[¶60-903] Toikan International Insurance Broking Pty. Ltd. & Anor v. Plasteel Windows Australia Pty. Ltd. & Anor.
Supreme Court of New South Wales, Court of Appeal.
Judgment delivered 13 February 1989.
Extracts from judgment below.

Insurance — Broker negligent — Failure to procure adequate insurance — Whether novation of contract — Failure to take all reasonable precautions — Onus of proof — Disclosure — Insurance Contracts Act 1984 (Cth) sec. 21(1), 48.

On 18 February 1987, commercial premises occupied by Plasteel Windows Australia Pty. Ltd. and Plascon Industries Pty. Ltd. (jointly called the "occupiers"), were extensively

damaged by a fire which, it was agreed, had been deliberately lit by a person or persons unknown utilising a solvent used in the course of the occupiers' business.

Until 28 November 1986 the premises affected by the fire were occupied by what was known as the "Plasteel Group of Companies" which consisted of a number of associated companies quite unrelated to the occupiers, but which carried on the business later carried on by the occupiers. In March 1985, Toikan International Insurance Broking Pty. Ltd., which was an insurance broker, proposed on the Plasteel Group's behalf to the insurer, Sun Alliance Insurance Ltd., for an industrial special risks policy covering the companies in the Plasteel Group "and/or subsidiary companies for their respective rights and interests". The policy was issued in the name of "Plasteel Group of Companies", was in force from 30 June for 12 months and subject to the usual renewal provisions. The policy contained conditions said to be applicable to all sections of the contract and condition 9 provided:

> "The insured shall take all reasonable precautions to prevent loss destruction or damage to the property insured by the policy."

Condition 12 provided :

> "The due observance and fulfilment of these Conditions and the other terms of the Policy by the Insured insofar as the same are capable as being construed as such, are conditions precedent to any liability of the Company(ies) to make any payment under the Policy."

The policy was in due course renewed for a further 12 months, and again the insured was described as "Plasteel Group of Companies".

On 8 August 1986, a receiver and manager was appointed to the Plasteel Group, and on 28 October 1986, the receiver sold the assets of the business which the Group had carried on to two companies, Arimava Pty. Ltd. and Diava Pty. Ltd. On 8 January 1987, Diava changed its name to Plasteel Windows Australia Pty. Ltd., and on 12 February 1987 Arimava changed its name to Plascon Industries Pty. Ltd. These two companies were the occupiers referred to above. The contract of sale was completed on 5 November 1986 and the occupiers took over the business on the following day, and in due course, became lessees of the premises described in the policy pursuant to an assignment by a member of the Plasteel Group.

After the receiver had been appointed the Plasteel Group's insurance policies were renewed, the receiver paid to Toikan the premiums for cover up to the date the Plasteel Group transferred their business to the occupiers and vacated the premises.

On 19 November 1986 a meeting took place between the general manager of the occupiers, Mr Gavin, who had previously been employed by the Plasteel Group as general manager, Mr Webber a director of Toikan, and a Mr Willenberg who was apparently Toikan's chief underwriter. There was discussion about the way in which the new owners would conduct the business. Mr Webber finally said that because the companies were operating in the same environment, producing the same product, using the same techniques, etc., the risk remained the same so that all that was needed was a name change. A letter was then sent by Mr Gavin, drafted by Mr Webber, informing Mr Willenberg that from 6 November 1986, the Plasteel Group would be operating under the names of the occupiers. On 20 November 1986 Mr Willenberg sent a memorandum to the insurer informing it of the change of name and requesting an endorsement of the memorandum. The endorsement was duly effected.

After the occurrence of the fire, the insurer denied liability to indemnify the occupiers under an industrial special risks insurance policy which the occupiers asserted and the insurer denied was in force at the time. The occupiers sought declarations of the insurer's liability and an order for damages against Toikan in the event that the claim against the insurer was defeated.

The claim against the insurer was dismissed by Yeldham J. at first instance, while judgment for the occupiers was given against Toikan. It was held that there was no contract of

insurance in existence at the relevant time by which the insurer was bound to indemnify the occupiers against the loss which they had sustained. His Honour found that Toikan as the occupiers' broker who had looked after all their insurance needs was negligent in having failed to provide them with the protection of an enforceable contract of insurance. This finding was not disputed on appeal. His Honour also found that had Toikan procured appropriate insurance the policy would have contained a provision in the same terms as a condition of the policy on which the occupiers sued; and would have required the insured to take all reasonable precautions to prevent loss. But, Yeldham J. concluded, Toikan, which for the purposes of the argument stood in the shoes of the hypothetical insurer, had failed to discharge the onus which lay upon it to prove that the occupiers had failed to satisfy that requirement.

Toikan appealed, joining the occupiers and the insurer as first and second respondents respectively, and challenging his Honour's holding that no contract of insurance was in force at the material time and his conclusion about the onus of proof; and contending that it lay on the occupiers who had failed to discharge it. The occupiers filed a separate appeal, joining the insurer and Toikan, and seeking to preserve the contract of insurance. Finally the insurer, by a notice of contention, asserted that it had rescinded any contract of insurance which might have existed, or alternatively, was entitled to the benefit of the provisions of sec. 28 of the Insurance Contracts Act 1984. The insurer adopted so much of Toikan's argument as supported failure by the occupiers to establish compliance with the condition referred to.

Toikan argued, firstly, that the memorandum of 20 November 1986, taken with the insurer's response which was to alter the insurer's records consonantly with the request, amounted to a novation by which the occupiers were substituted for the companies previously insured under the subject policy.

The second submission made by Toikan was that if it had procured adequate insurance, the policy would have contained provisions identical with those appearing as conditions 9 and 12 in the subject policy, and that the occupiers were in breach of those provisions, by not having taken all reasonable precautions to prevent loss.

A third submission made by Toikan was that, assuming that Toikan had procured an appropriate insurance policy in favour of the occupiers, there was a failure on the part of the occupiers to disclose certain acts of industrial sabotage and disruption, and threats made by a dismissed employee of the Plasteel Group, which had occurred while the Group was carrying on business in the premises and before the sale was completed in November 1986. The evidence of a senior underwriter employed by the insurer and called by Toikan was that if those facts had been disclosed he would have declined renewal of the policy. Yeldham J. rejected this argument on the ground that the matters said to be material did not relate to the occupiers or to the business which they proposed to conduct, and were therefore not the subject of disclosure.

Held: appeal allowed in part, new trial ordered.

(1) A novation could have only occurred in the present case if constituted by a contract between the former insured, the Plasteel Group, represented by the receiver, the insurer and the occupiers, the new insured.

(2) This did not occur. There was no evidence that the receiver knew anything of the transaction or had any interest in it. After the completion of the contract of sale, neither the receiver nor the Plasteel Group of companies had any interest in the insurance which covered loss of or damage to property which the Group no longer owned. Further, there was no outstanding obligation the release of which could have furnished consideration.

(3) The memorandum on which the transaction, i.e the novation, was said to depend was incapable of supporting it. It amounted to no more than a request to the insurer to endorse a change of name on the policy. It did not in any way suggest that what was intended was the

formation of a new contract between the insurer and parties with which it had no previous dealings and which were entirely separate from the original insured. The memorandum plainly implied that all that was sought was a purely clerical step designed to record that the insured had changed its name. There was no evidence that the insurer did in fact infer from the memorandum the existence of a sale of assets and the continuation of the commercial undertaking by entirely new and independent owners upon which it intended to confer the benefit of the policy.

(4) The submission alleging that a novation had taken place failed and could not be resuscitated by reliance on sec. 48 of the Insurance Contracts Act 1984 (Cth).

(5) Yeldham J. was incorrect in holding that it was for Toikan to establish that the occupiers had failed to take all reasonable precautions to prevent loss. Condition 9 was a condition precedent. The onus of proving compliance with it lay upon the occupiers as insureds: Kodak (Australasia) Pty. Ltd. v. Retail Traders Mutual Indemnity Insurance Association (1942) 42 S.R. 231 at pp. 234-235 and 237, per Jordan C.J. The order was made that the matter should be retried upon the question of whether the requirements of condition 9 were fulfilled.

(6) The submission based on disclosure was unsound. The character of the matters relied on did not satisfy the terms of sec. 21(1)(a) or (b) of the Insurance Contracts Act 1984 (Cth).

[*Headnote by the CCH INSURANCE LAW EDITORS*]

Appearances: C. Gee Q.C. with N. Rein (instructed by Minter Ellison & Co.) for Toikan. B. Rayment Q.C. with P.E. Blacket (instructed by A.R. Conolly & Co.) for Plasteel. S. Sheller Q.C. with J.E. Maconachie (instructed by Leigh Virtue & Collins) for Sun Alliance.

Before: Samuels, McHugh and Clarke JJ.A.