IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 1986

Between:

IFTAKHAR IQBAL AHMED KHAN Appellant

- and -

THE NATIONAL INSURANCE CO. LTD. Respondent

Dr. M.S. Sahu KHan for Appellant
Mr. P. Knight for the Respondent

Date of Hearing: 12th March, 1986
Delivery of Judgment: 21st March, 1986

JUDGMENT OF THE COURT

Kermode, J.A.

The appellant appeals against the judgment of Rooney J. dismissing his application for a declaration in connection with a cover note issued by the respondent on the 16th day of January, 1985 covering the appellant against the risks therein referred to.

The cover note is in the following terms:-

"NATIONAL INSURANCE 16/01/1985
Agent 0801

PROVISIONAL COVER NOTE

MR. IFTAKHAR IQBAL AHMED KHAN AS OWNER AND A.N.Z. BANK AS MORTGAGEE C/- KOYA & CO. LAUTOKA

In accordance with your request, you are hereby held INSURED against loss, damage or liability, subject to the terms and conditions of the Company's

Fire

Policy, in the sum of SIXTY THOUSAND DOLLARS $60,000.00 BUILDING OF DWELLING OCCUPIED BY INSURED.

SITUATION : 2 SAVALA ST. LAUTOKA
INCLUDED TO EXTEND. HURRICANE, E/QUAKE, EXTRANEOUS PARILS. (sic)

From 16/01/85 to 4 o'clock on 16/03/85.

Signature : R. Gopal

The National Insurance Company of Fiji Limited."

On the 17th January Cyclone "Eric" hit Fiji and within 2 days thereafter "Nigel" hit Fiji between them occasioning substantial damage to the insured property.

On the 22nd January, 1985 the appellant lodged with the respondent his claim to be indemnified for his loss which after assessment by the respondent's assessor was agreed at the sum of $31,476.

The respondent later denied liability claiming that a special condition in the company's policy excluded their liability because the loss was suffered within 7 days of the inception of the insurance.

The relevant special provision in the policy relating to cover against loss arising from damage by hurricane is :-

"2. WINDSTORM GALE HURRICANE AND CYCLONE

WINDSTORM GALE HURRICANE OR CYCLONE Provided that for each building and contents thereof, the Company shall not be liable under this extension for the first $150.00 of every claim or series of claims arising out of the one event.

SPECIAL CONDITIONS

1. No liability shall attach to the Company hereunder occurring before the expiration of 7 days after 4 o'clock on the day of inception of this Insurance".

Then follow a number of other exemptions which are not relevant.

Rooney J held that on the issue of the cover note the appellant was insured against all risks, other than cyclone damage. He further held that by virtue of the special condition the appellant was not covered against loss sustained on the day his house was damaged.

There are two grounds of appeal as follows:-

"1. THAT the Learned Trial Judge erred in Law in holding that the Appellant was not covered against risks of cyclone damage upon the issue of the cover note.

2. THAT the Learned Trial Judge erred in law in holding that the condition in the Policy that the cover excluded risk of cyclone damage until seven days had elapsed was applicable in the case of the Appellant."

These two grounds can conveniently be considered together.

In his written submissions Dr. Sahu Khan made the following concessions:-

> "For purposes or argument it is conceded that the term of the contract are to be collected from the proposal, the cover note and to a limited extent from the terms of the specimen policy. It is agreed that the cover note does show that it is subject to the terms and conditions of the Company's fire policy. It is also conceded for purposes of argument that the proposer must be held to have applied for a policy in the Company's usual form. However, it must be subject to this that the terms of the policy are not to be less advantageous to the proposer than the cover note. The cover note is the governing document and the other incorporated documents must of necessity yield to it in case of repungnancy".

The last sentence of that passage encompasses the main argument advanced on behalf of the appellant. It was contended that as the cover note was expressed to insure, without qualification, for the period from 16th January 1985 to 16th March 1985 it was repugnant to the special condition in the policy which excluded the liability of the respondent in respect of cyclone before the expiration of 7 days after 4 p.m. on the day of the inception of the cover or that if the two documents are read together, they are ambiguous. The submission was that if there is repugnancy or ambiguity the document must be construed contra proferentem, and the construction more favourable to the insured adopted. The dates shown in the cover note are merely dates stating

an interim period during which the risk is accepted under that note. Because of the terms of the exemption clause, postponing as it did, the commencement of the hurricane risk until seven days after the inception of the insurance, the commencement date of the policy had an added significance. It not only fixed the time and commencement of all the risks other than the time of commencement of the hurricane risk but also provided the time from which the commencement of that latter risk could be established. When the cover note and the conditions attaching to the hurricane risk are read together their meaning is abundantly clear and in our view there is no ambiguity or repugnancy requiring the application of the contra proferentem principle. The submission made to the contrary effect must accordingly be rejected.

It was also submitted that the special condition not having been drawn to the notice of the appellant, it was not applicable to him.

Rooney J, in his judgment in dealing with this aspect of the case, referred to a passage in MacGillivray and Parkington on Insurance Law Sixth Edition at page 282 where the learned authors state :-

> "284. Incorporation of policy conditions. The protection afforded by an interim receipt is not fully defined in the instrument itself, which is usually expressed to be on the company's usual terms, or subject to the conditions contained in the company's policies. Where the conditions are thus referred to expressly, the insurer does not have to prove that they were brought to the notice of the assured, or even that he had an opportunity of making himself acquainted with them. In such a case, the assured is bound by the conditions contained in the form of the company's policy currently in use and applicable to the case."

The authorities relied on by the authors for that statement are Queen Insurance Co. v. Parsons (1818) 7 App. Cas. 96 and McQueen v. Phoenix Mutual Insurance Co. (1879) 29 U. 26 p. 511. Modern authority for the same proposition is to be found in Steadfast Insurance Company Limited v. F & B. Trading Co. Pty Limited and Others (1970-71) 125 CLR 578 a decision of the High Court of Australia. In that case Walsh J. whose judgment was concurred in by Barwick C.J., Owen and Gibbs JJ, at p. 586 said:

> "The cover note states expressly that the cover given by it is subject to the terms and conditions of the company's policy. The general rule applicable to such a contract is that the conditions of the company's usual policy are binding on the insured, whether he has seen them or become acquainted with them or not: see MacGillivray on Insurance Law, 5th Ed, 1961), vol. 1, par. 640; Nicholson v. Southern Star Fire Insurance Co. Ltd. (1927) 285 R NSW 124 at pp 128-129 and cf. Citizens Insurance Co. Canada v. Parsons (supra)."

After stating the general rule thus, Walsh J. went on to say that there have been some decisions that certain conditions of a company's policy not communicated to an insured and not known to him were inapplicable to insurances under cover notes or interim receipts. Those instances, however, are few. They generally relate to conditions which impose an obligation on an insured such as the giving of immediate notice of an accident from which a claim might arise. In such cases it has been held unreasonable to suppose that the parties intended the insured to be bound until the contents of the policy or of the particular condition had been communicated to him - see, for instance, Coleman's Depositories Ltd. (1907) 2 KB 798. (CA.) The present case clearly falls outside that category of cases and accordingly the general rule must apply. The submission therefore fails.

The appeal accordingly fails. It is dismissed and the appellant is ordered to pay respondent's costs.

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Judge of Appeal

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