

STREET FIGHTING IN THE PACIFIC

When we talk of street fighting in the Pacific, I naturally think of the adventures of legal business in some Pacific territories. But there is another meaning to the street fighting topic, and that is the history of riots and insurrection in various Pacific territories.

Unfortunately (for TOWER), I have become somewhat of an expert on riot, unrest and insurrection claims, having advised TOWER now on four separate occasions in relation to civil unrest, insurrection, coups and riots in various Pacific territories. These include:

- The 2000 coup in Fiji
- The student riots in Papua New Guinea
- Two lots of riots and civil unrest in the Solomon Islands.

TOWER has operated in the South Pacific since the early 1870s. Along with QBE, TOWER has had a long-term and substantial involvement in the general insurance market in most major territories in the South Pacific. Currently, TOWER has significant operations in Fiji, Samoa, American Samoa, Tonga, Cook Islands, Solomon Islands and Papua New Guinea. Previously, TOWER had operated in Vanuatu and Niue, but these offices have since been consolidated. I have been TOWER's principal legal adviser throughout the Pacific since the early 1990s and have been privileged enough to be involved in numerous and varied cases in the South Pacific from the usual amount of arsons and frauds to endless personal injury defence cases and liability defences, as well as litigation against governments over tax disputes and CTP rates. Over these years, I have built up an extensive and very useful supply of contacts throughout the islands, both legal, governmental, investigative and business. But more importantly, I have gained, I think, a real understanding of the different cultures, governments, etiquettes, court systems and legal systems throughout these jurisdictions.

Legal Sources

In my opinion, the most helpful research aid in obtaining information about Pacific territories is the Pacific Islands Legal Information Institute, which is an initiative of the University of South Pacific School of Law. It contains varying amounts of legislative, constitutional, common law and research information from almost all Pacific Island jurisdictions. These range from the more substantial collections in areas such as Fiji and Papua New Guinea, to small amounts of anecdotal information from territories such as the Pitcairn Islands. If you are looking for information in relation to any particular Pacific territory, this is a very good starting point. There is also, of course, the journal of South Pacific and the law reports of Pacific Islands, also both initiatives of the University of South Pacific Law School.

Insurance Law and Regulation

The extent of regulation of the insurance industry and statutory reform of insurance law varies significantly between the jurisdictions. Some

jurisdictions have absolutely no regulation and absolutely no statutory reform of insurance law. Other jurisdictions are very tightly regulated. Thankfully, for New Zealand practitioners, most of the law reform regulation is based upon New Zealand Insurance Law Reform found in the Acts of 1977 and 1985. A helpful summary of this follows.

Fiji

In Fiji the insurance industry is regulated. The legislation is the Insurance Act 1998, under which insurers and intermediaries are required to be registered. The Act is administered by the Reserve Bank of Fiji. It contains specific capital insolvency requirements. The Insurance Act 1998 does not expressly provide authority on the Reserve Bank in relation to claims decisions. However, I have been involved in a number of situations in which the Reserve Bank has attempted to influence insurers in the handling of claims.

There is a provision in the Insurance Act - Section 80, which states that if the Reserve Bank is satisfied that an insurance company is carrying on its business in a manner "*detrimental to the interests of any insured*", the Reserve Bank can issue written directions. On occasions the Reserve Bank has attempted to utilise this provision in a claims context. I have always argued that the provision is clearly not intended to relate to claims, rather the **financial management** of insurance companies. The issue has never been tested in court and, as with any of the smaller jurisdictions, disagreements with regulators are usually resolved by communication and reasoned conciliation.

Fiji does have an Insurance Law Reform Act. It is the Insurance Law Reform Act 1996, an amalgamation of many of the provisions in New Zealand, including those in the Insurance Law Reform Acts 1977 and 1985 and also the Law Reform Act 1936 relating to claims directly against insurance companies. In particular:

- (1) There is a direct copy of Section 11 of New Zealand's Insurance Law Reform Act 1977 and of Section 9 Insurance Law Reform Act 1977;
- (2) There is also direct regulation of the authority of the right on insurance companies to apply average, similar to the provisions in the 1985 New Zealand Insurance Law Reform Act.
- (3) The insurable interest provisions in the New Zealand Insurance Law Reform legislation are also included;
- (4) There is strict regulation of the duty of disclosure (as opposed to the duty not to make misstatements). It sets out the duty on a similar basis as in the Australian Insurance Contracts Act.

Papua New Guinea

Papua New Guinea operates a tightly regulated insurance industry covering insurance companies, intermediaries and assessors. The industry regulator is the Insurance Commissioner who operates under the Insurance Act 1995. Again, the Act largely relates to financial and prudential regulation of the insurance industry, although the commissioner does from time to time become involved in attempting to resolve disputes over claims. Whilst the commissioner has no jurisdiction to make orders or direct insurance companies in relation to the handling of claims, I have on a number of occasions met with the Insurance Commissioner to attempt to conciliate disputes over claims.

There is no insurance law reform legislation as such in Papua New Guinea, except for the very short insurance (miscellaneous provisions) Act 1975 which codifies the obligation on insurance companies to actually reinstate rather than cash settle where there is an interested party.

Solomon Islands

The Solomon Islands has a similar regulatory regime with an Insurance Commissioner, but there is no law reform legislation relating to insurance practice.

Samoa

Samoa has a regulated insurance industry and the applicable legislation is the Insurance Act 1976. Again, this legislation governs only the licensing and prudential regulation of insurance companies and is nowhere near as prescriptive or detailed as the legislation in force in Fiji or Papua New Guinea.

There is no specific law reform legislation in Samoa.

Cook Islands

The insurance industry is currently not regulated in the Cook Islands, but the government has recently commissioned a report on regulation of the insurance industry in the Cook Islands, and that is likely to result in legislation similar to that in other jurisdictions.

There is no insurance law reform legislation.

Tonga

Tonga is totally unregulated in the insurance industry, except for some somewhat obscure tax laws relating to offshore insurance companies and liability to pay tax.

Imagine no Section 11 or Section 9!! In Fiji, TOWER recently had a case struck out by the High Court on the grounds that the proceedings were not

brought within a certain time of the claim being declined, as was required by the policy. Similarly, issues such as causation in exclusion clauses are not as burdensome in most jurisdictions. To this extent many New Zealand and Australian cases are of limited use. It's always important to consider in each case whether the law being considered follows common law or is altered by local legislation. For example, cases considering section 11 ILRA 1977 and causal issues in temporal exclusions would be of no use in PNG, whereas cases in NZ on sections 5 and 6 ILRA 1977 will, because they adopt rather than alter the common law.

Procedure

As far as procedure is concerned, most jurisdictions have adopted in one form or another either the New Zealand or the English rules of procedure, and in any of the jurisdictions New Zealand, Australian and English cases are highly persuasive, if not binding.

The court systems vary significantly, some relying on NZ as final courts and some in which courts of custom have significant jurisdiction.

Liability Defence Work

Liability defence work is another issue. Cast your mind back to the days before 1972 in New Zealand. That is the position in all the Pacific Islands.

Most of the jurisdictions in which I operate have compulsory third party motor vehicle insurance legislation, and this gives rise to many personal injury cases for insurers. The level of damages awarded in most countries varies significantly. For example, until very recently, the Cook Islands has had a very low level damage awards, although this is starting to creep up. There have been some somewhat scary judgements recently in Fiji, indicating that the courts are more pro-active. In Papua New Guinea the awards are relatively low.

Similarly, most jurisdictions have workers' compensation legislation, and in a number of jurisdictions the potential plaintiff has to elect whether to take the workers' compensation no fault compensation or to sue at common law. By and large, the level of exposure depends on who is injured. It is a sad fact of life in the Pacific that most of the nationals live with very little or no actual income. Given that the level of damages awarded is often based on lost future income, the awards tend to be very low.

My experience is that Fiji would be the most litigious territory in the personal injury area and, at any one time, we have numerous personal injury defence cases on the run. Almost all are settled before court, although occasionally we are required to take one to trial to send the right message.

Litigation in the Islands

I receive many calls from my colleagues in New Zealand for advice on who to use and how to conduct cases in the Pacific Islands, and over the 10 or 15 years in which I have been running cases there, I have learnt, often the hard way, the best way of going about business.

Except on a case-by-case basis, it is very difficult to be admitted in most Pacific jurisdictions. Whilst I am actively involved in cases in the Pacific and have arranged for New Zealand counsel to be admitted from time to time to run difficult or technical cases, I have managed to form relationships with good lawyers in all jurisdictions. In fact, some of our best legal representatives practise in some of the smallest and most remote jurisdictions.

What I found when I first became involved in this work was that TOWER, being a multi-national, had gravitated to the more ex-patriot dominated major law firms in the islands. I would have to say that I found their devotion to the client, not to mention their charging regime, to in many cases to be not what TOWER was looking for. I have managed to forge relationships with solicitors in almost all of our jurisdictions and now have a great team of local lawyers.

The extent to which I allow the lawyers to run their own cases depends largely upon my perception of their ability to run insurance cases, and this does definitely vary from jurisdiction to jurisdiction. By and large, I have a very hands-on role in running cases and the local lawyers work closely with me. In fact, if there has been any falling out between TOWER and local solicitors, it has occurred because of resistance from the local solicitors to my direct involvement in cases.

As I said, I am very hands-on in my involvement in the Pacific. I regularly travel to the Pacific, and take a personal role in briefing witnesses for major trials. Of course, in almost all Pacific jurisdictions, there is no such thing as exchange of briefs of evidence. It's back to the old days and trial by ambush. When running fraud cases, I find that hugely advantageous and actually great fun. What it means is that if you put the work into preparing for trial, properly briefing your witnesses and analysing the evidence, you have a huge advantage over many local lawyers who tend to turn up on the day with a bunch of witnesses and no real strategy.

Working in the Pacific involves dealing with people with numerous language and cultural differences. Whilst we operate in the commercial area, as any practitioner will understand, many eye witnesses and witnesses of fact will be people who were at the place in question. These may be anything from local villagers to village chiefs or even the local magistrate. I usually visit these territories with my favourite New Zealand private investigator and we locate, brief and manage our witnesses. In Papua New Guinea, this creates its own unique challenges.

In one case a few years ago our key witness was the local village magistrate who lived about two hours' walk out of Mount Hagen in the Papua New Guinea highlands. He was the key witness to a case involving a major riot which had caused over \$1,000,000 damage to TOWER's client's property. The riot occurred around about the time of the last elections and was clearly motivated by anger against our insured who was connected to the successful MP. Most insurance policies in remote areas of Papua New Guinea and some other jurisdictions exclude loss or damage caused by riot, but of course by the time we were preparing for trial, what was quite clearly a riot involving 300 or 400 angry protesters leading to demolition and looting of the insured's business, had become a simple burglary with supporting police documentation, police witnesses and other people of note. Luckily, we had secured the necessary witnesses well before the insured had an opportunity to speak to his friends in the local police force, and one of those witnesses was the local village magistrate, Winbruk Wok. Whilst meeting him at about four foot tall was an incredibly interesting cultural experience, it is important to cast aside our typical white man's attitude to this culture. This man was a person of immense mana in the area. He regularly held court in his local village and had authority that I would suggest would be roughly equal to a District Court Judge in New Zealand.

Clearly, a persuasive and compelling witness. As most people know, in Papua New Guinea there are over 1,000 languages to communicate between people from other villages. Unfortunately, our Magistrate did not speak pidgin. His only language was the local village language and, in order to interview and brief him, it was necessary to have two translators. We found a local policeman who spoke the village language and pidgin and then another person who spoke pidgin and English. We interviewed and briefed this witness on tape and then our New Zealand transcribers typed the English translation. As a sole consequence of having this incredibly powerful witness support our case, the insured withdrew his claim and discontinued all proceedings. He knew he was beaten.

There is absolutely no use in places like Papua New Guinea and the more remote areas of other Pacific jurisdictions in turning up with a pen and a pencil and thinking that you are going to take a brief of evidence off someone. Almost invariably, the people will not speak English and, if they do it, will be very, very limited. As such, it is imperative to use a translator. A statement taken off someone who did not understand it at the time is of no use and will be demolished once the witness is in court. For that reason, we tape record all interviews without exception. That way the translation can be scrutinised, there can be no suggestion of bribing (not uncommon in some jurisdictions) and, whilst of no particular evidential value, has certainly proven invaluable in ensuring the integrity of our evidence and witnesses and clearing up any misunderstandings in the future.

There is a place about four hours' drive inland from Lae on the other side of Papua New Guinea mainland. It is called Kainantu. It is famous because the local police station (an oversized ship's container) has a resident python. The police keep it in a cage out the back and explained to me with great enthusiasm how they have never failed to extract a confession from people they put in the cell with the python.

A few years ago, TOWER suffered a fire loss in the vicinity of \$1.5M in this town. It was a large trade store, the likes of which are dotted all over Papua New Guinea. Initially, the cause was put down to electrical, but our forensic and general investigators managed to overturn that decision. Witnesses had been got to but, finally, after a significant time, we located two witnesses who had been run out of town by the employer. These witnesses worked for the owner of the building next door and they had been cooking at the time of the fire.

In Papua New Guinea most trade stores, which are quite large operations, have what is called a kai bar attached. It is the Papua New Guinea version of a takeaway bar, and the deep fried lamb flap is the Papua New Guinea version of fish and chips. The main difference is that the food isn't cooked to order. They cook all the food the night before and leave it dripping in the display stands for people to buy in the morning.

The big trade stores are owned by quite large corporates, but they employ locals to cook the food. Paranoid that the locals will give away all the food to their wontoks (pidgin for family), they developed a practice of locking the people in the building at night (padlocks on the outside) and letting them out in the morning. Unfortunately, these poor fellows have to cook while they are there and our prime witness, located cowering in the corner of his local village, was the cooker. He put on a load of lamb flaps for his friends and fell asleep. He woke up to flames coming from the deep fryer which spread and burnt our building down. He had been sworn to secrecy by his boss (an ex-patriot) and told that if he admitted this to anyone he would be killed. Our witness, 'Paulus', had then been dispatched to his village after giving a false statement to the police.

Paulus was convinced to tell us the truth, but was very scared for his life. We had to interview him and obtain a formal record of his evidence. So it was decided to move him to Port Moresby.

There are, of course, no roads between the Lae side of Papua New Guinea and the Port Moresby side. So we put him on a plane and flew him to Port Moresby. Rather than flying our investigator back out there to re-interview him, we tried to do it over the telephone. Luckily Paulus spoke pidgin and we arranged for a local pidgin speaker to translate. We set up a speaker phone and commenced the interview. Paulus froze. He could not work out where the voice was coming from. He kept picking the phone up and looking under it

and would simply not talk to it. Finally, our local representative explained to us that we were wasting our time. Paulus was convinced there was a spirit in the phone and there was no way that he was going to talk to some machine like that.

So we had to put him up in a hotel in Port Moresby. It's a real wide eye opener. This man had never seen the water. When he first flew into Port Moresby, all he could say when pointing at the water was, "Queen over there". All I could imagine was that this was a relic of some missionary training relating to the Queen of England living across the ocean. When we finally met with him we had to strap him down in the hotel lift and, once he got to the hotel room, he slowly relaxed while clicking non-stop through all the Sky television channels 24 hours a day. He provided us with a true and honest version and that accorded completely with our forensic evidence.

Unfortunately, he had to stay in Moresby because if he had returned to his village he would have been killed. The end result was that the other side crumbled and we made a recovery in excess of \$1,000,000. All this because of Paulus the cooker.

Riots and Insurrection

In the years that I have operated in the Pacific, I have personally managed litigation in, as I mentioned, four separate situations of insurrection, riot or general civil unrest. Out of the 2000 Fiji coup came the leading decision around the exclusion for insurrection – Tapoo Holdings Ltd v Stuchbery out of the Supreme Court of the Fiji Islands. This was more a case relating to causation, and the law applied was that from *Spinney's* case in 1980, probably the leading insurrection case.

Some of the interesting challenges for TOWER and other insurers operating in Fiji at the time of the 2000 coup were actually the question of causation. There is no doubt, of course, that George Speight attempted to overthrow the government and what he did amounted to insurrection, but of course the insurance claims mostly arose out of the riot in the city centre. In addition, there were sporadic acts of arson, and the important lesson I learnt was to treat each case on its merits. There was always a tendency, especially in non-legal circles, to label an event as insurrection or riot (sometimes riot is and sometimes riot is not covered) and therefore declare that insurance may or may not apply. But what you have to remember is that whether there was a riot or an insurrection occurring in the country at the time, in the cold light of the court room you have to prove that that particular loss was caused by or arose from (depending on the policy wording) insurrection or riot.

What I found myself stressing time and time again, both to the Fiji Insurance Council, local lawyers and all involved was that there can be no general declaration in events such as this as to what will or won't be covered. Each policy depends upon its own wording and there is a myriad of wordings out

there. For example, in the Suva riot, if the policy excluded loss caused by insurrection, it could be questionable as to whether the exclusion would apply to a riot that occurred in the central city a number of kilometres from the act of insurrection.

That would require much more direct evidence than if, for example, the policy excluded loss "arising from" insurrection. The latter, obviously, requires a much lesser causal nexus.

In the end, TOWER settled all of its claims on an ex-gratia basis and with the full co-operation of the re-insurers involved. There was argument either way as to which way the court would go, and in the end the court upheld the decision by Lloyds to decline the claim on its particular wording.

The next issue that comes out of the repeated events is the question of riot. As most lawyers will know, the term riot is defined in some detail in most criminal codes and this applies across most Pacific jurisdictions. Again, however, there is no point in declaring that there was a riot in that area of town and therefore the claim will be declined. Depending upon the particular wording of the exclusion, it may be necessary to prove on a case-by-case basis that the rioters actually caused the damage. That is where TOWER's investigators move in, and we learnt another salutary lesson about the collection of evidence.

In Papua New Guinea there were significant riots in the early 2000s as a result of student dissatisfaction with the Government funding. In one particular riot TOWER insured a large chicken restaurant, probably the PNG equivalent of KFC. The place was burnt to the ground and we managed to identify a number of witnesses who saw it happen - or so we thought. We obtained a full and detailed brief of evidence from a witness who told us where the people came in, who struck the match, where the fire started, how many of them, and we were fair and square within the definition of riot in the criminal legislation. Unfortunately, when we asked him where he was he told us that he was at home at the time and we realised that he was of no use at all as a witness.

What transpired was our first salutary lesson in the Pacific relating to language issues. Somehow, temporal issues are lost in the translation from pidgin to English and, whilst this guy was not deliberately lying to us or deliberately trying to get into the limelight, when he spoke to us it sounded like he was there at the time. Now the first thing we do when briefing witnesses is to draw a diagram of the scene and to ask them, "Where you standing?"

Ethical Issues

In some of the Pacific Islands corruption and ethical standards are something that New Zealand lawyers have to grapple with. I am not suggesting for one

minute that corruption is rife in the Pacific. I tend to think somehow that it is a little bit more out in the open than perhaps it is in other countries. But we do have to remind ourselves that we are officers of the New Zealand Court and I don't care where I'm working, I apply those standards.

Often it's when dealing with your own people like local investigators or lawyers that you have to rein them in and explain to them that we are not prepared to pay witnesses or arrange for a certain witness not to make it through immigration.

You certainly have to think outside the square and be prepared to work within the culture you are working in, but obviously we must all draw the line at being drawn into the temptation to grease someone's palm to get a result. That is a line that we would never cross.

I do not believe that in any of the Pacific Islands I have operated in any of the judgements or judicial processes I have been involved in have been in any way tainted. There are cases such as those that arose out of the 2000 coup in Fiji where the impartiality of judicial officers has been questioned, but at the end of the day I believe that the biggest challenge open to the courts in the Pacific is resources and the ability to fund top quality judges. They rely heavily on New Zealand and Australian aid in that respect and, when appearing in almost all of the appellate jurisdictions in the Pacific, you will find New Zealand or Australian or even English judges. I personally have the utmost faith in the impartiality of the judiciary in all of the countries in which we operate and, if I was not so satisfied, I do not believe we could operate there.

The Pacific side of my practice has been immensely enjoyable for me and I believe will continue to be so. It's law as more senior practitioners remember it, street fighting both literally and figuratively, and real cases.

I am talking about common law before all the consumer and law reform legislation was passed in New Zealand, trials the way that only my predecessors in practice can remember them where witnesses actually gave evidence rather than reading a prepared script.

The cases are factually fun as well as legally and procedurally challenging. I don't physically get up to the Pacific as much as I should, but when I do I love it. It's an adventure, even if it does involve a bit of street fighting.

This paper is the work of Andrew Hooker and does not reflect the opinion or position of TOWER in any way.