IN THE SUPREME COURT OF NEW Z[redacted]
CHRISTCHURCH REGISTRY

NO. A.97/75

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BETWEEN JEAN FAIRCLOTH of Blenheim, Widow

Plaintiff

A N D ALBION INSURANCE COMPANY LIMITED, a company duly incorporated in England, but carrying on the business of a life insurance and accident insurance company in New Zealand, and having as one of its principal places of business offices at 150 Manchester Street, Christchurch

Defendant

Hearing: 21 April 1977
Judgment: 22 APR 1977
Counsel: A.A.P. Willy for Plaintiff
R.A. Young for Defendant

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JUDGMENT OF ROPER J.

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This is a claim by the Plaintiff as executrix of her late husband's estate wherein she seeks payment by the Defendant Company of the proceeds of a personal accident policy.

The relevant facts are not in dispute and came before the Court in the form of an agreed statement of facts, and a concession by Plaintiff's Counsel at the hearing that a certain notice in writing, which the Defendant Company contends should have been given, was not given by the deceased to the Company. Because of the very limited nature of the present enquiry it is unnecessary to refer to the whole of the agreed facts. In 1968 the deceased, who at all relevant times was a commercial airline pilot with the rank of Captain, entered into a contract of insurance with the Defendant Company. It provided a cover of $10,000 on death (and other benefits which have no relevance) resulting from accident "during non-working

hours". The premium was $10 per annum.

Captain Faircloth met his death on the 22nd July 1973, when an aeroplane owned by Pan American Airways crashed into the open sea off the island of Tahiti while en route from Auckland to Los Angeles. Captain Faircloth was not the pilot but simply a passenger on holiday.

The whole case turns on the interpretation of one clause in the policy of insurance, it being accepted by the Defendant Company that apart from the alleged breach by the deceased of that clause the policy was otherwise in full force and effect at the time of Captain Faircloth's death.

The clause, which is clause 3 of the conditions annexed to the policy, reads:-

> "3. The Insured shall give written notice to the Company of any intention of the Insured Person to travel beyond the limits of the Commonwealth of Australia, the Dominion of New Zealand and the intervening seas and the Company shall be entitled to make any variation to the terms and conditions of the policy deemed necessary."

As has been stated no written notice in terms of that clause was given to the company by the deceased prior to his departure from New Zealand.

Clause 10 of the conditions provides:-

> "10. The due observance and fulfilment of the terms provisions conditions and endorsements of this Policy by the Insured ormny claimant under this Policy in so far as they relate to anything to be done or complied with by the Insured or any claimant under this Policy and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

Mr Willy accepted that if I should find that written notice in terms of clause 3 should have been given, then the Plaintiff fails.

Mr Young accepted that the onus was upon his client company to prove that the deceased was in breach of clause 3, but it will be more convenient to first consider Mr Willy's rather ingenious approach to the

problem. He set about his task by proving as a matter of law what is meant by the terms "Commonwealth of Australia" and "Dominion of New Zealand". By reference to The New Zealand Boundaries Act 1863 (U.K.), The Acts Interpretation Act 1924, certain New Zealand Orders in Council and Australian Statutes, not to mention Everymans Encyclopedia, he was able to show that as a matter of law "The Dominion of New Zealand" extends from Raoul Island in the North to Campbell Island in the South, with the Snares and Chatham Islands as the western and eastern boundaries respectively, and included a sizable portion of the Ross sea and ice shelf. "The Commonwealth of Australia" includes of course the mainland and Tasmania, and the many small islands about its coast, and according to Mr Willy's researches, Norfolk Island, the Christmas and Cocos Islands in the Indian Ocean, and perhaps at the relevant time Papua-New Guinea. From that foundation Mr Willy went on to argue that the term "intervening seas" in clause 3 was devoid of any clear meaning; or that at least there was an ambiguity which I should resolve in the Plaintiff's favour by application of the contra proferentem rule. If I understood Mr Willy aright his contention was that every part of "a sea" which touched any part of the Commonwealth or Dominion as legally defined was an "intervening sea", with the result that the whole of the Pacific Ocean from the Antarctic to Alaska was an "intervening sea", as indeed was the Indian Ocean because of the presence therein of the Cocos and Christmas Islands. It followed said Mr Willy that the deceased had died in an "intervening sea", namely the Pacific, and there was no evidence that he intended to journey to a point where written notice in terms of clause 3 was required.

The law concerning the interpretation of words in contracts of insurance is clear. There are no peculiar rules of construction applicable to the terms and conditions in a policy which are not equally applicable

to the terms of other commercial contracts and I need only refer to the observations of Lord Greene M.R. in Hutton v. Watling [1948] 1 Ch 398 at p. 403. He said:-

> " The first thing we have to do, as I have said, is to construe that document. The true construction of a document means no more than that the court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances."

I am prepared to accept that if Captain Faircloth had met his untimely death while on a journey from say Auckland to Norfolk Island, or Sydney to Christmas Island, a problem could arise as to the meaning of the terms "Commonwealth of Australia" and "Dominion of New Zealand" which might be resolved in a Plaintiff's favour by applying the wider legal definition of those terms, but I think it quite unrealistic and contrary to ordinary commonsense to adopt Mr Willy's interpretation of an "intervening sea". In its ordinarily accepted meaning "intervening" means no more than "lying between", and by no stretch of the imagination could Tahiti be said to be in seas lying between Australia and New Zealand, even accepting Mr Willy's extended boundaries. I can see no basis whatsoever for extending the definition of "intervening seas" to cover the whole of an ocean, however vast, simply because it has been given the same geographical name and some part of the named territories lies within it.

Taking the ordinary commonsense approach it is clear that an insured was covered by the policy if he had an accident while in Australia or New Zealand or while travelling between the two. A breach of clause 3 has been proved.

In the course of his main submissions Mr Willy did suggest that there was no evidence that the deceased "intended" to travel beyond the prescribed limits. I took that to mean that there was no evidence that the deceased

intended to travel outside the Pacific Ocean when, according to Mr Willy, he would still be within the limits of an "intervening sea". Because of my view of Mr Willy's "intervening sea" argument it is unnecessary to consider that aspect further. However, if Mr Willy meant that there was no evidence that the deceased intended to travel to Tahiti, and so did not intend to travel beyond the limits prescribed by the policy I reject it with even greater alacrity. I think that if a senior commercial pilot is accepted as being on a certain plane it is reasonable to infer that he intended to be on it.

The Plaintiff's claim fails and there will be judgment for the Defendant with costs reserved.

Solicitors:

Gascoigne, Wicks & Co., Blenheim, for Plaintiff
R.A. Young, Hunter & Co., Christchurch, for Defendant