1960 *Present :* **Sansoni, J., and Sinnetamby, J.**

E. C. V. BUULTJENS, Appellant, *and* CEYLON INSURANCE CO., LTD., Respondent

S. C. 146—D. C. Colombo, 43449/M

Insurance—Motor car—Third party risks—Proposal Form—Ambiguity in questions appearing therein—Truth of answers—Relevancy of offences in breach of Motor Traffic Act— Suppression of material facts—Burden of proof.

Where an ambiguity exists in a question put in the proposal Form of a contract of insurance, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by Courts of Law.

In a motor car insurance policy in respect of third party risks, the answers to the questions in the proposal Form were made the basis of the contract and were warranted to be true. The applicant for insurance, who had been fined Rs. 5 twenty years earlier for driving a car without a certificate of competence, answered in the negative question No. 5 which was as follows :—" Have you or any other person, who to your knowledge will drive, ever been convicted of any offence in connection with the driving of a motor car or cycle ? ".

Held, that the proposer could not be deemed to have given an untrue or incorrect answer to question No. 5. The conviction for non-possession of a certificate of competence did not relate to an offence " in connection with the driving " of a motor car. If the question was intended to cover all offences under the Motor Traffic Act, it was most ambiguous and a Court of Law should protect the insured against such " traps ".

Held further, that the proposer could not be said to have withheld any material information which was likely to increase the risk of the insurer.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, with *V. J. Martyn* and *K. N. Choksy*, for plaintiff-appellant.

N. E. Weerasooria, Q.C., with *H. Wanigatunga* and *H. Mohideen*, for defendant-respondent.

Cur. adv. vult.

January 21, 1960. SINNETAMBY, J.—

The plaintiff, while driving his motor car No. CN-1144, met with an accident and injured his passenger one Mr. Koch, who in D. C. Colombo, Case No. 39,422/M obtained a decree for damages against the plaintiff in the sum of Rs. 21,748·58 and costs, alleging negligence. The car was insured by plaintiff with the defendant company and in the present case the plaintiff sought to obtain judgment against the defendant company in this sum.

In the earlier case brought by Mr. Koch against the plaintiff, the defendant company conducted the plaintiff's defence and in the course of his evidence the plaintiff stated that he had been fined Rs. 5 in 1936 for driving a car without a certificate of competence. It would appear that before the fine was imposed he was asked to furnish a certificate of competence for perusal by the Magistrate within a week and that he obtained one and did so. Upon this evidence being given the defendant company disclaimed liability and wrote letter P 10 to the plaintiff stating that they were not assisting him any further in the action and that the policy was void, giving as their reason the fact that in the proposal form which incidentally was signed in 1955, the plaintiff had not disclosed this conviction. The plaintiff, thereupon, brought this present action after a decree had been entered in Mr. Koch's favour.

The defendant company in seeking to avoid their liability under the policy, based their defence on two grounds. First, they pleaded that in the proposal form, the plaintiff had incorrectly answered in the negative question No. 5 which is as follows :—

> " Have you or any other person, who to your knowledge will drive, ever been convicted of any offence *in connection with the driving* of a motor car or cycle? "

It was contended that inasmuch as the answers to the questions in the proposal form were made the basis of the contract and were warranted to be true, the incorrect answer entitled the company to avoid the contract. The second ground of defence is that quite apart from the answers to the questions, the plaintiff had withheld information which tended to increase the risk of the company ; and in view of the agreement in the proposal form, by which the plaintiff undertook to withhold no information which might materially affect the risk, the failure on the part of the plaintiff to disclose this information rendered the subsequent policy void.

The District Judge held in favour of the defendant company on both grounds and the present appeal is against the learned Judge's findings.

In regard to the first of these defences, it was submitted that the conviction in 1936, approximately 20 years prior to the date of the proposal, was a fact the plaintiff should have disclosed in answer to question No. 5 and that having warranted the truth of the answers, quite irrespective of any other considerations, inasmuch as the answer was false, the contract is avoided. For the plaintiff, it was contended that the conviction for non-possession of a certificate of competence did not relate to an offence *in connection with the driving* of a motor car. It was contended that the words " *in connection with the driving* " involved only physical manipulation of the car and the non-possession of a certificate of competence was not the kind of offence contemplated by the question. In support of this contention the learned counsel for the plaintiff cited the case of *Revell v. London General Insurance Co. Ltd.* [1].

[1] *152 Law Times Reports 258.*

That too was a case in which the insurance company sought to disclaim liability on the ground that one Mrs. Revell had incorrectly answered a question, which was formulated as follows :—

> " Have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle ?"

She had answered " No " whereas, in fact, both she and her driver had been convicted of two offences, namely, (1) of driving a motor vehicle without a suitable reflecting mirror and (2) using a motor vehicle without having in force an insurance policy in respect of third party risks. Mackinnon, J., who heard the case took the view that neither conviction was *in connection with the driving* of a motor vehicle. In the course of his judgment he stated :—

> " If there is an ambiguity in the question so that upon one view of the reasonable meaning which is conveyed to the reasonable reader of it the answer was not false, the company cannot say that on the other meaning of the words the answer was untrue so as to invalidate the policy. The question is this ; ' Have you or any of your drivers ever been convicted of any offence in connection with the driving of a motor vehicle '." It is not " convicted of any offence under the Road Traffic Act ", it is " any offence in connection with the driving of any motor vehicle. "

The learned Judge continued :—

> " I think that a reasonable person reading that question might reasonably regard the purpose of this question as being directed to the carefulness of the driver who is likely to be driving cars under this policy. The most expert and careful driver in the world, who has never been convicted of any offence of careless driving, who never for a moment has departed from the most perfect standard of good and careful driving, could still become liable to a conviction of an offence under these two sections. "

Dealing with the question of ambiguity in the wording of questions in the proposal form Lord Shaw of Dunfermline in *Condogianis v. Guardian Assurance Co. Ltd.* [1] stated :—

> " In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the insured would be protected by Courts of Law. "

[1] *(1921) 2 Appeal Cases 125.*

The question considered in that particular case was as follows :—

> " Has the proponent ever been a claimant on a fire insurance company in respect of property now proposed or any other property ? If so, state when and the name of company."

The answer was " Yes. 1917 ' Ocean '." The answer was literally true as in 1917 the insured had claimed against the Ocean Insurance Co. in respect of the burning of his motor car but in 1912 he had made a claim against another company in respect of a similar loss. The learned Law Lord went on to state :—

> " the principle of a fair and reasonable construction of the question must also be applied in the other direction—that is to say, there must also be a fair and reasonable construction of the answer given ; and if on such a construction the answer is not true, although upon extreme literalism it may be correct, then the contract is equally avoided. "

The learned Judge took the view that this was a matter which affected the risk and the importance of the question increased with the number of times on which claims had been made. On the basis, therefore, that the answer was not reasonable or fair having regard to the object underlying the question, their Lordships held that the answer was incorrect and that, therefore, the contract was avoided. Learned counsel for the respondent company relied on this case, but it seems to me that the answer given in the present case can neither be regarded as unreasonable nor unfair. A reasonable man who undertakes to answer the question will have in mind only such matters as would affect the risk. How could the non-possession of a licence twenty years before the proposal form was signed affect the risk undertaken by an insurance company particularly when immediately prior to the conviction for that same offence the certificate of competence had been obtained and no accident or collision of any kind was involved ? No reasonable man, it seems to me, would think of disclosing that conviction as something connected with the driving of a motor vehicle.

It is undoubtedly true that when one considers the meaning attached to the phrase " in connection with the driving of a motor vehicle " in so far as it relates to offences under the Road Traffic Act in England or the Motor Traffic Act in Ceylon a different construction has been placed on it. The meaning attached to words depends largely on the context in which the words are used. Where offences more or less of a statutory kind are created for the first time by Acts, in considering the meaning of words one would naturally take into consideration the objects which the Act seeks to achieve. The Motor Traffic Act undoubtedly has as its main objectives the safety of all road users and the protection of revenue. The failure, therefore, to conform to certain regulations made to achieve those objects, relating to such matters, for instance as proper lighting, necessary accessories, and so on, may be regarded as offences connected with the driving of motor vehicles for the purposes of the Motor Traffic Act. One can readily understand, therefore, why in regard to certain

motoring offences, a different interpretation has been placed on the words " in connection with the driving of a motor vehicle ". Vide *Ismail v. Perera* [1] where, it was held, that these words were not confined to the actual manipulation of the motor vehicle. But when we come to consider the meaning to be attached to the words in a proposal form in which questions are answered for the purpose of a policy of insurance, one has to construe the words having in mind the object of the question. Quite clearly, in the mind of the insurer, in order to assess the risk, safety of road users or the protection of revenue, is not his primary object. How could the fact that a person, who in all other respects has admittedly been a very careful and cautious driver, has been convicted of not possessing a certificate of competence, render the risk the insurance company runs any greater ? No average person who reads the question would think it wrong to give the answer which the proposer in this case gave. I think it will come within the principle enunciated by Mackinnon J. in *Revell v. London General Insurance Co.*, namely, that the purpose of the question was to ascertain the carefulness of the driver " who will be driving the car under the policy ".

Learned counsel for the defendant company relied also on the case of *Glicksman v. Lancashire & General Assurance Co. Ltd.* [2]. The question in the proposal form which was considered in that case was as follows :—

" Has any company declined to accept, or refused to renew your burglary insurance ? If so, state name of company. "

The answer was " Yorkshire accepted but proposers refused ". The proposal form was signed by the appellant, one Glicksman, when he was doing business in partnership with another but prior to the partnership an application for insurance by Glicksman, when he was sole owner of the business, had been refused. The insurance company sought to avoid liability on two grounds which are the same as those pleaded in this case, namely :—

(1) that the answer was incorrect, and

(2) that a material fact affecting the risk had been concealed and withheld.

There, too, as in this case, there was a condition that the answers to the questions in the proposal form shall be the basis of the contract coupled with an undertaking given by the insured not to withhold any information which may tend to increase the risk. On the first ground their Lordships of the House of Lords took the view that the question was ambiguous. The word " You " in the question was answered by the proponent on the basis that it was used in the plural. In such an event the answer would have been correct ; but if it had been used in the singular also, the answer would have been incorrect. The Judges of the Court of Appeal differed on this question but Viscount Dunedin who delivered the judgment of the House of Lords stated that it was unnecessary to come to a conclusion as to which of these views was right, and refused to express an opinion upon it. He, however, held " with

[1] *(1956) 58 N. L. R. 46.*

[2] *(1927) Appeal Cases 139.*

unfeigned regret" that on the ground of materiality and concealment the policy was avoided as this was a matter of great importance to the insurance company which affected its risk and which should have been disclosed by the proponent. Some of the learned Judges in that case expressed in no uncertain terms their disapproval of the defence taken by the insurance company to avoid the policy. It must be stated that most reputable insurance companies do not take defences of this kind but when the amount involved is large the temptation is great to find some excuse for not paying.

In *Zurich General Accident and Liability Insurance Co. Ltd. v. Morrison & others*[1] the question on the proposal form was as follows :—

> "state whether you have driven motor vehicles regularly and continuously in the United Kingdom during the past twelve months."

Lord Greene M. R. referring to this question observed :—

> "The question is hopelessly vague and I am quite unable to give any precise meaning to it. It is to my mind most unfortunate that questions framed in such a slovenly way should be put to a person making a proposal for insurance who may afterwards find himself accused of having given a false answer according to the construction which the insurer may, in his particular case, choose to put on the question. This practice is particularly vicious when, as in the present case, the proposer is required to warrant the truth of his answer. Questions of this kind are—I do not say designedly—mere traps, and insurance companies must not be surprised if they are construed strictly against them."

If I may say so with great respect, these observations of Lord Greene are most appropriate and must be kept in mind when answers to questions in proposal forms are examined. In the present case the question, if it was intended to cover all offences under the Motor Traffic Act, was certainly most ambiguous and in the words of Lord Shaw of Dunfermline quoted earlier, Courts of Law should protect the insured against such "traps".

In regard to the second ground of defence to which I have already referred the burden is upon the insurance company to show that the matters concealed had they been disclosed would have affected the risk. This, it seems to me, they could not in any event have established even if they had endeavoured to do so, but in this case no evidence of any kind was called by the insurance company and they had accordingly failed to discharge the burden. The test was laid down in the *Privy Council* case of *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd.*[2], namely :—

> "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 a risk or stipulate for a higher premium."

[1] *1942 (2) K. B. 53.*

[2] *(1925) Appeal Cases 344.*

One can only say that in the present case even if the insured had disclosed this conviction it would not, having regard to the circumstances, in any way have influenced a reasonable insurer to either decline the risk or alter the premium.

Learned counsel for the appellant referred also to the case of *Taylor v. Eagle Star*[1]. This report unfortunately is not available to us. There, according to the note in Shawcross, drunkenness was held to be a material fact which should have been disclosed, and the failure to do so, avoided the policy. In the absence of the report, it is not possible to say whether the conviction for drunkenness was in respect of the driver's condition while at the wheel or not, though one can conceive of the driver's drunkenness even at a time when he was not driving, being a matter which an insurer would take into consideration as affecting the risk.

In my opinion, therefore, the answer to question 5 of the proposal form is not incorrect and the proposer has not withheld any material information which was likely to increase the risk.

I would accordingly set aside the judgment of the learned District Judge and direct that judgment be entered for the plaintiff with costs both here and in the Court below.

SANSONI, J.—I agree.

Appeal allowed.