IN THE FIJI COURT OF APPEAL
AT SUVA
CIVIL JURISDICTION

Civil Appeal No. ABU0057 of 2006
[On appeal from decision and Judgment of High Court, Lautoka and in Civil Action No. HBC 221 of 2003]

BETWEEN:

MOHAMMED NASIR KHAN and **MOHAMMED NAZIM KHAN** both sons of Mohammed Yakub Khan formerly trading as **MOHAMMED YAKUB KHAN & COMPANY** an firm of Lautoka but now trading as **MOHAMMED YAKUB KHAN & COMPANY LIMITED** a limited liability company having its registered office at Lautoka

APPELLANTS

AND

TOWER INSURANCE (FIJI) LTD

RESPONDENT

Appearances:
Appellant: Dr MS Sahu Khan
Respondent: Mr AK Narayan

Date of Hearing: 31 October 2008
Date of Judgment: 19 November 2008

Coram: Byrne, JA
Scutt, JA
Lloyd, JA

JUDGMENT OF THE COURT

INTRODUCTION

[1] At trial, the Plaintiffs – now Appellants (Khan, Khan and Khan & Co) – claimed an indemnity under an insurance policy held with the Defendant – now Respondent (Tower Insurance). The claim was that three vehicles were insured by Tower Insurance for a total of $135,000.00. The claim was based upon the vehicles having been 'written off' in an accident where all were damaged making them no longer roadworthy. Tower Insurance refused to honour the claim.

[2] This refusal, said Khan, Khan and Khan & Co, was 'unconscionable and inequitable', and Tower Insurance was 'estopped from denying liability' because in or about April 1997 it had accepted the insurance premium. Khan, Khan and Khan & Co claimed judgment not only for the full sum of $135,000.00, but 'exemplary and punitive damages, loss of profit and potential income, interest and any further or other relief and costs'.

[3] The matter was heard by a Judge of the High Court on 14 and 15 March 2006, with judgment delivered promptly on 28 March 2006.

[4] The trial Judge dismissed Khan, Khan and Khan & Co's claim, making no order for costs, because 'neither party was able to establish its claims'. Tower Insurance, His Lordship had said, 'is hard pressed to prove any of its positive defences and I take that no further'.

[5] As for the Plaintiffs, His Lordship held that Khan, Khan and Khan & Co had 'failed to establish a contract for payment of $135,000.00'. Even if it had a contract for payment upon the destruction of the three vehicles, His Lordship said, 'the contract clearly was for payment after establishment of the lesser of two sums, one (the insured sum, $135,000.00) stated in the document Exhibit P1 – being the National Insurance Endorsement certificate from Tower Insurance, and 'the other [market value] requiring to be proved upon reliable evidence':

> There was no such evidence and on that ground alone the pleading in paragraph (2) [as to the insurance contract for $135,000] cannot be upheld.

[6] Paragraph (3) of the Statement of Claim said:

ON or about the 20th day of October 197 at Matnipsi, Nadroga the said Truck was involved in a serious accident as a consequence whereof the said Truck together with the Trailer and Loader were extensively damaged and a complete write-off.

[7] On this, the Court said there was an electrical fault, that the 'brakes had nothing to do with the stopping of the vehicle' and that the Plaintiff 'is hard pressed to prove that what occurred was an accident rather than the consequence of a failure either by the driver or by the machine itself to do what was supposed to be done'. His Lordship said that the driver 'abandoned the vehicle and all three vehicles rolled or toppled to destruction' albeit the 'equipment said to be on the vehicles was supposed to stop that happening'. Maintenance was a matter for the Plaintiff, he said, and he could not find an 'accident proven on the balance of probabilities'.

DETERMINATION

[8] Taking into account all the matters in His Lordship's judgment, the Court Record and the written and oral submissions of the parties, this Court considers that the appropriate determination is:

- that the evidence established there was an insurance contract with Tower Insurance in respect of the three vehicles;
- that the insurance contract was in the amount of $135,000.00;
- that a valid claim was to be paid at $135,000 or the market value whichever was the lesser sum;
- that there was an accident in which the three vehicles were damaged;
- that the damaged vehicles were assessed in value at, respectively:
    - $20,000 ('market value of this vehicle would have not exceeded $21,000 and is probably closer to $19,000');
    - $6,000 ('the market value of which should not exceed $6,000');
    - $22,000 ('Given the age and apparent condition of the machine prior to the accident, we estimate the market value at not more than $22,000'): Exhibit D3, Letter Sturt & Associates, Insurance Assessors, Loss Adjusters & Investigators, Court Record, pp. 192-94
- that sum is due and payable by Tower Insurance to Khan, Khan and Khan & Company;
- that is solely the sum to be paid and no further sums should be paid under the Statement of Claim;
- that the parties each should bear their own costs.

[9] This determination is made by reference to the admissions made in the Statement of Defence, and the evidence produced at the trial, including most particularly the Assessors Report (Exhibit D3) tendered by the Defendant.

[10] Albeit, for example, His Lordship held there was no 'accident', Tower Insurance acknowledged there was. Albeit His Lordship held there was no insurance policy, Tower Insurance acknowledged there was.

[11] As to the Plaintiffs claim, exemplary and punitive damages were claimed, but not particularised; similarly as to loss of profits and potential income – these were not particularised, although they are a claim constituting special damage.

STATEMENT OF CLAIM & DEFENCE

[12] To illustrate, the Statement of Claim is set out together with the Defence in bold.

STATEMENT OF CLAIM

(1) **THE** Plaintiff is and was at the material times engaged on business inter alia transportation and heavy equipment operators.

DEFENCE

1. **THE Defendant makes no admissions as to the contents of paragraph 1 of the Statement of claim and denies that the action is properly constituted or that as constituted provides a reasonable cause of action to the Plaintiffs.**

(2) **IN CONSIDERATION** of the sum of $13,098.75 **(THIRTEEN THOUSAND AND NINETY EIGHT DOLLARS AND SEVENTY FIVE CENTS)** paid on or about the month of April 1997 the Plaintiff had the Heavy Goods Vehicle Registered Number AC 395 together with Low Bed Trailer Registered Number D 8637 and Clark 75 B Loader Registered Number 75 B insured with the Defendant and a Cover Note as such was issued by virtue of which the Defendant agreed to insure the Plaintiff's said Truck, Trailer and Loader for the sum of $135,000.00 **(ONE HUNDRED AND THIRTY FIVE THOUSAND DOLLARS)**

2. **AS to the contents of paragraph 2 of the statement of claim, the Defendant admits that in consideration of the payment of premiums payable it agreed to insure one prime mover truck registered number AC 395, one low loader trailer registered number D8637 and one Clark 75B loader registered number BK 325 and issued an indemnity policy of insurance effective from 7th April 1997 to 7th April 1998 for the sum insured thereon. Save for such admissions, the Defendant denies the contents of paragraph 2 of the statement of claim.**

(3) ON or about the 20th day of October 1997 at Matnipusi, Nadroga the said Truck was involved in a serious accident as a consequence whereof the said Truck together with the Trailer and Loader were extensively damaged and a complete write-off.

(4) THE Plaintiff immediately advised the Defendant of the accident.

3. **THE Defendant admits that on 20th October 1997 at Matnipusi, Nadroga the prime mover truck whilst towing the low loader trailer with the Clark loader loaded on it was involved in an accident whereby all three vehicles sustained damage and that claims were lodged on or about 21st November 1997 for the damage/loss sustained. Save for the aforesaid admissions, the Defendant denies the contents of paragraphs 3 and 4 of the statement of claim.**

(5) THE Plaintiff pleads that the performance on the part of the Defendant upon the payment of the premium and the issuance of the Cover Note by the Defendant due to no fault on its part and as a consequence of the accident and subsequent destruction of the said Truck, Trailer and Loader by extraneous circumstances the insurance became enforceable and payable.

(6) THE Plaintiff pleads that the performance on the part of the Defendant upon the payment of the premium and the issuance of the Cover Note by the Defendant due to no fault on its part and as a consequence of the accident and subsequent destruction of the said Truck, Trailer and Loader by extraneous circumstances the insurance became enforceable and payable.

(7) THE Defendant has declined to meet the damages suffered by the Plaintiff and has wrongfully and without any right whatsoever refused and still refuses to meet the claim of the Plaintiff.

(8) THE Defendant at no time prior to the accident cancelled or evinced its intention to cancel or refused to accept insurance for the said Truck, Loader and Trailer.

4. THE **Defendant denies the contents of paragraphs 5 to 8 inclusive of the statement of claim and avers that the claims for the respective vehicles were declined and the reasons notified to the insured and the Defendant is not obliged to make any payment under the policy of insurance for the reasons hereunder appearing.**

5. PRIOR **to the issue of the policy and cover in respect of each of the vehicles by the Defendant, the insured was required to complete proposals in respect thereof and whilst the policy was being effected the insured misrepresented and/or concealed facts then material to be known to it and of which it was not aware which induced it to issue the policy.**

PARTICULARS

(1) **In answer to the question, 'In the past 5 years have you or any person who will drive the car had any insurance cancelled or refused?' the insured answered, 'No' whereas in fact the insured had a policy of insurance cancelled by the New India Assurance Company Limited on or about 16th January 1997.**

(2) **In answer to the question, 'In the past 5 years have you or any person who will drive the car had a motor vehicle accident or claim?' the insured answered 'No' whereas in fact the insured had made two claims with New India Assurance Company Limited.**

6. BY **reason of the aforesaid, the Defendant is and was entitled (as it did) to avoid the policy.**

7. FURTHER **and/or in the alternative, it was a condition of the said policy and warranted that statements contained in the proposal formed the basis of the contract; that such statements were true in every respect; that the insured had not**

withheld any information likely to affect the acceptance of the proposal and that the correctness of all statements made in relation to the policy or any claim is essential before the Defendant had any liability under the policy.

8. **IN breach of the aforesaid condition and warranty, the insured made statements which were not correct the full particulars of which appear at paragraph 5 herein.**

9. **FURTHER and/or in the alternative, it was a term of the policy of insurance that any loss, damage or liability was excluded while the inured vehicle was in an unsafe condition.**

10. **THE claim in respect of the vehicle were excluded as at the time the low loader trailer did not have any brakes and was in an unsafe condition and the defendant is and was not obliged to pay the claim.**

11. **FURTHER or in the alternative it was an express term of the policy and specifically want ranted and declared that the insured undertook to exercise all due care and diligence to prevent loss or damage and/or not to cause or facilitate loss or damage to the vehicles or incur liability by any unreasonable, reckless or wilful act or omission.**

12. **IN breach of the aforesaid term warranty and declaration the insured low loader trailer registered number D8637 was in an unsafe condition without brakes.**

[13] The respective prayers for relief said:

Plaintiffs

WHEREFORE the Plaintiff claims from the Defendant

(a) Judgment in the sum of $135,000.00

(b) Exemplary and punitive damages

(c) Loss of profit and potential income

(d) Interest under the Law Reform (Miscellaneous Provisions)(Death and Interest)

(e) Such other and further relief as seems just to this Honourable Court.

(f) Costs.

Defendant

WHEREFORE the Defendant prays that the Plaintiffs' claim be dismissed with costs.

[14] His Lordship having discounted the defences of the Defendant, paragraphs (5) through (12) of the Defence must have been dismissed by His Lordship. At paragraph [22] of the judgment, His Lordship canvassed the evidence before him then determined at paragraph [23], as noted, that the Defendant was 'hard pressed' to prove any of them.

[15] His Lordship said at the outset of his judgment that he thought it 'necessary to mention ... that the evidence put before the court by both parties [was] insufficient to establish many of the facts upon which each ... purported to rely'.

[16] His Lordship did, therefore, 'approach [the] case through its pleadings'. This meant that the Plaintiffs contentions and the Defendant's admissions were squarely before the Court as determinative of the claim. Nevertheless, despite admissions by the Defendant which the Court could not ignore or set to one side, it appears His Lordship did so – the admission as to the insurance policy being one.

INSURANCE POLICY – DEFENCE ADMISSION

[17] His Lordship held there was no insurance policy covering the Plaintiffs three vehicles. This runs counter to the Defendant's admission at paragraph 2. of the Defence that there was such a policy: Court Record, p. 28 Indeed, the defences of the Defendant (dismissed by His Lordship) confirm again the acceptance by the Defendant that there was such a policy, although the Defendant sought (by its failed defences) to challenge its legal status..

[18] His Lordship said that there were problems with the Statement of Claim in that in paragraph (2) the numbers of the vehicles were not the same as appeared in the evidence.

[19] Yet the Defendant had already admitted to a policy of insurance in respect to the vehicles cited by the Plaintiffs. This is confirmed in paragraph 3 of the Defence where the Defendant explicitly acknowledges it was the three insured vehicles that were damaged in the accident – 'the' prime mover truck ... 'the' low loader trailer with 'the' Clark loader loaded on it ...': Court

Record, p. 29 The tenor of paragraph 4 of the Defence is the same: 'the claims for the respective vehicles were declined ...' No suggestion that they were not those the subject of the insurance policy acknowledge in paragraph 3.

[20] His Lordship recognises this in acknowledging that the Plaintiff was 'given some assistance by the Defendant in its admission in the Statement of Defence (para 2) that there was a policy that covered these three vehicles'. However, he then goes on to say:

> ... but the admission then if I understand it correctly is that the three vehicles were insured for $135,000.00. That is simply not correct on the evidence adduced. The Plaintiff's first exhibit [Exhibit P1], photocopies of what are said to be Endorsement Certificates for the Plaintiff's policy No. 77546342/FMV001 and 002, states in respect of the heavy goods vehicle registered number AC395: 'Sum Insured Market Value or $40,000, whichever is the lesser' and in respect of the Trailer the sum insured is market value or $20,000.00 whichever is the lesser. In respect of the Clark 75B the sum insured is market value or $75,000.00 whichever is the lesser.

[21] Passing then to what is a different point (that is, no longer as to the existence of the policy), His Lordship goes on to say that to establish the claim, the Plaintiffs:

> ... must prove the market value of each vehicle at the time it was destroyed so that the insurer or the Court may determine the amount to pay. There was nothing to indicate to me these vehicles had a combined value of $135,000.00.

[22] However, the sums stated in the claim, and acknowledged by the Defendant in paragraph (2) of the Statement of Claim, add up to $135,000.00 - $40,000.00 + $20,000.00 + $75,000.00.

[23] That the insurance policy refers to the respective sum of each as 'Market Value' or that sum (the sum quoted - $135,000.00) 'whichever is the lesser' is the standard form for insurance contracts. There is nothing unusual in this and to say it means the Defendant's admission is not an admission of the 'three vehicles insurance policy' asserted by the Plaintiffs does not follow. Indeed, that admission must stand as an admission by the Defendant of the insurance policy as asserted by the Plaintiffs.

MARKET VALUE ESTABLISHED BY EVIDENCE

[24] His Lordship then went on to address market value, stating:

> The only evidence for the Plaintiff were assertions by Mr Mohammed Nasir Khan who is identified with the Plaintiff, that for the values stated in Exhibit P1 valuations were done by an independent valuer, at what time he did not state and when asked for the valuer's name could not remember it. He said copies had been given to the bank and to the insurance company but no document was produced in evidence.

[25] He then went on to address Exhibit D3:

> I disregard the statements of the insurance investigator in his report (Exhibit D3) about his idea of the values of these vehicles. Without cross-examination on these bland assertions the Defendant's evidence is no better.

[26] Exhibit D3 is, as earlier noted, the Sturt & Associates Report on each of the vehicles. As to the Prime Mover, it says amongst other matters that whilst 'extensively damaged by fire':

> It is possible to establish that the pre-accident market value of this vehicle would have not exceeded $21,000.00 and is probably closer to $19,000.00.
>
> This figure is based on the estimate of the age of the vehicle and the fact that due to it being a Magirus (a brand we are not familiar with, in fact we can find no trace of it in Australia or even on the internet), there would have been little or no market demand for this vehicle.

[27] There is no need for cross-examination on this evidence to establish satisfactorily for the purpose of determining market value that the market value of the Prime Mover is $20,000.00 – that is, 'would not have exceeded $21,000.00 and is probably closer to $19,000.00' – hence, a fair assessment and estimate is $20,000.00. This creates no difficulty.

[28] As for the Trailer, the Report says:

> This trailer has sustained damage to the tyres by fire and some degree of impact damage.

It is important to note this is an extremely basic trailer the market value of which should not exceed $6,000.00.

[29] The Report goes on to comment about the lack of a braking system and matters as to this requirement under Fiji transport regulations. However, this does not interfere with the fact that on the evidence of Exhibit D3, the Trailer has a market value of $6,000.00.

[30] As to the Loader, the Report says:

> We have contacted Australia in order to verify the age of this loader, and are advised that the chassis number indicates it is between twenty five and twenty eight years old.
>
> It was registered in Fiji in 1981, and it may have either been imported as a used unit, or bought from government at a disposal sale, which were common at that time.
>
> The machine was, before the accident, in poor condition and there must be some doubt as to whether it was in good working order prior to being transported to the West.
>
> Since it has a registration number you may wish to have a search of the Road Transport Departments records to establish the last date any tax was paid on this loader.
>
> Given the age and apparent condition for the machine prior to the accident, we estimate the market value at not more than $22,000.

[31] The market value of the Loader can fairly be taken, therefore, as $22,000 on the evidence before the Court, namely Exhibit D3.

[32] There is nothing unusual or extraordinary as to market value being expressed as or in 'estimates'. This is a usual or ordinary business approach. Again, there was no need for cross-examination to establish this as the market value.

[33] There being no cross-examination, the evidence before the Court as to market value is that contained in Exhibit D3. That this was provided by – and hence, absent cross-examination established by – the Defendant does not make it any less tenable as evidence.

[34] Three points follow: two of disagreement with His Lordship, one of agreement.

[35] We do not agree with His Lordship that 'it is not possible to uphold the essential claim' of paragraph 2 of the Statement of Claim.

[36] We do agree with His Lordship that the demand 'must be at the lesser of the stated sum and the market value of each vehicle at the time of their loss'.

[37] We do not agree that the 'evidence is insufficient to establish those lesser sums'.

[38] This Court accepts, as we have said, that on this evidence, then, market value having been established as $20,00.00 + $6,000.000 + $22,000.000 – the sum total due to the Plaintiffs under the insurance contact was and is $48,000.00.

AN 'ACCIDENT'?

[39] The Defence acknowledged that the vehicles were damaged in an 'accident'. His Lordship discounts this admission by saying:

> The evidence puts beyond doubt the fact that these three vehicles were destroyed in one serious incident. The Statement of Defence (at para 3) admits that this was an 'accident'. I have to assume that this word is used loosely to mean 'incident' because the case put forward before the Defendant at the hearing was certainly a challenge to the claim of 'accident'.

[40] Once the admission of 'accident' was made by the Defendant in the pleadings, the Defendant cannot then assert 'no accident' or an 'incident' as His Lordship appears to seek to do by altering 'accident' in paragraph 3 of the Defence to 'incident'. The Defendant is bound by its pleadings.

THE BRAKES

[41] In oral argument and in subsequent written submissions, Counsel for Tower Insurance said amongst other matters that once this Court had accepted the Insurance Assessors Report (Exhibit D3) in respect of the sums set out as market value, then the Court was also obliged to accept the statements in Exhibit D3 as to 'lack of brakes' or 'deficiency in the brakes' and so

forth. This would be, however, to re-traverse the findings made by His Lordship as to the lack of the Defendant's having made out its defences. This is not an exercise upon which this Court should embark. Rather, His Lordship made that determination upon the evidence before him and we consider that that determination should stand.

LACK OF PARTICULARISATION BY PLAINTIFF

[42] As we have observed, however, the lack of particularisation on the part of the Plaintiff with regard to exemplary and punitive damages and special damage is fatal to those claims. Hence, the Plaintiff cannot succeed in respect of them on appeal.

INTEREST

[43] The appropriate rate of interest is 6%. That being said, the Court also recognises that the present economic situation, which appears destined to have a global impact, may require a revision in the future of the interest rate set by Courts in Fiji.

[44] In the present case, however, interest is unable to be awarded as albeit included in the prayer for relief, it was omitted from the pleadings. As was said in ***Credit Corporation (Fiji) Ltd v. Khan*** [2008] FJCA 26; ABU0040.2006S (8 July 2008):

> There is now a clear line of authority including decisions of this Court which require that if interest is to be claimed and awarded, it must be properly and explicitly pleaded. These decisions include ***Usha Kiran v. Attorney General of Fiji*** (Court of Appeal, Civil Appeal 25/1989); ***Tacirua Transport Co Ltd v. Virend Chand*** (Court of Appeal, Civil Appeal 33/1994) and ***Renuka Shankar v. Chandar Gopalan Naidu*** (Court of Appeal, Civil Appeal 3 of 2001). The latter case declared that this position had become the established practice of ... Fiji. Again, as a matter of fairness, interest ought to be considered only upon the basis of giving proper notice to a defendant by pleading such a claim: at para [34]

COSTS

[45] The Plaintiff partially having succeeded in the appeal, and the Defendant partially having sustained the judgment of the Court below, each party should bear its own costs.

Orders

1. The appeal is allowed to the extent that the Defendant is ordered to pay to the Plaintiff the sum of $49,000.00 in full and final settlement of the claim.

2. No order as to costs.

John E. Byrne

Jocelynne A. Scutt

Ian Lloyd

Judges of Appeal

Suva

19 November 2008

Solicitors:

Messrs Sahu Khan and Sahu Khan, Ba, for the Appellants

AK Lawyers, Ba, for the Respondent