IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 70 OF 1991
(High Court Civil Action No. 76 of 1991)

BETWEEN

JITENDRA CHAND LAL
& DINESH PRASAD — APPELLANTS

-and-

CAR RENTALS PACIFIC LIMITED
t/a AVIS — RESPONDENT

Mr Haroon Ali Shah for the Appellants
Mr Haroon Lateef for the Respondent

Date of Hearing : 9th August, 1993
Date of Delivery of Judgment : 20th August, 1993.

JUDGMENT OF THE COURT

The relevant facts on this case are on very small compass.

On or about 21st October 1990 the respondent to this appeal, the plaintiff on the action, entered into a contract with the first appellant, first defendant, whereby the defendant agreed to hire from the plaintiff a motor vehicle. Whether the defendant entered into that contract for himself and as agent for the second does not matter here. It is said that the contract contained a provision to cover the defendant(s) under an "All Risks" insurance policy, and that the hiring fee contained included a sum to provide for the premium payable in respect of such a policy. The legal position would be, unless the contrary

appears, that the plaintiff acted as agent for the defendant(s) to enter into an insurance agreement between him (them) and an insurance company.

The actual policy has never been put in evidence, nor, according to the evidence, has any attempt been made to ascertain its terms. The hiring agreement indicated that an extra amount was paid in addition to the hiring fee to cover insurance, although the type of insurance is not specified. It clearly has an option that the defendant(s) exercised. But in addition the first defendant signed what is labelled a "Warning!" That said affidavit Sukhdeo Singh 6th May 1993:

> *"You should know that your insurance is invalidated when you let an unauthorised person drive this vehicle. .....*
>
> *YOU PAY FOR THEIR MISTAKES!*
>
> *I understand that if I relinquish possession of this vehicle my insurance is no longer valid and I accept all liability."*

This makes it quite clear that the insurance was to cover any liability that the defendant(s) incurred in respect of whatever the policy covered. If it did not cover the contractual liability of the defendant(s) to return the vehicle in good order and condition to the hirer at the conclusion of the hiring period, then it is irrelevant.

On or about 21st October 1990 the vehicle, while being driven by the second defendant, was involved in an accident in which it was extensively damaged.

The plaintiff commenced proceedings against both defendants by writ and statement of claim filed in the High Court on 22nd January 1991. The Statement of claim stated that the plaintiff claimed :

(a) The sum of $20,000 being the value of motor vehicle No. .....

(b) Loss of earnings

(c) Further and other relief

(d) Costs

The writ and statement of claim were apparently served on 6th February 1991. On 11th March 1991 there was filed an acknowledgement of service from both defendants by their solicitor. It stated that it was intended to contest the proceedings. A request for search for a defence was filed on 12th June 1991, and on 18th June the Registrar entered judgment in default of defence for $20,000. An application to set aside the judgment was filed on 9th(or 11th) July 1991 supported by an affidavit from the defendants' new solicitor, which annexed a proposed statement of defence. There was a hearing before a Judge of the High Court on 26th September 1991, and the application was dismissed. His Lordship gave reasons on 15th November 1991. In the meantime, on 30th October 1991 there was filed a notice of appeal seeking orders that the judgment of 26th September be set aside and that the defendants have leave to defend in accordance with the proposed statement of defence. It may or may not be relevant to note that the order of the learned

Judge made on 26th September 1991 was entered on 18th November 1991 as being a judgment dated and entered on 15th November 1991, the day he published his reasons. On either 30th October 1991 - the date the appeal was filed - or on 18th November 1991, an application was made that execution on the judgment be stayed pending determination of the appeal.

It is convenient here to revert to the application to set aside the judgment (9th July 1991), the affidavit in support, the proposed statement of defence, and grounds contained in the notice of appeal.

The application to set aside the default judgment stated that it was based on the grounds appearing on the new solicitor's affidavit. There were two: (i) inadvertence that no defence was filed, and (ii) that the defendants had a "credit worthy Defence" as set out in the proposed statement of defence. So far as the latter was concerned, the only defence was that the defendants had paid the plaintiff a premium to have them covered by an all risks policy. We shall return to the notice of appeal.

In our opinion the learned Judge quite rightly dismissed the application to set aside the appeal. Leave on one side the "inadvertence" which was said to be the reason for failure to file a defence - in support of which there was not a skerrick of evidence, there was simply no defence disclosed. As we said earlier, the payment of a premium for an insurance policy would, in the absence of any other evidence, simply have enabled an

inference that there was a contract of insurance in existence between the defendant(s) and an insurance company. This would have no bearing on the liability of the defendants to the plaintiff for the damage to the car, and, possibly, consequential damages. The defendants could have joined the insurance company as a third party, or sued it if they had been found liable to pay any amount to the plaintiff. The fact of an insurance policy gave absolutely no defence to the defendants against the claim of the plaintiff. The learned Judge so found, and he was, on the evidence before him, correct. He rightly dismissed the application.

After the matter had been heard by him, and he had dismissed the application (26th September 1991), but before he published his reasons for judgment in November the notice of appeal from his order of dismissal was filed. In our opinion this contained only one ground of appeal that is of any relevance, namely :

> *"1. <u>THAT</u> the Learned Trial Judge erred in law and in fact in dismissing the Appellants' application dated 9th July, 1991 to set aside the Judgment in default of Defence in that the Learned Judge failed to consider that the default Judgment was entered upon a claim not being a liquidated claim."*

Naturally this was not considered by the learned Judge on the application from which this appeal is brought, because it had not by then been raised.

As mentioned earlier, on 30th October or 18th November 1991 an application for stay of execution on the judgment which had been entered by the Registrar back on 18th June 1991 was made. It will be remembered that the position then was :

Judgment in default 18th June 1991
Application to set aside 11th July 1991
Application dismissed 26th September 1991
Appeal against dismissal 30th October
Application to stay execution on original judgment 30th October 1991

His Lordship granted a stay of execution on the original judgment on 6th March 1992.

The submissions made to the learned Judge, and accepted by him as sufficient to warrant a stay, were that default judgment for a liquidated claim should not have been entered in this case taking in the nature of the claim made, the nature of the proceedings and the relevant provisions of the High Court rules.

The chronology of events set out above makes it clear that when the application to set aside the default judgment was heard by the Judge on 26th September 1991 and his decision given on the same day, the abovenamed defect, namely that the case was not one in which default judgment for a liquidated amount could be validly given, had not been raised. Naturally the Judge did not deal with it in his reasons for judgment delivered almost two

months later. But in the notice of appeal filed in the meantime (30th October 1991) this point had occurred to the legal advisers of the appellants and it was included in the notice of appeal. The application for a stay was filed on the same day, 30th October 1991, and when it came on for hearing, 16th January 1992, counsel for the respondent complained, bitterly no doubt, that a stay of execution should not be granted on the basis of a ground of appeal that had never been raised and argued. However, the Judge did take it into consideration and granted a stay as previously stated.

When the appeal came on for hearing before us, and we were about to request counsel for the appellants to tell us why we should allow an appeal on some point that had never been raised before or adverted to by the Judge, counsel for the respondent conceded that the respondent really had no right to sign judgment as if for a liquidated amount as had been done, and invited us to find a way that would enable a correct sum by way of damages to be assessed, including doing it ourselves, without, as it were, upsetting or interfering with the judgment in default. We declined his invitation to assess damages and decided there should be a hearing on the question of damages.

The appellants, through their counsel, were then invited to tell us why there should be any order made other than one which fixed up the damages aspect. He was unable to tell us any reason. The only ground ever raised and then submitted by him, was that the appellants were "covered by insurance". As we

mentioned earlier, on the material before any Court in these proceedings, this only meant that any liability for the loss of the vehicle that the appellants had incurred was a matter between them and their insurance company. Whether the loss had ever been claimed from it, and what its reaction was if it had, was simply unknown. The liability of the appellants for the loss had never been denied. So their proper course would have been to join the insurance company as third party when they were sued, or to await a verdict and assessment of damages and then sue the insurance company for the amount. The simple point is that there was no defence at all on the merits to the claim made in the respondent's writ.

The course that this Court should now adopt is quite clear. We should set aside the default judgment in so far as it proceeded to award a liquidated sum as a judgment, and remit the matter to the Judge of the High Court to assess the damages. Whether he would order particulars to be given, send the matter off to the Registrar for assessment or take some other course is a matter for him.

However we would invite him to consider the making of an order to join the insurance company as a third party if an application to do so is made to him by the appellants and there appear to be good reasons for doing so. This would enable it to participate in the matter of the quantum of damages to be awarded if it chose to do so. It would enable any question of whether one or both of the appellants were covered by insurance, or

neither, if these are relevant matters, to be determined. If insurance is relevant it would enable determination of the matter of whether the premium for the policy was paid on behalf of one or both appellants. It would prevent the insurance company from complaining, in any subsequent action against it, if it wished to do so, that it had not been given an opportunity to contest the amount of its liability; there may be provisions in the contract of insurance upon which the appellants can rely.

We must not be taken as recommending any further litigation or the incurring of any further costs. We would hope that this can be avoided. We are merely indicating what may be a way to minimise costs, delay, confusion etc, if the matter has to proceed further.

On the question of costs on appeal the parties made submissions. In the light of the fact that there was no defence filed, that the procedural deficiency was never raised before the Judge nor dealt with by him, that there was simply no defence except the procedural one, and that this appeal has been necessary because of these matters, the appellants should pay the defendant's costs of the appeal.

We believe that the following order is the proper one to give effect to what we believe is the correct outcome of the appeal on the grounds that we have sought to explain, namely:

Appeal allowed in part. The matter is remitted to the High Court for an assessment of damages payable by the appellants or either of them to the respondent and for such further and other orders relating to matters ancillary thereto as to the Judge may seem appropriate.

We feel that this is an appropriate case to bring to the attention of the legal representations and of the parties the provisions of Order 62 rule 8 of the High Court rules. A copy of that rule is annexed to these reasons for judgment.

Costs of the respondent to the appeal to be paid by the appellants.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal

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Mr Justice Gordon Ward
Justice of Appeal