INSURANCE AGENTS AND THE PROPOSAL FORM

Insurance litigation occasionally finds judges reluctantly deciding in favour of those who have come to court with unclean hands merely because the law falls squarely on their side. This comment must surely embrace some of the situations in which the insurer is able to rely on mistakes made by his own agent when filling in the insured's proposal forms in order to avoid liability to the insured. In finding in favour of one such insurer in *China Insurance Co. Ltd.* v. *Ngau Ah Kau,*[1] Ali F.J. had occasion to observe:

> Needless to say that I have come to this view with some reluctance and in the words of Viscount Cave that although one would have little sympathy with an insurance company who are seeking to profit by mistake contributed by their agent the case has to be decided according to law and the law happens to be on their side.

The problem may be simply stated. A person who wishes to insure himself or his property usually has to fill in a proposal form containing several questions. Sometimes, either for reasons of convenience or because the insured is illiterate, the insurer's agent fills in the form himself. Whether the insurer can rely on mistakes made by his agent to avoid liability is important because, in view of the basis clause which is found in nearly every proposal form, every word filled in is worth a prince's ransom. The basis clause whereby the insured warrants the accuracy of every statement in the form and agrees that they shall form the basis of the contract between the insurer and himself, allows the insurer to avoid liability to the insured if he can point to merely one incorrect answer, whether that be material to the risk or not.[2] Understandably, judges have occasionally lambasted insurers for their nonchalance in wielding the basis clause against their clients. In *Glicksman* v. *Lancashire and General Assurance Company*,[3] Viscount Dilhorne remarked:

> ... at least I am left with this impression, that those — shall I call them attractive? — qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew.[4]

The law as regards whether the insurer can use the basis clause against the insured when incorrect answers are due to his agent's fault has not been altogether consistent. Although much can be said against granting the insurer this right and earlier decisions reflected this view, the rule in *Newsholme Brothers* v. *Road Transport and General Insurance Company*,[5] that in filling in the answers in a proposal form,

[1] [1972] 1 M.L.J. 52, 59.
[2] *Dawsons* v. *Bonnin* [1922] 2 A.C. 413.
[3] [1927] A.C. 139.
[4] *Ibid*., at p. 143.
[5] [1929] 2 K.B. 356.

the insurer's agent is to be regarded as the agent of the insured, has become entrenched in the common law. The effect of this rule is succinctly summed up in Halsbury's, *Laws of England* as follows:[6]

> It is irrelevant to inquire how the inaccuracy arose; or whether the agent acted honestly or dishonestly; or whether the agent had forgotten or misunderstood the correct information he had been given; or whether the answers were a mere invention on the part of the agent; if the result is that inaccurate or inadequate information is given on material matters, or that a contractual stipulation as to accuracy or adequacy of any information given is broken, it is the proposer who has to suffer.

How the law came to adopt this rule may interest the jurist, but the baffled layman can, with justification, claim that the rule ensures that it is in this field that rules on non-disclosure and misrepresentation seem harshest on him. It must be stressed that an insured who has deliberately misled the agent, and whose false answers are mirrored in the proposal form, has no grounds for complaint, but such an insured should be made to suffer the consequences of his lack of good faith without any reference to this rule. The presence of this rule can adversely affect the interests of an insured who has been misled by the representations of the agent that everything in the proposal form has been adequately and correctly dealt with. Instead of this hard and fast rule, courts should have an unfettered discretion to decide according to the equities in each case. This seems the better approach and a discussion of the leading cases in this area will bear this out.

Cases Decided in Favour of the Insured

Bawden v. *London, Edinburgh and Glasgow Assurances Co.*,[7] long neglected until its recent resurrection in *Stone* v. *Reliance Mutual Insurance Society Ltd.*[8] is a convenient point to initiate a survey of the law. In this case, the insurer's agent who filled in the proposal form for the insured, an illiterate, was fully aware of the fact that the insured was blind in one eye but failed to record this in the form. Instead, on the form was included a statement that the insured had no physical infirmity rendering him peculiarly liable to accidents. When the insured lost his other eye, the insurer resisted his claim on the ground that there was a misstatement in the proposal form. The Court of Appeal unanimously rejected the insurer's contention and upheld the insured's claim. As later decisions have sought to restrict the scope of *Bawden's* case, it is important to note the reasons for the decision.

All three Judges (Lord Esher M.R., Lindley and Kay L.JJ.) were clear as to the main question before them. They put it thus:

> We have to apply the general law of principal and agent to the particular facts of this case. The question is, what was the authority of such an agent as Quin?[9]
>
> I am of the opinion. The case turns mainly upon the position of [the agent].[10]
>
> I agree. The defendants are a limited joint stock company and the principal question is, whether the knowledge of their agent is to be imputed to them.[11]

6 Third ed., Vol. 22, p. 204.
7 [1892] 2 Q.B. 534.
8 [1972] 1 Lloyd's Rep. 469 (discussed at p. 110, below).
9 *Ibid.*, *per* Lord Esher M.R., at p. 539.
10 *Ibid.*, *per* Lindley L.J., at p. 540.
11 *Ibid.*, *per* Kay L.J., at p. 541.

Their Lordships were clearly preoccupied with the ramifications of the agency relationship between the insurer and his agent. Lindley L.J.'s judgment reveals that the court had no information about the terms of the agency. Nonetheless, it was held that as the agent was described as "the agent of the company", it could be *implied* that he had authority to "negotiate and settle the terms of a proposal"[12] and to "put it into shape".[13] In the absence of any expressly stated prohibition, the agent should be taken to have the powers to fill in proposal forms. Lindley L.J. summed up the position as follows:[14]

> [The agent] was the person deputed by the company to receive the proposal and to put it into shape. He obtains a proposal from a man who is obviously blind in one eye and [he] sees this. This man cannot read or write, except that he can sign his name and [the agent] knows this. Are we to be told that [the agent's] knowledge is not the knowledge of the company?

His Lordship concluded that the agent's knowledge of the fact that Bawden had only one eye must be imputed to the insurer. The court could not countenance the arguments of the insurer because he was, in essence, *"trying to throw upon the insured the consequences of his own agent's breach of duty towards him."*[15] This emphasis on the agent's breach of duty, which regretably is neglected in later decisions, was also on the mind of Kay L.J., who said that the agent's duty extended to seeing that the filling in of the proposal form was properly done. It therefore followed that the agent had to point out to Bawden that the form would not be properly filled up if there was no statement to the effect that he had only one eye.

From the arguments above, their Lordships concluded that the policy must be construed as if it had been settled by the agent with a one-eyed man, or as if it contained a recital to that effect.

The Court of Appeal in *Bawden's* case, in effect, applied the principle of estoppel, a principle further developed by the Australian High Court in *Western Australia Insurance Co. Ltd.* v. *Dayton.*[16] In the latter case, it was not the insured's illiteracy that led to the agent's filling in of the proposal form. The agent, anxious to attend a social engagement, hurried the insured into signing a blank proposal form, promising that he would fill in the blanks himself later. The insurer claimed that the policy was void because of some misstatements by the agent, the true facts never having been communicated to the insurer or his agent. The High Court (Starke J. dissenting) rejected the insurer's contention.

Isaacs A.C.J., like the Court of Appeal in *Bawden's* case, con-, sidered the implications of the relationship between the insurer and his agent and concluded that an agent sent out to procure the signature to a proposal form must have, in the absence of express or necessarily implied restrictions, all the implied powers necessary to accomplish that purpose. Should the agent, while acting within the scope of his actual or apparent authority, mislead the insured, the insurer cannot

[12] *Ibid.*, *per* Lord Esher M.R., at p. 539.
[13] *Ibid.*, *per* Lindley L.J., at p. 540.
[14] *Ibid.*, at p. 540.
[15] *Ibid.*, at p. 540 (emphasis added).
[16] (1924) 35 C.L.R. 353.

avoid responsibility as "it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."[17] His Lordship said that the agent had induced the insured into believing that it was useless and unnecessary to read the proposal form and hurried him into signing a blank form, not for the insured's purpose or as his agent, but for the purposes of the company in so far as the securing of business was concerned and for his own purposes in so far as he wanted to rush off to a dance. The insurer knew that it was his own agent's handwriting on the form and after receiving several premiums, was estopped from avoiding the policy. Explaining the application of the principle of estoppel in such a situation, his Lordship said:

> Estoppel by representation is neither mysterious nor arbitrary nor technical. It is nothing else than justice of the common law intervening to prevent a lawful and righteous claim or defence being defeated by misrepresentation; and it has effect notwithstanding the most elaborate artificial barriers constructed for the purpose of excluding inquiry. . . .[18]

His Lordship further observed that:

> *The principle of estoppel as expounded by the authorities I have quoted, all of the highest order, finds no more necessary field than that of insurance in all of its branches.*[19]

Bawden v. *London, Edinburgh and Glassgow Assurance Company* and *Western Australia Insurance Co. Ltd.* v. *Dayton,* it is submitted, were correctly decided. They take into account legal logic and commercial realities. The principles enunciated in these two cases cater for differing situations and there may well be situations where the agent's knowledge need not be imputed to the insurer or there may be circumstances which do not estop the insurer from avoiding the policy. Where the need arises, they do protect the deserving insured. After all, insurers exist to maximise their profits, and their advertising effort includes representations to the public that their agents are "men on the spot" to offer expert and invaluable advice to clients. It is understandable then that a layman should rely on the agent's representations and especially so when the proposal form is being filled in by the agent. Isaacs A.C.J. approved of this in *Western Australian Insurance* v. *Dayton* when he said:[20]

> it cannot be ignored that insurance companies are avid competitors for business, and, in their eagerness to secure it, are not content to await spontaneous applications but send out gatherers in all directions. They arm those gatherers with some authority. The nature of that authority is to direct in some way the flow of premiums to the coffer of the society. Who is to suffer when the emissary of the society misleads the insured and induces him, by conduct amounting to a representation regarding some state of facts, to pay a premium which the emissary accepts for the company and which the company receives from him and retains? The agent's contract or his representations as to the matter entrusted to him are in that case as effectual to bind the company as if the directors themselves were acting.

Cases Decided in Favour of the Insurer

In *Biggar* v. *Rock Life Assurance Company*,[21] Wright J. attempted to limit the scope of *Bawden's* case by holding that it did not apply

[17] *Ibid*., at p. 377.
[18] *Ibid*., at p. 372.
[19] *Ibid*., at p. 376 (emphasis added).
[20] (1924) 35 C.L.R. 353, at p. 376.
[21] [1902] 1 K.B. 516.

to a situation where the insurer's agent "invents" false answers in the proposal form. In *Biggar's* case, the agent who filled in the form made several false statements without the knowledge or authority of the insured who signed the form without reading it. Wright J. observed:

> Cooper was an agent to receive proposals for the company. He may have been an agent, as Lindley and Kay L.JJ. put it in *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.*, to put the answers in form; but I cannot imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal forms. For that purpose, it seems to me, if he is allowed by the proposer to invent the answers and to send them in as the answers of the proposer, that the agent is the agent not of the insurance company but of the proposer.[22]

His Lordship was thus arguing that even if the insurer's agent remains his agent for the purpose of filling in forms, he ceases to be the insurer's agent and becomes the insured's agent the moment he "invents" false answers. His Lordship, relying on the United States Supreme Court decision in *New York Life Insurance Company* v. *Fletcher*,[23] held that the law imposed a duty on the insured not only to answer all interrogatories correctly but also to use reasonable diligence to see that the answers were correctly written. As the insured has it in his power to prevent such falsehoods, the insurer has a right to presume that he has performed his duty. In *Western Australian Insurance Co. Ltd.* v. *Dayton*,[24] Isaacs A.C.J. attempted to distinguish *Biggar's* case by arguing as follows:

> *Biggar* v. *Rock Life Assurance Company* is a case where the proponent was not in any way misled as to any state of facts: he knew there were questions to be answered by him, and he knowingly allowed the agent to invent answers for the proponent. Estoppel in his favour was out of the question.[25]

This distinction is dubious. It seems clear that the insurer should not be estopped from avoiding liability when the insured connives with the agent to give false answers or where the innocent agent mirrors the insured's false answers to questions addressed to him in the proposal form.[26] However, where the insured's only mistake has been to leave everything in the proposal form to the insurer's agent, the argument of Lindley L.J. in *Bawden's* case that the insurer should not be allowed to throw upon the insured the consequences of his own agent's breach of duty, is most persuasive. It is up to the insurer to be more careful in his selection of agents. This point was missed by Wright J. in *Biggar's* case and it is unfortunate that later decisions should have looked to this case for guidance, neglecting the lucid arguments of the Court of Appeal in *Bawden's* case.

In *Newsholme Brothers* v. *Road Transport and General Insurance Company*,[27] the Court of Appeal confined the scope of *Bawden's* case to even narrower limits. In this case, the insurer's agent who filled in the proposal form for the insured made some mistakes either

[22] *Ibid.*, at p. 524.
[23] 117 U.S. 519.
[24] (1924) 35 C.L.R. 355.
[25] *Ibid.*, at p. 378.
[26] As in *National Insurance Co. Ltd.* v. *S. Joseph* [1973] 2 M.L.J. 195 (discussed at p. 115, below).
[27] [1929] 2 K.B. 356.

because he had misunderstood or forgotten what was communicated to him or intentionally so as to earn a commission which he would otherwise not have received. Scrutton L.J. stressed that the decision in *Bawden's* case was not applicable to a situation where the agent, at the request of the insured, fills up the proposal form himself. Their Lordships in *Newsholme's* case did not favour the view that the insurer could be imputed with the knowledge of his agent, a view adopted by the court in *Bawden's* case. Scrutton L.J. expressed the view that the doctrine of constructive notice was not favoured in commercial matters. Greer L.J. summed up the court's views as follows:

> ... I also take the view that notice to the agent whose duty was to obtain a signed proposal form and send it to the company, was not notice to the company of anything inconsistent with the signed proposal form, and that *in filling up the form, whether he mistook the instructions of the insured or whether he intentionally filled in something different from what he was told, he was not acting as the agent of the company but as the agent of the insured*.[28]

Scrutton L.J. also took the view of Wright J. in *Biggar's* case that the law imposed a duty on the insured to check the proposal form. His Lordship stressed:

> In any case, I have great difficulty in understanding how a man who signed without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.[29]

Their Lordships found themselves able to distinguish the facts before them from those in *Bawden's* case. To them, the latter case was so decided because the court there viewed the policy as if it contained a recital to the effect that the contract was made with a one-eyed man. This reading of the latter case, it is submitted, takes into account the conclusion of the Court of Appeal in that case without taking into account the many cogent reasons discussed earlier which led to this conclusion. In truth, the Court of Appeal in these two cases took entirely different approaches to the same problem. In *Bawden's* case, their Lordships were concerned with the principle that an insurer who has held out someone as his agent should not make an innocent third party suffer for the consequences of his agent's breach of duty towards him; whereas in *Newsholme's* case, their Lordships were concerned that the insurer should not suffer the consequences of the insured's negligence in not checking the proposal form — that the agent had through his representations lulled the insured into not checking the form would not be relevant. The approach in *Newsholme's* case is inconsistent with that in *Bawden's* case. Indeed, in *Western Australian Insurance Co. Ltd.* v. *Dayton*,[30] Isaacs A.C.J. dealt with this question of negligence as follows:

> It was argued that the respondent was negligent; that is, that, notwithstanding the direction of [the agent] that he should simply sign and leave [the agent] to do what filling up was required, he ought to have opened and read the document and, if he had done so, he would have seen the necessity for disclosing the fact of the claim. It seems to me that argument was effectively answered by the House of Lords in

[28] *Ibid*., at p. 382 (emphasis added).
[29] *Ibid*., at p. 376.
[30] (1924) 35 C.L.R. 355.

> *Bloomethal* v. *Ford*.[13] Lord Halsbury L.C. says: "It appears to me that it is hopeless to contend that, after a representation made by the company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn round and say 'You should have inquired. You should have observed certain circumstances and if you had done so, you would have been better advised.' "

The principle in *Newsholme's* case, namely that in filling in the proposal form, the insurer's agent is the amanuensis or agent of the insured, soon eclipsed the decision in *Bawden's* case and in other jurisdictions as well. For instance, in the Canadian case of *Boutilier* v. *Traders General Insurance*,[33] where the agent, who had been told the truth by the insured, made mistakes while filling in the form after the insured had signed it, Coffin J. applied this rule and found in favour of the insurer although, on the facts, the case was more akin to *Western Australian Insurance* v. *Dayton*.[34] Perhaps, the following comments by Marshall J. in *Facer* v. *Vehicle and General Insurance Company Ltd*.[35] where this rule was applied, best typifies judicial sentiments on this matter:

> It is to be noted that though *Bawden* was decided in 1892, there is no clear reported case that the decision has been acted upon in the courts; but one does know that in Scotland, in Ireland and in America, there have been cases that have repudiated, or at least I should say not followed the decision in the *Bawden's* case.[36]

Stone v. *Reliance Mutual Insurance Society Ltd.*

The Court of Appeal decision in *Stone* v. *Reliance Mutual Insurance Society Ltd*.,[37] which brings *Bawden's* case into focus again, is probably the most interesting decision since *Newsholme's* case itself. Their Lordships, and Lord Denning M.R. in particular, while trying to distinguish the facts before them from those in *Newsholme's* case, were in effect undermining the arguments which led to the decision in that case.

The facts in this case are simple enough. The insurer's agent, who was instructed by the insurer to fill in proposal forms for proposers, filled in, without consulting the insured, the answer "none" to both the questions on whether the insured had made any previous claims and whether any previous policy of hers had lapsed. In addition to the usual basis clause, the proposal form concluded with the following declaration:

> . . . I further declare insofar as any part of this proposal is not written by me, the person who has written same has done so by my instructions and as my agent for that purpose.

When the insured suffered a fire loss, the insurer repudiated liability on the ground that the answers to the two questions mentioned above were false.

Both Lord Denning M.R. and Megaw L.J. took the view that as the agent had been instructed by the insurer to fill in the forms, the

31 (1897) A.C. 161.
32 [1972] 1 Lloyd's Rep. 469.
33 (1969) 7 D.L.R. (3d) 220.
34 (1924) 35 C.L.R. 353.
35 [1965] 1 Lloyd's Rep. 113.
36 *Ibid*., at p.119.
37 [1972] 1 Lloyd's Rep. 469.

insured should not suffer the consequences of his failure to consult the insured before filling in the answers. Lord Denning put it as follows:

> It is quite clear that in filling in the form, the agent here was acting within the scope of his authority. He said, "It is company policy that I should put the questions, writing down answers." This distinguishes the present case from *Newsholme's* case, where the agent had no authority to fill in the proposal forms: and it was held that he was merely the amanuensis of the proposer. The present case is more like *Bawden* v. *The London, Edinburgh and Glasgow Assurance Co*.[38]

With respect, this attempt to relate the present facts to those in *Bawden's* case and to avoid the rule in *Newsholme's* case would appear to reveal a serious flaw. Surely whatever benefits the insured may hope to derive from the fact that the agent was explicitly instructed to fill in the proposal form are more than adequately negated by the insured's *express declaration* in the proposal form that the agent is for the purposes of filling in the form, his agent and not that of the insurer, a declaration which was to be regarded as the basis of the contract.

Although their Lordships did not say so, they were actually echoing the cogent arguments of their Lordships in *Bawden's* case and *Western Australian Insurance Co.* v. *Dayton.* In fact, Lord Denning went on to stress that *Bawden's* case, although adversely commented upon in *Newsholme's* case, was correctly decided. Their Lordships were in effect saying that the insurer should not, in the words of Lindley L.J. in *Bawden's* case, "throw upon the insured the consequences of his own agent's breach of duty towards him.[39] Stamp L.J., in his short judgment that mentioned no cases, stated:

> The only possible inference is that the agent of the company did not do his duty properly, or did not regard the answers to his two questions 5 and 7 as having importance or materiality to his principal. This being so, I share the view that the principal cannot now be heard to say that there was in the terms of the first condition of the policy "a misrepresentation, misdescription or non-disclosure in a material particular."[40]

This approach is clearly inconsistent with that in *Newsholme's* case, where the Court of Appeal held that the insurer had a right to expect the insured not to be negligent in not checking the proposal form. Instead, Lord Denning, while conceding that the insured made a mistake by not checking the answers in the form, chastised the insurer for claiming they were misled when the boot was on the other leg. The Master of the Rolls said:

> It was their own agent that made the mistake It is he who ought to have known better. It was he who put the printed form before the wife for signature. It was he who thereby represented to her that the form was correctly filled in and that she could safely sign it. She signed it trusting to him. This means that she, too, was under a mistake because she thought it correctly filled in. But it was a mistake induced by the misrepresentation of the agent and not by any fault of hers. Neither she nor her husband should suffer for it.[41]

In fact, the Master of the Rolls went further and raised some rather interesting points regarding remedies available to the insured in

[38] *Ibid*., at p.474.
[39] [1892] 2 Q.B. 534, at p. 540.
[40] [1972] 1 Lloyd's Rep. 469, at p. 477.
[41] *Ibid*., at p. 475.

view of the agent's misrepresentation that the form had been properly filled in.[42] Hitherto, it had been thought that the only remedy available to the insured was rescission of the contract and a return of the premiums. In *Newsholme's* case, Scrutton LJ. said:

> If C is also the agent of B to procure proposals, and induces A to make a proposal by representing that a certain form of proposal contains the particulars that B wants to know, when it does not, the remedy seems to be to rescind the written contract procured by misrepresentation, not to alter the written contract and claim the benefit of it as altered.[43]

However, Lord Denning stressed that it was only in former times that rescission was the sole remedy. Nowadays, such a misrepresentation could give rise to further or other relief. It could debar a person from relying on an exception clause and in *Stone's* case, the misrepresentation disentitled the insurer from relying on the printed clause which allowed him to avoid liability for misdescriptions in the proposal form. It is too early to say whether this view will win widespread judicial acceptance in the future. It is certainly hoped that the troublesome and clumsy wording of the Misrepresentation Act, 1967 will not dissuade judges from unshackling themselves from the previous position. After all, rescission is a very unrealistic remedy for the insured. Which insurer will quibble about the return of premiums when he can avoid paying for the loss insured against?

To sum up, one may truly feel justified in arguing that just as the Court of Appeal in *Newsholme's* case may be said to have smothered *Bawden's* case instead of clarifying it, the Court of Appeal in *Stone* v. *Reliance Mutual Insurance Society Ltd.* may be said to have smothered the arguments which justified the rule in *Newsholme's* case.

Malaysian Decisions and the Rule in Newsholme's Case

In Malaysia and Singapore, where multiplicity of languages may well result in the insurer's agent playing a bigger role in the explaining of and filling in of the proposal form, one may be justified in expecting the problem postulated above to be comparatively well litigated upon. However, to date, there are no reported decisions on the matter in Singapore while in Malaysia, it has reached the courts only very recently. Nonetheless, the rule in *Newsholme's* case appears firmly entrenched in the Malaysian scene, especially after its blessing by the Federal Court in *China Insurance Co. Ltd.* v. *Ngau Ah Kau*.[44]

A discussion on misstatements in a proposal form in Malaysia must necessarily take into account sections 91 and 92 of the Evidence Ordinance.[45] Section 91 provides:

> When the terms of a contract...have been reduced by the parties to the form of a document...no evidence shall be given in proof of the terms of such contract . . except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

[42] Lord Denning held that the agent had, by his conduct, *impliedly* represented that the form had been correctly filled in.
[43] [1929] 2 K.B. 369.
[44] [1972] 1 M.L.J. 32.
[45] The corresponding Singapore provisions are to be found in ss. 91 and 92 of the Evidence Act, Cap. 5, Singapore Statutes, Rev. Ed. 1970.

Section 92 provides:

> When the terms of any such contract... have been proved according to section 91 of this Ordinance, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument ... for the purpose of contradicting, varying, adding to or subtracting from its terms...

China Insurance Co. Ltd. v. *Ngau Ah Kau*[46] illustrates the application of these provisions as well as the rule in *Newsholme's* case. In this case, the insurer relied on the basis clause to avoid liability because the proposal form included a misstatement that the insured had made no previous claims under a motor policy. The insured, who neither spoke nor read English, had in fact told the insurer's agent, who filled in the form, that he had made a claim six years ago but the agent advised him that it was unnecessary to disclose claims made more than three years prior to the signing of the form. The agent corroborated this and claimed that the insurer's own manager had told him that his advice was correct. However, Azmi L.P., with whom AH FJ. concurred, said:

> In my view, by reason of condition 9, the truth of the statements and answers in the proposal form have become terms of the contract and by reason of sections 91 and 92 of the Evidence Ordinance, it was not open to the plaintiff to make use of the evidence of [the agent] to contradict or vary or add to or subtract from them.[47]

If their Lordships were correct, it would mean an unnecessary restriction on the right of the court to consider the circumstances where the insurer ought to be estopped from avoiding liability. With respect, it is submitted that Suffian F.J.'s dissenting view is to be preferred. His Lordship said:

> The plaintiff in the instant case admits *in toto* the *terms* of the proposal form and the policy, and accordingly there is no question of contradicting, varying, adding to, or subtracting from its terms; all he tried to do was to contradict the written *answers* on the proposal form. For this reason, in my judgment, sections 91 and 92 have no application.[48]

Their Lordships also considered the rule in *Newsholme's* case.[49] Both Azmi L.P. and Ali F.J. tacitly approved the rule, as a result of which the agent's erroneous advice could not bind the insurer. Again, with respect, Suffian F.J.'s approach is to be preferred. His Lordship found himself able to distinguish this case from both *Biggars* case[50] and *Newsholme's* case. His Lordship said:

> ... in my view, while in the ordinary run of cases where a proposal form is filled in by the agent in consultation with the prospective client, in the absence of the insurer's company's manager who subsequently receives the proposal form already filled in and signed without being told of what had transpired between the agent and the prospective client, the agent is the agent of the prospective client, here on the other hand, because of the close consultation between [the agent] and [the insurer's manager] at the time when the form was being filled, it was quite proper for the learned judge to find, as he did, that in fact, [the agent] was also the company's agent and that accordingly, [the agent's] knowledge can be imputed to the company.[51]

[46] [1972] 1 M.L.J. 32.
[47] *Ibid*., at p. 54.
[48] *Ibid*., at p. 50.
[49] [1929] 2 K.B. 356.
[50] [1902] 1 K.B. 516.
[51] *Ibid*., at p. 50.

Suffian F.J., in effect, utilised the principles on imputed knowledge and estoppel as was done in *Bawden's* case and *Western Australian Insurance* v. *Dayton*[52] On the facts of the case, his Lordship's dissenting opinion would seem a more just solution.

China Insurance v. *Ngau Ah Kau* was decided before *Stone* v. *Reliance Mutual Insurance Society Ltd.* It was not until *Abu Bakar* v. *Oriental Fire and General Insurance Co. Ltd.*[53] that the Federal Court had the opportunity to evaluate the decision in *Stone's* case. In this case, the insurer repudiated liability on a fire policy on the ground that the insured had misdescribed the purposes for which the premises, in which he kept his insured property, were occupied. The insured had merely stated that there was a sundry shop downstairs and a dwelling on the first floor, omitting any reference to some grinding mills at the rear portion of the premises. The main ground of appeal pressed by the insured before the Federal Court was that the insurer's agent's knowledge of the existence of the mills should be imputed to the insurer.

Azmi L.P. and Ong F.J. allowed the insured's appeal on grounds which did not call for a consideration of *Stone's* case. Azmi L.P. implied that there had been no material misdescription by the insured, a point which was not relevant since the incorporation of the "basis clause" into the policy made it unnecessary to determine the materiality or immateriality of any misdescription while Ong F.J. held that the insured's answer had been "unimpeachable on any reasonable construction". On the other hand, Gill F.J., who dissented, dealt at length with counsel's submission that *Stone's* case revealed a swing back to *Bawden's* case. To be fair, *Stone's* case did not go as far as suggesting that the agent's knowledge will always be fatal to the insurer's case. However, Gill F.J.'s reading of *Stone's* case merits some comment. His Lordship said:

> The facts in the present case are clearly not similar to the facts in *Bawden's* case or *Stone's* case. In *Stone's* case, the insurance agent inserted the answer out of his own head. That distinguishes it from *Newsholme's* case where the agent had no authority to fill in the proposal from and was merely the amanuensis of the proposer . . . In Stone's case, the erroneous answers were brought about by the fault of the insurer's own agent acting in his capacity as such so that the company could not treat Mrs. Stone's non-disclosure as material. I must therefore hold that the decision in *Stone's* case cannot apply to the present case.[54]

With respect his Lordship's language is unfortunately confusing. Surely the distinction between *Stone's* case and *Newholme's* case is not that in the former case the agent had inserted the answer out of his own head, for it is clear that in the latter case, the agent had inserted the wrong answer, either deliberately so as to earn a commission or because he had forgotten or misinterpreted the insured's instructions. Moreover, it was stressed in *Newsholme's* case that it was the insured's duty to check the completed proposal form. Probably, his Lordship found it important that in one case, the agent had been ordered or authorised to fill in proposal forms while in the other he had not. This distinction, while plausible, takes the line of least resistance. If adopted, it will mean that the prudent insurer can reduce the effects

[52] (1924) 35 C.L.R. 353.
[53] [1974] 1 M.L.J. 149.
[54] *Ibid.*, at p. 153.

of *Stone's* case to nought by the extremely simple expedient of rescinding all instructions to his agents to fill in proposal forms, although the illiterate insured will still have to rely on the agent for assistance in filling in the proposal form. In view of this, it is hoped that the Federal Court will, when another occasion arises, interpret *Stone's* case in a manner that will relieve some of the hardships of the insured which are caused by the sharp practices of insurers.

The other three Malaysian decisions in which the rule in *Newsholme's* case was ritually adopted are cases where the decisions in favour of the insurers should, on the facts, be defended on other grounds instead.

In *National Insurance Co. Ltd.* v. *S. Joseph*,[55] the insurer, relying on the basis clause, sought to avoid a motor policy because of false answers in the proposal form. Yong J. found that the insured deliberately misrepresented facts to the agent who merely mirrored these lies in the proposal form. As stated earlier, when misstatements are the result of the insured's lies the insurer should be allowed to avoid liability, and the decision on this ground in favour of the insurer is a sensible one. Yong J. went further and held that even if the false answers were invented by the agent (a likelihood he dismissed), in view of the rule in *Newsholme's* case, the insurer could still avoid liability as the agent would, for the purposes of inventing those answers, be regarded as the agent of the insured.

In *Wong Lang Hung* v. *National Employees' Mutual General Insurance Association Ltd.*,[56] the insured, who was educated in Chinese, did not sign the proposal form immediately after it was filled in by the agent. Instead, she took it home for someone else to read and signed it at her house. The insurer, relying on the basis clause, sought to avoid liability because of a misstatement in the proposal form that the building insured was not attached to any other building when it was so attached. B.T.H. Lee J. found that on the facts, the insured was not induced by any misrepresentation by the agent to sign the form. The insured had taken the form home to have its contents verified and as such, must be taken to have adopted the contents. In any case, his Lordship argued that in view of the rule in *Newsholme's* case, the insurer could not be liable for the misstatement even if caused by the agent.

Finally, in *Ong Eng Chai* v. *China Insurance Co. Ltd.*[57] the insured instructed his brother-in-law to effect an insurance for him. The latter communicated all the relevant facts by telephone to the clerk of the agent who then filled in the particulars in the proposal form. Oddly enought, the agent himself signed the proposal form. Hashim Yeop Sani J., after citing with approval *Newsholme's* case, held that a legal relationship of principal and agent was created as between the insured and his brother-in-law who left the whole matter in the hands of his agent's clerk. By implication, therefore, the agent himself was authorised to sign the proposal form on the insured's behalf and the insured was liable for every misstatement in the proposal form.

[55] [1973] 2 M.L.J. 195.
[56] [1972] 2 M.LJ. 191.
[57] [1974] 1 M.LJ. 82.

It is clear that Malaysian decisions have tended to accept the rule in *Newsholme's* case. Suffian FJ. (now Suffian L.P.) has in *China Insurance* v. *Ngau Ah Kau*,[58] shown the way to distinguish *Newsholme's* case if need be and it is hoped that when the occasion arises again, his voice will not remain unaccompanied.

Conclusion

This area of law remains as confusing as ever. It is still too early to assess the effects of *Stone* v. *Reliance Mutual Insurance Society Ltd*.[59] on the law and one can only hope that the House of Lords will soon resolve the uncertainties created by the Court of Appeal's unconvincing distinctions between important decisions. If *Stone* v. *Reliance Mutual Insurance Society Ltd.* does mark a *volte face* in the attitude of the courts, it will have made a great contribution to the law in this area. Until these uncertainties are resolved, certain points should be borne in mind. Firstly, there should be no hard and fast rule that the insurer's agent is the agent of the insured for the purposes of filling in the proposal form. Secondly, where the agent is expressly ordered or authorised by the insurer to fill in the proposal form, he should be regarded as the insurer's agent for the purposes of filling in the form.[60] Thirdly, where the agent is not expressly ordered or authorised by the insurer to fill in the proposal form, he may be treated as having implied or ostensible authority to do so if the circumstances are such that the plea of estoppel can be raised against the insurer if he should seek to avoid the consequences of his agent's actions.[61] Finally, not every insured can resort to the plea of estoppel for there are situations, of which deliberate misrepresentations by the insured offer the clearest example, where the insurer should be allowed to avoid liability. If these points are borne in mind, judges may well be relieved of their unhappy task of having to decide in favour of those who have come to court with unclean hands.

TAN LEE MENG *

58 [1972] 1 M.L.J. 32.
59 [1972] 1 Lloyd's Rep. 469.
60 *Ibid.*
61 *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* [1892] 2 Q.B. 534.

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