DILIP KUMAR and JYOTISHNA DILIP KUMAR v NATIONAL INSURANCE CO OF FIJI LTD (CBV0009 of 2008)

SUPREME COURT — CRIMINAL JURISDICTION

GATES P, MARSHALL and SRISKANDARAJAH JJ

6 August 2010, 9 May 2012

Contract — interpretation — construction of phrase 'pending action' — fire insurance policy — whether 'pending action' refers to action actually commenced in court of law — contra preferentum rule.

The insurance company repudiated the fire claim of the appellant for failure to meet the condition of clause 18 of the fire insurance policy. Clause 18 stated: "In no case whatever, shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration." The issue to be decided was whether, to be a "pending action", the action had to be actually commenced in a court of law, or whether it was sufficient if the application was in contemplation or had been threatened.

Held –

(1) The words "pending action" on a proper construction have only one meaning in the context of clause 18 and the policy as a whole. They refer to an action which has actually been commenced in a court of law within 12 months from the occurrence of the loss or damage.

Appeal dismissed.

Cases referred to

Antaios Compania Naviera SA v Salen Rederierna AB [1984] 2 All ER 229; *Banking Corporation* Civil Appeal ABU0006/2003S; *Delbert Evans v Davies and Watson* [1945] 2 All ER 167; *Hassan Din and Finance Sector Management Staff Association v Westpac*; *Hansen Tangen v Sanko Steamship Co* [1976] 3 All ER 570; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; *Prenn v Simmonds* [1973] All ER 237; *Rich v CGU Insurance Ltd;* (2005) 13 ANZ Ins Cas 61-642, cited.

R.K. Newton instructed by *Parshotam & Co* for the Petitioner.

A.K. Narayanan instructed by *A K Lawyers* for the Respondent.

[1] Gates P. This case was first heard in the Supreme Court on 6th August 2010 and the Court consisted of myself sitting with Justice John Byrne and Justice William Marshall. In October 2010 Justice John Byrne retired from the bench. That meant that his lordship no longer held a warrant to give judgment in the matter. Since this is the final Court of Appeal this matter had been set down for re-hearing before a fully constituted bench.

[2] I agree with the judgment, reasoning and the proposed orders of Justice William Marshall.

[3] I similarly find no difficulty in construing the phrase *"pending action"* in clause 18 of the fire policy. The phrase must refer to litigation already commenced not to that simply contemplated. There is no need to resort to the contra proferentem rule.

[4] The petitioners suggest that such a construction encourages litigation rather than negotiation. It is always open for a party to negotiate settlement at any stage of litigation. The courts do not wish to impede genuine mercantile settlements

amongst men of commerce. Both parties are in business in a substantial way, without being disadvantaged or without competent legal advice. The contract term is a fair, reasonable, and unremarkable one. Modern business organisations need to ascertain each year the extent of their liabilities. The clause is unlikely to lead to difficulties. The one year period provided within which to file their claim provides adequate time for ascertainment of loss and for negotiation of settlement. Once litigation is commenced, negotiation can continue and may result in withdrawal of proceedings subsequently. I cannot agree that clause 18 encourages litigation at the expense of dispute settlement.

[5] **Marshall J.** This is an appeal by Dilip Kumar and his wife Jyotishna Dilip Kumar trading as Binaco Textiles from a decision of the Court of Appeal of 10th November 2006. The judges deciding the appeal were Ward, President, Eichelbaum JA, and Penlington JA. They gave their opinion in a judgment of the Court.

[6] On 30th July 2008 Pathik JA, Shameem JA and Hickie JA at a leave hearing in the Court of Appeal certified the following question as one of significant public importance:

> *"WHETHER on the proper construction of clause 18 of the respondents standard form fire insurance policy at issue in these proceedings it is necessary, for an action to be a 'pending action', that it will be actually commenced in a court of law within 12 months from the occurrence of the loss or damage or whether it is sufficient if the action is in contemplation or threatened against the insurer during that 12 month period."*

The orders of the Court granting leave to appeal were:-

> ***"ORDERS***
>
> *1. Leave to Appeal to the Supreme Court is granted which we certify to be of significant public importance.*
>
> *2. The Applicants to pay both parties costs of the Application for Leave."*

[5] Pursuant to the statutory provisions the granting of leave by the Court of Appeal means that the Supreme Court is dealing with a substantive civil appeal.

The Facts

[6] Binaco Textiles on 10th of September 1994 at their warehouse in Suva sustained considerable damage due to a fire. Two days later they made a claim on their fire insurance policy issued by the National Insurance Co of Fiji Ltd. The plaintiffs then filed a writ on 18th September 1995.

[7] It seems that the Plaintiffs solicitors were aware that pursuant to Clause 18 of the policy it would be advisable to file proceedings against the insurers on or before 12th September 1995. This is because on 6th September 1995 they wrote to the solicitors for the insurers that they had instructions *"to urgently issue a Writ … against your client unless we have settlement …forthwith."*

[8] But their plan of conservative and self protecting action failed when they delayed until 18th September 1995 when the writ was issued.

[9] Clause 18 of the policy reads:

> *"18. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."*

[10] There were also claims on other policies in respect of cover for burglary damage and theft arising out of the same incident. When the insurance company repudiated the fire claim on failure to meet the condition of Clause 18, in the

insured's action against the insurer, Coventry J tried the Clause 18 issue as a preliminary question. On that preliminary point, the present appeal is the final venue.

[11] On 19th May 2006 Coventry J gave his written *"Ruling on Preliminary Issue"*. The following are the key parts of his ruling:

> *"[10] Various authorities have been cited to me concerning the word 'pending'. They are predicated on different circumstances and do not assist me in making this decision.*
>
> *[11] It is not uncommon in contracts of insurance to find clauses requiring that a claim must be made within a stated period or that an action must be commenced within a stated period, failing which the claim will not be entertained. The commercial efficacy of such clauses is obvious and will be upheld as long as the periods are not unrealistically short.*
>
> *[12] In my judgment, action must mean a legal action filed in a court. The plain meaning of pending action means an action which is pending before the court. This is consistent with the first meaning in both dictionary definitions and the example 'a suit was then pending'.*
>
> *[13] It is also consistent with clause 10 which requires notice to the company forthwith upon the happening of any loss or damage and the delivery of a claim in writing within fifteen days. I cannot accept the plaintiffs contention that 'pending' in this clause means that an action 'is in contemplation or threatened during the twelve month period following the loss or damage'. Such an interpretation would mean that as long as an insured indicated 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.*
>
> *[14] This is an insurance contract. Both parties were aware of that at the time of the agreement. I consider that had either party been asked at the time of agreement what this phrase meant they would both have responded that pending mean pending before the courts, an action having been formally filed.*
>
> *[15] Accordingly, I find that the fire insurance claim part of these proceedings was filed out of time and accordingly that part of the proceedings is struck out."*

[12] In the Court of Appeal the judgment of the panel was a Judgment of the Court.

[13] In my opinion the modern law on construction of documents is authoritatively set out by the speech of Lord Hoffman when delivering the judgment of the majority for the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114.

[14] Lord Hoffman explained:

> "*My Lord, 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 construed. 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 240-252. [1971] 1 WLR 1381 at 1384 – 1386 and *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co (The Diana Prosperity)* [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 summarized 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 Compania Naviera SA v Salen Rederierna AB [1984] 3 All ER 229 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." "

[15] The Court of Appeal in Fiji adopted Lord Hoffman's statement of the law 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).

[16] The argument of the Appellants before this Court were the same as advanced in the Court of Appeal. I do not repeat them in this judgment. They are well summarized in paragraphs 12 through 18 in the Court of Appeal's judgment.

[17] In the following passages the Court of Appeal gave their reasons for concluding against the Appellants on the ambiguity issue:

"[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 Delbert-Evans v Davies and Watson (1945) 2 All ER 167. 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 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 under 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."

[18] I so fully agree with the reasoning of the Court of Appeal and indeed that of Coventry J at first instance, that I adopt these statements without qualification as representing my reasons for concluding that this appeal must be dismissed.

[19] It is unnecessary to give an opinion on the modern scope of the *contra proferentem* rule. However there is authority that its importance has declined in modern times. Much depends on the context of the commercial document being construed.

[20] I agree with what Kirby J said in the High Court of Australia in *Rich v CGU Insurance Ltd; Silbermann v CGU Insurance Ltd* (2005) 13 ANZ Ins Cas 61-642 at paragraph 24:

"For me, this is an interpretive tool of last resort, where analysis of a contested text does not otherwise yield a satisfying conclusion. Moreover, the contra proferentem rule obviously has less application in cases where, as here, both parties are corporations

experienced in, and familiar with, insurance policies of the kind the subject of these appeals, and where both parties have enjoyed legal advice and are of roughly equal bargaining power."

[21] I am surprised that leave was given by the Court of Appeal in this case which at all times has been barely arguable. I do not think the Court would have given special leave on a petition. That because of the little chance of success where the Courts below had fully and correctly expounded the applicable principles. The leave was given on account of the need to remind practitioners of the need to avoid professional negligence. On the facts of this case the profession should never have needed reminding. Importantly where there is a barely arguable case and the absence of a question of significant public importance the Court of Appeal should decline leave.

[22] In my view this appeal must be dismissed and costs assessed at $6,000 should be awarded in favour of the Respondent.

[23] **Sriskandarajah J.** I also agree with the judgment, the reasoning and the proposed orders of Justice William Marshall.

Gates P.

Orders of the Court

[24] The orders of the Court are:

(1) the appeal be dismissed.

(2) the appellants do pay the respondents costs assessed at $6,000.

Appeal dismissed.