1/10

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A 378/85

1668

BETWEEN **IAN HUGH FOX** of Christchurch, Chartered Accountant and **JONATHAN ROGER FOX** of Christchurch, Solicitor

First Plaintiffs

MEDIUM PRIORITY

AND **UNITED FISHERIES LIMITED** a duly incorporated company, having its registered office at Christchurch, and carrying on business there and elsewhere as Fish Merchants

Second Plaintiff

AND **Q.B.E. INSURANCE LIMITED** a company incorporated in the State of New South Wales, Australia, and having its principal office for New Zealand at Auckland, New Zealand, and carrying on business in Christchurch and elsewhere as an Insurance Company

Defendant

Hearing: 17th August, 1993.

Counsel Ms P. Courtney for the Applicant/Defendant
Mr J.G. Matthews for the Plaintiffs

Date of Judgment:
24 AUG 1993

RESERVED JUDGMENT OF MASTER HANSEN

At the commencement of this hearing, Mr Matthews indicated that the first plaintiffs discontinued the proceedings against the defendant. No formal discontinuance has been filed, but I accept his undertaking. However, a formal discontinuance should be filed forthwith.

The defendant seeks to strike out the statement of claim on the grounds that it is frivolous, vexatious and an abuse of process to put the defendant through trial which cannot succeed. The application is made pursuant to r.186 and r.477.

Mention was made in the course of the hearing of the quite appalling delay in the prosecution of this relatively straight forward matter. Ms Courtney suggested that this was a factor that should weigh with the Court in exercising its discretion under these two Rules. With respect, I am unaware of any authority for such a proposition, and if the submission was correct, it would have the effect of undermining the provisions of r.478.

Mention has already been made of the delay in this case. It arises from a motor vehicle accident that occurred as long ago as the 11th May, 1983. The vehicle concerned was a Mercedes Benz owned by the first plaintiffs, who were trustees of the Kotzikas Family Trust. That trust, together with the Rademaker Family Trust, and the Michaelides Family Trust, were the joint owners of the vehicle in question. It was leased to the second plaintiff, who was responsible for insurance. It is common ground that the vehicle was insured under Policy No.125980633.

The statement of claim seeks damages for the pre-accident value of the vehicle, less, the sale of the wreck.

The driver of the vehicle was Mr Kotzikas. There is some confusion on the evidence as to his exact role with the second plaintiff. There is apparent conflict between the answers to interrogatories he gave, and the evidence contained in the affidavit now filed by Mr I. Fox. It is also evident that Mr Kotzikas had consumed alcoholic beverages before the accident in question. It also appears to be common ground that the amount involved is in dispute. Mr Kotzikas, in his claim form, gave a different answer to that particular question than the answer he gave to an assessor employed by the defendant, a Mr Roberts. As a consequence, the defendant on numerous occasions attempted to have Mr Kotzikas execute a statutory declaration. This he persistently refused to do, apparently on legal advice.

The defendant was also charged with driving with excess blood alcohol. That charge was dismissed after a defended hearing some considerable time after the accident, because the doctor who took the blood sample was said not to be "in charge" of Mr Kotzikas at the relevant time. There is not complete evidence of this matter before the Court, but it would seem that Mr Kotzikas was perhaps acquitted on the basis of a legal technicality.

The striking out application comes because of Mr Kotzikas' persistent refusal to execute a statutory declaration. It arises from the provisions of condition 8.4(a)(iv) of the insurance policy. The relevant part of the clause reads:

" Upon the occurrence of any loss of (sic) damage to the property insured, or any event likely to give rise to a claim under this policy, the insured shall at his own expense:....

iv. give the Insurers all such proofs and informations with respect to the claim as may be reasonably required. "

The position taken by the defendant is that they have requested that Mr Kotzikas execute a statutory declaration and that such request falls within "proofs and informations" that is "reasonably required". They say on that basis the claim was declined and these proceedings were issued. Ms Courtney argued that it is common ground that Mr Kotzikas refused to execute a statutory declaration in circumstances where it was reasonably required; that there was no dispute he refused to execute the statutory declaration; and it follows that the defendant was unquestionably correct in declining the claim on that basis. Accordingly, she submitted that the plaintiffs could not possibly succeed at trial on those uncontroverted facts, and the proceeding was, therefore, frivolous, vexatious and an abuse of process.

On the other hand, Mr Matthews argued that the clause in question did not require Mr Kotzikas to complete a statutory declaration. He said it was a question of whether or not it was reasonably required, and that was something that could only be determined following the hearing of evidence in the normal way. He said Mr Kotzikas had given the evidence in signed form to Mr Roberts on the 2nd June, 1983, where he admitted having one beer and two whiskies. The only difference between that information and the draft statutory declaration the defendant sought to have signed was that the statutory declaration sought information as to where the liquor was consumed. Mr Matthews referred to the general exclusions provisions 4(b) and (c) of the policy, which covered the vehicle being driven by a person under the influence of intoxicating liquor or a drug, or being driven by a person while the proportion of alcohol in the blood of such person exceed the proportions referred to in s.58 of the

Transport Act. He submitted that Mr Kotzikas had given all necessary information to the defendant to enable it to allow or disallow the claim under those general exclusion clauses. Whether it was reasonable or not to require a statutory declaration required evidence to be considered in the normal way.

The reasons for clauses such as 8.4(a)(iv) are self evident. Normally, an insurer relies upon information from the defendant relating to the loss. Insurers are always exposed to exaggerated and false claims, and the purpose of such conditions is to enable an insurer to obtain proper and reliable information about the claim. (See ***Halsbury's Laws of England*** 4th Ed.para.499). It was also considered by Master Anne Gambrill in ***Norwood v Ian Dickson Limited & Others*** (Palmerston North, CP309/90, unreported judgment of 29/3/93). That case involved an application for a pre-trial determination of fact and law by the third party insurance company. The first defendant had been asked to answer certain questions by the insurance company, and neglected, or refused, to do so. On that basis, the insurance company declined the claim. The pre-trial question was whether in the circumstances the third party was entitled to decline to indemnify the first defendant against whatever liability the first defendant might have to the plaintiff in the proceedings. It was argued on behalf of the insurance company that because of the insured's failure to give such information and assistance as National Insurance properly required to investigate the claim, they were entitled to decline. The insurance company argued that there was an obligation on the insured to provide as a condition precedent to indemnity such information as the insurance company may require. It relied on general condition 2, which stated:

" The insured shall give all such information and assistance as the company may require. "

That clause, of course, is somewhat differently worded from the one in the policy concerning this case. However, Ms Courtney submitted that they were reasonably similar, and in that case the preliminary question was answered in favour of the insurance company. However, it should be noted that that hearing was in the context of the Court determining a preliminary question of fact and law, and not in the context of a striking out application.

Ms Courtney further argued that general exclusion clauses 4(b) and (c) mentioned above, excluded liability if Mr Kotzikas was under the influence, or driving with excess blood alcohol. She referred to the conflict between the claim form and the statement to Mr Roberts, and the fact that Mr Kotzikas was to be charged with driving with excess blood alcohol. She said that the alcohol consumption stated did not appear consistent with the recorded blood alcohol level, nor were the statement to the assessor consistent with the claim form. She said it was clear, and common ground, that Mr Kotzikas claimed to be unable to remember any details of the accident, and the defendant's suspicions were heightened by the solicitors' advice that the declaration would only be completed after the traffic prosecution was heard. She said all of those factors made it clear that it was quite reasonable for the defendant to require a statutory declaration from Mr Kotzikas.

Mr Matthews submitted, however, that whether or not it was reasonable to require a statutory declaration was a matter that could only be ascertained from all the surrounding circumstances. ***Michel v Colonial Insurance Company of N.Z.*** (1885) 2 QLJ 105, is authority for the proposition. That case dealt with a time requirement, but it seems to me the principle is equally applicable here. At page 107.Mein J., in delivering the judgment of the Court said:

> " What would be reasonable must necessarily vary with each particular case, and the question would be entirely one of fact. "

In my view, that is equally applicable here. Mr Matthews submitted that the second plaintiff could not compel Mr Kotzikas to make a statutory declaration, and any way such a request was unreasonable when there was the claim form, the signed statement to the assessor, plus an oral statement to the assessor. He said the purpose of the clause was to enable the company to determine liability, and it had been given sufficient information for that. I must confess I am somewhat cynical in relation to the allegation that Mr Kotzikas could not be compelled by the second plaintiff to give the declaration. In answer to an interrogatory he stated that he was the sole shareholder of the second plaintiff, apart from one share held by the first plaintiffs. It appears, however, that the interrogatory incorrectly referred to 1982 in the same manner as the claim form completed by Mr Kotzikas did. What is quite clear is that he is the managing director of the second plaintiff, and was in a position to give the statutory declaration if it could be said it was reasonably required. It is clear, however, that Mr Kotzikas at an early stage made his situation apparent through his solicitors, that there was no provision for the demands being made on him for the completion of a statutory declaration. Whilst one may be cynical about Mr Kotzikas' failure to provide the statutory declaration, the distinction between the owner and the driver was recognised in ***Challenge Finance Ltd v State Insurance General Manager***[1982] 1 NZLR 762. That case is somewhat different, in that Challenge Finance Limited had a conditional hire purchase agreement assigned to it, and the circumstances were such that the purchaser under that agreement would not provide the information. That inability to provide did not give State a defence to Challenge's action. It may well be, in all the circumstances of this case, a different conclusion would be reached, but it would be necessary to establish the exact relationship between Mr Kotzikas and the second plaintiff to do that. Certainly, there has been judicial recognition of the distinction.

Mr Matthews also submitted that the information sought by way of statutory declaration was now available to the defendant through the interrogatories that had been administered. That seems to be the case. However, Ms Courtney's response was that even if information was provided at trial, it is too late, because the clause involved was a condition precedent and relieved the insurer from liability. In support of that proposition, Ms Courtney relied on ***Welch v Royal Exchange Assurance*** [1938] 4 All ER 289. In that particular case, the information that had been sought was not made available until cross examination in the course of an arbitration. It was held that that was too late, because the insured was required under the clause in question to give such information within a reasonable time. Again, I consider that situation may be distinguished from the present. This is not a case where the information has not been given, but it is a situation where the information has not been given in a form requested by the defendant. The obligation under the clause is to give such proofs and information as may be reasonably required. I repeat, whether or not a statutory declaration can reasonably be required can only be determined by considering the evidence.

Ms Courtney also referred to a passage in paragraph 506 of ***Halsbury*** that reads:

> " Proofs of loss are necessarily documentary proofs: the loss may be proved by any satisfactory evidence. In requiring proofs or in deciding as to their sufficiency, the insurers must not act capriciously; they must be satisfied with such proofs as would satisfy reasonable men. In certain cases strict proof may be required. The assured may be required to verify the claim by a statutory declaration. "

The first point to make is that satisfaction must be that which would satisfy reasonable men. That is not something that can be determined in a vacuum. The second point is that the authority (***Watts v Simmonds*** (1924) 18 Ll L.Rep 177)for the proposition that the assured may be required to

verify the claim by a statutory declaration does not go so far as the text would suggest. In that case the policy included the following clause:

> " A statutory declaration by the assured with regard to any claim hereunder that he believes it to be a loss within the meaning of the insurance, and further that he has no reason to suspect or believe that such loss has been caused by any accepted risk, or is in any respect a loss from which the underwriters are by the terms of this policy declared free from liability, should be sufficient prima facie evidence that the loss is not of the character excluded by the terms of this policy. "

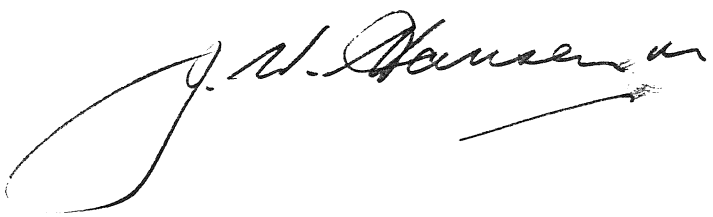
In that case, the plaintiffs' case was that jewellery was stolen from attache cases. That clause above was relied on by the plaintiff in support of a submission that the onus was on the underwriters to prove there was no theft. Having cited the clause of the policy, Lush J. continued:

> " It is, I think, clear that that clause has not the effect contended for. It has no bearing on the question what a claimant has to prove if it is disputed that he has suffered a loss. It relates in my opinion to a wholly different question. "

It seems to me that the case cited is not authority for the proposition in ***Halsbury***. It may well be that there are occasions when a statutory declaration may be required, or where it may be reasonable to require one. But in ***Watts v Simmonds*** there was a reference to the need for a statutory declaration in a specific context. It also appears from footnote (2) to the above passage from ***Halsbury*** that non-performance of a condition of this kind may be a defence to the insurers, but it does not preclude the assured from taking proceedings to enforce the policy. (See ***Braunstein v Accidental Death Insurance Company*** (1861) 1 B&S 782.) I am not satisfied on the uncontroverted facts that the plaintiffs have breached condition 8.4(a)(iv). The clause does not require the insured to give all such proofs and information that the insurer may require. It is only such proofs and

information that the insurer may reasonably require. I am satisfied that whether or not the request for a statutory declaration was reasonable is a matter that can only be determined after consideration of the evidence in the normal way. Having looked at this matter overall, it may well be that the second plaintiff, who apparently is determined to continue this proceeding, may face very real difficulties at trial, not least in the attitude adopted by Mr Kotzikas. But that is not something that I am asked to determine. I am also concerned with the very real and considerable delay in this matter, and propose to make a timetable order. The matter is to be listed in the next available Chambers list, but counsel may lodge a consent timetabling memorandum by facsimile, and their attendance may be excused if agreement can be reached.

As to the costs of this application, my initial reaction is they should be costs in the cause, but as to quantum fixed at $1,500, plus disbursements as fixed by the Registrar. If either counsel do not accept that course, memoranda as to costs may be filed within 7 days of the handing down of this judgment.



Solicitors for the Plaintiffs: White Fox & Jones, Christchurch.
Solicitors for the Defendant: McElroy Milne, Auckland by their Agents Wynn Williams & Co., Christchurch.