

THE ROYAL SCAM: THE SCUTTling OF THE "ALTIMIRA"

1.0 Introduction

- 1.1 Marine Underwriters generally retain the hope that the risks they take on will be subject to the normally foreseeable contingencies. They rely heavily on the honesty and integrity of the insured. The moral risk which an insured person may pose to an underwriter is an intangible and insidious element which is often difficult to assess, especially at the time that the underwriter agrees to accept the risk.
- 1.2 Claims of all types and at all levels of insurance are subject to fraud. In many cases the circumstances of a claim may give insurers and their solicitors strong suspicions of dishonesty. But ultimately, the true facts are difficult to establish and in many cases too expensive to pursue. Consequently the incidence of fraud must have an overall cost for the community.
- 1.3 Allegations or proven acts of dishonesty by proposers for insurance are important material facts for underwriters to take into account. But all too often the true facts are not readily available, or are suppressed by the proposer. However if uncovered subsequent to a claim, the non-disclosure of acts of dishonesty establishing poor moral risk, will provide underwriters with a useful affirmative defence.
- 1.4 In *Gate v Sun Alliance*¹, Sun Alliance defended a claim by the Gates for theft of their luxury launch, primarily on the ground that Mr Gate had conspired to scuttle the vessel. In addition Sun also relied on non-disclosure and false statement defences, which are always an important part of an insurer's armoury when attempting to defend fraudulent claims. These were:

¹ Now reported at [1995] LRLR 385

- * Non-disclosure of Mr Gate's dishonest propensity, and non-disclosure and misstatements of other ownership interests (including an undischarged bankrupt);
- * Non-disclosure/misstatement/fraud in respect of the vessel's value;
- * A false statement by Mr Gate in support of the claim, that he had never left any keys on board the vessel;
- * Misrepresentation as to true purchase price.

1.5 In this paper I intend to review the background to the claim, to outline some of the legal issues considered by the court and to review the significance of some of the Judge's findings to insurers facing fraudulent claims.

2.0 Background

2.1 The Altimira was a 53 foot jet powered luxury launch. Christopher and Mary Gate, acquired ownership in the vessel through a complicated property fraud on the Auckland Savings Bank by Mr Gate and his associates. The purchase was completed by a 3 way property "swap" deal.² The Gates kept the boat at the Half Moon Bay Marina, Howick.

2.2 After acquiring the vessel, Mr Gate learned that it was worth considerably less than he had believed at the time of its purchase. That ultimately eliminated the profit on the fraud through which he had acquired it. So he set about preparing to scuttle the vessel and to bring a fraudulent insurance claim against his insurer.

² See appendix 1

- 2.3 During April and May 1992, Mr Gate changed insurance brokers and insurers in mid term. He had previously had the vessel insured for \$550,000. After attempting to insure it with Sun Alliance for over \$1m, he agreed in May 1992 to an agreed value cover of \$760,000. The Gates also changed the vessel's name to "Altimira". He said that it was named after a song by *Steely Dan* called "*The Caves of Altimira*".
- 2.4 Around June 1992 Mr Gate further carried out some practical steps. He filled the vessel's fuel tanks. The vessel was backed into its marina berth to facilitate easy manoeuvring, especially for an unfamiliar skipper. Anxious to make sure that he was actually insured, Mr Gate even went to Sun's offices and insisted on the issue of an insurance certificate. Sun had earlier sent facsimile confirmation of cover to Mr Gate's broker on the basis of a placing slip. Mr Gate was just making certain. Finally he invited some friends out on the boat. During the course of that voyage a Mr McLaren, who later gave evidence for Mr Gate in the trial, made what the Judge accepted was a "*promotional*" style video of the boat - perfect for any subsequent court proceedings against Sun over the claim. The Judge considered the video an example of Mr Gate's "*scene setting*".
- 2.5 Around 8 July 1992 a witness at the marina saw the vessel leaving with 2 men on board. At the time Mr Gate was out of town with a solid alibi. On his return he notified Sun through his insurance broker around 16 July 1992, that the vessel was missing.
- 2.6 By that stage an anonymous caller to Sun had stated that the Gates were not the true owners of the vessel, and that it was over-insured. Sun had immediately faxed the broker requesting an updated survey and valuation of the vessel. But it was too late. In response to the claim notification, Sun immediately instructed its solicitors, who in turn instructed an investigator, Kevin Byrne.

- 2.7 The investigator uncovered details of a sophisticated fraudster who made a substantial living by dishonesty. But Mr Gate had never been apprehended. Apart from this aspect there were highly suspicious circumstances about the loss itself.
- 2.8 By September 1992 Sun's investigation was well advanced. But according to a predetermined plan, the Gates commenced legal proceedings against Sun for non payment under the policy. They filed summary judgment proceedings. The application for summary judgment was subsequently withdrawn after Sun filed affidavits disclosing multiple affirmative defences.
- 2.9 In May 1992, 6 months before the scheduled trial in November, Kevin Byrne learned that a fisherman had snagged a wreck in the Hauraki Gulf. He had pulled up a radar tower of a type similar to that on the "Altimira". Enquiries with the vessel's boatbuilder and the radar supplier revealed that the serial number on the radar was only one number out on that recorded by the supplier. Sun decided that it was worth the cost of mounting a dive expedition on the wreck.
- 2.10 After 2 dive trips, Sun established that it was the "Altimira". The divers recovered a switchboard key in place in the vessel's switchboard with the ranchslider key, necessary to gain access to the cabin, attached to it. The keys were removed and kept by Sun's solicitors.
- 2.11 Sun's recovery of the keys was not disclosed to Mr Gate. Instead, Sun served Mr and Mrs Gate with extensive interrogatories including questions relating to Mr Gate's possession of keys to the vessel. In answers to interrogatories, and later in signed briefs of evidence, Mr Gate committed himself to the story that he had the only set of keys for the vessel. The Gates' theory was that the vessel had been hot-wired by thieves or someone wanting to punish Mr Gate.
- 2.12 In the meantime in June 1992 Sun had also asked to inspect the set of keys which the Gates had retained (and unbeknown to Mr Gate, to photograph them). Later,

in November 1992 Sun wanted the keys again, this time for forensic examination. Mr Gate refused to produce the keys in response to this request. So Sun obtained a court order.

- 2.13 Sun wanted to establish a connection to the keys recovered from the wreck. Forensic examination would show whether the Gates' set of keys were copies or had been used to make copies. Mr Gate reluctantly released the keys after some delay.
- 2.14 On examination Sun's expert found that the keys had been mutilated by power wire brushing and grinding. So it was no longer possible to detect whether they had been used to produce copies. Mr Gate and various of his witnesses, were later to give explanations for the damage to the keys which the High Court and Court of Appeal described as "*absurd*" and "*bizarre*" respectively.
- 2.15 The proceedings went to trial in November 1993. Justice Fisher heard evidence from 66 witnesses over 19 sitting days. He found for Sun on all of its defences apart from misrepresentation of the purchase price of the vessel. The Judge's decision contains helpful summaries on the law relating to the application of fraud and contractual non-disclosure, misrepresentation and false statements in the insurance context. I review these in the following paragraphs.

3.0 Onus of Proof

- 3.1 One of the issues between the parties revolved around who carried the onus of establishing complicity by Mr Gate in the scuttling of the vessel. Sun argued the onus of establishing a loss within the scope of the policy was at all times on the Gates. Sun's policy was of the plain English type which used an "*accidental occurrence*" wording. It did not rely on the specific perils clauses normally used in marine hull insurance.

- 3.2 The Gates argued that they did not have any onus to prove the loss conclusively. Rather they only had to establish that prima facie the loss was accidental.
- 3.3 Justice Fisher held that effectively, the Gates only had to prove that the boat was actually missing to establish a prima facie claim under the policy. The onus then shifted to Sun to establish Mr Gate's complicity.
- 3.4 The Judge considered the decision in *Slatterv v Mance*.³ In that case the plaintiff claimed following the loss of his yacht by fire. The policy provided cover for losses proximately caused by certain specific perils including "*loss by fire*". Salmon J considered that the plaintiff only had to show that the loss had been caused by fire to establish a prima facie case. He distinguished cover for fire under the policy from losses covered by "*perils of the sea*" which requires proof of an accidental cause.
- 3.5 Sun Alliance relied on the decision in *Regina Fur Co Limited v Bossom*⁴ a decision of the English Court of Appeal. There the policy provided cover for "*all risks of loss or damage from whatsoever cause arising*". The plaintiffs claimed for losses arising from an alleged burglary. Sellers LJ considered that the onus remained on the plaintiff throughout to establish a loss of their goods by a peril covered under the policy.
- 3.6 However Justice Fisher did not consider that *Regina Fur* was on point. He considered that it was doubtful on the facts of *Regina Fur* that the plaintiff had even been able to establish a prima facie case. Therefore Sellers LJ's decision was obiter and therefore not heavily persuasive.

³ [1962] 1 Lloyd's Rep. 60

⁴ [1958] 2 Lloyd's Rep. 425

3.7 Justice Fisher considered that there was a clear distinction between legal and evidential burdens of proof. A legal burden of proof will usually amount to an essential step in the proponent's case. Failure to discharge the burden will mean loss of the case. By contrast an evidential burden is merely an obligation to adduce sufficient evidence to make the presence or absence of a given fact a live issue in the case. He referred to the position in jury cases. If an evidential burden is not satisfied, then an issue will not be put to a jury.

3.8 In the insurance context, the Judge considered that:

- (1) The accidental element forms an integral part of the peril insured against so it is a threshold step to be established by the insured;
- (2) The peril insured against is merely the loss simpliciter.

Justice Fisher held that an objective observer would say that the underlying purpose of an insurance policy is to insure against accidental loss. Therefore proof of accidental loss was an essential ingredient of the cause of action itself. That was the legal burden which the Gates had to satisfy.

3.9 By contrast the evidential burden only required the Gates to establish the primary facts. He concluded that it would normally be sufficient for the insured to prove the fact that the house burnt down or the vessel sank. Without more, the court would not consider owner scuttling or arson.

3.10 Effectively Justice Fisher concluded that there was no onus on the Gates to rule out scuttling to satisfy the legal burden of proving accidental loss under the policy. He held:

"House fires and boat sinkings are usually genuine accidents. Although arsons and owner scuttlings can obviously occur, the majority of citizens

are law abiding. Once it is shown that a house has burnt down, or that a vessel has sunk, it will be reasonable to assume that the owner was not implicated unless and until there is cogent evidence to the contrary."

- 3.11 The decision is not inconsistent with English authorities on the onus of proof. It leaves underwriters with two choices; putting the owners to strict proof without affirmatively pleading scuttling, or alternatively raising scuttling as an affirmative defence. If the former option is taken then the insurer is entitled to cross-examine the insured's witnesses and to call rebuttal evidence. But the underwriter would be prevented from presenting an affirmative case. If at the end of the insured's case the court is not satisfied on the balance of probabilities that the claim was genuinely accidental or caused by owner scuttling, then the plaintiff must fail.⁵

4.0 Standard of Proof

- 4.1 The standard of proof required for criminal allegations in civil proceedings has been the subject of controversy. Justice Fisher noted that there had been conflicting decisions which are not always easy to apply. The Judge distinguished between what he considered as two quite distinct concepts; the standard of proof demanded by law which he said should be influenced by considerations of legal and social policy, and the inherent probability of a particular factual proposition. He considered that the fact that people are not normally dishonest or criminal is a reason for raising the standard of proof. In the ordinary case policy considerations dictate that factual questions should be decided upon the balance of probabilities.
- 4.2 By contrast, allegations of serious misconduct bring into play the party's reputation. Mr Gate's counsel argued strenuously that his client's reputation was

⁵ The "Marel" [1994] 1 Lloyd's Rep. 624, 632 (Dillon LJ)

at stake because of the serious allegations Sun was making in respect of the scuttling and dishonesty factors and that he did not enjoy the safeguards of due process normally afforded to a criminal accused. In considering this submission the Judge took into account the fallibility of courts and the consequent need to raise their level of certainty beyond the norm when considering issues affecting reputation. The Judge held that:

"It is better frankly to recognise that where there is an allegation of serious misconduct against a litigant, the conventional civil standard of proof on the balance of probabilities is jettisoned. It is not enough to show that the misconduct is more probable than not. The degree of certainty called for is a high one which takes into account the disproportionate harm which would be caused to a person wrongly condemned. A court needs to be sure before making such a finding. And where serious crimes are alleged, the standard demanded will differ little from proof beyond reasonable doubt."

- 4.3 The decision is a clear signal that high standards of proof will be required when insurers raise affirmative defences relying upon allegations of fraud or criminal misconduct. As a result meticulous and exhaustive investigations must be made before such affirmative defences are pleaded. It is critical that investigations commence as soon as the claim is notified. At an early stage underwriters need to engage lawyers and investigators who must work closely together. The courts provide little sympathy to insurers who make serious allegations, and fail to meet what amounts to a rigorous standard of proof.⁶

⁶ See *Monkley v Guardian Royal Exchange* (High Court. Hamilton, CP209/88, 23 August 1990, Fisher J) 48 "... guilty of cruel and unjustified accusations against innocent victims" = increased general damages against GRE

5.0 Dishonest Propensiv

Mr Gate's Statement

5.1 At an early stage of Sun's investigation of the Gates' claim, it became readily apparent that Mr Gate had an unenviable history of dishonest activity. The approach of Sun's investigator and its lawyers was to have the investigator conduct a comprehensive interview of Mr Gate at which an orchestrated set of questions was asked. The questions dealt with the circumstances of the loss, Mr Gate's acquisition of the vessel, its value and condition, his financial position, his relationship to present and past business associates, and details of litigation he was currently involved in. Sun's strategy was to obtain as much information as possible at an early stage from Mr Gate. The interview then was used as the basis to determine further investigation primarily to check the veracity of Mr Gate's statements, and his past history.

5.2 Most of the interview was conducted by telephone. Sun's investigator then produced a substantial statement based on the telephone interview for Mr Gate to sign. Mr Gate later attempted to resile from the statements he had made. However he came to be under the mistaken believe that his telephone discussion had been taped by Sun's investigator. This may have been because of subsequent excessive reference to the discussion being "*recorded*" when all this was intended to convey was that Mr Byrne had taken notes. Rather than sign Sun's statement he instructed his solicitor to draft an alternative statement which essentially paraphrased Sun's statement. The signed statement still contained a large number of misstatements, one of which Sun successfully relied upon as an affirmative defence.

Sun's Allegations

5.3 Sun alleged that:

"Mr Gate is dishonest, has acted fraudulently, forged documents and committed perjury and/or is a person about whom such allegations have been made".

5.4 It relied on 5 separate cases to establish this allegation. The headings used by Justice Fisher in his judgment perhaps summarise the flavour of each case:

- * Gulf Marine forgery
- * Clegg/Sutch conspiracy
- * United Pacific Corporation failure to account
- * Auckland Savings Bank conspiracy
- * GST evasion

5.5 Sun effectively ran each as a separate trial within the overall trial. The hearing took on the nature of a criminal prosecution with multiple charges. Sun successfully established the essential ingredients required to prove each case and therefore the overall allegations.

5.6 Sun relied on both allegations of dishonesty, and proof of actual dishonesty to establish its defence.

Non-Disclosure Principles

5.7 Justice Fisher accepted the general proposition that it was not really necessary to go beyond s.18 of the Marine Insurance Act 1908 to establish the legal principles or which a non-disclosure defence is based. He followed the Court of Appeal's

decision in *State Insurance v McHale*⁷, that the court's approach to establishing the insured's actual knowledge or what he/she is deemed to have known, is subjective. But the insured need not personally know that a circumstance is material. Its existence only needs to be known to the insured for the duty of disclosure to arise.

5.8 Furthermore the Judge also considered that the circumstances need only influence the judgment of a prudent insurer armed with the knowledge of the actual facts. It need not be the determinative factor in accepting the risk.⁸ However Justice Fisher did not have to decide this issue because Sun called the actual underwriter to give this evidence, and the underwriter was predictably adamant that disclosure of the true position would have been decisive. All the expert witnesses (including firstly those called for the Gates) agreed that the dishonesty of the insured would be influential to a prudent underwriter.

5.9 Sun argued that taken collectively, Mr Gate's propensity for dishonesty established that he was a moral risk. There was a greater than normal risk of a fraudulent claim from him.

5.10 The Gates disputed Sun's allegations of Mr Gate's misconduct. They also argued that mere allegations unless ultimately substantiated are not legally required to be disclosed. The Gates also argued that Mr Gate had no duty to disclose even proven misconduct. The only concession was to agree that only proven criminal offending for which Mr Gate had been convicted should have been disclosed. But he had no previous criminal convictions, because he had never been caught.

5.11 Justice Fisher stated the issue as follows:

⁷ [1992] 2 NZLR 399

⁸ In *Pan Atlantic v Pinetop* [1994] 3 All ER 581 (the House of Lords reached the same conclusion).

"The ultimate question in the present context therefore concerns the moral character of the insured at the time the insurance contract is negotiated: Is he or she at that time a person more likely than usual to subsequently make a false claim?"

5.12 Justice Fisher considered the answer to this question lay in an insured's previous conduct. Therefore principles of prior dishonesty must be capable of being material. He considered that there were 3 specific legal questions:

- * *"Must every prior act of dishonesty be disclosed, however trivial and remote in time?"*
- * *"The second question is whether a prior act of dishonesty is capable of being material if no conviction has been entered with respect to the incident concerned."*
- * Finally the court had to decide whether mere allegations of dishonesty were capable of being material.

5.13 In answering the first question, the Judge distinguished between whether a circumstance was capable of being material as a matter of law, and a circumstance which was material as a question of fact. He considered that as a matter of law acts of dishonesty which were not crimes, which were trivial, or which were remote in time, would still be capable of being material. But whether each fact would actually influence the mind of a prudent underwriter was squarely a question of fact to be dealt with by expert evidence on the point. The Judge referred to

Edwards & Anor v AA Mutual Insurance Co⁹ and Reynolds and Anderson v Phoenix Assurance Co Ltd & Ors.¹⁰

- 5.14 In respect of the second question the Gates submitted that proof of criminal conviction was the only way in which former acts of dishonesty could be established in civil insurance proceedings. The Judge rejected this submission. He considered that the real question was whether the previous dishonesty had actually been committed. The Judge concluded that it was perfectly open to Sun to prove that Mr Gate had acted dishonestly on previous occasions before Sun agreed to insure the vessel.
- 5.15 Interestingly Justice Fisher considered that the fact that another court had previously ruled upon that point was not the real question. So previous proceedings relating to the alleged acts of dishonesty would not normally be of any relevance to the insurance proceedings. The Judge in the insurance proceedings is in a position to reach his/her own view after hearing all the evidence which the insurer could and did bring forward. So where the Crown has failed to obtain a conviction it is open to an insurer to run the same allegations (but with more or better evidence) in support of the moral risk defence.¹¹
- 5.16 Justice Fisher relied heavily on expert underwriters Messrs Twaddle & Freeman called by Sun. Both are experienced marine underwriters with many years of experience in the New Zealand underwriting market. These witnesses made the point that undetected dishonesty was even more material because it indicated that the insured was too clever to be caught and therefore more likely to successfully defraud an insurer.

⁹ (1985) 3 ANZ Insurance Cases para 60-668, 79, 160

¹⁰ [1978] 2 Lloyd's Rep. 440, 461

¹¹ March Caberet v London Assurance [1975] 1 Lloyd's Rep. 169

Allegations

- 5.17 The most contentious issue was whether mere allegations of previous dishonesty were capable of being material in law. Sun alleged that findings by a District Court Judge in a previous case involving Gulf Marine, and a Police complaint in relation to theft by Mr Gate from a previous employer, should have been disclosed by Mr Gate to Sun.
- 5.18 Sun relied on the decision in March Caberet v London Assurance.¹² In that decision May J considered that the insured had a duty to disclose the fact of an arrest charge and committal for trial, even though in truth he was innocent. However Justice Fisher preferred the subsequent decision in Reynolds & Anderson v Phoenix Assurance¹³ where Justice Forbes stated at p.460:

"With the greatest respect to Mr Justice May I must decline to follow him in his suggestion. The object of requiring disclosure of circumstances which affect the moral risk is, to borrow Mr Deyes' words, to discover whether the proposer is a person likely to be an additional risk from the point of view of insurance. The most relevant circumstance for disclosure is therefore that he has actually committed an offence of a character which would in fact influence the insurer's judgment. The proposer is bound to disclose the commission of that offence even though he has been acquitted or even if no-one other than he has the slightest idea that he committed it: the material circumstance is the commission of the offence."

Justice Forbes held that there was only a duty on an insured to disclose an allegation of criminal offending if the allegation was true.

¹² supra

¹³ supra

5.19 Justice Fisher followed this reasoning. He held:

"As I held earlier when speaking of materiality in general, whether any particular undisclosed circumstance was material is a question of fact to be determined by the court objectively, with the benefit of hindsight, and in the light of all the evidence currently available to it. I can see no obligation to disclose circumstances now demonstrated to have been immaterial. A circumstance is immaterial if it would not have influenced the judgment of a prudent insurer armed with actual knowledge of the full facts. If during a disputed insurance case the true facts as to dishonesty or wrongful conduct are traversed and factual conclusions arrived at, the presence or absence of mere allegations at the time of the proposal becomes irrelevant. In those circumstances materiality will turn upon the facts underlying the allegations, not the allegations themselves."

5.20 Ultimately the Judge had sufficient evidence to decide that the allegations were true. So he did not have to decide this issue to resolve the case.

5.21 However Justice Fisher's decision does raise a potentially difficult issue for insurers. Clearly underwriters are influenced by allegations of misconduct and dishonesty. If the allegations are disclosed to them, they have an opportunity to investigate to see if there is any truth in them. But insurance is not a right.¹⁴ Underwriters are likely to simply decide in the face of serious allegations not to accept the risk. Non-disclosure of the allegations will deprive underwriters of this opportunity. Then, in a claims situation, the underwriter will have to prove the truth of the allegation to be justified in avoiding the policy. The existence of the underhand allegations will not of themselves be enough.

¹⁴ March Caberet supra, 177

5.22 Accordingly failure by the court to accept non-disclosure of allegations as material is an undue restriction on principles of non-disclosure. Some commentators have gone as far to say that it is an undue restriction on an underwriter's freedom to contract¹⁵. The law should follow commercial reality. But the courts in New Zealand currently seem anxious to limit non-disclosure defences.

6.0 Fair Trading Act

6.1 The Gates raised a novel argument under the Fair Trading Act 1986. Essentially they argued that Sun was guilty of misleading and deceptive conduct. They complained that Sun's point of sale brochure, and proposal gave them false impressions that:

- (1) The value which would form the basis of the insurance cover was to be based on replacement cost whereas in fact it was to be based upon market value; and
- (2) The insured would be specifically warned as to all his or her legal duties with respect to the policy, whereas in fact there were undisclosed duties relating to non-disclosure, misstatement and fraud.

6.2 Justice Fisher rejected this argument. He accepted that Sun's brochure did raise false hopes that it would be prepared to agree to a value based on replacement costs. But on the evidence, dealings between Sun's underwriting representatives and Mr Gate's broker made it clear that Sun was only prepared to insure the vessel for its market value.

¹⁵ See 'Proof of Criminal Allegations In Marine Insurance Cases', C.C. Nicol (1995) 4 Int ML 85

- 6.3 The allegation that Sun failed to warn Mr Gate of his legal obligations exercised more of the Judge's time.
- 6.4 Sun argued that if the court accepted this argument it would subvert accepted insurance law principles based on the duty of utmost good faith established by *Carter v Boehm*¹⁶ and followed in a long line of subsequent decisions.
- 6.5 Ultimately Justice Fisher held that in the absence of any duty to warn at common law, and without any specific statutory intervention, the Fair Trading Act could not apply. Accordingly there was no breach of the Fair Trading Act by Sun Alliance.
- 6.6 Sun argued that in any event there was a fatal flaw in the Gates' argument. Even if Sun had breached the Fair Trading Act, it was difficult to see how they could possibly have been entitled to any damages. Obviously if Sun had given a warning to Mr Gate and he had followed it, then he would have disclosed his propensity for dishonesty. Sun's underwriters would not have accepted the risk. Neither would any other underwriter. The Gates would effectively be uninsurable. So they would have been no better off.
- 6.7 The court accepted this argument. Justice Fisher's decision on this issue has been reinforced by the High Court in *Quinby v General Accident*.¹⁷

7.0 The Court's Findings on the Scuttling Complicity

- 7.1 Sun had no direct evidence from those involved or from any eye witnesses that Mr Gate was involved in scuttling the vessel. Its case was largely based on

¹⁶ (1766) 3 Burr 1905

¹⁷ [1995] 1 NZLR 736

circumstantial evidence, especially relating to Mr Gate's actions surrounding the loss of the vessel. Furthermore there was a statement from a close business associate of Mr Gate. However this statement was made after they had fallen out. Therefore the witness, Mr Wallace, was subject to a strong credibility attack by the Gates' counsel.

7.2 The essential factors relied upon by Justice Fisher were as follows:

- * Significant over-insurance within 2 months of the loss.
- * No obvious alternatives to owner scuttling particularly since there was no evidence of theft of items on board when Sun's divers first located the wreck.
- * No ready access to the keys by anyone else.
- * Mr Gate's conduct in respect of the keys to the vessel during the investigation period.
- * Mr Gate's admission to his former business colleague reported to the Police before Sun located the wreck with keys on board, that the thieves had keys.

7.3 These factors were the high point of Sun's case. There were a number of more minor issues which the Judge was prepared to accept as cumulatively supporting Sun's argument. Really the breakthrough for Sun was in locating the wreck of the "Altimira". Until then the investigation had been like a murder investigation without a body!

7.4 In the face of the circumstantial evidence and admission to Mr Wallace, the Judge had to measure up Mr Gate's denial that he had been involved. That effectively

required a careful consideration of Mr Gate's credibility. Mr Gate was not assisted by Sun's success in establishing the 5 cases of previous dishonesty. Ultimately Justice Fisher had this to say about Mr Gate's credibility:

"Judges are always cautious about allegations that witnesses have deliberately lied in the witness box. Mindful of judicial fallibility, we generally prefer to leave open the possibility of honest mistake. Occasionally, however, the signs of deliberate lying are inescapable. In this case I had the opportunity to observe and listen to Mr Gate as he gave evidence over a period of 3 days. His demeanour, his preposterous explanations, and the eternal and external inconsistencies in his evidence, pointed unmistakably in one direction. One cannot escape the conclusion that over a period of 3 days he lied as a matter of course upon every conceivable subject. And what is distinctive in his case is that he is not merely an inveterate liar. His efforts in creating fictional correspondence and personal notes, tampering with prospective exhibits, manipulating witnesses and forging documents, can only be described as indefatigable. He is a man obsessed with the imaginative illusion. His future may well lie in writing novels or directing films. It certainly does not lie in giving evidence. I decline to take at face value any exhibit, document or evidence which he had anything to do with in this case. He is not a man to be believed when he says something on oath. I am not the first Judge to come to that view but I have reached it independently of others."

- 7.5 Not surprisingly, Justice Fisher found that there was nothing in Mr Gate's sworn evidence to counter balance the defence case over scuttling which he held was overwhelming.

8.0 The Result

- 8.1 Sun only failed to establish that Mr Gate misrepresented the actual purchase price of the vessel. The difficulty for the Judge in unravelling the facts surrounding the swap deal on the vessel worked against Sun on that allegation.
- 8.2 However, Sun was successful on all of its other affirmative defences. In rejecting an application for a stay of execution of the costs award the Judge recorded that Sun had been successful on no less than 10 independent routes, each resting on its own foundation of fact and credibility.

9.0 Costs

- 9.1 Following the judgment Sun argued that the Gates should fully indemnify Sun for its legal expenses incurred in defending the claim. Sun's submission was based on the fact that it had been put to significant cost and inconvenience by the Gates in investigating the claim. The Gates had fraudulently scuttled their own vessel and then forced Sun to incur the costs on a deliberately false premise.
- 9.2 Justice Fisher reviewed New Zealand decisions where the courts had awarded greater than scale costs. Ultimately he relied on the decision in *The Ny-Eastevr*¹⁸. That was also a scuttling case. Deputy Judge Hamilton said at p.70:

"There is apparently no case in which an order other than party and party costs has been made in a case where the insurers have made out a defence of scuttling: Apparently nobody has made an application and certainly none was made in the recent case of the Captain Panagos.

¹⁸ [1988] 1 Lloyd's Rep. 60

I approached the matter on the basis that one has to look at the whole of the behaviour of the unsuccessful party. On the basis of my findings the position is that the plaintiffs, Mr Horton directly and his company indirectly through him being its alter ego, have been guilty of fraudulent conduct and of pursuing a claim when, on the basis of my judgment, they must have known it was a false claim; they pursued it knowingly.

In those circumstances, there being no question of innocence of the particular plaintiffs who were involved here (as in the case, for example, of those who have advanced money in other assignees of policies) I conclude that this is a case where the plaintiffs pursued a claim in respect of what on my finding was a crime - involved fraud - and is about as outrageous behaviour as one can find. In those circumstances, in the exercise of my discretion, I think it is appropriate in this case to order that the costs should be paid on the indemnity basis set out in 04.62,R.12(2)".

- 9.3 Justice Fisher wholly accepted those comments. He awarded Sun Alliance solicitor/client fees of \$355,995.32 and disbursements totalling approximately a further \$50,000. The costs did not include the expenses of the investigation, diving expeditions, and other incidentals amounting to \$182,409.59.

10.0 The Gate's Appeal¹⁹

- 10.1 The Gates appealed against all of the factual and legal findings in the High Court, except the actual findings of dishonesty in relation to the moral risk factors and the Fair Trading Act aspect. However Mrs Gate was separately represented. She raised for the first time the issue of whether she had a separate interest under the

¹⁹ (1995) 8 ANZ Insurance Cases 61-251

policy and was therefore still entitled to indemnity despite Mr Gate's fraudulent conduct in scuttling the vessel.

- 10.2 The Court of Appeal rejected the separate interest argument. Primarily this was because it had not been raised in the High Court. The Gates had owned the "Altimira as a "husband and wife" partnership. The court reaffirmed its earlier decision in *Kelby v National Insurance Company of New Zealand*,²⁰ that as a matter of policy where there is disentitling conduct by one partner it must deprive the other partners of cover.
- 10.3 Sun raised other arguments including a head on attack on the only New Zealand case supporting a separate interest argument²¹ and construction of the policy. On the latter, the court recognised the strong arguments supporting Sun's contention that its policy would prevent Mrs Gate from recovering in any event. But it had no need to express a firm view.
- 10.4 The Court of Appeal also endorsed Justice Fisher's decisions on non-disclosure of moral risk factors. But it raised an ongoing concern about innocent non-disclosure of material facts which may ultimately allow insurers to decline otherwise bona fide claims. The Court commented on the desirability of insurers warning insureds of their general obligation to disclose all material facts at the time of entering of the policy and in particular warning that full and honest answers to all questions of the proposal may not be enough to discharge this general obligation of disclosure. That is already law in Australia by virtue of the Insurance Contracts Act 1984. Obviously New Zealand insurers will be treated more sympathetically by courts if similar notices are included in proposals.

²⁰ [1995] 1 NZLR 641

²¹ *Maulder v National Insurance* [1993] 2 NZLR 351

10.5 Finally, the Court of Appeal upheld Justice Fisher's decision on actual costs. The Gates argued that:

- * Sun spent too much time pursuing positive defences other than scuttling.
- * Sun should have gone to the Police rather than conducted the investigation itself.
- * Because Mrs Gate was innocent of fraud she should not have to pay.

10.6 The court rejected all of these arguments. Sun submitted that it was not appropriate for the Gates to say that Sun did too much work and incurred too many expenses on the trial, and that it could have successfully resisted their claim more easily and cheaply. It relied upon the following factors:

- * Sun had effectively prosecuted the case as a fraud trial.
- * Because the trial involved proof of fraudulent and other serious criminal conduct Sun had to establish the necessary dishonesty to the high criminal standard with compelling evidence.
- * Substantially the preparation and proof involved analysing and putting forward extensive circumstantial evidence.
- * At the same time Sun had to run 5 other fraud trials simultaneously with a factual enquiry in each case did not overlap and again prove each element of fraud or dishonesty (forgery, perjury, conspiracy to defraud, etc) to the same criminal standard.

10.7 The Court of Appeal accepted that the trial Judge was in the best position to ensure that an insurer is not able to pursue an open-ended enquiry, and that this

trial Judge was well-placed to determine whether Sun had acted and spent reasonably.

11.0 Conclusion

11.1 The Gates relentlessly pursued their claim. At a critical time they applied to the High Court for a priority fixture on the basis that Sun's allegations of misconduct were affecting Mr Gate's reputation and consequently his ability to conduct his business. They obtained a sympathetic decision, and were placed ahead of the long queue of deserving litigants to obtain a trial date in November 1993. They compounded the cost and inconvenience caused to Sun by appealing Justice Fisher's decision.

11.2 The case has become a high profile decision for the New Zealand insurance industry. It is a clear message to insurance fraudsters that insurers are prepared to go to extensive lengths to defeat fraudulent claims. Where fraud is established the protagonists are likely to feel the full sanctions available to the court.

12.0 Postscript

12.1 Immediately following the outcome of the High Court trial, the Police arrested Mr Gate. He was charged with attempted fraud on Sun Alliance, and attempting to pervert the course of justice by tampering with the keys.

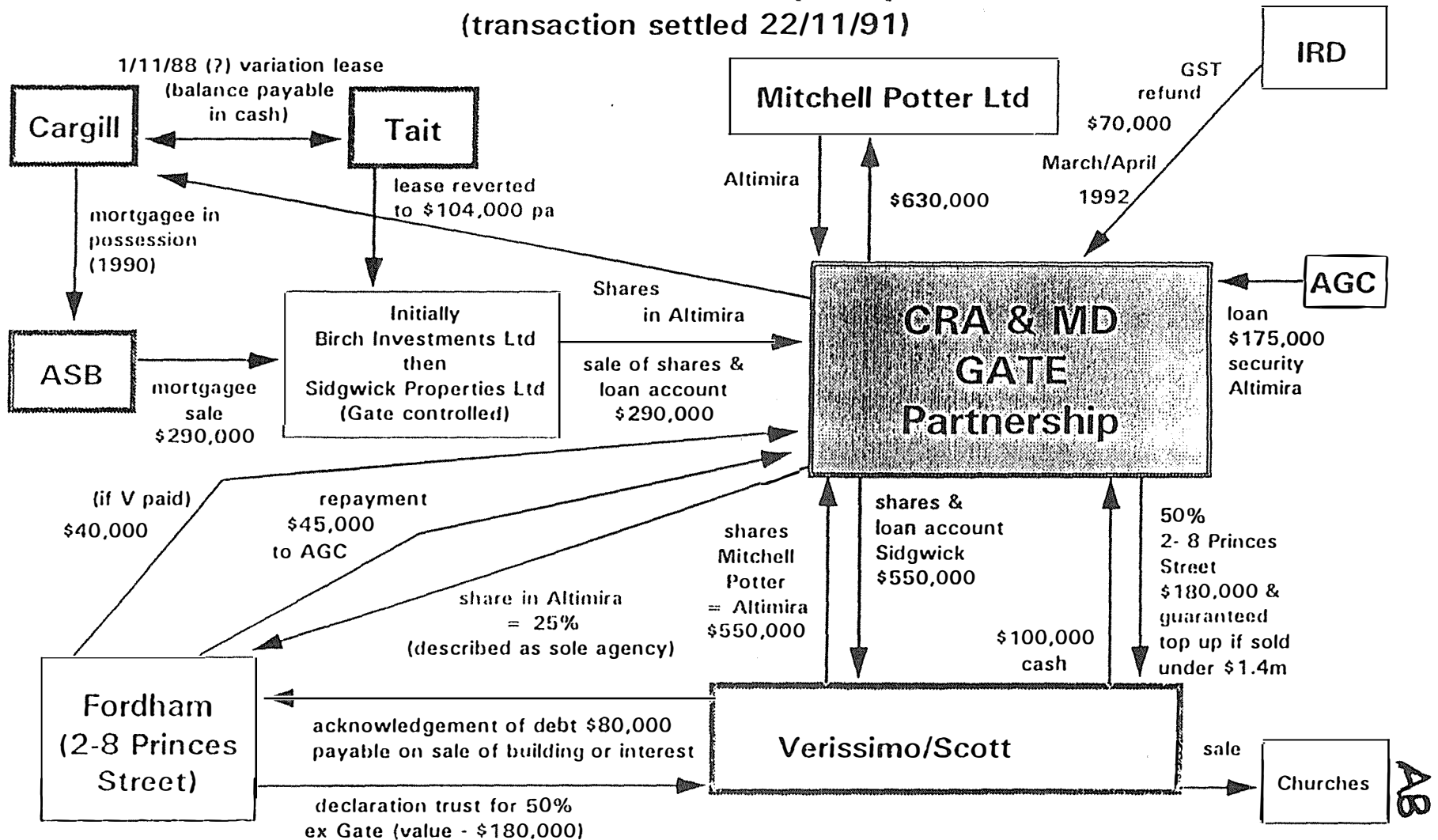
12.2 After an extended deposition hearing immediately prior to trial in the High Court, Mr Gate pleaded guilty. He made a full confession. He was sentenced to 2 years in prison. Mr and Mrs Gate are now bankrupt and Sun bought Royal and recently Commercial Union.

Philip Rzepecky

Appendix 1

Acquisition Altimira/Sale 262 Wakefield Street

Execution of conspiracy (transaction settled 22/11/91)



AB