Present : Bertram C.J. and Schneider A.J.

1920.

WIJERATNE *v.* THE CHINA MUTUAL LIFE INSURANCE COMPANY.

31—D. C. (Inty.) Colombo, 53,890.

Interrogatories—Action for "profits" by a policy holder against insurance company—Application that insurance company should disclose profits—Liability of insurance company to pay profits should be established before the company is called upon to disclose profits.

By an insurance policy the defendant company undertook to give to the plaintiff, a policy holder, a share of the profits in addition to the amount for which he was insured. The policy expired in 1919, and, no profits having been declared for that year, the plaintiff was paid only the amount for which he was insured. The plaintiff sued the defendant company for a share of profits. The defendant company denied their liability to pay anything for profits. The plaintiff moved the Court to call upon the defendant company to disclose the amount of their profits.

Held, that the information sought for by the plaintiff was premature before the question of liability to pay was decided.

[1] *(1902) 6 N. L. R., at page 267.*

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The Court cited, with approval, the dictum of Cotton L.J.: "The Court is always unwilling, before the right to relief is established, to make an order for discovery which may be injurious to the defendant, and will only be useful to the plaintiff if he succeeds in establishing his title to relief."

THE plaintiff sued the defendant company for the recovery of profits alleged to be due to him on a policy of insurance issued to him by the defendant company. The plaintiff estimated the profits due at Rs. 2,500 and prayed for judgment for that sum, or in the alternative for an accounting.

The defendant company pleaded in defence that no profits had been declared on the said policy and no sum was due to the plaintiff.

The plaintiff administered the following interrogatories to the defendant :—

(1) What are the profits made by you during the years 1904–1919 inclusive ? Give each year's profits separately. Attach to your answer copies of the balance sheets and profit and loss account for each year.

(2) Is it the fact that your deed of settlement provides that at least 90 per cent. of the profits of the company shall be distributed among policy holders ?

(3) Did you represent to the plaintiff that the profits on his policy would not be less than Rs. 2,500 ?

(4) What profits have you paid since 1904 to policy holders in Ceylon ? Attach to your answer a list of such payments.

(5) Is the following a correct statement of the method adopted by you for the distribution of profits : "The method of distribution provides for the allocation of the profits equitably as between policy holders under different plans and at varying ages. Profits are distributed on the deferred bonus plan, by which bonuses vest at the end of the deferred bonus period chosen, and, subsequently, at the expiry of periods of five years. In the case of endowment assurance policies, the deferred bonus period is taken as the full term of the policy in the absence of any expressed wish on the part of the policy holder for some other term. In the case of whole life policies, the deferred bonus period may be either five, ten, or twenty years, as desired by the assured."

(6) Did you adopt this method in the case of policy No. 21,040, which was held by Mr. Peter de Almeida ?

(7) What was paid by way of profits on the said policy No. 21,040 ?

(8) Did you in 1904 represent to Mr. C. M. Leitan of Negombo that the profits on his policy for Rs. 1,000 maturing in twenty years would amount to Rs. 800 ?

(9) Are the premiums in the case of policies with profits higher than those without profits ?

(10) Do you say that it is within your discretion to declare or refrain from declaring profits on a policy issued by you on the footing that it is payable on maturity with profits ?

(11) When did you receive in Colombo the printed form of the letter sent by you to the plaintiff bearing date June 1, 1919 ?

(12) By whom, at whose instance, and with whose authority were the typewritten words following, to wit, "1st June," "9," and "R. J. V. de S. Wijeyeratne, Esq., Clifton, Horton place, Colombo," inserted ?

(13) When was the decision of the directors referred to in the letter arrived at ?

(14) Was such decision placed before a meeting of the shareholders and/or policy holders ?

(15) Were shareholders and/or policy holders notified of the intention of the directors to arrive at such a decision ?

(16) How do you reconcile the said decision with the terms of the deed of settlement providing for the payment to the policy holders of 90 per cent. of the profits ?

The defendant filed the following affidavit in answer :—

I, Thomas Staines Clark, of Colombo, make oath and say as follows :—

(1) I am a partner in the firm of Clark, Young & Company, and my firm are the manager and general agents of the defendant company in Ceylon.

(2) I refuse to answer interrogatory (1) on the ground that it is irrelevant at this stage of the action. If the defendant company is ordered to render an account, the figures can, I believe, be supplied then, but they are not available in Ceylon.

(3) Answering interrogatory (2), I say that the deed of settlement will speak for itself. A copy of the deed can be inspected at the office of the defendant company's proctor.

(4) Answering interrogatory (3), I say that I did not make any such representation, nor to the best of my knowledge and belief did the defendant company.

(5) Answering interrogatory (4), I say that the defendant company has since 1904 paid as profits to policy holders in Ceylon Rs. 27,642·50. I refuse to attach a list of such payments on the ground that the requirement of such a list is offensive and irrelevant to the action, and in any event oppressive (irrelevant) at this stage of action.

(6) Answering interrogatory (5) I say that to the best of my knowledge and belief the statement therein is a correct statement of the method adopted by the defendant company.

(7) I refuse to answer interrogatories (6), (7), (8), and (16) on the ground that they are irrelevant to the action.

(8) The answer to interrogatory (9) is yes.

(9) I refuse to answer interrogatory (10) on the ground that what either the defendant company or I may say is not relevant to the action, except in so far as it may constitute the defence put forward, which is fully stated in the defendant company's answer to the plaint.

(10) My answer to interrogatory (11) is in May, 1919.

(11) Answering interrogatory (12), I say that the words mentioned were inserted by a clerk at the instance of Charles Bertie Finney, an assistant in my firm, and with the authority of the firm.

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(12) Answering interrogatory (13), I say that to the best of my knowledge and belief the answer is April 30, 1919, but I have no personal knowledge of the matter.

(13) Answering interrogatory (14), I say to the best of my knowledge and belief such decision was placed before a meeting of shareholders.

(14) I am unable to answer interrogatory (15). I can supply the information after reference to the office of the company in Shanghai if required.

The District Judge (P. E. Pieris, Esq.) made the following order:—

Plaintiff has come into Court claiming from the defendant, an insurance company, a sum of money which plaintiff estimates to be the profits accrued on his policy during a period of fifteen years. He has administered certain interrogatories, some of which the defendant has refused to answer, and he has moved the Court to compel the defendant to answer the same.

The first interrogatory refers to the amount of profits made during the period of fifteen years in question, and includes a demand for the production of the balance sheet and the profit and loss accounts. The defendant objects that the information is immaterial at this stage. Plaintiff does not contemplate more than one stage, namely, the trial. The defendant hints at two stages, a trial to be followed by an accounting. The necessity for two stages can well be avoided, and the information is material at this stage, and must be supplied by the defendant. In reply to the fourth interrogatory, the defendant has stated, as required, the amount paid since 1904 as profits to policy holders in Ceylon, but has declined to give a list of such payments. The defendant has urged that the requirement of such a list is offensive. The offensiveness is not self-evident. It is urged that it is irrelevant. On the other hand, it would be abundantly relevant as supplying the details which plaintiff is seeking to establish. It is said that the requirement is oppressive at this stage. Here, again, the defendant is contemplating two stages when one suffices. There is no material on which it can be held that there is any oppression in the requirement. There is no suggestion that the number of items is exhaustingly great. It was urged in the course of the argument that a bare list of payments would be useless. What the plaintiff requires is, not a bare list but a detailed list. The defendant is directed to supply the list demanded. Interrogatories (6), (7), and (8), call for certain information in regard to the policies held by two others, whom the plaintiff proposes to call as his witnesses at the trial, on the footing that their policies were identical with his, and that a certain course of business was followed in respect of such policies. The defendant has pleaded that such information would be irrelevant. *Ex facio*, it appears to me that the information is not irrelevant, and those interrogatories must be answered.

In the answer of the defendant it is stated that the defendant at a certain date decided not to declare any profits on certain policies. Interrogatories (10) and (16) are connected with this portion of the answer. The defendant is called upon to state if the company claims a discretion in regard to the declaration of profits, and also to reconcile the said decision with certain terms in the deed of settlement. These appear to me to be matters more suitable for oral cross-examination and legal argument, and these two interrogatories need not be answered.

The costs of this matter will be paid by the defendant. The answer must be filed in Court on or before February 16.

Drieberg, for the defendant, appellant.

H. J. C. Pereira, for the plaintiff, respondent

August 3, 1920 BERTRAM C.J.—

This is an appeal against the order of the senior District Judge of the District Court of Colombo requiring the defendant to answer certain interrogatories. The action is an action on an insurance policy. The policy undertakes to give to the policy holder a share of profits in addition to the amount for which he is insured. What the profits referred to are is not specified. Nor is the share specified. The only other document which explains what the rights of the policy holder in respect of profits may be is the application which he signed when the policy was granted. In that application he declared that "the methods which might be adopted by the company for any distribution of surplus and its determination of the amount apportioned to the said policy are hereby accepted for every person who shall have any interest in the said policy." This policy was entered into in the year 1904, and expired in the year 1919. It appears by a statement in the defendant's answer, that in April, 1919, the company determined not to declare any profits on policies expiring before the date of the next annual meeting, unless the directors should otherwise decide after considering the accounts for the financial year 1919. In view of this resolution the plaintiff has received no profits. He is simply paid the amount for which he was insured, and he now brings his action declaring that he is entitled to something in respect of profits. What his rights are must, in the first place, depend upon a determination of what is the agreement between the plaintiff and the company. The company say, as I understand their case, that by profits is meant simply "the profits of the year in which the policy matures." The appellant contests this. He maintains, in the first place, that this is not the natural meaning of the words in the context in which they occur, and in the second place, he points to a resolution of the Board of Directors which was incorporated as an amendment in what is described as the Deed of Settlement of the company, and is in the following terms: "From and after the year ending March 31, 1906, not less than 90 per cent. of such sum, if any, as would (but for this clause) be available for distribution as profits of the company in each year shall be applied for the benefit of such of the policy holders of the company as may be insured with profits at such times, in such a manner, and upon such terms as the directors may from time to time determine."

He maintains that, by virtue of that clause in the deed of settlement, a trust fund is, in fact, annually constituted of 90 per cent. of the sum available for distribution of profits. He maintains further that this clause indicates that the profits contemplated in the policy

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are not profits in the year in which the policy matures, but profits during all the years for which it is running, and that at the conclusion of this period he is entitled to the accumulated result of the sums appropriated to his policy in respect of profits during its whole course. He maintains, therefore, that, if there had been profits earned between 1904 and 1919, he must at least be entitled to something on the maturing of the policy. The company claims, on the other hand, that he is absolutely bound by the terms of his application, and that the fact that they have not apportioned anything to the policy in respect of which he sues is conclusive against him that there is nothing due in respect of profits on that policy. There are thus two questions to be determined: firstly, What is the contract between the parties? And secondly, as a term of that contract, Is the plaintiff bound by the words of his application in such a way that he is not entitled to sue in respect of profits?

As I say, it must be first determined whether the plaintiff is entitled to any relief before the amount of that relief can be estimated, and we are asked before that question is determined to call upon the defendant company to disclose the amount of their profits during the years 1904 and 1919, giving each year's profits separately. They are also asked to attach to the answer a copy of the balance sheet and profit and loss account for each year.

The question of the principle on which Courts grant discovery of this kind has been discussed in many cases, but I will cite two passages only from two of the most important cases. The first is *Parker v. Wells*.[1] Jessel M.R. says: "Now, in deciding whether discovery ought to be given, we must first consider whether it will help the plaintiff at the trial. If it will not, but will only be of use if the plaintiff obtains a decree, then we must consider whether it is fair that the defendant should be obliged to give it at this stage of the proceedings, or whether to compel him to give it would be oppressive." The other passage is *Finnessy v. Clark*,[2] where Cotton L.J. says: "The Court is always unwilling, before the right to relief is established, to make an order for discovery which may be injurious to the defendant, and will only be useful to the plaintiff if he succeeds in establishing his title to relief."

It seems to me that the information sought for by the plaintiff is premature at this stage. If he establishes his title to a share of the profits, and satisfies the Court that his interpretation of the agreement on which he sues is a right one, then, no doubt, the Court will take measures to give him by means of an inquiry such relief as he may be entitled to. I confess that, from the very wide terms of the resolution in respect of the appropriation of the 90 per cent. of the profits, it may be very difficult for any Court to give the plaintiff any definite relief. But this is a matter for subsequent discussion.

[1] *(1881) 18 Ch. Div. 477, at p. 483.* [2] *(1887) 37 Ch. Div. 184, at p. 187.*

Mr. Pereira maintains that at this stage he is at least entitled to be told whether during the years 1904 to 1919 the company have realized any profits at all. Unless he can show that, there is no basis for the action. I think he is unnecessarily apprehensive. By the terms of their answer to one of the interrogatories (interrogatory (4)) the defendant company expressly states that since 1904 it has paid as profits to policy holders a sum of Rs. 27,642·50. It seems to me that there is a clear admission, for the period in question, that some profits have been earned, and that is enough foundation for the plaintiff's case.

In my opinion it will be oppressive at this period to require the defendant company to answer interrogatory (1). Similarly, with regard to the fourth interrogatory, I see no reason why the defendant company should be required to give a detailed list of the payments they have made to other policy holders. With regard to the sixth and seventh interrogatories, they have references to the defendant's dealings with another policy holder. I cannot see how this is relevant to the plaintiff's action against the company. He can obtain such information as he desires from the policy holder in question. Similarly, with regard to interrogatory (8), I do not think that this is one which the company should be required to answer. It relates to an assurance said to have been given by some unnamed person to another policy holder with regard to the profits likely to accrue upon his policy when it matured. I do not see how the company can answer the interrogatory as it at present stands. In any case, it appears from the form of the application which the plaintiff signed that the defendant company expressly disclaim all responsibility for statements, representations, promises, or information given by their agents, unless they are reduced to writing and presented at the office of the company with the application. I cannot see that this interrogatory is relevant to the action, and I would not require the defendant company to answer it. I am, therefore, of opinion that this appeal should be allowed, with costs.

SCHNEIDER A.J.—I agree.

Appeal allowed.