TAPPOO HOLDINGS LTD and Anor v ROBERT ARTHUR STUCHBERY

HIGH COURT — CIVIL JURISDICTION

PATHIK J

3 March 2003

[2003] FJHC 277

Evidence — admissibility — application to allow oral evidence of the witness — whether witness can be allowed to give evidence as to what acts of terrorism mean — whether a non-expert witness can give meaning to the words in a policy.

The Plaintiffs called an insurance broker as their witness involving an insurance claim. The witness testified that he drafted the policy in question. The insurance policy contained certain exclusion clauses including acts of terrorism. The Plaintiffs filed an application to be allowed to adduce oral evidence as to the special meaning allegedly attached to the term of acts of terrorism through this witness/broker. The issue before the case is whether the witness may be allowed to give oral evidence as to the meaning of the term acts of terrorism when it is not defined in the policy itself and when it is accepted by both parties that the broker giving evidence is not an expert witness.

Held — (1) A policy of insurance is to be construed by the same rules as other contracts, the duty of the court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed.

Haughton v Empire Marine Insurance Company (1866) 1 LR Ex 206, considered.

(2) Nowhere in the pleadings does one find an assertion that acts of terrorism had special meaning as between the parties. The matter could have been discussed in the pre-trial conference. There is nothing on in the pre-trial conference minutes. Since there is no proper pleadings, the Defendant is prejudiced on this aspect and the Plaintiffs ought not to be allowed to adduce oral evidence as to the special meaning allegedly attached to the term "acts of terrorism" through the broker except to the extent permitted by law.

(3) The admissibility of extrinsic evidence is a technical and complicated subject. The negative aspect of the modern doctrine is that evidence of negotiations is not admissible as an aid to interpretation at all events unless they show an agreed meaning for the language used.

Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep 127, considered.

Application dismissed.

Cases referred to

Acme Wood Flooring Co Ltd v Marten (1904) 20 TLR 229, considered.

Prenn v Simmonds [1971] 1 WLR 1381, cited.

B. C. Patel and *Alan Prasad* for the Plaintiffs.

Daubney and *Shayne Sorby* for the Defendant.

Pathik J. Mr Uday Narayan, an insurance broker employed by Marsh Ltd, was called by the Plaintiffs as their witness. Mr Patel says he is not an expert witness. The broker has provided services as an insurance broker to the Plaintiffs since 1996, and the kind of service he provided them included, as he says, liaising with

the client and the underwriter, negotiating with the underwriter for terms, issuing, drafting policy document wordings, invoicing and general broking work.

He arranged insurance for the Plaintiffs in 1999 with Lloyds of London. The witness testified that he drafted the Policy in question in this action and negotiated with Lloyds underwriters, which they approved.

In the course of his evidence, Mr Patel asked the witness, "Is there a definition of 'acts of terrorism' in the policy?" to which the answer was, "No, Sir". Mr Daubney told the court: "*The policy speaks for itself, your Lordship. It's not for this witness to construe the policy. That's your Lordship's job*".

This is where the issue arose namely, whether this witness can be allowed to give evidence as to what the "acts of terrorism" is supposed to mean. Mr Patel submits that he can give evidence of that and it is admissible to show the meaning of a term in the policy. It was agreed that I hear legal argument on the issue. Mr Patel was allowed to ask the question, "Why is there no definition of 'acts of terrorism' in the policy?" The witness answered "*The terrorism was not defined in the policy because it's an all-risks policy and in this type of policy you don't define perils. It's an all-risk policy*".

Then there was objection from Mr Daubney to the question "*Is there a meaning for the words 'acts of terrorism' in the industry?*" Mr Patel says that he is entitled to lead evidence of them. Both counsel made legal submissions on the issue for my determination. Very comprehensive arguments were put forward by both sides.

Mr Patel's arguments are contained on p 170 et seq of the transcript. It is his argument that through this witness he wants to establish a course of dealing between this broker and the underwriter in London and that when the policy was issued, they knew the market or industry meaning of "acts of terrorism". There was a special meaning for "acts of terrorism", which is understood between brokers in insurance to mean use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear. This aspect, he says, has been pleaded. Mr Patel argues that he is entitled to lead evidence on this point. It is an exception to the parole evidence rule.

Mr Patel then referred the court to a number of authorities in support of his argument that he is entitled to call parole evidence. Mr Daubney's basis for objections are that, first, it is expert opinion evidence and, second, in any event, it contravenes the parole evidence rule and does not fall within any of the exceptions to the rule for the purposes of the construction of the contract which is the Policy of insurance. His argument is set out on p 180 et seq of the transcript.

The case before me concerns a claim under the insurance policy in question which contains certain exclusion clauses. The question that has arisen is whether Mr Patel can be allowed to adduce oral evidence of the meaning of the term "acts of terrorism" when it is not defined in the policy itself and when it is accepted by both sides that the broker giving evidence is not an expert witness.

Each case has to be looked at on its own particular facts. I have looked at the pleadings in this case. The evidence on the policy is being given by the broker. The broker is being asked to explain the meaning of the term "acts of terrorism" as understood in the industry by adducing oral evidence to explain the meaning of a term in the contract.

This kind of thing namely, the meaning of words in an insurance policy are or ought to be stated in a "slip" which is frequently attached to a Lloyds policy. In this regard, I refer to the case of *Acme Wood Flooring Company Ltd v Marten*

(1904) 20 TLR 229. The terms of the policy are contained therein which is handed to and accepted by the insured. In this regard I find the following passage in *The Digest*, vol 29, p 407, pertinent:

> Where a person insures with Lloyds and obtains from Lloyds, a policy in the form ordinarily granted by Lloyds, he must be taken to accept the terms expressed in the policy and to agree to the meaning which the words ordinarily bear. Semble a person dealing with Lloyds and having no express notice of the customs of Lloyds regulating the authority of brokers is not bound by such customs. (*Acme Wood Flooring Co Ltd v Marten*, supra).

In the light of the authorities submitted to me by both counsel, I have considered extracts from *MacGillivray on Insurance Law*, 9th ed, 1997, paras 11–27 and particularly paras 11–38 at items (5) and (6), and the cases referred to therein by Mr Patel.

However, as MacGillivray says, the admissibility of extrinsic evidence is a technical and complicated subject. On the authorities like *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyds LR 127 at 133, it is stated that the positive side of the modern approach is that evidence be admitted. It also states:

> The negative aspect of the modern doctrine is that evidence of negotiations is not admissible as an aid to interpretation, at all events unless they show an agreed meaning for the language used.

In this regard, Lord Wilberforce's statement in *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384, is pertinent when he said, inter alia, it is simply that such evidence is unhelpful.

As I said before, one cannot ignore pleadings and the safest course is to examine whether adducing of proposed evidence is allowed. As far as the issue before me is concerned, Mr Patel has submitted that there is sufficient in the pleadings to enable him to do what he proposes to do namely, to adduce oral evidence as to the meaning of the words in the policy through the broker who is a non-expert witness.

In opposition to this, I agree with Mr Daubney that nowhere in the pleadings does one find an assertion that 'acts of terrorism' had special meaning as between the parties. I agree with Mr Daubney that they could have pleaded that and then, as he says, it should have been open to him to have asked for particulars as to how its special or particular meaning arose. I further agree with counsel that this matter could have been discussed in the pre-trial conference. There is nothing on this in the pre-trial conference minutes.

In the outcome, because there is no proper pleadings, the defendant is prejudiced on this aspect and the Plaintiffs ought not to be allowed to adduce oral evidence as to the special meaning allegedly attached to the term "acts of terrorism" through this broker except to the extent permitted by s 15(2) of the Civil Evidence Act, 27 of 2002, which reads:

> Where a person is called as a witness in any civil proceedings, a statement of opinion by the person on any relevant matter on which he or she is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by the person, is admissible as evidence of what he or she perceived.

If I were to allow the application in the circumstances of this case, except to the extent I have mentioned, I would not only be creating a precedent, but opening the floodgates.

To conclude, for the present purposes I take comfort in the following words of Channel B in *Haughton v Empire Marine Insurance Co (Ltd)* (1866) 1 LR 206 at 211. This is what Channel B said:

> A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed.

For these reasons, the Plaintiffs' application is refused except to the extent allowed by s 15(2) of the Civil Evidence Act.

Application dismissed.