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Cases reported

Berger and Light Diffusers Pty Ltd v Pollock

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

KERR MJ

18-21, 26-29 JUNE, 2 JULY 1973

Marine insurance—Non-disclosure—Moulds shipped under open cover—Arrival in rusty condition—Liability repudiated on ground of non-disclosure of claused bill of lading, history of moulds and over-valuation—Whether a valued policy—Measure of indemnity—Marine Insurance Act, 1906, sects. 16, 18, 28, 57, 68.

Marine insurance—Open cover—Duty to disclose material facts.

Marine insurance—Non-disclosure—Test of materiality of facts not disclosed.

The plaintiffs were the owners of four large steel injection moulds which were to be used for the manufacture of plastic diffusers for fluorescent lighting. The moulds had been made in Hong Kong, but after a number of tests by various companies interested in using them for large-scale production were found to be unsuitable in their present state. The plaintiffs therefore wished to ship them from Australia, where they then were, to England so that they could be re-cut. On Oct. 24, 1966, the plaintiffs' shipping agents shipped the moulds on the steamship Paparoa, and received claused bills of lading stating that the goods were "unprotected", "second-hand" and "insufficiently packed". On Nov. 1 the plaintiffs' brokers, who had an open cover with the defendant representative underwriter, declared the shipment under that cover stating that the value of the moulds was £20,000. On Nov. 7 a "cross-slip" was issued on behalf of the defendant underwriter accepting the insurance under the open cover. This "cross-slip" was intended to be supplemented by further information which would then be embodied in the final contract. Subsequently a "signing slip" was issued stating that the moulds were "unpacked, bound together". The vessel arrived on Dec. 23 and the moulds were found to be damaged by rust due to being immersed in water after the fracture of a pipe in her hold. The plaintiffs claimed £20,000 from the insurers.

The defendant repudiated liability on the ground that the moulds on shipment were worthless and that the plaintiffs had failed to disclose material facts, i.e., (i) the fact that the bills of lading were claused; (ii) the history of the moulds; and (iii) the fact that they were over-valued.

The plaintiffs, however, contended that the plea of non-disclosure must fail because the insurance was effected by a declaration under an open cover with the result that the defendant had no option but to accept the declaration.

Held, by KERR, J., that (1) the policy was an unvalued policy within the meaning of the Marine Insurance Act, 1906, sect. 28 [section 28 states: "An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified."];

(2) the insurable value of the moulds calculated in accordance with sect. 16 [section 16 states: "Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows: . . . (3) in insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole."] was £5316.20;

(3) there was an actual total loss of the goods under sect. 57 [section 57 states: "(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss".] and the measure of indemnity calculated in accordance with sect. 68 [section 68 states: "Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured, . . . (2) if the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured."] was £5316.20, but since the plaintiffs had recovered £400 from the owners of the vessel on the basis of the limit under art. IV, r. 5 [which states that: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . "] of the Hague Rules, of £100 "per package or unit", the measure of indemnity was only £4916.20;

(4) the existence of the open cover between the brokers and the defendants did not relieve the plaintiffs of their duty under sect. 18 [which states: "(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded every material circumstance which is known to the assured, and the assured is deemed to know every material circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract."] to disclose material facts to the defendants;

—*Bolivia Republic v. Indemnity Mutual Marine Assurance Co. Ltd.*, (1908) 14 Com.Cas. 156, applied; *Ionides v. Pacific Fire & Marine Insurance Co.*, (1871) L.R. 6 Q.B. 674, distinguished.

(5) between the date of the "cross-slip" and the "signing slip" there was a continuing duty of disclosure;

(6) the clausing of the bill of lading was deemed to be known by the plaintiffs under sect.18 [supra], because it was known by their shipping agents;

(7) the defendant had not proved that the non-disclosure of the clausing of the bill of lading, or of the history of the moulds, or of the over-valuation was material.

Judgment for the plaintiffs.

Per KERR, J.: It seems to me, as a matter of principle, that the Court's task in deciding whether or not the defendant insurer can avoid the policy for non-disclosure must be to determine as a question of fact whether by applying the standard of the judgment of a prudent insurer, the insurer in question would have been influenced in fixing the premium or determining whether to take the risk if he had been informed of the undisclosed circumstances before entering into the contract. Otherwise one could in theory reach the absurd position where the Court

might be satisfied that the insurer in question would in fact not have been so influenced but that other insurers would have been. It would then be a very odd result if the defendant underwriter could nevertheless avoid the policy. I do not think that this is the correct interpretation of sect. 18 despite the generality of the language used in sub-s. 2. The effect of the non-disclosure may, of course, be so clear that the Court will require no evidence, or only little evidence, to decide in favour of the insurer. In doubtful cases, on the other hand, the Court may require evidence from the insurers themselves before being able to hold that the right to avoid the policy has been established.

Per KERR, J.: It must always be borne in mind that, in the absence of fraud, an excessive over-valuation is not in itself a ground for repudiating a contract of insurance. Over-valuation is only one illustration of the general principle that insurers are entitled to avoid policies on the ground of non-disclosure of material circumstances. It must, therefore, always be shown that the over-valuation was such that, if it had been disclosed, it would have entitled the insurer to avoid the policy because it would have affected his judgment as a prudent insurer in fixing the premium or determining whether or not to take the risk. This is not established by the mere fact that the Court subsequently, with knowledge of all the facts and the assistance of expert opinion, arrives at a much smaller value.

Cases referred to

Bolivia Republic v. Indemnity Mutual Marine Assurance Co. Ltd., (1908) 14 Com.Cas.156

Ionides v. Pacific Fire & Marine Insurance Co., (1871) L.R. 6 Q.B. 674; (1872) L.R. 7 Q.B. 517

Ionides v. Pender, (1874) L.R. 9 Q.B. 531

Roselodge Ltd. (formerly "Rose" Diamond Products Ltd.) v. Castle, [1966] 2 Lloyd's Rep. 113

Tanner v. Bennett, (1825) Ry. & M. 182

Trading Co. L.J. Hoff v. De Rougemont, (C.A.) (1929) 34 Com.Cas. 291; (1929) 34 Ll.L.Rep. 81

Visscherij Maatschappij Nieuw Orderneming v. Scottish Metropolitan Assurance Co. Ltd., (1921) 9 Ll.L. Rep. 420; (C.A.) (1922) 27 Com.Cas. 198; (1922) 10 Ll.L. Rep. 579

Williams v. Atlantic Assurance Co. Ltd., (C.A) [1933] 1 K.B. 81.

This was an action by the first plaintiff, Mr. Ludwig Berger, and the second plaintiff, Light Diffusers Pty. Ltd. (which he controlled), claiming an indemnity from Mr. Derek Alan Pollock, a representative Lloyd's underwriter, under a policy of marine insurance in respect of four steel injection moulds which were shipped at Melbourne on the steamship Paparoa for delivery at London and on arrival were found to have been damaged by rust. The defendant repudiated liability on the ground that the plaintiffs had not disclosed material facts.

Mr. Anthony Evans, Q.C., and Mr. A. F. B. Clark (instructed by Messrs. Herbert Smith & Co.) for the first and second plaintiffs; Mr. Anthony Lloyd, Q.C., and Mr. Anthony Hallgarten (instructed by Messrs. Clyde & Co.) for the defendant.

The further facts and arguments are stated in the judgment of Mr. Justice Kerr.

Judgment was reserved.

July 30, 1973

JUDGMENT

Mr. Justice KERR: In this action the first or alternatively second plaintiff (to whom I will refer as Mr. Berger and the company respectively), claim under a Lloyd's policy against the defendant as a representative underwriter for damage by rust sustained by four large steel injection moulds in 1966 during a voyage from Melbourne to London on the steamship *Paparoa*. The plaintiffs contend that the agreed value of the moulds under the policy was £20,000 or, alternatively, that this was their value if the policy was unvalued, and in either event that the moulds became a total loss as the result of corrosion damage. Alternatively the plaintiffs claim for a partial loss. The defendant denies that the value of the moulds was agreed by the policy and contends that they were in any event worthless at the time of shipment, with the result that no loss has been suffered, either total or partial. The defendant also claims to avoid the policy on various grounds of non-disclosure, in particular over-valuation, the concealment of the pre-shipment history of the moulds, and the fact that the bill of lading was claused, as mentioned hereafter. The pleas of non-disclosure are complicated by the fact that the moulds were insured by a declaration made under an open cover, and that the final details of the declaration were not communicated to underwriters until after it was known that the moulds had arrived in a rusty condition due to having been immersed in water after the fracture of a pipe in the ship's hold during the voyage. The action has involved a meticulous investigation of the history of the moulds and of the insurance arrangements, and the trial occupied some nine days. For the reasons stated hereafter I have come to the conclusion that the moulds had not been insured for an agreed value. I must therefore begin by considering the history of the moulds in order to determine what their arrived sound value would have been but for the corrosion damage which they admittedly suffered.

History of the moulds in Australia:

I must first set out certain matters by way of background. Until the autumn of 1966 Mr. Berger, who is of Czech origin, had for some years been living in Australia and had run a factory manufacturing plastic articles, including diffusers used for fluorescent lighting. Such diffusers took the form of a plastic grid composed of squares, the sides and depth being of the order of about half an inch. The factory was owned by the company, originally called Capital Plastics Pty. Ltd. and subsequently re-

named Light Diffusers Pty. Ltd. Mr. Berger controlled the company and owned virtually all the shares; it was effectively a one-man company and he said, as I accept, that in practice he drew no distinction between the company and himself except for formal purposes.

The company had been manufacturing small light diffusers with a total grid area of the order of 1 square ft. By 1964 there was an active market for such diffusers, and there was also an increasing trend towards grids of much larger area. However, the steel moulds required for producing such grids were costly and required a high standard of manufacture to work satisfactorily during continuous production. Depending on the quality of the material and workmanship, the four moulds with which we are here concerned could have cost of the order of £32,000 in Australia in 1964 and over £20,000 in the United Kingdom in 1967. (Although many figures in the case were expressed in Australian pounds, and subsequently in Australian dollars, I will generally refer to sterling, except where specific reference to Australian currency is required.)

In 1963 Mr. Berger decided to try to break into the market for large plastic light diffusers. He had no technical qualifications, his only knowledge of plastics and injection moulding being derived from his experience of the factory which he had been running. He acquired a number of large diffusers of the type then being made by an Australian manufacturer who had a virtual monopoly of this product, and he decided to have the necessary moulds manufactured in Hong Kong in order to obtain them at a much lower price. He took these diffusers to a company in Hong Kong called Shriro Precision Engineering Co. Ltd., and in December, 1963, ordered from them the four steel moulds with which this action is concerned. The diameter of the mouldings which these moulds were to produce was 4 ft. x 1 ft., 2 ft. x 2 ft. and 4 ft. x 2 ft. in the case of the two remaining moulds, though these were not identical. Their external dimensions were correspondingly larger, and their weight was considerable, the total weight of the four moulds being of the order of 15 tons.

No drawings or photographs of these or similar moulds were available at the trial, but there was a great deal of technical evidence about them, and I must refer to some of their more important features. The moulds are made in two halves. Their most important feature is the machining of the grid of grooves into which the plastic is injected in a liquid state, which then hardens under enormous pressure when the moulds are closed. The hardened plastic is then ejected mechanically in the form of light diffusers of the required design. The precision required in machining the grooves is shown by the fact that the thickness of the plastic in the present case was only of the order of 25/1000ths of an inch. Imperfections in the machining of the grooves will produce mis-shapen mouldings and difficulties in

ejecting the mouldings without damage to them, thereby slowing down the production process. Such imperfections are in many cases referred to as "undercut". If undercut is present to a small extent it may be possible to remove it by polishing the surfaces of the grooves or sometimes by local machining; but if it is present to a large extent then only a complete re-cut by machining will make the mould usable for continuous production. There are also other features of the moulds which are of importance. The steel must be of a sufficient hardness to avoid distortion when the moulds are closed under pressure in continuous production. Further, if the steel is too soft the mould surfaces are liable to become more easily damaged if great care is not exercised in operation. If the mould surfaces suffer distortion or damage two results are liable to follow. First, the top edges of the grooves may become burred or splayed, which will make it difficult or impossible to eject the mouldings. Secondly, on injection of the plastic it may get into spaces within the closed mould where it should not be. Such spaces may also result from inaccurate machining. In either event, there will be an excess of plastic known as "flashing". This may spoil the mouldings and may, in itself, also tend to distort an insufficiently hard mould by causing the mould to close on an excess of plastic under pressure.

A number of other matters were common ground between the parties, or virtually undisputed. First, although the quality of the manufacture of the mould is of the greatest importance, any mould, however well made, is liable to have teething troubles when it is first put into operation. For instance, some slight degree of undercut, particularly localized, is not unusual and may be capable of being remedied. As one witness put it, the toolmaker makes the mould and the moulder makes it work. Secondly, the quality and workability of a mould can only be judged by seeing whether or not it is capable of being used for continuous production runs, and for this purpose it must first be tested by engineering trials or pre-production runs. If it is ultimately found that a mould cannot be used for continuous production then it has no commercial value other than as scrap. Before concluding whether a mould is unusable for continuous production because of bad machining, excessive undercut or flashing, a moulder would consider the possibility of re-machining the mould. However, in the present case this was commercially out of the question, for two reasons. First, it would have made the thickness of the grid surfaces unacceptably large. Secondly, the filling of the re-machined grooves would have required an unacceptably greater amount of plastic. It was accordingly common ground that if these moulds could only have been used for continuous production after re-cutting then they had to be scrapped.

In the foregoing summary I have referred several times to the use of the moulds for continuous production. This involves three factors about which

there was a good deal of discussion. First, the hourly rate at which mouldings can be produced; secondly, the degree of continuity for which such production can be maintained without undue breakdowns and repairs; and thirdly, the life of the mould expressed in terms of the number of mouldings which can be expected to be made from it. I must shortly state my conclusions about these aspects of the evidence.

When Mr. Berger decided to enter this market he had got it firmly in mind that a production rate of the order of 50 mouldings per hour was required to enable him to be competitive. But in fact he was mistaken about this, and I am satisfied that a rate of the order of 35 per hour would have been competitive and commercially viable. Secondly, as regards continuity of production it was virtually common ground that a satisfactory mould must be capable of being used continuously in shifts over periods of weeks or even months, like any other engineering tool required for mass production. Of course, this does not mean that there would be no breakdowns, but if the mould is not capable of being used with a reasonable degree of continuity then it would not be a commercial proposition. Moulds may, however, frequently be shifted from one country to another because the local market requirements may be such that after production for some months in one country they can be more profitably employed elsewhere. Finally, as regards the production life of a mould of this nature the evidence was rather vague. One expert witness put it as anywhere between 100,000 and 1,000,000 mouldings. No one suggested that moulds of this type would be designed to produce less than something of the order of 100,000 mouldings. However, there was also evidence showing that the demand for mouldings of the type in question here was such, at the material time, that even a few thousand could have been sold at a profit, and I shall have to revert to this point later.

I now return to the orders for the four moulds placed by the company with Shriro in Hong Kong in December, 1963. These orders were undoubtedly remarkable in the experience of every expert who was called. As one would expect, orders for expensive machine tools of this kind would normally be detailed and specific. They would be based on a specification and usually, no doubt, on drawings. The specification would, in particular, lay down the quality and hardness of the steel to be used. They would also frequently contain some guarantee relating to the performance of the moulds under trial. However, none of these features existed in the present case. Mr. Berger merely produced to Shriro samples of the mouldings made by the other manufacturer which he wanted the moulds to be capable of producing. Shriro then evidently got out some designs, presumably in the form of drawings. The company was given the right to suggest modifications within 14 days. The designs were not produced in

evidence; they have apparently not survived, and Mr. Berger remembers little about them. They were submitted to the company's technical manager in Australia, a Mr. Jackson, but there was no evidence about his knowledge or experience of moulds of this kind. He suggested some minor modifications which Mr. Berger could not remember. There was no discussion about the quality or hardness of the steel to be used. The contracts with Shriro were dated Dec. 9, 1963, and test mouldings were to be dispatched to Australia by Mar. 30, 1964, time being of the essence, though there was evidence that it might often take nine to 12 months to obtain delivery of such moulds. It subsequently turned out that the moulds could not be tested in Hong Kong, and they were accordingly shipped to Australia untested.

Perhaps the most remarkable feature of these contracts was the price. The total price of the four moulds came to about £3625. It was common ground that this was something of the order of one-seventh or one-eighth of the price which moulds of this nature would then have been expected to cost. Mr. Berger realized that he was apparently getting a bargain, and he explained the relative informality of the contracts by saying that he was anxious not to push Shriro too far. No doubt manufacturing costs in Hong Kong were considerably lower than in Australia; that is why Mr. Berger placed these orders in Hong Kong. There is also evidence that Shriro realized within a short time that they had badly under-quoted on these moulds. But even allowing for both these factors these moulds were, in my view, justifiably described as "cut price" by Counsel for the defendant.

The first of the moulds was shipped to the company in Australia in about July, 1964. It was then tested in the factory of British Xylonite (Australia). The test was unsatisfactory in that a number of faults were found and modifications and repairs were advised by British Xylonite as essential for economic running. I should mention at this point that in April, 1964, before they had seen any of these moulds, British Xylonite had paid Mr. Berger £200 for an option to buy all four moulds at a price of £32,000, but after the test nothing more was heard about this option. On the other hand, this option shows the basic value of such moulds and their market potential if they operate successfully.

As the result of the test on the first of the moulds Mr. Berger threatened legal proceedings against Shriro because the mould had not been properly constructed. He was, however, anxious that Shriro should complete the remaining moulds, and the dispute was ultimately settled in October, 1964. The remaining moulds were shipped to Australia during that month, one of the 4 ft. x 2 ft. moulds not being completely finished. On the evidence before me the terms of settlement were that Shriro should refund to the company the whole amount which had by then been paid for the moulds, and I understood Mr. Berger to say that they had done so. In his final speech

Mr. Evans, for the plaintiffs, said that on the basis of the company's accounts only something over half of the amount was in fact refunded. But these accounts were not before the Court and, on the evidence before me, the company in effect acquired these moulds without having had to pay anything for their manufacture. The company also sought to recover from the Australian Customs a little over £2000 which had been paid on importation by way of duty, but was unsuccessful.

At some stage of the subsequent history of the moulds the company or Mr. Berger spent about £2000 on repairs or modifications to one or more of them by a company whose name Mr. Berger could not remember. I accept this evidence. But the main events in Australia relating to the moulds concern a company called Radio Corp. Pty. Ltd. and its associated company Servex Electrical Co. Pty. Ltd. I understand both formed part of the Philips group of companies. In January, 1965, Radio Corp. gave a quotation to the company covering the modification and testing of the moulds in a total sum of about £4600. There then began a lengthy series of repairs, modifications, tests, pre-production runs and further quotations by Radio Corp. and Servex which continued until October, 1965. The documentary evidence relating to these has been meticulously analysed. No oral evidence was called from either Radio Corp. or Servex, but I had before me an affidavit from the then factory manager and subsequently the production manager of Servex. Apart from this—which could, of course, not be tested by cross-examination, and was in fairly general terms—the condition and value of the moulds at the end of this period are entirely matters of inference from the documents by the expert witnesses who were called and my impression of their evidence.

Before summarizing the main events and the conclusions which I have formed on this part of the case there is one preliminary point. It was submitted on behalf of the plaintiffs that the history of each mould should be treated separately. In my view this is neither desirable nor really practicable on the limited evidence available. The documents before me may well represent no more than fragments of the total picture relating to each mould, particularly since Mr. Berger was also in direct oral communication with Radio Corp. and Servex. In drawing inferences from the contents of these documents a process of elaborate analysis might well be misleading. Although it is true that different faults were found in the four moulds, and that one of the 4 ft. x 2 ft. moulds gave more trouble and performed worse than the others, all four were made by the same manufacturer, evidently of the same steel, more or less contemporaneously, and pursuant to two orders placed on the same day at two lump-sum prices for two moulds in each case. None of the four moulds appear at any time to have been valued individually by anyone. Invoices between Mr. Berger

and the company and another company controlled by him, to which I refer hereafter, as well as the subsequent customs invoices, all valued the four moulds in one lump sum, and they were also insured in one sum. In all these circumstances I think that the only practicable approach is to consider the history broadly by reference to all four moulds.

Radio Corp. began work on the moulds in March, 1965. Difficulties were experienced with undercutting, flashing and ejection, but these were not in any way considered to be insuperable. In April, 1965, before beginning serious testing, Radio Corp. pointed out that the moulds were of "soft construction" and therefore liable to damage. However, they did not, at this stage, carry out any hardness test of the steel, and apart from the possibility of the moulds becoming damaged in use Radio Corp. do not appear to have been concerned about the quality of the steel. By May, 1965, the modifications and tests had gone well enough for it to be agreed between the company and Radio Corp. that the latter should produce 1000 mouldings from each of the moulds on the basis of an engineering trial run. The company was to provide the plastic for this purpose, and pay Radio Corp. an hourly rate covering the period of production. This rate was fixed by Radio Corp. on the assumption that the moulds would be able to produce 40 mouldings per hour. At the same time Radio Corp. expressed interest in a long-term contract to be negotiated between the company and Servex, depending on the results of this trial. However, matters did not proceed smoothly. During try-outs of the moulds many difficulties were encountered, in particular with ejection. The trials were repeatedly interrupted because it was found that further modifications and polishing of the grooves was required. A total of about 1100 mouldings was, however, ultimately produced from each of the four moulds. These were produced during average test runs of about five hours, the longest run being about 17 hours. This was because there were breakdowns due to ejection trouble and flashing, which required further repairs and polishing of the moulds. This work was covered by further quotations and invoices submitted to the company from time to time. While the moulds were producing in this intermittent fashion the average rate of production was of the order of 35 per hour. But apart from the fact that production was never achieved, nor attempted, under conditions of continuous operation, a further problem was the high proportion of mouldings which had to be rejected. There is, unfortunately, little clear evidence about the proportion of rejects, for two reasons. First, when disputes subsequently arose between the plaintiffs and Radio Corp. and Servex, one of the matters in dispute was to what extent saleable mouldings had been produced out of this total production of about 4400 mouldings. The plaintiffs then contended that only a small proportion was saleable; in his evidence Mr. Berger put