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

CIVIL APPEAL NO. ABU 121 OF 2016
(High Court No. HBC 113 of 2014)

BETWEEN : **DOMINION INSURANCE LIMITED**

Appellant

AND : **HOUSING AUTHORITY**

Respondent

Coram : **S.Chandra, RJA**
A.Brito-Mutunayagam, JA
Deepthi Amaratunga, JA

Counsel : **Mr D.Prasad for the Appellant**
Mr V.Maharaj for the Respondent

Date of hearing : **26th June, 2018**

Date of Judgment : **4th February, 2019**

JUDGMENT

Chandra, RJA

1. I agree with the reasons and conclusions of Brito-Mutunayagam, JA.

Brito-Mutunayagam, JA

2. The appellant had issued two insurance policies to the respondent: a "*Group Mortgage Protection Insurance Scheme*" on 31st December 2006, and a "*Housing Authority Mortgage Protection (Extension) Debtors Medical Insurance Scheme*" on 1st January 2008. The policies were renewed annually. In 2012, a dispute arose between the parties, when the appellant notified the respondent of an increase in premium effective from 1st August, 2012. The respondent did not agree to pay the revised premium, as required by the appellant. Subsequently, the respondent made eleven claims under the policies following the death or disablement of its members, commencing from 12th February, 2013. The claims totalled a sum of $ 487,047.48. The appellant declined the claim.

3. The respondent filed action in the High Court claiming the sum of $ 487,047.48, together with interest at 10% under the Insurance Law Reform Act. The appellant denied liability. The statement of defence and counter claim stated that the appellant had notified the respondent of the increase in premium and gave notice of cancellation of the policy on 6th November, 2012. The appellant agreed to pay claims which had a date of loss prior to the cancellation, provided the respondent paid the increased premium.

4. The Learned Trial Judge held that the appellant had no right to increase the premium mid-year. There was no formal termination and the appellant was bound to pay the claim of $ 487,047.48 to the respondent together with interest and costs summarily assessed at $ 4000.

5. The appellant appeals to this Court on the following grounds:

1) *That the Learned Trial Judge erred in law an fact when he failed to consider what was the intention of the Respondent and Appellant when the Insurance Policy was prepared as evidence tendered by Respondent (in particular pages 30 and 31 of the Agreed Bundle of Documents) which was its internal board Document stated that Appellant "has the right to review the policy at any time during the policy period".*
2) *That the Learned Trial Judge erred in law and fact by stating in paragraph 28 of the Judgment that it is not clear what is meant by "during the year" that whether the loss ration can be reviewed during the year or it can only be done at the end of the year when Respondent's Insurance broker Marsh in its report and Appellants expert witness stated in his evidence that the Appellant had the right to review the policy at any time during the year and such evidence was not challenged by Respondent as it failed to adduce any expert witness.*
3) *That the Learned Trial Judge erred in law and fact by concluding in paragraph 30 of his Judgment that the contract clause was ambiguous when no due regard was made to Appellant's witness with considerable experience with Insurance policies that words "during the year" was not ambiguous but meant insurer had the right to review the policy at any time during the policy contract.*
4) *That the Learned Trial Judge erred in law and fact by stating ..that contra proferentem rule applies and Appellant had no right to increase the premium mid-year but to calculate the loss ratio at the end of that particular year when there was evidence ..which he failed to consider Appellant's expert witness and Respondent's insurance broker's statement that Appellant could review the premium at any time during the year.*
5) *That the Learned Trial Judge erred in law and fact by stating in paragraph 34 of his Judgment that the Appellant did not terminate the contract when there was sufficient evidence given by Appellant which clearly stated that the contract was terminated on 6th November 2012 which was agreed to by the Respondent's witness.*
6) *That the Learned Trial Judge erred in law and fact by stating in paragraph 36 of his Judgment that no formal termination of his contract was given when evidence tendered marked P13 clearly stated if no agreement is reached by 6th November 2012 the policy lapses."*
7) *That the Learned Trial Judge erred in law and fact by stating that the Appellant is liable to pay $355,460.65 as there was no cancellation of the contract of insurance when in fact there was sufficient evidence which he failed to consider that the policy lapsed from 6th November 2016.*
8) *That the Learned Trial Judge erred in law and fact by applying contra proferentem rule when the policy wording was not in any way ambiguous and failed to consider any of Appellant's witness on the interpretation of policy wordings and failed to consider the Respondent's witness that the contract was terminated on 6th November 2012.*

6. The principal contention of the appellants in the first, second, third, fourth, fifth and eighth grounds of appeal is that the Group Mortgage Protection Life Policy gave the appellant the right to review and increase the premium at any time "*during the year*", and not at the end of the year as held by the High Court. There is no ambiguity in the words "*during the year*". It is further argued that the Learned Trial Judge erred in applying the *contra proferentum* rule and failing to consider the internal Board document, the appellant's expert witness and the respondent's insurance broker's statement that the appellant could review the premium at any time during the year.

7. On 19th July 2012, the appellant had advised the respondent of the increased rates of premium, due to their deteriorating loss. The respondent accepted that there was a loss of more than 80% of the gross premium and agreed for a 15% increment, but did not agree for the "*proposal for revision in premium during mid-term of the year of insurance as this is contrary to our agreed contract*", as provided in its response of 25th July 2012.

8. The central issue in this appeal turns on the interpretation of the words "*during the year*", in the following clauses in "*Section V – General Provisions*" of the Group Mortgage Protection Life Policy.

Clause 4 of "*Section A- The Contract*", which reads:

> *It is agreed that the rates are guaranteed for a period of 3 years effective from 31st December 2006 subject to claims (paid/incurred) during any one year of the insurance not exceeding 80% of the gross premium for the same period. In the event that the claim exceeds 80%* ***during the year,*** *the Insurer* ***has the right to revising the premium.***(emphasis added, underlining mine)

Section D titled "*Premium Rates*", which reads:

> *It is agreed that the rates are guaranteed for a period of 3 years effective from 31st December 2006 subject to the Loss Ratio during any one year of the insurance not exceeding 80%. In the event that the Loss Ratio exceeds 80%* ***during the year,*** *the insurer* ***has the right to increase the premium rates*** *but not by a larger percentage than the difference between 80% and the actual loss ratio.*(emphasis added, underlining mine)

9. The appellant contends that the premium can be increased at any time during the current year of the policy.

10. The clauses under consideration provide that on the occurrence of the claims/loss ratio exceeding 80% of the gross premium "*during the year*", the appellant is entitled to increase the premium. It does not expressly refer to the period when the revised premium may be imposed.

11. In my judgment, it is trite that a premium may only be imposed prospectively for an ensuing period, at the end of the current period of a policy. It follows that if the loss ratio exceeds 80% of the gross premium "*during the year*", the appellant is entitled to increase the premium in the ensuing year. I do not find any ambiguity in the clauses.

12. In ***Hassan Din and Finance Sector Management Staff Association v. Westpac Banking Corporation***,(Civil Appeal ABU0006/2003S) as cited by Mr Prasad, counsel for the appellant, the judgment of the Court of Appeal citing Lord Diplock in ***Antaios Cia Naviera,***[1985] AC 191, at pg 201 stated that a meaning must be given that " *yields to business common sense*".

13. In my judgment, the Learned Trial Judge came to a correct finding that the appellant *"has to calculate the loss ratio for a particular year and decide whether to increase the premium or not at the end of that particular year."*

14. Next, the appellant argues that the Learned Trial Judge failed to consider an internal Board document, the appellant's expert witness and the respondent's insurance broker's statement that the appellant could review the premium at any time during the year.

15. In my view, the Learned Trial Judge has quite correctly rejected the reference to extrinsic evidence.

16. I reproduce an extract from the speech of Lord Hoffman in ***Investors Compensation Scheme Ltd v. West Bromwich Building Society*** (1998) 1 All ER 98 at page 114:

> ***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..*(emphasis added)

17. The first, second, third, fourth, fifth and eighth grounds of appeal fail.

18. Finally, the appellant urges in grounds 5, 6 and 7 of its appeal that the Learned Trial Judge erred in stating that there was no formal termination of his contract, when there was sufficient evidence given by the appellant that the contract was terminated on 6th November 2012. "*P13 clearly stated if no agreement is reached by 6th November 2012 the policy lapses.*"

19. On 6th September 2012, the appellant wrote to the respondent stating that it is prepared to accept an alternative option to its already advised premium adjustment. The letter concluded as follows:

> *We now look forward to your decision as to which Option to accept. If neither is agreed to then it is simply not possible for us to continue with the scheme* ***and in the unlikely event that this situation eventuates and to protect our position if it does we must as a formality give notice of cancellation in accordance with the policy conditions.****. We would still take the view that the increased premium effective from 1st August would be payable and a contra would be made claims made until the expiry date.*(emphasis added, underlining mine)

20. The appellant requests the respondent to forward its decision on which option it accepts and states that if neither is agreed to, it would not be possible for the appellant to continue with the scheme. The letter goes on to state that in the "*unlikely event* that *this situation eventuates*", it would as a formality, give notice of cancellation "*in accordance with the policy conditions*".

21. "*P13*" is a letter of 24 October, 2012, from the appellant to the respondent. This provides that if the matter is not resolved, the current policy will lapse on the 6th November.

22. Section J of the Group Mortgage Protection Life Policy provides that the Policy may be terminated by either party providing sixty days prior written notice of termination before the termination becomes effective. There was no evidence before Court that the policy was terminated, in accordance with this section.

23. In my view, there was clearly no termination of the policy by the appellant. The policy continued

24. In my judgment, the Learned Trial Judge has correctly held that the appellant had not terminated the policy, in any of its correspondence to the respondent.

25. The fifth, sixth and seventh grounds of appeal fail.

26. The appellant's appeal is declined.

The respondent's Notice

27. The respondent in his Notice filed on 24th November 2016, states that the lower court erred in not awarding interest at the rate of 10 % on the judgment sum, pursuant to the Insurance Law Reform (Interest Rates) Regulation, 2004.

28. The Learned Trial Judge held that the appellant shall pay the respondent the sum of $ 487,047.48 together with interest, in terms of section 4(1) of the Law Reform(Miscellaneous Provisions)(Death and Interest)Amendment Act from date of judgment until the entire sum is paid in full.

29. Section 34 of the Insurance Law Reform Act, 1996, provides that:

> ***The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the*** *amount and ending on whichever is earlier of the following days-*
>
> *(a) The day in which the payment is made.*
>
> *(b) The day on which the payment is sent by post to the person to whom it is payable.*(emphasis added)

30. In my view, interest is payable on the respondent's claim, in terms of section 34 of the Insurance Law Reform Act at 10% per annum, as prescribed by the Insurance Law Reform (Interest Rates) Regulations.

31. Mr Maharaj, counsel for the respondent in his written submissions has conceded a period of three months as *"the day as from which it was unreasonable for the insurer to have withheld payment"*.

32. Accordingly, I hold that interest at 10% per annum is payable on the claims commencing from the expiry of three months from the date on which each of the eleven claims were made by the respondent to the appellant, until date of this judgment.

33. The judgment of the Learned Trial Judge ordering interest to be paid in terms of section 4(1) of the Law Reform (Miscellaneous Provisions) (Death and Interest) Amendment Act, is set aside.

34. I hold in favour of the respondent, pursuant to its Notice.

Amaratunga,JA

35. I agree with the reasoning and conclusions of Brito-Mutunayagam, JA.

36. ***The Orders of the Court:***

(a) The appeal of the appellant is dismissed.

(b) The judgment of the Learned Trial Judge ordering interest to be paid in terms of section 4 (1) of the Law Reform (Miscellaneous Provisions)(Death and Interest)Amendment Act, is set aside.

(c) I hold in favour of the respondent, pursuant to its Notice filed on 24th November 2016.

(d) Interest is payable on the respondent's claim of $ 487,047.48, at 10% per annum from the expiry of three months from the date on which each of the eleven claims were made by the respondent to the appellant, until date of this judgment.

(e) The appellant shall pay the respondent costs of this appeal in a sum of $ 5000.

Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

Hon.Justice A.Brito Mutunayagam
JUSTICE OF APPEAL

Hon. Justice Deepthi Amaratunga
JUSTICE OF APPEAL