COVER WITHOUT COVER

CHOP ENG THYE CO. v. MALAYSIA NATIONAL INSURANCE SDN. BERHAD[1]

The facts were as follows: In March 1971 the plaintiffs applied to the defendant insurance company for a fire insurance cover in the sum of $20,000 for their smoke house and its contents for a period of one year commencing April 2, 1971. Pursuant to this application and in consideration of the payment of premium amounting to $1,000.50 the insurance company issued a protection note in favour of the plaintiffs. On April 6, 1971 the smoke house and all its contents were destroyed by fire. The plaintiffs claim for their alleged loss was rejected by the defendant. The plaintiffs sued by filing their writ of summons on May 16, 1972, that is, about thirteen months after the occurrence of the fire.

The defendant contended, *inter alia*, that they were not liable under the cover note by virtue of a condition in the contemplated policy that the defendants shall not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration.[2] The cover note expressly stated that it was subject to the clauses and conditions of the insurer's printed form of policy. The fire and its consequent loss took place on April 6, 1971 but it was not until May 16, 1972 that the writ of summons was filed against the defendant. The plaintiffs argued that they were not bound by the contemplated policy's terms and conditions because the policy was never given to them. Did the express stipulation in the cover note bind the plaintiffs and the defendant insurer to the terms of that policy? Ajaib Singh J. held that they were bound saying,[3]

> "The answer to this question would appear to be that by incorporating the clauses and conditions of the defendants' fire insurance policy in the cover note and by the plaintiffs' acceptance of the cover note in that form and content both the plaintiffs and the defendants rendered themselves bound by those clauses and conditions."

[1] [1977] 1 M.L.J. 161.

[2] The defendant also pleaded that they were not liable because (a) the cover note was issued by a person not duly appointed as their agent and (b) the assured had received $7,000 from two other fire policies issued by different insurers and in doing so had received more than the indemnity they were entitled to.

[3] *Ibid.* at page 165.

The learned judged cited the cases of *Queen Insurance Company* v. *William Parsons*[4] (a Privy Council decision) and *General Accident, Fire and Life Insurance Corporation Ltd.* v. *Shuttleworth and Anor*[5] as authority for this proposition of law.

As there was no pending action or arbitration within twelve months of the loss the insurer had ceased to be liable.[6] The plaintiffs' claim was dismissed with costs.

INCORPORATION OF POLICY TERMS AND CONDITIONS INTO A COVER NOTE[7]

In *Queen Insurance Company* v. *William Parsons*, a Canadian appeal to the Privy Council, the appellant insurance company had issued to the respondent an "interim receipt" pending the issue of a contemplated fire insurance policy. The interim receipt stated, *inter alia*, that the assured "had proposed to effect an insurance against fire subject to all the usual terms and conditions of this company." It also contained a clause that the insured property was subject to those conditions during the currency of the interim cover. The insured property suffered fire damage before the policy was issued to the assured. It was held by the Privy Council that the words, "subject to all the usual terms and conditions of this company" meant that the terms and conditions of the company's policy ought to be read into the interim receipt. Thus where there is an express reference in the cover note to the conditions of the proposed policy the insurer is not required to show that they were brought to the assured's notice or even that he had an opportunity of making himself acquainted with their requirements.

What is the legal position if the cover note contains no express provision incorporating the conditions of the policy? It appears that even in such a case the cover is subject to the conditions and terms usually found in the particular type of policy which the assured has applied for. In *Wyndham Rather, Ltd.* v. *Eagle Star and British Dominions Insurance Company Ltd.*,[8] Sargant L.J. in the English Court of Appeal said,[9]

[4](1881–82) 7 App. Cases 96.

[5](1938) 60 Ll L.R. 301.

[6]The plaintiffs lost also on the ground that they failed to prove that their loss exceeded $7,000 which they had already received from other insurers of the same smoke house.

[7]A comprehensive discussion of this subject can be found in MacGillivray & Parkington on Insurance Law (1975) 6th Ed. pp. 118–121.

[8](1925) 21 Ll. L. Rep. 214.

[9]*Ibid.* at p. 215.

> "Looking at it from the broad business point of view, it appears that just as [the trial judge] held that a slip must be deemed to constitute a contract, and that it could not be properly held that the assured was left unprotected in the interval between the slip and the preparation of the policy, so in a case of this kind it cannot be properly supposed that the insurers are giving the assured in that interval a protection upon greater or other conditions than those which are to be embodied in the ultimate policy."

It is easy to defend these propositions. They stem from the hallowed principle that the contractual rights and liabilities of the parties are governed by their express or implied intention at the time they agreed to become bound. It is in the public interest that agreements, express or implied, should be regarded as sacrosanct. It seems attractive to argue that the assured in the *Queen Insurance Company case* should have rejected the interim receipt if he did not agree to express incorporation of the company terms and conditions into the interim receipt. A similar argument would be that even if a cover note is silent on this matter a reasonable assured must realise that it would be subject to some form of terms and conditions and therefore put on inquiry. Hard cases must not be allowed to make bad law.

But the reality of the situation must not be overlooked. The assured would have no actual knowledge of the requirements of proposed policy's terms and conditions before the policy is delivered to him unless he has previously dealt with such policies or unless he takes the trouble to ask the insurance company to supply him with a specimen policy. The average lay-assured instructed in the intricacies of constructive notice and implied contract would assume that he is not bound by the policy's terms and conditions until he receives the same. Again in Malaysia insurance policies and cover notes are printed in English and a sizeable portion of the population is not educated in that language. The English Law on this subject of incorporation anticipate a knowledgeable assured, who is educated in the English language and who is prudent enough to take early action to acquaint himself with the terms and conditions of an insurance policy which he has applied for, but which he has not received and which he will not receive for some time. When these rules are applied to a Malaysian assured the outcome may not be fair.

The problems raised above may be overcome to some extent by supplying the cover note holder with a specimen copy of the proposed policy at the time the cover note is issued to him. Such a step would enable him to acquaint himself with the policy's terms and conditions.

Malaysian insurance legislation has always taken a benevolent attitude towards the assured.[10] It is submitted that a new statutory provision

[10] See in particular sections 15A, 15C, 16A, 18A–G and 44A of the Insurance Act 1963.

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ADDENDUM (p. 163)

Add immediately after last line the following:

requiring insurance companies to provide a specimen copy of the ultimate policy together with a Bahasa Malaysia translation whenever they issue a cover note may go a long way to protect innocent and ignorant assureds.

SECTION 29 OF THE CONTRACTS ACT 1950

This section reads (emphasis added):

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or *which limits the time within which he may thus enforce his rights, is void to that extent.*"

Does a condition in an insurance contract, which provides that the insurer shall not be liable for any loss or damage after the expiration of twelve months from the occurrence of the loss or damage, limit the time within which an assured may enforce his rights so as to fall within the mischief of section 29? There is an old Selangor case on the interpretation of this particular aspect of s. 29. In *Corporation of Royal Exchange* v. *Teck Guan*[10a] a clause semilar to the one used in the instant case was held void under the section.[10b] Cases decided in India on section 28 of the Indian Contracts Act 1872 (which is in *pari materia* with the Malaysian section 29) indicate that the answer is in the negative. In this context a passage in Pollock and Mulla reads as follows (emphasis added)[11]

> "Under the provisions of this section, an agreement which provides that a suit should be brought for the breach of any terms of the agreements within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those *which do not limit the time within which a party may enforce his rights, but which provide for a release or fofeiture of rights if no suit is brought within the period stipulated in the agreement*. The latter class of agreement are outside the scope of the present section, and they are binding between the parties.

Thus in India a condition which clearly and distinctly limits the period within which the suit may be brought is void under the section. In the Rangoon case of *Ma Ywet* v. *China Life Insurance Co.*[12] cited in the *Indian Cases* a condition in a life policy which provided that no suit shall be brought on the policy after one year of death was held to be void. But a condition which provides that there shall no longer be any rights to enforce after a specified period which is less than the ordinary period of limitation has been held to be not void. In *Baroda Spinning and Weaving Company* v. *Satyanarayan*[13] a fire policy contained a clause that "if the claim is made and rejected and an action or suit be not commenced within

[10a](1912) F.M.S.L.R.

[10b]The limiting clause read "If the claim be made and rejected and an action or suit be not commenced within three months after such rejection all benefits under this policy shall be forfeited"

[11]Pollock and Mulla on Indian Contracts and Specific Relief Acts (1972) 9th Ed. p. 295.

[12](1911) 11 I.C. 756.

[13](1914) 38 Bom 344. See also *Girdharilal* v. *Eagle Star & British Dominions Insurance Co.* (1923) 27 C.W.N. 955; 80 I.C. 637.

three months after such rejection, all benefit under the policy shall be forfeited."[13a] The High Court of Bombay held that the clause was valid. From the Baroda case it would appear that insurers may lawfully limit he time within which the assured may sue to a period less than that allowed by the statute of limitation provided that it is framed as a release or forfeiture of the assured's rights if no suit is brought by him within a specified period. The Law Commission of India in its 13th Report made the following comment on the Indian s. 28:[14]

> "57. Decided cases reveal a divergence of opinion in relation to certain classes of insurance policies with respect to the applicability of the section. On examination, it would appear that these cases do not really turn on the interpretation of the section but hinge on the construction of the insurance policies in question. The principle itself is well recognised that an agreement providing for the relinquishment of rights and remedies is valid but an agreement for relinquishment of rights and remedies is valid but an agreement for relinquishment of remedies only falls within the mischief of Section 28. Thus, in our opinion, no change is called for by reason of the aforesaid conflict or judicial authority."

Everything therefore depends on the construction of the condition in question. The prudent Indian insurer would ensure that his condition takes the form used in the *Baroda* case.

Section 29 of the Malaysian Contracts Act 1950 and the Selangor case of *Corporation of Royal Exchange* v. *Teck Guan* were not cited in *Chop Eng Thye & Co.* v. *Malaysian National Insurance Sdn. Bhd.* It is to be noted that the limiting clause in that case was of the same type as used in the *Corporation of Royal Exchange* case. If the section had been cited and the court had followed that decision the clause in the *Chop Eng Thye's* case might have been held void[15]. Indian decision like the *Baroda* case are not binding on Malaysian courts and our courts are free to choose a different attitude towards the intepretation of s. 29.

P. Balan.

[13a] A similar limiting clause was used in the Corporation of Royal Exchange case see n. 10b.

[14] Cited in V.G. Ramachandran, *Law of Contract in India*, Vol. I (1970) p. 873.

[15] Not that it would have helped the plaintiff – See n. 6.

APPEALS FROM ACQUITTAL IN THE HIGH COURT

Public Prosecutor v. *Tai Chai Geok* (1978) 1 MLJ 166.
Public Prosecutor v. *Lim Eng Chye* (1978) 1 MLJ.

In 1976 section 50 of the Courts of Judicature Act, 1964 was amended by Act A324 of 1976 so as to provide in effect that the Federal Court shall have jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original criminal jurisdiction, "subject to this or any other written law regulating the terms and conditions upon which criminal appeals may be brought". Further it was provided that an appeal by the Public Prosecutor shall be either against acquittal or sentence provided notice of such appeal is given by or with the consent in writing of that officer only.

Prior to that amendment the Federal Court had only power to hear and determine appeals by a person convicted by the High Court in the exercise of its original criminal jurisdiction. The purpose of the amendment was therefore to enable an appeal to be brought against an acquittal by the High Court in the exercise of its original criminal jurisdiction.

In *Public Prosecutor* v. *Tai Chai Geok* (1978) 1 MLJ 166 the Federal Court has severely restricted the effect of the amendment. In that case on a charge under s.39B of the Dangerous Drugs Ordinance, 1952 the jury had returned a majority verdict of not guilty by 5 to 2. The accused was therefore acquitted. The Public Prosecutor appealed to the Federal Court. It is not clear what were the grounds of appeal in that case. Ong Hock Sim Ag. C.J. Malaya in giving the judgment of the Federal Court said that Senior Federal Counsel referred them to section 2 of the Criminal Appeal Act 1968 of the United Kingdom which in effect provides that the Court of Criminal Appeal may allow an appeal against a conviction if they think

(a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory;
(b) the judgment of the court should be set aside on the ground of a wrong decision of any question of law; or
(c) that there was material irregularity in the course of the trial

It seemed that at the appeal the Federal Court was asked to apply the converse of section 2 and to hold that they may reverse an acquittal by a Jury if they are of opinion that on the evidence adduced the verdict was unsupportable or unreasonable. Ong Hock Sim Ag. C.J. stated that the matter was unique and unprecedented in the history of criminal justice and held that it was not proper or within the competency of the Federal Court to overrule the verdict of the jury and (1) substitute the verdict of