See also 570. 92 WN. 397
Foll at p 568. Foll & Dist at p 563. (1973) 2 NSW. LR. 7
Foll & pp 563, 568. Dist & p 563 (1975) 1 LLL 52

Foll. (1980) 2 NSWLR 664. App. 165 CLR 622

[HIGH COURT OF AUSTRALIA.]

SAUNDERS . . . . . APPELLANT;
PLAINTIFF,

AGAINST

THE QUEENSLAND INSURANCE COMPANY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *Oct.* 12, 13.

SYDNEY, *Nov.* 30.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Insurance—Fire insurance—Proposal—Conditions—Questions not answered to be deemed answered in negative—Question answered by agent—Answer correct to best of agent's knowledge—Incorrect in fact—Inquiry as to prior claim—Question not deemed answered in negative—Withholding information likely to affect acceptance of proposal—Misrepresentation or omission to state fact material to be known for estimating risk—Questions for jury—New trial.

The appellant effected an insurance of certain premises with the respondent company. The policy contained a provision that the insurance should be subject to the particulars in the proposal for insurance, which it was agreed should constitute the basis of the insurance and be incorporated in and form part of the policy. A condition of the policy was that any question asked in the proposal and not answered should be deemed to be answered in the negative. One of the questions asked by the proposal was whether the proponent had ever been a claimant on a fire insurance company or had property damaged or destroyed by fire. The proposal was filled in by an agent of the proponent who was also an agent for the respondent, and he answered this question: "Not to agent's knowledge"; and signed the proposal as agent for the proponent. The declaration made by the proponent's agent in the proposal also declared that the proponent had not "withheld any information likely to affect the acceptance of this proposal." Condition 1 of the policy provided that if there be "any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact," the

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company should not be liable. The insured having sued the company under the policy, the trial Judge held that the answer "not to agent's knowledge" was not an answer to the question asked, which must accordingly be taken to be answered in the negative; he thereupon gave judgment for the company and discharged the jury. On appeal to the High Court,

Held, that the answer "not to agent's knowledge" was not a failure to answer the question asked so as to imply a negative answer, and that the word "withheld" in the declaration meant "refrained from disclosing," and that it should be left to the jury to determine whether the proponent had "withheld any information likely to affect the acceptance" of the proposal; and whether there had been any "misrepresentation" or "omission" within condition 1 of the policy.

Decision of Supreme Court of Western Australia (*Northmore* J.) reversed.

APPEAL from the Supreme Court of Western Australia.

The appellant, Marguerita Saunders, brought an action in the Supreme Court of Western Australia, against the respondent, the Queensland Insurance Co. Ltd., claiming a declaration that a policy of insurance against loss or damage by fire which she had effected with the defendant was a valid and subsisting policy and that the defendant was liable to pay and make good to the plaintiff the value of the insured building, which had been destroyed by fire. There was an alternative claim for payment of the sum of £750, the amount for which the building was insured.

The policy was issued subject to the condition "that this insurance shall at all times and under all circumstances be subject to the particulars in the proposal for this insurance (which shall in all cases be deemed to be inserted or furnished by the assured), and to the conditions and stipulations printed on the back hereof, which proposal, conditions, and stipulations constitute the basis of this insurance, and are to be considered as relevant to and incorporated in and forming part of this policy."

The proposal for the insurance, dated 7th December 1929, was made for the appellant by a firm of estate agents named Hunters, who were also agents for the respondent. When the proposal was made the appellant herself was in Tasmania, where she resided. The proposal contained a number of printed questions opposite to which the agents put replies. One of the questions asked was:—"Has proponent (or husband or wife of proponent) either individually or in conjunction with any other person or persons ever been a

claimant on a fire insurance company or had property damaged or destroyed by fire? If so, give date of each and every fire, and of claim or claims made, situation of such property, and if insured name of company or companies on which claim was made and where?" Opposite this question the agents wrote: "Not to agents' knowledge." The proposal concluded with the following declaration:—"Declaration.—I/We do hereby declare and warrant that the answers given above are in every respect true and correct, and I/we have not withheld any information likely to affect the acceptance of this proposal; and I/we agree that this proposal and declaration shall be the basis of the contract between the company and myself/ourselves, and I/we agree that the person filling up this proposal form wholly or in part does so as my/our agent and not that of the Company, and further that neither facts within the knowledge of nor statements made to any agent of the Company shall be binding on the Company unless embodied in writing on this proposal form, and I/we further agree to accept the Company's policy subject to the terms and conditions contained therein. Any question not answered in this proposal will be taken as replied to in the negative. Signature of proponent or his/their authorized agent." Here the agents signed in their firm name: "Hunters, agents for M. Saunders." The answer made by the agents to this question was true; but, although the agents were unaware of the fact, the appellant had suffered a loss by fire two or three years before, and had made a claim upon a fire insurance company in respect of the loss. It appeared that such company had paid a portion only of the loss, declining to pay the whole on the ground that the premises became unoccupied and so remained for a period of more than thirty consecutive days, but that afterwards the same company accepted a fire insurance proposal or proposals from the appellant. Condition 1 of the policy, headed "Misdescription," provided:—"1. If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the Company shall not be liable upon this policy so far as it relates

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to property affected by any such misdescription, misrepresentation, or omission."

By its defence the Company pleaded (*inter alia*) that the plaintiff warranted that the answers given in the proposal were true and correct, and that she had not withheld any information likely to affect the acceptance of the proposal, and that the defendant Company was induced to make the policy sued on by the plaintiff concealing from the Company facts known to the plaintiff but unknown, though material to be known, to the defendant Company, namely, the fact that the plaintiff had been a claimant on a fire insurance company in 1926, and the fact that the plaintiff had had property damaged or destroyed by fire in 1926.

Upon these facts the learned Judge ruled that the statement "not to agents' knowledge" was not an answer to the question in the proposal; that the question was therefore not answered within the meaning of the sentence at the foot of the declaration; that it must therefore "be taken as replied to in the negative"; that, a negative answer being contrary to fact, there had been a breach of warranty which relieved the respondent of liability. The learned Judge entered judgment for the Company without taking a verdict.

From that judgment the plaintiff appealed direct to the High Court.

Wilbur Ham K.C. (with him *F. Curran*), for the appellant. It cannot be said that this question was not answered. It was answered, though the answer may have been unsatisfactory (*Western Australian Insurance Co.* v. *Dayton* (1); *Newsholme Bros.* v. *Road Transport and General Insurance Co.* (2); *Montreal Assurance Co.* v. *McGillivray* (3); *Welford and Otter-Barry's Fire Insurance*, 2nd ed., pp. 155-156). The respondent is estopped from alleging that the non-disclosure of further facts was material, or that the answer given was untrue, or that the respondent issued a policy on the basis of a negative answer. The respondent cannot be heard to say that the answer is incomplete. The agent of a company has an implied authority to say to what extent the company requires the questions to be answered (*Dayton's Case* (4)). The respondent had the option of asking for or abstaining

(1) (1924) 35 C.L.R. 355.
(2) (1929) 2 K.B. 356.
(3) (1859) 13 Moo. P.C.C. 87, at p. 124: 15 E.R. 33, at p. 47.
(4) (1924) 35 C.L.R., at pp. 370, 376-377.

from asking for further information, and the answer cannot be construed as being an answer in the negative. As to condition 1 of the policy, everything which it requires has to be material; and it was not competent for the learned Judge to take the case away from the jury. The matter should have been left to the jury to determine whether the omission to disclose whether there had been a previous claim was material or not (*Porter* on *Insurance*, 6th ed., p. 177).

Robert Menzies K.C. (with him *T. W. Smith*), for the respondent. The reasons given by the learned Judge are correct. When the proponent signs a document containing a series of questions and answers and plainly intimating that any question not answered is to be read in the negative, then if the question is not answered a negative answer is to be read into the proposal. A failure to answer in such circumstances does not necessarily connote a blank opposite to the answer. Meaningless words opposite to the answer would not be an answer to the question, and the words put opposite to the question here cannot be construed as an answer. It is the proponent's information that is being sought. There was an express warranty that no claim had been made on a fire insurance company by the proponent, and there was evidence of a withholding of information likely to affect the acceptance of the proposal. The proponent, knowing of the previous claim, says that she has not withheld information likely to affect the acceptance of the proposal. The learned Judge was right in not leaving the matter to the jury (*Westbury* v. *Aberdein* (1)).

Wilbur Ham K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :— Nov. 30

RICH J. I have read the judgment of my brother *Dixon* and agree with it.

STARKE J. This was an action brought upon a policy of fire insurance, in which judgment was entered for the defendant Company. The policy contained the usual provisions that the insurance should

(1) (1837) 2 M. & W. 267 ; 150 E.R. 756.

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be subject to the particulars in the proposal for insurance, which it was stipulated should constitute the basis of the insurance and be incorporated in and form part of the policy. The particulars of the proposal were partly contained in the form of answers to questions put by the Insurance Company. One of those questions and answers was as follows:—Q. "Has proponent (or husband or wife of proponent) either individually or in conjunction with any other person or persons ever been a claimant on a fire insurance company or had property damaged or destroyed by fire? If so, give date of each and every fire, and of claim or claims made, situation of such property, and if insured name of company or companies on which claim was made and where." A. "Not to agents' knowledge." The proponent also made a declaration as follows: "I/We do hereby declare and warrant that the answers given above are in every respect true and correct, and I/we have not withheld any information likely to affect the acceptance of this proposal; and I/we agree that this proposal and declaration shall be the basis of the contract between the Company and myself/ourselves, and I/we agree that the person filling up this proposal form wholly or in part does so as my/our agent and not that of the Company, and further that neither facts within the knowledge of nor statements made to any agent of the Company shall be binding on the Company unless embodied in writing on this proposal form, and I/we further agree to accept the Company's policy subject to the terms and conditions contained therein. Any question not answered in this proposal will be taken as replied to in the negative." It was admitted that the plaintiff had previously had a fire, and had made a claim on a fire insurance company. The learned Judge who presided at the trial of the action held that the answer "Not to agents' knowledge" was no answer to the question. "The question is not," he said, "what knowledge the agents had or had not, but whether in fact the proponent had ever made a claim under a fire policy, or had ever had property damaged by fire, and to that question no answer was returned. Therefore, in pursuance of the direction at the foot of the proposal, the question, not being replied to, is to be taken as being replied to in the negative." The answer to the question is true so far as it goes, though it is an imperfect answer. But it is not an

irrelevant answer, for the material facts known to the agent only might well affect his principal. (Compare *Blackburn, Low & Co.* v. *Vigors* (1)). The learned trial Judge goes too far, I think, in asserting that a statement as to the agents' knowledge was no answer to the question. This assertion led to his next proposition, based on the terms of the proponent's declaration, that the question not being replied to is to be taken as replied to in the negative. The stipulation regarding unanswered questions was introduced, I suppose, to meet decisions to the effect that where upon the face of a proposal a question appears not to be answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer (see *Phœnix Life Insurance Co.* v. *Raddin* (2)). The problem, however, is somewhat different here. An imperfect or incomplete answer has been given to the question, and the respondent insists that it can, by reason of the stipulation, treat the question, so far as it was not answered, as replied to in the negative. That contention seems to me wrong, for two reasons : one, because on its proper construction the stipulation refers to a question not answered and not to an imperfect or incomplete answer ; the other, because the form of the answer and the circumstances in which it was made reasonably exclude any other answer than that actually given.

But this view does not dispose of the action. The pleadings raise other issues. One is the respondent Company's allegation that the appellant withheld from it information that was likely to affect the acceptance of the proposal. It will be remembered that one of the matters warranted by the appellant in her declaration was that she had not withheld any information likely to affect the acceptance of the proposal. In fact she had previously had a fire and made a claim under a policy, and this was not disclosed to the Company. It is an absolute duty at common law on the part of a person proposing assurance to disclose all facts within his knowledge material to the risk. "It is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known." But a warranty

(1) (1887) 12 App. Cas. 531.

(2) (1887) 120 U.S. 183.

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not to withhold any information involves, I think, a narrower obligation, namely, an obligation not to make a conscious omission —that is, not to omit to state any fact present to the mind of the insured. The fact of the previous fire and claim was within the knowledge of the appellant, but whether she withheld the information in the sense last mentioned is a fact upon which a jury must pass its verdict, as also is the question whether the information was likely to affect the acceptance of the proposal. Again, the Company has pleaded that the appellant concealed material facts from it, namely, the fire and the claim, which were within her knowledge. This issue has not been decided. It involves a consideration of the absolute duty of disclosure already mentioned, and of the question whether the facts that were concealed were material to the risk. The plea, involving as it does, matter of fact, must be put to a jury.

The result is that the judgment below should be set aside and a new trial ordered.

DIXON J. The policy of fire insurance upon which the appellant sued contained the usual proviso that the insurance should at all times and under all circumstances be subject to the particulars in the proposal for the insurance (which should in all cases be deemed to be inserted or furnished by the assured) and to the conditions and stipulations printed on the back of the policy, which proposal, conditions and stipulations constitute the basis of the insurance and are to be considered as relevant to and incorporated in and forming part of the policy. Her action failed because in the course of her own case facts appeared which, in the opinion of the learned Judge who presided at the trial, established a breach of the conditions to which the insurance was thus subject. He entered judgment for the respondent without obtaining a verdict. Because no verdict was taken the appellant has been able to appeal direct to this Court, whereas if a verdict had been returned, although under the direction of the Judge, she must have moved to set it aside in the Supreme Court (*The King* v. *Snow* (1); *Commonwealth* v. *Brisbane Milling Co.* (2)).

(1) (1915) 20 C.L.R. 315. (2) (1916) 21 C.L.R. 559.

The question was not raised before us whether, under the statutory provisions and rules regulating the trial of actions with a jury before the Supreme Court of Western Australia, the Court is authorized at the trial to enter a judgment which is not founded on a verdict. The appeal was confined to the question of substance whether the appellant had made out a case fit to be submitted to the jury.

The proposal for the insurance, an insurance against loss or damage of buildings by fire, was made for the appellant by a firm of estate agents who were also agents for the respondent. When the proposal was made, the appellant herself was in Tasmania, where she resided. The proposal contained a number of printed questions, opposite which the agents put replies. It concluded as follows:—"Declaration.—I/We do hereby declare and warrant that the answers given above are in every respect true and correct, and I/we have not withheld any information likely to affect the acceptance of this proposal; and I/we agree that this proposal and declaration shall be the basis of the contract between the Company and myself/ourselves, and I/we agree that the person filling up this proposal form wholly or in part does so as my/our agent and not that of the Company, and further that neither facts within the knowledge of nor statements made to any agent of the Company shall be binding on the Company unless embodied in writing on this proposal form, and I/we further agree to accept the Company's policy subject to the terms and conditions contained therein. Any question not answered in this proposal will be taken as replied to in the negative. Signature of proponent (or his or their authorized agent)." Here the agents signed their firm name adding the words "agents for M. Saunders." One of the questions asked was:—"Has proponent (or husband or wife of proponent) either individually or in conjunction with any other person or persons ever been a claimant on a fire insurance company or had property damaged or destroyed by fire? If so, give date of each and every fire, and of claim or claims made, situation of such property, and if insured name of company or companies on which claim was made and where?" Opposite this question the agents wrote "Not to agents' knowledge." This statement was true, but although the agents

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Dixon J.

were unaware of the fact, the appellant had suffered a loss by fire two or three years before, and had made a claim upon a fire insurance company in respect of the loss. It appeared that the company had paid a portion only of the loss, declining to pay the whole on the ground that the premises became unoccupied and so remained for a period of more than thirty consecutive days, but that afterwards the same company accepted a fire insurance proposal or proposals from the appellant. Upon these facts the learned Judge ruled: (a) that the statement "not to agents' knowledge" was not an answer to the question in the proposal; (*b*) that the question was therefore not answered within the meaning of the sentence at the foot of the "declaration"; (c) that it must therefore "be taken as replied to in the negative"; (*d*) that a negative answer being contrary to fact, there had been a breach of warranty which relieved the respondent of liability. I am unable to agree with the view that the question should be taken as answered in the negative. There can be no doubt of the inadequacy of the response written by the agents opposite the question, but so far as it went it was relevant to the inquiry. In effect it warned the insurers that the knowledge of the principal was not given and had not been ascertained by the agents actually making the proposal who answered the question according to their knowledge only. The proposal must be construed as a whole. The statement at the foot, that any question not answered in the proposal will be taken as replied to in the negative, reads rather as if it were addressed by the insurers to the proponent than by the proponent to the insurers; but whether it be regarded as a statement by insurers of the construction they will put upon a failure to answer their questions, or as a statement by the proponent of the meaning of his omission to answer, or it be interpreted as a consensual provision of an intended contract adopted by both parties as an expression of their common intention, proceeding no more from one than from the other of them, it yet remains a part only of an instrument the whole of which must be considered and construed together in order to ascertain the answer or statement upon the matters inquired after which the document expresses or might be fairly understood by the insurers to express. The words "any question not answered in this proposal" appear, primarily

at least, to be directed to cases where nothing is stated in response to a question. They do not say, although possibly they may mean, "in so far as a question is not answered in the affirmative." But if a proposal contains opposite a question a statement inconsistent with a negative reply, or an intention to give one, it seems difficult to treat that question as "not answered" within the meaning of a provision which implies a negative in default of an answer. In this case, I think, the response given clearly confines the negative answer to the knowledge of the agents. Accordingly I think the question ought not to be considered within the meaning of the phrase "any question not answered." But the result does not appear to me to depend only on the interpretation of this phrase and its application to the response given. Because, I think, no insurer who considered the reply given with the provision as to unanswered questions could reasonably understand the proposal as a whole as expressing a negative reply. The document appears to me clearly to imply a refusal to give a negative answer which is not confined to the agents' knowledge but is absolute. For these reasons, I do not think that the answer to the question should be taken to be a negative. The respondent, however, contends that the appellant's omission to inform it of the previous fire and claim involves a breach of the warranty expressed in the words of the "Declaration": "I have not withheld any information likely to affect the acceptance of this proposal." Upon the evidence, as it stood, it might have been found that the appellant, who had given only general directions for the insurance of her property, did not advert to the previous fire in connection with the insurance which was effected under her general instruction; the proposal for it being made on her behalf without her knowledge. The word "withheld" means more than "omitted to communicate." It means "refrained from disclosing," and would not be satisfied by an omission through failure to advert to the subject. Moreover, as the evidence stood, it would have been necessary to submit to the jury the question whether the previous fire and claim, if all the circumstances were stated, constituted "information likely to affect the acceptance of this proposal."

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Reliance was also placed upon the first of the conditions indorsed on the policy. But this condition does not include the omission to disclose facts unless they be material to be known for estimating the risk. The issue of materiality is one of fact, and I do not think it could, upon the circumstances appearing in evidence, be withdrawn from the jury. See *Anglo-American Fire Insurance Co.* v. *Hendry* (1). For this reason also the respondent's contention that non-disclosure was established avoiding the policy at common law must fail.

The appeal should be allowed and a new trial ordered.

EVATT J. The appellant, Mrs. Marguerita Saunders, was the owner of a hostel at Kalamunda, Western Australia, and dwelt there until January 1928. She then went to reside in Tasmania. In October 1929 she instructed a Perth firm of estate agents called Hunters to insure the hostel against fire. Hunters had been collecting her rents. They were also "agents" for the respondent Company, which, no doubt, means that they sought and obtained policy business for the Company. As soon as they received Mrs. Saunders' letter, they obtained an interim cover note dated October 7, 1929.

The respondent's inspector went to Kalamunda in order to look over the property. On December 7, 1929, an employee of the insurance Company brought to Hunters a proposal form. It was already filled up, except that certain questions asked in the form were not answered. Christopher Hunter then completed the form. He gave answers to two questions, one relating to Mrs. Saunders' tenure of the property, and the other to the existence of mortgages or incumbrances. Hunter also supplied the name of the E. S. & A. Bank, Perth, as a referee.

The respondent's employee then asked Hunter about the questions in the printed form, as to past refusals to insure properties in which the proponent was interested, and as to whether the proponent had "ever" made any claims on fire insurance companies. Hunter said that he did not know of any proposals refused or fire claims made; and the respondent's clerk then wrote the following words in the space provided on the form for answering the two questions: "Not to agents' knowledge." The clerk added that if the Company

(1) (1913) 48 S.C.R. (Can.) 577.

was not satisfied they would write to the appellant herself. Hunter then signed the proposal as "agents for M. Saunders," paid a premium of £7 12s. 6d., and, shortly after, received the formal policy of insurance, covering the period of twelve months from October 7, 1929, the date of the cover note. No further inquiry was directed either to Mrs. Saunders or Hunters before the issue of the policy.

During the currency of the policy, part of the property insured was destroyed by fire, and damage to the extent of £750 was sustained by the appellant. When the appellant made her claim to be indemnified, the respondent ascertained that, some years before the issue of the present policy, Mrs. Saunders had made a claim upon a fire insurance company, after certain property had been destroyed by fire.

The respondent has relied upon three defences to the action:—

1. It was stipulated in the policy that the proposal should be the basis of the insurance, and in the proposal it was declared on Mrs. Saunders' behalf, first, that the answers "given above" to the questions were "in every respect true and correct," and, secondly, that "any question not answered . . . will be taken as replied to in the negative." It is said that the question relating to previous fire claims was "not answered," that it is therefore to be taken as answered "No," and that such answer was untrue.

In my opinion this defence fails. The answer "Not to agents' knowledge" was true in fact. The question asked was answered to the best of Mr. Hunter's belief. The answer given was not full or complete, because Mrs. Saunders' personal knowledge was not stated. If a business man was himself filling in such a form, and was unaware of the fact that, fifty years earlier, he had made some fire claim, he could not safely answer "No" to the question. But an answer "I do not remember any" would be a statement of the truth, and would also be an answer to the question. In different circumstances a proponent or his agent might say:—"I do not know; my insurance broker A.B. does"; "I know of one only" (setting it out); "but there may be more"; "I am answering as agent only, and from my own knowledge: my principal is abroad. Refer to him. I know of no previous claim by him."

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The last reply instanced is substantially that made by Hunters to the respondent. It is not possible to say that the question asked was "not answered," and that it must be assumed, contrary to the fact, that a mere "No" was the answer given.

2. It is also contended that the declaration made by the agent in the proposal form warranted that "I/we have not withheld any information likely to affect the acceptance of this proposal," and that all information as to the fact of the previous claim was withheld from the insurance Company.

It is important to note that the printing at the foot of the proposal form contemplates that not only a proponent himself, but also his authorized agent may sign the declaration. It may possibly be questioned whether the declaration as to the withholding of information is intended to apply further than to the actions of the authorized agent. This is a pure question of construction of the form used, and does not affect the general duty of the proponent himself to act with the utmost good faith. I will assume, however, that the opinion to which I incline is correct, and that the present appellant must fail in her action if the fact was that either she or her agent had "withheld any information likely to affect the acceptance of this proposal."

The promise was not that all information had been disclosed, but that information had not been kept back. The word "withheld" points to some active suppression of facts on the part of the persons in question, rather than to a mere failure to state such facts. Breach of the condition would be proved if it were shown that at or about the time of the inquiries and proposal Mrs. Saunders remembered the fact of a previous claim in relation to the new proposal for insurance, and did not inform the Company of the fact. But there is no evidence that either she or Hunter "withheld" such information.

Was the information in question "likely to affect the acceptance" of the proposal? That raises an issue of fact. It cannot be affirmed as a matter of necessary legal inference that the fact of one previous claim by a proponent upon a fire insurance company is, of itself, "likely to affect" the decision of every fire company to issue a policy. It is more than possible that some insurance companies

obtain the answers to questions relating to past transactions of a proponent with other insurance companies, not for determining the risk involved in accepting the proposal, but in order to provide some technical defence in case of fire. None the less, it is a fact strongly in favour of an insurance company's contention that a subject is material that a question upon the subject is asked in the proposal form (*Glicksman* v. *Lancashire and General Assurance Co.* (1)). But it is not necessarily conclusive.

The matter depends to a large extent upon the business practice of the particular insurance company. What considerations influenced it in assuming fire risks ? Would the disclosure of the information have affected its decision ? To what extent, if at all, did it pay attention to the personal or " moral " hazard ? Was the matter not disclosed remote or proximate in point of time ?

In the present case the Company accepted the proposal made although the answer given to the question relating to the very subject matter of prior fire claims was inadequately answered. A tribunal of fact paying due regard to the failure of the Company to make any further inquiry as to previous claims, and to its concentration upon the " material " hazard—as is shown by the report on the back of the proposal form—might reasonably conclude that it was not at all concerned with the " respectability and solvency " of the appellant.

It follows that it is a question for the jury to determine whether the information not disclosed to the respondent was " likely to affect " the acceptance of the proposal made.

3. It is also said that condition 1 indorsed on the policy, itself enables the respondent to escape liability, because there has been an omission to state facts " material to be known for estimating the risk," and the two facts of a previous fire and a previous claim come within the phrase quoted.

Condition 1 is headed " Misdescription," and reads as follows :— " If there be any material misdescription of any of the property hereby insured, or of any building or place in which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the Company shall not be liable upon this policy so far as it relates

(1) (1927) A.C. 199.

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to property affected by such misdescription, misrepresentation, or omission."

I do not think that this condition was intended to be the expression of the general duty of the assured to disclose all facts material to be known by an insurer. In application the condition is addressed to any misdescription of the property insured, or of the place where it is contained, or misrepresentations as to or omissions to state material facts concerning all or part of the property insured. Clause 1 does not deal with the non-disclosure of facts which are unrelated to the actual property insured, or its situation, and which merely concern the past "insurance history" of the person insured.

Even if clause 1 did apply to the present case, a question of fact would remain whether the information was "material to be known for estimating the risk." In all the circumstances, a jury might well conclude that the information not given did not possess the necessary quality of materiality.

The appeal should be allowed, and the matter remitted for retrial before a jury.

McTIERNAN J. I agree.

Appeal allowed with costs. New trial ordered. Costs of first trial to be costs in the cause.

Solicitor for the appellant, *Fred Curran.*

Solicitor for the respondent, *J. F. McMillan*

H. D. W.