IN THE HIGH COURT OF FIJI
AT SUVA - CIVIL JURISDICTION

Civil Action No: HBC 155 of 2012

BETWEEN	:	PITA ILAISA WAQA
		Plaintiff
AND	:	STANDARD CONCRETE INDUSTRIES LIMITED
		Defendant
AND	:	DOMINION INSURANCE LIMITED
		Third Party

Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr A. Pal for the Defendant Mr Devenesh Sharma, Ms. N. Choo with him, for the Third Party
Date of Hearing	:	9 May 2017
Date of Decision	:	17 May 2017

DECISION

This is a matter of insurance law which Counsel for the insurance company says is of public interest. Therefore, although this is an application for a stay, I shall expound the relevant law on insurance, in the interest of the public.

1. Before me is a Summons for stay of execution (summons) of my Judgment delivered on 3 February 2017 (Judgment) filed by the Third Party. In it, the Third Party (Dominion) seeks the following orders:

   (1) A stay of the Judgment until determination, of the appeal, against it, by the Court of Appeal.
   (2) Alternatively, an order granting stay on condition that the Judgment sum be paid into Court pending the outcome of the appeal.

2. The grounds for the application are as follows:
   The trial Judge erred in law and in fact:
   (i) In holding that the Third Party is obliged to indemnify the Defendant against the Plaintiff's claim.
   (ii) In holding that Condition 8 of the insurance policy cannot be relied on to repudiate liability where the Defendant had failed to take reasonable precautions.
   (iii) In failing to consider that the policy was subject to terms and conditions "in that the repudiation of the Policy for failing to take reasonable precautions was an implied terms (sic) of the Policy".
   (iv) In awarding special damages when there was no specific/particularized pleading and/or evidence of special damages by the Plaintiff.

3. In the Affidavit in Support of the Summons, the Acting C.E.O of Dominion says if no stay is granted the appeal would be rendered nugatory, and the Judgment is now a matter of public interest.

4. In the Affidavit in Opposition to the Summons, the General Manager Finance of the Defendant says it has paid the Judgment sum and sought indemnity. The appeal would not prove nugatory because the Defendant is in a sound financial

state. The argument of public interest is created to avoid payment of the Judgment sum to the Defendant. If there is litigation it is because of the drafting of the policy that Dominion has.

5. At the hearing of the Summons, Counsel for Dominion submitted that there were 2 grounds for a stay. The first was it was a meritorious appeal. The Defendant had breached its statutory duty. It was arguable that the insurance does not cover special damages. The second was there was prejudice to Dominion because the Judgment will lead to further claims.

6. Counsel for the Defendant then submitted. He said the non-granting of the stay would not render the appeal nugatory. The said grounds were without merit as Dominion's Counsel, Ms Choo had conceded that nothing in condition 8 of the policy entitled Dominion to repudiate liability where the Defendant failed to take reasonable precaution. Ms Choo also conceded that no implication was to be drawn from condition 8 that Dominion was entitled to repudiate liability if the Defendant failed to take reasonable precautions. A stay should be refused because there was no public interest involved.

7. Dominion's Counsel in his reply said the Court of Appeal is being asked to set aside the Judgment. The special damages included the loss of earnings of $17,940.

8. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I now proceed to deliver my decision.

9. The 2 main grounds for any successful stay application are the following:

   (i) There are merits in the appeal.
   (ii) The appeal will be rendered nugatory if a stay is not granted.

10. This Summons like the Judgment it seeks to stay and the appeal that arises from the Judgment all turn on the pivot of the insurance policy. This is Dominion's

policy and if there be any ambiguity, the contra proferentem rule will operate against it in the construction of the conditions.

11. The express condition on which Dominion founds its stand to repudiate liability is condition 8 of the policy. Condition 8 reads "Precautions: The insured shall take all reasonable precautions to prevent accidents and must comply with all statutory obligations relating to employee safety and occupational health".

12. Going through the Dominion policy, in the Agreed Bundle, with a fine tooth comb, from the start to its finish, does not disclose even an iota of evidence that Dominion is entitled to repudiate liability, if the Defendant fails to take all reasonable precautions or to comply with all statutory obligations relating to its employees. This should bring this matter to an ultimate end here or anywhere else. Cadit quaestio (the matter admits of no further argument). Nevertheless I shall proceed in the public interest.

13. The situation before this Court in 2017 was faced by the English Court of Appeal in 1941 in: Woodfall & Rimmer Ltd v Moyle And Another [1941] 3 All E.R.Annotated 304. The insurance policy condition concerned read "The assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations". These words are similar to the words of condition 8 here. Lord Greene, M.R. said at 308-9 that "If the construction which is urged on behalf of the underwriters is the right one, I do not think that it would be an exaggeration to say that this document is really a trap for the insured. In using that expression, let it not be thought for one moment that I use it as implying that a trap is intentionally set. I mean nothing of the kind. Al I mean is that, if the intention of the underwriters was to limit their risk in the way in which counsel

for the appellants would have it limited, they have used language which entirely fails to make that intention clear. I cannot help thinking that, if underwriters wish, by some qualification, to limit a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is". Goddard LJ said if they were to read the condition that the assured shall take reasonable precautions to prevent accidents in the way in which counsel for the appellants (underwriters) had invited them to read it, it seems to him that it would follow that the underwriters were saying "I will insure you against your liability for negligence on condition that you are not negligent", because if the employer had taken all reasonable precautions to prevent accidents, it follows that he cannot be liable in negligence.

14. The Court dismissed the appeal against the judgment for the plaintiff (the insured employer) for all the sums claimed.

15. I accept as persuasive authority the decision of the English Court of Appeal. If I may say so, their Lordships' strictures on the Lloyds' underwriters are equally applicable 76 years later to any insurance company.

16. There is only one other matter that I need to discuss before I conclude. This is the contention of Counsel for Dominion that the special damages awarded which are being challenged include the past loss of earnings in the sum of $17,940 and not just $200 for medical and transport expenses.

17. That, loss of earnings are covered by the policy is obvious because condition 9 requires the insured (Defendant) to keep "a proper Wages Book so that a record may exist of such workmen as are entitled to call upon the Insured for

Compensation and this wages book must be available for inspection at any reasonable time by Dominion Insurance". Why would Dominion need to inspect the wages book unless "Dominion agrees to indemnify" the Defendant?.

18. It is trite law that special damages are to be specially pleaded or particularized and proved. The Statement of Claim pleads $90 for medical expenses and $156.40 for transport expenses, which together come up to $246.40. The Court only allowed $200 for both.

19. With regard to the past loss of earnings of $17,940, this again was specially pleaded. However the Defendant's Counsel at the trial, in his oral submission, conceded that this loss had been sustained. "Concede" is defined by the Oxford Dictionary as admit", grant, allow". It should have been obvious to all, that if the Defendant admits, grants or allows that the Plaintiff had suffered a loss and the Court makes an award for that loss, that no appeal can thereafter be lodged against that award, by the Defendant and even less by a Third Party.

20. It is a disingenuous argument to say the appeal is against an award for special damages comprising $17,940 and $200, when the plain unvarnished truth is that in reality it can only be an appeal against the paltry sum of $200 which had not ben conceded and which, only, can be the subject of an appeal.

21. At the end of the day, there is no element of public interest as put forward by Counsel for Dominion to the Court. If there is any public interest involved here, it is in the opposite direction and the Court can do no better that to quote from the editorial note to the Court of Appeal decision. It says that if an employer is to be insured against his liability to a workman it would seem to be futile to take out a

policy with a condition that he was not covered if he was guilty of negligence or breach of statutory duty. Yet this seems, in effect, to have been the main argument for the insurers in this case (see page 304).

22. In my opinion, if a person pays a premium to an insurance company to cover a risk, it is in the public interest that the insurance company should indemnify him if that risks occurs, unless at the inception of the policy the insurance company had qualified their obligation to indemnify the insured by expressing "their intention, with competent advice, in language appropriate to achieve the result desired" (per Lord Greene). In fine, absent the clearly expressed limitation of the risk assumed, absent the entitlement to avoid liability to pay.

23. In the result, as Counsel for the Third Party has failed to satisfy me that there are any merits in the appeal or that an appeal would be nugatory, the Summons for a stay is dismissed with costs, summarily assessed at $1,500, to be paid by the Third Party to the Defendant.

Delivered at Suva this 17th day of May 2017.

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David Alfred

JUDGE of the High Court of Fiji.