AMP v. Earthquake + War Damage

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 184/82
C.A. 190/82
C.A. 191/82
C.A. 192/82
C.A. 193/82
C.A. 194/82

IN THE MATTER of the Declaratory Judgments Act 1908

AND

IN THE MATTER of the Earthquake and and War Damage Act 1944

BETWEEN AMP FIRE AND GENERAL INSURANCE COMPANY (NZ) LIMITED, GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION LIMITED, THE NATIONAL INSURANCE COMPANY OF NEW ZEALAND LIMITED, SUN ALLIANCE INSURANCE LIMITED, FARMERS MUTUAL INSURANCE ASSOCIATION, THE PRIMARY INDUSTRIES INSURANCE COMPANY LIMITED, THE SOUTH BRITISH INSURANCE COMPANY LIMITED and THE NEW ZEALAND INSURANCE COMPANY LIMITED

Appellants

AND THE EARTHQUAKE AND WAR DAMAGE COMMISSION

Respondent

Coram: Cooke J. (presiding)
Richardson J.
Sir Clifford Richmond

Hearing: 15 and 24 June 1983

Counsel: J.O. Upton for General Accident Fire & Life, National, New Zealand, South British and Sun Alliance Insurance Companies
W.M. Wilson and B.W. Brown for Farmers Mutual Insurance Association and and Primary Industries Insurance Company
B.R. Boon and I.D. Matheson for A.M.P. Fire & General Insurance Company
A.G. Keesing and K.I. Murray for Respondent

Judgment: 29 July 1983

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

AMP v Earthquake & War Damage Commission

The Proceedings and Issues

These appeals, heard together, are from a decision in the High Court on six originating summonses, taken out by different insurance companies and relating in all to some 28 different forms of insurance policy. The broad issue concerns the scheme of statutory insurance provided for by the Earthquake and War Damage Act 1944 whereby, subject to the provisions of the Act and regulations under it, property insured against fire in New Zealand is automatically insured to the same amount by the Earthquake and War Damage Commission against earthquake damage and war damage. By regulations the automatic insurance also extends to extraordinary disaster damage and landslip damage. The premiums for the statutory insurance are payable by the insured's fire insurance company to the Commission and by the insured to the company. In effect the company may be said to collect them on behalf of the Commission, but the Act does impose an independent liability on the company for payment to the Commission.

In 1951 amendments were made to s.14, the key section, in the light of the practice of issuing fire insurance policies providing for, not merely an indemnity for the value of the property destroyed or damaged, but the cost of replacing or reinstating that property. The amendments make it clear that the automatic insurance against earthquake and war damage is to the amount of the indemnity value only. It

remains optional for the insured to take out additional replacement cost insurance for such damage with a private insurer - or indeed with the Commission itself, if the Commission so agrees in exercise of powers given to it by s.15 of the Act. The amendments include a specific statement that s.14 shall not apply with respect to any contract of insurance that is limited to an excess over the indemnity value of the property. As to contracts to which s.14 does apply, there is provision in some circumstances for ascertaining the indemnity value by valuation certificates and approval by the Commission, and calculation of the earthquake and war damage premium accordingly. That procedure is not convenient either to the insurance companies or the Commission; one question falling to be decided in the case is in what circumstances is it necessary.

That question is linked with the main issue, which concerns fire policies providing within the same document two kinds of cover: namely, indemnity insurance and replacement insurance over and above that. Until 1980 the Commission had accepted that there was no reason why indemnity and excess of indemnity contracts should not be incorporated within one policy of fire insurance, with no earthquake and war damage premium being chargeable on the excess of indemnity part. But in December 1980 in a circular to all insurers the Commission announced a changed

attitude. It stated that it had 'received a legal opinion to the effect that because there is only one proposal, the parties, risk and period of insurance are the same and there will be only one premium payable (although perhaps with different components) a Court is likely to hold that the division of the cover into two sections does not convert the policy into two contracts'. Therefore, the circular goes on, earthquake and war damage premium is chargeable on the full amount of the insurance (i.e. indemnity and excess of indemnity) under these policies.

Presumably it is implicit in the circular that the result just mentioned could be avoided if the valuation procedure were used. Unless it were used, however, the result of the view reflected in the circular would appear to be that the Commission would provide indemnity insurance only, yet would receive premiums calculated on replacement cost. Further, insurance companies which had not collected from policy holders on that basis might nevertheless owe large sums of money to the Commission, although for all practical purposes unable now to recover the extra premiums for the past from the policy holders.

In this situation the appellant companies wished to contest the Commission's new interpretation. They each applied to the High Court for declarations relating to various policies. The wording of the declarations sought varies somewhat but in general is to the effect that the

indemnity portion of a certain policy constitutes a contract of insurance within s.14 and that the excess over indemnity portion is not within the section.

The questions of statutory interpretation involved were argued before Jeffries J. on 18 and 19 May 1982, but on 11 November 1982 the Judge delivered a judgment declining in his discretion to answer them. He explained his reasons fully. The main one was amplified by the Judge in various ways but was in substance that, no matter which interpretation of the Act the Court decided to be correct, further statutory amendment would be likely to be necessary. Indeed he pointed out that the Commission itself had seen a need for this as long ago as 1971. Another reason, evidently regarded by the Judge as rather less important, was that policy holders were not parties to the proceedings.

It is noteworthy that Jeffries J. stated expressly - and very fairly - that to refuse to answer the questions might not be a right exercise of the discretion. We are bound to agree with him on this point. In principle the prospect of amending legislation is not necessarily a good reason for refusing to declare the existing law. In this instance it is by no means certain that legislative amendment will be required on the particular matters with which the case is concerned. It is logical to ascertain the true effect of the existing statutory provisions before Parliament decides whether or how they should be amended. Compare the

declaration granted as to the interpretation of certain provisions of the Electoral Act in Wybrow v. Chief Electoral Officer [1980] 1 N.Z.L.R. 147. The questions in this case are of importance to the insurance industry and the general public. They turn essentially on the construction of a statute and are prima facie suitable questions to be dealt with on originating summons as authorised by the Declaratory Judgments Act 1908, s.3.

It was accepted by all parties that the convenient course was for this Court to hear the questions of interpretation fully argued before determining whether they should be answered in these proceedings and, if so, by which Court. Having heard them fully argued, we are satisfied that the originating summons procedure is indeed appropriate. It is true that policy holders as such have not been represented, but the competing possible interpretations have been very fully canvassed. Moreover the interpretation which we hold to be correct, to be stated hereinafter, will not result in any unfairness to policy holders.

We would of course have preferred to have had the normal advantage of the Judge's opinion and reasoning on the questions; and we have considered the possibility of remitting them to him, even at this late stage. But the appellants, while acknowledging that the advantage to an appellate court of a decision by the learned Judge should be

weighed, urge that here it is outweighed by the need for early finality. They ask us to decide the questions now. In the light of the history and the sums at stake, their request can only be seen as reasonable. Accordingly we turn to the questions of interpretation.

The Meaning of the Section

The material provisions of s.14 of the 1944 Act at present read as follows, subss.(2A) and (2B) and the words in square brackets in subs.(3) having been inserted in 1951 and the words in double square brackets in subs.(2A) having been inserted by way of replacement in 1963:

> **14. Property insured against fire deemed to be insured against earthquake and war damage** - (1) Subject to the provisions of this Act and of any regulations made thereunder, where in respect of any period after the commencement of this Act any property is insured to any amount under any contract of fire insurance made in New Zealand with an insurance company after the commencement of this Act, the property shall at all times during that period be deemed to be insured under this Act to the same amount against earthquake damage and war damage. (2) In respect of the insurance of any property under this section the insurance company with which the property is insured against fire shall pay an earthquake and war damage premium in accordance with this Act at such time and in such manner as may be prescribed. [(2A) Where the contract of fire insurance provides for settlement of any claim for damage to or destruction of

the property upon a basis more favourable to the insured person than its indemnity value, -

(a) The property shall be deemed to be insured under this section to the amount of the indemnity value only:

(b) The earthquake and war damage premium in respect of each period of the insurance shall be computed on the amount of the indemnity value of the property as approved by the Commission after being certified at the commencement of that period by a valuer approved by the Commission, being a [[registered architect]] or by a valuer registered under the Valuers Act 1948 or an engineer registered under the Engineers Registration Act 1924:

Provided that if no such certificate is approved by the Commission in respect of any period the premium shall be computed on the amount to which the property is insured under the contract.

(2B) This section shall not apply with respect to any contract of insurance that is limited to an excess over the indemnity value of the property.]

(3) Upon the making of [any contract of fire insurance to which this section applies] the earthquake and war damage premium at the rate then prescribed, computed in respect of the period of the contract of fire insurance, shall thereupon become a debt due by the insurance company to the Commission.

(4) The amount of the earthquake and war damage premium for which any insurance company at any time becomes liable under this section in respect of any contract of fire insurance shall thereupon become a debt due by the insured person to the insurance company, and may be recovered by the company accordingly. If at any time before the debt is fully discharged any other person becomes an insured person under the contract of fire

> insurance the amount remaining unpaid shall thereupon become a debt due by him to the insurance company, without prejudice to the liability of any other person. Where 2 or more persons are liable for any amount under this subsection their liability shall be joint and several.
>
> ...

Most of the policies specified in the originating summonses take the form of providing indemnity insurance up to a named sum and replacement insurance in excess of that sum if certain conditions are satisfied - such as completion of reinstatement within a reasonable time and the actual incurring of such costs. During the earlier stages of the hearing in this Court counsel focused attention on whether such policies consisted of one contract or two. This preoccupation was no doubt due to the way in which the Commission's 1980 circular put the matter. With all respect to the legal opinion referred to, we think and indicated our view to counsel that it is an unnecessarily narrow approach, inconsistent with the obvious intent of the 1951 Amendment Act.

As already indicated, the basic purpose of the amendments made in 1951 was clearly to ensure that the automatic statutory cover would be limited to indemnity insurance and that the premiums for it would be calculated accordingly. Provided that this purpose is achieved, it cannot matter in administering the legislation whether a

policy holder who has taken out against fire both indemnity insurance and replacement insurance with an insurance company has done so under one contract or two. In most cases where there is a single composite policy there is probably only one contract, the total premium payable to the company being higher on account of the replacement cover. Nevertheless, when an indemnity sum is named and there is provision in certain circumstances for extra replacement insurance above that, there is not likely to be any difficulty in treating the provision for that extra cover as an identifiable and distinct part of the policy, although no doubt usually including many terms common to it and the indemnity part. Nor was any instance of difficulty in the case of such a policy drawn to attention in argument.

In ordinary speech a reference to a contract may often naturally be made as including part of a contract. One may say, for instance, that a hirer has a contract for the supply of a television set, although that same document gives him a right to repairs as well in certain circumstances. Similarly in legal contexts it is a familiar enough notion that the greater includes the less. (Omne majus continet in se minus, if a Latin maxim be preferred.)

The statute does not contain a definition of 'contract' but there is in s.2(1) a definition of 'Contract of fire insurance':

> 'Contract of fire insurance' means a contract whereby any property is insured against loss or damage by fire, whether the contract includes other risks or not; but does not include any contract of marine insurance or any contract of reinsurance; and does not include any contract whereby any property is insured against any form of earthquake damage unless the contract also includes insurance against loss or damage by fire other than earthquake fire:

That definition is consistent with the approach that within one overall insurance contract there may be a number of parts or covers, which may be treated separately for the purposes of the Act.

So we conclude without difficulty that in s.14(2B) the words 'any contract of insurance' include any part of any such contract. In other words s.14 does not apply with respect to any contract of insurance (including any part of any such contract) that is limited to an excess over the indemnity value of the property.

There then arises a further question, not specifically mentioned in the Commission's 1980 circular but put prominently before this Court by Mr Keesing on behalf of the Commission. Throughout all his submissions concern was reflected that an interpretation of s.14 might be adopted whereby the Commission might be bound to provide earthquake and war damage insurance up to the amount of indemnity value but might be entitled to premiums only on some lower figure

nominated by the policy holder in his fire insurance policy. Mr Keesing referred to this hypothetical lower figure as an indemnity sum - an expression nowhere used in the section itself. He drew a distinction between it and indemnity value - an expression used in the 1951 amendments to the section, but not there defined.

Not only has the expression 'indemnity value' been left undefined by Parliament, but there is no evidence before the Court of any established usage in the insurance industry giving a fixed meaning to the expression or distinguishing between it and the other expression used by counsel, indemnity sum. That being so, the Court is free to and should place on 'indemnity value' in the section the meaning that best gives effect to the apparent intention of Parliament. We have already stated what we understand to be that intention. It is helpful also to bear in mind a leading principle of insurance law, stated as follows in 25 Halsbury's Laws of England, 4th ed. para.3:

> 3. **The principle of indemnity.** Most contracts of insurance belong to the general category of contracts of indemnity in the sense that the insurer's liability is limited to the actual loss which is in fact proved. The happening of the event does not of itself entitle the insured to payment of the sum stipulated in the policy; the event must in fact result in a pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he

> establishes to be the actual amount of his loss. The contract being one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more, whatever may have been his estimate of what his loss would be likely to be and whatever the premiums he may have paid, calculated on the basis of that estimate. However, if he wants to guard against unpredictable fluctuations in values (particularly of goods for which there may be a very variable market) and the consequent danger of paying far too much in premiums for what the goods turn out to be worth at the date of loss, he may persuade his insurers to enter into an agreement at the time of making the insurance, and from time to time afterwards, fixing the value. If recorded in or annexed to the policy, such an agreement makes it a valued or agreed value policy and, in the absence of fraud or circumstances invalidating the agreement, the insurers will be precluded from disturbing the agreed value if and when a loss occurs. ...

Against that background we think that the appellants are right in a submission which was among those adopted by all their counsel. As previously mentioned we are not attracted by their arguments based on a two-contract approach. But one of their other submissions was to the effect that indemnity value means the indemnity value up to a maximum of the figure, if any, nominated in the fire insurance contract. Putting it in another way, the expression means the value of the loss for which indemnity is provided by the contract. We hold that this interpretation is correct. It produces a workable result in accord with the purposes of the legislation and the general law of insurance.

That result is that in the case of a fire insurance policy giving indemnity up to a named sum, that sum will be the upper limit of the indemnity value and will correspondingly be the amount up to which the property will be automatically insured against earthquake and war damage under s.14(1). The earthquake and war damage premium will accordingly fall to be computed on that amount at the rate prescribed by regulations made under s.26(2)(e); the present rate is fixed by the Earthquake and War Damage Regulations 1956 (1956/61) reg.6 as amended in 1967 (1967/111) and 1970 (1970/143). Any contract or part of a contract limited to an excess over that amount will be altogether outside the scope of s.14, by virtue of subs.(2B). The concern voiced by counsel on behalf of the Commission will thus be disposed of.

The reasons pointing to this interpretation are further strengthened by the following considerations. If the interpretation suggested and feared by counsel for the Commission were correct, there could be cases where property is under-insured in an indemnity policy - that is to say, in his suggested terminology, the indemnity 'sum' would be less than the indemnity 'value' - but where separate replacement policies cover the difference between the indemnity 'sum' and replacement cost. On the same interpretation the replacement policies would not be limited to an excess over the indemnity value, so they would not be excluded from the

section by subs.(2B). It seems unlikely that Parliament would have intended this complication. It also seems unlikely that there would at all commonly be issued a separate replacement policy leaving the insured to bear the difference between the limit in his indemnity policy and the actual value of the property destroyed or damaged. The kind of contract which Parliament meant to take altogether out of the scope of the section, by subs.(2B), is much more likely to have been simply a contract purporting to give cover in excess of the amount of indemnity insurance.

Section 14(2A) falls into place on the interpretation which we are adopting. There may be some fire insurance policies which give purely replacement cover, naming no indemnity figure. Counsel thought it likely that at least some commercial policies of that kind have been issued. Those are the circumstances in which it will be necessary for the purposes of the statutory cover to fix an indemnity value. The valuation and approval machinery provided for by para.(b) of subs.(2A) is available. Failing that, the proviso to the paragraph will apply, and the earthquake and war damage premium will be computed on the full amount of the fire insurance. As Jeffries J. put it, 'this is a penal incentive to supply the valuation'.

The result is not unfair to the policy holder. In general the policy proposal forms warn the proposer to declare the full value of the property for indemnity

insurance. If a policy holder is nevertheless under-insured against fire, he will be correspondingly under-insured against earthquake and war damage, but simply because he has named too low an indemnity value and paid premiums on that footing. It is true that the Commission, like the fire insurance companies, will receive less premium income to the extent that there is under-insurance, and to that extent the Commission's pool of funds available after a disaster will be the less; but there is no particular reason to suppose that the legislature was concerned to avoid that consequence. On the contrary from the outset the scheme of the Act has been to measure the earthquake and war damage insurance by the fire insurance. A person under-insured against fire and having no replacement policy has always been in exactly the same position as to earthquake and war damage insurance. Moreover the Commission has power under the Act to write replacement earthquake and war damage insurance, in competition with the insurance companies.

Counsel were given an opportunity to bring to notice at the adjourned hearing of the appeals on 24 June 1983 any practical problems that might arise, regarding any of the policies that are the subject of the originating summonses, if the true interpretation of s.14(2B) is as above stated. No such problems were brought to notice, nor did it appear that as regards any other provision in s.14 or elsewhere in the Act the interpretation which we have indicated would

cause practical difficulties. However, rather than lengthening this judgment greatly by embarking on the task of applying the interpretation specifically to each of the numerous policies, we reserve leave to any party to apply in writing to this Court within one month of the date of delivery of the present judgment on any relevant question arising under any particular policy specified in the originating summonses.

A separate point is raised by the originating summons taken out by the New Zealand Insurance Company Limited and the South British Insurance Company Limited. Those companies ask for an order that section D (inflationary provision) of the valuation for insurance purposes (building) form used by the Commission, insofar as it purports to impose a requirement by the Commission on an insured or insurer, is ultra vires the Commission and therefore invalid and unlawful. The reference is to a provision in the form requiring the valuer, architect or engineer certifying under s.14(2A)(b) to include in the indemnity value an estimated amount of inflation anticipated during the period of insurance. It was submitted that to insist on this - as the Commission admittedly does - is contrary to the provision of paragraph (b) for a certificate at the commencement of the period.

While the certificate has to be given at that date, we do not see sufficient reason for interpreting the Act so as to preclude a realistic estimate of indemnity value. Some allowance for inflation can reasonably be stipulated for by the Commission. It is arguable that to require estimated inflation throughout the period, rather than an estimated average, is unfair as a basis for calculating the premium. On the other hand the value approved by the Commission fixes the upper limit of its liability at any time during the period; the insured can never recover more under the automatic indemnity cover. We are not prepared to hold that the Act impliedly prohibits the Commission from arriving at that maximum sum in the manner contemplated by the form.

In the result the appeals are allowed. There will be a declaration applicable to all six originating summonses that the true interpretation of s.14 of the Earthquake and War Damage Act 1944 as amended is as stated earlier in this judgment. On the separate question (No.6) raised by the summons taken out by the New Zealand Insurance Company Limited and the South British Insurance Company Limited, there will be a declaration that the requirement referred to is not ultra vires the Commission. Leave to apply is reserved as already stated.

Clarification of the matter was in the interests of all parties, so we think it appropriate to leave the parties to bear their own costs in both Courts.

R B Cooke J.

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