HIGH COURT OF SOLOMON ISLANDS

BRUCE ROBERT MURRAY AND THERESA TAKABAN MURRAY -V- TOWER INSURANCE LIMITED (formerly National Insurance Company of New Zealand Limited)

Civil Case No. 166 of 2002

Honiara: Brown PJ

Date of Hearing: 22 August 2003
Date of Judgment: 8 October 2003

Mr. J Sullivan for the plaintiff
Mr. A Radclyffe for the defendants

Insurance - *house-owners and householders policy insurer purports to cancel and reinstate policy with different terms by letter sent insured- happening of acts excluded in reinstated policy-claim to be indemnified denied- validity of effect of letter-consensus.*

The plaintiffs had policies of insurance with "Tower Insurance" indemnifying them in relation to house properties in Honiara against particular risks. On the 6 September 1999, Tower Insurance wrote to the plaintiffs purporting to terminate its policy but reinstating it on fresh terms which were wide exclusions of risk.

In October/November the premises suffered damage and the plaintiffs have sought indemnity, which has been refused, the insurer relying on the exclusions in the fresh policy. The plaintiffs have sued claiming that the original policy still stands.

Held: 1. The insurers object in seeking to cancel the original policy by letter in those terms has been so inextricably joined with a purported reinstatement on materially different terms, that it has failed in both objects, so that the original policy remains.

2. The insurer had not satisfied the burden of showing the necessary consensus (express or implied) in an insurance contract involving as it does, *umberrima fides.*

Cases Cited

1. *Morris -v- Baron & Co [1918] AC 1,*
2. *British and Beningtons Ltd v North Western Cachar Tea Co. Ltd* [1923] A.C. 48
3. *Marriott v Oxford & District Co-operative Society Ltd (No. 2)* [1969] 1 W.L.R. 254
4. *In United Dominions Corp (Jamaica) Ltd -v- Michael Mitri Shoucair* (1969) 1 A.C. 340
5. *Tallerman & Co. Pty Ltd -v- Nathans Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93
6. *Concui Pty Ltd -v- Worrell* [2000) H.C.A. 64
7. *Turner -v- Metropolitan Life Assurance Co. of New Zealand Ltd (1988) 5 NZ I Insurance Cases 60-86*
8. *In AIG Europe S.A. -v- QBE International Insurance Ltd (2001) EWHC Commercial 491*

The original statement of claim by the plaintiffs seeks some $480,000 for the replacement of house properties damaged by vandals in about late October, early November 1999 in Honiara in manner described as involving burglary, housebreaking and malicious damage.

By virtue of a policy of insurance issued by the defendant (then National Insurance Co. of NZ Ltd) the plaintiffs were indemnified against particular risks to their residential properties in Honiara according to its terms for a 12 month period commencing on the 9th May 1995 and then annually consequent upon payment of the premiums. In May 1999, there were additional variations made to the terms of the policy and again by letter (the letter) of the 6 September 1999, the company purported to terminate its policy (the original contract, or policy) and immediately reinstate it (the new policy) with further terms (being particular exclusions).

The defendant was the insurer under House owners and Householders Policies, of the plaintiff's houses, and on the 6 September 1999, wrote to the plaintiffs, ("the letter") explaining that,

> *Policies 7902663/XDF002*
>
> *As you know, the situation in the Solomon Islands is deteriorating. As a result, normal commercial and business activities can no longer be carried out.*
>
> *One of consequences of this situation is that we are unable to continue to provide you with the protection which is afforded by our policies of insurance. We entered into*

those policies on the basis of circumstances which have now dramatically changed. Those changes have been taking place over the past few months, but we refrained from taking any action in the hope that matters be resolved. However, we must now reluctantly conclude that the situation has deteriorated to such a level that it is no longer possible for us to offer the same cover.

We are therefore left with no option but to take the following action under the terms of your policy:

The policy set out above is cancelled in accordance with its terms. You should check the cancellation/termination clause of your policy to identify the date on which this will take effect. At the same time as the cancellation taking effect in accordance with the policy terms the policy is reinstated subject to the following additional exclusions.

Loss, damage or liability or claims arising from or contributed to in any way by:

> *Riot, civil commotion, civil disturbance, any unlawful activity whether politically motivated or not, sabotage, subversion, strikes or lockouts, persons taking part in labour disturbances or any activities in connection therewith, any action of military, police, security or other authorities or in instrumentalities whether governmental or not, including any fire or other damage directly or indirectly resulting from any of the above.*
>
> *Any deliberate act or damage, whether to the insured property or not*
>
> *Looting, sacking and/or pillaging*

In late October or November, the premises of the plaintiffs were severely damaged in the course of the "troubles" in Honiara, and the plaintiffs sought indemnity under the policy of insurance from the defendant. Tower Insurance Ltd (Tower) has denied liability, pleading the exclusion of cover contained in the re-instated policy referred to by the letter.

Consequently this court has been asked to decide a preliminary issue of law.

> *"Was the Defendant, without the consent of the Plaintiffs, entitled to cancel the Policy of Insurance No. 806552/XDF002 and simultaneously reinstate the said policy with additional exclusions so as to continue in force the said policy subject to additional exclusions?*

The Defendant contends for an affirmative answer, whereas the Plaintiffs contend for the negative and says that the same amounts to a variation of the said policy for which the consent of both parties was required.

For the insurer has refused to indemnify the plaintiffs in reliance upon the purported exclusions and upon other grounds.

An agreed statement of facts was filed and helpfully deals with matters admitted on the pleadings and facts in issue. I need not set out these matters, for the purposes of my ruling.

The plaintiff's submissions on the preliminary issue

Mr. Sullivan says that where there has been an attempted unilateral (and therefore invalid) variation of the policy, the original policy remains on foot and unamended. He concedes the insurer had the right to unilaterally cancel the policy of insurance by virtue of its terms, but that the manner in which the insurer sought to achieve its purpose had the effect of continuing the same policy under the same policy number, upon the same terms but with additional exclusions. Therefore the purported cancellation failed in its intention.

This court should have regard to the authorities on variation or rescission of contract; find in effect, a variation rather than rescission and fresh contract. The insurer cannot both approbate and reprobate in respect to the policy (It cannot be permitted to say, on the one hand that the policy is cancelled and on the other hand, that it is still on foot, which it must be if the plaintiffs are still held covered).

The plaintiff's case law

(Mr. Sullivan's written submissions shortly refer to cases supportive of his propositions). He says:

4. The test to be applied in distinguishing between variations on the one hand and rescission plus novation on the other hand is now reasonably clear although each case will of course depend on its own circumstances.

> "What is of course, essential [for rescission] is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting." *Morris –v- Baron & Co (1), per Vt. Haldane, 19.*

> "The difference between variation and rescission is a real one, and is tested to my thinking, by this. In the first case [variation] there are no such executor clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second [rescission] you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject matter as the first but in a different way, it is impossible that the two should both be performed.(Morris –v- Baron & Co, supra at 25-26) (Lord Dunedin)."

5. To the same effect is *British and Berringtongs Ltd -v- North Western Cachar Tea Co. Ltd* (2) where Lord Summer said at 68 –

> "Under the circumstances it is plain that the original contracts were not made an end of May 12, 1920, but were meant at most to be subjected to a variation or alteration as the manner and measure of performances of the original terms. The change does not go to the very root of the original contracts nor it is inconsistent with the, it merely varied the written contract... the situation of the parties being unchanged."

- see also Lord Atkinson at.62; *Marriott v Oxford & District Co-operative Sol.* (3) 258-239 (Parker CJ).

6. The English approach is thus to look at the intention of the parties in all the circumstances of the case. If the intention is to make a change that goes to the very root of the first contract and substitute it with an entirely new contract standing alone then the original contract is rescinded. However where the intention is merely to alter the manner or measure of performance of the original teams without going to the root of the contract then the original contact is merely varied. If the true intention is that the contract is to be varied, but the variation is unlawful or otherwise invalid, then the original agreement remains in force unamended – cf. *United Dominions Corp. (Jamaica) Ltd v Shoucair(4)*, 347-348 (PC).

7. The Australian position is to like effect, namely, the determining factor is always the intention of parties and that there is no rescission but only a variation, where the relationship between the parties sis merely modified by cutting out part of the rights and obligations involved with or without

the substitution of new rights and obligations *Tallerman & Co. Pty Ltd* (5), 112-113 (Dixon CJ and Fullagar J), 143-144 (Taylor J); *Concut Pty Ltd -v- Worrell* (6), 5-6.

On the facts, Mr. Sullivan says the insurer's intention was to effect a variation of the policy, which was a unilateral variation with-out the plaintiff's consent, and thus of no effect.

The defendant's (insurers) submissions on the preliminary point

Mr. Radclyffe separated the issues and argued that Tower was entitled to:

1) cancel the policy of insurance and
2) reinstate the policy of insurance on different terms.

He said there is no issue that the policy gave the insurer an express right to cancel, with or without cause.

That is so.

Plaintiffs counsel had been careful to suggest the question has not been the subject of earlier reported consideration. Mr. Radclyffe shrugs and says for good reason, since the defendant had cancelled the earlier policy and replaced it by a policy with new terms. That *simpliciter* explains why the question should be answered in the affirmative.

That proposition is very attractive, for the letter spells out the insurers intentions, without ambiguity. But reflecting the insurer's intentions may not effectively reflect the contract, if any made as a consequence of the letter

In his written submissions, Mr. Radclyffe argued that it is not necessary for the court to decide, in the context of the preliminary issue whether Towers purported cancellation and subsequent reinstatement were valid, rather only whether Tower was entitled to cancel and then subsequently reinstate.

I do not accept this proposition.

The parties have agreed facts sufficient for my purpose since the argument is of small compass. If it is decided in the affirmative, then the proceedings may be foreshortened while if in the negative, the insurer may have various options but the costs of arguing, piecemeal, this preliminary point, will be avoided were I to decide here and now.

Mr. Radclyffe said, in the circumstances of the letter, notice of cancellation was effectively given the Murrays and that the notice, expressed to rely on a term of the policy was consequently effective for the purposes of the policy clause entitling the company to cancel. Payment of a refund of premium, he said, is not a prerequisite under the clause, for cancellation of the policy to be effective.

I should say I am satisfied that where a policy (and factually this is the case, here) contains an express provision entitling the insurer to cancel the policy, the policy can be cancelled in accordance with that clause.

Mr. Radclyffe says Tower, on any interpretation of the policy, complied with that part of the policy entitling it to cancel.

What remains, of course, is whether the letter, read in its entirety, can be said to achieve that result.

Reinstatement

The defendant's argument.

The letter then reinstated the policy subject to different terms. At best, Towers reinstatement could be interpreted as an offer. It was quite separate from the act of cancellation, and its success, failure, or rejection does not affect the clear and contractual basis on which the policy was cancelled.

Towers rather leaves the assertion in the last sentence, above, without support, without addressing the form of notice, or letter to argue why such assertion should succeed.

Reasons of the Court on reinstatement

Reading the notes on cancellation – (general principles 2000 CCH Australia Ltd – Australian & New Zealand Insurance Reporter – 14-330) does not throw light on the assertion, for the cases quoted are not on point. A case which does touch on the form of notice of cancellation was *Turner -v- Metropolitan Life Assurance* Co. of New Zealand Ltd (7), where Wallace J commented that a notice advising "that your policy has lapsed and the life assured is no longer covered by this policy "but that" consideration will be given to reinstating your policy "providing the total amount (of premiums) outstanding is paid within 14 days "may have been ambiguous".

What may be taken from that case, is the court was there dealing with a policy whose terms were unchanged, yet whose insurers notice was strictly construed and where ambiguous, against the giver of the notice.

Findings

In AIG Europe S.A. -v- QBE International Insurance Ltd (7) the Queens Bench Division, Commercial Court (Moore-Bick J)heard that the claimant, "AIG" had entered into a facultative contract of reinsurance with "QBE" in respect of losses arising under the Aerospatiale policy for the same three year period. The reinsurance was effected through a Luxembourg broker, Societe Anonyme d'Inermediaires Luxembourgeois. In its claim form AIG alleges that it gave notice to cancel the underlying policy with effect from 31st December 2000 pursuant to a clause in that policy. On that basis the underlying policy ran for two rather than three years. AIG alleges that he QBE wrongfully purported to cancel it with effect from 31st December 1999. It seeks a declaration that reinsurance remained in full force and effect in respect of the period up to 31st December 2000 and also seeks to recover sums payable under that contract.

There was English authority "relating to the incorporation (in the latter contract of reinsurance) of terms by reference, drawing a distinction between those which are germane to the subject matter of the contract and those, such as arbitration clauses, which are essentially ancillary in nature"(Moore-Bick, J, 4).

In his reasons, at 6, Moore-Bick J said;

> *The incorporation of the terms of one contract into another related contract between different parties raises rather different question from those, which arise when one party to a contract seeks to incorporate by reference a set of standard trading terms. In the former case most, but not all, of the terms of the original contract are likely to be directly relevant to the substance of the contract into which they are to be incorporated. In these circumstances it becomes necessary to decide which terms the parties intended to incorporate and which they did not. In may cases the answer will be that in the absence of specific language the court will not be able to infer with confidence that the parties did intend to incorporate any terms other than those which are germane to their own contract: see the comments of Colman J in AIG Europe (UK) Ltd -v- The Ethniki at pages 309f – 310e. In the latter case this question rarely arises and the result is that all or none of the terms in question are incorporated. The present case, of course, is of the former kind. It does not necessarily follow, therefore, that general words in the reinsurance contract incorporating the terms and conditions of the*

underlying policy can be taken as demonstrating clearly and precisely the existence of a consensus in relation to clauses which are ancillary to the substance of the contract.

The case raises two important aspects. The first is the need to demonstrate clearly and precisely the *existence of a consensus* in relation to clauses which are germaine to the substance of the contract of insurance and which are sought to be included in a later contract. The second is the effect to the attempted challenge to the existence of the original policy.

I find that the fresh terms extending the scale of "exclusions" are germane to the purposes of the contract, and not ancillary, as was the case in QBE International Insurance Ltd. So here Tower seeks to incorporate by reference, not to some earlier agreement, but rather by letter of unilateral composition.

Mr. Radclyffe, for Tower has argued that is not necessary to show consensus since there had been no variation, rather the first policy was cancelled and the second policy stood on its own, having incorporated these fresh terms.

But the risks undertaken by Tower to indemnify the plaintiffs had been materially reduced by the fresh "exclusions". The reason for the material reduction in risk was given in the earlier part of the letter. Tower had balanced what remaining risk it was willing to carry, against the amount of the retained premium paid on the original policy. Obviously to allow the risk undertaken at the time of the original policy, to remain would have called for an increased premium but Tower chose to avoid the risk.

The willingness of Tower to reinsure on fresh terms was predicted on the greater risk attaching to Tower's obligations under the original contract, risk calling for fresh exclusion clauses deemed necessary by Tower. The assertion for the need for change, by Tower, is based on its perception of risk under the original contract, and the letter addresses that need for change.

Towers purpose then was to lessen the risk under the original contract. It may or may not have the right to do so under its policy during the term of insurance. I have not been referred to any clause in the original policy which allows such a change. Certainly on a material change to risk, either party may cancel the policy pursuant to an express term. In this case Tower has sought to achieve its purpose by purporting to cancel the policy and issue a fresh one. The predicated need for change relates to the original policy which Tower seeks to vary, not as to term but as to the extent of its risk.

Further, clear words in the letter make it plain the insurer intended to add these fresh terms to a policy. Those fresh terms change the extent of the insurer's risk, most materially, from that risk in the earlier policy. This is a unilateral act of the insurer in a process of acts, which effectively deny the insured any real opportunity to consider their position. At the instant of reinstatement, fresh terms changing the material risk are deemed to apply, without the foreknowledge of a contracting party.

The insurer, by the use of its letter in this fashion, seeks to incorporate all the original terms and the new exclusions, as terms and conditions of the policy.

I do not accept the insurer can do so, for it is not seeking, as in *QBE International Insurance* to pick up, as it were, terms in a previous agreement (which may or may not be incorporated in the new) according to the reasoning in that case. Rather it is seeking to impose entirely fresh terms, "exclusions", which were not contemplated by the parties at the time of the original contract. So there cannot be incorporation in the case before me, of these fresh terms on the basis of an earlier contemplation (conceded that this has not been suggested) but I raise it since the line of authority to *QBE International Insurance* illustrates a reluctance to adopt terms in fresh contracts except in particular circumstances of the *ratio decidendi* set out above. The underlying basis is the need to show consensus, and I am not satisfied Tower has discharged the onus.

How much harder, then must it be for an insurer to insist on fresh terms not in contemplation of the parties at the time of the original policy, when there is no real opportunity for consensus, and where the insurer's letter omits to point to a right to unilaterally change the material extent of risk in a policy of insurance which it purports to reinstate.

Mr. Radclyffe argues that the plaintiffs may treat the letter as a proposal, but there is, in the face of the letter, no ambiguity. The policy is reinstated and the premium remaining, attributed to this reinstated policy. Hardly words of an offer of a new policy or any suggestion of one. Even the term of the insurance cover under the original policy remained the same.

Mr. Radclyffe argues that the letter may be treated as an offer to reinstate insurance. It has none of the *indicia* of an offer on its face. I do not accept this argument. The company expressly stated that the policy was reinstated. No talk about proposal or offer of insurance.

The reinstated policy had this material change.

...the policy is reinstated subject to the following additional exclusions.

Loss, damage or liability or claims arising from or contributed to in any way by:

Riot, civil commotion, civil disturbance, any unlawful activity whether politically motivated or not, sabotage, subversion, strikes or lockouts, persons taking part in labour disturbances or any activities in connection therewith, any action of military, police, security or other authorities or instrumentalities whether governmental or not, including any fire or other damage directly or indirectly resulting from any of the above.

Any deliberate act or damage, whether to the insured property or not.

Looting, sacking and/or pillaging

The general exclusion in the original policy is narrower in its scope. Counsel have not argued that this general exclusion encompasses, in any event, the additional exclusions set out in the letter, and I find it is a material widening of the general exclusions, and unrelated to the incidents of the general exclusion.

The choice to seek to achieve the companies' objects by the letter this fashion implicitly contains the risk that neither object is achieved.

I appreciate the line of cases which Mr. Sullivan says, support the plaintiff's argument goes some way in that direction. The earlier English decision of the Privy Council in *United Dominion Corp (Jamaica) Ltd* is clear authority for Moore - Bick J's approach.

In United Dominions Corp (Jamaica) Ltd -v- Michael Mitri Shoucair (4), the Privy Council on appeal from the Court of Appeal of Jamaica, held that:

> *That the question whether an agreement which varied a money lending transaction and was itself unenforceable, avoided also the agreement which it sought to amend, depended on giving effect as far as possible to the intention of the parties which was just as important in money lending contracts as in any other, so that if the variation agreement revealed an intention to rescind the agreement which it sought to amend, the latter was destroyed, but if it did not seek to do so then the original agreement in force unamended.*
> *Morris v. Baron [1918] A.C. 1, H.L. followed.*

In this case there is no concession by the insurer that the original policy was to be varied, rather the company expressly relied on the cancellation, and immediate reinstatement of the original policy.

The Australian case *Concut Pty Ltd* does not really assist, for it seeks to elicit the intention of the parties in circumstances where there was consensus to contract. On the facts of this case, I find an absence of consensus, so the case is unhelpful.

The initial object of the letter, the cancellation of the policy cannot be separated from the companies' purported reinstatement. They are so inextricably joined that, to use the phraseology of Moore-Bick J, none of the objects in question are achieved.

The purported reinstatement of a policy was with terms germane to the underlying purpose of the contract of insurance, but there has been no consensus shown. Since the fresh terms are of such import in relation to risk (terms germane to the insurance contract) consensus must be express or implied in a contract of insurance involving as it does, *umberrima fides*. As I say, the insurer has not satisfied me that consensus in relation to the new policy between the parties, existed.

The original policy then, remains in force in spite of the letter.

I answer the question in the preliminary issue in the negative.

BROWN PJ