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

CIVIL APPEAL NO. ABU0072 of 2004S
(High Court Civil Action No.HBC238 of 2002L)

BETWEEN:

ASHOK KUMAR
CHANDRA MATI SINGH

Appellants

AND:

SUN INSURANCE COMPANY LIMITED

Respondent

Coram: Ward, President
Wood, JA
Ford, JA

Hearing: Friday, 4 November 2005, Suva

Counsel: Mr N. Lajendra for the Appellants
Mr S. Maharaj for the Respondent

Date of Judgment: Friday, 11 November 2005, Suva

JUDGMENT OF THE COURT

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[1] The appellants seek an order setting aside the judgment of Justice Byrne of 23 September 2004, by which declarations were made in favour of the respondent insurer to the effect first, that it was entitled to avoid liability to provide an indemnity under the Motor Vehicle (Third Party) Insurance Policy, which it had issued in relation to a Toyota Hiace Van registration DJ066; and secondly that it was not liable to satisfy any judgment which might be entered in favour of the appellants

arising out of the motor vehicle accident which occurred on 18 August 2001, at the Queens Road at Nabou, involving that vehicle.

[2] The appellants had each brought claims against the registered owner of the relevant vehicle, Mohammed Islam, and against the driver, Ratu Peni Kurisoru, for the bodily and fatal injuries which were respectively sustained in that accident.

[3] The issues before the court turned upon the policy wording so far as it defined the party or parties entitled to the benefit of cover, and upon a breach of a policy condition.

The Policy Wording

[4] The policy was issued in compliance with the Motor Vehicle (Third Party) Insurance Act Cap.177 (the Act).

[5] The policy contains the following relevant wording

> ***"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 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 the paragraph 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."***

[6] Byrne J. found as a fact that the driver Ratu Peni Kurisoru did not hold any driving licence at the time of the accident, let alone one permitting him to drive the vehicle for the purpose set out as item 4 in the policy. There was no issue at trial as to

whether he held a licence and there is no challenge to this finding. Nor upon the evidence placed before the court, could there have been any doubt in that respect. It should be mentioned that neither he, nor the owner, attended the trial.

[7] The appeal in relation to this aspect of the case involves the proposition that there was error in the finding that the policy did not apply where the driver was unlicensed.

[8] In deciding this issue, Byrne J. relied upon the decision of Kermode J. in ***Michael Raman v. Reginam*** Cr. App No. 27 of 1978, which concerned a clause in the same terms as that employed in the present policy. This clause, Kermode J. observed, involved;

> ***"a very substantial change of form. In 1959 the breach of a condition to like effect made the policy voidable. But by virtue of the proviso the legal position now is that a driver who holds no valid driving licence, or did not hold one within 30 days prior to the time of driving, or is disqualified from holding or obtaining a licence, is not covered by the policy at all. There would in fact be no policy in force covering such an unlicensed driver, because the policy does not extend to cover an unlicensed driver."***

Although that decision concerned the position of the driver, the reasoning upon which it was based applied equally to the position of the owner.

[9] The earlier decision of ***Ram Dayal v. Reginam*** 6 FLR 134 was distinguished by Kermode J. upon the basis of the different policy wording in that case, being one which depended upon a breach of the condition making the policy voidable. That condition was as follows:

> ***"The person insured shall not use the motor vehicle nor shall the owner cause permit or suffer any person to use such motor vehicle... (d) whilst any such person as aforesaid does not hold a licence to drive a vehicle of the class described herein."***

[10] As Byrne J noted, Kermode J declined to follow ***In Re Temo Maya*** 23 FLR 117 or ***Murtaza Khan v. Reginam*** 11 FLR 161, and observed that ***Michael Raman v. Reginam*** had stood the test of time, not having been overruled in the twenty-six years since it was decided, and having been cited with approval by Tuivaga CJ in ***Satish Chandra Maharaj v. Reginam*** 29 FLR,165.

[11] Each of these decisions concerned prosecutions of unlicensed drivers charged with driving without insurance. ***Murtaza Khan*** was a case where the wording was different from that appearing in the policy considered in ***Michael Raman*** and in the present case. ***Temo Maya*** however involved the same policy wording as that in the present case and in ***Michael Raman***.

[12] In deciding Temo Maya, Mishra Ag C.J. simply followed ***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."***

It might be added that until avoided, the driver would be insured, that being the critical issue of fact in each of these prosecutions.

[13] The appellant maintains its submission that ***Michael Raman*** was wrongly decided, and that Byrne J. should have followed ***Murtaza Khan*** and ***Temo Maya***, citing additionally the decision in ***Director of Public Prosecutions v. Dharma Nand*** Cr. App No. 64 of 1984.

[14] That was a sentence appeal following the conviction of a driver who had forgotten to renew his driving licence. Justice Rooney drew attention to the unsatisfactory state of affairs which arose from the application of the decision in ***Michael Raman*** and the practice of insurers, who were approved under s.3(1) of the Act, to issue

policies of insurance which contained the same wording (clause 4) as that in the present case.

[15] Rooney J. observed:

> ***"The purpose of the statute is to protect the public against the consequence 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."***

[16] Rooney J. also drew attention to s.6(1) of the Ordinance (as it then was), the effect of which was that only approved insurance companies may undertake this type of business, and continued:

> ***"The type of policy envisaged is one which covers any liability in respect of death of or bodily injury to any person caused by or arisen out of the use of the vehicle. A policy of insurance which contains clause 4 does not, in my view, satisfy that requirement, as it purports to limit the insurer's liability in a manner not contemplated by section 6. It could be argued in a civil claim that an approved insurer who issues a policy not complying with the requirements of the Ordinance cannot rely on that circumstance in order to avoid liability thereunder. I must express some doubt as to the correctness of the decision in Michael Raman's case."***

[17] He acknowledged, however, that his views on this matter were purely obiter and suggested that the practice of insurers in this respect be referred to the Parliamentary Select Committee, which was, at that time, engaged in a review of the law relating to insurance in the country.

[18] Justice Rooney's concerns in relation to the form of policy which had become current, echoed the earlier concerns of Justice Kermode in ***Michael Raman***, which had led him to observe that *"only legislation can now bring Fijian policies in line with English polices"* and, *"in the interest of third parties, a change of law would appear desirable."*

[19] The fact that there has been no response to the expression of these concerns is relevant, and tends to suggest an acceptance of the law which was regarded as settled in ***Michael Raman*** and approved in ***Satish Chandra Maharaj***.

[20] It is to be noted that s.6(1) of the Act provides:

> ***"6(1) 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 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 of or bodily injury to any person caused by or arising out of the use of the vehicle." (emphasis added.)***

[21] Section 6(3) provides that an approved insurer issuing a policy 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 persons*" *(emphasis added.)*

[22] The *"person, or persons, or classes of persons specified in the policy"* and, as a result insured under it, are those referred to in clause 4 of the policy, in this case:

> ***(a) "the owner, and***
>
> ***(b) any person who is driving on the owners order with his permission;***
>
> ***Provided that the person driving holds a licence*** *... ." (emphasis added).*

[23] It appears to us that the proviso forms part of the specification or description of the insured, and that the clause is punctuated in a way that shows that it is not confined, in its application, to the driver.

[24] To circumscribe the specification or description of the persons, or classes of persons incurred would not be inconsistent with s.6(1)(b) of the Act whose purpose is to ensure coverage, if a policy is issued, of any liability which may be incurred in respect of the death or bodily injury caused by or arising out of the use of the vehicle, *by the person, persons, or classes of persons "specified in the policy."* In other words, the section contemplates the entitlement of the authorised insurer to specify or limit the persons covered, leaving it to the insurer to identify or define who they might be. Once identified or 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 s.6(1) of the Act.

[25] So understood, clause 4 is properly to be read as a policy wording specifying or defining the persons or classes of persons insured. It is not a condition the breach of which would give rise to a right of avoidance. Nor is it a provision which might unlawfully limit the coverage for any liability which the specified insured might incur. In that regard, the fact that the absence of a licence is not one of the matters referred to in s.10 of the Act, as being incapable of effective exclusion, is persuasive.

[26] The difference between a policy wording and condition seems not to have been addressed in ***Temo Maya*** or ***Dharma Nand***, and in our view, neither decision provides support for the submission, now advanced, that Byrne J. erred in following ***Michael Raman*** and ***Satish Chandra Maharaj***.

[27] The principal argument advanced by the appellants was to the effect that whether by way of a proviso or condition, it was contrary to the spirit and intention of the Act for an insurer to exclude coverage for liability arising from an act of negligence on the ground that the driver was unlicensed.

[28] This submission depends upon the proposition that the policy should be applied in a way that reflects the primary purpose of the Act in requiring compulsory third party insurance. That purpose was described by Hutchison J, in ***Collinson v. Wairarapa*** (1958) NZLR 1 at 12, as being one to "ensure that, where persons suffer personal injury, then there will be means available for their compensation in proper cases.", that is where that injury or, it might be added, a death occasioning loss to dependents, arose as the result of the negligent use of the vehicle: See also ***Stewart v. Bridgens*** (1935) NZLR 948 ***Leggate v. Brown*** (1950) 2 KB 564 and ***Commerical Union Assurance Co. Ltd.v. Colonial Carrying Co. of NZ Ltd***. (1937) NZLR 1041.

[29] This was the purpose to which reference was made in ***Dharma Nand***, yet it must yield to the wording of the Act in so far as it permits the insurer to define the persons or class of persons insured. In the present case, the policy wording has that effect, in so far as the proviso renders it applicable to the owner and driver but only where the driver is licensed.

[30] These grounds of appeal have accordingly not been made good. While there is a sound policy behind compulsory thirty 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 an exposure of authorised insurers to claims involving drivers who are unqualified, or disqualified from operating motor vehicles, which could be quite significant.

[31] The result in this case is most unfortunate and there would be a public benefit served by creating a common fund under Act of Parliament to which authorised insurers should be required to contribute, that could provide cover to persons who are injured, and to the dependents of those who are killed, as the result of the actions of unlicensed drivers or through the use of uninsured vehicles, as well as in

those cases where the vehicle concerned in the accident cannot be identified. Ample precedent for such a scheme exists in other jurisdictions.

[32] However we are not persuaded that error has been shown in relation to the policy wording grounds of appeal.

The Policy Condition

[33] The relevant policy condition was as follows:

> ***"The Person insured shall not use the motor vehicle nor shall the owner permit any person to use such motor vehicle.***
>
> *(a)* ... ...
> *(e)* ... ...
> *(c)* ... ...
> *(d)* ***whilst any such person as aforesaid***
>
> *(i)* ***is under the influence of intoxicating liquor."***

[34] Byrne J. made a finding, upon the evidence placed before him, that Peni Kurisoru was driving the vehicle at the time of the accident under the influence of the intoxicating liquor, which he had acknowledged, in a record of interview (taken some 12 months later, at the Nadi Police Station), having consumed before the accident. In this respect, he acknowledged having shared one carton of Fiji Bitter with two companions between 7 pm and 10 pm on their way towards Nadi, and that the liquor which he had consumed had "some contributory effect on the accident," which occurred at approximately 1:30 am on the following morning. (See Questions and Answers 23 to 41).

[35] It was held that the respondent was accordingly entitled to rely on clause 1 (d) (i) of the policy to deny liability.

[36] In relation to this aspect of the judgment, it is submitted that there was error in that

(a) there was no evidence, beyond the admission in the police interview, to show that Peni Korisoru was driving the vehicle under the influence of intoxicating liquor, it being the case that because of his injuries, no tests were carried out, with the consequence that he was only charged with dangerous driving offences;

(b) the respondent was not entitled to rely upon an exclusion clause for which there was no provision in the Act;

(c) if there was a breach of a permitted condition of the policy, then it could not be relied upon against third parties, its only relevance being that it provided a basis for recourse by the insurer against the insured for any monies paid to third parties.

[37] Our decision in relation to the first issue renders it strictly unnecessary to consider these grounds of appeal. However out of deference to the arguments presented, we shall deal with them briefly.

[38] The expression "under the influence of intoxicating liquor" in exemption clauses in insurance policies has been held to mean "under such influence as to disturb the quiet, calm and intelligent exercise of faculties." It has a temporal rather than a causative connection: ***London v. British Merchants Insurance Co Ltd***. (1961) 1 WLR 798.

[39] The finding of fact with which this submission is concerned, should not be altered upon appeal unless there was an absence of an evidentiary basis for it. The present is such a case since, although the evidence of the admissions made by Peni Kurisou, was received perhaps surprisingly without challenge, it was somewhat

equivocal and it did not establish the extent of the beer consumed by the driver, or the degree of the effect that it had upon him. To consume liquor is not enough to invoke the exclusion. It was necessary for the insurer to show that the driver was "under the influence of intoxicating liquor," within the meaning given to that expression, when driving the vehicle at the time of the event giving rise to liability on the part of the owner or driver. The evidence in this case fell short of that required, in the light particularly of the time over which the beer was drunk, the time which elapsed between 10pm. and 1.30 am, the lack of evidence of the amount consumed by Kurisou, and the somewhat equivocal nature of the admission.

[40] It may be also observed that neither the owner or Kurisou took part in the proceedings. As a result there was no direct evidence on the issue, the proof of which rested upon the insurer.

[41] The remaining submissions (b) and (c) turn upon s.10 of the Act which provides that "so much of the policy as purports to restrict the insurance of the person insured" by any of the eight matters thereafter particularised, "shall, in respect of such liabilities as are required to be covered under this Act, be of no effect." The only matter that was identified as possibly being of relevance for the present case was that mentioned in sub paragraph (a)

> ***"the age of physical or mental condition of persons driving the motor vehicle."***

[42] Justice Byrne found that the appellants could not derive any assistance from this provision, although he did not state the reasons for that holding.

[43] We are not persuaded that this finding was in error. The expression "physical or mental condition" does not seem to be apposite for a temporary condition of self induced intoxication. Although in a somewhat different context, a policy condition requiring the insured to "employ only steady and sober drivers" was held in

National Farmers Union Mutual Insurance Society Ltd. v. Dawson (1941) 2 KB 424 not to be one restricting the insurance "by reference to the physical or mental condition of the driver", within the meaning of s.12(a) of the Road Traffic Act 1934 (UK).

[44] In the absence of express provision in s.10 directly precluding reliance on an exemption clause concerned with driving under the influence, that being a clause which has been in use in the country and elsewhere for a considerable period, the argument based on this proposition must, in our view, fail.

[45] While the appellant has otherwise established error in relation to this aspect of the case, it is not enough for the appeal to be allowed, since we are not persuaded of error in relation to the primary grounds of appeal.

Costs

[46] The appellants also sought to appeal against the order which was made requiring them to pay the costs of the proceedings assessed at $3,000. There was a discretion to award a gross sum for costs, and an advantage in doing so in that it avoided the extra cost and delay of taxation. In most cases which involved a good deal of affidavit evidence, and comprehensive submissions, this amount would not seem to have been unreasonable to the point of having involved appealable error. However, there was a problem in making an award of costs, in this case against the present appellants. They were, in truth, secondary parties, since the primary purpose of the proceedings was to secure a declaration affecting the owner and driver, who chose not to appear, forcing the appellants to take up their cause.

[47] For these reasons we consider that the appeal should be allowed in relation to the costs order, but not otherwise. That order is set aside.

[48] Although the respondent sought an order that the appellants pay its costs of the appeal, the issue raised was one of general importance for the insurance industry, in respect of which there was in existence a competing judicial view to that relied upon by the trial judge. Additionally, the appellants succeeded on their costs appeal and on one aspect of the substantive appeal. We consider that the appropriate order is that each party pay its own costs both of the proceedings below, and on appeal.

Ward, President

Wood, JA

FIJI COURT OF APPEAL

Ford, JA

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Messrs. Suresh, Maharaj and Associates, Suva for the Respondent

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