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CON-STAN INDUSTRIES OF AUSTRALIA V NORWICH WINTERTHUR (AUST) LIMITED [1986] 64 ALR 481

High Court of Australia – 11 April 1986

FACTS

Con-Stan Industries of Australia Pty Ltd (Con-Stan) engaged an insurance broker to select insurance for various risks. Norwich was selected by the broker as the appropriate insurer. Norwich agreed to insure Con-Stan.

Con-Stan paid insurance premiums to the broker who did not pay them to Norwich. The broker then went into liquidation and Norwich sued Con-Stan for the unpaid premiums.

Con-Stan argued that there was an implied term in the insurance contract that it was only required to pay the premiums to the broker, and that paying the broker discharged the debt for the insurance premiums.

ISSUES

Did the usual business custom for the payment of insurance premiums imply that there would be a contractual term that brokers were liable for the payment of the premiums to the insurer?

Did business efficacy imply a term in the contract that the payment of premiums was to be made by brokers and not the insured?

FINDING

There was no implied term in the contract, arising by virtue of custom or usage in the insurance industry, that the broker alone was liable for payment of premiums or that payment of the premiums to a broker discharged the insured's obligation to the insurer. The custom relied on was not so well known and accepted by everyone making insurance contracts. There was no implied term to satisfy business efficacy as the alleged implied term was not obvious to the parties and it was not clear that both parties would have accepted that the implied term should be included in the contract.

QUOTE

Gibbs CJ, Mason, Wilson, Brennan & Dawson JJ said:

"In order to establish a custom to the effect that a broker is alone liable to an insurer for payment of a premium on a policy of insurance, it is not sufficient to show that in the ordinary course of events the premium is paid to the insurer by the broker, nor is it sufficient to show that where a broker has failed to pay a premium the insurer makes its first demand for payment from the broker. Both circumstances are consistent with the continued liability of the assured.

It is necessary to establish a clear course of conduct under which insurers do not look to the assured for payment of the premium. This may be established by proving either an absence of claims by insurers against

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insured or the existence of claims directed exclusively to brokers as a practice rarely if ever departed from." - page 486 of [1986] 64 ALR 481

IMPACT

A term will only be implied into a contract where the custom to be relied upon as showing the implication of the term is so well known and agreed upon that all parties to the agreement would have agreed to its importation. Parties to a contract should not assume that obscure or uncertain terms will be implied into agreements. Should they be unsure of a term's implication they should have the term expressly included in the agreement.

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