

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS6/2015

[2017] SCSC 76

PROGRESS INSURANCE BROKER (PTY) LIMITED
(Represented by one of its Directors Robert David)

APPELLANT

Versus

MARIE ANGE FERLEY
Mont Buxton, Mahe

RESPONDENT

Heard: 30 November 2016
Counsel: Mr Elvis Chetty for the Appellant
Mr Guy Ferley for the Respondent
Delivered: 2 February 2017

JUDGMENT

McKee J

- [1] This is an Appeal against the Decision of a Magistrate exercising her civil jurisdiction. I have considered the Notes of evidence, the judgment of the Magistrate, the grounds of appeal and the closing written submissions.
- [2] In coming to her judgment the Magistrate analysed the evidence, as she saw it, and set out her conclusions and findings in the second paragraph of page three on her judgment and then proceeded to consider *quantum*.

- [3] It is to this second paragraph that I direct my attention. The Magistrate simply stated that the Plaintiff [now the Respondent] had proved her case on the balance of probabilities but, in my view, she did not set out her reasoning in full for finding that the Appellant was at fault or had been negligent. The Respondent had addressed this issue in the Particulars of Faute/Negligence in the Plaint. The allegations of fault were that the insurance cover was not changed from fire to comprehensive as agreed between the Appellant and Respondent, that the Respondent had not been fully advised as to the different terms of the two types of policy and that the Appellant had failed to give general insurance advice.
- [4] I found it necessary to consider the evidence. Fire insurance was arranged in March 2010 since the house was in the course of construction, with windows and doors still to be installed. One year later in March 2011 the policy came up for renewal and there was a discussion between Robert David, a Director of the Appellant Company [hereinafter referred to as "Mr David"], and the Respondent. As a result, the insurance cover was extended from "fire only" to comprehensive risks. All would have been well but for damage to the house as a result of a burglary on 27th May 2011 which was followed in October 2011 by further damage from a tree falling and damaging the house. When the claim under the comprehensive cover was made in May 2011, the assessors from the Insurance Company SACOS visited the property with Mr David and found the house was incomplete and unoccupied and refused the claim since the pre-conditions of completion and occupation had not been fulfilled.
- [5] There was conflicting evidence between Mr David and the Respondent as to the precise content of the conversation which took place prior to the policy being changed from "fire only" to "comprehensive". The Respondent's evidence was that, at that time, Mr David had not advised her that a material condition of comprehensive insurance was the actual occupation of the house. In cross-examination she adjusted this and said that it was possible that the Mr David had told her about the need for occupation but that she did not think so. Mr David 's evidence was clear on the point and was that he had advised the Respondent that when the house was complete and someone was in residence the insurance cover could be amended to comprehensive cover. Mr David stated that on the

renewal date in March 2011 he was advised by the Respondent that the windows and doors had been installed, the house painted and the supply of electricity and water had been connected. He thus formed the opinion that the house was completed and that actual occupation would soon occur. He arranged comprehensive cover and the Respondent put him in funds to pay the premium, which he did.

[6] There the matter rested until the claim in May 2011 for damage resulting from the burglary. An inspection of the house disclosed that the house was still incomplete and remained unoccupied. As a result the claim for damage resulting from the burglary, a comprehensive risk, was refused. A later claim in October 2011 following impact damage from a tree-fall was also refused presumably because the house had remained unoccupied or since the contentious issue had not been resolved. The refusal of the insurance company to consider the original claim led to the action against the Appellant, the insurance broker, in the magistrates court. The Respondent alleged negligence on the part of the Appellant and succeeded in her claim. This judgment from the Magistrates Court is now appealed.

[7] FINDINGS.

[8] This is a civil case and hence the burden of proof is on the balance of probabilities and not on the higher criminal standard of beyond reasonable doubt. I find that the reasons given for the decision in the lower court were unsatisfactory and unclear and I have to reconsider the whole matter.

[9] The house was uncompleted and unoccupied when the claim was made for damage resulting from burglary which occurred in May 2011 even although it had been insured against comprehensive risks. The essential pre-condition of completion and occupation had not been fulfilled and hence the claim was refused.

[10] In order to determine the true condition of the house as at the time of the renewal of the policy in March 2011 I look to the evidence of Mr David and the Respondent. The Respondent stated that she had not been told by Mr Davis that it was an essential condition of comprehensive insurance that the house was occupied although she later

qualified this by stating that he may have told her but she did not think so. The evidence of Mr Davis evidence was to the contrary. He stated that he had advised her of the pre-condition of occupation before comprehensive cover was appropriate. He stated that in March 2011 the Respondent told him that she had put in the windows and doors, painted the house and connected the electricity and water. He had then effected comprehensive cover.

[11] In my opinion there are two matters which require consideration:

[12] [1] During the period when Mr David had been advising the Respondent on insurance matters, had he advised her that comprehensive insurance cover could only be taken out on completion **and after actual occupation**, and,

[13] [2] Was he in error in proceeding to instruct comprehensive cover after he had been advised that the doors and windows had been installed, the house painted and the services for electricity and water connected and had thus formed the view that the house would soon be occupied?

[14] Point 1 above.

[15] I accept that Mr David has some sixteen years' experience in the insurance business. The evidence of Mr David was firm in this respect. The evidence of the Respondent was qualified, uncertain and unclear. I find on the balance of probabilities that Mr David, being an experience professional, did advise the Respondent during discussions that comprehensive cover could only be instructed and effective following actual completion and occupation of the house.

[16] Point 2 above.

[17] The policy of insurance would have become due for renewal for a period of twelve months from March 2011. Having been advised that the finishing work to the house had been completed and the utility services connected I find that it was reasonable for Mr David to form the view that occupation would soon follow even although a precise date had not been given to him. I find that it was a prudent business decision for Mr Davis to

proceed to arrange comprehensive insurance in order to protect his client against a full portfolio of risks from the date of renewal. The Respondent was put in funds by the Respondent and paid the increased premium for comprehensive cover. I can infer from this that the Respondent was fully aware of the insurance position. The Respondent could have advised Mr David later of any unforeseen circumstances and the insurance cover and premium could have been duly adjusted. She did not do so.

[18] In order to succeed in her claim the Respondent has to show that the actions and behaviour of Mr David, and hence the Appellant vicariously, fell below the standard of expertise and care expected of a prudent and diligent insurance broker. In my opinion she failed to do so. I find that she failed to show in what manner the actions of the Appellant had fallen below the required standard. She failed to show in what way the Appellant had been negligent. Looking at all the circumstances of this case I find that no fault or negligence attaches to the Appellant in connection with advice given and actions taken on behalf of the Respondent in respect of insurance matters relating to the house in question.

[19] ACCORDINGLY, the Appeal is upheld and with costs.

Signed, dated and delivered at Ile du Port on 2 February 2017

C McKee
Judge of the Supreme Court