IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. ABU0020 OF 2008

BETWEEN	:	QBE INSURANCE (FIJI) LIMITED	*Appellant*
AND	:	RAVINESH PRASAD	*Respondent*
Coram	:	Byrne, J. A. Goundar, J. A. Hickie, J. A.	
Counsel	:	F. Haniff for the Appellant R. P. Chaudhary for the Respondent	
Date of Hearing	:	14th November 2008	
Date of Judgment:		5th February 2009	

JUDGMENT

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[1] **Introduction**

On 17th June 1997 the Respondent (then 17 years old) issued a Writ of Summons against Nirmala Sharma, the owner and Amitesh Kumar Sharma (the driver) of vehicle number CI317 in Civil Action No. 223 of 1997 in the Lautoka High Court.

[2] In compliance with Section 11 of the Motor Vehicle (Third Party Insurance Act Cap. 177), the Writ of Summons was served on Queensland Insurance (now QBE Insurance (Fiji) Limited) the same day. Queensland Insurance were the Third Party Insurers for Motor Vehicle No. CI317 at the time of an accident on the 2nd of April

1997 at the Junction of Vomo Street and Leonidas Street, Lautoka. The hearing began on the 4th of August 2005 before Mr Justice Finnigan, the Defendants being unrepresented due to the withdrawal from the action of Messrs Krishna & Company who were originally instructed by Queensland Insurance and then Mr Haroon Ali Shah who was instructed subsequently. Mr Shah was given leave to withdraw by Mr Justice Finnigan on the 4th of August 2005. On the application of counsel for the Plaintiff (Respondent), the Judge made an order striking out the statement of defence.

[3] The Judge found that on the 2nd of April 1997 the Respondent was riding his bicycle across the junction of Vomo Street and Leonidas Street when the 2nd Defendant, Amitesh Kumar Sharma, who although only a probationary driver was alone in his mother's car, made a right-hand turn without giving any indication and collided with the Respondent and his bicycle. The Judge held that he was satisfied that on the 4th of June 1997 Amitesh Kumar Sharma was convicted in the Magistrates Court of Careless Driving and was fined $30.00 in default 30 days imprisonment.

[4] The Judge awarded damages of $40,000.00 for pain and suffering, $7,200.00 interest on past general damages and $46,800.00 for loss of earning capacity. He also awarded special damages of $925.00 and costs to the Respondent of $1,500.00.

[5] The Defendants then made an application to set aside the Judgment. This was heard by Mr Justice Finnigan on the 19th of June 2006 on Affidavits. A Ruling was delivered on 5th July 2006 when the Judge refused to set aside the Judgment then gave the

Defendants the opportunity to support their application by oral evidence.

[6] Oral evidence was taken on the 7th of August 2006 and a Ruling delivered on the 22nd of August 2006. The learned Judge again refused to set aside the Judgment. That Judgment was never appealed and still stands but it is unsatisfied.

[7] On the 25th of October 2006 the Respondent (Plaintiff) issued a summons in the High Court against the present Appellant seeking an order that the Appellant pay to the Respondent's solicitors on behalf of the Respondent the amount of the Judgment and costs entered in the Respondent's favour on the 11th of August 2005. The application was made pursuant to Section 11(1) of the Motor Vehicles (Third Party Insurance) Act Cap. 177. The summons came up for hearing before Singh J. on the 16th of November 2007 and he delivered Judgment in December 2007 and a Supplementary Judgment in January 2008. The Appellant appeals to this Court against both these Judgments. Section 11(1) of the Motor Vehicles (Third Party Insurance) Act provides that an Insurance company must satisfy a Judgment which has been entered against the owner of an insured vehicle. It reads:

> ***"If, after a certificate of insurance has been delivered under the provisions of subsection (4) of Section 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 Section 6, being a liability covered by the terms of***

the policy, is obtained against any person insured by the policy, then, notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company shall, subject to the provisions of this section, pay to the persons entitled 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".

[8] The Judge found that the original writ was served within seven days; the Judgment had not been stayed, and the policy had not been cancelled. It was still in force at the time of the accident.

[9] Under Section 11(2) the insurers must have notice of the proceedings within seven days of the commencement of the proceedings. There is no requirement that the insurers be made a party to the proceedings. The Appellant refused to satisfy the Judgment because it claimed that the driver of the insured vehicle was a learner driver and he was not accompanied by another driver who held a driver's licence and therefore the terms of the insurance policy were breached and it was not liable.

[10] The learned Judge disposed of this argument quickly and in one sentence. At page 6 of the record he said:

"Impressive as this argument might appear on the face of it, in the circumstances of this case it is still-born.

[11] He continued:

"Amitesh Kumar Sharma was the driver of the vehicle which was involved in the accident. He was charged with two offences namely Careless Driving and Contravening the Condition of Learner's Permit in that he failed to display the letter 'L' in front and on the back of the motor vehicle. He was convicted of these two offences. He was not charged or convicted for the offence of Driving Without the Presence of a Licensed Driver. Surely if Police noted that there was no 'L' plate, then they would have noticed if the learner's driver was unsupervised".

[12] This Court agrees.

[13] Section 11(3) of the Act allows an insurer to obtain a declaration from the Court that, apart from any provision contained in the insurance policy, the insurance company is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in a material particular.

[14] The Investigator's Interview

The insurance company's investigators interviewed Amitesh Kumar on the 15th of August 1997. Singh J. found that the Insurance company then had the necessary information with it to seek a declaration from the Court that it was entitled to avoid the policy. It failed to do so but, as the Judge remarked ***"is now coming ten years later to obtain the same result".***

[15] In the view of this Court this is a clear example of estoppel by conduct.

[16] **The Grounds of Appeal**

Seven grounds of appeal were filed. Ground one has already been dealt with in paragraph 9 supra. The Act does not require the driver to be a party to the action. Ground two claims that the Judgment was in personam only between the Respondent and the Defendants in Civil Action No. 223 of 1997. We reject this ground because it flies in the face of the clear statutory obligation imposed on the Insurance company by the Motor Vehicles (Third Party Insurance) Act. The Respondent asks only for what he is statutorily entitled to under Section 11(1) of the Act. Ground three alleges that the learned Judge erred in law in holding the Appellant liable to the Respondent when there was no privity of contract between the Appellant and the Respondent. This is true. There is privity of contract between the Defendants and their insurers but not between the Appellant and the Respondent. Ground 4 alleges that the learned Judge was in error when he made no reference to

the terms and conditions of the Policy and more specifically to the exclusions contained therein. We reject this ground also.

[17] The policy was never in dispute. What the Appellant disputed was its liability under Section 11(1) on the ground that the Respondent driver was not accompanied by a licensed driver. Both Mr Justice Finnigan and Mr Justice Singh made findings of fact that the Respondent was accompanied by a licensed driver and hence the Appellant was liable to satisfy the Judgment. There is no need to make any reference to the terms and conditions of the Policy.

[18] <u>Ground 5</u>

This ground alleges that the learned Judge erred in law in holding that the Appellant was duty bound to pay the Judgment sum when the Appellant had declined to indemnify the Defendant in Civil Action No. 223 of 1997. We reject this ground because it is clear that the learned Judge held that the Appellant had wrongly decided not to indemnify the Defendants in Civil Action No. 223 of 1997.

[19] Ground six alleges that Mr Justice Singh erred in finding that the Appellant was *"represented by solicitors"* in Civil Action 223 of 1997 when there was no such evidence to make the finding. The Appellant was represented by solicitors in Civil Action No. 223. If the Appellant decided to withdraw its legal representation in that action on the assumption that it was not liable then it did so at its peril. In our view His Lordship was under no misapprehension as to the nature of the application before him contrary to the claim made in Ground 7. The reference to an alleged misapprehension arises from a Supplementary Judgment delivered by Singh J. when

his attention was drawn by counsel for the Respondent to certain minor errors in the wording of two parts of his Judgment. The Judge found correctly that he had inherent power to vary his order so as to make its meaning plain.

[20] The result is that the appeal is dismissed. The Appellant must pay the Respondent's costs which we fix at $2,500.00.

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Byrne, J. A.

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Goundar, J. A.

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Hickie, J. A.

FIJI COURT OF APPEAL

At Suva

5th February 2009