

SUN INSURANCE CO LTD v MUKESH CHANDRA(CBV 007 of 20011)

SUPREME COURT — APPELLATE JURISDICTION

5 GATES P, CHANDRA and SUNDARAM JJ

25 April, 9 May 2012

10 **Insurance — general insurance — passenger of motor vehicle injured when collided with another motor vehicle driven by a person who did not hold a driving licence — whether injured passenger could recover damages from insurer of either vehicle — insurance policy covered third party risks but included exceptions to liability such as when the driver held a licence within the period of 30 days immediately prior to the time of driving — Motor Vehicles (Third Party Insurance) Act ss 4(1), 4(2), 6, 6(1)(b), 10, 11, 19, reg 3 — Road Traffic Act — Road Traffic Act — Supreme Court Act s 7(3) — Motor Traffic Act 1930 and 1934 (UK).**

20 The respondent was a fare paying passenger in a motor vehicle (the first vehicle) insured with the appellant Sun Insurance. He was injured when that vehicle collided with a second vehicle, also insured with Sun Insurance. The appellant's insurance policy in relation to the first vehicle set down limitations as to the use of the vehicle to the effect that the policy shall also cover the motor vehicle for social domestic or pleasure purposes, or for the Owner's business within the limits set out in the schedule, or, in the case of a hire car or a rental car, for the hirer's business. The motor vehicle was not to be used for any other purpose unless the policy was endorsed and extra premium (if any) paid. The respondent obtained judgment against the drivers and registered owners of the two vehicles. The driver of the second vehicle did not hold a driving licence and was later charged and convicted in that regard. The respondent commenced a further action in the High Court of Fiji seeking a declaration. Inoke J held the appellant was liable to pay the judgment sum of \$233,295. On 18 March 2011, the Court of Appeal allowed the appellant's appeal and set aside the orders of the High Court but in respect of the appellant's liability in respect of the second vehicle, the appellant was ordered to pay the respondent \$233,295, in respect of its liability of the first vehicle. The appellant sought special leave to appeal to the Supreme Court.

Held –

35 (1) The Court of Appeal erred in concluding that Sun Insurance had not proved that the driver of the second vehicle never held a driving licence as there was sufficient material to show that he had been charged and convicted for same as well as for driving a motor vehicle in contravention of the third party policy risk.

40 (2) As there was a contravention of the condition in the policy issued by the appellant excluding their liability in respect of the person driving the vehicle they cannot be held liable in respect of the claim of the third party respondent. That third party will have to be satisfied with their claim against the insured driver and take whatever steps they could to enforce same against the insured.

(3) The insurance policy did not permit the use of the first vehicle to carry fee paying passengers. In such circumstances the insurer would not be liable to pay the amount stipulated in s 6(1)(b) of the Act.

45 Special leave to appeal granted.

Cases referred to

Sun Insurance v Pranish Prakash Chand , Supreme Court CBV0005 of 2008S, applied.

50 *Ashok Kumar and Chandra Mati Singh v Sun Insurance Co Ltd* Civil Appeal No.ABU0072 of 2004S; *Bright v Ashford* [1932] 2 KB 153; *Dominion Insurance Ltd v Bamforth and others* [2003] FJSC 3; *General Accident Fire and Life*

5 *Assurance Corporation Ltd v Shuttleworth* [1938] 1 KB 650; *Gray v Blackmore* [1934] 1 KB 95 ; *Kerridge v Rush* [1952] 2 Lloyd's Reports 305; *QBE Insurance (Fiji) Ltd v Ravinesh Prasad* Supreme Court CBV 0003 of 2009, 18th August 2011; *Repeka Naba v Tower Insurance (Fiji) Ltd* Supreme Court CBV0002 of 2011, 12th May 2011; *Robb v McKechnie* [1936] SC 256; *Zurich General Accident and Liability Insurance Co. Ltd v Morrison* [1942] 1 AER 529, cited.

Michael Raman v Reginam Cr App No 27; *Murtaza Khan v Reginam* [1965] 11 FLR 161, considered.

10 *Ring, QC with S Maharaj* for the Petitioner.

E Maopa for the Respondent.

15 [1] **Gates P, Chandra, Sundaram JJ.** The Respondent was a fare paying passenger in a van registration number BU 802 that was insured with Sun Insurance. He was injured when the van collided with a second vehicle, AC 133, also insured with Sun Insurance. The Respondent obtained judgment against the drivers and the owners of the two vehicles in action HBC 50/2007. The first and second defendants in that action were the driver and registered owner respectively of van BU 802. The Third and Fourth Defendants were the driver and registered owner of vehicle AC 133, respectively. The driver of AC 133 did not have a driving licence and he had been charged and convicted regarding same. The Respondent brought an action HBC 42 of 2009 in the High Court of Fiji at Lautoka against Sun Insurance Co Ltd seeking a declaration against the said Company being the Insurer. Inoke J granted the orders sought by the Respondent with interest and costs to the effect that the Petitioner is liable to pay the judgment sum of \$233,295 plus interest and costs in the sum of \$3,000 to the Respondent, the interest to be calculated at 6% per annum and costs of \$3,500.

20 [2] On appeal by the Petitioner to the Court of Appeal, the orders of the Court below were set aside and in respect of the Petitioner's liability in respect of vehicle AC 133 the Petitioner was ordered to pay the Respondent the sum of \$233,295, in respect of their liability in respect of vehicle BU 802 they would have been liable to pay the Respondent the sum of \$4,000 which sum is included in the sum of \$233,295, interest at 6% for the period from 10th September 2008 until the date of the order, no costs of the appeal were ordered but ordered as costs at first instance and in respect of action HBC 50 of 2007L the Petitioner to pay the Respondent costs assessed in the sum of

35 [3] \$4,000.

40 [3] The Petitioner in the present petition of appeal has sought special leave to appeal from this Court to set aside the judgment of the Court of Appeal dated 18th March 2011 on the basis that the decision raised a major policy consideration in the most likely event that the public in Fiji will not be able to afford compulsory insurance as the decision will no doubt cause insurers to revise their premiums to provide unrestricted cover save as limited by the decision. An increase in insurance premiums would place a heavy burden on the general public at large. A refusal by underwriters to undertake compulsory insurance business due to the financial implications will have a direct impact on the public. It may require the Government to consider some other scheme funded by it which may not be possible in the current economic climate.

50 [4] The main issue in the present case is in respect of the liability of an Insurer against third party risks under Cap 177 in Fiji, which has been considered by this Court on previous occasions and more recently in *Sun Insurance v Pranish*

Prakash Chand, Supreme Court CBV0005 of 2008S, 15th October 2010. In that case this Court considered the legislative scheme of Cap 177 in terms of the legislative history and the common law in the United Kingdom upto and after the passing of the Road Traffic Act 1930 and the Road Traffic Act 1934.

5 [5] The ruling in *Sun Insurance v Pranish Prakash Chand* (supra) has been reinforced in *Repeka Naba v Tower Insurance (Fiji) Ltd* Supreme Court CBV0002 of 2011, 12th May 2011 and *QBE Insurance (Fiji) Ltd v Ravinesh Prasad* Supreme Court CBV 0003 of 2009, 18th August 2011.

10 [6] In view of the position regarding third party insurance claims against the insurer being considered by this Court in the recent judgments as stated above, the question arises as to whether special leave to appeal should be granted to the Petitioner in terms of s 7(3) of Supreme Act of 1998.

15 [7] The Petitioner has set out grounds of appeal (a) to (g) in its petition seeking special leave to appeal. Of special significance is ground (d) which is as follows:

(d) That the learned Judges' judgment is quite obviously a "Agenda driven interpretation" of the Act and which is not the function of the Court but that of the Legislature in that the Courts function is to interpret and apply the Laws as it stands and not to legislate.

20 [8] Taking into account the basis of the petition of the petitioner as set out in paragraph 4 above and this ground of appeal (d), it would be appropriate to grant special leave to appeal and to revisit the decisions set out in paragraph 5 above and consider the appeal of the Petitioner.

25 [9] The law relating to third party risks has been incorporated in Fiji in The Motor Vehicles (Third Party) Insurance Act (Cap 177), and it would be relevant to set out the more salient provisions in the said Act which made it compulsory for vehicle owners to take out a policy of insurance against third party risks. The preamble to the Act states it is "*AN ACT TO MAKE PROVISIONS FOR COMPULSORY INSURANCE AGAINST THIRD PARTY RISKS ARISING OUT*
30 *OF THE USE OF MOTOR VEHICLES*".

[10] Users of motor vehicles should be insured against third party risks.

35 *S 4 (1) Subject to the provisions of s 5, no person shall use, or cause or permit any other person to use, a motor vehicle unless there is in force in relation to the use of that motor vehicle by such person or other person, as the case may be, such a policy of insurance in respect of third party risks as complies with the provisions of this Act.*

40 It is clear therefore that according to this section that it is compulsory for a user of a motor vehicle to insure the said vehicle against third party risks. Section 4(2) states that it is a punishable offence to contravene this section, and such a person after conviction is disqualified from holding or obtaining a driving licence for a period of 12 months from the date of conviction.

[11] Section 6 sets out the requirements of the policies of insurance.

S 6 (1) In order to comply with the provisions of this Act, a policy of insurance must be a policy which:

45 *(a) is issued by an approved insurance company;*

(b) insures such person, persons or classes of persons 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 or bodily injury to any person caused by or arising out of the use of the vehicle;

Provided that –

50 *(a) such policy shall not be required to cover –*

(i) liability solely arising by virtue of the provisions of the Workmen's Compensation Act; or

(ii) *save in the case of a passenger carried for hire or reward in a passenger vehicle or where persons are carried by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or*

5 (iii) *liability in respect of death of or injury to a relative of the person using the vehicle at the time of the occurrence of the event out of which the claim arises, or to a person living with the person is using the vehicle as a member of his family; in this paragraph "relative" means a relative whose degree of relationship is not more remote than the fourth;*

10 (iv) *any contractual liability;*

(b) *such policy shall not be required to cover liability in excess of \$ 4000 for any claim made by or in respect of any passenger in the motor vehicle to which the policy relates or in excess of \$40,000 for all claims made by or in respect of such passengers. The amount herein specified shall be inclusive of all costs incidental to any such claim or claims.*

15 S.6(4) *A policy shall be of no effect for the purposes of this Act unless and until there is delivered by the approved insurance company to the person by whom the policy is effected a certificate, in this Act referred to as a "certificate of insurance" in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed.*

20 [12] Section 6 defines the third party insurance policy under this Act. According to the definition the parties to the policy are, on the one part an approved insurance company and on the other part a person, persons or classes of persons requesting for a third party insurance and the policy should be in relation to any liability incurred by the said person or persons in respect of the death or bodily injury to any person caused by or arising out of the **use of the vehicle insured.**

25 [13] The next matter of importance in this section is as regards the persons who would be affected by the use of such vehicle. This is stated in express terms in the phrase "*in respect of death or bodily injury to ANY PERSON caused by or arising out of the use of the vehicle*", which therefore would cover all third parties who would be affected as a result of the use of the said vehicle.

30 [14] However, the proviso to s 6(1) sets out exceptions to the liability in respect of specific instances and persons. Proviso (a) (i) exempts situations covered by the Workmen's' Compensation Act. Proviso (ii) exempts passengers carried for hire or reward in a passenger vehicle, or persons carried by reason of a contract of employment which would be employees. Proviso (III) exempts liability regarding relatives of the user of the vehicle or in respect of a relative living with the use of the vehicle as a member of his family, the relative meaning a relative whose degree in relationship is not more remote than the fourth. Proviso (iv) exempts liability where there is any contractual liability. Under proviso (b) the liability is limited to \$4000 in respect of any claim made by or in respect of any passenger in the motor vehicle to which the policy relates.

45 [15] Therefore it would seem that s 6 while providing for liability to arise in respect of third parties excludes and also limits such liability in respect of specific persons or specific situations. While the Statutory provision has these limitations, insurance companies when setting out the persons who are covered by the policy in compliance with s 6(1)(b) add on a qualification to such person or persons who would be driving such vehicle. For instance in the policy that was issued in this case after setting out that the owner and any persons who is driving on the owner's order or with his permission goes on to specify thus "*Provided that the*

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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
5 obtaining such a licence". Such a provision would narrow down the scope of the protection afforded by the policy.

[16] A further matter that would become relevant in placing a qualification on the user of the vehicle insured such as the requirement of holding a licence to drive the vehicle, an obligation would be placed upon the insured (the owner of
10 the vehicle) to take sufficient care when authorizing another to drive the vehicle. A child who is under age and who cannot apply for a driving licence, or a thief who drives a stolen vehicle would not come within the meaning of "persons authorized to drive".

[17] It would also be of relevance to state that in the present case Nazim Hussein who was the driver vehicle AC 133, who did not have a driving licence was convicted (a) for dangerous driving occasioning death, (b) driving a motor vehicle without a driving licence and (c) for driving a motor vehicle in
15 contravention of the third party policy risk. It would be apparent therefore that in terms of the policy of insurance issued by Sun Insurance, there has been a contravention of the policy condition regarding the qualification of the driver.

[18] Cap 177 s 10 provides for the Avoidance of restriction on the scope of policies covering third party risks.

S.10. Where a certificate of insurance has been delivered under the provisions of s 6
25 (4) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the person insured thereby in respect of any of the following matters –

(a) the age of physical or mental conditions of persons driving the motor vehicle; or
(b) the condition of the motor vehicle;
(c) the number of persons that the motor vehicle carries; or
30 (d) the weight or physical characteristics of the goods that the motor vehicle carried;

or

(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; or
(g) the carrying on the motor vehicle of any particular apparatus; or
35 (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
40 company to pay any sum in respect of the liability of any person otherwise 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.

[19] Section 10 is to the effect that any conditions laid down in the policy by the insurer regarding the matters set out in (a) to (h) would be of no effect to third parties as regards liabilities that are required to be covered under the Act. Where such conditions are laid down by the Insurer, in terms of the proviso to S10 the insurer if he has paid any sum in respect of any liability of a person covered by
50 the policy is entitled to recover such sum from that person (the insured). However, It is a practice among insurance companies to lay down conditions in

relation to the matters specified in s 10, as well as other conditions not specified in S10 as has been seen in the present case too where conditions had been laid down regarding safe condition of the vehicle while in use, restriction on the weight of the load it was conveying, carrying passengers for hire or reward or in

5 pursuance of a contract of employment in contravention of the licence issued for the vehicle that was described, not to permit the driving of the vehicle by a person under the influence of intoxicating liquor or is as a result of age or some physical or mental condition rendered incapable of driving such vehicle with safety.

[20] Section 11 of the Act deals with the duty of insurance companies to satisfy
10 judgments against persons insured in respect of third party risks.

S 11(1) If, after a certificate of insurance has been delivered under the provisions of subsection (4) of s 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 s 6," being a liability covered by the terms of the
15 *policy, is obtained against any person 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 person 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.*

20 *11(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 proceedings in which the judgment was given, the insurance company has notice of the bringing of the proceedings; or*

25 (b) *in respect of any judgment so long as execution thereon is stayed pending an appeal.*

S11 (2) (c) covers the case in which a policy was cancelled by mutual consent or by virtue of its provisions prior to the event giving rise to the liability. S.11(3) provides that the insurer is not liable if, in an action commenced within 3 months after the commencement of the proceedings in which the judgment was given, the insurer has obtained a declaration that it is entitled to avoid the policy for material non-disclosure or false representation in a material particular. The avoidance of the liability under s 11 (3) is subject to a proviso that notice of the insurer's proceedings must, within 7 days of their commencement, have been given to the plaintiff in the action under the policy.

35 [21]

(i) For the use of a motor vehicle, taking out an insurance against third party risks is compulsory under the Motor Vehicles (Third Party Insurance) Act. An insurance policy is a contract between the Insurance Company and the Insured and therefore the parties
40 could agree on terms and conditions when taking an insurance policy provided those conditions are not prohibited or restricted under the said Act. As in any contract any breach of condition would make the policy invalid. In this instance the policy is in relation to the use of the vehicle, therefore any breach of condition in the use of the vehicle would render the policy invalid as long as the breach continues. If a person using a vehicle breaches a condition of a third insurance policy while using the vehicle,
45 he is supposed to be using the vehicle without a third party insurance policy. By such conduct he is not only committing an offence under s 4(2) of the said Act but he also becomes personally liable for any death or injuries caused to third parties.

(ii) In the above circumstances the Insurance Company would not be liable as the insurance cover provided to the vehicle becomes invalid and the "certificate of insurance" issued in pursuance of the said insurance policy also becomes invalid.

50 (iii) The Motor Vehicle (Third Party Insurance) Act imposes a liability on the insurer who has issued a Certificate of Insurance of honour a judgment obtained against the

insured provided that the certificate of insurance is in force and valid at the time of the occurrence of the event and subject to the procedural safeguards provided in Subsection (2) of s 11. The Certificate of Insurance will not be in force if there is a breach of a condition in the policy other than that stipulated in s 10 of the Act or if it is cancelled by mutual consent or by virtue of any provision in the policy (S.19). The Certificate of Insurance is invalid if it is obtained by non disclosure of a material fact or by a representation of fact which was false in a material particular. This exception is subject to the proviso to subsection (3) of s 11.

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10 [22] Having considered the statutory provisions in the Fiji Act (Cap 177) it would be relevant to consider the cases and other authorities in relation to these provisions. The cases which have dealt with the Motor Traffic Act of 1930 and 1934 in the United Kingdom and subsequent amendments thereto and the decisions in Fiji regarding Cap 177 would be relevant in determining the scope and application of the Fiji Act which has similar provisions.

15 [23] In *Bright v Ashford* 1932 2 KB 153 where a motor cyclist rode a motor cycle with another person sitting behind him as a passenger on the pillion without a side-car was charged for using a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third party risks as complied with the requirements of s 38 of the Road Traffic Act of 1930, it was held that the policy referred to did not cover use whilst carrying a passenger unless a side-car was attached to the motor cycle as in those circumstances there was no policy of insurance in force in respect of third party risks.

20 [24] In *Gray v Blackmore* 1934 1 KB 95 a garage proprietor had obtained a policy which provided for indemnity against liability to third persons in respect of bodily injury in the event of accident arising out of the use of his car. The policy also expressly provided that it should not cover liability caused, sustained or incurred while the car was being used otherwise than for "*private purposes*" which were defined as meaning social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession. While using the car for a purpose in connection with the motor trade the plaintiff met with an accident as a result of which a third party claimed damages for personal injuries. As the underwriters refused to indemnify the plaintiff, he claimed a declaration that they were bound to do so. It was held that the underwriter was not liable. S.38 of the Road Traffic Act does not avoid a condition limiting the cover under a policy: it merely prevents an underwriter escaping liability to a third party by reason of some act or omission of the assured after the claim has arisen. The effect of a breach of the conditions in the policy is not to throw on the underwriter a burden which he has never agreed to undertake, but merely to put the assured, so far as the insurance provisions of the Road Traffic Act are concerned, in the same position as if he had never taken out a policy at all.

30 [25] In *Kerridge v Rush* 1952 2 Lloyd's Reports 305 where there was a condition limiting the liability of the insurer regarding the number of trailers that could be drawn by the tractor regarding which an insurance policy was obtained, it was held that where a greater number of trailers than was permitted by law was drawn by the tractor, that there was no policy in existence as the policy did not cover such a situation.

45 [26] In *Robb v McKechnie* 1936 SC 256 an insurance policy against third party risks covered the use of a motor lorry except when drawing a trailer. In a prosecution charging the owner of the lorry for contravening s 35 of the Act of 1930 where the lorry had been used with a trailer, it was held that in respect of

the liability for third party risks while the lorry was drawing a trailer was not a risk “covered by the terms of the policy” and that therefore there was no insurance policy against third party risks in force while the lorry was being so used. The condition in the policy was considered to be one relating to
5 “limitations as to use”.

[27] In *General Accident Fire and Life Assurance Corporation Ltd v Shuttleworth* (1938) 60 Ll L Rep 301 the insured had obtained a policy without disclosing the fact that he had been disqualified from holding a driving licence as he had been convicted for a serious motoring offence. The policy contained a
10 condition to the effect that the Insurer would not be liable while the vehicle was being driven by the policy holder unless he held a licence to drive such a vehicle. It was held that the insurer was never on risk as the insured had not disclosed about his disqualification, and the Insurer was entitled to a declaration that they were not on risk.

[28] In *Dominion Insurance Ltd v Bamforth* and others 2003 FJSC 3 where a truck driven by Ravin Chand struck a motor vehicle driven by Mrs Wilson which was owned by Kay Bamforth. Mrs Wilson suffered personal injuries in the accident and the vehicle she drove was a write off. Mrs Wilson secured a judgment against the employer of Ravin Chand the owner of the truck and the
20 third party insurer. Notice of the commencement of the proceedings had been given to the insurer 13 days after they began and not within 7 days as required by s 11(2)(a). On appeal by the Insurer to the Court of Appeal, it was held that there had been substantial compliance with the notice requirement and sustained the liability. However, on appeal to the Supreme Court by the insurer, it was held
25 that the Insurer was not liable as the mandatory provision of giving 7 days notice had not been complied with. This case illustrates the effect of s 11 (2) (a) which creates a condition precedent before imposing a liability on an Insurer.

[29] In *Ashok Kumar and Chandra Mati Singh v Sun Insurance Co Ltd* Civil Appeal No. ABU0072 of 2004S the question revolved on a condition in the policy of insurance which related to the class of persons entitled to drive the vehicle that was insured. It stated that the driver should hold a licence permitting
30 him to drive a motor vehicle for every purpose for which the use of said motor vehicle is limited 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
35 or obtaining such a licence. It was found that the driver in question did not hold any driving licence at the time of the accident and there was no challenge in that finding. The appeal was in respect of the proposition that there was an error in the finding that the policy did not apply where the driver was unlicensed. The appeal was dismissed and the insurer was held not liable.

In the lower Court Byrne J in deciding this issue regarding the unlicensed driver had relied upon the decision of Kermode J in *Michael Raman v Reginam* Cr App No.27 of 1978 where Kermode J observed that the proviso regarding the requirement of the driving licence, or not holding one within 30 days prior to the time of driving, or is disqualified from holding or obtaining a licence, is not
45 covered by the policy at all and that there would be in fact no policy in force covering such an unlicensed driver, because the policy does not extend to cover an unlicensed driver.

Kermode J in arriving at his conclusion declined to follow *Temo Maya in re* [1977] 23 FLR 117 or *Murtaza Khan v Reginam* [1965] 11 FLR 161. In *Re Temo*
50 *Maya* the Court had followed the decision in *Murtaza Khan* without giving consideration to the change in policy wording, noting that a breach of the

stipulation in the policy would not make the policy completely inoperative. It would merely make it voidable at the instance of the insurance company. Until so avoided, it would hold good. This view does not accord with the interpretation that has been seen in the other cases that has been set out above in this judgment.

5 (It may be noted that the decision in *Murtaza Khan* had influenced the thinking of the Court in *Sun Insurance v Pranish Prakash Chand* which will be dealt in the course of this judgment later).

The Court of Appeal stated that-

10 “While there is a sound policy behind compulsory third party insurance which is designed to protect innocent persons injured, or suffering loss as dependents, through negligence, there are also sound policy reasons in support of the decision in *Michael Raman*, and in support of the present wording of the policy, so as to restrict coverage to those cases where the driver is licensed. Otherwise there is a potential for the exposure of authorized insurers to claims involving drivers who are unqualified or
15 *disqualified from operating motor vehicles, which could be quite significant.*”

[30] The above cases illustrate the fact that a term in the policy which avoids liability of the insurer in respect of third party claims would be enforceable against such third party. This basis would be contrary to the stand taken in the Supreme Court decision in *Sun Insurance v Pranish Prakash Chand* (infra) and the cases that followed that decision, *QBE Insurance (Fiji) limited and Ravinesh Prasad* (infra) and *Repeka Naba v Tower Insurance (Fiji) Ltd* (infra).

[31] In *Sun Insurance v Pranish Prakash Chand* the question at issue was in relation to a policy which sought to exempt the insurer from liability against third parties in that the vehicle should not be used for carrying passengers for hire and reward. The Court exhaustively dealt with the development of the statutory provisions in the United Kingdom and in arriving at the final decision was influenced by the decision in *Murtaza Khan v Reginam* (infra) and *Zurich General Accident and Liability Insurance Co Ltd v Morrison* 1942 1 AER 529.

[32] In the judgment of the Supreme Court in *Sun Insurance v Pranish Prakash Chand*, the Court at paragraph 58 cited the judgment in the Morrison case and quoted exhaustively from the judgment of Lord Justice Goddard who dealt with the United Kingdom Motor Traffic Act of 1930 and its Reform in 1934. Lord Justice Goddard dealt with s 10 of the UK Act (Corresponding to s 11 of the Fiji Act), but did not specifically deal with s 10 (1) (corresponding s 11 (1) of the Fiji Act) which really dealt with the main aspect of the avoidance of liability by the insurer. His Lordship dealt with s 10(3) which provides for an insurer obtaining a declaration regarding non-disclosure of a material fact or representation which was false as represented by the insurer in obtaining the policy. The main phrase
40 in s 10 (1) namely “any such liability as is required to be covered by a policy” had not been dealt with.

[33] There is similar reasoning as in Morrison’s case cited above in the judgment of Chief Justice Mills Owen in *Murtaza Khan v Reginam* (infra). His Lordship dealing with s 11 of the Fiji Act (comparable to s 10 of the UK Act)
45 stated that “the section presupposes a case of non-liability under the policy by reason of the company being entitled to avoid or cancel the policy. The object, very clearly, is to provide for compensating the third party by way of imposing a statutory obligation on the insurance company to do so, but not by way of extending the indemnity afforded by the policy vis-à-vis the insured. It does not
50 prevent the company from avoiding or cancelling the policy vis-à-vis the insured.”

[34] The view expressed in Murtaza Khan's case is in line with the view expressed by Lord Justice Goddard in Morrison's case. As pointed out above in both cases the main phrase "*any such liability as is required to be covered by a policy*" had not been dealt with and the section had been considered as one imposing a statutory liability on the insurer to safeguard third party rights. As has been stated earlier in this judgment in the analysis of s 11 (a) of the Fiji Act, it has to be read in conjunction with s 6 (1) (b) which entitles the Insurer to enter into a contractual obligation with the insured in setting down the person or class of persons entitled to drive the vehicle that is to be insured. Such contractual freedom has been granted to the insurer to lay down conditions regarding the person or class of persons entitled to drive the vehicle. Such conditions would take away the statutory obligation cast on the insurer as against third parties even though there is no privity of contract between the insurer and the third party.

[35] In *Sun Insurance v Pranish Prakash Chand*, the Supreme Court at paragraph 68 had concluded thus:

68. *In this Court's judgment the following factors are our reasons for finding against the view that section in the 1934 Act, which is s 11 of Cap 177 in Fiji only confers third party rights against insurers where at the time of the event the Insured and his permitted user of the insured vehicle were not in any breach of conditions in the policy.*

(i) *the express words of the legislature are clearly expressed and admit only of the interpretation that the scheme allows third party statutory recovery against the insurer when the insured is out of cover because of breach of condition.*

(ii) *the mischief causing the legislature to act in 1930 was the need for compulsory third party insurance.*

(iii) *the mischief causing the legislature to act in 1934 was the need to make compulsory third party insurance effective. It was the insurance companies' practices that were responsible for the perception and reality that the 1930 Act was not protecting the public as social pressure demanded.*

(iv) *the authority of Goddard L.J. and Mills-Osen C.J in Murtaza Khan in our view reflect the true intent of the United Kingdom legislature in 1930 and 1934 and are authority supporting the view we have ourselves formed.*

[36] In view of the position set out above in paragraph 34 and 35, the reasons set out in paragraph 68 in the judgment of Sun Insurance quoted above cannot be accepted as containing the proper ambit and operation of the law in respect of s 11 of the Act. S.11(1) as stated above does provide a situation where an insurer can avoid liability against a third party which depends on the conditions set out in the policy in terms of s 6(1)(b).

[37] As the cases of *Rupeka Naba v Tower Insurance (Fiji) Ltd* (infra) and *Q.B.E. Insurance (Fiji) Ltd v Ravinesh Prasad* (infra) followed the reasoning in *Sun Insurance v Pranish Prakash Chand*, it would not be necessary to deal with those judgments in view of the position set out in paragraphs 34, 35 and 36 above.

[38] It will necessary at this stage to deal with the judgment of the Court of Appeal in the present case against which this appeal has been taken up. The said judgment contains a judgment of Justice Marshal and Justice Izaz Khan. Justice Khan has agreed with the judgment and reasoning of Marshall JA in respect of vehicle AC 133. In effect the judgment of Marshall JA dealt with the liability in respect of vehicle AC 133 and the judgment of Khan JA dealt with the vehicle BU 802.

[39] In his judgment Marshall JA at paragraph 5 of the said judgment dealing with driver conditions used by underwriters following the enactment of the 1934 Act in the United Kingdom stated that the policy had a driver condition, firstly that the driver had to have possessed a valid driving licence, secondly at the time
5 of the event the driver must not be disqualified from holding or obtaining a licence. He went on to state that the policy of this was clear and firstly that the insurer was not to be liable to the third party employing the s 10 scheme (in Fiji s 11) if the permitted driver of the insured had never held a driving licence. Secondly, the insurer was not to be held liable to the third party if at the time of
10 the event the insured's driver was disqualified from holding or obtaining a driving licence.

[40] At paragraph 6 Marshall JA went on to say that "After the 1934 Act commenced, there were no conditions in the United Kingdom such as the condition in the present policy which was also in the policy in Sun Insurance v
15 Pranish Prakash Chand. This turns on the imposition of a third condition by the insurer on the insurer's driver. If he has not renewed his driving licence after 30 days of its expiry, the insured is not covered by reason of this failure on the part of his driver. This applies even if the driver is a qualified *driver and is not disqualified from holding or obtaining a licence*". At paragraph 8, Justice
20 Marshall stated that "*in my view any imposed condition other than the two discussed above does not take away the third party's statutory right to claim against the insurer under s 10 of the 1934 Act. The thirty day non renewal condition is an insurance company add on intended to make insurers not liable and intended to make third parties lose out.*"

[41] At paragraph 11 of the said judgment Marshall JA has stated that where the driver may have the permission of the owner, but has never held a driving licence or at the time of this event is disqualified from holding or obtaining a driving
25 licence, the policy does not create the insurers statutory direct liability to third parties who are injured or killed.

[42] Having set out his position regarding the driver condition as stated above, Justice Marshall has gone on to deal with the situation "*at any time within the period of thirty days from expiry*" and arrived at the conclusion that it is a provision purporting to exclude the driving of a qualified driver who is not
30 disqualified. It is in the same category as the provision that the policy does not cover a person driving if he is an "*a Jew, bookmaker or an actor*".

[43] Having stated his position in relation to the law, Marshall JA has arrived at the conclusion that Sun Insurance had not proved that Nazim Hussein, the driver of vehicle AC 133 never held a driving licence. He went on to state further
40 that Sun Insurance had also not proved that Nazim Hussein was disqualified from holding or obtaining a driving licence, and that they did not prove that Nazim Hussein's previous licence (if any) expired.

[44] The reasoning set out by Marshall J regarding the law and his final conclusion regarding the liability of Sun Insurance is with respect inconsistent.
45 In setting out the law as pointed out above, the driver condition regarding unlicensed driver, disqualified driver, "*30 days from expiry of driving licence period*", if found in the terms of the policy would avoid the liability of the insurer against a third party as stated in paragraphs 39 to 42 above.

[45] Further in this case there was no doubt as regards the position of Nazim Hussein in respect of driving a motor vehicle without a driving licence, as there
50 was sufficient material to show that he had been charged and convicted for same

as well as for driving a motor vehicle in contravention of the third party policy risk, and therefore it would be erroneous to state that Sun Insurance had not proved such matters.

5 [46] Therefore as there was a contravention of the condition in the policy issued by Sun Insurance excluding their liability in respect of the person driving the vehicle they cannot be held liable in respect of the claim of the third party. The third party will have to be satisfied with their claim against the insured and take whatever steps they could to enforce same against the insured.

10 [47] Izaz Khan JA in his judgment dealt with the liability of the driver of the other vehicle BU 802 where Mukesh Chandra was a passenger and arrived at the conclusion that Sun Insurance was liable on the basis of the proviso to s 6(1)(b) which is to the effect that the policy shall not be required to cover liability in excess of \$4,000 for any claim made by or in respect of any passenger in the
15 motor vehicle to which the policy relates.

[48] Vehicle No. BU802 which was also insured by Sun Insurance had in its policy set down limitations as to the use of the vehicle to the effect that the policy shall also cover the motor vehicle for social domestic or pleasure purposes, or for
20 the Owner's business within the limits set out in item No.1 (b) of the schedule, or, in the case of a hire car or a rental car, for the hirer's business. The motor vehicle was not to be used for any other purpose unless the policy is endorsed and extra premium (if any) paid.

[49] A consideration of the said limitation placed on the policy would show that
25 the use of the said motor vehicle is for private purposes. The policy in operation regarding the said vehicle in question would not permit the use of such a vehicle to carry fee paying passengers. In such circumstances the insurer would not be liable to pay Mukesh Chandra the amount stipulated in s 6(1)(b).

30 [50] In view of the increasing incidents resulting in damages and injuries being caused to third parties it would be important to lay down the statutory position in relation to insurance against third party risks:

(a) Under the Statute the Insurer can impose certain conditions in the insurance
35 policy. If the conditions stipulated in s 10 are included in the insurance policy and the vehicle is used in contravention of those conditions, and where a third party has suffered death or bodily injuries as a result of same, liability of the insured can be met by the insurer vis-à-vis third party. In such circumstances the insurer has a right to claim the sum paid to the third party from the insured.

40 (b) A policy stipulating conditions other than those contemplated in s 10 can be included in the policy and the particulars of such conditions should be incorporated in the certificate of insurance issued in conformity with the Schedule set out in Regulation 3 of the Act.

The Certificate of Insurance prescribed in the Schedule gives two categories of
45 conditions namely (a) person or class or persons entitled to drive and (b) limitations as to use. If the vehicle is used in breach of any of the conditions coming under these categories, the insurer is exempted from third party liability.

Conclusion

[51]

- 50 (1) The petition for special leave to appeal is granted.
(2) The judgment of the Court of Appeal is set aside.

(3) There will be no costs as the Appellant has stated that it is not seeking costs in this Court.

Special leave granted.

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Adam Anastasi
Solicitor

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