IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 131/2022
[2023] NZSC 41

BETWEEN	JDA CO. LIMITED First Applicant
	NIKKYO CO. LIMITED Second Applicant
	INTEGRITY EXPORTS CO. LIMITED Third Applicant
AND	AIG INSURANCE NEW ZEALAND LIMITED First Respondent
	VERO INSURANCE NEW ZEALAND LIMITED Second Respondent
	IAG NEW ZEALAND LIMITED Third Respondent

Court: Glazebrook, O'Regan and Kós JJ

Counsel: P J Napier and H G Holmes for Applicants
P Davies for Respondents

Judgment: 27 April 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondents costs of $2,500.

REASONS

[1] The applicants are exporters of cars from Japan who made claims under a marine open cover insurance policy (issued by the respondents) for typhoon damage in 2018. Under the policy an insured was required to declare "the number of units/Motor Vehicles received into the Assured's control at the specified Pre Shipment Holding Yards … during the preceding month". Insureds gave notice to an intermediary, Automotive Technologies Ltd, of the vehicles for which insurance was taken, by providing spreadsheets or completing schedules on ATL's website. ATL compiled monthly declarations for a broker, Sage Partners Ltd, which calculated and invoiced the premiums. It was undisputed that the insurer was temporarily on risk for as-yet-unidentified cars received into yards in the immediately preceding month before the declaration.

[2] Typhoon Cimaron struck the Kansai region of Japan on 23 August 2018 and Typhoon Jebi did so on 4 September 2018. An unusually large numbers of vehicles were nominated in the declarations relating to those months. The respondent insurers declined cover for certain claims, which are the subject of this proceeding. The applicants sought declarations in the High Court that the respondents were liable for damage to their vehicles and, by declining cover, were in breach of the contracts of insurance.

[3] In the High Court, Gault J found the policy required insureds to evince an intention to take insurance, and notifying ATL was insufficient: it was not an agent of the insurers.[1] Only JDA Co. Ltd had evidenced its intention to take insurance prior to the attachment of risk; the other applicants, Nikkyo Co. Ltd and Integrity Exports Co. Ltd, had not.[2]

[4] Secondly, the Judge held the premium clause (requiring monthly declaration to the insurer) was a promissory warranty for the purposes of s 34 of the Marine Insurance Act 1908, requiring exact compliance (failing which liability is discharged). The Judge held that there was a breach of this warranty when a vehicle

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1 *JDA Co. Ltd v AIG Insurance New Zealand Ltd* [2021] NZHC 2912 [HC judgment].
2 At [61]–[70].

was not included in the declaration in the month following the month it entered the pre-shipment holding yard. JDA's vehicle entered the yard on 3 August 2018 and was omitted from the 12 September 2018 declaration. More generally, the applicants were not entitled to cover for vehicles entering a pre-shipment holding yard in or before July 2018 but then only declared (as occurred) on 12 September 2018, or vehicles entering a yard in or before August 2018 but then only declared on 10 October 2018. The insurers' liability arose only on a declaration compliant with the terms of the policy.[3]

[5] The Court of Appeal upheld these conclusions, save that it reserved its position on the non-agency question – considering it did not need to decide it.[4]

Proposed appeal

[6] The applicants submit the Courts below made fundamental errors of law and failed to address key arguments advanced by their counsel. It is said that the Courts erred in construing the policy (in finding the premium clause to be a warranty, and in holding insurance depended on compliant declaration and could not be taken after attachment of risk), and in not finding waiver by the respondents. It is also said the Courts below should have found that ATL was the respondents' agent. Finally, it is said that construction of the policy is a matter of general commercial significance, and that a miscarriage of justice will arise if the appeal is not heard.

Our assessment

[7] The criteria for leave are not met in this case.

[8] First, we consider the proposed appeal would turn primarily on its own unusual facts, including the insureds' evidently calculated conduct in failing to notify acquisition and receipt into yards, enabling a selective approach to cover that the policy terms were designed to preclude. On these matters there are concurrent findings by the Courts below. Those Courts also found concurrently that non-notification in the month the vehicles entered the yard evinced a lack of intention to insure as at

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3 At [81] and [86]–[95].
4 *JDA Co. Ltd v AIG Insurance New Zealand Ltd* [2022] NZCA 532 at [81] [CA judgment].

attachment of risk – i.e. upon purchase, ahead of receipt into yards and declaration to the insurer. We consider there are insufficient prospects of persuading this Court to a different conclusion on the facts.[5] Likewise, the factual findings below render unlikely this Court finding ATL was agent of the insurers, rather than the insureds. Nor are we persuaded that the Courts below erred in respect of waiver. In fact they each found this occurred to a limited degree.[6]

[9] Secondly, the critical policy wording here was bespoke, distinctly negotiated and agreed. Its apparent purpose was to preclude selection and late inclusion in the manner the Courts below found happened here. Its construction does not give rise to a question of general or public importance or general commercial significance.[7] We consider the applicants have insufficient prospects of success in their proposed argument that the premium clause was not a warranty for the purposes of the Marine Insurance Act. As Ms Davies submits, the requirement to declare all vehicles received into the relevant yards during the preceding month is expressed in mandatory terms and the finding that it is a warranty is consistent with the scheme of the policy and its evident importance to the respondent insurers.

Result

[10] The application for leave to appeal is dismissed.

[11] The applicants must pay the respondents costs of $2,500.

Solicitors:
Keegan Alexander, Auckland for Applicants
Fee Langstone, Auckland for Respondents

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5 *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; *Hookway v R* [2008] NZSC 21 at [4]; and *B (SC 18/2020) v R* [2020] NZSC 52 at [12].
6 HC judgment, above n 1, at [76]; and CA judgment, above n 4, at [32] and [86].
7 Senior Courts Act 2016, s 74(2)(a) and (c).