1936 *Present :* **Abrahams C.J. and Soertsz A.J.**

SAIBO *v.* NEW INDIA INSURANCE CO., LTD.

133—D. C. Colombo, 51,899

Insurance—Damage caused by fire—Action for recovery of loss—Failure to disclose material facts—Burden of proof.

Where in an action to recover the loss caused to the insured in terms of an insurance policy, the claim was resisted by the Insurance Company on the ground that the plaintiff in making his proposal for insurance had concealed material facts which it was his duty to disclose to the Company,—

***Held,* that the burden of proving non-disclosure was upon the Insurance Company.**

THIS was an action brought by the plaintiffs-respondent to recover damages in terms of a policy of insurance by which the first plaintiff insured a tea factory of which he was owner with the defendant-Company. First plaintiff subsequently leased the factory to the second plaintiff. The claim was resisted by the defendant-Company on the following grounds :—

(1) that the first plaintiff in making his proposal for insurance unlawfully concealed certain material facts which it was his duty to disclose ;

(2) that the claim was fraudulent and that an untrue and excessive value was placed on the stock, which was damaged ;

(3) that the first plaintiff had failed to obtain the sanction of the defendant-Company to the transfer of his interest in the insurance property to second plaintiff according to the conditions of the insurance policy.

The learned District Judge held that plaintiff had not concealed material facts, that he had obtained the sanction of the Company for the transfer to second plaintiff, and awarded the plaintiffs the sum of Rs. 41,048.60 damages.

N. E. Weerasooriya (with him *Canakeratne* and *Dodwell Goonewardene*), for defendant, appellant.—The learned Judge did not give us an opportunity to meet plaintiffs' evidence, although we had objected to their leading evidence piecemeal and the learned Judge had said that he would consider the objection later. His findings are vitiated by reason of the fact that we were not allowed to meet the case of the plaintiffs on matters on which the burden was on plaintiffs. We have not been heard on material issues on one of which the learned Judge has found against us ; and consequently the whole judgment is bad.

The first plaintiff had signed a proposal form. He was under a duty to disclose. The contract is formed on the basis that there has been in fact a disclosure. The rights on the contract would arise only if the parties enter into the contract on that basis. If a condition precedent has not been performed, there is no contract. There are certain facts which first plaintiff must disclose. He says he has disclosed. We deny it. In regard to those facts he must prove them, this being a contract of good faith.

We gave the terms of the proposal in the answer. In the first paragraph of the replication, those terms of the proposal are admitted. My submission is that on the pleadings the burden was on the first plaintiff to prove that he had given information of the cancellation of Mohamed Ally's policy and of the refusal by the two insurance companies. The interrogatories served by him clearly show that he took up the position that information had been given certainly in regard to the cancellation of Mohamed Ally's policy. So that plaintiff was aware that he had signed a proposal in which he had said "No". Then his case was going to be that although he had omitted to disclose he had orally disclosed. The burden was clearly on him in those circumstances to lead evidence of the fact that he made oral disclosure.

Counsel cited *Glickman v. Lancashire and General Assurance Co., Ltd.*[1]

H. V. Perera (with him *Cyril E. S. Pereira*), for plaintiff, respondent.—At the very beginning of the trial Counsel proposed to lead evidence on three issues only. He undertook to prove—

(1) that there was a policy,
(2) that there was a fire,
(3) that his loss was so much.

That is his only obligation at that stage. If no further evidence is led, plaintiff is entitled to succeed. If the insurer alleged faudulent non-disclosure or breach of contract, it would be his duty to prove those allegations. There was at the beginning of the case a burden resting on the defendant to prove their plea of non-disclosure. Then under our law a person who has burden of proving a fact has only one opportunity. He cannot have a second opportunity. The process might go on indefinitely.—When burden rests on one, one has to lead all the evidence. The fact that the duty was on us to disclose does not show that the burden of proving disclosure is on us. Machinery is provided by law to get material to meet case for the other side, when the law gives him the opportunity of doing so, which the law gives only once.

One need not prove an admitted fact. A person might admit the existence of a certain fact but not its truth. There is no admission of non-disclosure on the pleadings.

Counsel cited *Weldon on Fire Insurance (3rd ed.) p. 138.*

Cur. adv. vult.

November 13, 1936. ABRAHAMS C.J.—

In July, 1929, the first plaintiff-respondent insured "Westhill" Tea Factory, Gampola, of which he was the owner, with the defendant-appellant Company through their agents, Henry de Mel & Company, Colombo. Subsequently he leased the factory to the second plaintiff-respondent who worked it as a bought leaf factory. In the early morning of December 12, 1932, the factory and its contents, whatever they were, were completely destroyed by fire, and a claim was made on the Company for something over Rs. 70,000 being the alleged damages sustained by the plaintiffs-respondents by reason of this fire. The claim was resisted, and in the ensuing action the plaintiffs were awarded the sum of Rs. 41,048.60, which included a sum of Rs. 3,333 the value of 14,000 lb. of tea held by the learned District Judge to have been on the premises

[1] *(1925) 2 K. B. 593 at p. 605.*

at the time of the fire and to have been destroyed thereby. The company resisted the claim on the following grounds. Firstly, that the first plaintiff-respondent in making his proposal for insurance unlawfully concealed certain material facts which it was his duty to disclose, namely, that his predecessor in ownership of the factory, one Mohamed Ally, had insured the factory with the Commercial Insurance Company, which insurance had been cancelled by the Company in January, 1929, to the knowledge of the plaintiff, and that also other Insurance Companies had refused to insure the factory. Secondly, that the claim was fraudulent and that an untrue and excessive value was sought to be placed on the stock which was damaged and a false declaration as to the value had been made, and thirdly, that the first plaintiff respondent had failed to obtain the sanction of the defendant-Company to the transfer of his interest in the insured property to the second plaintiff-respondent in terms of one of the conditions attached to the policy.

The Company appeals against the finding of the learned District Judge that the first plaintiff-respondent had not concealed the cancellation of Mohamed Ally's policy and the refusal of the other insurance companies to insure the factory, and also against the finding of the learned District Judge that 14,000 lb. of tea were proved to have been destroyed in the fire, and they also contended that the plaintiffs' case should have been dismissed on the ground that the Company's sanction had not been obtained to the lease by the first plaintiff-respondent to the second plaintiff-respondent. The appellant also complains that the learned District Judge was wrong in taking the view that the burden was on the appellant and not on the respondents to show that disclosure was made of the cancellation of Mohamed Ally's policy and of attempts to insure the premises by the first plaintiff-respondent, and that the learned District Judge was wrong in allowing the plaintiff-respondents, after the appellant had closed his case, to lead evidence to show that there was a disclosure, and was also wrong, after allowing this evidence to be led, in refusing to permit the appellant to adduce evidence in rebuttal thereof.

I am inclined to deal first with the submission relating to the sanction of the lease to the second plaintiff-respondent. This of course can be disposed of in a few words. Condition 7 of the policy would have invalidated the insurance if the insured party before the occurrence of any loss or damage transferred the interest in the property without having obtained the sanction of the Company, signified by endorsement on the policy. By a letter dated May 30, 1932, P. 6, on page 226 of the record, a Mr. M. Ameen, Proctor, informed the Company through Messrs. De Mel & Company, that the premises had been leased for a period of five years to the second plaintiff-respondent. On July 9, the Company wrote to the first plaintiff-respondent reminding him that the renewal premium of Rs. 593 in respect of his policy would fall due on the 25th of the month, and they asked him for a remittance. They went on to inform him that as regards the lease of the premises to the second plaintiff-respondent they would send him an endorsement to be attached to the policy. This premium was sent and it was acknowledged by a letter of the 28th of the same month, in which a copy of the lease was asked for and also the name of the Bank in which the second plaintiff-respondent kept his account,

as the Company required satisfactory information on these points before making any endorsement on the policy. The first plaintiff-respondent alleged at the trial that he never received that letter. Whether he did or not, I share the surprise of the learned District Judge that after promising an endorsement if the premium was sent, and accepting the premium when sent, the Company can claim that their sanction had not been obtained to the lease. It is very much like the story of the school boy who wanted both the bun and the penny with which he had bought the bun.

Next, as to the submission of the appellant that the burden of proving a non-disclosure was wrongly placed upon him, and that the learned District Judge was wrong in refusing to permit him to rebut the evidence of the respondent that there had been a disclosure, what seems to have happened is this. Leading Counsel for the plaintiff-respondent led evidence that there had been a fire, and that certain damage had resulted from the fire, and that the amount of that damage was covered by the policy of insurance with the appellant Company. He then closed his case, saying that he reserved his right to call evidence in rebuttal on the other issues. Leading Consel for the appellant said that if that procedure was adopted it might mean that he might have to call evidence in rebuttal of the evidence led by the plaintiff on certain issues, and the learned District Judge noted on the record that that was a point he would consider later. Counsel for the plaintiff-respondent then closed his case after reading certain documentary exhibits, and reserved his right to call evidence in rebuttal.

The appellant then called the surveyor who reported on the result of the fire. There was also called a number of witnesses who gave evidence regarding the cancellation of Mohamed Ally's policy by Messrs. Lee, Hedges & Company, Agents for the Commercial Insurance Company, and certain other witnesses who gave evidence that the first plaintiff-respondent had signed a proposal of insurance with Messrs. Bosanquet & Skrine, Agents for the Liverpool, London & Globe Insurance Company, which proposal was refused, and also that he made an application in person to Messrs. Shaw, Wallace & Company, Agents for the Bankers & Traders Insurance Company, for fire Insurance which application was refused then and there. Leading Counsel for the appellant then closed his case after reading certain documentary exhibits, and Counsel for the plaintiffs-respondents then called further evidence, including the first plaintiff-respondent himself, for the purpose of showing that he had made a disclosure of the cancellation of Mohamed Ally's policy and also of his negotiations with Messrs. Bosanquet & Skrine and Messrs. Shaw, Wallace & Company. At the conclusion of this evidence, leading Counsel for the appellant proposed to call evidence to rebut that evidence given on behalf of the plaintiffs-respondents. This was refused by the learned District Judge on the ground that the onus of proving a non-disclosure of those material facts relating to the insurance was really upon the Company, and that the evidence of non-disclosure should have been given during the case for the appellant, and the appellant having closed his case ought not to be allowed to reopen it after the plaintiffs-respondents had themselves given evidence of disclosure. There is no

doubt, to my mind, that Counsel for the appellant thought he had reserved his right to call evidence to rebut any evidence of disclosure given by the plaintiffs-respondents. That does not confer upon him the right to do so, if the onus is upon him to prove non-disclosure.

Now, in *Welford & Otter-Barry's Fire Insurance (3rd ed.)* at page 138, we find the following passage :—

> "The onus of proving concealment rests on the insurers, since, the policy being proved, the presumption is that everything was rightly done. In order to establish the defence of concealment the insurers must prove that the facts alleged to have been concealed by the assured were true, that they were material, that they were within his knowledge and were not disclosed. Where the assured admits that the facts ought to have been disclosed, and the only question in issue is whether a disclosure of them was in fact made, slender evidence is all that is required to show that it was not made."

It was argued before us, on behalf of the appellant, that the appellant could not be expected to give evidence rebutting in advance the details of a disclosure of which the appellant was entirely unaware. But the answer to that is, I think, that adequate machinery is provided in the shape of a demand for particulars or by means of interrogatories, so that a party in the position of the appellant would come into Court well armed with evidence to the effect that no communication of the sort alleged by the opposite side was ever communicated to the persons mentioned by the appellant in his particulars or answers to interrogatories, as the case may be. That being so, in my opinion, the appellant fails on that ground of appeal.

The next question for decision is whether the learned District Judge was right in coming to the conclusion on the evidence that the first plaintiff-respondent had disclosed to the Company the cancellation of Mohamed Ally's insurance policy by Lee, Hedges & Company, and the refusal to insure the factory by Bosanquet & Skrine & Company, and Shaw, Wallace & Company. As I have said, the burden of proving non-disclosure was placed upon the Company, but it would appear that that burden had been shifted to the first plaintiff-respondent by the production of the proposal form which he signed and in which it appears that certain questions relating to the previous history of dealings with other insurance companies in respect of the factory had been wrongly answered. These were the questions which had to be answered :—

> 6. A.—Are any other insurances on the same property in force with this or other offices ?
>
> The answer to that was "No".
>
> B.—If so, state the amounts and names of the Offices.
>
> No answer was assigned to this.
>
> C.—Has this risk, or any part thereof, been declined by any other Company ? If so, give name of Company."
>
> No answer was assigned to this.
>
> 11. Have you at any time had occasion to make a claim for loss or damage by fire ? If so, give details below.
>
> The answer to this was "No".

12. Has any fire insurance proposed or effected by you ever been declined ? If so, state particulars below.
The answer to this was "No".

It was therefore, in my opinion, for the first plaintiff-respondent to explain why those questions were not answered as they ought to have been answered.

The first plaintiff-respondent himself gave evidence. He said that he could not read or write English (and this fact is not disputed), and that therefore the proposal form was filled up by one Kulatunge. Kulatunge was an insurance canvasser, and it was he who introduced the first plaintiff-respondent to Sir Henry de Mel & Company. The first plaintiff-respondent said that the proposal form was filled up in the office of De Mel & Company, in the presence of Sir Henry de Mel, Sir Henry de Mel's son, and Mr. Jayewickreme who was in the employment of the Company. He said he disclosed the fact of the cancellation of Mohamed Ally's policy and that he produced a letter from Bosanquet & Skrine, and that he also said that Shaw, Wallace & Company had declined his proposal but at that time he did not know the reason why. This evidence was substantially corroborated by Kulatunge who said that when the first plaintiff-respondent was giving information according to the question on the proposal form, he took the answers down on a piece of paper and afterwards transferred them to the proposal form. He said most emphatically that the "No" in answer to Question 11 and the "No" in answer to Question 12 were not in his handwriting and that he had in fact written something in answer to Question 11 which had been subsequently erased, not by himself, and the word "No" placed above the erasure. An examination of the original proposal form certainly shows that there has been an erasure, but it is not possible to say what the erased words actually were.

I do not propose to review the evidence given by the first plaintiff-respondent and Kulatunge because it seems to me that the question which we have to decide is whether the learned District Judge ought to have held that the evidence given by these two persons, considered together with the numerous documents produced, was so inconsistent and contradictory or amounted to a story so inherently improbable that he ought to have held that it was unacceptable as against the first plaintiff-respondent's signature to the proposal form which was the only evidence the Company had produced. The learned District Judge saw the witnesses and, in accepting their evidence in default of contradiction by those members of the Company who were said to have been present when the proposal form was filled in, I really cannot say that he was wrong. It may very well have been that Sir Henry de Mel and the other persons would, had they given evidence, have outweighed the first plaintiff-respondent and Kulatunge in the view of the learned District Judge, but I have no right to assume that this result would necessarily have followed had they been called, and that therefore there was really no need to call them. The learned District Judge was sufficiently impressed by the evidence of the first plaintiff-respondent and Kulatunge to hold that they had successfully explained away the evidence furnished by the proposal form, and I see no reason to disturb that finding.

There is, finally, the question of the destruction of the 14,000 lb. of tea held by the learned District Judge to have been consumed by the fire. Two days after the fire, a Mr. Armitage was appointed to survey and report upon the fire. Mr. Armitage appears to have been greatly impressed by the fact that there were no signs of any smouldering tea or any heap of ashes to indicate that so large a quantity of tea had been consumed. Mr. Armitage has greater experience than anyone in Ceylon of assessing damage by fire done to tea factories. He said he had assessed 47 tea factories, among which a large number had been burnt in 1931-1932. He said that he asked the tea-maker and the lessee (that is to say, the second plaintiff-respondent), who were present when he surveyed the damage, as to where was this large quantity of tea, and the answer that he got was "Oh, it is burnt". He asked them to show him where it was and they said that it was round about near the portico but there was nothing to be seen there. He says it struck him at the time that this was one of the most extraordinary features of this fire. In his report, which was produced at the trial, he emphasized that there were none of the usual signs of smouldering or burnt tea. In writing to the Insurance Company on December 29, he calls attention to that portion of his assessment report which deals with the absence of the "usual signs of large quantities of smouldering burnt tea". However, in the report he does assess the quantity of tea at the tea-maker's figure of 14,300 lb. and puts a certain value upon it. Both the tea-maker and the second plaintiff-respondent gave evidence that there were indications that the tea had been burnt, and both say that they pointed it out to Mr. Armitage. The second plaintiff-respondent went so far as to say that even at the time of the trial signs were there, and that when Mr. Armitage came the tea was still smouldering in some places, and that Mr. Armitage's evidence that there were none of the usual signs of smouldering or burnt tea which are present when a large quantity of tea was burnt, was false.

The learned District Judge says, "I certainly accept Mr. Armitage's evidence that there was no smouldering tea at the time he arrived at the spot, but, to my mind, this does not prove conclusively that the quantity of tea alleged by the plaintiff was not there at the time, and the effect produced on Mr. Armitage himself by the absence of any sign of smouldering tea, is I think best appreciated by looking at his own act in allowing the full value of the 14,000 pounds of tea claimed by the plaintiff. If, after the examination he made, Mr. Armitage was still prepared to allow for that quantity of tea, I do not see how it is possible for me to say that he was wrong in making that allowance, merely because of the fact that there were no signs of smouldering tea." It appears to me that from these words the learned District Judge thought that although there were no signs of smouldering tea at the time that Mr. Armitage arrived at the spot, it was not unreasonable to assume that there had been signs but they had disappeared, and that that was probably in Mr. Armitage's mind when he made an allowance for the actual quantity of tea claimed to have been destroyed. I do not so read Mr. Armitage's mind. He has emphasized the fact that he would have expected to see signs of tea because, in his great experience, there always were signs, and I have

come to the conclusion that his allowance for the tea claimed to have been destroyed was based upon mere hypothesis and not upon a reasonable possibility. But I fear the learned District Judge has overlooked the implications in the evidence of the second plaintiff-respondent and the tea-maker. They did not say that there had been signs of smouldering tea and that those signs had disappeared for some reason or another. They flatly contradicted Mr. Armitage and said that there were signs and that they pointed them out to Mr. Armitage. What do these assertions mean? Why is Mr. Armitage given the lie direct? Mr. Armitage says that there ought to have been signs of tea. What these witnesses say amounts to this: not only ought there to have been signs of burnt tea, but there *were* signs of burnt tea, so that the point for decision was really, who was speaking the truth—Mr. Armitage or the second plaintiff-respondent or the tea-maker? The learned District Judge decided in favour of Mr. Armitage, and he cannot take away the effect of his decision by saying that it is true that there were no signs of tea at the time Mr. Armitage came, but that it does not follow that there were no signs previously.

There is further evidence in support of the appellant Company's contention that this claim for 14,000 lb. of tea ought not to have been allowed. It would appear that all the tea from the Westhill Factory was sent to Messrs. Somerville & Co., Colombo, for sale. Mr. Armitage requested this firm to give particulars of the quantity of tea sold since the lessee, the second plaintiff-respondent, took over the factory. The firm sent a list of the quantities of tea sold on this account, and it would appear that during the month of November over 15,000 lb. of tea had been sold, on December 6, 3,345 lb. had been sold, and on December 20, 2,035 lb. had been sold. The sales in November took place on the 8th, the 15th, and the 22nd, respectively. The quantity sold in November was very much greater than that sold in any previous month. It is very difficult to see how, if over 15,000 lb. had been sold in November and 5,000 lb. in December, there could have been 14,000 lb. in the factory at the time of the fire. This answer of Messrs. Somerville & Co. is attached by Mr. Armitage to his report, and both these documents and certain other documents relating to the fire are mentioned in the report, and all put in evidence. It is now objected on behalf of the plaintiffs-respondents that this copy of a letter of Messrs. Somerville & Co. was smuggled in under cover of the report. It was certainly not submitted in evidence independently, but it was mentioned in the report, and if it was open to any objection, that objection should have been lodged then and there. Either, Counsel for the plaintiffs-respondents at the trial did not read the report at all, which does not seem very likely, or he did read it and thought that it was not worth while making any objection to this document because a representative of Messrs. Somerville & Co. could very easily have been called and it would therefore be futile and only a technical objection to resist its admission. In my opinion, then, the learned District Judge was wrong in holding that the claim for the destruction of 14,000 lb. of tea was sustainable. That is not to say, however, that we disagree with the finding of the learned District Judge that the claim was not fraudulent. The first plaintiff-respondent who really made the claim for resultant damage did so on the faith of information he received from the second

plaintiff-respondent, and there is no ground for believing he did not make the claim *bona fide*. The most we will say is that the claim is unsustainable.

I would allow the appeal to the extent of disallowing the claim to the tea, and I would dismiss the appeal on the other grounds. The decree should be varied accordingly. As to cost, I think the fairest order to make would be that the appellant Company should pay two-thirds of the costs in both Courts, and the respondents one-third. A great deal of the time taken up in the hearing of the case was devoted to this question of the destruction of the tea, and I think then that this division of costs is fair.

SOERTSZ A.J.—I agree.

Judgment varied.