STINSON PEARCE LIMITED

v.

QUEENSLAND INSURANCE (FIJI) LIMITED

[HIGH COURT, 1993 (Fatiaki J) 15 October]

Civil Jurisdiction

Contract- insurance- whether "forcible and violent" entry upon the insured premises- whether entry "a riot".

Four armed and masked men burst through the open door of a jeweller, smashed the display cases and stole the contents. The Insurers rejected the claim insisting that the doors having been open there had been no forcible and violent entry. The High Court HELD: the circumstances of the burglary amounted to forcible and violent entry and also amounted to riot.

Cases cited:

In re Calf and Sun Insurance Office [1920] K.B. 366
In re George and the Goldsmiths and General Burglary Insurance Association Ltd [1889] 1 Q.B. 595
London and Lancashire Fire Insurance Co. Ltd v. Bolands Limited [1924] A.C. 836

Action for breach of contract in the High Court.

B. N. Sweetman for the Plaintiff
R. Krishna for the Defendant

Fatiaki J:

In this action the plaintiff claims to be entitled to recover the sum claimed under a policy of insurance issued by the defendant and covering the period from 31.12.86 to 31.12.87.

The facts upon which the claim is based are not disputed and are set out in the agreed statement of Savitri Pratap which is reproduced below. She says :

> "On the 6th August, 1987, at approximately 3.45 p.m. I was on duty as Manageress of Prouds Shop at Vitogo Parade, Lautoka. My assistant was Subadra, who has since emigrated from Fiji. There were two customers in the shop, Mrs. Peckham and Mrs. Lunn, together with one small daughter of Mrs. Peckham. The front doors of the shop were open. Three or four masked men suddenly burst into the shop, through the open door. Their faces were entirely hidden with the exception of eye holes, and they wore socks over their hands and arms.

> They carried crowbars and axes. One of them placed an axe against my neck and said "Don't move." I had my hands on the counter but I took them off because feared they might chop my hands. The men then proceeded to smash the show cases in the shop with their axes and crowbars, The first case contained Mikimoto pearls and rings, the second contained gold jewellery, chains, bracelets, pendants, ear rings and diamond rings, and the third show case contained watches of Seiko and Pulsar Brands. After they had smashed open the show cases they swept the contents of the cases into sacks which they carried. I was terrified and my assistant and the customers also appeared shocked and terrified.
>
> For many weeks afterwards I hated entering the shop as the scene continued to return to my mind. Once the shop breakers had swept the goods into their sacks they left as rapidly as they had entered and departed in a vehicle standing outside the shop. The whole episode probably only lasted 30 seconds.
>
> (Sgd.) S. Pratap"

On those facts on the 14th of August 1987 the plaintiff (through its brokers) lodged 2 claims with the defendant insurers, one under a "plate glass insurance" policy for the repairs to its showcases, which was subsequently paid, and another, under a "burglary insurance" policy for the assorted items of jewellery and watches which were removed from the showcases and which latter claim has been the subject-matter of extensive correspondence between the professional advisors of the plaintiff and representatives of the defendant and is the subject matter of the present proceedings.

It is necessary to carefully consider the terms of the policy to see whether or not the plaintiff's claim is covered.

The policy document issued by the defendant is entitled: "Burglary Insurance Policy - Business Premises" and sets out the following contractual agreement between parties :

> "In consideration of the insured named in the Schedule hereto having paid to QBE Insurance Limited (hereinafter called the Company) the Premium mentioned in the said Schedule. The Company Agrees That if at any time during the period of insurance stated in the said Schedule any of the property insured described in the Schedule whilst contained within the Premises (which shall not include any garden, yard, open verandah, outbuilding or appurtenances) specified in the said Schedule be lost or damaged as the result of :

(a) THEFT consequent upon actual forcible and violent entry upon the said premises or any attempt thereat

(b) THEFT or any attempt thereat by a person feloniously concealed in the said premises

the Company will pay to the Insured the value (as at the time of the loss) of the property lost or the amount of the damage or at its option reinstate or replace such property or part thereof."

The policy document then lists various exclusions including any loss or damage due to theft committed by any of the insured's family or any person or persons whilst lawfully on the premises and thereafter sets out several conditions including one which required the insured to take all precautions for the safety and protection of the property insured.

The Schedule to the policy is a Certificate and several pages of specifications of which the following-are the most relevant:

"THE INSURED	:	Stinson Pearce Limited.
OCCUPATION	:	Principally Duty Free Dealers, Importers Wholesalers Retailers ...
INTEREST INSURED	:	On property, the Insured's own or held by them in trust or on commission for which the Insured is responsible...., the sums insured being understood to apply to: contents, stock of every description, merchandise ...
SITUATION	:	Anywhere in Fiji."

In my view in the absence of a more precise definition of 'the premises', the policy is apt to cover any premises at or out of which the insured is conducting its normal business or occupation. Accordingly there can be no doubting that the duty-free shop premises at 145 Vitogo Parade, Lautoka are within the location(s) contemplated by the broad terms of the policy.

Equally I am inclined to the view that the particular showcases in which the plaintiff's stock and merchandise was stored, whilst covered by the policy in the event of any damage being caused to them, is not and cannot be considered the actual "business premises ". This is implicit in various terms and conditions of the policy which would be rendered meaningless if the plaintiff's showcases could be considered "the premises" for the purposes of the policy.

For instances, peril (b) and exclusion (b)(ii) contemplate persons "feloniously concealed on the said premises" and "lawfully on the premises" and the policy extension dealing with "temporary removal" differentiates between removals within the same premises and to any other premises.

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In my view the provision by the plaintiff of the glass showcases for the purpose of storing and displaying its stock and merchandise in its business premises was a necessary requirement of condition 1 of the policy in so far as it was a "reasonable precaution for the safety und protection of the property insured"

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Having thus determined that "the premises" for the purposes of the policy is the plaintiff's shop at 145 Vitogo Parade, can it be said that the undoubted theft of the plaintiff's stock was consequent upon actual forcible and violent entry upon the said premises ?

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Before dealing with this issue however there is a submission by learned Counsel for the defendant seeking to limit any claim under the policy to one arising from a "burglary" as the term is technically understood and defined in Section 299 of the Penal Code (Cap.17).

Specifically, Counsel submits : "... that the subject Burglary Insurance Policy only covered risks of theft consequent upon actual forcible and violent entry upon the plaintiff's premises at night and not during day time or during trading hours when the shop premises were open to the public."

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I cannot agree. Nowhere in the operative part of the policy is the term "burglary" to be found nor has the operative part been limited to a theft at night. Indeed, the policy clearly and expressly provides continuous cover "... at any time during the period of insurance ..."

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Furthermore, the peril covered is much narrower than is contemplated by the extended definition of a "breaking" (See : Section 297 of the Penal Code) for the purposes of an offence of burglary which in turn is not only restricted to dwelling-houses but is also complete upon proof of an accompanying "... intent to commit any felony therein."

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In other words even if the technical meaning of burglary could be incorporated into the policy it would be limited to the species of acts expressly provided for by the policy namely "theft consequent; upon an actual forcible and violent entry upon the said premises ..."

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Needless to say if I accept the defendant's submissions in this regard (which I do not) then even a theft consequent upon an actual forcible and violent entry committed during the day-time would not be covered not because the policy is so-expressed but because the title of the policy contains the word "Burglary".

In my view to construe the policy so as to restrict the cover to the offence of burglary as defined in the Penal Code would have the wholly unreasonable

effect of oblitering nearly all the insurance cover which is given on the face of the policy. With respect that seems to me to be quite an impossible construction to place upon an insurance policy plainly intended by the parties to cover business premises at any time during the currency of the policy.

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I turn then to the rather vexed question of whether the theft which undoubtedly occurred at the plaintiff' s business premises at 145 Vitogo Parade, Lautoka on the afternoon of the 6th of August 1987 (which is common ground) was "consequent upon an actual forcible and violent entry" ?

B

In this regard the plaintiff's simple argument is summed up in the following passage in Counsel's written submissions where he says :

> "The entry of masked raiders into a jewellery shop by bursting through the front doors, carrying axes and crowbars, can hardly be described as other than a forcible and violent entry into the shop. The holding of an axe to the neck of one of the shop employees and a threat to her was a further act of violence. The smashing of the showcases with the axes and crowbars were extreme acts of force and violence."

C

It is common ground however that the doors through which the thieves entered the plaintiff's premises were wide open at the time and no actual force was used in order to gain entry into the premises. Very simply, the shop doors were open as was normal during business hours and the armed and masked men entered through the open doorway.

D

There is no suggestion that in order to gain entry into the shop premises the thieves had to overcome some sort of barrier or entered into a part of the shop from which members of the public were excluded or used any sort of force or violence on any part of the entrance door.

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In the circumstances the submission of learned Counsel for the defendant is the equally simple one that there was no 'actual forcible and violent entry' into the premises. In Counsel's words :

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> "The violence must be connected with the act of entry. If the entry is obtained without violence, the subsequent use of violence to effect the theft, as instance where a showcase is broken open, does not bring the loss within the policy."

The leading authority for this proposition is the judgment of the Court of Appeal in the case of in re George and the Goldsmiths and General Burglary Insurance Association, Limited [1889] 1 Q.B. 595.

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In that case in the early morning before business hours, during the temporary absence of a servant of the assured, some person opened the front, door, entered the shop, and, breaking open a locked-up compartment or showcase within,

which formed part of the shop, stole therefrom part of the insured property. The assured sought to recover his loss under a Burglary and Housebreaking
A policy which insured against loss or damage "by theft following upon actual forcible and violent entry upon the premises ..."

In rejecting the claim the Court of Appeal held that the loss which occurred was not covered by the policy.

Lord Russell C.J. in discussing the meaning of the phrase " ... an actual forcible
B and violent entry ..." said at p. 603:

> "It seems to me that the words taken together contemplate the existence of, not a mere technical entry by violence, but an entry by real violence."

C and later at p.604 :

> "... I conceive that the policy was directed to securing the assured against the-consequences of an entry effected by real 'violence', as the word is commonly understood, in contradistinction to an entry effected by stealth without violence as I think the entry in this case was effected."

D

Then in rejecting a second proposition that the actions of the thief inside the premises amounted to an "actual forcible and violent entry" the learned Chief Justice said after examining various terms of the policy at p.605: "I think that must mean entrance from the outside into the shop or premises connected therewith."

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Smith L.J. for his part expressed the following opinion on the first question before the Court when he said at p. 608:

> "In my opinion the word 'violent' was used to accentuate and give point to the kind of force which was covered by the policy, and to prevent ... it being argued, that, as the mere turning of
F the handle of a door is the exercise of some force, therefore such an act was covered by the policy, It is true the entry must be actual, but also with force and violence. These last words cannot be omitted."

and in rejecting the argument that the glass showcase was forcibly entered by
G the thief he said at p.609 :

> "It is force and violence from without, and not from within the premises which is covered by the policy."

Collins L.J. contented himself with the view expressed at p.609 where he says:

> "It is no part of our province to make for the parties a reasonable

> contract; and if, as I think, they have not altogether succeeded in doing so for themselves, we cannot do so far them. I think the vice of the decision of the Divisional Court, if I may say so, is that they sought to make for the parties a contract which should be reasonable from all points of view ..."

The only other authority that needs to be examined is the later decision the Court of Appeal In re Calf and Sun Insurance Office [1920] K.B. 366.

In that case too the thief had originally gained entry into a building without using any force or violence though he later used force and violence to break into various rooms in the building from which he stole items.

The Court of Appeal in upholding the assured's claim restricted "the premises" referred to in the policy to those rooms in the building that were used exclusively by the assured in conducting his tailoring business and not those in which he resided or were let out to tenants albeit that they were all within the same building.

More particularly Bankes L.J. in distinguishing In re George (op. cit) said at p.378 :

> "All I need say about the words 'forcible and violent entry' is that in my opinion they have reference to the character of the act by which an entry is obtained rather than the actual amount of force used in making the entry."

Atkin L.J. on the other hand adopted the established principles of the criminal law and the definition of burglary in determining the meaning of the phrase in the policy "entry of the said premises". He said at p.381 :

> "It is therefore clear that a breaking and entering, the subject matter of this policy, is satisfied by either entering the premises through an open door or being on the premises lawfully, and then breaking and entering into one room in the premises; and I see no reason for placing a different construction upon the same words in this policy."

In this regard Section 297 of our Penal Code (Cap. includes in the definition of "breaking and entering" :

> "A person who obtains entrance into a building by means of any threat ... used for that purpose ... is deemed to have broken and entered the building".

In dealing with the words "actual forcible and violent entry", his Lordship whilst accepting that more force was required than merely lifting a door latch or turning a key, nevertheless stressed at p.383 :

> "... that this is a business document relating to protection against burglary and housebreaking and is intended, one would assume, to be protection against the ordinary methods of burglars and housebreakers. "

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In his Lordship's judgment :

> "the view taken by the learned judges in George's Case was that ... the words "actual forcible and violent entry" ... was intended to mean an entry effected by the exercise of force in a manner that was not customary in order to overcome the resistance of the usual fastening and protection in the premises."

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Younger L.J. agreed with both judgments and confined himself to an analysis of what was the "premises" covered by the policy. He expressed the view at p.385 :

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> "Looking again at the words of exclusion it is, I think reasonably clear that the reason for the exclusion of garden, outbuilding, or other appurtenances is that the assured cannot exercise over them that amount of care and supervision which would be some protection to the insurer, if exercised. Accordingly the insurer was not willing to take any risk with reference to the contents of those parts of the premises. In my opinion too this policy extends only to premises in the sole occupation of the assured as business premises."

D

Clearly the two decisions of the Court of Appeal are on first blush not easily reconciled, but reconcilable they are on the basis of the view the Court formed on what comprised "the premises" covered by the policy question.

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In George's case it was the whole shop building whereas in Calf"'s case it was comprised of the rooms within building exclusively used for the assured's business purposes. In George's case therefore entry was not forcible and violent whereas in Calf"'s case actual force and violence was used to gain entry into the locked rooms within the building albeit that the thief's initial entry into the building was not so effected.

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In so far as it is necessary to choose between the two decisions, I prefer the broader views expressed in the judgments of the Court of Appeal in Calf's case on the meaning to be given to the phrase : "actual forcible and violent entry".

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There is no difficulty to my mind in holding, where armed and masked men burst into a shop and threaten and terrorise employees and went on to destroy glass showcases in the premises, that there is an "entry" within the category of acts which may be characterised by the phrase "an actual forcible and violent entry"

In my view the difficulties that have arisen with regard to the meaning of the phrase are due in large measure to the over-refinements of lawyers and a failure to give due weight to the commercial context in which the insurance policy was issued.

If I am wrong however in finding that the theft in this case was consequent upon a forcible and violent entry upon the plaintiff's business premises, then, I have not the slightest doubt that the loss arose within the clear contractual extension of the policy to include amongst the perils or risks insured, "loss or damage arising during or in consequence of riot ..."

In this latter regard the definition of a "riot" in Section 86 of the Penal Code (Cap. 17) reads:

> "When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot."

and an "unlawful assembly" is in turn defined as one in which:

> " ... three or more persons assemble with intent to commit an offence or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace ..."

In my opinion on the agreed facts, the removal of the jewellery and other items from the plaintiff's business premises at 145 Vitogo Parade on the afternoon of the 6th of August 1987 was nothing short of "a loss arising during or in consequence of a riot" and therefore clearly within the express terms of the insurance policy issued by the defendant company.

I am somewhat fortified in my opinion by the decision in London and Lancashire Fire Insurance Co. Ltd v Bolands Limited [1924] A.C. 836 in which 4 armed men entered the assured's premises during daylight hours, held up the employees with revolvers and stole all the cash they could find. They also threatened the employees on the premises and as they were leaving. There was however no public disturbance in the neighbourhood at the time.

The House of Lords upheld the arbitrator's finding that the assured could not recover under his burglary and housebreaking policy because the circumstances in which the money was stolen constituted a riot within the proviso in the policy which excluded "(any) loss directly or indirectly caused by, or happening through or in consequence of .,. riots".

Viscount Finlay in rejecting the argument that what had occurred was an armed robbery and not a riot said at p.841 :

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> "... the circumstances ... seem to me to constitute what in the legal sense of the term would be a riot. Whether one looks at the acts that were done and threatened or at the number of persons present, or at the whole surrounding, one is forced to the same conclusion, that it would be perfectly impossible to say that all the essentials to the constitution of the offence of a riot at law did not exist. There was a riot beyond all question".

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For the foregoing reasons the plaintiff succeeds in this action.

There will be judgment for the plaintiff in the sum of $15,952.24. I also award the plaintiff interest at the rate of 10% p.a. calculated from the 5th of September, 1989 until payment, with costs to be taxed if not agreed.

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(Judgment for the Plaintiff)

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