

**IFTAKHAR IQBAL AHMED KHAN**

A

v.

**THE NATIONAL INSURANCE CO. LTD.**

[COURT OF APPEAL—Mishra J. A., O'Regan J.A., Kermode J. A.]

B

Date of Hearing: 12 March, 1986

Delivery of Judgment: 21 March, 1986

*(Insurance—Cover Note—expressed to be subject to Policy conditions—those contained exemption from particular risk within 7 days of commencement of policy—postponement for 7 days of that risk need not be drawn to insured's attention—no ambiguity—exempting provision applied during that period).*

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*M. S. Sahu* for Appellant.

*P. Knight* for the Respondent.

The appellant appealed against a decision of the Supreme Court which had dismissed his application for a declaration in connection with a cover note issued by the respondent on 16 January, 1985 covering the appellant against risks alluded to therein.

D

The cover note was in the following terms—

“NATIONAL INSURANCE

16/01/1985

Agent 0801

E

**PROVISIONAL COVER NOTE**

**MR IFTAKHAR IQBAL AHMED KHAN AS OWNER AND A.N.Z. BANK AS MORTGAGEE C/- KOYA & CO. LAUTOKA**

F

In accordance with your request, you are hereby held INSURED against loss, damage or liability, subject to the terms and conditions of the Company's.

Fire

Policy, in the sum of SIXTY THOUSAND DOLLARS \$60,000.00 BUILDING OF DWELLING OCCUPIED BY INSURED..

G

SITUATION: 2 SAVALA ST. LAUTOKA  
INCLUDED TO EXTEND. HURRICANE, E/QUAKE,  
EXTRANEIOUS PARILS. (sic)

From 16/01/85 to 4 o'clock on 16/03/85.

Signature: R. Gopal

H

A The National Insurance Company of Fiji Limited.”

On 17 January, 1985 cyclone ‘Eric’ and within 2 days thereafter cyclone ‘Nigel’ struck Fiji, between them causing great damage to the insured property.

B The appellant claimed for his loss which was agreed at \$31,476. The respondent denied liability relying on a special condition in the policy which excluded its liability because loss was suffered within 7 days of inception of the insurance.

This condition stated—

“2. *WINDSTORM GALE HURRICANE AND CYCLONE*

C *WINDSTORM GALE HURRICANE OR CYCLONE*  
Provided that for each building and contents thereof, the Company shall not be liable under this extension for the first \$150.00 of every claim or series of claims arising out of the one event.

*SPECIAL CONDITIONS*

D 1. No liability shall attach to the Company hereunder occurring before the expiration of 7 days after 4 o’clock on the day of inception of this Insurance”.

E The trial Judge held that by virtue of the special condition appellant was not covered against the loss sustained. The argument from the appellant was that other matters conceded, the terms of the policy were not to be less advantageous to the proposer than the Cover note; that the Cover note was the governing document. The other incorporated documents must of necessity yield to it in the case of repugnancy. It was put that the cover note was expressed to insure for the period which included the arrival of the cyclones it was repugnant to the special condition in the policy which referred to exclusion for the first seven days. Alternatively it was submitted the documents together included an ambiguity; so in the case of repugnancy or ambiguity the document must be construed *contra proferentem* and the construction most favourable to the insured applied.

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*Held:* The date of the policy fixed the time or commencement of all the risk other than hurricane risks but also enabled the time when the hurricane risks were to be covered to be ascertained.

G When the cover note and policy are read together there was no ambiguity requiring the application of the *contra proferentem* rule. Having regard to the cover note’s express reference to the policy it was not necessary for the insurer to bring the insured’s notice to the special term on the policy. See Macguillivray and Parkington on Insurance Law Sixth Edition p.282 and authorities there collected. See also *Speedfast Insurance Company Limited v. F. & B. Trading Co. Pty. Limited* (1970–1971) 125 C.L.R. 578.

H Appeal dismissed.

Cases referred to:

- Queen Insurance Co. v. Parsons* (1818) 7 App. Cas. 96.  
*McQueen v. Phoenix Mutual Insurance Co.* (1879) 29 U. 26 p. 511.  
*Steadfast Insurance Company Limited v. F & B Trading Co. Pty. Limited and Others*  
 (1970-71) 125 CLR 578.  
*Nicholson v. Southern Star Fire Insurance Co. Ltd.* (1928) 28 NSW S.R. 124.  
*In re Coleman's Depositories Ltd.* (1907) 2 KB 798.

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KERMODE, J. A.

Judgment of the Court

The appellant appeals against the judgment of Rooney, J. dismissing his application for a declaration in connection with a cover note issued by the respondent on the 16th day of January, 1985 covering the appellant against the risks therein referred to.

C

The cover note is in the following terms:—

“NATIONAL INSURANCE  
 16/01/1985  
 Agent 0801

D

PROVISIONAL COVER NOTE

MR IFTAKHAR IQBAL AHMED KHAN AS OWNER AND A.N.Z. BANK AS  
 MORTGAGEE C/- KOYA & CO. LAUTOKA

In accordance with your request, you are hereby held INSURED against loss, damage or liability, subject to the terms and conditions of the Company's.

E

Fire

Policy, in the sum of SIXTY THOUSAND DOLLARS \$60,000.00 BUILDING OF  
 DWELLING OCCUPIED BY INSURED..

SITUATION: 2 SAVALA ST. LAUTOKA  
 INCLUDED TO EXTEND. HURRICANE, E/QUAKE,  
 EXTRANEIOUS PARILS. (sic)

F

From 16/01/85 to 4 o'clock on 16/03/85.

Signature: R. Gopal

The National Insurance Company of Fiji Limited.”

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On the 17th January Cyclone “Eric” hit Fiji and within 2 days thereafter “Nigel” hit Fiji between them occasioning substantial damage to the insured property.

On the 22nd January, 1985 the appellant lodged with the respondent his claim to be indemnified for his loss which after assessment by the respondent's assessor was agreed at the sum of \$31,476.

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The respondent later denied liability claiming that a special condition in the company's policy excluded their liability because the loss was suffered within 7 days of the inception of the insurance.

A The relevant special provision in the policy relating to cover against loss arising from damage by hurricane is:—

"2. *WINDSTORM GALE HURRICANE AND CYCLONE*

WINDSTORM GALE HURRICANE OR CYCLONE

B Provided that for each building and contents thereof, the Company shall not be liable under this extension for the first \$150.00 of every claim or series of claims arising out of the one event.

*SPECIAL CONDITIONS*

1. No liability shall attach to the Company hereunder occurring before the expiration of 7 days after 4 o'clock on the day of inception of this Insurance".

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Then follow a number of other exemptions which are not relevant.

Rooney, J. held that on the issue of the cover note the appellant was insured against all risks, other than cyclone damage. He further held that by virtue of the special condition the appellant was not covered against loss sustained on the day his house was damaged.

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There are two grounds of appeal as follows:—

"1. THAT the Learned Trial Judge erred in Law in holding that the Appellant was not covered against risks of cyclone damage upon the issue of the cover note.

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2. THAT the Learned Trial Judge erred in law in holding that the condition in the Policy that the cover excluded risk of cyclone damage until seven days had elapsed was applicable in the case of the Appellant."

These two grounds can conveniently be considered together.

In his written submissions Dr Sahu Khan made the following concessions:—

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"For purposes of argument it is conceded that the terms of the contract are to be collected from the proposal, the cover note and to a limited extent from the terms of the specimen policy. It is agreed that the cover note does show that it is subject to the terms and conditions of the Company's fire policy. It is also conceded for purposes of argument that the proposer must be held to have applied for a policy in the Company's usual form. However, it must be subject to this that the terms of the policy are not to be less advantageous to the proposer than the cover note. The cover note is the governing document and the other incorporated documents must of necessity yield to it in case of repugnancy".

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The last sentence of that passage encompasses the main argument advanced on behalf of the appellant. It was contended that as the cover note was expressed to insure, without qualification, for the period from 16th January 1985 to 16th March 1985 it was repugnant to the special condition in the policy which excluded the liability of the respondent in respect of cyclone before the expiration of 7 days after 4 p.m. on the day of the inception of the cover or that if the two documents are read together, they are ambiguous. The submission was that if there is repugnancy or ambiguity the document must be construed *contra proferentem*, and the construction more favourable to the insured adopted. The dates shown in the cover note are merely dates stating an interim period during

which the risk is accepted under that note. Because of the terms of the exemption clause, postponing as it did, the commencement of the hurricane risk until seven days after the inception of the insurance, the commencement date of the policy had an added significance. It not only fixed the time and commencement of all the risks other than the time of commencement of the hurricane risk but also provided the time from which the commencement of that latter risk could be established. When the cover note and the conditions attaching to the hurricane risk are read together their meaning is abundantly clear and in our view there is no ambiguity or repugnancy requiring the application of the *contra proferentem* principle. The submission made to the contrary effect must accordingly be rejected.

It was also submitted that the special condition not having been drawn to the notice of the appellant, it was not applicable to him.

Rooney J., in his judgment in dealing with this aspect of the case, referred to a passage in Macgillivray and Parkington on Insurance Law Sixth Edition at page 282 where the learned authors state:—

“284. *Incorporation of policy conditions.* The protection afforded by an interim receipt is not fully defined in the instrument itself, which is usually expressed to be on the company's usual terms, or subject to the conditions contained in the company's policies. Where the conditions are thus referred to expressly, the insurer does not have to prove that they were brought to the notice of the assured, or even that he had an opportunity of making himself acquainted with them. In such a case, the assured is bound by the conditions contained in the form of the company's policy currently in use and applicable to the case.”

The authorities relied on by the authors for that statement are *Queen Insurance Co. v. Parsons* (1818) 7 App. Cas. 96 and *McQueen v. Phoenix Mutual Insurance Co.* (1879) U. 26 p.511. Modern authority for the same proposition is to be found in *Steadfast Insurance Company Limited v. F. & B. Trading Co. Pty. Limited and Others* (1970–71) 125 CLR 578 a decision of the High Court of Australia. In that case Walsh J. whose judgment was concurred in by Barwick C. J., Owen and Gibbs J. J., at p.586 said:

“The cover note states expressly that the cover given by it is subject to the terms and conditions of the company's policy. The general rule applicable to such a contract is that the conditions of the company's usual policy are binding on the insured, whether he has seen them or become acquainted with them or not: see MacGillivray on Insurance Law, 5th Ed., 1961), vol. 1, par. 640; *Nicholson v. Southern Star Fire Insurance Co. Ltd.* (1927) 285 R NSW 124 at pp 128–129 and cf. *Citizens Insurance Co. Canada v. Parsons* (supra).”

After stating the general rule thus, Walsh J. went on to say that there have been some decisions that certain conditions of a company's policy not communicated to an insured and not known to him were inapplicable to insurances under cover notes or interim receipts. Those instances, however, are few. They generally relate to conditions which impose an obligation on an insured such as the giving of immediate notice of an accident from which a claim might arise. In such cases it has been held unreasonable to suppose that the parties intended the insured to be bound until the contents of the policy or of the particular condition had been communicated to him—see, for instance, *Coleman's Depositories Ltd* (1907) 2 K.B. 798 (C.A.). The present case clearly falls outside that category of cases and accordingly the general rule must apply. The submission therefore fails.

The appeal accordingly fails. It is dismissed and the appellant is ordered to pay respondent's costs.

*Appeal dismissed.*