

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA NO. S 781 of 1999

BETWEEN

MARYSIA PEREIRA

Plaintiff

AND

BRITISH AMERICAN INSURANCE COMPANY (TRINIDAD) LTD

Defendant

Before the Honourable Madam Justice A. Tiwary-Reddy

Appearances:

K. Ratiram for the Plaintiff

J. Walker instructed by Ms. Jagessar for the Defendant

JUDGMENT

The Plaintiff is one of the two Legal Personal Representatives of the estate of her father, Lennox Ventour (the deceased) who died by drowning on 7.6.96 at age 44. The Plaintiff's claim is for the sum of \$200,000.00 being the amount due under a policy of insurance with the Defendant on the deceased's life. The Defendant contends that at the material time no valid policy of insurance was in effect since the deceased had not fulfilled certain medical requirements.

The Plaintiff gave evidence on her behalf while Geraldine Ramdoo and Sharon Noel testified for the Defendant. An agreed bundle of 18 documents was tendered by consent. The parties also agreed on the following issues.

1. Was there a contract between the parties?
2. If so, what were its terms?
3. Is this contract binding on the Defendant?

The Plaintiff testified that in January 1996 the deceased had told her that anytime he closed his eyes she would be well taken care of because she was the beneficiary under three life insurances policies which he had taken out with the Defendant, through its agent Lythe Dattoo (Dattoo).

In January 1996 the deceased had been employed as a long-shoreman with the Port Authority and Dattoo was then a co-worker. It is to be noted that Dattoo is no longer an agent of the Defendant and did not give evidence at the trial. Further no explanation was given for his failure to testify. After the deceased died, the Plaintiff discovered three completed Salary Deduction Authorisation forms signed by the deceased and dated 10.1.96, 12.1.96 and 30.1.96 authorising monthly deductions of \$138.48, \$29.00 and \$29.00 respectively from the deceased's salary in favour of the Defendant. These amounts represented premiums payable under the said three policies of insurance.

Of the three policies, two were for \$10,000.00 each while the third one was for \$100,000.00. These policies also provided for payment of double the amount in the event of the accidental death of the deceased.

In August, 1996 the Defendant paid the Plaintiff two sums of \$10,000.00 in respect of the two \$10,000.00 policies and paid the accident benefit of \$20,000.00 being \$10,000.00 x 2 in April, 1997. The Defendant refused to pay the sum of \$100,000.00 in respect of the third policy and the Plaintiff sought assistance from the Trinidad Insurance Claims Bureau. On 4.1.99 the Defendant issued a cheque for \$542.68 in favour of the Plaintiff representing a refund of premiums paid through salary deductions with the notation - "Application Never Submitted Re: L. Ventour". The Plaintiff's attorney returned this cheque to the Defendant.

Sharon Noel, was the manager of the Defendant's Service Department. Her duties included servicing clients to whom policies were issued and keeping track of policies issued via a Policy Register. The information in the Register was stored in a binder. Ms. Noel testified that a search of the said binder revealed that the Defendant had issued two policies to the deceased in the amount of \$10,000.00 each in January, 1996 and no other policies. Ms Noel further explained that by "issue" she meant that the applicant had fulfilled all the requirements for a policy to be issued to him or her.

Geraldine Ramdoo was the manager of the Defendant's Home Office located at the corner of 5th Street and Jogie Road in Barataria. Ms. Ramdoo had been employed in the Defendant's Underwriting Policy Issues Department for more than 15 years and had been the manager since 2002. Ms. Ramdoo testified that the Defendant offered, inter alia, different types of life insurance including a universal life policy of insurance and explained the Defendant's procedure for issuing a policy. All the Defendant's field agents are required to undergo a period of training and are given copies of the Defendant's guide-lines including the Automatic Underwriting Requirements before he or she goes out and starts selling insurance.

In January, 1996 Dattoo was attached to the H. Rudolfo agency at Arima. The normal procedure is that the agent will sit with the client, ask the questions listed in the application form and the agent will enter the client's answers on the form. On completion the client will read over the answers and sign the form. The agent then submits the form to the agency manager who will review same and transmit it to the Defendant's Home Office. On receipt at the Home Office, the Defendant's control clerk will stamp the application on the date it is received and review the form to see if the routine requirements are met. At the time of the deceased's application, the Automatic Underwriting Requirements for a male applicant aged 36 to 45 for a universal life policy in the sum of \$100,000.00 were a full medical and urinalysis reports. These requirements are set out in the Defendant's guide-lines.

The agent who completes the application must notify the applicant that he must undergo a full medical examination and urinalysis before his application can be considered. The agent must make an appointment with one of the Defendant's doctors for the applicant to submit to a medical examination and a urinalysis. The Defendant's procedure is for the agency manager to sign an invoice authorising the medical examination. The agent may give the invoice to the client to take to the doctor or he may take it with him when he accompanies the client to the doctor. The medical report is completed by a doctor who confirms the applicant's medical history and helps the Defendant's underwriter assess the applicant's risk. This report is relevant to determine whether the applicant can be accepted as a standard risk or not accepted at all or whether a counter-offer should be made.

Ms. Ramdoo further testified that she was aware that the Defendant had received an application from the deceased for universal life coverage in the sum of \$100,000.00 but that the application had been returned to the H. Rudolfo Agency together with a Request for Correction dated 1.2.96 highlighting "Full Medical/Urinalysis not attached" and "Medical Authorization Form (invoice) not attached". Ms. Ramdoo did not know whether Dattoo ever made an appointment for the deceased to see the Defendant's doctor or whether an invoice was ever issued by the H. Rudolfo Agency for the deceased to undergo a medical examination. No written communication was sent by the Defendant to the deceased informing him that the medical reports were outstanding. Further, Ms. Ramdoo did not know whether Dattoo or the H. Rudolfo Agency ever informed the deceased that these reports were outstanding.

According to Ms. Ramdoo, since the requirements for a full medical and urinalysis were never satisfied, the application was never processed and no policy was ever issued to the deceased. In the interim the premiums received in respect of this application were paid into a suspense account. The Defendant was unable to locate the deceased's completed application form but

tendered a copy of its standard application form. Ms. Ramdoo accepted that there is nothing on the application form which states that an applicant is required to undergo a medical examination.

Paragraph 3 of Clause 3 on page 4 of the said standard application form states:

“3. DECLARATIONS AND AUTHORIZATIONS ...

It is further agreed that unless otherwise provided by a receipt which has been issued in connection with this application, the said policy shall only take effect if: (1) it is delivered to the applicant and the first premium paid in full to the company and (2) there has been no material change in the health or insurability of the Life or Lives Proposed subsequent to the completion of this application.”

It is not disputed that no policy was ever delivered to the deceased. Further the Defendant has admitted that the deceased had paid a total of \$542.68 being the monthly premium of \$138.48 for at least four months. There has been no suggestion of any material change in the health or insurability of the deceased’s life.

The Defendant’s standard form of Conditional Receipt which was tendered in evidence, states, inter alia:

“CONDITIONAL RECEIPT”

Received from _____ on _____ the
sum _____ of
\$ _____

Being a deposit in connection with an application for insurance, on plan number _____ in the amount of _____ on the life of _____ the life proposed subject to the provisions and conditions below, the Company agrees to provide, from the date of this receipt (or the requested issue date, if later), insurance on the Life Proposed under the terms of the policy applied for in the same manner and subject to the same provisions and conditions as if the

policy applied for had been issued and delivered on such date.

Provisions and conditions

This receipt is void if:

- a. ...
 - b. ...
2. **The insurance provided by this receipt will not take effect in any of the following cases:**
- a) **The deposit is less than one-sixth of the annual premium for the policy applied for, or**
 - b) **...**
 - c) **The Life Proposed is not an insurable risk on standard terms according to the Company's general practice, or**
 - d) **The Life Proposed commits suicide, whether sane or insane, or no policy is issued (in which cases the deposit will be refunded).**
3. **The insurance provided by this receipt will terminate after 60 days from the date of the receipt, or when the policy applied for becomes effective, whichever shall first occur.**
4. **...**
5. **No agent of the Company has the authority to alter the terms and conditions of this receipt.**

Signed on _____ at

Signature of Agent"

The Conditional Receipt provided that the insurance will not take effect if the Life Proposed is not an insurable risk on standard terms according to the Company's general practice or where no policy is issued. It must be noted that there is no evidence before this Court that such a receipt was issued to the deceased. In any event since the deceased paid monthly premiums for at least four months he satisfied the requirement of having paid at least one-sixth of

the annual premium. However, Ms. Ramdoo maintained that since the deceased had failed to provide the requisite medical information, the Defendant was never in a position to determine whether the deceased was an insurable risk according to the Defendant's general practice.

No explanation was offered for the failure of Dattoo or a representative of the H. Rudolfo agency to testify. Neither was any evidence led as to whether the deceased was notified by Dattoo or the H. Rudolfo agency that his medical information was outstanding. The Defendant has been unable to say what became of the deceased's completed application form. However, the Defendant has accepted that it received the completed application form from the H. Rudolfo Agency and maintained that the said form was returned to the said agency for the medical requirements to be fulfilled.

Submissions

The Plaintiff maintains that a contract was concluded because the deceased signed the completed application form and authorised monthly premium deductions of \$138.48 from his salary to be paid to the Defendant. Further such deductions were made continuously from January 1996 until his death in early June, 1996 and prior thereto, neither the Defendant nor its agents had advised the deceased that his medical information was outstanding. In effect the Plaintiff had made an offer which the Defendant had accepted by receiving the monthly premium deductions.

The Defendant insists that no contract was concluded because of the deceased's failure to provide the requisite medical reports. Since this was one of the Defendant's Automatic Underwriting Requirements for a Universal Life Policy in respect of an applicant of the deceased's age, the deceased had failed to satisfy this condition and accordingly no contract was concluded.

Was There a Concluded Contract?

In order that a binding contract of insurance shall be concluded, there must be agreement between insurers and assured as to the terms of the insurance. In non-marine business it is usual for an offer to be made by the proposer who completes a proposal form and sends it to the insurers for their consideration and acceptance. An acceptance will be of no effect in law unless the parties have agreed upon every material term of the contract they wish to make. The material terms of a contract of insurance are: the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. There must either be an express agreement on all these terms or the circumstances must be such as to admit of a reasonable inference that the parties were tacitly agreed - **Paragraphs 2-1 and 2-2 of Macgillivray on Insurance Law – 10th Edn.**

In the instant case Dattoo solicited an offer from the deceased and submitted same to the Defendant. It is not disputed that the deceased had applied for a Universal Life Policy, which is, the risk to be covered. The duration of the insurance cover was for the term of the deceased's life. The amount and mode of payment of the premium can be elicited from the Salary Deduction Authorisation Form dated 10.1.96 authorising the deduction of the sum of \$138.48 monthly from the deceased's salary and transmission of same to the Defendant. The amount to be paid in the event of the deceased's death was \$100,000.00 with payment of a further sum of \$100,000.00 in the event of the deceased dying by accident.

Of the three salary deduction forms signed by the deceased in January, 1996 two were for \$29.00 monthly in respect of two separate policies while the third one was for \$138.48 monthly. The Plaintiff tendered only one of the deceased's payslips i.e. for the week ending 9.6.96 which showed a deduction of two sums (\$34.62 and \$7.25) in favour of the Defendant.

I have noted that a weekly deduction of \$7.25 over four weeks amounts to \$29.00 while a weekly deductions of \$34.62 over four weeks is equivalent to \$138.48 i.e. the amount of the monthly premium in the salary authorisation deduction form signed by the deceased on 10.1.96. Further on 4.1.99 the Defendant had issued a refund cheque in the sum of \$542.68 in favour of the Plaintiff but failed to give particulars of how it had arrived at this figure. I have also noted that $\$542.68 \div \34.62 is almost 16. It follows that according to the Defendant the deceased paid approximately 16 weekly amounts of \$34.62 from 10.1.96 to 7.6.96.

Both in its Defence and at the trial the Defendant admitted that in 1996-1997 it had paid the Plaintiff two sums of \$20,000.00 in respect of the two whole life policies and never alleged any short-fall in the payment of premiums in respect of these two policies. In its Defence the Defendant averred that the deceased had applied for these two policies on or around January 11, 1996 and January 28, 1996 and had applied for the universal life policy in the sum of \$100,000.00 on January 12, 1996. However the Defendant produced no documentary evidence to support these contentions but cross-examined the Plaintiff on the Port Authority's Complete Deduction Listing in respect of the week ending 9.6.96 which showed only one deduction of \$7.25 and another of \$34.62. Further, the Defendant gave no evidence of the actual deductions made from the deceased's salary and received by the Defendant during the period January to June, 1996.

It cannot be disputed that the premiums in respect of the \$10,000.00 policies would be less than that for the \$100,000.00 policy. It is to be noted that \$100,000.00 is ten times \$10,000.00 while \$138.48 is almost five times \$29.00. Having reviewed the documentation as well as the oral evidence of the witnesses I find that the monthly premium for each of the \$10,000.00 policies was \$29.00 while the monthly premium for the universal life policy in the sum of \$100,000.00 was \$138.48. I find further that the deceased applied

for the universal life policy on 10.1.96 and for the two whole life policies on 12.1.96 and 30.1.96.

Plaintiff's Evidence

The only person who could support the Plaintiff's case is the deceased who is now dead. Therefore the Plaintiff had to rely on what the deceased had told her about his dealings with the Defendant and on whatever documents she was able to retrieve after the deceased's death. It is to be noted that the Plaintiff produced only the deceased's last weekly payslip ending 9.6.96 while the deceased died on 7.6.96.

Since the deceased had told the Plaintiff that she would be well taken care of when the deceased died, because she was the beneficiary under his three life insurance policies with the Defendant, it seems that the deceased was of the view that he had concluded the three contracts of insurance with the Defendant.

Defendant's Evidence

During the course of Ms. Ramdoo's evidence she referred to a Production Report and stated:

“I became aware of Ventour's application for \$100,000.00 universal life insurance when I received a lawyer's letter about the \$100,000.00 insurance. I was able to identify that such an application came into our company from a production report. This is a new business report whereby all applications coming from an agency are listed in that report. It will have the sum assured noted on that form. A copy of that production report was submitted to our lawyers”.

The Defendant's counsel informed the court that he had only received this report the day before and the Plaintiff's counsel stated that he needed to look

at the document. However the said document was never tendered into evidence.

The Defendant is an insurance company which has been in business for a number of years. Ms. Ramdoo had been employed at the Defendant's Underwriting Department for at least 15 years. Surely the Defendant should have particulars of all its dealings with the deceased, including copies of all his completed applications and of all monies paid to the Defendant. It is significant that none of the completed applications nor details of the premiums which the Defendant had received from the deceased were produced by the Defendant. It is also to be noted that the deceased died on 7.6.96 and the Trinidad Claims Bureau wrote to the Defendant on 26.9.96, that is, within four months. It follows that the Defendant had notice of the Plaintiff's intended claim shortly after the deceased's death and should have taken steps to locate and secure the relevant records.

At the hearing of the summons for directions on 4.12.00 before the Assistant Registrar Mr. Mohammed, it was recorded that the Defendant proposed to call three witnesses at the trial including the insurance agent and the Arima agency manager. Neither of these witnesses gave evidence at the trial. With respect to Dattoo, Ms. Ramdoo's evidence was:

“The field agent is responsible for following up and getting the routine requirements fulfilled. The field agent for L. Ventour was Mr. Lythe Dattoo. He is not still employed with the Defendant. I don't know when Dattoo ceased working for the Defendant ...”

Ms. Ramdoo also testified that the deceased's application for the universal life policy was returned to the H. Rudolfo Agency in Arima **“so that they can complete the routine requirements necessary”**.

Again the Defendant failed to call the Agency manager or any representative of this agency to give evidence. Neither did the Defendant offer any explanation for its failure to do so. It must also be noted that Ms. Ramdoo's evidence was that the normal procedure for having an applicant fulfil the medical requirements was that the agent would inform the applicant of the requirement of a medical examination and would make an appointment with one of the Defendant's doctors for the applicant to see the particular doctor. Further the agency manager would sign an invoice authorising the medical examination. The agent may either give the invoice to the applicant to take to the doctor or he may take it with him when he accompanies the applicant to the doctor.

In this case the Plaintiff was not in a position to say whether the deceased was ever notified of the need for a medical examination, whether any such appointment was made or whether an invoice was ever issued. In this regard the evidence of the agent Dattoo and of the agency manager was vital.

In **Wisniewski v Central Manchester Health Authority (1998) 7 PIQR (Personal Injuries and Quantum Reports) 324 the Court of Appeal of England** held that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

This was a claim for damages for clinical negligence in which it was alleged that a hospital, and in particular a named doctor, had negligently failed to monitor the blood/oxygen of a foetus during labour. The Defendant health authority put in two unsatisfactory statements from the doctor, and then applied to adduce his evidence under the Civil Evidence Act on the basis that he was now in Australia. Both the trial judge and the Court of Appeal were critical of the doctor's position; there was clearly a case to answer, his statements were equivocal as they stood; no adequate explanation had been given for his failure to attend or to give evidence by some other means. It was

held by the Court of Appeal that in such circumstances it was appropriate to draw adverse inferences against the party who failed to adduce oral evidence from a key witness. After reviewing the relevant authorities **Brooke LJ** said at p 340 –

“From this line of authority I derive the following principles in the context of the present case

- 1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.**
- 2. If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.**
- 3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue.**
- 4. If the reason for the witness’s absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly**

satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

Can this Court draw Adverse Inferences?

I move next to apply the above principles to the facts of the instant case. In order to draw adverse inferences from the absence of either of two witnesses (Dattoo or Rudolfo) who were expected to have material evidence on the issue of the medical requirements, the Plaintiff must have presented a case to answer on the issue of the contract of insurance.

I find that the Plaintiff has established agreement between the deceased and the Defendant on three of the four principal terms of the contract i.e. the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. With respect to the fourth principal term i.e. the definition of the risk to be covered, the Plaintiff contends that she has also established agreement on this term i.e. a universal life policy since it was the Defendant’s agent who had completed the deceased’s application for such a policy. However the Defendant maintains that it was never able to assess the risk because the deceased never provided his medical and urinalysis reports while the Plaintiff contends that the Defendant failed to inform the deceased of these medical requirements and therefore the deceased cannot be bound by this condition.

I find that the Plaintiff has made out a case to answer on the issue of whether the contract was concluded. I find further that the Defendant might reasonably have been expected to call these persons (Dattoo and Rudolfo) as witnesses. In fact the Defendant gave notice of its intention to do so at the hearing of the summons for directions. No explanation was given by the Defendant for its failure to call these persons. Even though Dattoo is no longer one of the Defendant’s field agents, there is no evidence that he or the manager of the agency was unavailable. In any event, no sub-poenas were

issued to these persons either to produce documents or to testify. And the Defendant has advanced no explanation for not calling these witnesses or for not taking steps to secure their attendance at the trial. At the trial Counsel for the Defendant informed the court simply that attempts were made to have Dattoo testify but that these attempts were unsuccessful. Counsel made no mention of efforts to have H. Rudolfo or a representative of the H. Rudolfo agency testify

I find that the Defendant failed to call either Dattoo or the Manager or a representative of the H. Rudolfo agency for tactical reasons and in order to avoid them being cross-examined. In these circumstances, this Court draws, as it is entitled to do, adverse inferences from the absence and silence of the said two witnesses, especially Dattoo. Dattoo should have testified as to whether or not he had informed the deceased of the requirement to submit to a medical examination and a urinalysis before the Defendant would be able to assess the risk or whether he ever made any appointment with the Defendant's doctor to see the deceased and the deceased's responses thereto. The representative of the H. Rudolfo agency should have been able to produce or account for the deceased's completed application form and/or the invoice issued to the doctor for the deceased's medical examination. This representative should also have been able to give evidence of the steps he/she took to notify the deceased of the outstanding medical requirements upon receipt of the Request for Correction Form (Document 7) from the Defendant's Head Office.

In the result, the Defendant has failed to adduce oral and/or documentary evidence from two key witnesses. Having drawn such adverse inferences against the Defendant, the evidence of the Plaintiff is strengthened and I find that the Plaintiff has established a concluded contract of insurance between the deceased and the Defendant for a Universal Life Policy in the sum of \$100,000.00 with a further sum of \$100,000.00 payable in the event of the deceased dying by accident. In this case the deceased died by drowning at the

port of Port of Spain. I find further that this contract of insurance is binding on the Defendant.

DECISION

Accordingly there will be judgment for the Plaintiff on her claim and I make the following orders:

- (1) The Defendant do pay to the Plaintiff the sum of \$200,000.00.
- (2) The Defendant do pay the Plaintiff's costs of this action.
- (3) Stay of execution for 21 days.

Dated this 14th day of October, 2004.

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Amrika Tiwary-Reddy
Judge