

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

CIVIL APPEAL NO. ABU0042 OF 2006S

(High Court Civil Action No. HBC 265 of 2005L)

BETWEEN:

PRANISH PRAKASH CHAND

Appellant

AND:

SUN INSURANCE COMPANY LIMITED

Respondent

Coram:

Randall Powell, JA
Andrew Bruce, JA
Izaz Khan, JA

Hearing:

Thursday, 10th July 2008, Suva

Counsel:

S. K. Ram for the Appellant
A. Narayan for the Respondent

Date of Judgment: Friday, 11th July 2008, Suva

JUDGMENT OF THE COURT

1. Sandhika Chand ("the Owner") owned a Toyota Hilux van ("the vehicle"). He took out an insurance policy with the respondent ("the Insurer").
2. The Owner hired the vehicle out to Ganpati Bala ("Mr Bala") for \$100 per week. On 24 March 2003 Mr Bala used the vehicle to convey Prem Singh ("Mr Singh") in return for payment of \$35, \$10 which was paid at the commencement of the journey when

fuel was purchased, and the balance which was to be paid at the end of the journey. During the course of the journey the vehicle crossed onto the wrong side of the road and collided head-on with a vehicle containing the plaintiff, Pranish Prakash Chand ("Mr Chand").

3. Mr Chand commenced proceedings against the Insured and Mr Bala. Neither of them took steps to defend the proceedings, default judgment in liability was entered against them and damages of \$137,674.20 ("the moneys") was proved at a hearing. Mr Chand then took proceedings against the Insurer seeking a determination of three questions of law and a consequent declaration that the Insurer was liable to pay him the moneys.
4. Affidavits were filed by both parties but no oral evidence was called nor was there any cross-examination of witnesses. Written submissions were filed. Mr Chand objected to some of the annexures to the Insurer's affidavits as hearsay evidence, and the trial judge held that he could not "*issue a definitive ruling on the facts in this case*". However on 15 February 2006 he answered the three questions of law and gave judgment for the Insurer.
5. The three questions of law that Finnigan J was asked to determine were:
 1. Whether the Insurer was required to compensate Mr Chand (and therefore indemnify Mr Bala and the Owner) for the moneys under the ***Motor Vehicles (Third Party Insurance) Act (Cap 177, Laws of Fiji)***.
 2. Whether the Insurer can refuse to compensate Mr Chand on the grounds that allegedly Mr Singh was a passenger being carried for \$35 in the vehicle when such carriage of a passenger for hire or reward was not known by the Insured.
 3. Whether the Insurer can refuse to compensate Mr Chand under the ***Motor Vehicles (Third Party Insurance) Act (Cap 177, Laws of Fiji)*** on any other

grounds (this not how the third question, as appears in the judgment, was phrased, but this seems to be the issue that was considered).

6. The trial judge answered the questions No, Yes and Yes.

The Insurance Policy

7. The Owner had a policy of third party insurance ("the Policy") with the Insurer. The Policy is a simple document with a few clauses on the front, and two conditions and a schedule on the back. It is a document in which headings are clearly meant to be operative.

8. The Policy on the top of the first page says "*Motor Vehicle (Third Party Insurance) Ordinance, Motor Vehicle (Third Party Insurance) Regulations.*"

It then says **Third Party Policy** and goes on to describe the motor vehicle (clause 1), it names the owner of the motor vehicle (clause 2) and the period of insurance (clause 3), and specifies the "*amount of premium paid for issue of Policy*" (clause 4)

The description of the vehicle includes its make and model, its body type (in this case "VAN"), and its engine, chassis and registration numbers.

9. Clause 5 of the Policy, headed **LIMITATIONS AS TO USE**, provides, in its entirety that:

"Premium has been paid for only for the use of the motor vehicle for the purposes set out in item No. 3A on the schedule on the back hereof, provided however that a premium paid for the use of the motor vehicle for the purpose set out in item No. 2, 3, 4, 5 or 10 of the schedule shall also cover the motor vehicle for social domestic or pleasure purposes, or for the Owner's business within the limits set out in item 1(b) of the schedule, or, in the case of a hire car or rental

car, for the hirer's business. The motor vehicle must not be used for any other purpose unless the policy is endorsed and extra premium (if any) paid."

10. Clause 6 of the Policy reads, in its entirety:

**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:

Provided that the person driving holds a licence permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 above or at any time within the period of thirty days immediately prior to the time of driving has held such a licence and is not disqualified for holding or obtaining such a licence

WHEREAS the Owner named herein has made a proposal and paid a premium to the above-named Insurer for the issue of a Third Party Policy to comply with the Motor Vehicles (Third Party Insurance) Ordinance in relation to the motor vehicle described herein the Insurer agrees subject to the terms limitations exclusions and conditions contained herein or endorsed hereon and to the provisions of the said Ordinance to insure the persons or class of persons insured under this policy as described under paragraph 6 above against all liability incurred by such person or classes of person in respect of the death of or bodily injury to any person caused by or arising out of the use of such motor vehicle on the roads in Fiji during the period aforesaid or during any period for which the Insurer may renew this insurance.

11. Under the heading **EXCLUSIONS** the Insurer says that 1. It will not be liable in respect of any claims by any person who was a relative of the person using the vehicle at the time of the accident or in respect of getting in or out of the vehicle and 2. The policy does not cover workmen's compensation liability or any contractual liability and:

3. *This Policy does not cover any liability in respect of any occurrence which happens when the motor vehicle is being used for any purpose other than those for which the premium has been paid as stated in paragraph 5 above.*

12. The Schedule of the Policy contains 11 items. Item 3 reads:

“GOODS VEHICLE. A motor vehicle that is constructed or adapted or primarily used for the conveyance of goods or merchandise of any description in connection with trade, business or agriculture. For the person of this definition the performance by Government or local authority of any of its functions shall be deemed to be the carrying on of a business. (a) Light goods vehicle with a carrying of up to 2 tons.”

The other 11 items in the Schedule describe other motor vehicles, namely Private Car, Business Car, Taxi, Omnibus, Emergency Vehicles (fire, ambulance, police), Motor Cycle, Trailer, Motor Trade Vehicles, Rental Car and Miscellaneous Vehicles Not Otherwise Classified (tractors, hearses, etc)

First Finding –The Driver

13. Finnigan J found that the Policy offered cover to the Owner against claims made by third parties against the Owner, but did not offer unlimited cover, that is cover to another driver of the vehicle.

That seems to be a finding in the face of clause 6 (b) of the Policy which makes it clear that Mr Bala was covered because he was a person driving with the Owner’s permission.

The trial judge’s finding in this respect was in error.

Second Finding – Vehicle Classification (the Policy Schedule)

14. Finnigan J also found that the vehicle wasn't covered because it was insured as a *"Light goods vehicle with a carrying of up to 2 tons"* when in fact it was a *"light goods vehicle that is authorised under the Traffic Regulations to carry passengers"*
15. The trial judge refers to the Land Transport Authority Vehicle Registration Certificate which records that the vehicle was registered as a commercial vehicle with seating for three persons and he holds:

"The insurer is liable only for what cover the policy contains for a light goods vehicle that can carry up to 2 tons. I cannot conjure out of the words of the policy a liability that may be claimed for an accident when the vehicle is being used otherwise than as a light goods vehicle."

16. The Land Transport Authority Vehicle Registration Certificate does not demonstrate that the vehicle was other than the vehicle that was insured by the Policy. The fact that it has seats for three persons and was registered as commercial doesn't say anything about the use the vehicle was being put to. Vans, even vans used to carry goods, can have a seating capacity for three. The trial judge seems to be making some sort of leap between vehicle classification and use and in doing so has fallen into error.

Third Finding – Use of the Vehicle

17. The trial judge found that there was *"insufficient evidence to make a finding about what use he (Mr Bala) made of the vehicle, except for the occasion when he carried Prem Chand in return for the agreed payment of \$35.00"*.

18. The trial judge was entitled to proceed on the basis that on the occasion of the accident the vehicle was being used to carry the passenger for the \$35 payment because the second question the trial judge was asked to answer assumed that matter.
19. The real issues that this Court must determine are whether the Policy properly construed excluded cover to the vehicle on this occasion (because of that use) and, if so, was the Insurer prevented from relying on such exclusion by the Motor Vehicles (Third Party Insurance) Act Cap 177 ("the Act").

The Motor Vehicles (Third Party Insurance) Act

20. Section 6(1) of the Act provides:

"In order to comply with the provisions of this Act, a policy of insurance must be a policy which-

(a) is issued by an approved insurance company;

(b) insures such person, persons or classes of person as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of that vehicle:

Provided that .."

The proviso is to the effect that the Insurer shall not be required to cover the matters that have been picked up in Exclusions 1 & 2 of the Policy (workers compensation, contractual liability, relatives, getting onto or alighting from a motor vehicle).

21. Section 6(3) of the Act provides:

"An approved insurance company issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of

persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of person."

Section 6(4) of the Act provides that a policy shall be of no effect until a certificate of insurance in the prescribed form is delivered to the person by the whom the policy is effected.

22. Section 11(1) of the Act provides:

*"If, after a certificate of insurance has been delivered under section 6(4) 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 section 6(1)(b), **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 the benefit of such judgment any sum payable thereunder in respect of 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."**[emphasis added]***

23. Sections 11(2) & (3) of the Act provide, in essence, that no sum shall be payable by an approved insurance company under ss1 unless the insurance company was given notice of the proceedings in which the judgment was given within 7 days of the commencement of the proceedings and if the insurance company has, in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given, obtained a declaration that:

"apart from any provision contained in the policy, the insurance company is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in a material particular or that if a company has avoided the policy on the ground that it was entitled to do so apart from any provision contained in it.."

24. Mr Chand's primary submission is that because he gave notice to the Insurer of his proceedings against the Owner and Mr Bala, and because the Insurer did not obtain a declaration under section 11(3), the Insurer was obliged to pay Mr Bala the judgment (the moneys) whatever the Policy might provide as between the Insurer and the Owner.

Put more generally, the submission was that when a judgment against an Insured is obtained by a third party, a legal relationship is created between the person who obtains the judgment and the Insurer obliging the insurer to pay the judgment unless the Insurer obtains a declaration under section 11(3).

Liability, it was put, was created by the injury to the third party by a vehicle the subject of a Third Party Insurance Policy.

25. This construction of section 11(1) would have a great deal of force except that the words ***being a liability covered by the terms of the policy*** have to do some work. It seems to this Court that section 11 will operate as Mr Chand contends provided there is cover under the Policy. In this case the combined effect of clauses 5 & 6 of the Policy, and in addition Exclusion 3 of the Policy, is that unless the vehicle is being used as a "*Light goods vehicle*" at the time of any accident, or for social or domestic purposes, there will not be a liability under the Policy.
26. That is what the Policy says. The question is does the Act permit such liability to be excluded.
27. Section 10 of the Act provides:

"Where a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 ..., so much of the policy as purports to restrict the insurance of the person insured thereby in respect of the following matters-

- (a) *the age of physical or mental condition of the persons driving the motor vehicle; or*
- (b) *the condition of the motor vehicle; or*
- (c) *the number of persons the motor vehicle carries; or*
- (d) *the weight or physical characteristics of the goods that the motor vehicle carried;*
- (e) *the times at which or the areas within which the motor vehicle is used; or*
- (f) *the horse power or value of the motor vehicle;*
- (g) *the carrying on the motor vehicle of any particular apparatus;*
- (h) *the carrying on the motor vehicle of any particular means of identification other than any means of identification required to be carried under the provisions of the Traffic Act,*

shall, in respect of such liabilities as are required to be covered under this Act, be of no effect:

Provided that nothing in this section shall require an approved insurance company to pay any sum in respect of the liability of any person other than in or towards the discharge of that liability and any sum paid by an approved insurance company in or towards the discharge of the liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the approved insurance company from that person.

- 28. There is nothing in section 10 that specifically prevents an insurer from restricting liability based on the purpose for which a vehicle is used.
- 29. It seems to this Court that an exclusion based on the purpose for which a vehicle is being used offends section 6(1) of the Act which provides that the policy **must** be a policy which insures the person, persons or classes of person *“in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of that vehicle”*, and which

section specifies the liability that can be excluded, which does not include an exclusion based on the purpose for which the motor vehicle was being used.

30. Any other construction would subvert the scheme and policy of the Act. A vehicle could be in and out of cover during the course of a morning, depending on whether goods were being carried or whether passengers were being conveyed. In the Policy clause 5 provides that the motor vehicle can also be used for "*social, domestic or pleasure purposes*", but on the Insurer's case there would be no reason why an insurer has to offer cover for that extended purpose.
31. The scheme of the Act is this. Section 6 mandates that a third party insurance policy must cover any liability arising out of the use of the insured vehicle, apart from specified matters. Section 10 permits an insurer, as between the insurer and the insured in relation to eight specified matters, to restrict the insurer's liability to the insured, but provides that those restrictions will be of no effect as between the insurer and the injured third party.

So for example a policy could provide that cover will only be extended to a vehicle if the number of passengers for which the vehicle was licensed to carry was not exceeded. Such a restriction on cover offends section 6(1) and an insurer cannot escape liability to a third party injured by such a vehicle. However the insurer is permitted by section 10(c) to recover from the insured the amount the insurer has had to pay to the third party.

32. The words in section 11(1) "*being a liability covered by the terms of the policy*" have to be read as being a liability covered by the policy *in accordance with the Act*.
33. The Court of Appeal in *Ashok Kumar & Chandra Mati Singh v Sun Insurance Company Limited* [2005] ABU0072.04S considered policy wording that sought to

restrict cover to the owner and any person driving with the owner's permission provided that the person driving held a licence. The Court of Appeal held that such a restriction was not in breach of section 6(1)(b) because the section permitted the insurer to insure such person, persons or classes of persons *as may be specified in the policy*.

That must be correct but the case is not authority that an insurer may make restrictions as to the purpose for which a vehicle can be used.

34. Ashok Kumar also makes the unanswerable point that once *the person, persons or classes of persons* are specified:

"then the effect of the section is to ensure that their potential liability, in respect of bodily injury or death connected with the use of the vehicle is fully covered, save for the permitted exceptions noted in the proviso (a) and (b) to s6(1) of the Act".

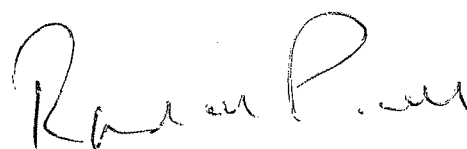
The Court also cited with approval earlier observations of the namely:

"The purpose of the statute is to protect the public against the consequences of negligence in the driving of motor vehicles by persons unable to meet substantial claims. That purpose may be defeated if approved insurers are permitted to avoid their liability to compensate the victims of road accidents by reliance upon this term of the policies issued."

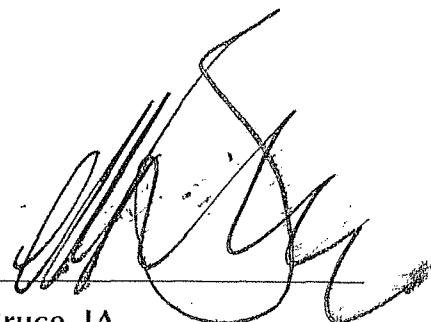
35. It follows from the foregoing that the use that was being made of the Van at the time of the accident is irrelevant to Mr Chand's claim against the Insurer and, section 11 of the Act having been complied with, the Insurer is obliged to pay Mr Chand the moneys. The trial judge ought to have answered the three questions Yes, No and No.

36. The orders of the Court are:

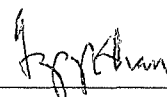
1. Appeal allowed;
2. Judgment for the appellant against the respondent in the sum of \$137,674.20;
3. The respondent is to pay the appellant's costs of this appeal and the proceedings before Finnigan J as taxed or as otherwise agreed.



Powell, JA



Bruce, JA



Khan, JA

Solicitors:

Samuel K. Ram, Ba for the Appellant
A.K. Lawyers, Ba for the Respondent