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

CIVIL APPEAL NO. ABU0056 OF 2006S
(High Court Civil Action No. 0424 of 1995S)

BETWEEN: **DILIP KUMAR** (f/n Maneklal) and
JYOSTNA DILIP KUMAR (f/n Shivlal) trading as
BINACO TEXTILES

Appellants

AND: **NATIONAL INSURANCE COMPANY OF FIJI LIMITED**

Respondent

Coram: **Ward, President**
Eichelbaum, JA
Penlington, JA

Hearing: **Thursday, 2nd November 2006, Suva**

Counsel:

J Turner	]	for the Appellant
C Cameron	]	
A K Narayan	]	for the Respondent

Date of Judgment: **Friday, 10th November 2006, Suva**

JUDGMENT OF THE COURT

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[1] This appeal concerns the proper construction of a fire insurance policy whereunder the respondent was the insurer and the appellants were the insured.

Background

[2] The appellants carry on a textile business under the name of Bianco Textiles. On 10 September 1994 the appellants' warehouse was damaged by fire. Under

clause 10 of the policy the insured was required, first, on the happening of any loss or damage to give notice forthwith to the insurer and, secondly, within 15 days after the loss or damage give notice in writing of a claim. The appellants complied with this clause. They immediately advised of the fire and later on 12 September 1994 gave notice in writing of a claim.

[3] The policy further provided in clause 18:

> ***"In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or the damage unless the claim is the subject of pending action or arbitration."***

It is the construction of the words "pending action" which is central to this appeal.

[4] The appellants commenced an action out of the High Court against the respondent on 18 September 1995. That was more than 12 months after the fire. The Statement of claim contained the appellant's fire claim under the fire policy as well as other claims under a burglary policy for a series of burglaries which had taken place. As at the date of the commencement of the action none of these claims had been met by the respondent. The burglary claims are not relevant for present purposes.

[5] After the commencement of the action the respondent took the point that under clause 18 the appellant's claim in so far as it related to the fire was out of time and that the respondent was not liable for any of the loss or damage claimed because the fire claim was not the subject of a "pending action" at the expiration of 12 months after the fire.

[6] The appellants on the other hand responded to the effect that on the plain and ordinary meaning of clause 18 for an action to be "pending" it was sufficient if it was in contemplation or threatened against the respondent during the 12 months period following the loss of damage rather than formally commenced by a filing in Court.

[7] The appellants relied on correspondence which had passed between the parties during the 12 months after the fire in support of their contention that an action was in contemplation or threatened against the respondent before the expiration of the 12 months. The relevant correspondence was as follows:

(a) A letter of 21 March 1995 from the appellants' solicitors to the respondent wherein they specified the loss arising from the fire and stated:

> ***"..we hold instructions to draw up High Court proceedings against your company in which a claim is to be made for the payment under the insurance policy and consequential losses, including a claim for interest***
>
> ***TAKE NOTICE that unless payment is made to our client within seven (7) days of the receipt by you of this letter, such proceedings will be filed. If you are not going to make the payment, perhaps you would like to inform us of the name of your solicitors so that we can serve the papers directly on them."***

(b) A letter of 18 April 1995 from the respondent to the appellants' solicitors wherein the respondent in a one-sentence reply stated that its solicitors "for this claim" are Cromptons.

(c) A letter of 6 September 1995 from the appellants' solicitors to the respondent's solicitors (Cromptons) wherein the former noted that the latter had so far not replied to the letter of 21 March. The letter then continued:

> ***"We will appreciate if this matter could be responded to on an urgent and priority basis. We have instructions to urgently issue a Writ of Summons against your client unless we have settlement of the entire claims forthwith and an indication is forthcoming from your office that the matter will be resolved quickly."***

Neither the respondent nor the respondent's solicitors replied to this letter.

The Proceedings in the High Court

[8] The construction of the fire policy was argued as a preliminary issue before Coventry J. By consent the policy and the relevant correspondence were placed before the Judge. Neither party adduced any oral or affidavit evidence.

[9] In the High Court the appellants contended for the wider construction of "pending action" as set out above and in the alternative contended that the words were reasonably open to two meanings, that there was an ambiguity and that the contra proferentem rule must therefore apply.

[10] The respondent maintained the stance that the claim was not the subject of a "pending action" at the expiration of the 12 month period because on a proper construction of those words they referred to an action which had actually been commenced. Accordingly so the respondent argued it was not liable to meet the appellants' claim. The respondent further contended that there was no obligation on it to give a definite response within the 12 months period as to whether the claim was accepted or not but that in any event it was clear from its letter of 18 April 1995 that the claim was denied. The respondent further contended that the appellants' solicitors letter of 6 September 1995 was not sufficient to bring the claim within the proper meaning of the words "pending action".

Judgment of Coventry J

[11] In a reserved judgment delivered on 19 May 2006 Coventry J ruled that the appellants' fire claim part of its action against the respondent was out of time and he accordingly struck out that part of the proceeding. The Judge found that on a proper construction of the words "pending action" they meant an action, already filed, which was pending before the Court at the expiration of 12 months after the fire. The Judge concluded that this meaning was consistent with dictionary definitions of

the word "pending" and was consistent with clause 10 in the policy, to which reference has already been made. The Judge rejected the appellants' contention:

> ***"...that "pending" in this clause (Clause 18) means that an action is in contemplation or threatened during the 12 months period following the loss or damage. Such an interpretation would mean that as long as an insured indicated that he was contemplating or threatening an action that would suffice for clause 18 purposes, no matter how long after the date of the loss he filed his claim. That is clearly not the purpose of this clause."***

The Appeal

[12] The appellants' now appeal against the preliminary ruling of Coventry J. They attacked the Judge's conclusion as to proper meaning of the words "pending action." They maintained that clause 18 was capable of two meanings, that it was ambiguous on its face and that the clause should therefore be construed contra proferentem against the insurer.

[13] As to the two meanings contention, counsel for the appellants in his written submissions filed ahead of the oral hearing submitted that the words "pending action" in clause 18 were sufficiently broad on the plain and ordinary meaning of the words used to encompass not only a case where an action had actually been commenced within the period of 12 months after the loss or damage, but also a case:

> ***".....where active steps had been taken within the 12 month period after he loss had occurred to inform the insurer that a proceeding was pending, i.e was in active contemplation or threatened, even though the court documents were not actually filed and served within the 12 month period, and the proceedings themselves were filed shortly afterwards."***

[14] That however was not the appellant's final position. Just after the appellants' counsel opened the appeal he amended this submission by deleting the underlined words in the quotation just set out and substituting the words.

> ***"a reasonable period of time after the intimation of the claim or the expiration of the 12 months period."***

[15] The appellants' counsel contended that clause 18 was lacking in clarity and certainty and he submitted that the insurer could have framed the clause in such a way as to put the position beyond doubt. For example, by using such words as "unless the claim is the subject of legal proceedings which have been commenced ....."

In this regard he compared the wording of the policy in ***Walker v. Pennine Insurance Co Ltd*** (1980) 2 Lloyds LR 156.

[16] The appellants' counsel selectively referred us to some dictionary meanings of "pending" especially the meaning "about to happen" "awaiting decision" and "about to come into existence". He submitted that these meanings supported his case. He cited ***Delber – Evans v. Davies and Watson*** (1945) 2 All ER 167. That was a criminal case in which Humphreys J decided that a criminal case is still pending while the time for appealing has not run out and where the convicted person has either appealed "or is proposing to appeal."

[17] The counsel accepted that the object of clause 18 was to provide the insurer with certainty as to its liability. He submitted, however, that that object would still be achieved on the wider meaning for which he contended. Counsel asserted that the insurer would know where it stood at the latest "a reasonable time" after the expiration of the 12 months period. Counsel disavowed the notion that his formulation which we have set up above created an open ended period of time and one which lacked precision.

[18] Counsel then addressed the argument to us on the contra proferentem rule. For the reasons which appear below we do not find it necessary to set out those arguments.

Our Consideration of the Appeal

[19] Like Coventry J we are unpersuaded by the arguments for the appellant.

[20] An insurance policy is a commercial contractual document. The modern approach to the construction of such a document was set out by Lord Hoffman when delivering the judgment of the majority in the House of Lords in ***Investors Compensation Scheme Ltd v. West Bromwich Building Society*** (1998) 1 All ER 98 at page 114.

> ***"My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construe. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 3 All ER 237 at 240-242. [1971] 1 WLR 1381 at 1384 – 1386 and Reardon Smith Line Ltd. v. Hansen-Tangen v. Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.***
>
> ***(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***
>
> ***(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but his phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the***

parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the documents would have been understood by a reasonable man

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd. [1997] 3 All ER 352, [1997] 2 WLR 945)

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB. The Antaios [1984] 2 All ER at 233, [1985] AC 191 at 201:

> *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.""*

[21] Lord Hoffman's approach was adopted by this Court in ***Hassan Din and Finance Sector Management Staff Association v. Westpac Banking Corporation*** Civil Appeal ABU0006/2003S Judgment 26 November 2004 (Ward P, Barker and Tompkins JJA).

[22] Applying the principles set out by Lord Hoffman the essential question for our determination is to ascertain the meaning which would be conveyed by clause 18 to a reasonable person with the relevant background knowledge.

[23] We have looked at the contract as a whole. We particularly remind ourselves that the meaning which a document conveys to a reasonable person is not the same thing as the meaning of its words. In this case we have been unassisted by the dictionary meanings cited to us by the appellants' counsel. Likewise we have been unassisted by the criminal case of ***Delber – Evans v. Davies and Watson*** (Supra). The critical words must be viewed in the context of the entire contract. In our view the combined effect of clauses 10 and 18 is to be lay down a claims procedure. First the insured must give notice forthwith. Then he must give notice of claim within 15 days and finally he must, if necessary, bring himself within clause 18 to hold the respondent liable in the event that the claim has not been accepted. Clearly the object of clause 10 is to alert the insurer promptly to the loss or damage order the policy and secondly the making of a claim. The commercial purpose of clause 10 is to enable the insurer to take steps in an appropriate case to investigate the claim promptly, to effect whatever salvage is available and to take any other available steps in mitigation of loss.

[24] In contrast, clause 18 is directed at the insurer's liability to the insured. It is directed at certainty for the insurer. Clause 18 is a cut off provision as to the insurer's liability in regard to the claim to which it has earlier been alerted. The clause is directly relevant to two important aspects of the insurance business. First, the maintenance of adequate reserves for outstanding claims and secondly, the wider issue of fixing premiums.

[25] The second and wider meaning contended for by the appellants' counsel would not achieve the commercial objects just referred to. There would not be certainty for the insurer as to the termination of its liability to the insured. The clause would have an open ended meaning. It would not be clear as to precisely when the insurer's liability would be at an end. The wider objects of the clause in relation to the insurer's business would be frustrated.

[26] We next turn to clause 10 and its relationship to clause 18. The meaning contended for by the appellants would be inconsistent with clause 10. The appellants formulation contemplates a second notice which would be to the same effect as the notice required in clause 10. That result could not have been intended by the parties. The words "pending action" must therefore refer to another event, namely, an action having actually been commenced.

[27] Lastly we refer to clause 12 which deals with, *inter alia,* the situation where a claim is rejected. That clause provides:

> ***"...if the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection..... all benefit under this policy shall be forfeited."***

If the appellants' construction is accepted then the words "action" would have a different meaning in clause 18 from the meaning which it has in clause 12. Clearly that could not have been the intention of the parties.

[28] Accordingly for the reasons given we reject the appellants' contentions. We conclude that the words "pending action" on a proper construction have only one meaning in the context of clause 18 and the policy as whole. They refer to an action which has actually being commenced in a court of law within 12 months from the occurrence of the loss or damage. We therefore agree with the conclusion of Coventry J.

[29] Having reached this point there is no need for us to go on and consider the appellants' second argument that the contra proferentem rule should apply. The application of the contra proferentem rule simply does not arise.

Result

[30] The result of this appeal is therefore as follows:

[1] The appeal is dismissed.

[2] The appellant is ordered to pay the costs to the respondent in the sum of $750 (inclusive of disbursements).

Ward, President

Eichelbaum, JA

Penlington, JA

Solicitors:

Parshotam and Company, Suva for the Appellant
A K Lawyers, Lautoka for the Respondent

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