17/12

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 520/83

1556

BETWEEN RUSSELL JAMES PAYNE of Auckland Fish Wholesaler as Administrator of the estate of KENNETH JAMES PAYNE late of Howick in New Zealand, Salesman, Deceased

PLAINTIFF

A N D THE MUTUAL LIFE & CITIZENS' ASSURANCE COMPANY LIMITED a duly incorporated company having its registered office at the corner of Lambton Quay, and Hunter Street, Wellington, and carrying on business there and elsewhere as Insurers

DEFENDANT

Hearing : 24th October 1984

Counsel : A.R. Galbraith for plaintiff
~~R.R.~~ Towle for defendant

Judgment : 5 DECEMBER, 1984.

JUDGMENT OF VAUTIER J.

In this case the plaintiff has sought judgment against the defendant for the sum of $14,500 being the amount payable in terms of a compromise alleged to have been entered into of a claim made by the plaintiff against the defendant which was the subject of earlier proceedings in this Court between the present parties. Interest is also sought from the date of the alleged compromise, viz. 19th

January 1983, down to the date of judgment.

The plaintiff has brought this claim as the administrator of the estate of his late son, Kenneth James Payne, who died on the 11th May 1980. Kenneth James Payne had insured his life with the defendant, which carries on the business of life insurance, for the sum of $20,000 under a policy which was in force from the 1st April 1980 and remained in force on the date of the insured's death, subject to there having been due compliance with its terms. The plaintiff, acting as administrator, made demand for the sum of $20,000 but payment was declined and the proceedings previously mentioned were commenced in this Court under A.No. 469/82 claiming the said sum of $20,000 and other incidental relief.

A statement of defence was filed on behalf of the defendant in which the death and the making of demand were admitted but reference was made to a clause of the policy whereunder, subject to an exception having no application here, the policy was declared to be null and void if the life insured (whether sane or insane) should die by his own hand or act within thirteen calendar months from the date of the policy. It was pleaded that the insured, Kenneth James Payne, had, in fact, died by his own hand on or about 11th May 1980. His death, it was pleaded, was the result of him injecting himself with a drug, namely, amethococaine.

It was further pleaded, on behalf of the defendant, that it was a condition of the policy that full and

truthful answers be given by the insured in the personal statement made by him forming part of the proposal for the insurance. In answer to a question in this personal statement, reading :-

> "Within the past 5 years have you either occasionally or regularly taken any stimulants, sedatives or drugs by mouth or by injection? If so, give particulars."

an answer in the negative was furnished. It was further pleaded that this answer was untrue and known by Kenneth James Payne to be untrue at the time when he completed the proposal. The statement of defence in this earlier action was filed on the 30th July 1982. On the 22nd September 1982 an amended statement of defence was filed in which the answer given in the personal statement with regard to drug usage was again referred to.

The evidence given in the present action showed that the defendant was aware that there had been a finding by the Coroner, on the 27th June 1980, that the death of the insured was due to amethococaine poisoning, self administered. It also showed that the defendant had endeavoured to obtain the consent of the plaintiff to the police permitting its representative to peruse any statements made in relation to the death of Kenneth James Payne and, in particular, the statement made by the plaintiff himself and that this consent had not been obtained.

The evidence further showed that, in this

situation, negotiations were entered into between Mr. Lockhart, acting as counsel for the plaintiff, and the solicitors for the defendant. An offer in writing, made without prejudice, was made by Mr. Lockhart on behalf of the plaintiff signifying the plaintiff's willingness to settle the claim on the basis of a lump sum payment of $14,500 provided that the settlement was concluded and payment made on or before 5 p.m. on the 20th December.

The defendant's solicitors, in reply, said that they were prepared to recommend to the defendant that such a settlement be concluded but thought that they would not be able to obtain instructions by the stipulated date. Mr. Lockhart, in reply, said that the stipulation regarding the settlement date was waived, and the later date of 20th January 1983 was agreed upon. The defendant's solicitors confirmed this latter fact in a letter to the plaintiff's solicitors and referred to the necessity of their obtaining instructions from Australia.

Following this, Mr. Blackie, of the firm of Messrs. Towle & Cooper, acting on behalf of the defendant, on the 19th January 1983, as I find, informed Mr. Lockhart that the settlement figure of $14,500 was confirmed and Mr. Lockhart advised his instructing solicitors on that day accordingly. He also referred to the fact that it had been arranged that the necessary forms of discharge would be forwarded by Mr. Blackie to him in due course.

On the 25th January, however, Messrs. Towle &

Cooper wrote to the solicitor for the plaintiff and to Mr. Lockhart in the following terms :-

> " Evidence has just come into our hands which puts a completely different complexion on your client's claim against the M.L.C. Assurance Company. This evidence was not available to Mr. Towle during the course of his discussions with you and Mr. Lockhart prior to Christmas and consequently those discussions took place without any knowledge of it.
>
> It has been made known to us that the deceased had been a regular drug user for several years prior to his death; that he had smoked cannabis and that he injected himself with morphine and pethadine. There is also evidence that he was dealing in drugs.
>
> In these circumstances we do not now regard ourselves or our client as bound by our previous discussions with you in relation to the proposed settlement. We regard the matter as completely at large."

Mr. Lockhart took the stand that a concluded settlement had been reached and, as liability to the plaintiff to make payment in terms thereof continued to be denied, the present proceedings were issued.

The evidence called on behalf of the plaintiff, before me, included that of the plaintiff's solicitor, Mr. Doherty, and of Mr. Lockhart. On behalf of the defendant a clerk employed by the defendant was called to produce the policy and proposal and personal statement. The plaintiff himself was also called on behalf of the defendant, he having been served with a subpoena to attend. There was also called Mr. Abbott, a detective employed by the New Zealand Police who had interviewed the plaintiff following the death of his son and he produced the signed statement

which he obtained from the plaintiff following this interview. He had also interviewed and obtained a statement from a brother of the deceased, namely, Robert Stanley Payne, and application was made for admission of this statement in terms of section 3 of the Evidence Amendment Act 1980.

In relation to this application there was evidence that Robert Stanley Payne was last known to have been residing in Sydney, Australia. There was evidence from the plaintiff himself that this son was still not residing in Auckland and had not done so since 1980. In these circumstances, I concluded that it would be proper to admit in evidence the son's statement to the police on the grounds that it dealt with matters of which Robert Stanley Payne had personal knowledge and that undue delay or expense would be caused by seeking to have him give evidence personally. There had also been made available to the defendant's solicitors a statement made by one Ian Douglas McCullough. He was served with a subpoena to attend the hearing but did not do so and I admitted his statement for like reasons.

Detective Abbott also confirmed that a request had been made by the solicitors, Messrs. Towle & Cooper, that the police should release to them the statement made by the plaintiff but he had declined to consent to this being done.

I must say, at the outset, that I find that there was here a settlement by way of compromise concluded between the plaintiff and the defendant of the action

brought by the plaintiff. It was submitted, on behalf of the defendant, that there was no concluded agreement for settlement reached because there still remained, on the 25th January, the outstanding matter of the execution by the plaintiff of a formal release and acknowledgement of the cancellation of the policy. I do not agree that because this remained to be done the agreement to compromise had not been concluded. The execution of such documents was, in my view, simply a formal step in relation to the completion of final settlement on the agreed terms. That such releases would be forwarded for execution was, on the evidence, expressly included as such a term. If it had not been I would have treated that as a term necessarily and properly to be impliedin the agreement for compromise.

It is certainly completely clear that a litigant who enters into a compromise of a claim brought against him has no right to seek to have the compromise set aside simply upon the basis that a ground of defence subsequently comes to his knowledge. This is exemplified by the decision in Elsas & Bochs v Williams (1885) 52 L.T. 39. In that case the defendant, having had an action brought against him, seeking an injunction to restrain him from selling certain buttons said to be an infringement of the plaintiffs' trade mark, entered into a compromise whereby he consented to an order for a perpetual injunction, as he believed he had no defence to the action. It was subsequently, however, brought to his knowledge that buttons of the same type had been sold in England long before the registration of the plaintiffs' trade mark. The defendant's motion to

have the injunction set aside was unsuccessful.

This is, I find, quite clearly a case in which counsel on each side had the authority of the party on behalf of whom he was acting, to conclude a settlement upon the terms which were finally agreed upon. In these circumstances the position in law, in my view, is to be found stated in Halsbury's Laws of England 4th Ed. Vol. 3 in the title Barristers at paragraph 1183 :-

> "1183. When compromise not binding. Apart from the cases in which a compromise entered into by counsel in excess of his authority will not be enforced, any compromise or settlement may, generally speaking, be set aside upon any ground which would invalidate an agreement between the parties."

The law relating to compromises is more fully dealt with in the title Contract in Vol. 9 of Halsbury paragraph 321 where it is stated :-

> "321. Compromises. Where a party agrees to forbear from suing on a good claim that may be valuable consideration for a promise, whether he agrees to forbear absolutely or for a certain time or for no specified time at all. Moreover, even where the promise to forbear is for some reason invalid, the actual forbearance may be valuable consideration.
>
> A compromise of a disputed claim which is honestly made, whether legal proceedings have been instituted or not, constitutes valuable consideration, even if the claim ultimately turns out to be unfounded. It is not necessary that the question in dispute should be really doubtful, it is sufficient if the parties in good faith believe it to be so, even if such belief is founded on a misapprehension of a clear rule of law. Presumably, the position will be similar where the dispute is as to the facts, though a settlement based upon a mistake of fact might be void for mistake .....

> However, the compromise of a claim will not constitute consideration where the claim is not made in good faith, either because the plaintiff in the action knows that his claim is unfounded, or where there is no sufficient evidence of any intended claim ....."

Halsbury's New Zealand Commentary upon this paragraph (c321), as Mr. Towle pointed out, provides various examples of cases in which it was held that the compromise was binding, there being a bona fide belief in the cause of action, and of other cases in which the compromise was held not binding for lack of such honest belief. I have considered all the authorities thus referred to and find they show a consistent acceptance of the principles as set forth in Halsbury in the passages which I have quoted above.

One of the cases most frequently cited on the question is Callisher v Bischoffsheim (1870) L.R. 5 Q.B. 449 where the compromise reached upon by the plaintiff was in respect of a claim he had put forward against the Honduras Government. At p.451 Cockburn, C.J. said :-

> "Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair

> chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.
>
> It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action."

In New Zealand the authorities are fully considered in the judgment of Reed J. in the case referred to in the New Zealand Commentary of In re Nigro (1926) N.Z.L.R. 501. It is there pointed out that the case of Callisher v Bischoffsheim was quoted with approval by the English Court of Appeal in Miles v New Zealand Alford Estate. The statements of Reed J. in Nigro's case were themselves referred to with approval by the New Zealand Court of Appeal in O'Connell v Waldegrave (1928) N.Z.L.R. 480. The case Callisher v Bishchoffsheim was also followed by a full Court in Oliver v Dickinson (1927) N.Z.L.R. 411 (see page 416).

In another of the authorities referred to in the Halsbury Commentary, Veitch v Sinclair (1975) 1 N.Z.L.R. 264, the plaintiff was relying on an agreement to pay to him the sum of $4,000 in consideration of his surrendering an option he held for the purchase of certain shares. Chilwell J. in dealing with the question of the validity of the plaintiff's option and the knowledge of the parties as affecting any

contract made by the plaintiff to surrender or sue upon it, said at p.269 :-

> "The authorities are in my view correctly summarised in Cheshire and Fifoot's Law of Contract (op cit) 62-63:
>
> > 'A plaintiff who relies upon the surrender of a claim to support a contract must prove :
> >
> > (i) that the claim is reasonable in itself, and not 'vexatious or frivolous,'
> >
> > (ii) that he himself has an honest belief in the chance of its success, and
> >
> > (iii) that he has concealed from the other party no fact which, to his knowledge, might affect its validity.'"

It must clearly be recognised, however, that a claim under an insurance policy is, in some respects, very different from a claim based on other forms of cause of action. The law has always recognised that special standards of good faith are required both in relation to the making of contracts of insurance and in respect of claims made in terms of such contracts. Thus, in Ivamy's General Principles of Insurance Law 4th Ed. at page 433, there is to be found the following statement :-

> "Since it is the duty of the assured to observe the utmost good faith in his dealings with the insurers throughout, the claim which he puts forward must be honestly made and if it is fraudulent he will forfeit all benefit under the policy whether there is a condition to that effect or not. The assured must make a full disclosure of the circumstances of the case."

The leading case is that of Britton v Royal Insurance Co. (1866) F & F 905 where Wills J. at page 909 said :-

> "The contract of insurance is one of perfect good faith on both sides and it is most important that such good faith should be maintained. It is the common practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim and there was such a condition in the present case but a condition is only in accordance with the legal principle and sound policy .....
> If there is a wilful falsehood or fraud in the claim the insurer forfeits all claim whatever upon the policy."

Reference is made to the statement of Pollock C.B. in Goulstone v Royal Insurance Co. Ltd. (1858) F & F 276 at page 279 :-

> "If the claim was fraudulent the plaintiff cannot recover."

I am satisfied, in the present case, that Mr. Payne was fully aware that his son, within the period referred to in the proposal for the insurance, had been involved in drug use. Having heard and observed him in the witness box, I find myself unable to accept his denials as to knowledge of these matters. In his statement to the police, now made available, he said :-

> "In the matter of involvement with drugs he had been involved some years ago in cannabis. This was between 2½ and 3 years ago. He was just smoking it. We had words about this and he took off and went to Australia."

In his evidence before me he said, when these statements were brought to his attention :-

> "I may have said that. I may have not. At the time I had only been informed some 2 or 3 hours earlier of my son's death and I was in a very distressed condition. What I was recalling was that at the time of Michael's conviction for smoking cannabis I was very upset, naturally, and I had asked Michael where he got the cannabis from and he said he got it from Ken and that is the only thing I recall. I have no proof he got it from Ken only what he said."

The Michael referred to is the plaintiff's other son.

Mr. Payne, in giving this evidence, was, on my assessment, very far from being convincing and I take into account in reaching the conclusion on this aspect of the matter that in his evidence relating to the question of the permission sought by the defendant's solicitors that they be permitted to peruse the statement made by Mr. Payne to the police, there was a marked conflict between his evidence and the evidence of other witnesses. His solicitor, Mr. Doherty, when asked if he was aware that the plaintiff had declined to give permission to the police to release the statement to the defendant's solicitors, said :-

> "I cannot really confirm really what had gone on between himself and the police. I am aware that he had had some dealings with them."

Mr. Lockhart, who acted as counsel for Mr. Payne in relation to the previous proceedings and the negotiation of the settlement, was asked whether he was aware that there

had been a refusal by the plaintiff to permit the police to make the statement available, said that he was aware that this was so. When Mr. Payne, however, came to be asked about this matter, he gave evidence as follows :-

> "Yes, I was asked if I would agree. I stated to the policeman concerned that the matter was in the hands of my solicitor and I had to contact my solicitor Mr. Doherty. I contacted Mr. Doherty and he says not much use worrying about it, the settlement is due now and it is irrelevant for that information to be passed to them."

He denied ever having refused to make the statement available. I am unable to accept this on the evidence presented.

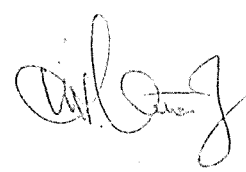
I am also of the view, on the evidence as presented, that the plaintiff was fully aware that if it was revealed that his son had been involved in using drugs in the five year period before the policy was taken out this would be fatal to any claim under the policy. What was said in the statements of defence filed by the defendant, the first of which was filed on the 29th July 1982, no doubt served soon afterwards, would obviously have been brought to his attention. The two defences raised constituted the whole basis of the dispute. The ground of defence relating to the condition as to death by the insured's own hand obvicusly, of course, presented difficulty for the insurer. The onus, it seems clear, was upon it to establish that the insured knew that he was likely to die from the drug which he administered to himself. It was the second defence which was clearly all important. Mr. Lockhart's evidence shows that the whole claim was discussed in his chambers

with both the plaintiff and his solicitor before the effort to compromise was embarked upon. I am unable to accept the plaintiff's statement as to his being unsure whether the defendant, in its defence, had raised the question of the untrue statement made by his son in the proposal for insurance.

I would here add that in reaching the conclusions I have stated with regard to the plaintiff's knowledge of the misstatement made by his son in the personal statement to the insurer and of its importance as regards his claim I have not relied in any way upon the statements of Robert James Payne and Ian Douglas McCullough adduced in evidence as previously mentioned. I have found it unnecessary to consider the contents of those statements.

I, accordingly, conclude that the compromise was rendered unenforceable by the reason of the deliberate concealment by the plaintiff of the facts known to the plaintiff regarding the insured's involvement in drug use. These facts should, in my view, have been disclosed by him when the claim was made.

There will accordingly be judgment for the defendant with costs according to scale and disbursements and witnesses' expenses as fixed by the Registrar. I certify for the sum of $60. in respect of discovery of documents.



Solicitors :

Plaintiff : E.F. Doherty, Auckland.

Defendant : Towle & Cooper, Auckland.