KRISHNA DATT v BLUE SHIELD (PACIFIC) INSURANCE LTD

HIGH COURT — CIVIL JURISDICTION

FATIAKI J

14 March 2002

[2002] FJHC 284

Insurance — insurance agents and brokers — insurance claim — Insurance Act s 58 forbids contract of engagement — insurance licence — Insurance Act Cap 217 Pts 3, 4, 5, 6, 8, ss 58, 58(4), 59 — High Court Rules O 33 r 3.

Plaintiff sought claims arising from a contract of engagement with Defendant alleging that Defendant repudiated the contract and refused to pay her commissions. Defendant alleged that the Plaintiff had no licence to do so.

Held — (1) There was no express prohibition on the Plaintiff's "contract of engagement" with the Defendant insurer.

(2) Performance of a "contract of engagement" without the requisite licence although not prohibited per se was illegal.

Claim dismissed.

Cases referred to

Stewart v Oriental Fire and Marine Insurance Co Ltd [1984] 3 All ER 777, cited.

Cope v Rowlands (1836) 2 M & W 150; (1836) 46 RR 532; *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267; *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; [1978] HCA 42, considered.

Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 All ER 417, distinguished.

G. Prasad for the Plaintiff

M. B. Patel for the Defendant

Judgment

Fatiaki J. This action was first instituted by the Plaintiff on 2nd October 1997 claiming various reliefs against the Defendant company. The claim is based on an engagement letter dated 16th April 1992 wherein the Plaintiff was appointed the Defendant's sales representative in respect of an insurance scheme offered by the Defendant company to the Fiji Teachers Union Group. In terms of the letter the Plaintiff was required to enrol certain minimum numbers of contributors to the insurance scheme by certain nominated dates, in return for which, the Plaintiff would receive payment by way of commission at agreed percentages of the total amount of premiums paid (the contract of engagement).

The Plaintiff claims that after several years of operating the scheme, the Defendant repudiated his "contract of engagement" by refusing to pay him the correct commission whereby, without his consent, the Defendant had unilaterally varied the agreed rate of commission payable to him.

In its statement of defence the Defendant specifically invoked the provisions of s 58 of the Insurance Act (Cap 217) which expressly prohibits any person (under pain of criminal sanctions) from commencing, transacting or carrying on any business as an insurance agent or broker unless licensed to do so under the

Act. The Defendant accordingly sought the dismissal of the Plaintiff's claim and a refund of commission payments that had been made to the Plaintiff pursuant to his engagement letter.

On 5th October 1999 the court with the concurrence of counsels and with a view to substantially curtailing the proceedings, ordered, pursuant to O 33 r 3 of the High Court Rules, that the following agreed questions or issues be tried as preliminary matters:

(1) The meaning and effect of s 58 of the Insurance Act (Cap 217) on the enforceability of the "contract of engagement"?

(2) Notwithstanding (1) above, the enforceability of the "contract of engagement"?

The following facts were also agreed by the parties for the purpose of considering and determining the agreed issues, namely:

(a) That a 'contract of engagement' existed between the parties;

(b) That the plaintiff at no time held a licence under the Insurance Act; and

(c) That the 'contract of engagement' was performed by both parties.

No evidence was required to be called and it was agreed that the issues be determined by way of written submissions.

I am grateful to counsels for the comprehensive written submissions provided to the court which I have found very helpful and has considerably reduced the length of this judgment.

As to issue (1) Plaintiff's counsel submits after referring to English, New Zealand and Australian cases:

… That the principles of interpretation and the considerations on public policy in the forgoing cases are relevant to look at the contract of engagement in the present case. We submit that s 58 of the Insurance Act meant to do no more than penalise the agent who commences, transacts or carry a business without a licence. The provision is for the protection of the public, however, it did not mean to go and further prohibit the contract of engagement between the Plaintiff and the Defendant. The purpose of s 58 is to protect the public and not to invalidate the contracts of insurance or contracts of engagements of agents who in a way are agents of the insurance company in who [sic] interests the agents procure the insurance business.

The contracts of insurance under the group insurance schemes are legal and enforceable. The Defendant has and will benefit from the contracts of insurance procured by the Plaintiff under the group schemes. These individual contracts under the group scheme were obtained through the work and efforts of the Plaintiff pursuant to the contract of engagement. If the contract of the engagement of the Plaintiff, by virtue of which the Defendant has been engaged, is to become unenforceable, it would be extremely harsh, inequitable and unjust on the Plaintiff.

The object of the licensing of agent under s 58 of the Insurance Act is to protect the public. In the present case, no harm or loss has been suffered by any member of the teachers union for whose benefit the schemes were launched. No member of the public has been in any way prejudiced. … No one has been defrauded. No tort has been committed. Why should the Plaintiff be made to suffer or denied relief? … The Defendant should have known better on the implication of the Plaintiff not having the licence and advised the Plaintiff accordingly. It continued on a course of dealing as if nothing was wrong, that no licence was needed for continued performance of the contract of engagement. If the contract is unenforceable, the Plaintiff will lose out but, in contrast, the Defendant will obtain a totally undeserved windfall.

For his part defence counsel submits:

… that the holding of the appropriate license by the Plaintiff was a condition precedent to the Plaintiff's appointment under the contract and there was a statutory provision

(s 58) absolutely prohibiting the Plaintiff from acting and/or holding himself out, commencing, transacting or carrying on business of an insurance agent unless the Plaintiff was licensed to do so by the Commissioner. The creation of an offence under s 58 per se deems the contract of engagement dated 16th April, 1992 to be void ab initio and consequently of no legal effect and therefore the same cannot be relied on to found a cause of action against the Defendant or to seek any reliefs or remedies against the Defendant in any manner or form. The seriousness of the offence is highlighted by s 58(4) in that it prescribes such breaches to be dealt with as continuing offence.

Later counsel writes:

It is significant to note the passing of the Insurance act 1998 which prescribes the licensing requirements and standards and in effect extends the implications set by s 58. In this regards, we submit that the Plaintiff's contention to the effect that Legislature did not intend to have the s 58 provisions have any bearing on contracts entered without them being subjected to a licensing condition lacks merits and is untenable.

The prohibition stipulated in s 58 clearly envisages that contracts which have the effect of undermining or cutting across or breaching the provisions of the said section are per se invalid and unenforceable ab initio. The words 'commence', 'transact' and 'carry on' all by necessary implication absolutely prohibit entering into contracts which will offend the provisions of s 58 of the Act …

The whole nature of licensing system is to place checks and balances on the operations conducted by the licensee as the licence is a means of providing the safeguard needed by the general community at large when dealing with the licensee. Activities which are absolutely prohibited activities like the one in the instant case cannot by any stretch of imagination be validated by courts whether in law or in equity.

And finally:

The sentiments expressed by the Plaintiff's Counsel (in para 2 of p 6 and elsewhere) in his Submissions are misplaced and ought to be discarded on the basis of its narrow approach confined to hypothetical questions and assumptions. Needless to state, ignorance of law is no excuse and the Plaintiff is not excused from the application of this long standing tenet. As submitted earlier, the grounds on which the Plaintiff has proceeded to rely on, do not have any application … as the circumstances are such that the creation and the subsequent performance thereunder all hinges on the legality issue based on s 58 of the Act on which the Plaintiff's case was doomed to be a failure from the outset.

In brief, Plaintiff's counsel points to the absence of any provision which specifically prohibits the entry into a "contract of engagement" between an insurer and an agent and counsel argues that the consequence of rendering unenforceable the Plaintiff's "contract of engagement" would be "extremely harsh, inequitable and unjust on the Plaintiff" who has expended his time, money and energies in obtaining contributors for the Defendant's insurance scheme.

Defence counsel, on the other hand, points to the protective nature of the statutory requirement that an insurance agent be licensed under the Insurance Act and the wording of s 58, in particular, as indicating a statutory intention to prohibit absolutely contracts which have the effect of "undermining or cutting across" the requirements of the section.

Quite plainly both counsels differ fundamentally on the meaning and effect of s 58 of the Insurance Act (Cap 217) which is described by its long title as: "An Act to Regulate the Business of Insurance and for purposes incidental thereto" (hereafter referred to as the Act).

In *Archbolds (Freightage) Ltd v S Sanglett Ltd* [1961] 1 All ER 417 Devlin LJ helpfully identified the threefold effect of illegality on a contract. For present purposes however it is only necessary to refer to the third where his lordship said (at 424):

> *The third effect of illegality is to avoid the contract ab initio, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.*

In similar vein in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* [1978] HCA 42(1978) 139 CLR 410 per Mason J said (at 423):

> *The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognised that the principle is necessarily subject to any contrary intention manifested by the statute … when the statute is silent on the question … it is a matter of construing the statute and in construing the statute the court will have regard not only to the language, which may or may not touch upon the question, but also the scope and purpose of the statute from which inference may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.*

The first question therefore which the court must consider in this case is whether the Plaintiff's "contract of engagement" is forbidden by the Insurance Act? Quite plainly the Act does not expressly prohibit the employment of agents or brokers nor does it expressly prohibit the making of a "contract of engagement" between an insurer and an agent. Indeed the Act appears to contemplate or assume that insurers will, in conducting their business, engage agents and have dealings with brokers.

Be that as it may, the Act regulates the business of insurance in several ways including by requiring insurers (under pain of a criminal sanction) to be registered with the Commissioner of Insurance before transacting any insurance business (Pt III); Furthermore insurers are required to maintain certain minimum liquidity ratios sufficient to meet their liability to policy holders (Pt IV). The Act also requires the keeping of audited financial records and prohibits the amalgamation of insurance companies or the transfer of insurance business without the approval of the Commissioner for Insurance (Pts V and VI).

Quite plainly these provisions are designed to protect the public in the form of actual and potential policy holders against the risk that insurers may be unable to meet liabilities that they have assumed by ensuring the financial soundness of the insurers. They are also designed to ensure that insurance business is carried on by reputable companies, in an orderly manner and is subject to regular governmental supervision. We are not however concerned in this case, with the enforceability of a contract between an unlicensed insurer and an insured as was the concern of the court in *Stewart v Oriental Fire and Marine Insurance Co Ltd* [1984] 3 All ER 777.

The particular provision of the Act which falls to be construed in this case is s 58 which occurs in Pt VIII headed "AGENTS AND BROKERS" and reads:

> (1) No person shall commence, transact or carry on business of agent or broker unless he is licensed by the Commissioner under this Act.
>
> *(2) The Commissioner shall notify in the Gazette within one year of the appointed date or as soon as practicable thereafter, and at intervals of not more than every two years thereafter, a list of agents and brokers licensed under this Act.*
>
> *(3) A person may with the approval of the Commissioner on payment of the prescribed fee inspect the list of agents or brokers licensed under the Act.*

(4) Any person not licensed under this Act commencing, transacting or carrying on business as an agent or broker shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand dollars and if the offence is a continuing one, to a further fine not exceeding five hundred dollars for every day after the first during which the offence has continued.

And s 59 requires the application for an agent or broker's licence to be in an approved form and be accompanied by a prescribed fee.

On the plain wording of s 58(1) I am satisfied that there is no express prohibition of the Plaintiff's "contract of engagement" with the Defendant insurer. The section in my view is specifically directed at the commencement, transaction and carrying on of the "business of (insurance) agent..." which, by definition involves acting as an intermediary between an insurer and a proposer by "channeling, soliciting or procuring insurance business" for the insurer.

Accordingly the mere applying for or obtaining an agent's licence under the Act while a pre-condition to lawfully engaging in the business of an insurance agent is not strictly a part of the actual "business" nor is it any guarantee that the agent will in fact undertake insurance business after acquiring a licence. Similarly a "contract of engagement" which merely appoints a person an agent for an insurer is not illegal per se without some activity on the agent's part.

Having said that however the question remains, despite the absence of an express prohibition, is a "contract of engagement" impliedly prohibited by the section?

In this regard s 58(4) makes it an offence punishable by a fine for anyone to engage in the business of an insurance agent without being licensed to do so. What is more the offence is a continuing one for which a daily fine may be imposed. Plainly practising as an insurance agent without a licence is considered a serious offence.

It is also relevant to consider what is the object or mischief that the section seeks to overcome? In my view the requirement that an insurance agent be licensed before he can "commence, transact or carry on business..." is much more than a "revenue-earning" or an "anti-competition" provision. It is, consistent with the earlier parts of the Act already mentioned, intended to protect members of the public (as proposers) who transact their insurance through the intermediary of an insurance agent, by preventing unscrupulous and unsuitable persons from acting as insurance agents.

That is not to say that an insurance agent's licence is an absolute guarantee of honesty and integrity on the part of the insurance agent, but equally, it is much more than a mere formality or a "meal-ticket".

I am fortified in this view by the provisions of s 60 of the Act which requires the Commissioner of Insurance before issuing an agent's licence, to be satisfied that "... the applicant has sufficient experience in and knowledge of insurance matters" and has sound "financial standing" and management practices and "it is otherwise in the public interest that a license … be granted to the applicant".

Even Plaintiff's counsel accepts in his written submissions that:

The whole purposes of the Act are to regulate the business of insurance and the requirement of licensing of agents is for the protection of the public interest. It is to ensure that people have the necessary skills and expertise to serve the public.

Counsel goes on however to submit that:

… There is no allegation that the plaintiff is not suitable … (and) there is no allegation that any of the insured persons has been prejudiced or any member of the public been affected.

While I can appreciate the force of counsel's latter submission, in my judgment it is impermissible in construing the meaning and effect of a statutory provision to argue ex post facto, that a breach of the provision has, in fact, caused "no harm or loss" to the person(s) for whose protection the provision was enacted. If that were permissible then the requirement of a licence would be rendered naught and could be ignored with impunity.

In *Cope v Rowland* (1836) 2 M & W 150; (1836) 46 RR 532 which might be described as the "locus classicus" on implied prohibition and which has striking similarities to the present case, *Baron Parke* in delivering the judgment of the court rejecting an unlicensed broker's claim for work and labour and commission said at 539–41:

It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. Lord Holt: Bartlett v Vinor. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?'

And later, in words that with slight amendments would be equally applicable in this case, his lordship said:

… The question for us now to determine is, whether the enactment of the statute is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? Or whether one of its objects be the protection of the public and the prevention of improper persons acting as brokers? On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; on the latter it is: for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing. In order to decide this point, it is only necessary to look at the statute itself. If its object had been simply the pecuniary advantage of the Mayor and Corporation, it would have been wholly unnecessary to have made any provision for securing the good conduct of the persons admitted. The more that should be allowed to practise, the larger the revenue of the city; but the enactment, that all persons who should act as brokers should be admitted by the Court of Mayor and Aldermen under such restrictions and limitations for their honest and good behaviour as the Court should think fit and reasonable, shows clearly that the Legislature had in view, as one object, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken (in the language of Lord Holt, above referred to) to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting; and this is the contract on which this action (so far as it relates to brokerage) is brought.

Needless to say even though an insurance agent's "contract of engagement" is not expressly prohibited by the section while it remains executory, any attempt by the contracted agent to perform it's terms or act under it (without an agent's licence) would be illegal under the section. In other words while the "contract of engagement" is not prohibited per se, in the absence of the requisite licence, its performance would be illegal.

The Plaintiff's "contract of engagement" as pleaded in the statement of claim engaged him "as a commission agent for the marketing of certain insurance schemes" and more particularly, "to arrange for certain minimum numbers of contributors (to the scheme)". If I may say so it is difficult to imagine how the Plaintiff might perform such a contract without being the holder of an agent's licence, and, at the same time, not run afoul of s 58. To this extent the present case is distinguishable from the *Archbold Ltd* case (opcit).

In the words of Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* (1957) 1 QB 267 at 288:

> *If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication.*

I do not accept that the purpose of Pt VIII of the Insurance Act (Cap214) would be sufficiently served by the penalty prescribed in s 58 for an offender. In my view the non-avoidance of the plaintiff's "contract of engagement" would utterly frustrate the protective object of the section and I would resist any decision that would have such an unsatisfactory result.

The answer to the first agreed issue to which I am reluctantly driven is: s 58 of the Insurance Act (Cap217) impliedly prohibits the making of the Plaintiff's "contract of engagement" which is accordingly rendered "void ab initio" and unenforceable.

If I am wrong however in determining that the Plaintiff's "contract of engagement" is "void ab initio" then I move to consider the second agreed issue or question which might have been better framed: notwithstanding the illegality could the Plaintiff still recover payment for the work that he has performed for the Defendant?

In his written submissions Plaintiff's counsel dealt with this issue under various subheadings including: "Resulting Trust"; "Quantum Meruit"; "Damage in Tort for Misrepresentation"; and "Remedies under (the) Fair Trading Decree". Reference was also made to the parties not being "in pari delicto" and to "quasi-contract"; "unjust enrichment"; and "estoppel" as possible heads of claim.

Most of these matters are not sufficiently pleaded or clearly raised in either the statement of claim or in the reply to defence and Plaintiff's counsel frankly admits that an application may have to be made to amend the pleadings to clearly include them.

Recognising this, defence counsel writes:

> *The submissions of the plaintiff are not supported by the pleadings and, we submit, that on this basis the offending portions of the submissions ought to be expunged or disregarded. It is obvious that the exceptions relied on by the plaintiff's counsel constitute an after-thought on the plaintiff's part and submissions based on these imaginary non-existent set of affairs cannot be cured by amendment of the pleadings.*

Furthermore counsel submits:

> *The grounds canvassed by the plaintiff in his submission under various heads (including misrepresentation, principles of equity, Fair Trading Act) cannot be maintained or sustained as they are inextricably linked or connected to the central issue of illegality …*

In this latter regard Devlin LJ in the *Archbold Ltd* case (op cit) said (at 424):

> *Another effect of illegality is to prevent the plaintiff from recovering under a contract if in order to prove his rights under it he has to rely on his own illegal acts; he may not*

do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal.

The critical phrase however is: "... if in order to prove his rights under (the contract) he has to rely on his own illegal acts...". In this regard and mindful of the numerous shortcomings in the Plaintiff's pleadings, I am not at all satisfied that the agreed facts (b) and (c) are sufficient for me to properly dispose of this second issue under the present procedure and accordingly, I make no findings thereon.

Suffice it to say that it may well be that the Plaintiff could sustain a viable cause of action without having "... to rely on his own illegal acts..." or on the illegal "contract of engagement" but that can only be properly and conveniently dealt with by way of a freshly constituted action.

The claim is accordingly dismissed with costs to the Defendant which are summarily fixed at $750.

Claim dismissed.