IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

CIVIL APPEAL NO. ABU0019 OF 2008
[Lautoka High Court Action No. 70 of 2005]

BETWEEN : **SUN INSURANCE COMPANY LIMITED**
Appellant

AND : **PACIFIC GREEN INDUSTRIES (FIJI) LIMITED**
Respondent

Counsel : S. Maharaj for the Appellant
S.K. Ram for the Respondent

Dates of Hearing & Submissions : 9th, 20th June, 7th July, 13th, 21st October 2008

Date of Ruling : 16th January 2009

RULING

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[1] The *Appellant* applies for a Stay of a Judgment of the High Court at Lautoka (Phillips J.) dated the 29th of February 2008 in which the Judge gave judgment for the Respondent on a claim that the present *Appellant* had wrongly refused to indemnify it in respect of damage caused by a fire on the 6th of November 2004 at the *Respondent's* furniture factory at Malaqereqere, Sigatoka.

[2] Following the fire the *Respondent* made a claim under its policy with the *Appellant* for the sum of $4,758,400.00. On the 16th of February 2005 the *Appellant* declined the claim giving three reasons:

i) There had been non-disclosure of material facts namely fires, which were material to the risk being covered, which ought to have been disclosed.

ii) The premises where the loss occurred had not been duly authorized and approved by the relevant authorities.

iii) Attempts were being made by the *Respondent* to misrepresent facts to the *Appellant* during the claim investigation process.

[3] The learned Judge held that there had been non-disclosure of material facts namely a previous fire on the *Respondent's* premises in March and June 2002, September and October 2003 and three such fires in July and August 2004. There was another fire on the 27th of September 2004 which the *Appellant* claimed had not been disclosed when the *Respondent* sought re-insurance.

[4] Having found that there had been non-disclosure of material facts the Judge however declined to find for the *Appellant* on the ground that there had been no evidence given that the *Appellant* had actually been induced by the non-disclosure of previous fires to enter into a policy with the *Respondent*. She asked:

> *"Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded"?*

[5] She held that since the *Appellant* had not called an independent broker or underwriter to testify to this requirement she was compelled to find for the *Respondent.*

[6] The *Appellant* argues that there is no such requirement in law for independent evidence of other insurers to be called as to what they would have done in similar circumstances and that consequently this is an arguable ground of appeal for the Full Court. In so holding the learned Judge relied on a dissenting judgment of Lord Lloyd of Berwick in **Pan Atlantic Insurance Co. Ltd. and Another –v- Pine Top Insurance Co. Ltd.** [1995] 1 AC 571.

[7] The head note of this case reads:

> *"(1) (Lord Templeman and Lord Lloyd dissenting). The test of materiality of disclosure for the purposes of both marine insurance under s18(2) of the 1906 Act and non-marine insurance was, on the natural and ordinary meaning of s18(2), whether the relevant circumstance would have had an effect on the mind of a prudent insurer in weighing up the risk, not whether had it been fully and accurately disclosed it would have*

had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so, at what premium. That test accorded with the duty of the assured to disclose all matters which would be taken into account by the underwriter when assessing the risk (i.e. the 'speculation') which he was consenting to assume (see p.587 b to h, p.588 d e, p.600 d to h, p.601j, p.605 g h, p.607 b c, p.610 b to d, p618 c d and p.619 h j, post); Container Transport International Inc. –v- Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1984] 1 Lloyd's Rep. 476 approved.

(2) However, for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure, not only did the misrepresentation or non-disclosure have to be material but in addition it had to have induced the making of the policy on the relevant terms. Accordingly, an underwriter who was not induced by the misrepresentation or non-disclosure of a material fact to make the contract could not rely on the misrepresentation or non-disclosure to avoid the contract (see p.585b, p.586hj, p.588 d e, p.617e f, p.618 c d, p.619 h j, p.634 a to d and p.638d, post); Container Transport International Inc. –v- Oceanus Mutual

Underwriting Association (Bermuda) Ltd. *[1984] 1 Lloyd's Rep. 476 overruled in part.*

[8] In that case Lord Goff, who together with Lord Mustill and Lord Slynn who were the majority Judges stated:

> *"First it seems to me, as it does to Lord Mustill, that the words in s18(2) 'would influence the judgment of a prudent insurer in ...determining whether he will take the risk' denote no more than "an effect on the mind of the insurer in weighing up the risk. The subsection does not require that the circumstance in question should have a decisive influence on the judgment of the insurer; and I, for my part, can see no basis for reading this requirement into the subsection".*

[9] In his dissenting judgment Lord Lloyd said at p.571:

> *"Whenever an insurer seeks to avoid a contract of insurance or re-insurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions:*
>
> *i) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms?*

ii) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded?

iii) If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise.

iv) The evidence of the insurer himself will normally be required to satisfy the Court on the first question.

v) The evidence of an independent broker or underwriter will normally be required to satisfy the Court on the second question. This produces a uniform and workable solution, which has the further advantage, as I see it, of according with good commercial common sense. It follows that the CTI case was wrongly decided, and should be overruled".

[10] It is to be noted that Lord Berwick uses the word *"normally"* which can be taken to mean that other circumstances might justify a departure from the rule as Lord Lloyd held it to be.

[11] It is important to note that in Pan Atlantic their Lordships were unanimous on the point that there was a subjective inducement

requirement, but they were divided 3-2 on the correct test for materiality. The majority view of Lords Goff Mustill and Slynn was that the correct test for materiality was whether a fact would have *"an effect on the mind of the insurer in weighing up the risk".* (per Lord Goff). The minority view, which does not represent the law at least in England, is that expressed by Lord Lloyd and Lord Templeman and quoted by the Judge, suggests a much narrower test for materiality based on whether the non-disclosure had a decisive influence on the judgment of a prudent insurer. Accordingly, the *Appellant* submits that the Judge applied the wrong test for materiality and has erred in law accordingly. It must also be stated that English law has long recognized that the evidence of the insurer itself can satisfy the materiality requirement if the Court is satisfied that the insurer is a *"prudent insurer".* There is no suggestion in this case that the *Appellant* is not a prudent insurer.

[12] Indeed, for many years the evidence of other underwriters was regarded with suspicion by the Courts. A recent illustration of this in a case which was not cited to Phillips J. is **Mundi –v- Lincoln Assurance Co.** [2006] Lloyd's Reports IR 353 a decision of Mr Justice Lindsay. The Judge held that it was for him to decide on materiality as the trier of fact. He held that the evidence of the defendant insurer's own practice that the facts withheld (drinking habits, for the purposes of life insurance) were objectively material. It is arguable therefore that the statement of the Judge *"the evidence of Mr Chand does not satisfy the second question"* is wrong as a statement of the law in Fiji.

[13] In paragraph 4 of his Judgment Lindsay J. said:

> *"Although it is proper for the Court to formulate legal tests governing the materiality of facts, the question of whether a given fact is or is not material is one of fact to be determined by a jury or the Judge as the trier of fact. The decision rests on the Judge's own appraisal of the relevance of the disputed fact to the subject matter of the insurance; it is not something which is settled automatically by the current practice or opinion of insurers".*

The Judge then continued:

> *"Thus the materiality of an uncommunicated fact may be so obvious that it is unnecessary to call any expert evidence to establish this point. Scrutton L.J. put the matter forcibly in* ***Glicksman –v- Lancashire and General Assurance Co.*** *in the following way:*
>
> > *"[It was argued] that before a Court can find that a fact is material, somebody must give evidence of the materiality. That is entirely contrary to the whole course of insurance litigation; it is so far contrary that it is frequently objected that a party is not entitled to call other people to say what they think is material; that it is a matter for the Court on the*

> ***nature of the facts. I entirely agree with Roche J. that the nature of the facts may be such that you do not need anyone to come and say, "this is material". If a ship-owner desiring to insure his ship for the month of January knew that in that month she was heavily damaged in a storm, it would, with deference to Counsel who has suggested the opposite, be ridiculous to call evidence on the materiality of that fact; the fact speaks for itself. Where, however, the Court is unsure of the materiality of a given fact, it is usual to call expert evidence from persons engaged in the insurance business in order to assist the Court in making its decision".***

[14] In my view therefore this raises a very arguable point of law which should be decided by the Full Court. It appears that the question has never been decided so far by this Court and in my view it should be. All other things being equal therefore, for this reason alone I consider that a Stay of the Judgment of Phillips J. should be granted. In this regard it is also important to note the views of the learned Judge herself on this. Under the heading of *"The novelty and importance of questions involved"*, in paragraph 11 of her Ruling of the 25th of April 2008 the learned Judge said this:

> ***"In my view the points of law involved in the appeal raise questions of some importance.***

The issue of the test to be applied to a "prudent insurer" and whether a prudent insurer would have entered into the contract on the same terms if it had known of the misrepresentation or non-disclosure immediately before the contract was concluded and the test to determine this are issues which require an authoritative judgment by the Fiji Court of Appeal. Also whether the test outlined in the House of Lords Judgment in Pan Atlantic Insurance Co. Ltd. and Another –v- Pine Top Insurance Co. Ltd. [1995] 1 AC at p.571 applies in Fiji".

[15] This reinforces my view that it is appropriate to grant a Stay of the Judgment if the law allows me to do so. I am satisfied that it does. In my decision in Civil Appeal No. ABU0063 of 2007 **Honeymoon Islands (Fiji) Ltd. & Others –v- Follies International Ltd.** delivered on the 30th of November 2007 at paragraph 14 I wrote:

"Special Circumstances Not an Inflexible Rule

I think it is sometimes assumed that special circumstances have to exist before a Stay can be granted in a civil process but this is not an inflexible rule. For example in Reddy's Enterprises Limited –v- Governor of the Reserve Bank of Fiji [1991] F.J.C.A. 4 ABU0067d. 90s Sir Moti Tikaram P. said:

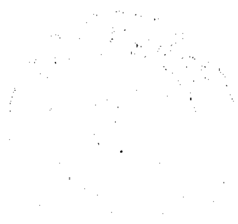
"In requiring the Applicant to establish special circumstances in this case I am not to be taken to hold that in all applications for a Stay it shall be incumbent on the Applicant to show special circumstances in the traditional sense. I subscribe to the view that adherence to an inflexible rigid test to all types of Stay on injunction cases without considering their nature is not to be favoured. The strict test rule can negate the wide discretion vested in Courts and could even lead to denial of justice in particular cases". I respectfully agree.

[16] The learned Judge considered that to grant a Stay would cause more harm to the *Respondent* than the *Appellant* on the basis that the *Respondent's* witnesses might not be available, but in my view the same consideration applied to both parties equally and therefore was equivocal.

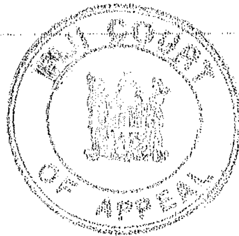
[17] In **Powerflex Services Pty. Ltd. & Ors. –v- Data Access Corporation** [1996] 137 ALR 498, a full Bench of the Federal Court of Australia confirmed that there was no need to demonstrate *"special"* circumstances before granting a Stay but that it was:

"Sufficient that the Applicant for the Stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour".

[18] I consider that on the facts of this case the discretion should be exercised in favour of the *Appellant*. I therefore order that a Stay of all further proceedings including the Judgment of Phillips J. is granted until the final determination of this case in this Court. Costs will be in the cause.



[John E. Byrne]
JUDGE OF APPEAL



At Suva

16th January 2009