

J. Smellie

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 435/94

4-08-95

BETWEEN : (1) JACK D. BRANDON PLAINTIFFS
: (2) KATHERINE A. BRANDON
AND : THE PROPRIETORS, STRATA PLAN NO.30 DEFENDANT

ORDERS

Schofield J.

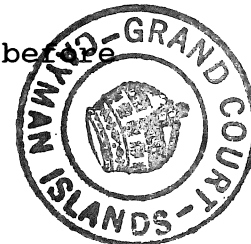
The plaintiffs jointly own a condominium unit in the Islands Club complex in Grand Cayman, or as the lawyers would have it, are the joint proprietors of a strata lot contained in strata plan no. 30 which was registered in the manner provided by the Strata Titles Registration Law 1973 and the Registered Land Law of these Islands. Under the Strata Titles Registration Law the Strata Corporation has a duty to insure and keep insured the buildings included in the plan against certain perils . It is not in dispute that such insurance was kept by the defendants in respect of the buildings comprising the Islands Club complex until 30th June 1993. Thereafter, says the defendant, and more particularly for the years, 1993- 1994 and 1994-1995, the buildings have been insured under a policy of insurance issued by The Islands Club Insurance Group Ltd (hereinafter called "the Group") a company the registered office of which is in the



British Virgin Islands and which has been approved to carry on business as an insurance company by the Government of the British Virgin Islands. In advance of effecting such insurance coverage the defendant wrote to the proprietors of the individual units inviting them to indicate whether they wished to join the Group or stay out of it and , in the words of the defence, "pay normal premiums". It seems that by electing to insure the buildings with the Group the defendant, and through it the proprietors of the units within the strata plan, were to be saved an amount of money in the form of premiums. Twenty-three out of twenty-six proprietors of the units indicated they wished to join the Group and so the by-laws of the defendant were amended by the requisite two-thirds majority to permit the defendant to take out insurance with the Group.

The plaintiffs paid \$4043. to the defendant as their share of the premiums in respect of the policy for 1993-1994. It seems that defendant has an account for each proprietor out of which it deducts administrative and other expenses including the insurance premiums. The defendant has deducted the sum of \$4258 out of the plaintiffs' account being their share of the premiums in respect of the policy for 1994-1995.

On 1st December 1994, the defendant threatened to assume control of the plaintiffs' strata lot and to lease it to others on the ground that the plaintiff not fully paid their contributions towards the insurance premiums for 1994-1995. It seems that the plaintiffs' account had already been debited in respect of those premiums before



the date of that letter. Furthermore the Strata Titles Registration Law, whilst giving power to the defendant to establish a fund for the payment of such insurance premiums and providing for their recovery by court action, does not permit the defendant to assume control of the plaintiffs' strata lot on such non-payment (see section 6(2) and 6(3) of the Law). This is conceded by the defendant and no action is to be taken on the letter of 1st December 1994. A prayer by the plaintiffs for a declaration that the defendant does not have power to assume control of their strata lot is therefore redundant.

The plaintiffs maintain that the policy of insurance taken out with the Group is illegal and void because the Group is not licensed to carry on insurance business in these Islands. It has been agreed by counsel that this is the one real issue in the case and all other issues are determined by it and all orders sought either stand or fall upon the determination of this one issue. Although there are concurrent summonses by the plaintiffs

(1) for a striking out of the defence on the ground that it discloses no reasonable defence and/or that it is otherwise an abuse of the process of the Court and (2) for a determination of several questions of law, I have decided with the concurrence of counsel to determine this one issue of law pursuant to Order 14A GCR . The issue is stated in paragraph (b) of the plaintiffs' summons as follows:

"Whether the policies of insurance issued to the defendant by (the Group) a company formed under the laws of the British Virgin Islands which has its registered Office in Tortola, British Virgin



Islands which is not, and has never been, licensed in accordance with any of the provisions of the Insurance Law, 1979, to carry on insurance business in the Cayman Islands but which was, at all relevant times, licensed to carry on insurance business by the Government of the British Virgin Islands, were and are illegal and void."

The requirement for an insurer to obtain a licence in these Islands is contained in section 3 (1) of the Insurance Law (1995 Revision) which reads:-

"3. (1) Whoever not being licensed in that behalf carries on insurance business is guilty of an offence."

The Group is not licensed to carry on insurance business under section 3 (1). If I find that the Group required a licence under the Insurance Law then the policies issued to the defendant are illegal and are void. This now seems to have been settled in England following the decision, albeit obiter, of the English Court of Appeal in Phoenix General Insurance Co. of Greece SA v Halvanon Insurance Co. Ltd [1988] 1QB 216(cited in the All England Law Report as Phoenix General Insurance Co. of Greece SA v Administratia Asiguratilor de Stat [1987] 2 All E.R. 152). This decision was applied in the subsequent cases of Re Cavalier Insurance Co. Ltd. (1989) 2 Lloyd's Rep 430 and D.R. Insurance Co. v Seguros America Bananex (1993) 1 Lloyd's Rep. 120. Where a contract of insurance is prohibited by statute, even though that prohibition is only expressed to be in the form of a penalty and the statute does not declare such a contract voids no court will give effect to such contract and it is void. If in this case the Group



required a licence to write the insurance policies of the defendant then it committed an offence under section 3 (1) supra and it follows that the policies were and are void.

Was such a licence required by the Group? Did it carry on insurance business within the meaning of the Insurance Law? "Insurance business" is defined by section 2 of the Insurance Law to be:

"....the business of effecting and carrying out contracts

- (a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or
- (b) to pay a sum of money or other thing of value upon the happening of an event

and includes re-insurance business and running-off business including the settlement of claims.

This definition does not help a determination of the issue, for the real question for determination is not whether the Group's act of contracting to insure the defendant against the perils referred to in the contract was an act of insurance business; the real question is whether the Group carried on insurance business.

It is a well-established presumption in the construction of statutes that, in the absence of clear and specific words to the contrary, an "offence-creating section" of a Law is not intended to make conduct taking place outside the territorial jurisdiction of these Islands an



offence triable in these Islands (see for example Cox v Army Council (1962) 46 Cr. App. R 258, 262.) Section 3 (1) of the Insurance Law cannot be construed as purporting to make an English Insurance Company which writes insurance from its English office in respect of risks which occur in England subject to penalty in the Cayman Islands because it has failed to take out a licence in these Islands. Nor can it have been the Legislature's intention that merely because the subject to be insured is located within the Cayman Islands that the insurer needs to take out a licence under our Insurance Law. To take an extreme example, if an expatriate Englishman who works and spends most of his time in these Islands returns to England on his annual fortnights' visit decides to take out a life policy with an English insurance company, can it be said that the English insurance company requires a licence under our Law before it can insure him? That is an absurd proposition.

The plaintiffs point to a 1987 amendment to our Insurance Law as assisting their position. Prior to that amendment section 3 (1) of the Law read:

"3. (1) " Whoever not being licensed in that behalf carries on insurance business in or from within the Islands is guilty of an offence.

By Law 25 of 1987 this section was amended to remove the words "in or from within the Islands." The purpose of this amendment is to be found in the Memorandum of Objects and Reasons attached to the Bill



which was introduced to the Legislative Assembly.

It says:

" Clause 3 seeks to make four amendments to Section 3, two of which extend the scope of the offences created by that section so as to cover insurance business transacted outside the Islands by a company registered within the Islands."

Did the amendment also have the converse effect of extending the scope of the offences created by the section so as to cover every transaction of insurance business carried out within the Islands by any company, including one registered outside the Islands? In my judgment it did not: one must look at the whole scope of the insurance business transacted in determining whether it amounts to the carrying of insurance business within the meaning of section 3(1) of the Insurance Law. Such matters as whether an insurer has a physical presence in the Islands in the form of offices and personnel, whether the business effected involves a single transaction or whether an insurer offers its services to the public generally, as well as the location of the subject matter of the policies, must be considered. I am fortified in my view by reference to section 4 of the Insurance Law (1995 Revision) which sets out the scheme of licences which may be applied for. Section 4(1) reads:

4 . (1) Persons desiring to carry on insurance business in or from within the Islands may make application in writing to



the Governor for the grant of a licence under one or more of the following categories-

- (a) Class 'A' Insurer's Licence;
- (b) Unrestricted Class 'B' Insurer's Licence;
- (c) Restricted Class 'B' Licence;
- (d) Insurance Agent's Licence;
- (e) Insurance Broker's Licence;
- (f) Insurance Sub-Agent's Licence
- (g) Insurance Manager's Licence, and
- (h) Principal Representative (Insurance)'s Licence."

It is significant that in this subsection the words " in or from within the Islands " remain and were not deleted by the 1987 Amendment.

Licences in categories (d) to (e) of section 4(1) do not concern us. Here is what the following subsections of section 4 have to say about licences within categories (a) to (c):-

4. (4) A Class 'A' Insurer's Licence permits a local or an external insurer to carry on insurance business generally in or from within the Islands.

(5) An Unrestricted Class 'B' Insurer's License permits an exempted insurer to carry on insurance business other than domestic business from within the Islands.

(6) A Restricted Class 'B' Insurer's Licence permits an exempted insurer only to accept insurance business other than domestic business from its member or members or such other persons as may be specifically approved by the Governor.



(7) An external insurer having its principal or registered office in a place outside the Islands where the legislation for the regulation and supervision of insurers is acceptable to the Governor may be licensed as an approved external insurer under Class 'A'.

In section 2 "external insurer" is defined as "an insurer who is neither a local nor an exempted insurer".

The word "generally" in subsection (4) must have a meaning and it cannot be said that an insurer who effects one transaction carries on insurance business "generally". It is probable therefore that the Group, being an external insurer which does not carry on insurance business generally, would not be eligible for a licence under the Insurance Law.

Before I conclude I should refer to section 7 (9) of the Insurance Law which reads:

"7. (9) A licensed insurance broker may obtain a special dispensation from the Governor to place a policy or contract of domestic business with one or more unlicensed insurers where-

(i) the said insurers have not been refused a licence under this Law;

(ii) the said insurers are approved by the Governor as being of sound reputation.

(iii) the Governor is satisfied that the proposed volume of domestic business to be placed with such unlicensed insurers is inadequate to support the payment of Class 'A' licence



fees or that some other good and sufficient reason exists; and

(iv) the said insurance broker can demonstrate to the satisfaction of the Governor an evident need (in terms of additional capacity or policy coverage, or otherwise) that the business be so placed.

If granted, such dispensation, shall be subject to review at such intervals, if any, as the Governor may specify when granting the dispensation and there shall be no appeal against the refusal of any such dispensation or renewal thereof and paragraph (a) of section 7 (2) shall apply to a policy placed under this subsection."

Plaintiffs' Counsel argues that this is the provision which caters for persons who cannot find a domestic insurer to insure them for the risks for which they desire cover or who, in the interests of economy, wish to be insured by unlicensed external insurers. However, that provision regulates the transactions of insurance brokers and is not meant to regulate individuals who wish to go direct to an external insurer.

The Group has not been shown to have a presence in the Islands in the form of an office or an agent. It does not carry on insurance business generally and confines itself to the one transaction involving the defendant. In my opinion it does not carry an insurance business within the meaning of section 3(1) of the Insurance Law (1995 Revision). It is not required to be licensed under that Law and the insurance policies it issued to the defendant were not illegal and void.



I would dismiss the action and will request Counsel to assist me by drafting the orders I make upon this judgment.

Costs will follow the event.



Dated this 4th day of August, 1995.

A handwritten signature in black ink, appearing to read "D. Schofield", is written over a faint, circular stamp.

D. Schofield

Judge