IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0005 OF 1997
(High Court Civil Case No.HBC 468 of 1994)

BETWEEN:

DOMINION INSURANCE LIMITED

Appellant

AND:

WESTPAC BANKING CORPORATION
BARRY SHELTRUM
DAYDREAM CRUISES

Respondents

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice Ian Roy Thompson, Justice of Appeal

Hearing: **Wednesday, 18 November 1998, Suva**

Counsel: **Mr. M B Patel for the Appellant**
Mr. M. Daubney with Mr. G E Leung for the Respondents

Date of Judgment: **Friday, 27th November, 1998**

JUDGMENT OF THE COURT

The appellant, Dominion Insurance Limited. ("the Company") appeals against a judgment of Fatiaki J. delivered in the High Court at Suva on 8 October 1996 awarding $139,000 and interest to the respondents under a marine insurance policy in respect of a vessel which became a total loss on 26 March 1994. The issues on appeal are whether the policy was current at the time of the loss, and whether His Lordship correctly exercised his discretion in awarding costs to the successful plaintiffs to be taxed on a common fund basis under Order 62 r 25(3) and (4) of the High Court Rules.

The vessel was insured as a private pleasure craft under a policy first issued in November 1990 for the period 17.10.90 to 17.10.91 It was owned by the second respondent, Mr. Sheltrum, trading as Daydream Cruises, and the interest of Westpac Banking Corporation as mortgagee was noted. Before the expiry date of 17.10.91 a document headed 'Renewal Certificate' was issued by the Company to Mr. Sheltrum referring to that expiry date and stating it was renewed to 17.10.92, with a note of the premium payable, after which was the following printed statement:

> ***'Please note: Your policy, as detailed below, will expire at 4.00 p.m. on the date shown. As you 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. If you have any enquiries about this or any other policy, please do not hesitate to telephone or call at our office.'***

Then followed some details referring to the terms of the policy, and at the foot a notice reading:

> ***'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.'***

Renewal Certificates in the same terms were issued prior to the expiry date of 17 October in 1992 and 1993. Throughout the period from 17.10.90 to 17.10.93 the company accepted payment of the premiums by irregular instalments, on at least two occasions off-setting claims payable against outstanding premiums. On 1 March 1993 it wrote to Mr. Sheltrum reminding him that the cover provided by it was subject to the full payment of premium before

renewal date and that for his own protection it was important to settle the account without delay. A reminder of 21 April 1993 contained a threat that failing payment within 7 days, the Company would have no option but to cancel cover and charge a pro-rata premium for the time of risk. This was followed by a letter of 14 June 1993 with a similar threat of cancellation in default of payment.

By expiry date of 17 October 1993 all premiums up to then had been paid and accepted, and a Renewal Certificate in the same form for the period to 17 October 1994 was issued under cover of a letter of 21 September asking for payment of the premium before 17.10.93 The Company wrote again on 1 November 1993 pointing out that the renewal premium had not been paid and stating that payment was essential to ensure that the insurance remained current. Nothing was paid. In January and February 1994 the Company's auditors wrote to Mr. Sheltrum seeking his acknowledgment that he owed it $10,941 to which he replied confirming that the amount of $8,076.00 was outstanding. (This was the amount of a reduced premium negotiated earlier). On 18 February 1994 the Company wrote drawing his attention to the fact that the premium had been outstanding for more than 90 days and seeking payment "as discussed with our underwriting manager." It was still unpaid on 24 March 1994 when the vessel was lost. The Company declined liability, contending there was no cover because the renewal premium had not been received.

The case against it in the High Court proceeded on an agreed statement of facts and documents, and no evidence was given, and the amount of the loss was accepted at $139,000. Although the Company submitted that under s.53 of the Marine Insurance Act (Cap 218)

payment of the premium was a condition precedent to the issue of a policy, this is not necessarily so. That section reads:

> ***'Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.'***

It will be noted that the insurer is merely "not bound" to issue the policy until payment or tender, and it follows that it may elect to do so, notwithstanding failure to pay. The provisions are also subject to the opening qualification "Unless otherwise agreed". The dealings between Mr. Sheltrum and the Company throughout their relationship clearly demonstrate that the Company renewed the policy each year regardless of the fact that the premium was not paid, and its assumption of cover is confirmed by the letters it sent threatening to cancel unless payment was made. A threat to cancel can be consistent only with the existence of a current policy.

The Company sought to rely on the notice at the foot of the Renewal Certificate quoted above, to the effect that the premium had to be received by the expiry date if the insured wished the cover to continue. This must he read in the light of the description of the document as a "Renewal Certificate" and the statement that the policy had been renewed for the period, along with the information that this had been done to protect the interest of a valued client. As Fatiaki J, observed there is some inconsistency or conflict between these statements. It can be resolved by treating the notice at the foot as a warning to the insured that if the premium is

unpaid, the cover granted may be cancelled. The Company had the right to do that at any time by notice under the General Conditions of the policy, but no such notice was given.

The law on this aspect has been summarised in the following extract from MacGillivray and Partington on Insurance Law (7th edn.) para 861:-

> ***'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...'***

As this case turns essentially on its own facts and the particular wording of the Company's Renewal Certificate, it is not necessary to discuss various decisions referred to us by counsel. They demonstrate that if an insurer refers to the need for payment of the premium as a condition of renewal, this should be in unambiguous terms; and in any event the insurer should not conduct itself in a way that amounts to a waiver, or an acknowledgment that the policy is still current. For these reasons the appeal on liability must be dismissed.

In awarding costs on a common fund basis, His Lordship took the view that the Company's refusal to pay out on the policy brought it into the category of a litigant whose conduct was so reprehensible that it should be liable for a more generous award of costs than those usually awarded on a party-and-party basis. With respect to His Lordship, we see nothing in the Company's attitude or conduct of the case to take it outside the area of normal commercial litigation. The Company (mistakenly, as it turns out) believed it had a genuine defence to the

claim in the light of the 5-month default in payment of the premium. Indeed it could be said that Mr. Sheltrum brought the litigation on his own head by ignoring the requests for payment. We are satisfied that there was no justification for an order that the costs be taxed on the common fund basis awarded, and that part of the appeal succeeds.

Although the question did not arise on the appeal, the Company may be entitled to set off any outstanding premiums against the amount to be paid under this judgment, in conformity with the earlier dealings between the parties.

After the appeal hearing had closed, counsel for the respondents referred us to a judgment of this Court delivered on 15 May 1998 (***Dominion Insurance Ltd v Sea Island Paper and Stationery Ltd***) dealing with a similar point. Because it accorded with the view we had already formed as expressed in this judgment, we saw no need to call for further submissions.

Conclusion

(1) The appeal against liability is dismissed.

(2) The appeal against the basis of the costs awarded is allowed, and in place of the order made in the High Court the appellant/defendant is to pay the respondents'/plaintiffs' costs in that court, to be taxed on a party-and-party basis only.

(3) In this Court the respondents will have costs of $1750 (which take into account the appellant's partial success) together with disbursements as approved by the Registrar if not agreed.

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Sir Moti Tikaram
President

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Sir Maurice Casey
Justice of Appeal

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Justice I.R. Thompson
Justice of Appeal

Solicitors:

Messrs. M.B. Patel & Associates, Suva for the Appellant
Howards, Suva for the Respondents

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