

IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0008/97S
(High Court Civil Action No. 0285 of 1994/L)

BETWEEN:

DOMINION INSURANCE LIMITED

Appellant

AND:

SEA ISLAND PAPER & STATIONERY LIMITED

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Justice D. L. Tompkins, Justice of Appeal

Hearing: 7th May 1998

Counsel: Mr. R. Krishna for the Appellant
Messrs. Maharaj and R. Gordon for the Respondent

Date of Judgement: 15th May 1998

JUDGEMENT OF THE COURT

Sea Island Paper & Stationery Limited (hereinafter referred to as the respondent) is a company engaged in manufacturing of stationary, printing and related industries. Dominion Insurance Limited (hereinafter referred to as the appellant) is a company engaged in the insurance business.

The respondent took out a fire insurance policy with the appellant in respect of stock in trade, business fixtures, plant and machinery at the respondent's

premises located in Nadi for the initial period from 26th June 1992 to 26th June 1993. At the expiration of this period, the parties entered into negotiations for the renewal of the policy for the period 26th June 1993 to 26th June 1994. It is not disputed that these negotiations were concluded in September 1993 for the renewal of the policy to be back dated to 26th June 1993.

On 7th December 1993 at about 10.30 am the fire destroyed the premises and the items insured at the respondent's premises. It is also not disputed that at the time of the fire, the respondent had not yet paid the premium for the renewal period. It was paid after the items were destroyed by fire.

The respondent put in a claim for the sum of \$166, 566.74 representing the value of items insured by the appellant. The appellant declined the claim in its letter dated 9th December 1993 on basis that the "policy was not in force at the time of the fire". Further negotiations by the respondent to settle the claim were also declined by the appellant.

Subsequently, the respondent issued proceedings in the High Court at Lautoka for recovery of the sum insured, and for damages and interest.

At a pre-trial conference, the parties agreed to the issues to be determined by the High Court as follows - whether the subject policy of insurance was valid or effective at the time the risk had occurred; whether the appellant is liable to indemnify the respondent for the consequential loss; whether the loss of two forklifts

was covered by the policy; and whether the average clause was applicable to the claim.

At the trial, the respondent submitted that the fire occurred on 7th December 1993 and that this was within the period covered by the said policy and, therefore, the appellant is liable to indemnify the respondent for the loss.

On the other hand, the appellant submitted that the renewal of the policy was entered into on the basis that its liability under the policy is conditional on the pre-payment of the premium and that at the time the fire occurred the premium had not been paid.

The High Court concluded that there was a valid policy and that the appellant was liable to indemnify the respondent for its losses suffered in the fire.

In respect of the average clause, the Court concluded that the clause was applicable and that the respondent was entitled to a loss of only \$80,500.00 as agreed.

In respect of the claim for loss of the forklifts, the Court concluded that they came within the definition of plant and machinery and therefore covered by the policy.

In respect of interest on the judgement, the Court allowed an interest of 4% per annum on the judgement sum from the date of fire to the date of the trial.

However, the Court did not allow the additional expenditure which was paid by the respondent to the bank by way of interest on credit facilities.

The appellant has appealed against the decision with respect to liability. The grounds of appeal raise three distinct issues: (1) whether there was a valid insurance policy (2) whether the appellant was liable to indemnify the loss under the policy (3) whether it was agreed in the policy that liability undertaken by the appellant was conditional upon pre-payment of the premium.

The respondent has cross-appealed on quantum. The first ground is that the trial judge erred in law and in fact in holding that average clause applied in respect of the respondent's claim.

The second ground is that trial judge erred in law and in fact in disallowing the claim for interest in respect of additional expenditure incurred by the respondent.

The third ground is that the trial judge erred in law and in fact in awarding interest on the judgement at 4%.

Appeal

We now consider the grounds of appeal relating to liability. In support of their submissions, both counsel relied on the terms of a letter dated 6th December 1993 written by the appellant to the respondent which reads:

"06 December 1993

*The Managing Director
Seas Island Paper & Stationery
P.O. Box 532
Nadi*

Dear Sir

***RE: OUTSTANDING ACCOUNT
POLICY REF - 226811 VARIOUS AMOUNT DUE
\$11,205.00***

We would refer to our letter of 29th September 1993 and your various discussions with the writer in respect of renewal of all policies.

We wish to advise you that despite our various requests premiums remain outstanding and as such we are unable to extend your credit terms any further.

Should we not receive the full premium within fourteen (14) days from the date of this letter we would have no option but to cancel all your policies without any further notice.

However please note that we would not be liable for any losses that may occur whilst the premium is outstanding.

Yours faithfully

*Sgd. Ajay Singh
Managing Lautoka*

cc: The Manager Westpac Banking Corporation Nadi"

The trial judge set out this letter in his judgement on page 95 of the record and then set out the submissions of the parties based on this letter in the following terms:

"The defendant states that payment of the premium was a condition precedent to the liability of the defendant. The plaintiff on the other hand is saying that it was given a period of grace - 14 days to pay the premium and the premium was paid within that time."

The trial judge did not expressly deal with the issue of whether the liability of the appellant under the policy was conditional on the pre-payment of the premium. It would appear from his reasons for decision that he may well have assumed that this was so and proceeded to determine the case on the following basis:

"It is clear from the letter of 6th December 1993 that the plaintiff had credit terms. The premium was due on 26/6/93 and the plaintiff all the time was led to believe that the policy was extended until 26/6/94. This may amount to the waiver of the condition - also the plaintiff had credit terms. The defendant by its conduct had allowed the payment of premium at a future date and had allowed the policy to continue."

It is apparent from this passage that the trial judge decided the case on two bases - (1) that the appellant had agreed to extend credit terms and for the premium to be paid at a future date (2) that the appellant may have waived the condition. The trial judge did not conclusively decide the second basis. He simply stated that the conduct of the appellant may amount to a waiver. We agree with the submission made by counsel for the respondent that the trial judge did not make such a conclusive finding in this regard and therefore it is not necessary for us to deal with the issue on appeal. It is, however, clear that the trial judge concluded that there was a valid insurance policy on the basis that the appellant had agreed to extend credit terms and that the premium should be paid within 14 days from the 6th December 1993.

In an insurance policy the insurer may require that payment of premium for which it undertakes to indemnify the insured must be paid before liability arises.

However, the law is clear that notwithstanding such a requirement the insurer may extend time for payment of the premium and the validity of the insurance policy is not affected by the non-payment at the time of the risk. In MacGillvray and Partington "*On Insurance Law* (7th edition) at paragraph 861 it is stated:

"There is no rule of law to the effect that there cannot be a completed contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment....."

In Vol. 25 of *Halsbury's Laws of England* (4th Edition) at paragraph 464 entitled *Prepayment of Premium* it states:

"In practice, payment of the premium in advance is usually a condition precedent to liability, not only in the case of the first premium but also of the renewal premium. The assured is then precluded from recovering for a loss which happens before the premium is paid unless the circumstances are such that the insurers are estopped from denying that they have received payment or have by their conduct waived the condition."

A similar statement of the law can also be found in the judgement of Viscount Maugham in *Wooding v Monmouthshire and South Wales Mutual Indemnity Society Ltd* [1939] 4 All ER 570 at 581.

To determine whether the appellant was entitled to decline to indemnify the respondent because the premium was not paid when the fire occurred, it is necessary to examine the sequence of events in more detail.

The opening words of the policy provided:

"In consideration of the insured named in the Schedule hereto having paid to the Company first Premium as mentioned in the Schedule....."

the company agrees to indemnify the insured on the terms set out in the policy. It follows that the liability to indemnify for the term of the policy was conditional upon the premium having been paid, unless the company by words or conduct, has waived that condition.

When the negotiations for the renewal of the policy were concluded in September 1993, the appellant, on 29 September 1993, wrote to the respondent referring to the discussions that had occurred, and saying:

"As discussed we wish to confirm that your policies have been renewed as from 26/06/93 to 26/06/94.

Attached is our statement and would appreciate you forwarding us your premium cheque by return."

With the letter was sent what is described as a renewal certificate.

Included in it was the following:

"PLEASE NOTE; YOUR POLICY AS DETAILED BELOW WILL EXPIRE AT 4 PM ON THE DATE SHOWN. AS YOUR ARE A VALUED CLIENT WE HAVE PROTECTED YOUR INTEREST BY RENEWING YOUR POLICY FOR THE PERIOD STATED. PLEASE FORWARD THE PREMIUM PAYABLE TO REACH US BY THE EXPIRY DATE....."

At the foot of the renewal notice was the following:

***“IMPORTANT NOTICE IMPORTANT NOTICE
IMPORTANT NOTICE***

***RENEWAL TERMS ARE ON A CASH BASIS AND YOUR
PREMIUM MUST BE RECEIVED BY THE EXPIRY
DATE SHOWN IF YOU WISH THE COVER TO
CONTINUE.”***

It was submitted on behalf of the appellant that the effect of the renewal certificate was that the appellant was not liable to indemnify for any loss that occurred during the renewal period if the premium is unpaid, or, as it was put in the statement of defence, the renewal certificate was issued on condition that it does not become valid or effective until the premium was fully paid.

We do not accept this submission for these reasons. First, the wording of the renewal certificate, issued as it was months after the expiry date stated in it of 26/06/93, is contradictory. It claims to have “protected your interest by renewing your policy.....”, but then asserts that the premium must be received by a date long since passed “if you wish the cover to continue.” In the face of this contradiction it cannot be said that the appellant made the payment of the premium a pre-requisite for the liability to insure. The *contra proferentem* rule requires the court to adopt a construction favourable to the insured and against the insurer from whom the documents emanates: *Fowkes v. Manchester and London Life Assurance Association* (1863) 129 R.R. 607, 615. In the circumstances in which the renewal certificate was issued, the respondent may well have believed that it was covered, despite some of the wording of the certificate.

Secondly, the letter of 29 September 1993 does not state the renewal was conditional on the payment of the premium. On the contrary, it asks for "your premium cheque by return", a statement that would mean to the respondent that the policy has been renewed and the risk assumed on the basis that the respondent had some time to pay the premium.

The evidence establishes that between September and December, the manager of the appellant approached the respondent on several occasions, seeking payment of the outstanding premiums. But at no time prior to the letter of 6 December 1993 did the appellant indicate that it was not at risk because the premiums had not been paid. Rather, it is clear that the appellant extended credit to the respondent for the payment of the premiums. It did not insist on payment "by return". When it wrote on 6 December it said that it was unable "to extend you credit terms any further", clearly indicating that it had extended credit terms up to that date.

The result of these exchanges is that the policy was renewed, and credit for the payment of the premiums had been extended. There was no condition attaching to the terms of the renewal that the appellant was not to be at risk until the premiums were paid.

Under clause 5 of the policy the appellant is entitled to terminate the policy on giving seven days notice. However, the appellant, in its letter of 6 December, did not give notice that the policy would be terminated at the expiration of the fourteen days referred to in the letter. Rather it threatened to terminate if the

full premium was not paid within fourteen days. What is clear is that at the time of the fire on 7 December the policy remained in force.

What then is the effect of the last paragraph in the letter?

"However, please note that we would not be liable for any loss that may occur whilst the premium is outstanding".

The appellant submits that as a result of these words, it cannot be at risk under the policy until the premium is paid. We do not accept that submission.

If, as we have held to be the case, there was no condition attaching to the renewal that the appellant was not at risk until the premium was paid, can the appellant unilaterally impose such a condition, as it sought to do in the last paragraph of the letter? We think not. It amounted to an attempt to vary what were the terms of the contract between the appellant and the respondent, without the agreement of the respondent. It was entitled under the terms of the policy to give seven days notice terminating the policy, and thereby terminating its risk, but it was not entitled to vary the terms of the contract pending that termination, which is what it attempted to do in the last paragraph of the letter. A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract: *Chitty on Contracts* 24th Ed, paragraph 1376.

The result is that at the time of the fire, the policy was in force, and there was no condition that the appellant was not at risk if the premium had not been

paid. It follows, although for somewhat different reasons, the judge was correct in holding that the appellant was liable to indemnify the respondent for its loss suffered in the fire.

We therefore dismiss the appeal against liability.

Counsel for the appellant purported to argue further grounds of appeal relating to quantum. Counsel for the respondent has submitted that we should not grant leave for these grounds to be argued on the basis that the appellant has not appealed against quantum. Section 5 of the *Court of Appeal Rules* provide that an appellant should not be allowed to be heard on any ground of appeal not stated in the notice of appeal. That is the general rule unless leave is granted by this Court. Counsel for the appellant has not sought any such leave nor has he advanced any grounds upon which leave should be granted. Consequently we would ignore the appellant's submissions with respect to quantum.

Cross-appeal

The first ground relates to the application of the average clause. This involves consideration of clause 10 of the policy which reads:

“CONTRIBUTION AND AVERAGE

If at the time of any destruction or damage to any property hereby insured, there be any other subsisting insurance, whether effected by the insured or by any other person or persons, covering any of the property, the Company shall not in any way be liable to pay or contribute more than its rateable proportion of such destruction or damage.

In all cases where any other subsisting insurance or insurances, effected by the insured or by any other person or persons, covering any of the property hereby insured, either exclusively or together with any other property in and subject to the same risk only, shall be subject to Co-insurance, the insurance on such property under this policy shall be subject to Co-insurance in the like manner.

When an insurance is declared to be subject to Co-insurance the following clause shall apply:-

in the event of destruction or damage by fire or any other peril hereby insured against this Company shall be liable for no greater proportion of the destruction or damage than the sum insured bears to ninety percent (90%) of the value of the property insured at the time such destruction occurs, limited however in all cases to the sum insured thereon

Provided that the above provision shall not apply if the amount does not exceed 5% of the insured thereon."

It was submitted by counsel for the respondent and not disputed by counsel for the appellant that average clause is as defined in *Australian Insurance Law* (second Edition) under paragraph:

"15.115 is a stipulation which provides that, if at the time of the loss the sum for which the subject matter of the insurance is covered is less than its true value, the assured is deemed to be his own insurer for the difference in value and must bear a ratable proportion of the loss accordingly"

The question we have to determine is whether clause 10 of the policy stipulates such a clause. In determining the issue, the trial judge referred to a passage in *MacGillivray & Parkinson on Insurance Law* (6th ed.) at paragraph 2000 (page 385) in which reference is made to *Carreras Ltd v Cunard Steamships Co.* [1918] 1 KB 118. The trial judge does not say in so many words how he applied this passage but it may well be that he relied on the part of the passage which states:

"In Carreras Ltd v Cunard Steamships Co. where the plaintiff company warehoused goods with the defendant company at a fixed rental to include insurance against loss or damage by fire, Bailhache J. held that the so-called pro-rata condition of average was so common in fire insurance on merchandise that it must be implied as a term of the warehouse agreement. The average clause now occurs in almost all policies, except those relating to private dwelling and its contents used wholly or mainly for religious worship"

This reference does not accurately reflect the true basis of the decision by Bailhache J. In the course of his judgement His Lordship made reference to a submission that was put to him:

"Mr Foote has argued that the presence of an average clause is essential, and that if there is no average clause a fire policy on goods must be constructed as having a different effect from a marine policy on goods. Assuming that that is the law, I can only say that average clauses are now almost universally inserted in fire policies on goods.."

It becomes clear that Bailhache J. assumed that it is necessary to insert an average clause in a policy. However, he proceeded further and implied that there was an average clause in the contract. *Carrera's Case* can be distinguished in this regard from the present case. In *Carrera's Case* the defendants had a floating policy with the British Dominion General Insurance Company, by which all goods deposited in their warehouse were insured against fire "subject to the conditions of average" recited on the back of the policy. His Lordship implied average clause with this factor in mind. There is no such evidence in the present case from which an average clause may be implied. With respect *Carreras case* has no application to the present case.

The question that remains to be determined is whether clause 10 in the present case is an average clause. The clause is headed "Contribution and Average". We agree with counsel for the respondent that a heading in a policy is only a guide to what the clause provides. One has to construe the substance of the clause to see whether or not it is an average clause. It is clear from the terms of clause 10 that it deals with co-insurance only and has nothing to do with an average clause.

We therefore allow this ground of cross-appeal.

The second ground of cross-appeal relate to the claim for damages in the sum of \$19,833.00 representing the interest the respondent paid to the bank for money it borrowed to replace the stock destroyed by fire.

With respect to the judge, he misconceived the respondent's claim under this heading. It did not seek to recover this interest as an item for which the appellant was liable to indemnify under the policy. Rather it was claimed as foreseeable damage that the respondent suffered as a result of the breach by the appellant of its contractual obligation to insure under the policy. To put it another way, it was a measure of damage that flowed from the appellant not paying that to which the respondent was entitled. Had that amount been paid shortly after the fire, the respondent would not have incurred interest on its overdraft to the extent that it did.

However, later in this judgment we give our reasons for holding that the respondent is entitled to interest on the amount of the judgment from the date of the fire to the date of judgment at the rate of 13.5%, the same rate as that which he was charged on the overdraft. The respondent cannot have both, as that would result in the respondent being paid twice for the same loss. If the respondent receives interest on the judgment at the same rate as the interest on the overdraft for this period, it will not have suffered this item of damage. For this reason, rather than that adopted by the judge, we do not allow this interest claim.

We therefore dismiss this ground of cross-appeal.

The third ground of cross-appeal relates to the percentage of 4% awarded on the judgement sum. The basis of a claim for interest on judgement is provided for by s 3 of the *Law Reform (Miscellaneous Provisions) (Death and Interest Act) Cap. 27* which provides:

“...In any proceedings tried in the High Court for the recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part for the debt..... the whole or any part of the period between the date when the cause of action arose and the date of Judgment.....”

It is clear that the Court has a discretion in determining the rate of interest and whether or not the interest on judgement should be for the whole or part of the period between the date when the cause of action arose and the date of judgement.

In exercising his discretion the trial judge allowed interest from the date of fire to the date of trial at the rate of 4%. The complaint on appeal is confined to the rate of interest. Counsel for the respondent submitted that it was agreed by the parties at the pre-trial conference on 11th July 1995 that if the trial judge was minded to exercise his discretion in allowing interest that the rate of interest was agreed at 13.5%. Counsel for the appellant has submitted that there was no such agreement. We have examined the minutes of the conference (at pages 42-43 of the record) and find that there was no such agreement. The minute relating to this particular issue was recorded as:

"Whether the Plaintiff is entitled to interest on the amount if any payable by the Defendant at the rate of 13.5% per annum from 7/12/93."

The minute simply stated the issue as to whether (1) defendant is liable to pay interest and (2) and whether the rate should be at 13.5% as claimed by the respondent in the statement of claim.

As to what should be the proper rate of interest, as we have pointed out before this is within the discretion of the Court. In determining the proper rate of interest, little assistance can be gained by reference to the appropriate rate in other jurisdictions. The reason is that conditions or circumstances vary from country to country. In some countries such rates are fixed. In England, rate of interest is fixed from time to time by the Lord Chancellor (see *Jefford v Gee* [1970] 1 All ER 1202 at 1208).

We should consider relevant decisions which have dealt with the question of rate of interest in Fiji. We have been referred to one authority, *Maganlal Brothers Limited v L B Narayan & Company* (a decision of the Court of Appeal, Civil Appeal No 31 of 1984 dated 15th November 1984). In that case the rate of interest was fixed at 13.5%. The Court of Appeal did not discuss the basis for arriving at the rate of interest and there is no way of knowing whether the rate adopted was the commercial rate at the relevant time.

In *Harry Pratap v The Attorney-General Fiji* (Civil Appeal No. 14 of 1992, a decision handed down on 20th August 1992) the Court of Appeal considered whether 3% was the appropriate rate. The Court said:

"...we are of the view that the figure of 3% for interest from the date of the issue of the writ is within what we conceive, on the facts before his Lordship, was the range open to his discretion. Again, it may be somewhat on the lower end of that range but certainly not such as to justify our intervention on the material present here. A factor which must have influenced His Lordship's decision was the pace at which the action, once commenced, did proceed. Regrettably the state of the evidence makes it inappropriate for us to give a definitive judgement on the appropriate rate of interest to be used for this type of case in Fiji. We will try and take the first suitable opportunity to do so."

In *Attorney-General of Fiji v Paul Praveen Sharma* (Civil Appeal No. 41 of 1993, a decision handed down on 12th August 1994) the Court Appeal considered whether the rate 4% was the appropriate rate. The Court said:

"The purpose of the award of interest on special damages is twofold; to put the injured person on the same financial position, so far as is possible, as he would have been in if

the amount of the damages had been paid to him as soon as he served his writ and deter the tortfeasor from delaying payment. Special damages are awarded for economic loss: the assessment their amount is not a matter of setting a conventional figure, as it is in respect of non-economic loss, (as to which see Wright (supra) at page 777) and the rate of interest is not to be simply what is conventional. As the award relates to a period which has lapsed when the judgement is given, the rates of interest and inflation during the period are ascertainable and speculation about matters which are uncertain is not required. However, no evidence of interest or inflation rates was presented to His Lordship."

It is clear from this passage that the appropriate rate of interest is determined by ascertaining the rate of interest and inflation at the relevant time. This is a matter of evidence and not a matter of fixing a conventional figure. In the present case Mr Ramayan of the respondent company gave evidence of the rate of interest charged by the bank with respect to the payment of interest paid at the relevant time. Counsel for the respondent submitted and this was not contested by counsel for the appellant that the appropriate rate was 13.5%. In the light of this evidence an award of 4% would appear to be low. Having regard to the evidence, we would allow this ground of cross-appeal and substitute interest at the rate of 13.5%.

In the circumstances the respondent will have the costs of the appeal and the cross-appeal.

In summary the formal orders of the Court are:

- (1) Appeal against liability is dismissed.

- (2) Cross-appeal in respect of application of average clause is allowed.
- (3) Cross-appeal in respect of claim for \$19,833.00 is dismissed.
- (4) Cross-appeal in respect of award of 4% interest on judgment is allowed and substitute interest at the rate of 13.5%
- (5) The appellants to pay the respondent's costs of the appeal and the cross-appeal.



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Sir Moti Tikaram
President



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Sir Mari Kapi
Justice of Appeal



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Justice D.L. Tompkins
Justice of Appeal

Solicitors:

Messrs. Krishna & Company for the Appellant
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