QUEENSLAND INSURANCE (FIJI) LTD v SHORE BUSES LTD (ABU0070 of 2004S)

COURT OF APPEAL — CIVIL JURISDICTION

WARD P, SMELLIE and PENLINGTON JJA

22, 25 November 2005

Contract — insurance — interpretation — motor vehicle policy — dangerous driving — comprehensive insurance with renewal certificate — passenger risk liability of $100,000 — whether two extensions amended policy — whether series of accidents arose out of "one event" — whether Appellant's liability was $1 million inclusive of passenger claims — contra proferentem rule.

The Respondent was a bus operator and one of its buses, comprehensively insured by the Appellant, was involved in a motor vehicle accident that resulted in injuries to its passengers. Section 6 of the policy contained passenger risk liability of $100,000. The driver was prosecuted for dangerous driving and was convicted in the Magistrates Court. The Appellant later issued a renewal certificate containing the same liability. Item 11 of the renewal certificate provided that the maximum amount of liability of the Appellant stipulated in s 6 was increased to $1 million. The parties disputed whether the Appellant's liability was restricted to $100,000 inclusive of passenger claims. The High Court declared that the Appellant's liability was up to a maximum of $100,000 and ordered indemnification sought by the Respondent.

The Appellant challenged: (1) whether the two extensions amended the last paragraph of s 6; (2) whether there was a series of accidents arising out of the one event; and (3) whether the Appellant's liability was $1 million inclusive of passenger claims.

Held — (1) The effect of the two extensions was to amend the last paragraph of s 6, which provided the Respondent with extended cover for liability for:

(a) third party injury;
(b) third party property damage;
(c) death or bodily injury sustained by any passenger or any person getting on or off a vehicle or about to do so;
(d) law costs charges and expenses under para 2 of s 6.

However, the cover was limited to the maximum amount of $1 million (inclusive of passenger risk cover) and in respect of an accident or series of accidents arising from one event.

(2) The words "in relation to any one accident or series of accidents arising from the one event", in s 6 properly construed in this case meant that the series of accidents arose out of the one event which was the overturning of the bus.

(3) The insurance policy and renewal certificates are commercial contractual documents made by the Appellant as an insurer. The limit of the Appellant's liability under s 6, as amended by the two extensions, was ambiguous. The Appellant's document was unclear and not precise. The contra proferentem rule was used in resolving the conflict between the renewal certificate and the ambiguity since it was a construction favourable to the Respondent as the insured. The last paragraph of s 6, as amended by the two extensions, must prevail over the maxima set out in the renewal certificate. It was declared and ordered that the Appellant indemnify the insured Respondent for all the passenger's injury claims that arose out of the overturning of its bus provided that the liability was limited to the maximum sum of $1 million.

Appeal allowed.

Cases referred to

AXA Reinsurance (UK) Plc v Field [1996] 1 WLR 1026; [1996] 3 All ER 517, considered.

South Staffordshire Tramways Co Ltd v Sickness & Accident Assurance Association Ltd (1891) 1 QB 402, distinguished.

F. Haniff for the Appellant

H. Nagin for the Respondent

[1] Ward P, Smellie and Penlington JJA. This appeal concerns the proper interpretation of a motor vehicle policy issued by the Appellant to the Respondent.

Background

[2] The Respondent is a bus operator. It has a number of buses. On 3 May 1996 one of its buses registered number CP433, which at that time was carrying some passengers, was involved in an accident at Walu Bay. The driver lost control of the bus and it overturned. The driver was prosecuted for dangerous driving. He was convicted in the Magistrates Court at Suva and fined $100.

[3] At the time of this incident the bus, along with others in the Respondent's fleet were comprehensively insured with the Appellant under policy number 0075543. That policy contained passenger liability cover.

[4] Sometime after the incident the Respondent was served with a number of writs of summons issued out of the High Court by passengers who had been injured when the bus rolled over. They claimed damages for personal injuries for the alleged negligence of the bus driver in failing to keep proper control of the bus.

[5] In two of the actions interlocutory judgments have been entered against the Respondent with damages to be assessed. We were informed from the bar that, as yet, none of the claimants have received any payment.

[6] As appears later a renewal certificate issued by the Appellant contained the words:

> passenger risk liability $100,000

[7] A dispute arose between the Appellant and the Respondent as to whether the Appellant's liability for passenger risk cover was restricted to $100,000 in respect of *all the passenger claims* or the apparent limitation of $100,000 applied to each claimant. Here we note that both the Appellant and the Respondent did not take into account at this time some other critical provisions in the policy, which in our view, increased the maximum exposure of the Appellant. More of that later.

[8] Suffice it to say that the parties were unable to reach any agreement and so the Respondent commenced proceedings by way of an originating summons. The Respondent sought the following declaration and order against the Appellant:

> (i) a declaration that the Defendant is liable to indemnify the Plaintiff under the Defendant's Comprehensive Motor Vehicle Insurance Policy No 0075543 over its bus registration No CP433 for passenger risk liability up to a maximum amount of $100,000.00 in respect of each claim arising out of a road accident.
>
> (ii) an Order that Defendant do indemnify the Plaintiff against the interlocutory judgment entered against the Plaintiff in Civil Action Nos 206 of 1997 and 207 of 1997 at the High Court, Suva and against all damages assessed thereunder and all costs to the limit of $100,000.00 in each case.

[9] Short affidavits in support of and in opposition to the originating summons were filed and served. Pathik J after considering written submissions from both sides supplemented by oral submissions reserved his decision. In a judgment delivered on 31 August 2004, Pathik J made the declaration and order sought by the Respondent.

[10] The Appellant now appeals.

The comprehensive motor vehicle policy

[11] The terms of the policy were set out in a printed form. Attached to the printed form was a sheet of additional clauses including a clause with the subheading "Passenger Risks" and a schedule attaching to and forming part of the policy. In that schedule the bus numbers were set out with their respective insured values. As well there was another piece of paper which was attached. It was headed "Endorsement attaching to and forming part of policy number 75543".

[12] Under a heading on the printed form "What you are covered for" there were a series of risks such as accident, theft, towing, use of other vehicles which are not relevant to this appeal. The heading however, which is relevant is number 6. It had the heading "Your legal liability (personal and property) and law costs" (hereafter we shall refer to this clause as "s 6"). It stated:

> If as a result of an accident caused by or in connection with the use of your vehicle, or a caravan or trailer which it is towing, you are held to be legally responsible *for injury or damage to property of another*, Q.I. will pay those damages.
>
> Q.I. will also pay all Law Costs, charges and expenses incurred by you with our written agreement or which you may be ordered to pay, provided that any legal action is defended with our written agreement.
>
> Q.I. will not pay damages for any injury sustained by any relative or friend who lives with you, or with whom you live, nor any employee of yours, nor any person driving the vehicle or entering *or leaving the vehicle nor being carried as a passenger*.
>
> Q.I. will not pay for damage to property owned by you, in your custody or control, or which you are transporting.
>
> This section does not protect you against liability for which a Third Party Insurance policy is required in accordance with the Motor Vehicles (Third Party Insurance) Act 1966. It will protect you for any amounts in excess of the amount insured by the Third Party Insurance policy.
>
> *The maximum amount Q.I. will pay under this section for injury or damage to property is limited to $30,000 in relation to any one accident or series of accidents arising from the one event.* [Emphasis added.]

[13] Pausing here it is to be noted that s 6 is directed to "injury or damage to property" that is to say:

(i) third party personal injury (but not death) in excess of the statutory cover. See the first and fifth paragraphs of s 6; and

(ii) third party property damage. See the first paragraph of s 6.

The liability of the Appellant for these risks is then limited by the words of the aggregation provision set out in the last paragraph of s 6. That provision expressly excludes injury to a passenger and to any person entering or leaving the vehicle. See the third paragraph of s 6.

[14] On the sheet of additional clauses which formed part of the policy, there is a clause which is headed "Passenger Risks". It read as follows:

> It is understood and agreed that, notwithstanding anything contained therein to the contrary and subject to the Limit of Indemnity stated in the Schedule, the indemnity

granted under Item 6 of the Section "What You Are Covered For" of this Policy extends to cover the insured's liability at law for death or injury to persons (other than persons driving or any relative of the Insured or any employee of the Insured) being in or on the vehicle described herein entering into or alight from such vehicles.

[15] The Respondent in consideration of an *additional* premium obtained additional cover. These extensions to the policy were the subject of the endorsement referred to above. We now set out the material part of that endorsement.

ENDORSEMENT ATTACHING TO AND FORMING PART OF POLICY NUMBER 75543

ADDITIONAL THIRD PARTY AND PASSENGER RISK EXTENSION — PASSENGER RISK EXTENSION

Having paid an additional premium, the indemnity under Item 6 of Section headed WHAT YOU ARE COVERED FOR of the Policy, shall extend to cover as follows:

The Insured's liability at law for death or bodily injury sustained by persons in or on the Vehicle described herein, or entering or alighting from, or about to enter or alight from such vehicle, QI will not pay damages for any injury sustained by any relative or friend who lives with you, or with whom you live, nor any employee of yours, nor any person driving the vehicle.

ADDITIONAL THIRD PARTY COVER-PROPERTY

Having paid an additional premium, the maximum amount of liability of QI stipulated in Item 6 of this Policy is increased to $1,000,000 INCLUSIVE OF THE ABOVE PASSENGER RISK EXTENSION.

[16] Under the passenger risks extension the indemnity under s 6 was extended to cover the Respondent's "liability at law for death or bodily injury sustained by persons in or on the vehicle … or entering or alighting from or about to enter or alight from such vehicle". Once again injuries sustained by any relative or friend or an employee or person driving the vehicle were excluded. Thus, this extension like the "passenger risks" clause provided passenger risk cover which had been otherwise expressly excluded in s 6, as we have stated above.

[17] The additional third party cover — property extension provided that the maximum amount of liability of the Appellant stipulated in s 6 was increased to $1 million. Then followed the significant words "INCLUSIVE OF THE ABOVE PASSENGER RISKS EXTENSION". This endorsement thus extended the cover in s 6 for third party personal injury (above the statutory cover) and third party property damage subject to the maximum stated.

[18] It is important to note that the passenger risk extension did *not* contain any maximum. The additional third party cover — property extension on the other hand contained a maximum of $1 million "inclusive of the above the passenger risk extension", which must refer to the *previous* extension set out in the previous endorsement relating to the passenger risk extension.

[19] The clause "passenger risk" which was printed on the sheet of additional clauses (and which we have set out above) similarly extended the Appellant's liability to cover claims at law for death or injury to persons, other than the ones stated in parenthesis, along with those in or on the vehicle and entering into or alighting from the vehicle. That provision was said to be" notwithstanding anything contained … to the contrary". Those words must of course refer to the exclusion of passenger cover in s 6. As well the clause stated that it was "subject to the limit of indemnity stated in the Schedule". There was however no limit of

indemnity stated in the Schedule. The Schedule which we have already referred to set out the buses of the Respondent and their respective insured values.

[20] The policy was renewed from year to year. Upon renewal, a renewal certificate was issued by the Appellant to the Respondent. The certificate set out, inter alia, the name of the insured, the period of insurance and the premium payable. Item 11 in the certificate is relevant. It stated:

> PASSENGER RISK LIABILITY — $100,000.00 THIRD PARTY PROPERTY DAMAGE — $1,000,000.00

The first line in item 11 is the limitation referred to earlier in this judgment.

The case in the High Court

[21] We now refer to the position in the High Court. Both parties concentrated on the last paragraph of s 6 of the policy and the wording in Item 11 of the renewal certificate "passenger risk liability $100,000.00". It became clear during the hearing before us, that neither counsel referred in the High Court to the wording of the second extension "Additional Third Party cover — property". The attention of the judge in the High Court having not been drawn to this extension he did not make any comment or finding thereon.

[22] Both parties focused on the last paragraph of s 6, which for convenience we set out once again:

> The maximum amount QI will pay under this section for injury or damage to property is limited to $30,000 *in relation to any one accident or series of accidents arising from the one event.* [Emphasis added.]

[23] The Respondent contended that the injuries to the passengers were separate accidents arising from a separate event but arising from one originating cause. The Respondent further contended that the Appellant's limitation of liability was not limited to an aggregate of $100,000 but to $100,000 in respect of *each* passenger.

[24] The Appellant, on the other hand, contended that the injuries to the several passengers constituted a series of accidents arising from the one event, namely, the overturning of the bus and that the maximum amount payable in respect of an accident was $100,000 in relation to any one accident or series of accident arising from the one event.

[25] It is unnecessary for us to go into the detail of the judgment. It is sufficient to say that the judge found that the personal injury to the several passengers in the bus at the time of the overturning incident constituted a series of accidents and that where several persons were injured, as in the present case, the liability of the Appellant was to be measured by the maximum set out in the renewal certificate for *each* injured passenger and that the Respondent would not have the right to claim a larger indemnity in the case of each injured person than $100,000.

The appeal

[26] In opening the appeal counsel for the Appellant accepted the judge's finding that the passengers in the bus suffered a series of accidents when it overturned. His complaint was that the judge had not properly construed the words at the end of s 6 "arising from the one event". Counsel submitted that on a common sense view the series of accidents suffered by the passengers originated from the one event namely the overturning of the bus.

[27] Counsel further contended that each case must be decided on the wording of the insurance policy in issue and that other cases were not determinative. He submitted that the judge fell into error when he accepted the reasoning of the Court of Appeal in England in *South Staffordshire Tramways Co Ltd v Sickness & Accident Assurance Association Ltd* (1891) 1 QB 402 (*South Staffordshire*). The judge held that the wording of the relevant clause in that case resembled "very closely the words in the instant case". In the *South Staffordshire* case a tram car overturned and caused injuries to a number of passengers. The tramway company became liable to pay damages to the extent of 833 pounds. The policy insured the tramway company against "claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from November 24 1887 to the amount of 1250 pounds in respect of any one accident but not exceeding in all the sum of 1500 pounds in any 1 year". The English Court of Appeal unanimously held that the injuries caused to each of the passengers was a separate accident within the meaning of the policy. The Appellant's counsel in the appeal before us submitted that s 6 was different from the policy wording in *South Staffordshire* case and accordingly that case could be distinguished. Significantly, the word "cause" was not used in s 6.

[27] The Respondent's counsel maintained the submission which he made to the trial judge wherein he relied on the *South Staffordshire* case and contended that each injured passenger in the present case suffered an accident and that there were several accidents which were separate events arising from the one originating cause.

[28] We now pause to deal with this issue. It can be dealt with quite shortly. With respect to the judge, we do not agree with him. In *AXA Reinsurance (UK) Plc v Field* [1996] 1 WLR 1026; [1996] 3 All ER 517 at 526 Lord Mustill said:

> In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. I believe that this is how the Court of Appeal understood the word. A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening.

[29] Here the words used were "the one event", that is as Lord Mustill said, "something which happens at a particular time, at a particular place, in a particular way". In our view that was the overturning of the bus. We agree with the judge that there were a series of accidents. Each of those accidents, however, arose from the overturning of the bus. The words "arising from" are a synonym for "originate". Section 6 did *not* use the word "cause" which has a different meaning as expounded by Lord Mustill. We therefore accept the Appellant's counsel's submission that the judge erred in his construction of the words "in relation to any one accident or series of accidents arising from the one event", at the end of s 6.

[30] But that is not an end to the matter. We now come to the issue of maximum liability. The Respondent's counsel relied on the wording in the renewal certificate and contended that the Appellant's liability passenger risk was limited to $100,000 in respect of all the passenger claims arising out of the overturning of the bus. He did not go beyond item 11 in the renewal certificate.

[31] Likewise, in fairness, neither had the Respondent gone beyond those words in the High Court.

[32] When the Appellant's counsel came to the issue of maximum liability and pointed us to the renewal certificate we drew his attention to the wording of the second extension "Additional Third Party Covered — Property" wherein it was stated (and for convenience we set it out again):

> Having paid an additional premium, the maximum amount of liability of QI stipulated in Item 6 of this policy is increased to $1,000,000.00 INCLUSIVE OF THE ABOVE PASSENGER RISKS EXTENSION

We put to the Appellant's counsel the proposition that the Appellant's maximum liability for the risks stipulated in s 6 and as amended by extensions had been, by virtue of this extension, increased to $1 million and that that sum was *inclusive of the passenger risk extension* which appeared immediately above the additional third party cover — property extension. We also pointed out that the passenger risk extension did not contain any limit. Thus, so it seemed individual passenger claims were not limited *provided that* all the claims for the various kinds of risks covered by s 6 did not exceed the maximum of $1 million.

[33] The Appellant's counsel's response to this proposition was a continued reliance on the renewal certificate which he reminded us formed part of the policy because of earlier words in the printed form to the effect:

> The Certificate, which forms the part of this policy sets out your relevant details and those of your vehicle.

[34] In any event, the Appellant's counsel invited us to refer the matter back to the High Court. We indicated in response that we were not prepared to do so. The accident happened in May 1996, over 9 years ago. Five claims have been made and to date not one of the claimants have been paid any money. Finality is required. We indicated that we regarded the issue as a matter of construction of a written policy document and that that process would not be assisted by any further evidence.

[35] The Appellant's counsel accepted that the maximum liability for the risks covered by s 6 as the result of the additional third party cover — property extension was $1 million but that because of the renewal certificate there was a limit of $1 million for the passenger risk indemnity and $1 million for the property damage indemnity, which counsel submitted included the passenger risk limitation of $100,000.

[36] Our task is to properly construe and interpret the policy which is a commercial contractual document. Being a document in writing what has to be considered is the language in fact used in the policy and any documents which are contractual by virtue of being incorporated in the policy (and that would include the endorsements). The court's function when presented with a conflict between the parties as to what the policy means is to interpret what the parties have in fact said in the contract. The words used are prima facie to be construed in their plain ordinary and popular meaning. The document must be looked at as a whole. These are well settled principles which must guide us in the present case.

[37] Having carefully considered the whole of the policy including the attached extensions, we are unable to find any contractual foundation or authorisation for the renewal certificate stating a limitation for passenger risk liability (apart from that contained in the "Additional Third Party Cover — Property" extension).

[38] As we have noted earlier the clause "Passenger Risks" includes the words "and subject to the limit of liability stated in the Schedule" but the schedule does not state a limit of liability for passenger risk. There is no reference to that clause or to the passenger risks extension clause. The *only* limitation stated in the policy apart from the renewal certificate are the words and figures in the additional third party cover — property extension.

[39] We accept the Appellant's counsel's submission that the renewal certificate formed part of the policy but a consequence of that proposition is that, viewed objectively, the policy (including the renewal certificate) contains an ambiguity on its face.

[40] The additional third party cover — property extension plainly states that the maximum amount of liability of the Appellant stipulated in s 6 is increased to $1 million *inclusive* of the passenger risk extension. On the other hand, the renewal certificate purports to impose limitations for passenger risk and for third party property damage which are *different* from the plain meaning of the words set out in the additional third party cover — property extension.

[41] In our view, this situation calls for the application of the contra proferentem rule.

[42] Here, it is proper to record that the Respondent's counsel in his submissions to us accepted responsibility for not drawing the attention of the High Court to the additional third party cover — property extension. He now contended that there was an ambiguity and that the extension must prevail over the renewal certificate.

[43] Both the policy and the renewal certificate have been framed by the Appellant as the insurer. It is the Appellant's language. It is the business of the Appellant to see that precision and clarity are attained. If the Appellant fails to do so and there is an ambiguity then such ambiguity must be resolved by adopting the construction favourable to the Respondent as the insured.

[44] Applying the contra proferentem rule we conclude that the maximum liability stated in the additional third party cover — property extension must prevail over the maxima stated in the renewal certificate.

Conclusion

[45] We now recapitulate. First, in our view the effect of the two extensions was to amend the last paragraph of s 6 to provide the Respondent with extended cover for liability for:

(a) third party injury (above the statutory cover);
(b) third party property damage;
(c) death or bodily injury sustained by any passenger or any person getting on or off a vehicle or about to do so; and
(d) law costs charges and expenses under para 2 of s 6.

Such cover was limited to a maximum amount of $1 million (inclusive of passenger risk cover) in relation to any one accident or series of accidents arising from the one event.

[46] Second, we accept that on a proper construction of the last words in s 6 there was in this case, a series of accidents and that they arose out of the one event, namely, the overturning of the bus. To this extent the Appellant has been successful on the appeal.

[47] And third, we are of the opinion that there is an ambiguity as to the limit of the Appellant's liability under s 6, as amended by the two extensions. In our view, the Appellant's liability is $1 million inclusive of passenger claims. That is

in conflict with the renewal certificate and the ambiguity must be resolved by the application of the contra proferentem rule. The last paragraph of s 6, as amended by the two extensions, must prevail over the maxima set out in the renewal certificate.

[48] As a result, the Appellant is liable to cover the Respondent for each of the passenger claims provided that the total of all the claims arising out of the overturning of the bus for which the Respondent is covered under s 6, as amended by the two extensions, does not exceed $1 million.

Result

[49] 1. The outcome of the appeal is set out in the following declaration and order:

(a) It is declared that Queensland Insurance must indemnify the insured for all passenger injury claims arising out of the overturning of the bus on 3 May 1996 provided that the liability is limited to the maximum sum of $1 million for all claims covered by s 6, as amended arising out of that event.

(b) Queensland Insurance is ordered to indemnify as indicated in (a) above.

2. As each party has succeeded in part we make no order as to costs.

Appeal allowed.