 19th March, 1951, a copy of which marked 'A' is attached to the plaint. A fire broke out on the 27th December, 1951, on the premises in which the stock-in-trade of the plaintiff consisting of motor spares and electrical goods was stored. A large part of the goods was either damaged or destroyed and the decree from which the defendants, an insurance company, appeals has awarded the plaintiff Rs. 73,054/60.

Apart from the quantum of loss and damage which was disputed, the claim was resisted on several grounds of which it is necessary for the decision of this appeal to refer to only those set out in paragraph 7 of the answer. It reads,

"7. The defendant pleads that the plaintiff made the following material misrepresentations and non-disclosures prior to the formation of the contract in the aforesaid Policy of Insurance, marked 'A' and annexed to the plaint.

"(*a*) that the plaintiff represented to the defendant that the business premises in which the insured stock-in-trade was to be stored had external walls of brick and chunam, whereas in fact the external walls of the said business premises are constructed on three sides with brick and chunam, and on the fourth side, by a wooden partition and a wire mesh.

"(*b*) that the plaintiff represented to the defendant that he would remove his stock book and account books from the said premises every night since there was no fire-proof safe on the said premises, whereas in fact on the night of 27th December, 1951, the plaintiff failed to do so.

"(*c*) that the plaintiff represented to the defendant that the building in which the insured stock-in-trade was to be stored was only two years old and in good state of repair, whereas in fact these representations were untrue.

"(*d*) that the plaintiff in his sketch of the said premises on the proposal form attached hereto marked 'X' failed to disclose to the defendant that there is a cafè and kitchen attached to it, adjoining the said premises and separated from the said premises only by a wooden partition and a wire mesh. The defendants would not have entered into the said Policy of Insurance marked 'A' and annexed to the plaint, if any one or more of the aforesaid material misrepresentations and non-disclosures in paragraphs 5 (*a*) to (*d*) (*apparently a mistake* for 7 (*a*) to (*d*) ) hereof had not been made and that the said Policy of Insurance is rendered null and void/or the defendant is entitled to have the said Policy declared null and void."

At the hearing of the appeal no submissions based on the allegations in paragraphs (*a*) and (*c*) or regarding the café and kitchen in paragraph (*d*) above were addressed to us by learned counsel for the appellant. For the purpose of avoiding the Policy he relied only on one submission, namely, that at the time the contract was entered into, namely 19th March, 1951, there had been a failure to disclose facts appertaining to the custody of the account books of the plaintiff which materially affected the risk undertaken by the defendant company who are referred to hereinafter as "the insurers". To this argument the reply was that the point was not open to the insurers, as it was neither pleaded nor embodied in an issue, or, if the point was open, there was no obligation on the part of the plaintiff to make any disclosure regarding the books of account. It is for the purpose of dealing with this aspect of the case that the contents of paragraph 7 of the answer have already been quoted *in extenso*.

Before dealing with the merits of the arguments adduced on either side it is necessary to refer to answers given by the plaintiff to questions in a Proposal Form (D1) dated 28th November, 1945, when the stock-in-trade of the plaintiff was first insured by the insurers for Rs. 50,000 (vide cover note D2 for the year ending 28th November, 1946, and Policy No. 000224 marked D3). The questions and answers were as follows :

" 13. Do you or your representative

(*a*) Take stock at least once a year ? Yes.

(*b*) Keep a set of Account Books ? Yes.

(*c*) Keep such Account Books in a fire-proof safe ? No iron safe. It is always taken home with the Proprietor. "

It is common ground that at the time the proposal was signed the plaintiff had no fire-proof safe for lodging his account books and that he used to take them home. However from the year 1947 the books were kept in the premises and they were in fact destroyed by fire on the 27th December, 1951. The contention for the insurers is

(*a*) that although the proposal D1 was signed in 1945 on the occasion of the issue of the first policy it was on the basis of the statements contained therein that the policy sued on was issued ;

(*b*) that at the date of the policy the statement in D1 that the account books were taken home was not true in fact and that in any event it was the duty of the plaintiff to have disclosed when he took out the policy sued on that the account books were kept at the place of business since 1947 and that the failure so to disclose materially affected the risk and the policy sued on was thereby avoided.

The plaintiff's answer is that as the policy sued on was not a renewa but a fresh policy the proposal of 1945 cannot be regarded as the basis of the policy. It was further contended by the plaintiff

(*a*) that the allegations in paragraph 7 of the answer and the issue based thereon, namely,

" 3. Did the plaintiff make any, and/or all the misrepresentations and/or non-disclosures, prior to the formation of the contract sued upon, set out in paragraph 7 (*a*) and/or 7 (*b*) and/or 7 (*c*) and/or 7 (*d*) of the answer ? "

precluded the defendant from taking the point in appeal that the non-disclosure, if any, regarding the account books avoided the policy

(*b*) that the only allegation in the answer, namely, in paragraph 7 (*b*) touching the account books was a representation that " he *would* remove his stock book and account books from the said premises every night ", and that, therefore, the representation, if any, was in the nature of promise to do an act *in futuro* the failure to do which did not of itself make the representation fraudulent.

The learned trial Judge found that the policy on which the action was brought was a new contract in the sense that it was not a renewal of the policy which expired on 28th November, 1950.

On the assumption that the policy sued on was in reality a contract the basis of which was the proposal signed in 1945 the learned Judge went on to hold that the answer to question 13 (*c*) was " true as it relates to the time the proposal was made ". He further held that the answer was not of a promissory nature carrying the implication that the books would be taken home by the insured till the end of the period for which the policy was issued. In other words he held that the answer did not constitute a warranty or condition a breach of which would save the insurers from liability.

Learned counsel for the appellant argued that while the answer given by the plaintiff might have been true at the time it was given in 1945, the plaintiff knew that it was not true at the time the policy sued on was issued. It was his duty then to disclose that fact and that the non-disclosure which materially affected the risk was a conclusive answer to the claim. Reliance was placed strongly on the case of *In re Wilson and Scottish Insurance Corporation, Limited* [1] in which it was held that the renewal of a fire policy is impliedly made on the basis that the statements in the original proposal are still accurate. While a fresh proposal may not be necessary it may be very material to the insurers to know of any change in the extent of the risk to enable them to determine whether or not they will continue the insurance. I do not think the principle laid down in this case can be applied to the policy sued on. The last of the policies came to an end on 28th November, 1950. About three months elapsed before the present policy was issued and any rights accruing to the insurers on the proposal of 1945 also came to an end by the latest on the same date. The fact that the agent of the insurers Mr. Krishnasamy believed that there was a renewal of the old policy at the time he issued the cover note cannot conclude the question in their favour. A submission was made by the insurers both in the trial court and in appeal that the basis of the policy was the proposal signed in 1945 because the plaintiff by his letter D13 of 3rd January, 1952, requested the insurers to send him a copy of the policy and " the connected proposal form ". The learned trial Judge was not prepared to read this letter as an admission by the plaintiff that the proposal was the basis of the policy. He has expressed his opinion of the plaintiff as follows :—

> " The plaintiff is illiterate in English. He may have picked up a few words of English in the course of his business. He certainly does not understand the nice distinction between a new policy evidencing a new contract and a renewal of an old policy. What he wanted was that his goods should be covered by insurance. "

I am unable to give to the letter D13 the effect contended for on behalf of the insurers. It certainly falls short of an admission that the plaintiff regarded the proposal D5 as the basis of the policy. In the result I hold that the policy is not avoided on the ground that the plaintiff did not disclose to the insurers that he had ceased to take his account books home and that they were left after the day's business in the premises.

It was submitted to us, as stated before, that this point of non-disclosure was not open to the insurers as it was neither pleaded in the answer nor raised as an issue at the trial. A close examination of the pleadings on this point and the issue which have already been quoted in full shows

[1] (*1920*) *2 Ch. 28.*

that the insurers relied on only one specific act of non-disclosure mentioned in paragraph 7 (*d*) of the answer and three specified acts of misrepresentation mentioned in paragraphs 7 (*a*) to (*c*). I am not prepared to read paragraph (*b*) to mean that the insurers sought to avoid the contract on the basis that while the representations as to the account books was true as at the date of the proposal the plaintiff failed in his duty to disclose, at the time the policy sued on was issued, that it was no longer true. The plaintiff's objection is entitled to prevail unless the insurers can satisfy the court that it has all the facts before it to decide the point raised on their behalf. On this aspect of the matter it was contended for the plaintiff that if the insurers had raised the point in the trial court as a specific issue, namely, a failure in 1951 to disclose a change in circumstances affecting the risk undertaken by the insurers, he might have led evidence that they were aware in 1951 that the books were no longer taken home by him at the end of each day's business. In my opinion the objection to the insurers raising the point of non-disclosure in appeal for the first time ought to be upheld.

However, on the basis of the finding that the policy sued on was not a renewal of a subsisting policy governed by the proposal D5, it follows in my opinion that the contention that the policy was avoided fails and there is left to consider only the submission that there was no legal proof of the monetary value of the loss sustained by the plaintiff.

The assessment of the damage suffered by the plaintiff was made by the Chairman of the Ceylon Fire Insurance Association, Mr. B. G. Thornley, at the request of the insurers. The trial Judge accepted his figures and after making a deduction of 10% as being the margin of profits fixed the loss at Rs. 73,054/60. The only objection taken to the evidence of Mr. Thornley is that a representative of the insured and a representative of a well known firm of motor car dealers who were associated with him were not called as witnesses at the trial. For the insurers no evidence was called to show that the values placed against each of the damaged articles specified in the list P23 prepared by Mr. Thornley was excessive. In a communication P10 dated 21st January, 1952, the plaintiff wrote to the insurers asking them to confirm that the goods damaged were valued by Mr. Thornley at Rs. 84,613/97. No reply was sent either to this letter or to those calling attention to it. While it is true that Mr. Thornley did not personally know the market value of each and every one of the numerous articles set out in P23, he was entitled to gather information from a reliable source and ultimately he took the responsibility for the assessment which he made at the instance of the insurers themselves who must be deemed to have been satisfied as to his competence. The learned trial Judge says of the assessment that it had been made with commendable precision and care and I do not think that the absence of the evidence of the two representatives associated with Mr. Thornley renders his estimate of the loss unreliable.

In my opinion the appeal fails and should be dismissed with costs.

SANSONI, J.—I agree.

*Appeal dismissed.*