Privy Council Appeal No. 26 of 1991

The Earthquake and War Damage Commission *Appellant*

v.

Waitaki International Limited *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD LOWRY
SIR MICHAEL KERR

*[Delivered by **Lord Oliver of Aylmerton**]*

This appeal from a decision of the Court of Appeal of New Zealand (Cooke P., Richardson and Casey JJ.) raises what is, in the end, a short point of construction of the terms of certain contracts of fire insurance entered into by the respondent company ("Waitaki") between 1979 and 1985 covering the assets of its business.

The Earthquake and War Damage Act 1944 established a statutory scheme of compulsory insurance against earthquake and war damage. A commission (the present appellant) was set up to administer an earthquake and war damage fund established at the Reserve Bank of New Zealand which fund originally consisted of the monies standing to the credit of the existing war damage fund but was to be fed and maintained principally by premiums compulsorily exacted from property owners. Broadly the scheme involves the no doubt justifiable assumption that at least the vast majority of property owners, whether commercial or domestic, insure their properties against loss or damage by fire. Insurance against earthquake damage is then linked to fire insurance by providing that where any property is insured against fire it is deemed to be insured to the same amount against earthquake damage and war damage, but subject to the limitation that such insurance extends only to the amount of the indemnity and not the replacement

case of property other than a building the replacement thereof by similar property, in either case in a condition equal to but not better or more extensive than its condition when new ...

(ii) Where such property is damaged, the repair of the damage and the restoration of the damaged portion of the property to a condition substantially the same as but not better than or more extensive than its condition when new ..."

Thus, considered in the context of the Act of 1944, it is clear that the contract is one which provides for settlement of a claim upon a basis more favourable to the insured person than indemnity value and that accordingly the provisions of section 14(2A) apply.

If the policy contained no further provision, there could, their Lordships think, be no serious doubt about what, on the true construction of the contract, was "the amount to which the property is insured under the contract", which amount forms the basis of computation for the premium payable by the insurers to the Commission. The rate applicable to that premium is currently regulated by regulation 6 of the Earthquake and War Damage Regulations 1984 and is, in the case of a period of insurance for one year, five cents for every $100 of the amount on which the premium is calculated. The contract covers, in terms, all the property of the company and insures its replacement or reinstatement value - that is to say, the value which formed the basis for computation of the $250,000 policy premium - and the fact that the insurers' liability is limited to a particular sum in respect of claims arising out of a single event is entirely irrelevant. The amount so prescribed is not an overall limit of liability but merely the limit for the payment of any one claim, so that payment of the limited amount in respect of a claim arising out of one event leaves the cover of the insured's property against further claims up to the same limit in respect of other events occurring during the period of insurance entirely unaffected.

The only difficulty in the way of this simple and natural construction, which gives full effect to a familiar and perfectly well understood limitation of liability, lies in a subsequent clause in the contract. This is contained in the policy conditions, condition 10 of which reads as follows:-

"REINSTATEMENT

In the event of a claim or claims under this policy in respect of loss, damage or destruction to property insured or business interruption and in the absence of written notice by the Insured to the contrary the sum insured shall be automatically

> reinstated in full from the time of the occurrence, the Insured undertaking to pay such premium as may be required for such reinstatement."

It is extremely difficult to see how this can be made to fit with the provisions of the policy which have gone before. The terms of the contract clearly place upon the insurers the obligation of providing the replacement value of all or any of the insured's property which is destroyed or damaged during the period of insurance, subject only to one limitation, that is to say, that in no case can the insurer be compelled to expend more than the sum of $50 million on a single claim or a series of claims from a single event. Subject to that limitation the insurers' liability is limited only by the value of whatever property of the insured may be destroyed or damaged during the period and to speak of the "sum insured" being "automatically reinstated in full" is quite meaningless. That would have a clear and perfectly intelligible meaning if the limitation of liability were an overall limitation so that, on each claim being met, the amount of the cover was *pro tanto* reduced. But the "sum insured" clause, which contains the only limitation on the insurers' *ex facie* liability to replace, repair or indemnify, can be read in that way only if the words "any one loss or series of losses arising out of any one event" are omitted altogether, for they can have only one meaning. As they stand it is difficult to see how the two clauses can live together and the only way in which any sensible meaning can be given to clause 10 without turning the limitation of liability clause into something which it quite plainly is not is to treat it as a not altogether dissimilar clause was treated in *Pennsylvania Company v. Mumford* [1920] 2 K.B. 537, 547 and as imposing an obligation on the insured, as each claim is made, to pay an additional premium at the contract rate computed on the amount at which the claim is settled.

However, as between itself and the Commission, Waitaki took the position that the contract was one in which the overall limit of the insurers' liability was $50 million (conveniently referred to by the trial judge as "x dollars" since the amount increased with each successive policy) and tendered premiums on that basis, a position which the Commission at first accepted. Possibly the reasoning was the same as that advanced in Waitaki's submission to their Lordships' Board and was based upon the proviso in the operative part of the contract that the insurers' liability should "in no case exceed the sum insured stated in the Schedule". But, of course, the sum insured stated in the Schedule is, in terms, the sum insured for any single loss so that to read this back into the proviso simply results in its reading "shall in no case exceed $50,000,000 for any one loss etc.". Thus, that reasoning can be validated only by ignoring the qualifying words altogether.

property, whether considered globally or item by item, is insured for more than the amount currently specified as the sum insured" is simply to attribute no meaning at all to the words "any one loss etc. ...". Waitaki owns nine freezing plants. If one assumes hypothetically a total loss of one plant on Day One involving a claim for $60 million, the remaining properties do not then become uninsured, quite regardless of the reinstatement provision. If, on the same day or on successive days, each of the remaining plants is destroyed as a result of eight separate events, the insurers remain obliged to meet claims in respect of all the losses up to the limit in each case of $50 million. What is insured by the policy is all Waitaki's property in New Zealand, so that the cumulative cover extends to the replacement costs (up to the limit, in each case, of all nine properties).

Following the ordinary rules of construction that words must be given their ordinary and natural meaning and that effect is to be given, so far as possible, to all the provisions of the contract, the "sum insured" provision can only mean what, in plain terms, it says. Their Lordships are unable to accept Waitaki's submission that condition 10 has the effect of deleting the qualifying words "one loss or series of losses etc. ..." altogether from the contract.

But even accepting for the moment a construction which would accord to the one loss/one event limit the force of an overall limitation of total liability under the policy, their Lordships are unable to follow the next step in the reasoning which led to the court's final declaration. What the proviso to section 14(2A)(b) directs attention to is "the amount to which the property is insured under the contract" (emphasis added). "The contract" in this case is one which provides for the replacement on destruction of the whole of Waitaki's property even on the hypothesis for which Waitaki argue. There is never a point of time during the period of the contract at which the whole of Waitaki's property is not covered against loss to its replacement value, subject only to the limitation on each individual loss. As a claim is made, so, under the contract, the insurer becomes obliged to keep the property covered up to the prescribed limit and to provide the full replacement value except only that, if the damage claimed is attributable to one event only, it is entitled to avail itself of the cut-off point in relation to that claim. Each one of the nine plants remains covered under the contract even though, on the making of a claim, a further premium becomes exigible. The obligation to cover and the obligation to pay a further premium, unless Waitaki elects not to, both arise under the single contract and it is, in their Lordships' view, impermissible to regard condition 10 as giving rise to a chain of contingent new contracts. The contract which "provides for settlement of any claim for damage" as prescribed by section 14(2A) is the contract in which

clause 10 is contained and it is to the amount of the insurance cover in that contract that reference has to be made in the calculation of the statutory premium under the Act. Their Lordships have thus been driven to the conclusion that the analysis of McGechan J. was correct and that his declaration (subject to the amendment mentioned below) ought to be restored.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed. As previously mentioned, there was some uncertainty at the trial whether section 14(2A)(b) certificates in respect of all or any of the relevant years had been provided or approved and Mr. Joyce, having taken instructions, was prepared to agree on behalf of the Commission that the declaration ought to be framed in a way which would not preclude Waitaki's right to establish the indemnity value of the property by certification if that right was still subsisting or was conceded. It was accordingly agreed that the declaration ordered by the judge should be amended by the addition, either after the words "adjudged and declared that" or by means of a proviso, as may be most convenient, of a qualification in the following terms agreed between counsel:-

> "... subject to the right if still subsisting of the defendant to establish by certification and approval under section 14(2A) of the Earthquake and War Damage Act 1944 (as amended) that the premium should be computed on the amount of the indemnity value of the property."

Waitaki must pay the Commission's costs before the Board and in both courts below.