

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

CIVIL CASE No.32 OF 1997

IN THE MATTER of the Road
Traffic (Control) Act [CAP 29]

AND IN THE MATTER of Civil
Case No.39 of 1997

AND IN THE MATTER of Civil
Case No. 148 of 1994

Between : Gilbert Dinh also known as Dinh
Van Than trading as Entreprise Roger
Brand of P.O.Box 205, Port-Vila, Efate
in the Republic of Vanuatu

Plaintiff

And : Commercial Union Assurance
Company of Australia Ltd of C/o
Barrett & Sinclair of P.O.Box 240,
Port-Vila, Efate in the Republic of
Vanuatu

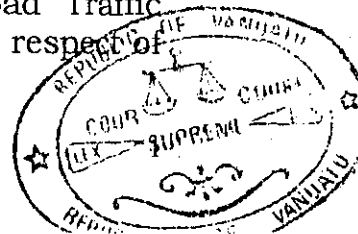
Defendant

Coram : Mr Justice Vincent Lunabek, Acting Chief Justice
Mr Juris Ozols for the Plaintiff
Mr Mark Hurley for Mrs Claudine Monvoisin, Plaintiff in
Civil Case No.59 of 1996
Mr Baxter Wright for the Defendant

JUDGMENT

By Summons dated 14th of November 1996, the Plaintiff seeks
declarations from this Court as to the following matters :

1. That pursuant to an insurance policy No. 24POO28248/00 (the
"Policy") being a motor vehicle insurance policy between the
Defendant as Insurer and Entreprise Roger Brand as Insured, the
Defendant is by reason of section 41(3) of the Road Traffic
(Control) Act [CAP 29] liable to indemnify the Plaintiff in respect of



any and all liability to Mrs Claudine Monvoisin in respect of bodily injuries suffered by her the subject of her claim in Supreme Court proceedings No.59 of 1996.

2. That the Defendant's election to disaffirm the policy on the grounds of an alleged non disclosure by the Plaintiff of a material fact within the Plaintiff's knowledge at the time of taking out the policy is null and void and in breach of section 41(3) of the Road Traffic (Control) Act [CAP 29].
3. That the indemnity provided under the policy remains in full force and effect.

On 7th April 1997, the three abovenamed Counsels appeared before me seeking for the following orders which were issued on 11 April 1997.

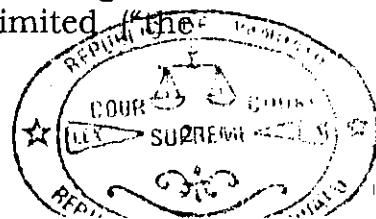
1. That the Chief Registrar assign a new Plaintiff Number in respect of the Summons issued under Order 58 and advise all three Counsels of same.
2. That all Counsels prepare written submissions in respect of the Declarations sought pursuant to Order 58 and exchange those submissions within 7 days of the date hereof and thereafter file final submissions within 10 days of the date hereof.
3. That the matter is to be relisted for hearing at the earliest date hereof.

Final written submissions were respectfully filed by Counsels in May 1997. Before, I proceed with the submissions, I will state some factual events in order to give a clear picture or understanding about the present proceedings.

Factual Events

The Plaintiff, Mr Dinh, is the proprietor of the business trading under the name of Entreprise Roger Brand.

He was the registered owner of the Berliet tip truck which was involved in an accident of 16 February, 1994. The Berliet tip truck is insured under an insurance policy number 24POO28248/00 (the "Insurance Policy") and ("the Insurer") is Commercial Union Assurance Company of Australia Limited. On 16 February, the Berliet tip truck, driven by Mr Jimmy Nulak collided with Madame Monvoisin's vehicle causing both property damage and bodily harm. There are various proceedings before this Court arising out of that motor vehicle accident of 16 February 1994. In Civil Case No.148 of 1994, Claudine Monvoisin has made a claim for property damage to her vehicle arising out of that same accident. A Third Party Notice was issued against Commercial Union Insurance Company of Australia Limited (the



Insurer") claiming indemnity under the Insurance Policy referred to earlier. In response to the Third Party Notice the Insurer filed a Defence to the Third Party Notice denying its liability on the basis of an exclusion clause in the policy. An amended statement of claim was filed in Civil Case No.148 of 1994 and the Insurer file an amended Defence wherein again the Insurer relied upon the exclusion clause in the Insurance Policy as the basis of its denial of liability. Thereafter, a specifically endorsed Writ of Summons was issued in Civil Case No.59 of 1996 about the personal injuries claim arising under the Insurance Policy. By letter of 11 July 1996 from the Insurer's lawyer, the Insurer elected to then disaffirm the Insurance Policy which is resulted in the present proceedings before the Court.

THE ISSUE

Can the Insurer elect to disaffirm the Insurance Policy on the basis of his common law right to avoid its contractual liabilities for non-disclosure in the light of section 41 of the Road Traffic (Control) Act [CAP 29]?

PRELIMINARIES

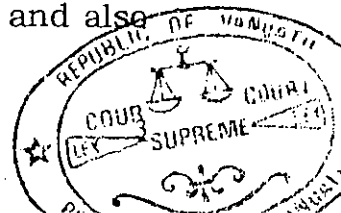
It is worth mentioning that Mrs Claudine Monvoisin is not a party to this Civil Case No.32 of 1997 nor a party to the Insurance Policy in dispute. However, it is clear from the terms of the declaration sought in paragraph 1 of the Originating Summons that she is the Plaintiff in respect of bodily injured suffered by her the subject of her claim in Supreme Court proceedings No.59 of 1996. There is no doubt that she will be affected by the determination of the issue in dispute and, therefore, she will be allowed to be heard. Other parties do not dispute that. Further, the Berliet tip truck which collided with Mrs Monvoisin's vehicle, was owned by Mr Dinh (the Plaintiff) and insured by Commercial Union Assurance Company of Australia Ltd ("C.U.") (the Defendant). The C.U. has by its Solicitor's letter of 11 July, 1996 purported to disaffirm the policy in question. Mrs Monvoisin will be given the opportunity to put forward her claim against either the insurer and/or the insured.

THE SUBMISSIONS OF THE PARTIES

Summary of the Plaintiff's submissions

It is contended for the Plaintiff that the Defendant's submissions that the proper law of the Insurance contract is English Law pursuant to section 24(1) of the Insurance Act [CAP 82] is clearly an incorrect submission as a reading of the Insurance Act shows that that section 24(1) only applies to policies issued by a Lloyd's underwriter and not to a policy of insurance issued by a company like Commercial Union.

It is submitted for the Plaintiff that it is necessary for the Court to look at the whole of section 41 of the Road Traffic (Control) Act and also



subsequent amendments to the Act to be able to form a proper appropriation of section 41(3) of the said Act.

Further, section 41(3) should be read in conjunction with the above sections 41(1) and 41(2) of the Act. It is submitted that clearly it was the intention of Parliament to provide for the protection of the population at large by ensuring that any vehicle on the roads of Vanuatu was covered by a Third Party Insurance Policy so that in the event of any death or bodily injury the victims could be compensated for their injuries. And section 41(3) clearly reflects this intent in so far as it provides as follows :

"No such policy of Third Party Insurance shall be avoided or vitiated by reason of any term or condition of any policy of Third Party Insurance shall be deemed to be null and void."

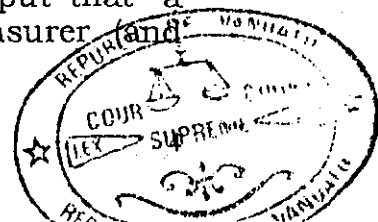
It is further said for the Plaintiff that the Court should also take note of subsequent amendments to the Act such as the new part IV A amended by Amending Act No.11 of 1990 wherein, at section 30B and 40C, it is a requirement that foreign vehicles can only be registered after proof is provided of valid Third Party Insurance. Clearly then, it is said, it is the intention of Parliament that the population at large have the benefit of knowing that all vehicles are covered by an enforceable Third Party Insurance Policy.

It is also said for the Plaintiff that the Defendant's lawyer seeks, incorrectly, to rely on some Common Law right to cancel or avoid the contract. The Defendant counsel says that Commercial Union can rely on a disclosure obligation (by the Plaintiff) independent of the terms of the contract. It is said that the Defendant's submission is proven false by both the conditions of the contract and the applicable law.

The Plaintiff says the Insurance Policy is a contract and the parties are bound by the terms of the contract and the applicable law. By relying on clauses 2(a) and 5 of the general conditions of the contract, the Plaintiff contended that Commercial Union has tried to adopt the Australian statutory insurance regime in place of the Common Law and it must follow then that at the same time that whatever common law right they may have had in the Australian jurisdiction to disaffirm has been lost by their entering into a contract upon these specific conditions.

The Plaintiff submitted therefore that the quasi Australian regime cannot work in Vanuatu. The Plaintiff says Vanuatu has a statutory insurance regime which overrides the Common Law on certain important aspects just as the Insurance contracts Act 1984 of the Commonwealth of Australia overrides the Common Law in Australia.

The Plaintiff draws the Court's attention to section 45 of the Insurance Act [CAP 82] providing for cancellation of policies. It is put that "a local policy" means a policy issued by a registered insurer (and



Commercial Union falls within this category on property, lives or other risks in Vanuatu) and therefore, a Third Party policy falls within this definition.

Further, the Plaintiff asks the court to pay particular attention to the use of the word "cancellation". It is common both to the General Conditions of the Policy and to section 45 of the Insurance Act CAP 82. It is said that the words "cancellation" has a plain and obvious meaning and in the policy under the review now before the Court, contemplates that the procedure for dealing with a failure to comply with the duty of disclosure must inevitably lead to cancellation.

The Plaintiff says, section 45(3) of the Insurance Act stipulates that a policy may not be cancelled except upon 30 days notice and it also obliges the Insurer to refund the excess of paid premium. In this instance, the Plaintiff says by letter dated 9 May 1994, the Insurer refused to accept the claim on the basis that it fell under the general exclusion but they did not at any stage during which the policy was enforced seek to cancel that policy, nor did they ever provide a refund of premiums. It is then submitted that even if Commercial Union had cancelled the policy it could have no bearing on their cover for accidents that had occurred prior to cancellation.

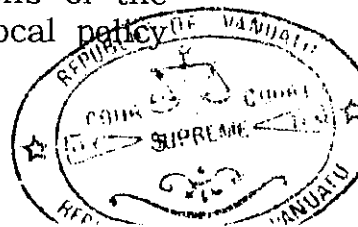
The Plaintiff says that the provisions of section 41 of the Road Traffic (Control) Act ought to be read in conjunction with the provisions of the Insurance Act [CAP 82], which lead to this interpretation :

The Insurance Act prevents any local insurer and in this instance Q.B.E. falls within the definition of local insurer from cancelling a policy of insurance except upon thirty (30) days notice. This takes precedence over the conditions of the policy and overrides the Australian Law that is said to be part of the contract. But yet, it is very similar to the consumer oriented provisions of the Australian Law in that, the insurer can take unfair advantage of the insured after they have paid their insurance by cancelling the policy as a whole.

The Plaintiff says the Insurance Act prevents the policy as a whole from being cancelled without prior notice and then the Road Traffic (Control) Act prevents the insurer from using the exclusion clauses within the policy as a basis for refusing to pay out a claim. The Plaintiff contended that by the letter of 9 May 1994 to the Plaintiff, Commercial Union Insurance sought to do exactly what is prohibited under section 41(3) of the Road Traffic Control Act in that they state in that letter :

"We advise that we are unable to accept this claim as the accident arises under general exclusion 1(d) of the Motor Policy."

In effect, the Plaintiff says that the insurance regime applicable in Vanuatu is clearly dealt with by virtue of the provisions of the Insurance Act and the Road Traffic (Control) Act. Any local policy



cannot be cancelled upon thirty (30) days prior notice. Any such local policy where it deals with Third Party claims cannot while it remains uncanceled be avoided by the insurer using any of the escape clauses within the policy.

The Plaintiff finally argues that the Court's decision on the applicability of the Insurance Act and more importantly section 41 of the Road Traffic (Control) Act is anything but hypothetical, it clearly establishes whether Mr Nulak and/or Mr Than are entitled to an indemnity from Commercial Union.

For the reasons stated, the Plaintiff urges this Court to declare the purported disaffirmation of the Policy by Commercial Union to be null and void in breach of section 41(3) of the Act.

Summary of Mrs Claudine Monvoisin's submissions

It is put for Mrs Monvoisin that the issue here is whether the insurer is obliged to meet any damages awarded in Mrs Monvoisin's favour or whether she must proceed exclusively against Mr Dinh for recovery of any such award.

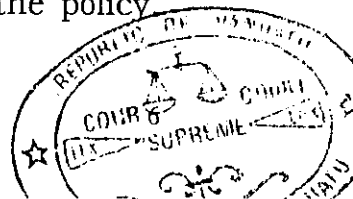
It is said for Mrs Monvoisin that the practice in personal injury claims, is for the insurer to take control of the defence of any claim and to defend the claim in the name of the party responsible for the accident. Any settlement reached or judgment entered in favour of the Plaintiff does not need to concern himself/herself with the responsible party's ability to pay.

It is submitted for Mrs Monvoisin that what Commercial Union is purported to do by having elected to disaffirm the policy is in contravention of section 41(3) and it is therefore of no effect.

It is also contended that the Defendant's suggestion that the "disaffirmation" of the policy does not arise in respect to any "term or condition" of the policy giving the Defendant a right to do so but rather the alleged non disclosure gives C.U. the right to avoid the contract is a very narrow reading of section 41(3) of the Act.

Further, the duty of disclosure is alleged to be a breach of a Common Law duty of disclosure that arises separately from any contractual obligation. Mrs Monvoisin says that such an interpretation is nothing more than an academic splitting of hairs designed to try and fell outside the very clear statutory intent set out in section 41(3) of the Act.

It is also said that the duty to some Common Law obligation arising separately from the policy is not only too narrow but legally unrealistic. It is then submitted that contractually it arises pursuant to an implied term of the policy of insurance a breach of which gives the insurer certain rights including the right to disaffirm the policy.



The non disclosure does not make the contract automatically void, but rather it is "voidable" at the instance of the insurer.

It is also said that the cases cited by the Defendant's counsel do not support this approach and can be distinguished in this case in the context of the specific wording of this insurance contract between the Plaintiff and the Defendant and the public policy reasons for not allowing insurance contracts to be avoided. The primary basis for avoiding an insurance policy is non disclosure, and therefore to allow avoidance for non disclosure would be to totally undermine the public policy reasoning behind section 41 of the Act.

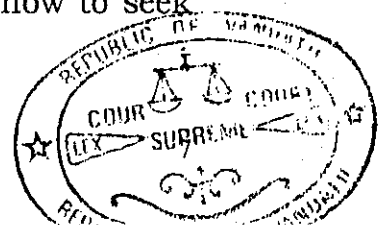
It is further said that the policy in question includes the heading entitled "Extract from Insurance Legislation" setting out the insured's duty of disclosure pursuant to the Insurance Contracts Act 1984 of the Commonwealth of Australia. The insured is advised that if the insured fails to comply with the duty of disclosure, the insurer may be entitled to reduce his liability under the contract in respect of a claim or may cancel the contract. It is further pointed out that if the non disclosure is "fraudulent", the insurer may also have the option of avoiding the contract from its beginning. It is then submitted that the inclusion of those words in the policy makes the duty of disclosure an express term of the contract.

It is also said that the insurer has sought as part of the policy to remind the insured of its duty to disclose and alerting to the fact that there are contractual consequences. It is then concluded that the insurer is making the duty of disclosure an important contractual term of the insurance contract, the breach of which will have certain consequences.

It is then submitted that whether such a term is described as an express term or an implied term is immaterial as it clearly falls within the definition of section 41(3) of the Act. "... any such term or condition thereof whatsoever..." it is said, in short, that as such term is relied upon to vitiate the contract it must be null and void by virtue of section 41(3).

It is advanced that in that case the policy itself makes it very clear that a certain level of disclosure is required, which by its presence imposes a contractual obligation to disclose on the insured. In this case, irrespective of whether the duty is breached, the policy in so far as the compulsory Third Party element is concerned cannot be avoided or vitiated or disaffirmed.

It is contended that the Defendant affirmed the policy when they filed their defence to the Third Party Notice in proceedings No.148 of 1994 of 18 August 1995 (see Annexure "D" to Mr Dinh's affidavit). In their defence they rely on an exclusion clause in the policy to escape liability - that in itself amounts to a waiver of their right now to seek to disaffirm the policy.



It is also argued that the purpose of section 41 is to protect the injured third party so that s/he can venture on to the roads safer in the knowledge that s/he is insured in any accident caused or contributed to by another driver, then the receipt of appropriate compensation is guaranteed by an insurer and is not dependant upon whether the responsible person has the means to pay the compensation in question.

It is advanced that any attempts from the insurer to escape liability under a contract of insurance -whether it be reliance upon one non-disclosure or misrepresentation of a "material fact" at the time of the policy was entered into- are expressly negated by section 41(3) of the Act.

It is also argued that the reason for such a provision is obvious. The Third Party who has no control over the conduct of the insured, whose action may give rise to grounds to avoid or vitiate the policy, should not be prejudiced by matters outside his or her control which have the result of jeopardising the recovery of compensation whatever his/her financial means.

Finally it said that whether or not there are factual grounds present to disaffirm the policy is not the issue before this Court in Civil Case No.32 of 1997. Rather the issue goes to the very substance of whether C.U. can choose to disaffirm the policy in light of section 41 of the Act.

For these reasons, it is urged upon this Court to declare the purported disaffirmation of the policy by C.U. null and void and in breach of section 41(3) of the Act.

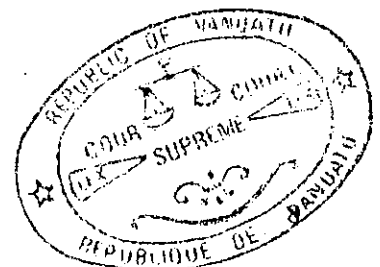
Summary of the Defendants submissions in reply

The Defendant's legal counsel ranged the submissions of the Plaintiff and Mrs Claudine Monvoisin in 3 different categories, respectively :

(a) The Incorporation argument, (b) the Abolition argument, (c) the Cancellation and Avoidance Ab Initio argument. The Defendant submits that these submissions are based on a misinterpretation of Australian law and fundamental misconception of the nature of the rights the defendant has exercised in avoiding the policy.

(A) Incorporation Argument

The Defendant rejected Mrs Monvoisin's argument that the document headed "Extract from Insurance Legislation" ("the Extract") incorporates the provisions of the Australian Insurance contracts Act 1984 as express terms of the contract and thereby the duty of disclosure is an express term of the contract.



The Defendant submitted that this Extract is provided to potential customers of the Defendant as a pre-contractual notice of rights under Australian law such as is required under section 22 of the Insurance contracts Act. The Defendant submitted that this Extract does not incorporate the provisions of the Australian legislation as express terms of the contract.

The Defendant submitted that even if the Extract does contain express terms of the contract, those terms do not entirely replace the defendant's common law rights. Those terms modify and describe the Defendant's power to exercise its common law rights.

(B) Abolition argument

The Defendant says that the Plaintiff's argument that Vanuatu's statutory regime "over-rides" the common law on certain important aspects just as the Insurance contracts Act 1984 of the Commonwealth of Australia over-rides the Common law of Australia, is based on a misinterpretation of the nature of Australian law. Section 7 of the Insurance Contracts Act provides that :

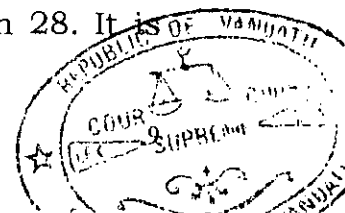
"It is the intention of the Parliament that this Act is not, except in so far as this Act expressly or by necessary intendment, otherwise provides, to affect... the operation of any principle or rule of the common law (including the law merchant or of equity.)"

It is further said that, if as the Plaintiff argues in paragraph 18, the Insurance Act (Vanuatu) is a parallel regime to the Insurance contracts Act in Australia, there must be an express statement by the legislature in order to remove the common law right enjoyed by the parties to the insurance contract.

It is also said that the Plaintiff and Monvoisin have not identified any section of the Insurance Act (Vanuatu) which purports to remove or modify the Defendant's right to avoid the contract for non-disclosure. It is then submitted for the Defendant that the rights of cancellation described in section 45 of the Insurance Act (Vanuatu) and upon which the Plaintiff makes a number of arguments, are completely unrelated to and independent of the defendant's right to avoid the contract for non-disclosure.

It is therefore submitted that the provisions of the Australian Insurance Contracts Acts, even if the Plaintiff's arguments is correct in that, they are incorporated as terms of the contract by the Extract, these provisions do not remove the Defendant's common law rights to avoid the contract for non-disclosure.

It is also submitted that the Insurance contracts Act recognises the existence of a duty of disclosure under section 21. Non-disclosure of a material fact gives rise to remedies as stipulated in section 28. It is



then said that section recognises the common law duty of disclosure and, by virtue of section 7, in the absence of any express exclusion, the common law relating to pre-contractual obligations remains in place. For example, it is advanced that, marine insurance is not dealt with by the Insurance Contracts Acts, and the common law rights to non-disclosure remain in force in that area of Australian law (see *Khoury v. GIO* (1984) 58 ALJR 502 at 507).

The Defendant submitted that if these provisions of the Australian law are not incorporated into the insurance contract, then, the incorporation of these provisions as contractual terms does not deny its common law rights where there has been non disclosure (see section 7 of the Insurance Contracts Act).

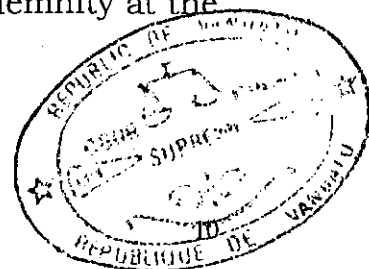
(C) Cancellation and Avoidance Ab Initio

The Defendant submitted that the Plaintiff has fundamentally misconceived the nature of the rights the Defendant exercises when avoiding the contract for non-disclosure and the nature of the rights of cancellation. These two sets of rights exist and operate independently of each other.

It is also said that likewise, rights to cancellation under section 45 of the Insurance Act (Vanuatu) and common law rights to avoid the contract for non-disclosure are completely independent legal concept :

- (a) Cancellation is a remedy available to the parties to a contract, while disclosure is a duty which the parties to an insurance contract owe to each other.
- (b) The remedy of cancellation arises during the terms of the contract while the duty of disclosure arises at the formation of the contract.
- (c) Cancellation is one remedy available for a breach of the duty of disclosure under clause 2 of the General Conditions, but it is not only remedy available to the defendants.
- (d) Cancellation involves the termination of the contract at a particular point in time. In contrast, non-disclosure leads to a right by the insurer to avoid the contract ab initio (as if the contract never existed).

It is further said that, cancellation on the one hand and avoiding the contract ab initio on the other are legal concepts with very different consequences. It is said as an example that, if the insurer had cancelled the contract after the accident, this would have had no effect on liability as the contract was on foot at the time of the accident. If the insurer avoids the contract for non-disclosure, the contract is said never to have come into existence and cannot provide indemnity at the time of accident.



The Defendant submits that whether it has or has not cancelled the policy under the General Conditions and section 45 of the Insurance Act (Vanuatu) are completely irrelevant to whether it can avoid the contract ab initio for a breach of the duty of disclosure and exercise the other rights it has as a consequence of that breach, as it claims to have done.

LETTER OF 9 MAY 1994

It is also the defendant's submission that no inference can be drawn from the letter of 9 May 1994 in relation to the personal injury proceedings which are the subject of the declarations sought by the Plaintiff.

AFFIRMATION OF THE CONTRACT

It is said that the Defendant has filed an Amendment Defence in those proceedings (148 of 1994) which pleads the Plaintiff's non-disclosure of the unroadworthy condition of the vehicle at the formation of the insurance contract. It is said the Defendant was not required to plead the non-disclosure of a material fact in its defence to the Third Party Notice in proceedings 148 of 1994, although it did so in its Amended Defence.

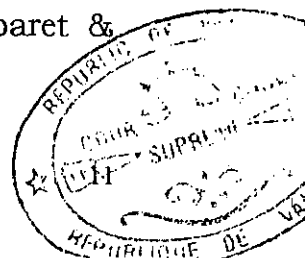
- The Road Traffic (Control) Act, it is put, does not prevent the Defendant disaffirming liability for property damage following a breach of a term or condition of the insurance contract. Section 41(3) of the Road Traffic (Control) Act, it is argued, is limited to Third Party Insurance contracts for "death or bodily injury" (as defined in section 41(1) of the Road Traffic (Control) Act.

It was, thus, open to the Defendant it is said, to plead that it was not liable for property damage under the insurance contract because of the breach of a term or condition of the insurance contract that the vehicle only be operated in a roadworthy condition.

It is also argued that Monvoisin's Specially Endorsed Writ of Summons in the personal injury proceedings (59 of 1996) was filed on 23 April 1996. The Plaintiff, then, filed an Amended statement of claim on 25 June 1996. The Defendant then, it is said, amended its defence in the property damage proceedings to plead the Plaintiff's non-disclosure of the unroadworthy condition of the vehicle at the time of the accident.

DISCLOSURE AS AN IMPLIED TERM OF THE CONTRACT

The Defendant repeats its earlier submissions in these proceedings that the duty to disclose all material facts prior to the execution of an insurance contract arises independently of any obligations under the "terms or conditions" of the insurance contract : March Cabaret &



Casino Limited v. Ullmann Sav. Skandia (UK) Insurance Company Limited (1991) 1 Q.B. 665.

The Defendant submits that the case of William Pickersgill & Sons Limited (1912) 3 KB 614 as authority for the proposition that the non-disclosure of material facts is a defence arising out of a contract of insurance, may be distinguished as a case dealing with alterations to the Marine Insurance Act 1868 (UK) effected by the Marine Insurance Act 1906 (UK) thereby altering the rights of the underwriter to claim a defence against the assignee of a marine insurance policy. The Defendant submits that this case can be distinguished as relating to a particular statute in a particular area of insurance law (namely marine insurance) which has no relation to the case before the Court.

It is said that Marine Insurance is a distinct area of Insurance law as recognised, for example, in Australia by the existence of separate legislation, namely the Marine Act 1909, and that the Insurance Contracts Act does not apply to this area of insurance. It is also said that the case of William Pickersgill was distinguished by the High Court of Australia in Khoury v. GIO (1984) 59 ALJ R. 502 at 507 where this line of authority is described as having "serious difficulties".

POLICY OF THIRD PARTY INSURANCE SCHEME

The Defendant said the Plaintiff and Mrs Monvoisin submitted that the terms of section 41(3) of the Road Traffic (Control) Act should be read in a way that achieves certain specific policy objectives. The Defendant acknowledges these policy arguments are persuasive, but submitted that the issues in this case must be decided as a matter of law and statutory interpretation.

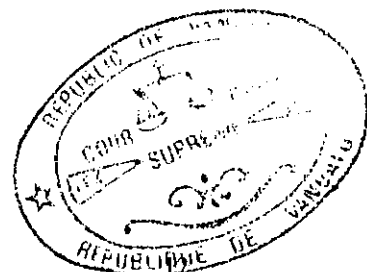
The Vanuatu legislature has limited the restrictions of section 41(3) of the Road Traffic (Control) Act to "terms and conditions". The Plaintiff and Monvoisin have not identified any statutory context which would justify a wide interpretation of the meaning of that phrase. In the absence of any express exclusion of the common law duty of disclosure, the Defendant submits that section 41 of the Road Traffic (Control) Act does not negate the Defendant's right to avoid the contract ab initio for non-disclosure.

Finally it is submitted for the Defendant that if the Vanuatu legislature enacted s.41 of the Road Traffic (Control) Act to ensure that a Third Party insurer could never refuse to pay a claim, the Parliament would have used express words to that effect and to meet the policy objectives identified by the Plaintiff and Monvoisin.

COURT CONSIDERATIONS

RELEVANT LEGISLATIVE PROVISIONS

The Road Traffic (Control) Act (as amended) CAP 29.



PART V
THIRD PARTY INSURANCE

Compulsory Third Party Insurance

Section 41 provides :

- "(1) No person shall use or cause or permit any other person to use any motor vehicle on a road unless there is in force in relation to that vehicle a policy of third party insurance covering liability arising from the use of such vehicle by any person on a road of such vehicle by any person on a road for the death or bodily injury of any person, other than a passenger in such motor vehicle issued by an insurance company.*
- (2) The amount of liability insured shall be unlimited.*
- (3) No such policy of third party insurance shall be avoided or vitiated by reason of any term or condition thereof whatsoever and any such term or condition of any policy of third party insurance shall be deemed to be null and void.*
- (4) ..."*

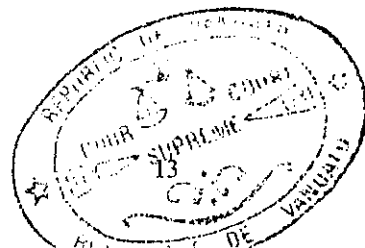
BY PART IVA [of the Road Traffic Act]
REGISTRATION OF FOREIGN VEHICLES

Section 40B says :

- "(1) The following documents shall be submitted to the Minister prior to the registration of a foreign vehicle:-*
 - (a) The original invoice from the vehicle manufacturer or selling agent ;*
 - (b) the former original vehicle registration certificate;*
 - (c) Original proof of valid third party insurance ;*
 - (d) Original certificate of road worthiness issued by reputable vehicle inspection garage ; (Emphasis added)*
- ...*
- (2) ..."*

Section 40C of the same Act says also that :

"The following documents shall be submitted to the Minister to effect annual registration renewal of a foreign vehicle :-



(a) Original proof of valid third party insurance ; and

(b) Original certificate of road worthiness issued by a reputable vehicle inspection garage." (Emphasis added)

THE INSURANCE ACT CAP 82

Section 24 says :

"(1) Every local policy issued by members of a registered association of underwriters shall contain a clause providing expressly that its validity, interpretation and effect and the rights and obligations of the parties to it are governed exclusively by English Law as applicable within Vanuatu immediately before 30 July 1980 and that the Supreme Court shall have jurisdiction therein.
..."

Section 45

"(1) No local policy shall be liable to cancellation except in accordance with the provisions of this section.

(2) ...

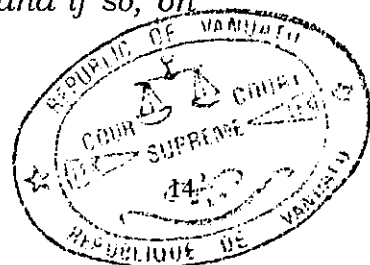
(3) A policy other than a life assurance, marine or aviation policy may be cancelled at any time by an insurer after giving to the insured named therein not less than 30 days notice in writing of the proposed cancellation by personal service or by registered and upon refunding to the insured the excess of paid premium over and above the pro-rata premium for the time the policy has been in force, which refund shall accompany the notice.
..."

THE RELEVANT PART OF THE "EXTRACT FROM INSURANCE LEGISLATION" ATTACHED TO POLICY - COMMERCIAL INSURANCE

"Extract From Insurance Legislation

Your Duty of Disclosure

Before you enter into a contract of general insurance with an insurer, you have a duty, under the insurance contracts Act 1984 of the Commonwealth of Australia, to disclose to the insurer every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of insurance, and if so, on what terms.



You have the same duty to disclose those matters to the insurer before you renew, extend, vary or reinstate a contract of general insurance.

- that is of common knowledge ;
- that your insurer knows or, in the ordinary course of his business ought to know ;
- - as to which compliance with your duty is waived by the insurer.

Non-Disclosure

If you fail to comply with your duty of disclosure, the insurer may be entitled to reduce his liability under the contract in respect to a claim or may cancel the contract.

If your non-disclosure is fraudulent, the insurer may also have the option of avoiding the contract from its beginning.

IMPORTANT NOTICES

1. Claims

This Policy does not provide cover in relation to events that occurred before the contract was entered into.

... ”

THE RELEVANT PART OF THE COMMERCIAL UNION ASSURANCE COMPANY OF AUSTRALIA A.C.N. 004 478 371 (HEREINAFTER CALLED THE COMPANY).

COMMERCIAL UNION INSURANCE

MOTOR VEHICLE INSURANCE

...

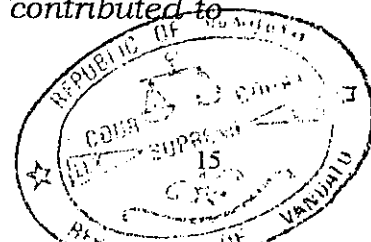
“General Exclusions

The Company will not be liable to make payment in respect of :

1. any destruction, loss of or damage or the incurring of a liability by the Insured or any person driving, using or in charge of the Insured vehicle or substitute vehicle (the vehicle), with the Insured's expressed or implied consent, where :

(a) ...

- (d) the vehicle is being used in an unsafe or unroadworthy condition unless the Insured can prove to the Company that the event giving rise to the claim was not caused or contributed to by such unsafe or unroadworthy condition...”



"General Conditions

2. Cancellation

(a) *The Company may cancel this Policy or any section by giving the Insured written notice to that effect where the Insured has :*

- (1) failed to comply with the duty of utmost good faith.*
- (2) failed to comply with the duty of disclosure at the time when the Policy was entered into or renewed.*
- (3) failed to comply with a provision of the Policy.*
- (4) failed to pay the premium.*
- (5) made a fraudulent claim under this Policy or any other policy of insurance (whether with the company or another insurer) that provided cover during any part of the period during which this Policy of insurance provides cover.*
- (6) failed to notify the Company of any specific act or omission or such notification as required under the terms of insurance.*

(b) *Method of Cancellation*

- (1) The Insured may cancel this Policy at anytime by notifying the Company in writing.*
- (2) Subject to the provisions of the Insurance Contracts Act 1984 the Company may cancel this Policy at anytime by giving 30 day notice in writing to the Insured of the date from which cancellation is to take effect. Such notification is to be delivered personally or posted by certified mail to the Insured at the address last notified to the Company. Proof of mailing is sufficient proof of notification.*

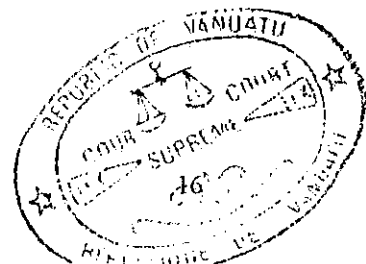
(c) *Adjustment of Premium*

- (1) After cancellation by the Insured the Company will retain or be entitled to the premium for the period during which this Policy has been in force.*
- (2) After cancellation by the Company the Insured will be entitled to a pro-rata refund of the premium.*

5. Company Rights

(a) *The interpretation of this policy shall be governed by the provisions of the Insurance Contracts Act 1984 of the Commonwealth of Australia and the relevant laws of the Commonwealth of Australia and any claims made under this Policy shall be governed by Australian laws.*

...."



It is common ground that the proper law of the contract is the law of Vanuatu comprising of both the statutes passed including the Insurance Act (CAP 82) and the Road Traffic (Control) Act (CAP 29) (as amended) and the Common law.

By perusing the relevant part of the provisions of the Insurance Policy under consideration in this case, I accept the submission that the Insurance Policy in question includes the Heading entitled "Extract from Insurance Legislation" setting out the Insured's duty of disclosure pursuant to the Insurance contracts Act 1984 of the Commonwealth of Australia, constitutes an express term of the contract of Insurance ("Policy"). There is no dispute at all that the Insurer (C.U.) has sought as part of the Policy to remind the Insured of its duty to disclose and alerting to the fact that there are contractual consequences. Obviously the Insurer is making the duty of disclosure an important contractual term of the insurance contract, the breach of which will have certain consequences.

In effect, the inclusion of the "Extract from Insurance Legislation" constitutes a constructive notice. The C.U. has taken reasonable steps to notify the Defendant against whom the clause of non-disclosure is to be used of its existence and contents (including non-requirements). Those steps have been taken as a pre-contractual notice of rights under Australian Law before or at the time the contract is entered into. The "Extract" becomes part of the Insurance Policy and constitutes an important term [see Clause 5(a) General Conditions].

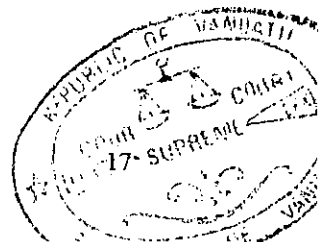
Section 41(1) of the Road Traffic (Control) Act CAP 29 (Vanuatu), is about the Third Party Insurance covering liability arising from the use of a motor vehicle by any person on a road for the death or bodily injury of any person, other than a passenger... (emphasis added).

Section 41(3) of the same Act, is applicable only to the Third Party Insurance covering liability arising from the use of a vehicle on a road causing "death or bodily injury of any person", other than a passenger of the motor vehicle.

Section 41(3) of the Act does not cover property damage claim.

I therefore accept the submission that the interpretation of section 41(3) of the Act cannot be extended to include the property damage claim. Section 41(3) is limited to the Third Party Insurance for "death or bodily injury" (as defined by section 41(1) of the Act) (Vanuatu) CAP 29.

It was then open to the Defendant to plead that it was not liable for property damage claim under the Insurance Contract because of the breach of a term or condition of the Insurance Contract that the vehicle only be operated in a roadworthy condition.



I also accept the submission that the rights to cancellation under section 45 of the Insurance Act (Vanuatu) and the common law rights to avoid the contract for non-disclosure are completely independent legal concepts with very different consequences. If the Insurer had cancelled the contract after the accident, this would have had no effect on liability as the contract was on foot at the time of the accident. If the Insurer avoids the contract for non-disclosure, the contract is said never to have come into existence and cannot provide indemnity at the time of accident.

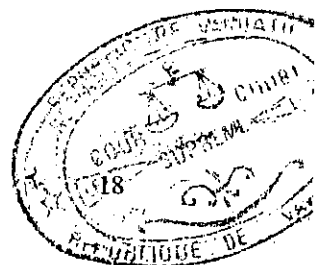
Therefore, whether the Defendant has or has not cancelled the Policy under the General Conditions and section 45 of the Insurance Act (Vanuatu) are completely irrelevant to whether the Defendant can disaffirm the contract ab initio for a breach of the duty of disclosure.

In this case, section 41(3) of the Road Traffic (Control) Act CAP 29 (Vanuatu) overrides the common law rights of the Defendant to disaffirm/avoid the Third Party Insurance for the use of a motor vehicle on a road for the "death or bodily injury of any person", other than a passenger... on the basis of a breach of the duty of disclosure.

However, section 41(3) does not negate the Defendant's right to avoid the contract for non-disclosure in respect to property damage claim. This will of course depend on the evidence.

On the basis of these considerations, the following declarations are hereby made :

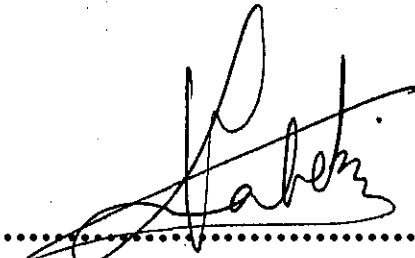
1. That pursuant to an Insurance Policy No.24P 00 28 248/00 (the "Policy") being a Motor Vehicle Insurance Policy between the Defendant as Insurer and Entreprise Roger Brand as Insured, the Defendant is by reason of section 41(3) of the Road Traffic (Control) Act (CAP 29) liable to indemnify the Plaintiff in respect of any and all liability to Mrs Claudine Monvoisin in respect of bodily injuries suffered by her the subject of her claim in Supreme Court proceedings No.59 of 1996.
2. That the Defendant's election to disaffirm the Policy on the grounds of an alleged non-disclosure by the Plaintiff of a material fact within the Plaintiff's knowledge at the time of taking out the Policy is null and void and in breach of section 41(3) of the Road Traffic (Control) Act (CAP 29) in respect of bodily injuries suffered during the time of accident which is the subject of this case.
3. That the indemnity provided under the Policy for bodily and injury remains in full force and effect.



4. That the indemnity provided under the policy for property damage remains in full force and effect subject to contrary evidence.
5. Costs be in the cause.

DATE AT PORT-VILA, this 10th DAY of AUGUST 1998

BY THE COURT


.....
VINCENT LUNABEK J.
Acting Chief Justice

