

APPORTIONMENT IN OVERLAPPING INSURANCE COVERAGE.

STATE FIRE INSURANCE GENERAL MANAGER v. LIVERPOOL AND LONDON AND GLOBE INSURANCE CO. LTD., [1952] N.Z.L.R. 5; [1951] G.L.R. 554.

The facts before the Court of Appeal in State Fire Insurance General Manager v. Liverpool and London and Globe Insurance Co. Ltd., [1952] N.Z.L.R. 5; [1951] G.L.R. 554 raised a nice point of construction, apparently not previously considered in this country, of clauses common in present-day insurance policies. It is a matter for regret that on a question of a type rarely before the courts, on account of the reluctance of insurance companies to embark on litigation among themselves, the Court of Appeal (Finlay, Cooke and Hutchison JJ.) has reached a conclusion apparently inconsistent with the English cases discussed below.

The appellant was the insurer of a local body under a policy of £2,500 indemnifying the local body in respect of its legal liability for negligence, such indemnity being extended (by way of endorsement on policy) to cover the local body's officers in respect of their personal liability for negligence in the course of their duties with the insured. The latter extension was subject to the proviso that if the officers were otherwise indemnified in respect of such liability, the indemnity provided by the appellant should not apply until the full amount of such other insurance had been applied as far as it should go in satisfaction of such liability. The policy contained a further clause (Condition 12 (b)) that if any other insurance existed covering the same risk, the appellant should be liable only proportionately to the total liability of all the insurers.

The respondent had issued a policy indemnifying one of the local body's officers for £1,500 against legal liability in respect of negligence. Condition 12 of this policy provided that in the event of other insurance existing covering the same risk, the respondent should be liable to contribute only its rateable proportion.

An action had been commenced against the local body and the officer, alleging negligence on the part of the officer in the course of his employment. The action was compromised by the appellant and the respondent as insurers under the respective policies, and the present proceedings were brought to determine how the sum of £784 paid pursuant to the settlement should be borne by the insurers. Northcroft J. held the parties should contribute rateably: [1950] N.Z.L.R. 867; [1951] G.L.R. 5. The Court of Appeal reversed that judgment, holding that the full loss should fall on the respondent.

The main point canvassed on appeal was the construction to be placed on the rateable proportion clause and what may conveniently be called the exclusion or "excess" proviso in the appellant's policy, on the one hand, and the rateable proportion clause in the respondent's policy on the other, and the applicability to this point of the three English cases cited in argument, Gale v. Motor Union Insurance Co., [1928] 1 K.B. 359, weddell v. Road Transport and General Insurance Co. Ltd., [1932] 2 K.B. 563, and Austin v. Zurich General Accident and Liability Insurance Co. Ltd., [1944] 2 All E.R. 243.

It is clear that the exclusion proviso and the rateable proportion clause in the appellant's policy are irreconcilable. Where the appellant's liability arises otherwise than by operation of the endorsement extending cover to the local body's officers (which includes the exclusion proviso) the rateable proportion clause is the only condition in the appellant's policy qualifying liability in the event of other insurance existing covering the same risk, and is of course fully effective. Where however the applicant's liability arises by virtue of the endorsement, then if the exclusion proviso is fully effective, as was held on appeal, there is no room for the operation of the rateable proportion clause, which in these circumstances and on this construction is left without meaning or effect.

The three English cases concern comprehensive motor policies, in terms of which the insurance was extended (in the case of one set of insurers) to cover the insured while driving a vehicle other than his own, and (in the case of the other set) to cover any licensed driver who might be using the insured's vehicle with his consent; the extensions in each case were subject to the

proviso that the person would be covered only if not otherwise covered by insurance in respect of the same risk.

In Gale's case the extension clause in each policy contained a proviso purporting to exclude cover under that policy in the event of other insurance existing in respect of the same risk. Each policy also contained a rateable proportion clause. Roche J. held that the two insurers were liable to contribute in equal shares. The exclusion proviso in each policy, he reasoned, must be read with the clause providing for rateable proportion. The result arrived at was first, that the provision as to rateable contribution qualified and explained the preceding clause negating liability, and secondly, that the exclusion clause applied only if the other policy gave a full and complete indemnity - not the partial or rateable proportion contribution which resulted when both policies were read together and interpreted as above. It was necessary, in Gale's case, to contend for (a) the qualifying effect of the rateable proportion clause upon the exclusion proviso in the same policy and (b) the non-applicability of the exclusion proviso in each case because of the existence of the rateable proportion clause in the other policy. The necessity arose because of the presence in both policies of an exclusion proviso, which, if given full effect, would preclude the rateable proportion clause from operation. In other words, the rateable proportion clauses, unless given effect to by the subordination of the exclusion provisos as in (a), are not available to produce the effect in (b). It is submitted then that there are two distinct principles of construction involved in Gale's case. The first is that an exclusion proviso is to be qualified and cut down by a rateable proportion clause in the same policy; and where there are two policies covering the same risk, the one containing both exclusion and rateable proportion clauses, the other neither, the result must be that the rateable proportion clause prevails and the two policies contribute rateably. The second principle is that a proviso purporting to exclude cover if another policy exists giving indemnity, is not effective if such other policy gives a partial, possible or contingent indemnity, e.g. where it contains a rateable proportion clause. Accordingly, where one policy has an exclusion proviso (but no rateable proportion clause) and the other a rateable proportion clause (but no exclusion proviso), again the two policies are liable to contribute in rateable proportion.

It is submitted that the answers given to the two hypothetical sets of facts stated above are the logical conclusions if the principles of construction adopted in Gale's case are pushed to their extremes. At the same time, as will become apparent, there is no necessity to extend the reasoning in Gale's case so far in order to achieve the opposite conclusion to that reached in the case under discussion.

Attention must be drawn to one further aspect of Gale's case. The judgment in that case held that the insurers should contribute in equal shares. It appears, however, that this was by agreement of the parties, and that in the absence of such agreement, the insurers would have been liable to share the loss in rateable proportion, in accordance with the rateable proportion clauses.

In the other two English cases, Weddell v. Road Transport and General Insurance Co. Ltd. (supra) and Austin v. Zurich General Accident and Liability Insurance Co. Ltd. (supra), both policies in each case contained exclusion provisos, but one or other lacked the rateable proportion clause present in each policy in Gale's case.

In Weddell's case the position was: Policy A, exclusion proviso; Policy B, exclusion proviso and rateable proportion clause, the latter being expressly worded so as to avoid the qualifying effect attributed to the rateable proportion clause in similar circumstances in Gale's case. This exception, however, was not relied upon, the insurer under Policy B being at all times willing to pay its rateable proportion.

The argument was pressed upon the Court that, following Gale's case, the rateable proportion clause in Policy B cut down the exclusion proviso, and that Policy A, containing no rateable proportion clause, would escape all liability. It might be mentioned in passing that the latter result does not follow from Gale's case on the analysis of the judgment set out above. The objection taken to the argument was this: that if Policy B relied on the qualification to its rateable proportion clause and adopted the same argument, the absurdity followed that the two destroyed each other by operation of the exclusion clauses. Hence the risk, apparently doubly covered, was in the result not indemnified at all. Rowlatt J. disposed

of the matter in a manner which neither derived support from, nor gave support to, the earlier decision. He held that the reasonable construction was to exclude from the category of co-existing cover any cover which is itself expressed to be cancelled by such co-existence, and in the result both insurers were held liable to contribute equally, subject (in the words of the learned judge) "to any rateable proportion clause there may be."

Austin's case was dealt with on the same basis. Policy A contained exclusion proviso and rateable proportion clause so worded (as in Weddell's case) to avoid Gale's case; Policy B contained an exclusion proviso, together with a condition that the insurer was not to be liable except in excess of the amount recovered under any other indemnity. Tucker J., following Weddell's case, held both insurers liable to contribute; in this case, however, in equal shares.

Three points may be noted before leaving the English judgments.

First, the ratio decidendi in Gale's case on the one hand and that in Weddell's and Austin's on the other, are intended to be applicable to basically different sets of facts. Gale's case provides a canon of construction in the following basic situations: (a) rateable proportion clause and exclusion proviso present in the same policy - some rule of construction being necessary because of the incompatibility of these two provisions - and (b) rateable proportion clause in one policy, exclusion proviso in the other. The judgments in Weddell and Austin afforded no help in either of these situations. The basic situation with which Weddell's case - followed in Austin's - is intended to deal, it is suggested, is exclusion proviso in both policies, rateable proportion clause in neither; and to this set of facts the ratio decidendi in Gale's case is inapplicable.

It is not overlooked that both in Gale's case on the one hand and in the two later cases on the other, the facts went beyond the basic situations set out in the preceding paragraph. It is submitted that the principle in Weddell and in Austin requires for its application an exclusion clause in each policy. For the operation of the principle in Gale's, this is

not necessary; that case deals basically with the reaction of a rateable proportion clause against an exclusion clause in the same, or in the other policy. The point it is endeavoured to bring out is that Gale on the one hand, and Weddell and Austin on the other, are to be applied to basically different sets of facts, but that this issue is obscured by the combination of clauses in the three cases concerned - there being present in each instance other clauses not essential for the operation of the principle applied. It is clear that in Gale, because of the presence of such additional clauses, the principle of Weddell and Austin might equally well have been applied to produce the same result. The matter might be expressed in this way, that in the various combinations of rateable proportion clauses and exclusion provisos which may be achieved in two policies, there is one extreme to which the principle in Gale's case only, of the three, is applicable, another, to which the principle of Weddell and Austin, but not of Gale, is relevant, while between the two lie the various sets of facts, including those actually in issue in Gale, Weddell and Austin, to which either set of principles may be applied.

Secondly, the authority of Gale's case cannot be doubted at this stage. The case has survived two subsequent decisions which might have criticised it; is cited without disapproval in a leading present-day work on motor insurance (1); and has no doubt been acted upon in insurance circles for twenty-five years. Nor, indeed, is it criticised in any way in the judgments under discussion.

The third and minor point is the difference of opinion between Rowlatt J. in Weddell's case and Tucker J. in Austin's as to the proportions payable by the respective insurers once liability has been fixed as resting on both insurers. As has been pointed out in the former case, it was stated that the proportions would be fixed subject to any rateable proportion clause there may be, whereas in the latter Tucker J. considered the loss should be borne equally in all cases. The issue will arise on the set of facts under discussion if (as will be submitted) both insurers should have been held liable to contribute. Finlay J. preferred the view taken in Austin's case: [1952] N.Z.L.R. 5, 19; [1951] G.L.R. 554, 565; his brother judges left the matter open:

[1952] N.Z.L.R. 5, 27; [1951] G.L.R. 554, 559. It is submitted that whatever may be the correct position in a case decided on the mutual cancellation of exclusion provisos as in Weddell and Austin, there is no reason why on the present set of facts, if efficacy is denied to the appellant's excess proviso, the rateable proportion clause should not come into operation. That is the view taken by Northcroft J. in the Court below and, as is pointed out above, is in accordance with the judgment in Gale.

Turning now to the judgments in the present case, it will be convenient to consider first, and briefly, the judgment of Finlay J. After examining the English cases, the learned judge expressed the view that on the arguments presented in the Court below, he agreed with the conclusions of the trial judge, that both insurers were liable to contribute. On an issue not put to Northcroft J., however, he found for the appellant. The matter is dealt with at [1952] N.Z.L.R. 21, 22; [1951] G.L.R. 566: it is briefly this, that the expression "any other insurance" in Condition 12 of the respondent's policy, the rateable proportion clause, referred to other "primary" insurance only, not to "secondary" insurance (insurance by way of extension of the original risk) such as the appellant's.

It might be respectfully suggested that the learned judge's reasoning appears to be unsupported by authority, though the same point might have been taken in each of the English cases, and further that both his brother judges in the present case (at 28 (560)) and Tucker J. in Austin's case (at 247) expressly refused to differentiate between "primary" and "secondary" cover, though not, it is admitted, in precisely the same context as is in issue in the judgment of Finlay J. It is submitted with respect, however, that the learned judge's reasoning is open to a more fundamental objection to which reference may more conveniently be made at a later stage.

The joint judgment of Cooke and Hutchison JJ. concludes, upon an examination of Weddell and Austin, that the proper course to adopt on the authority of those decisions is that a rateable proportion clause should be subordinated to an exclusion proviso in the same policy; that accordingly

the exclusion proviso in the appellant's policy was fully effective, and that the full loss should fall on the respondent. The learned judges further held that the appellant's policy was an "excess" policy, coming into operation only on the exhaustion of the respondent's cover, and that it was accordingly not an "insurance covering the same risk", in terms of Condition 12 of the respondent's policy.

It is respectfully submitted that the judgment is erroneous in the following respects:

- (a) That the English cases are misinterpreted;
- (b) That the judgment deprives the appellant's rateable proportion clause of all meaning in cases within the extension clause;
- (c) That in holding the appellant's policy not to be "insurance covering the same risk", in terms of the respondent's rateable proportion clause, the judgment misinterpreted Gale's case, and that on this aspect alone, judgment should have been for the appellant.

As to (a); The conclusions drawn from the examination of the English cases in the present comment is that Gale is the only case of the three in which the rateable proportion clause and the exclusion proviso react upon each other, and in that case the result was that the exclusion proviso - not the rateable proportion clause as was stated by the Court of Appeal - was subordinated. In Weddell and Austin the primary issue was the reaction upon each other of exclusion provisos in opposite policies, and liability was fixed on both insurers. It should further be said, in respectful rebuttal of the view taken by Cooke and Hutchison JJ., that in Weddell one of the policies contained no rateable proportion clause at all, while in Austin, one policy had a rateable proportion clause expressly worded so as to avoid the effects of the decision in Gale's case, while the other had no true rateable proportion clause whatsoever but a clause of the excess type found in the appellant's policy in the present case. It cannot therefore be said with confidence that the ratio decidendi in these two cases is that the rateable proportion clause is subordinated to the exclusion proviso. In Gale's case, the only one of the English cases where both policies contained an unqualified rateable proportion clause as well as an exclusion proviso, the exclusion



proviso was undeniably subordinated to the rateable proportion clause in each instance.

The canon of construction in Gale's case, it is accordingly suggested, is applicable in the present case. The only distinction that can be taken is that in Gale's case the proviso to the extension clause excluded all cover under the policy if other insurance existed covering the same risk, whereas in the present case, exclusion exists only in so far as the amount of other insurance covers the loss. The view taken by Finlay J., who considered that the distinction was here immaterial, is respectfully adopted: [1952] N.Z.L.R. 5, 18; [1951] G.L.R. 554, 564. The difference, it is submitted, is merely one of degree: while the loss is within the amount of cover afforded by the other insurance, as in the present case, the excess proviso of the appellant's policy purports to achieve precisely the same result as an exclusion proviso. In essence, it is a "partial" exclusion proviso in the one case, "total" in the other, and an exclusion clause whether total or partial being inconsistent with a rateable proportion clause purporting to operate on the same contingency, Gale's case should be brought into operation to fix both insurers with liability.

As to (b): The Court (though mentioning the matter in passing at 29 (560)) has not resorted to any formal mode of construction of the inconsistent clauses in the appellant's policy, e.g. that the first of two repugnant provisions is to prevail. It must accordingly be assumed that the Court was of opinion that the policy could be construed as a whole without resorting to any artificial construction, but it cannot be denied that in the result, the rateable proportion clause is left meaningless in cases where the appellant's liability arises by virtue of the extension clause.

It is submitted that the rateable proportion clause can be assigned meaning if, and only if, the proviso in the extension (to the effect that the appellant's cover is not to apply until other insurance is exhausted) is construed as meaning "until the rateable proportion fixed as payable by the respondent by condition (12) (b) of the appellant's policy is exhausted", i.e. the respondent having been made liable for its contribution according to rateable proportion, the appellant's excess clause

then operates and is construed as meaning, to fix the appellant's liability for the difference between the total payable and the amount payable by the respondent according to rateable proportion. It is not denied that this is not the effect the appellant's excess clause should achieve standing alone, nor that the same result would be achieved in the absence of the excess proviso. The plain fact is that it is impossible to give both the excess proviso and the rateable proportion clause an interpretation consistent with their ordinary meaning standing alone, where both are found in the same policy and are apparently intended to operate upon the same contingency. The interpretation suggested above confers at least some meaning upon all the clauses construed as a whole.

As to (c): Cooke and Hutchison JJ. hold the appellant's policy is not an "insurance covering the same risk" in terms of the respondent's rateable proportion clause, while Finlay J. (see p. 51 above) concludes that insurance in that context connoted primary insurance only, not cover by way of extension as afforded by the appellant's policy. It followed, reasoned the Court, that the respondent's rateable proportion clause could not come into operation.

Though it is not explicit in the judgments, it is assumed that this line of reasoning is directed to the question whether the appellant could be fixed with liability by the operation of the respondent's rateable proportion clause alone, since there would seem to be no point in deciding in proceedings to which the insured was not a party that the liability of the respondent was reducible by operation of that part of the loss on the insured. If so, it follows from the submissions under (a) that if the English cases had received the interpretation it is suggested should have been placed upon them, the Court would not have had occasion to consider the problem in this light: that is to say, having held (as it is respectfully suggested it should have done) that the appellant's exclusion proviso is ineffective to relieve it of responsibility, it would not have been necessary to resort to the terms of the respondent's rateable proportion clause to see if this brought the appellant in to contribute.

Having decided, however, that the terms of the appellant's policy made the respondent solely liable, the Court was of course entitled to examine the respondent's policy to see if its