1317 (3) N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 83/81

773

BETWEEN RICHARDSON McCABE & CO. LTD

Plaintiff

A N D MONARCH INSURANCE COMPANY OF NEW ZEALAND LIMITED

First Defendant

A N D QBE INSURANCE LIMITED

Second Defendant

Hearing: 5 July 1984

Counsel: C.R. Carruthers for First Defendant in support
D.J. White for Plaintiff to oppose

Judgment: 12 July 1984

JUDGMENT OF QUILLIAM J

This is an application for leave to delivery interrogatories.

The further amended statement of claim alleges that on or about 1 June 1979 the plaintiff entered into a contract of insurance with the first defendant under which the first defendant agreed to insure three comminutors being imported by the plaintiff for the Wanganui City Council. The importation was the subject of a separate contract between the plaintiff and the Wanganui City Council entered into at about the same time. The contract of insurance is contained in a document described as a placing slip. This was prepared by a broker acting on behalf of the plaintiff

and contained the terms which the first defendant was asked to accept and did accept. One of the provisions of the placing slip was, "Noted and agreed. Cover will cease upon acceptance of the interest insured by Wanganui City Council." Another provision in the same document incorporates into the contract, "Institute Cargo Clauses (All Risks)." Clause 1 of those clauses also contains provisions as to the termination of the risk. That clause is as follows:

> " 1. This insurance ... terminates either on delivery
>
> (a) to the Consignees' or other final warehouse or place of storage at the destination named in the policy,
>
> (b) to any other warehouse or place of storage, whether prior to or at the destination named in the policy, which the Assured elect to use either
>
> (i) for storage other than in the ordinary cause of transit
>
> or
>
> (ii) for allocation or distribution,
>
> or
>
> (c) on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge
>
> whichever shall first occur. "

The three comminutors were duly imported by the plaintiff into New Zealand but while they were in storage in premises at Petone they were destroyed by fire. It is the plaintiff's case that the contract of insurance was still in existence and that the first defendant is liable under it

because the cover had not ceased in terms of the "noted and agreed" clause. The defence is that the cover had already ceased because of the provisions of cl 1 of the Institute Cargo Clauses in that the comminutors had been stored other than in the ordinary course of transit and also because more than 60 days had elapsed after discharge at the final port of discharge. The real issue in the case, therefore, concerns the interpretation of the contract of insurance and, in particular, whether the "noted and agreed" clause overrides the Institute Cargo Clauses. This is the background against which the interrogatories are sought to be delivered.

I should mention that the plaintiff has agreed to answer questions 4.1, 11, 12 and 13 as formulated by the first defendant and question 14 has been withdrawn by the first defendant and I make no further reference to any of those.

All the questions to which objection is raised relate to the contract between the plaintiff and the Wanganui City Council for the importation of the comminutors and the submission for the first defendant was that they seek to establish a factual background known to the parties at or before the date of the contract and including the facts concerning the genesis and aim of the transaction. There were a number of matters of particular objection to the individual questions but it is necessary to deal first with the more general objection that the first defendant is not entitled to seek information concerning a contract made by the plaintiff with a third party.

The general principles regarding interrogatories were not a matter of difference between counsel and I need not set them out. I simply observe that the law as to interrogatories is very sweeping and that "pretty nearly

anything that is material may now be asked": (Marriott v Chamberlain (1886) 17 QBD 154 at p 163). This longstanding principle helps to explain how the present case must be approached.

The question here is whether, for the purpose of construing a contract, the Court is confined to a consideration of the circumstances surrounding the making of the particular contract or whether it may look further and consider matters within the knowledge of a party to the contract and which may have affected that party's approach to the contract. The general principle is stated in Chitty on Contracts, 25th ed, Vol I, para 766, in this way:

> " The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. (British Movietonews v London and District Cinemas [1952] AC 166.) That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself: 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties." (Smith v Lucas (1881) 18 Ch D 531, 542.) However, no contract is made in a vacuum. In construing the document, the court must therefore always have regard to its commercial purpose and the factual background against which it was made. "

Up to this point counsel were agreed.

The principle, however, extends further than that. Of immediate relevance is the decision of the House of Lords in Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570. That case concerned a charterparty and sub-charterparty relating to the building of a tanker in Japan. It is of no assistance to set out the facts of that

case. What is of significance, however, is the statements of principle which appear in the judgments, and in particular in the judgment of Lord Wilberforce. The case concerns the interpretation to be given to a passage in the sub-charterparty but it was sought for that purpose to introduce evidence as to Japan's usages and practice. Lord Wilberforce prefaced his main findings at p 574 in this way:

> " To argue that practices adopted in the shipbuilding industry in Japan, for example as to sub-contracting, are relevant in the interpretation of a charterparty contract between two foreign shipping companies, whether or not these practices are known to the parties, is in my opinion to exceed what is permissible. But it does not follow that, renouncing this evidence, one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. "

Lord Wilberforce went on later, on the same page, to enlarge on that:

> " It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties

> cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. "

At p 575 Lord Wilberforce referred to the case of Hvalfangerselskapet Polaris Aktielselskap v Unilever Limited (1933) 39 Com Cas 1 and to the fact that the judgments in that case seemed to show "that mutual knowledge of extrinsic circumstances, while relevant, is not an essential condition of the admissibility of factual evidence." In further reference to the same case he said:

> " I think that all of their Lordships are saying, in different words, the same thing - what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts, which form part of the circumstances in which the parties contract, in which one or both may take no particular interest, their minds being addressed to or concentrated on other facts, so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed. "

Although I may not be bound by this decision I am satisfied that I should follow it. In its application to the present case it means that I should regard the contract concluded between the plaintiff and the Wanganui City Council upon the basis of which the contract between the

plaintiff and the first defendant was then concluded as capable of being relevant to the interpretation of the latter contract. I should, of course, go no further than that because the question of whether it is relevant will be one for the trial Judge. The significance of my finding, however, is that I consider I ought to allow interrogatories in respect of that earlier contract. If the trial Judge decides that he should not pay regard to that contract then he will no doubt put aside the answers to interrogatories in respect of it. I therefore find against the first defendant on the general objection raised and I must go on to consider the individual objections raised to the various questions on other matters. I deal in turn, by reference to their numbers, with each of the questions and sub-questions to which objection was taken.

Questions 1.1 to 1.4

These sub-questions seek particulars as to the existence of a separate policy to cover storage and transport and as to the details of any such policy. The objection was that they related to a matter of legal obligation and so were inadmissible and also that they sought evidence rather than facts. I do not think this is correct. As I understood them the sub-questions are directed to the obtaining of particulars of the contract from which it may then be possible to proceed to a consideration of legal obligations or other matters. The fact that the supplying of those particulars may incidentally involve evidence is not, I think, a disqualifying circumstance.

Questions 2.1 and 2.2

A similar objection was taken, namely that this question related to a legal obligation. In the form in which question 2.1 is asked, namely, "Was not the plaintiff bound by its contract ....", that appears to be a valid objection. Mr Carruthers, for the first defendant, explained that he sought no more than to find out whether there was a term of the contract relating to storage. This would be a matter of fact and therefore unobjectionable. I am prepared to allow the question so long as it is amended to limit it in the way I have referred to. I leave it to counsel to make the amendment. Once that is done question 2.2 is, in my view, unobjectionable.

Questions 3.1 and 3.2

These were objected to as seeking evidence rather than facts, but I think the same situation applies here as to question 2. What is asked is as to the fact of an enquiry and the facts as to source and calculation. I think the question should be answered.

Questions 4.2 and 4.3

These were objected to as raising matters of law, namely, the effect of the policy. The argument for the first defendant was that the questions sought no more than to know whether the plaintiff was aware of the existence of a term in its policy with the second defendant regarding storage. Looked at in that way I consider questions 4.2 is unobjectionable and should be answered. The same comment cannot be made in respect of question 4.3. While that sub-question also uses the word "aware" it does so in a

context which can only relate to an awareness of the legal effect of a term in the policy. It asks whether the plaintiff was aware that the terms of the policy achieved a particular result, namely, to cover storage of the comminutors on termination of Marine Open Cover in accordance with cl 1 of the Institute Cargo Clauses. It does not seem to me that this can relate to anything but a request as to knowledge of the interpretation of the policy and I am not prepared to allow it.

Questions 5.1 and 5.2

Each of these ask as to the plaintiff's intentions and are objected to on that ground. The argument for the first defendant was that although the word "intentions" is used it really relates to what the plaintiff proposed to do in order to fulfil its contractual obligations. I do not consider there is a distinction of that nature which can be drawn here. I have allowed as relevant the fact of another contract and the terms of that contract, but I cannot accept that the plaintiff should have to answer questions about what it proposed (or intended) to do in order to fulfil its contractual obligations. The enquiry should be confined to what, in fact, was done. I therefore disallow questions 5.1 and 5.2.

Question 6

This question asks why the plaintiff required the inclusion in the policy of the Institute Cargo Clauses if it intended that the policy should cover storage in terms of the contract with the Wanganui City Council. It is objected to as relating to the plaintiff's reasons for doing something rather than having asked whether the plaintiff had

done that thing. I think the objection is sound. The policy is to be construed on the basis of the words contained in it read in the light of the circumstances which existed at the time. Perhaps the reasons for the policy having been phrased as it was will emerge from the evidence, but I do not consider it relevant to enquire now what the plaintiff's reasoning may have been. The question must be disallowed.

Question 7

This asks whether the premium was calculated and paid in relation to the insurance during the voyage. The calculation of the premium was a matter for the first defendant and would not form an appropriate basis for a question of the plaintiff. It was argued, however, that the plaintiff could be asked whether the premium had been paid on the basis posed. There is a subtlety in this reasoning which I find it difficult to follow. Paragraph 4 of the statement of claim alleges that the plaintiff duly paid to the first defendant the sum of $144.34, being the premium payable under the contract of insurance. As is acknowledged, the calculation of that premium was a matter for the first defendant. If it wishes to know whether the plaintiff was aware of how that calculation was made then I see no objection to that being asked. The question in its present form is not sufficiently clear. I am prepared to allow it so long as it is rephrased to seek an admission or denial as to the plaintiff's knowledge of how the premium was calculated.

Questions 8.1 and 8.2

Question 8.1 relates to the apparent conflict between the "noted and agreed" clause in the policy and the

inclusion of the Institute Cargo Clauses. It asks whether the purpose of the "noted and agreed" clause was to prevent the insurance from terminating immediately on delivery to the destination in Wanganui. On the face of it this appears to be the very question which is in issue in the action and to be a matter of law. It is objected to on that ground. The argument in support of the question is that it relates to the objective reason as a matter of fact for the clause being included rather than to the intention of the parties as to the interpretation to be given to it. Again I find the distinction difficult to follow. The reason for the inclusion of the clause could only, as it seems to me, relate to the intention of the plaintiff as to what it wanted to achieve. Whether it did so must depend upon the meaning to be given to the words used rather than the reasons for the words being included.

Questions 9 and 10

These questions, on the face of them, relate to disclosure. Question 9 asks whether the plaintiff disclosed to its insurance broker its obligation to store in terms of the contract with the Wanganui City Council, and question 10 asks whether the plaintiff alleges that it disclosed to the first defendant that it was required, in terms of that contract, to store the comminutors. Both questions are objected to on the basis that there is no allegation of non-disclosure and that the questions relate to matters not in issue and are merely fishing for a further cause of action. The argument for the first defendant was that these questions were not asked in order to find a further cause of action but are directed to showing the factual background in order to reveal whether an obligation on the plaintiff to store the comminutors was made known to the broker whose job it was to arrange the appropriate insurance cover. It was

said this was a matter crucial to the interpretation of the policy.

I do not consider the instructions given by the plaintiff to its broker are a matter which ought properly to be the subject of interrogatories. This is altogether different from the terms of the contract with the Wanganui City Council which set the background against which the policy was taken. The instructions (or disclosures) by the plaintiff to its broker are in the same category as the reasons or intentions of the plaintiff for seeking the insurance cover it did. The enquiry will need to be confined to the meaning of the words used in the light of the knowledge of the parties and the surrounding circumstances at the time. This does not include a knowledge of the information supplied by the plaintiff by way of communications made to its own agent. I am not prepared to allow these questions.

In summary, therefore, there will be an order that the plaintiff answer, within ten days, the following interrogatories:

Questions 1.1. 1.2, 1.3 and 1.4.

Questions 2.1 (so long as it is amended as I have indicated), and 2.2.

Questions 3.1 and 3.2.

Questions 4.1 and 4.2.

Question 7 so long as it is amended as I have indicated.

Questions 11, 12 and 13.

All other questions and sub-questions are disallowed.

The costs are reserved.

Solicitors: Chapman, Tripp, WELLINGTON, for First Defendant

Alexander Bennett & Co., AUCKLAND, for Plaintiff