IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0076 of 2000

High Court Civil Action No. HBCO463 of 1996

BETWEEN: DOMINION INSURANCE COMPANY LTD

Appellant

AND: KAY LYNETTE BAMFORTH and MARGARET ANNETTE WILSON

First Respondents

AND FUEL SUPPLIES (PACIFIC) LIMITED

Second Respondent

AND RAVIN CHAND

Third Respondent

AND MOHAMMED SHARMEEM

Fourth Respondent

Coram: Eichelbaum JA, Presiding Judge
Sheppard JA
Tompkins JA

62

Hearing: 19 November 2001

Counsel: A.K. Narayan for the appellant
V.Maharaj for the first respondents
G O'Driscoll for the second respondent

Date of Judgment: 19th February 2002

JUDGMENT OF THE COURT

This appeal concerns a motor accident that occurred on 7 June 1995. A car owned by the first named first respondent, Mrs Bamforth, the first plaintiff in the High Court, and driven by the second named first respondent, Mrs Wilson, the second plaintiff in the High Court, collided with a truck driven by the third respondent, Mr Chand, the second defendant in the High Court. This truck was owned either by the second respondent, Fuel Supplies, the first defendant in the High Court or by the fourth respondent, Mr Sharmeem, the fourth defendant in the High Court. The appellant, Dominion Insurance, the third defendant in the High Court, was the insurer of Fuel Supplies under a policy of insurance in respect of third party risks in terms of the Motor Vehicles (Third Party Insurance) Act (cap 177) ("the Act").

When these proceedings were commenced on 26 September 1996, they were against Fuel Supplies, Mr Chand and Dominion Insurance. On 26 November 1997, Mr Sharmeem was joined as a defendant. It was agreed between the parties that Dominion Insurance should be a defendant to enable its liability, if any, to be determined in the one action.

In a judgment delivered on 17 October 2000, Byrne J held that the accident was caused through the negligence of Mr Chand, who at that time was an employee of Mr Sharmeem. The Judge concluded that Mrs Bamforth was entitled to judgment for $4,921.90 and Mrs Wilson to judgment for $60,231.02, both judgments being against all defendants. Dominion Insurance has appealed against that judgment. Although no appeal was filed on behalf of Fuel Supplies, Mr Driscoll on its behalf submitted that in respect of both plaintiffs, there were no grounds for entering judgment against Fuel Supplies.

The sequence of events

Fuel Supplies had owned the truck since May 1986.

On 21 September 1992 Fuel Supplies gave to the Bank of Baroda a bill of sale over the truck involved in the accident and other vehicles owned by Fuel Supplies to secure an advance made by the bank.

On 30 November 1993 Fuel Supplies agreed to sell the truck to Mr. Sharmeem, trading as Sharmeem Transport. An invoice was written out recording the sale at $22,000, and the payment of $7,000 on account of the purchase price.

On 28 February 1994 Mr Kahn, the managing director of Fuel Supplies, executed a transfer form intended to transfer the truck from Fuel Supplies to Mr Sharmeem.

On 12 August 1994 Dominion Insurance issued to Fuel Supplies a certificate of insurance that effected cover for the purposes of the Act of the owner and of any person who was driving the vehicle on the owner's order or with his permission.

On 23 March 1995, Fuel Supplies wrote to the Bank of Baroda, asking for the security to be discharged over four vehicles, including the truck involved in the accident. According to Mr Kahn, there was no reply to that request.

On 7 June 1995 the accident occurred. At that time the truck was in the possession of Mr Sharmeem and being driven by Mr Chand in the course of his employment with Mr Sharmeem.

On 15 June 1995 the executed form of transfer of the truck was handed to Mr Sharmeem. In a statement to the Dominion Insurance's assessor, Mr Kahn said that it was on that day that he transferred the truck to Mr Sharmeem. It appears from the copy of the transfer produced that Mr Sharmeem signed the transfer on that day.

On 15 June 1995 the Dominion Insurance issued a certificate of insurance relating to the truck showing the owner as Mr Sharmeem, this being by way of transfer.

On 10 January 1996, the bill of sale over the truck was discharged.

On 26 September 1996 these proceedings were issued. They were served on Dominion Insurance on 9 October 1996.

The findings in the judgment

The accident was caused by the negligent driving of Mr Chand acting in the course of his employment by Mr Sharmeem.

After a detailed review of the evidence and submissions relating to the nature of the transaction between Fuel Supplies and Mr Shameem, the Judge concluded:

> "Despite the apparent contradictions in the pleadings of [Fuel Supplies] and [Mr Sharmeem] and the evidence of Mahmood Khan, on the balance of probabilities I am satisfied that this was a conditional sale in which [Fuel Supplies] and [Mr Shameem] did not intend the property in the truck to pass until the bill of sale had been discharged. . .

> Furthermore, the arrangement entered into between [Fuel Supplies] and [Mr Shameem] was consistent with [Fuel Supplies'] right to repossess the vehicle (by virtue of being its registered owner) from [Mr Shameem] in the event of default by [Mr Shameem]. The arrangement also did not prejudice in any way the bank's right of possession in the event of any default in its mortgage repayments by [Fuel Supplies], irrespective of whether the bank had any knowledge of the arrangement between [Fuel Supplies] and [Mr Shameem]."

Mr Chand was not the servant or agent of Fuel Supplies. At the time he was an employee of Mr Shameem who is thus vicariously liable for his negligence.

As Fuel Supplies remained the legal owner of the truck on the date of the accident the Judge concluded that Dominion Insurance was required to indemnify Mrs Wilson for the injuries that she suffered, unless there was some other reason that would disentitle her from so claiming.

Dominion Insurance received the notification required to be given by s 16 of the Act when Mrs Bamforth went to the Dominion Insurance office the day after the accident to report the accident as Dominion Insurance also insured her vehicle.

The damages payable to Mrs Bamforth for the loss of her car that was damaged beyond repair in the accident, and other costs incurred, were $4,744.00 plus interest of $177.90, a total of $4,921.90.

The damages payable to Mrs Wilson for the injuries she suffered in the accident were assessed at $40,000.00 plus interest of $9,800.00 for general damages and $10,054.00 plus interest of $377.02 for special damages, a total of $60,231.02.

The grounds of the appeal

The appellant's notice of appeal contains nine grounds. They can conveniently be considered under seven headings:

1. At the time of the accident, was Fuel Supplies the owner of the vehicle for the purposes of the Dominion Insurance motor vehicle third party insurance policy?

2. Was Mr Chand driving the truck with the permission of Fuel Supplies for the purposes of the policy?

3. Did Dominion Insurance receive notice of the accident as required by s 16 (1) of the Act?

4. Is Dominion Insurance relieved of liability because it did not receive notice of the bringing of proceedings before or within 7 days after the commencement of proceedings as required by s 11 (2) (*a*) of the Act?

5. Can Dominion Insurance be liable for the property damage suffered by Mrs Bamforth?

6. Can Fuel Supplies be liable for the property damage suffered by Mrs Bamforth?

7. Was the award of damages to Mrs Bamforth and to Mrs Wilson excessive?

The owner of the vehicle

The certificate of insurance that was issued on 12 August 1994 showed the period of insurance as commencing on 13 August 1994 and terminating on 13 August 1995. Unless it had lapsed, it was therefore current at the time of the accident on 7 June 1995.

The certificate of insurance shows the owner of the truck as Fuel Supplies. This issue therefore becomes, on a proper construction of the policy, and/or the Act and/or common law, did the policy lapse on the sale of the vehicle, whether conditional or unconditional? If, at the time of the accident, Fuel Supplies remained the owner of the truck, the policy would remain effective. If, at the time of the accident, Mr Sharmeem

was the owner, the policy would have lapsed, as the owner shown in the policy no longer had an insurable interest. So the issue turns on whether, at the relevant time, ownership had passed to Mr Sharmeem.

This was a sale of goods in respect of which the Sale of Goods Act (cap 230) applies. Section 3 relates to a sale and an agreement to sell:

> 3. - (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price ....
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

This section makes it clear that a contract of sale may be absolute or conditional. Where the transfer of the property in the goods is subject to a condition, it becomes a sale when the condition is fulfilled.

Section 19 relates to the passing of property in specific or ascertained goods:

> 19. - (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Section 20 sets out rules for ascertaining intention as to time when property passes which apply unless a different intention appears. Relevant to the present case is Rule 1:

> Rule 1 - Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed.

In the present case there was a sale of specific goods, that is the truck, that was in a deliverable state. This section does not contain a rule relating to conditional contracts. They appear to be governed by s 3 which we have set out above.

We now consider the available evidence with a view to ascertaining what was the intention of the parties concerning the passing of ownership in the truck to Mr Sharmeem.

Mr Kahn gave evidence that was in some respects conflicting. We refer particularly to the following passages in evidence in chief and in cross examination:

> "After this transfer not immediately done because it was under mortgage to Bank of Baroda as security for advances to our company and therefore we couldn't transfer it to Mohammed Sharmeem. Our arrangement between self and Sharmeem was that he would buy the truck and wait for a transfer after the mortgage cleared.
>
> Day of transfer – the day he became the registered owner. Can't remember when sold for $22,000 but he not to have ownership until security to Bank of Baroda satisfied.
>
> I retained the ownership because of my obligation to the Bank and it was transferred after the loan repaid - on 10/1/96.
>
> On day of sale I made it quite clear that he solely responsible for the vehicle. I had divested myself of any interest in it. Made it clearer the transfer could not be effected till Bank cleared account. I sold it at his request subject to the bill of sale. The only issue the bill of sale affected was not the ownership - I had given it to him and not possession - gave it to him - only the transfer. To register the transfer

at the Authority had to have transfer signed by existing owner. That is why I gave it to him subject to the Bank's clearance. I wanted him to register it in his name which could only occur after Bank clearance.

When I gave him transfer he was supposed to get his own third party insurance but he knew he could not get a transfer because he knew the Bank had not cleared the bill of sale.

I said I knew the Third Party insurance still in my name (the company's). I also accepted that the Third Party policy would be issued in my company's name as long as the bill of sale not discharged.

The sale of this vehicle conditional on the bill of sale had to be cleared by the Bank of Baroda. The condition could also mean that if the condition not satisfied the vehicle could be seized by Bank or me. Even though I had given away possession I still retained the legal ownership of the vehicle.

Mr Kahn gave statements to the insurance assessor engaged by Dominion Insurance. In a statement dated 23 October 1996 he said:

"The vehicle was under a bill of sale with Bank of Baroda. Sharmeem Transport desperately needed a transport to use under his contract to PWD. I told Sharmeem that I cannot sell the truck because it was still under the bill of sale and the truck cannot be transferred. He insisted me to sell the truck to him on condition that the truck to transfer when the bill of sale was discharged, and he also took responsibility to pay any damage if occurred to any person or property."

In a later statement given on 7 November 1996 he said that he transferred the vehicle to Sharmeem Transport on June 15, 1995

The Judge referred to Mr Sharmeem's statement of defence and in particular the pleading in paragraph 2:

(a) That on the 30th November 1993 he brought (sic) a second-hand Hino truck from Fuel Supplies (Pacific) Ltd for the sum of $22,000.

(b) That the said sum was paid in full and transfer of the said vehicle was signed by [Fuel Supplies]

(c) That when [Mr Sharmeem] went to the Transport Control Board to register the transfer, he found out that the said vehicle was under a bill of sale to the Bank of Baroda.

(d) That despite numerous requests to [Fuel Supplies] and the Bank of Baroda to discharge the said bill of sale, it failed to do so until 10th January 1996.

The notable features about this pleading are that there is no mention of any conditional sale, and it supports the contention that the property in the truck was given to Mr Sharmeem on 30 November 1993. It also indicates that the purchase price was paid in full when the transfer was signed. However, it is common ground that the purchase price was not paid in full at that time, and there certainly is evidence to indicate that Mr Sharmeem knew when he took possession of the truck that it was still subject to the bill of sale.

The Judge also referred to Fuel Supplies's statement of defence and in particular paragraphs 1 and 2:

1. That [Fuel Supplies] denies liability to the plaintiffs as pleaded in their statement of claim on the basis that the vehicle registration No. BZ364 had been sold to [Mr Sharmeem] on or around the 30th of November 1993 at which date actual position of the said vehicle vested in [Mr Sharmeem] absolutely.

2. That a transfer of the said vehicle was duly signed on the 28th of February 1994 by [Fuel Supplies] in favour of [Mr Sharmeem] and thereafter the onus lay on [Mr Sharmeem] to register the same.

The Judge recognised that again this pleading made no reference to a conditional sale, on the contrary it indicated that at least after 28 February 1994 the sale was unconditional. Also, the pleading is directly contrary to Mr Kahn's evidence in the passage we have set out, in which he said that at the time of the accident he was aware that the vehicle was still registered under his company's name.

On these pleadings the Judge made the following observations.

> "I find these submissions [that the sale was an unconditional one] at first glance persuasive but I am reminded that the sworn evidence of Mahmood Kahn was clearly to the effect that the sale was conditional and that ownership remained with [Fuel Supplies] until the bill of sale had been discharged.
>
> I am further reminded by [Dominion Insurance] that [Fuel Supplies] conceded when confronted with his own pleadings that it was correct that he did not know that the vehicle had still not been transferred to Mr [Sharmeem] at the time of the accident. He conceded that [Fuel Supplies] only became aware of the non registration of change of ownership when this action was initiated."

Having considered these and other aspects the Judge expressed his conclusion in the passages we have set out above. When stating the findings in the judgment he went on to say that he rejected Dominion Insurance's argument that the sale in question here was not conditional and thus he found at the time of the accident the property in the truck was in Fuel Supplies.

We can find no error in the manner in which the Judge approached this issue. He recognized that it was to be determined by ascertaining the intention of the parties to the contract. That required a careful consideration of the available evidence both oral and documentary. The only documentary evidence relating to the sale was the invoice to which we have been referred. It recorded the payment on account and the balance remaining but it was silent on whether the contract was complete or conditional and on the effect of the undischarged bill of sale. The only available oral evidence was that of Mr Kahn. Mr Sharmeem did not give evidence. In weighing up the evidence of Mr Kahn the Judge, as he recorded in his judgment, was conscious of the fact that Mr Kahn and Mr Sharmeem were friends with the possibility of collusion designed to ensure liability was passed on to Dominion Insurance.

In the end, having considered all of these factors, the Judge reached the conclusion that the parties did not intend property in the truck to pass to Mr Sharmeem until the bill of sale had been discharged. It followed that Fuel Supplies was the owner of the truck at the time of the accident with the consequence that the certificate of insurance issued by Dominion Insurance was at that time in full force and effect.

The issue the Judge had to decide was entirely a question of fact. It is well established that an appellate court should not reverse a trial judge's finding of fact unless it can be established that that finding was clearly wrong. This principle was recently restated by Thomas J in the Court of Appeal of New Zealand in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, 199:

> "It may not be fully appreciated that the deference of an appellate Court to the findings of fact of the Court at first instance is founded on a number of pragmatic considerations which make it inappropriate for the appellate Court to intervene. The advantages possessed by the trial Judge in determining questions of fact are manifest. Of paramount importance, of course, is the fact the trial Judge hears and sees the witnesses first hand over a matter of days, or even weeks, of taking evidence. He or she can form an impression of the reliability of witnesses and, where necessary, their credibility – although in deference to the witness's feelings the Judge may not always express an adverse conclusion in that regard. As the evidence unfolds the trial Judge gains an impression from the evidence which is not necessarily or usually apparent from the cold typeface of the transcript of that evidence on appeal. The Judge forms a perception of the facts in issue from which he or she adds or subtracts further facts as witnesses give their evidence, and so obtains as complete a picture as is possible of the events in issue. The Judge perceives first hand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.
>
> An appellate Court has none of these advantages and must acknowledge that the Court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate Court to assert the capacity to be able to "second-guess" a trial Judge's findings of facts when it does not share those advantages. Exceptional caution in departing from the trial Judge's findings of fact is therefore regarded as imperative."

There clearly was evidence on which the Judge could reach the conclusion he did. We find no reason for disturbing the Judge's conclusion that, at the time of the accident, Fuel Supplies was the owner of the vehicle for the purposes of the Dominion Insurance motor vehicle third party insurance policy.

Was Mr Chand driving the truck with the permission of Fuel Supplies?

Both the certificate of insurance and the policy itself provides:

> 4. PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THIS POLICY -
>
> (a) The Owner, and
>
> (b) Any person who is driving on the Owner's order or with his permission.

Thus, if Mr Chand were driving the truck with the permission of Fuel Supplies, Dominion Insurance would be liable to indemnify him for any claim for personal injuries resulting from the accident.

The Judge made no finding on this issue. He considered, and rejected, a submission that Mr Chand was the agent of Fuel Supplies, with the result that Fuel Supplies was not under vicarious liability for his negligent acts. He held that Mr Chand could not in any way be regarded as the servant or agent of Fuel Supplies. We agree with that conclusion.

When Fuel Supplies agreed to pass possession of the truck to Mr Sharmeem, he knew, as is apparent from the passages of Mr Kahn's evidence we have set out above, that the truck was to be used by Mr Sharmeem in his contract with the PWD, and that, in the course of so doing, it would be driven by his employees. Mr Kahn in his evidence said:

> "I advised Mr Sharmeem to operate the truck in my company's name but he responsible for any damage. Any person driving with Sharmeem's permission had my permission."

It is clear, in our view, from the nature of the transaction and particularly the knowledge that Mr Kahn had about the use to which the truck was to be put during the time that ownership was retained by Fuel Supplies and the truck was in the possession of Mr Sharmeem, that he was permitting Mr Sharmeem to use the truck for that purpose and

for it to be driven by Mr Sharmeem's employees. It follows that the persons driving the truck, including at the time of the accident Mr Chand, were driving the truck with Fuel Supplies's permission.

This conclusion accords with the purpose of the policy and the relevant statutory provisions set out in the Act. For so long as the truck remained owned by Fuel Supplies, Mr Sharmeem was unable to effect his own insurance under the Act. It is entirely consistent with the purpose of the Act of providing insurance cover to a person injured in a motor accident to find, in these circumstances, that Mr Chand was driving the truck with Fuel Supplies' permission.

For these reasons, we conclude that Dominion Insurance can be bound to indemnify Mr Chand in respect of any personal injury damages resulting from the accident for which he is liable, provided there has been compliance with the conditions to which we now refer. Whether it is so bound will depend on the resolution of the next two issues.

Did Dominion Insurance receive notice of the accident as required by s 16 (1)?

The relevant parts of s 16 (1) are:

> On the happening of any accident affecting a motor vehicle and resulting in . . . personal injury to any person, it shall be the duty of the owner, forthwith after the accident, or, if the owner was not using the motor vehicle at the time of the accident, it shall be the duty of the person who was so using the vehicle, forthwith after the accident, ... to notify the insurance company of the fact of such accident, with particulars as to the date, nature, and circumstances thereof . . .

This section, therefore, placed a duty on Fuel Supplies as owner and Mr Sharmeem and Mr Chand as the persons using the truck to notify the insurance company of the details required.

Mrs Bamforth has deposed in an affidavit that the day after the accident she went to the Navua police station and obtained the name of the driver of the truck and the owner, Fuel Supplies. On the same day she came to Suva and went to the office of Dominion Insurance. She told a staff member of the accident and gave her the further details given to her by the police. The staff member took down the details, went away, and returned five minutes later. When she returned she told Mrs Bamforth that Fuel Supplies was the owner of the truck and that Dominion Insurance had issued a policy in respect of the vehicle. She also confirmed that Mrs Bamforth had a valid policy in respect of the car. When Mrs Bamforth asked the staff member what she should do to claim for damages to her vehicle and injuries suffered by Mrs Wilson, she was told that she should consult a lawyer.

In his decision the Judge referred to the comments by Porter J in *Herbert v Railway Passengers Assurance Company* [1938] 1 All ER 650:

> "All that is required is that the company should be made aware that it is formally being notified of an accident. Once it is so notified, it is for the company to decide if it wishes to require the insured person to take any further steps in the matter."

After referring to the evidence of Mrs Bamforth which we have set out above the Judge concluded that Dominion Insurance received the notification required to be given under s 16 of the act.

With respect to the Judge, we are not able to agree with that conclusion. Section 16 makes it plain that the duty to notify the insurance company of the accident and the relevant particulars rests on the person who was using the vehicle at the time and on the owner. No doubt that duty can be fulfilled by any person acting as the agent of or on behalf of the person using the vehicle or the owner. Further, we agree with the Judge's view that a detailed written notification need not be given. But what is required is a notification, whether formal or informal, to the insurance company by or on behalf of the person using the vehicle or the owner. No such notification was given in this case.

The notification of the accident given by Mrs Bamforth the day after the accident was not a notification by or on behalf of Mr Chand or Fuel Supplies. It was a notification given by her on her own behalf to Dominion Insurance as the insurers of her vehicle. That Dominion Insurance became aware at that time that the other vehicle involved in the accident was also insured by it cannot convert Mrs Bamforth's notification on her own behalf into a notification on behalf of Mr Chand or Fuel Supplies. The person employed by Dominion Insurance who was responsible for claims said that the only notification Dominion Insurance received of the accident was when it was served with the writ on 9 October 1995.

It follows that there was not compliance by Mr Chand or of Fuel Supplies of their duties under s 16 (1).

However that is not the end of the matter. Section 16 (4) provides:

> (4) If the owner or such other person fails to give any notice or otherwise fails to comply with the requirements of this section in respect of any matter, the insurance company shall be entitled to recover from him as a debt due to it an amount, equal to the total amount including costs, paid by the insurance company in respect of any claim in relation to such matter.

When that subsection is read in conjunction with s 11, it is clearly the statutory intention that non compliance with s 16 (1) does not relieve the insurance company of liability to meet any claim against its insured that is covered by the policy of insurance.

Section 11 (1) provides:

> 11 (1) If, after a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under the provisions of paragraph (b) of subsection (1) of section 6, being a liability covered by the terms of the policy, is obtained against any person insured by the policy, then, notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company shall, subject to the provisions of this section, pay to the persons entitled

> to the benefit of such judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable by virtue of any written law in respect of interest on that sum.

Subsections (2) and (3) set out circumstances in which no sum shall be payable by an approved insurance company. These circumstances do not include non-compliance by the person using the motor vehicle at the time of the accident or the owner of their duties under s 16 (1).

The consequence of these provisions in the Act, therefore, is that, if there has been non-compliance with the requirements of s 16 (1), the insurance company remains liable to pay the amount to any person who would be entitled to judgment against a person covered by the policy. But the insurance company can then seek to recover the amounts it has paid from the owner or the person using the vehicle who had failed to give the required notification.

For these reasons, we conclude that Dominion Insurance did not receive notice of the accident as required by s 16(1), but that does not prevent Mrs Wilson from obtaining judgment against Dominion Insurance for the amounts to which she would be entitled to judgment against Mr Chand and Fuel Supplies, provided liability for those amounts is covered by the policy.

Is Dominion Insurance relieved of liability by s 11(2) (*a*)

Section 11 (2) (*a*) provides:

> (2) No sum shall be payable by an approved insurance company under the provisions of subsection (1) -
>
> > (a) in respect of any judgment unless before, or within 7 days after the commencement of the proceedings in which the judgment was given, the insurance company has notice of the bringing of the proceedings;

It is accepted that no notice of the bringing of the proceedings was given to Dominion Insurance before the commencement of proceedings. They were commenced when the writ was issued on 26 September 1996. The writ was served on Dominion Insurance on 9 October 1996, 13 days after the proceedings were commenced. That was the first notice Dominion Insurance had of the intention to bring the proceedings.

Counsel for Mrs Wilson submitted that the conversation between Mrs Bamforth and the person in the office of Dominion Insurance which we have detailed above was a sufficient notice of the bringing of the proceedings for the purpose of s 11 (2) (*a*).

There is an identical provision in s 153 (1) of the Road Traffic Act 1988 UK and its predecessor, s 10 (2) (a) of the Road Traffic Act 1934 UK. The decision we have referred to above, *Herbert v Railway Passengers Assurance Co*, was decided under the latter. The judgment of Porter J, in the passage to which we have referred, suggests that some degree of formality is required. That and several other cases under these sections were reviewed by Kennedy LJ in the Court of Appeal in England in *Wake v Page and anor* The Times, 21 December 2000. He observed that the indications in *Herbert* that some degree of formality is required can, in the light of later decisions, be disregarded. However, he did consider that it was authority for the proposition that to show that the insurer had notice of the bringing of the proceedings there must be more than evidence of a casual comment to someone acting as agent for the insurer. He also held, based on the authorities to which he referred, that the notice can be oral and it need not even emanate from the claimant. It can be given before proceedings have commenced, and it need not be specific as to the nature of the proceedings or the court. Whether in any given case it is shown that the insurer had notice of the bringing of the proceedings (as opposed to the making of a claim) is a matter of fact and degree.

That last observation is based on the statement of Cazalet J, delivering the judgment of the Court of Appeal in *Desouza v Waterlow* [1999] RTR 71;

> "In my view notice in any particular case is a matter of fact and degree and will turn on the extent to which the insurer has been made aware of the background

> circumstances and of the position of the claimant in regard to the taking of proceedings. Such notice can be given orally or in writing. The essential purpose of the requirement of notice is that the insurer is not met with information, out of the blue, that his insured has had a judgment obtained against him."

However, the authorities also make it clear that what is required to be given to the insurer is notice that proceedings have been or will be brought. Notice of intention to claim is not sufficient. Thus in *McGoona v Motor Insurers' Bureau* [1969] Lloyds L R 34, 47 Lawton J said in a passage that has been adopted in later cases:

> "Now, "proceedings" in that sub-clause, in my judgment, must mean the beginning of legal proceedings. Notification that a claim may be made is not notification of the commencement of proceedings and there is obviously good reason why the commencement of proceedings is the material time. Insurers may have repudiated liability as against their assured but they may have their own reasons for taking over control of any litigation there may be. . . It is important from the insurer's point of view, too, that they should have notice not later than seven days after the commencement of proceedings because of the danger of judgment in default of appearance being given against a defendant assured."

When these authorities are considered, it is in our view clear that the conversation between Mrs Bamforth and the representative of Dominion Insurance the day after the accident cannot be notice of the bringing of the proceedings by Mrs Wilson within the subsection. It was certainly notice that Mrs Bamforth intended to claim to be indemnified by Dominion Insurance in respect of the damage to her vehicle. Further, she gave an indication to Dominion Insurance that she and Mrs Wilson were contemplating bringing a claim against the owner or driver of the truck in respect of which, it became apparent in the course of the interview, Dominion Insurance was also the insurer. At its highest, it could have been no more than in indication that a claim may be brought by her and by Mrs Wilson. But that cannot amount to notice of the bringing of the proceedings by Mrs Wilson for the purpose of this subsection.

Section 11 (2) (*a*) imports into the policy what is in effect a condition precedent to the liability of Dominion Insurance to make the payment it would otherwise be required to make by s 11 (1). Whether or not Dominion Insurance was prejudiced by the failure to

comply with the subsection is irrelevant. In *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 2 All ER 395 Bingham J held that the insurers were entitled to rely on the breach of what was in that case a notification condition in the policy, even if they had not been prejudiced by the lack of notification, because the condition expressed in clear terms that notification was a condition precedent to the insurers' liability to make payment under the policy. Section 11 (2) (*a*) has the same effect.

The issue therefore is whether the requirement for notice within seven days of the commencement of proceedings is mandatory, so that the giving of the notice six days late means that no sum is payable by Dominion Insurance. Or whether it is directory, so that Dominion Insurance remains liable to pay if there has been substantial, but not precise, compliance with the notice requirement. The Judge in his decision did not address the application of s 11 (2) (*a*), although the defence was pleaded in Dominion Insurance's amended statement of defence. On the hearing of the appeal, counsel addressed the Court on the section, but did not make submissions nor refer to authorities on whether the provision is mandatory or directory.

The classic statement of principle is that of Lord Penzance in *Howard v Bodington* (1887) 2 PD 203, 211;

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

At 211 he quoted the following passage from Lord Campbell's judgment in *Liverpool Borough Bank v Turner* (1860) 29 LJ (Ch) 827;

> "No universal rule can be laid down for the construction of statutes, and as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to

try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

In *Hawkes Bay Hide Processors of Hastings v Commissioner of Inland Revenue* [1990] 3 NZLR 313 the Court of Appeal of New Zealand was concerned with the situation where the appellant, having filed a notice of appeal in time, filed the case stated in the High Court 20 days after the expiration of the 14 days within which a case stated must be transmitted to the High Court under the relevant provision in the Inland Revenue Department Act 1974. The court held that there was no provision for discretion, the late filing of a case was not capable of waiver by the commissioner, and the appeal could not therefore proceed.

Richardson J, at 316, after referring to *Howard*, said;

"Ascribing such labels as "imperative", "mandatory" and "directory" to a statutory provision is not, of course, a substitute for trying to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered. The true question is whether the legislature intended that language which is obligatory in form should have the effect of invalidating the non complying act, or whether the act should nevertheless have legal effect. The question arises only because the legislature itself has not spelled out what the effect of non observance is to be. The answer turns on an analysis of the language, scheme and purpose of the statute. That analysis often leads to discussion in the cases of the purpose of such a requirement, and the weighing of private rights and public interest. In the end, however, it is a matter of ascertaining what the legislation intends rather than developing or criticising judicial rationalisation for that legislative intention."

In *New Zealand Institute of Agricultural Sciences v Ellesmere County* [1976] 1 NZLS 630, 636 Cooke J considered the meaning of these terms. He referred to one usage being that occasionally an imperative provision has been described as one which must be complied with exactly, a directory provision as one with which substantial compliance will suffice. He went on to say;

"Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its

> place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance."

The present case concerns a specific time limit for the carrying out of the required action, namely the insurance company having seven days notice of the bringing of the proceedings. The normal rule is that where a statute contains a time limit, that must be observed. In the recent case of *R v Weir* [2001] 2 All ER 216, which concerned an application by the Director of Public Prosecutions for leave to appeal to the House of Lords which was lodged one day after the 14 day time limit, Lord Bingham observed at 222 that where a time limit is laid down and no power is given to extend it, the ordinary rule is that the time limit must be strictly observed. He referred to the observation of Millett LJ in *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 739;

> "If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time. That is why Grove J said in *Barker v Palmer* (1881) 8 QBD 9 at 10 – "provisions with respect to time are always obligatory, unless the power of extending the time is given to the court". This probably cannot be laid down as a universal rule, but in my judgment it must be the normal one. Unless the Court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether, and it cannot be dispensed with altogether."

However, a less rigid view was adopted by the Court of Appeal in *Secretary of State for Trade and Industry v Langridge* [1991] Ch 402. Section 16 (1) of the Company Directors Disqualification Act 1986 provides that a person intending to apply for the making of a disqualification order shall give not less than 10 days notice of his intention to the person against whom the order is sought. The court held by a majority that the provision was directory in character not mandatory and any non-compliance with the statutory requirement to serve a 10 day notice was a procedural irregularity which did not render the application void or voidable.

Balcombe LJ cited with the approval a passage from de Smith's Judicial Review of Administrative Action 4th ed (1980) 412 that included;

> Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or a serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

He referred to *Barker* (above), observing that he found it difficult to reconcile that decision with the principles he had set out in his judgment.

We pass now to consider the purpose and subject matter of this provision, looked at in the context of the Act. The general object of the Act is to ensure that persons who have suffered personal injury in a motor accident and have valid claims against other drivers involved, are able to obtain satisfaction of the judgments they may obtain. Thus s 4 (1) provides that no person shall use, or permit any other person to use, a motor vehicle unless there is in force in relation to the use of that motor vehicle a policy of insurance that complies with the Act. Within that general object of providing insurance in this way, the Act contains a number of terms and conditions relating to that insurance. Section 11 (2) (*a*) is one of those provisions. Its purpose is clear. It is to ensure that if proceedings are brought against a person who is insured by a policy in accordance with the Act, the insurance company will have notice of the proceedings either before or within the comparatively short period of seven days after those proceedings were commenced. The purpose of the provision is, as Cazalet J observed in *Desouza* in the passage to which we referred, to ensure that the insurer does not discover after the event that its insured has had judgment obtained against him. It is to ensure that early on in the proceedings and at a stage before the insured, by any action or inaction, has prejudiced the interests of the insurer, it is able to take over the conduct of the proceedings.

Another purpose was referred to by the Privy Council in *Ceylon Motor Insurance Association Ltd vThambugala* [1953] 2 All ER 8870, 871, where Mr de Silva, delivering the judgment of the Privy Council in a case concerning the corresponding provision in

Ceylon, said one of the objects, but not the sole object, of the section was to enable the insurer to institute within time proceedings under the equivalent of s 11 (3) of the Act.

Section 11 (3) provides that no sum shall be payable by an insurer if, in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given, it has obtained a declaration that it is entitled to avoid the policy on the grounds of nondisclosure, false representation or some other ground. The proviso to the subsection states that the insurer shall not be entitled to the benefit of such a declaration unless, before or within seven days after the commencement of that action, it has given notice to the plaintiff in the action under the policy specifying the nondisclosure or false representation relied on. Both subsections therefore refer to action being required before or within seven days after the commencement of the proceedings. The insurer requires the notice of the bringing of the proceedings under subs (2) (*a*) to enable it to give in time the notice it is required to give under subs (3). However, provided the same approach is adopted to both time limits, no inconsistency should result.

There is another aspect. Most of the cases where this issue has been examined involve statutory requirements containing time limits in provisions originating the appeal process, or some other step in the course of judicial proceedings. If there is not compliance with these statutory provisions the court or tribunal may lack jurisdiction to proceed further. The provision with which this appeal is concerned is of an entirely different character.

We are satisfied that it cannot have been the intention that the time limit of seven days must be strictly adhered to. There is no magic in that time. Even if regard is had to the time after service at which default judgment can be entered, seven days is not vital, as default judgment cannot be entered until 14 days after service. The essential requirement is that the insurer should be able to take over the conduct of the proceedings promptly. This objective will be achieved if it has notice of the proceedings within seven days or soon thereafter. Thus if there is substantial compliance with that time limit, the purpose

of the provision will have been achieved. It is not appropriate to prescribe what would amount to substantial compliance, as that must depend on the particular circumstances of the case. But we would anticipate that it would be a matter of days rather than weeks or months.

In this case the time limit was exceeded by six days. We conclude that notice of the proceedings within 13 days of commencement was, in the particular circumstances of this case, substantial compliance with the statutory requirement. Accordingly Dominion Insurance is liable to pay the amount of the judgment against Fuel Supplies in favour of Mrs Wilson. This ground of appeal cannot succeed.

Can Dominion Insurance be liable for the property damage suffered by Mrs Bamforth?

At the conclusion of his judgment, the Judge entered judgment for Mrs Bamforth for $4,921.90 for her property damage and Mrs Wilson for $60, 231.02 for her personal injuries, "against the Defendants", ie against Fuel Supplies, Mr Chand, Dominion Insurance and Mr Sharmeem. Although not stated, the intention appears to be that the judgments were against all of them jointly. Thus under the judgment Dominion Insurance was liable for the property damage suffered by Mrs Bamforth.

There can be no justification for this result. The policy was issued under the provisions of the Act. In accordance with s 6 (1) (*a*), it is a policy that insures the persons specified in the policy in respect of liability which may be incurred "in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle." Nothing in the Act, nor in the terms of the policy, makes Dominion Insurance liable to indemnify the owner or the driver for liability for property damage.

Nor can there be any basis for holding Fuel Supplies liable for Mrs Bamforth's property damage nor for Mrs Smith's personal injuries. Mr Chand, the driver, was acting in the course of his employment with Mr Sharmeem. He was neither the servant nor the

agent of Fuel Supplies. That Fuel Supplies was permitting Mr Sharmeem and his employees to use the vehicle does not make it liable for damage, whether personal or property, caused by the negligence of Mr Sharmeem's employee.

Was the award of damages to Mrs Wilson excessive?

Although in its grounds of appeal Dominion Insurance contended that the damages awarded to Mrs Bamforth were excessive, it did not pursue this ground, limiting its submissions to the contention that judgment should not have been entered against it in respect of the property damage suffered by her. We have determined that submission in the preceding section.

Dominion Insurance challenged the award to Mrs Wilson in two respects.

First, it submitted that the Judge erred in allowing $9,100 for dental repairs. In his judgment, the Judge referred to her claim for $9,300 which she had paid to a dentist in New Zealand where her broken teeth were recapped. She produced a report from the dentist that referring to the damage to her teeth that had occurred and setting out the dental treatment that was provided. The Judge said that Mrs Wilson admitted in cross-examination that not all the treatment she received was due to the accident. She could not quantify what proportion of the total sum of $9,300 was for treatment of her accident injuries. However, as the Judge noted, there was no mention in the report from the dentist of any treatment not being required for any condition other than damage due to the accident. But because of the reservations he had about this element, he considered it fair to reduce the amount to $9,100.

It was contended on behalf of Dominion Insurance that there was no basis for deducting only $200, that the onus was on Mrs Wilson to establish the extent of her loss and that in the absence of proof only one-third of the sum claimed should have been allowed.

We are not prepared to interfere with the Judge's assessment. He was entitled to take the view that, in the light of Mrs Wilson's evidence and the dental report provided, only a modest reduction in the costs incurred should be made. It is common in personal injury cases that claims for special damages as well as general damages cannot be proved precisely. The Judge must make the best assessment he can on the evidence before him. An appellate court will not interfere unless the assessment is clearly wrong. That is not so here.

Secondly, it was submitted on behalf of Dominion Insurance that the award of $40,000 for pain and suffering was excessive and that an award of $15,000 would have been appropriate. Counsel drew to our attention other cases where lesser amounts had been awarded.

The Judge referred to Mrs. Wilson's evidence of the effects of her injuries following her admission to hospital. Her knees were painful, her face required stitching from the top of her nose down the right side of her face to under her chin, her lips were stitched together and she had a severe injury to her left forehead over her left eye through her head on the left side nearly to the back. She had a hole on the right hand side of her face which broke her teeth on the top to approximately the middle, the back of her neck and left shoulder were badly injured. She was on a drip in hospital for four days and suffered much pain there and while in hospital in New Zealand.

On her permanent disabilities the Judge said:

> "She then said that she could not trust her knees when going upstairs or down hill. She requires the assistance of a walking stick on uneven surfaces. This has adversely affected her missionary work which requires a lot of travelling. She said she found it difficult to sit in airplanes for long periods. She relies heavily on [Mrs Bamforth] for support. At the time of the accident she was 55 years old and at the time of trial 59. She required plastic surgery to her face which was necessary because of the poor stitching done in the Navua Hospital . . . I observed the scars on her face shown in the photograph. She had one scar on the left-hand side about 7 1/4 cms long, one scar about 2 1/4 cms long and another scar about 3 3/4 cms long on her left forehead extending diagonally from left to right. She also had one scar about 2 1/4 cms long on her right chin."

The Judge noted that she had received treatment from an osteopath where her neck was manipulated and as a result she was able to move her neck more freely. His conclusion was:

> "In my view taking Mrs Wilson's age into account and the fact that she has now made a reasonable recovery and as a result of plastic surgery the scarring on her face has been reduced, I consider an award of $40,000 under this heading is justified."

An appellate court will review a judge's assessment of general damages if it can be demonstrated that the judge acted on a wrong principle or if the amount of the general damages is clearly excessive or inadequate. Relevant to the assessment in this case is pain and suffering, loss of amenities and the cosmetic consequences. It is apparent from those parts of the Judge's decision to which we have referred that he took into account each of these elements. When regard is had to the degree of her pain and suffering, the effects on her daily life of her permanent disabilities and the disfiguring effects of the scarring to her face, we are satisfied that an assessment of general damages of $40,000 was entirely appropriate. This ground of appeal cannot succeed.

The result

The judgment entered in the High Court is set aside. In lieu, there will be judgment:

For Mrs Bamforth for $4,921.90 plus interest at 3% from the date of judgment in the High Court to the date of this judgment against Mr Chand and Mr Sharmeem,

For Mrs Wilson for $60,231.02 plus interest at 3% from the date of judgment in the High Court to the date of this judgment against Mr Chand, Mr Sharmeem and Dominion Insurance.

89.

Costs

The appeal has succeeded in part, but failed on the major issues. We make the following costs orders:

(a) Dominion Insurance to pay costs to Mrs Wilson as agreed or taxed.

(b) Dominion Insurance succeeded on its appeal against the judgment in Mrs Bamforth's favour against it. It is entitled to costs against her which we fix at $500.00.

(c) Fuel Supplies is entitled to costs against Mrs Wilson and Mrs Bamforth jointly which we fix at $500.00

Eichelbaum JA

Sheppard JA

Tompkins JA

FIJI COURT OF APPEAL