

/IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 188 of 2012

BETWEEN : **SUN INSURANCE COMPANY LIMITED** a limited liability company having its office at Ground & Level 1, Sun Insurance Kaunikuila House, Laucala Bay Road, Suva, Fiji Islands.

PLAINTIFF

AND : **TELECOM FIJI LIMITED** a limited liability company having its offices at Level 7, Ganilau House, Suva, Fiji Islands.

FIRST DEFENDANT

AND : **MANASA VAKASOOO** of Nakaulevu Village, Nakelo, Tailevu, Fiji Islands.

SECOND DEFENDANT

AND : **ATECA ADITUKANA** of Kalabu Housing, Valelevu, Suva, Fiji Islands.

THIRD DEFENDANT

Date of Hearing : 6th November, 2013

Date of Judgment : 14th November, 2013

Mr. T. Tuitoga - For the Plaintiff
Mr. P. Sharma - For the 1st and 2nd Defendants
Mr. A. Chand - For the 3rd Defendant

CATCH WORDS

Section 11(3) Motor Vehicles (Third Party Insurance) Act (Cap 177) - avoid the third party policy- 'Person driving'- interpretation of policy

JUDGMENT

A. INTRODUCTION

1. The Plaintiff filed the summons in terms of Sub-Section 11(3) of Motor Vehicle (Third Party Insurance) Act (Cap 177). The Plaintiff, the insurer seeks to avoid the third party

policy on the basis the driver of the vehicle did not have a valid driving license at the time of the mishap. The injury to third party incurred from rolling of the vehicle to a third party, after the said driver parked the vehicle and alighted from it. It is admitted fact that at the time of the incident the driver's driving licence had expired and more than 30 days lapsed from the said expiration. At the hearing Mr. P. Sharma raised an objection that Section 11(3) of Cap 177, can only be resorted when issues relating to *oberrima fidei* are raised. I allowed the Plaintiff to either amend the summons or to make further submissions on said issue, but the counsel for the Plaintiff did not seek to amend the summons, but made further submissions on the said objection. I have considered this objection as a preliminary issue and sustained the objection in line with the determinations of Fiji Supreme Court in *Sun Insurance vs. Pranish Prakash Chand* (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October,2010) and *Sun Insurance Company Ltd v Chandra* [2012] FJSC 8;CBV0007.2011 (9 May 2012, Unreported).

B. FACTS

2. The Plaintiff filed its Originating Summons in terms of Section 11(3) of the Motor Vehicle (Third Party Insurance) Act (Cap177) and inherent powers on 9 July 2012 seeking the following orders:

- “1. A Declaration that Sun Insurance Company Limited, the Plaintiff herein, is entitled to avoid liability to provide indemnity to the First and Second Defendants in respect of the claim by the Third Defendant under Third Party Insurance Policy Number 25955 (“Policy”) on the grounds that the Second Defendant did not hold a valid driving licence at the material time – 8 November 2010 in breach of clause 6 of the Policy.
2. A Declaration that Sun Insurance Company Limited, the Plaintiff herein, is not liable to satisfy any judgment that may be entered against the First and Second Defendants arising out of an accident on 8 November 2010 involving Motor Vehicle Registration Number FC 368 being the subject of the Third Defendant's claims in Suva High Court Civil Action Number HBC 110 of 2012 and/or any further actions that may be issued relating to the same accident involving Motor Vehicle Registration Number FC 368.
3. That the declarations sought in paragraphs 1 and 2 above be determined as a preliminary issue before the substantive hearing of Suva High Court Civil Action Number 110 of 2012.

4. For an order that the First and Second Defendants pay all the costs of these proceedings to the Plaintiff.
 5. Such further and/or other relief as to this Honourable Court may deem just.”
3. The First Defendant is the registered owner of Motor Vehicle Registration Number FC 368 (“the Vehicle”) when the alleged injury to third party incurred on 8 November 2010. The Second Defendant was the First Defendant’s employee at the material time and was authorized by the First Defendant to drive the vehicle while engaged in his employment.
 4. The Plaintiff issued Third Party Insurance Policy Number 25955 (“Third Party Policy”) for the Vehicle valid for a year from 28 August 2010 to 28 August 2011 and on 8th November 2010, the Vehicle was driven to Harper Place, off Reservoir Road, Suva by the Second Defendant on the First Defendant’s order and/or with the First Defendant’s permission in the course of his employment. He stopped the vehicle and alighted from it and walked few steps along the street, and the vehicle rolled down Harper Place and collided with the Third Defendant and allegedly causing injuries.
 5. At the material time the 2nd Defendant did not possess a valid driving licence as it had expired on 30th August, 2010 and he was able to renew it only after the incident on 11th November 2010. On 24 April 2012, the Third Defendant issued a writ of summons, in Suva High Court Civil Action Number HBC 110 of 2012 against the First and Second Defendants seeking *inter alia* general damages, costs and interest for the alleged injuries sustained from the incident.
 6. The Plaintiff had instructed its solicitors, to defend the said action brought against the First and Second Defendants by the Third Defendant and on 30 April 2012, the solicitors filed an Acknowledgment of Service and a statement of defence was also filed.
 7. The present action seeking orders stated in paragraph 2 of this judgment was filed by the solicitors for the insurer, in order to avoid the said third party insurance policy on the basis that the 2nd Defendant who was the driver of the vehicle did not hold a valid driving

licence at the time of the incident or 30 days prior to the incident as required by clause 6 of the Third Party Insurance Policy. It is to be noted at the time of the incident the 2nd Defendant was outside the vehicle walking along the street shortly after having parked the vehicle at the said location.

C. ANALYSIS

8. The Originating Summons is made under Section 11(3) for the Motor Vehicle (Third Party Insurance) Act (Cap177) and had also relied on inherent power of the court. The Plaintiff states that it is entitled to deny liability to indemnify the First and Second Defendants against third party liabilities, because the Second Defendant did not hold a valid driving licence on 8 November 2010 or 30 days prior to the incident, as stipulated in the policy, when the alleged accident happened. The Plaintiff states that it was a breach of clause 6 of the Third Party Policy (the policy).

9. Clause 6 of the Third Party Policy reads as follows:

“6. 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 or with his permission:

Provided that the person driving hold 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 obtaining such a licence.”

10. The Plaintiff is relying on Section 11(3) of the Motor Vehicle (Third Party Insurance) Act (Cap 177) and the abovementioned clause 6 of the third party insurance policy in this originating summons for the orders they have sought. First I deal with the Section 11(3) of the Motor Vehicle (Third Party Insurance) Act (Cap 177) to ascertain whether the Plaintiff is entitled to make this originating summons seeking avoidance of the third party insurance policy and then whether they can rely on the clause 6 of the said Policy.

11. The Section 11(3) of the Motor Vehicle (Third Party Insurance) Act (Cap 177) states as follows

“(3) No sum shall be payable by an approved insurance company under the provisions of this section if, in an action commenced before or within 3 months after the commencement of the proceedings in which the judgment was given, the insurance company has obtained a declaration that, apart from any provision contained in the 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 or if the company has avoided the policy on the ground that it was entitled to do so apart from any provision contained in it

Provided that an insurance company which has obtained such a declaration in an action shall not thereby be entitled to the benefit of the provisions of this subsection in respect of any judgment obtained in any proceedings commenced before the commencement of that action unless, before or within 7 days after the commencement of that action, it has given notice thereof to the person who is Plaintiff in the action under the policy specifying the non-disclosure or false representation on which it proposes to rely and that it intends to seek a declaration and any person to whom notice of such action is given may, if he desires, be made a party thereto.”

12. In Fiji Supreme Court in **Sun Insurance v Pranish Prakash Chand** (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010) the relevant provisions of Cap 177 was discussed with the legislative history of the provisions of law relating to restrictions of liability. The said Supreme Court decision dealt with the restrictions imposed by the insurers regarding third party liabilities and the statutory limitations to such restrictions and its applicability, but considering the complexity and ambiguity of the Cap 177 dealt with interpretation of the provisions of the said statute including Section 11(3) Cap 177 and at the beginning stated the following general observation about the Cap 177 at paragraph 21:

‘In their present form the sections of Cap 177 the Motor Vehicles (Third Party) Insurance Act (Cap 177) are one of the most technical and incomprehensible set of statutory provision in the Fiji statute book. This is because they appear in Cap 177 as if they were and always had been one statutory code. The reality is otherwise. A first statute attempted to deal with an urgent social problem and then was proved to be inadequate in practice. The mischief remained and problem became worse. So four years later a second statue proposed and enacted a radical solution to the

problem. In the process nothing was repealed although parts of the first statutory scheme became redundant in the second scheme. Yet once their legislative history is understood, their proper interpretation is of great public importance to the residents of Fiji and visitors to Fiji. (emphasis mine)

13. I cannot less agree with the status of the Cap 177 and it had led to conflicting decisions in the High Court and unfortunately such authorities are relied on by counsel to support their contentions. I do not wish to high light those in this judgment, and first and foremost rely on the said Supreme Court decisions of *Sun Insurance vs. Pranish Prakash Chand* (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010) and *Sun Insurance Company Ltd v Chandra* [2012] FJSC 8; CBV0007.2011 (9 May 2012, Unreported). The earlier Fiji Supreme Court decision, had elaborated legislative history of the provisions of Cap 177 and interpreted said provisions relating to restrictions in third party policies contained in the Sections of Cap 177. The reason for the Fiji Supreme Court to deal with all the provisions relating to restrictions of third party policies contained in the Cap 177, in the said decision may be to put to rest ingenious constructions by the counsel on ‘one of the most technical and incomprehensible set of statutory provision in the Fiji statute book’. So, in Fiji if there is any issue relating to application of restrictive clauses in third party insurance policy and the application of Cap 177, it should begin from the said Supreme Court decision *Sun Insurance vs. Pranish Prakash Chand* (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010), unfortunately both counsel did not rely on the said Fiji Supreme Court judgment either in their written submissions or in oral submissions.
14. Both parties relied on the latter decision of Fiji Supreme Court which dealt specifically “30 day restriction” regarding the validity of driving licence exception, similar to Clause 6 of the third party insurance policy of the Plaintiff which I would deal later in this judgment. As a preliminary issue I have to decide whether the Plaintiff could resort to Originating Summons seeking avoidance of third party policy in terms of Section 11(3) of Cap 177.
15. After carefully analyzing the legislative history in UK regarding the third party policies which is the basis of the Section 11 of Cap 177, Fiji Supreme Court in *Sun Insurance vs*

Pranish Prakash Chand (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010) at paragraph 53 held as follows

“(1). If you **cancel** the policy because you are aware of breaches of condition by the insured **prior to the event** giving rise to the third party claim, you have **no liability**.

(2) Breach of condition by the insured if it means that the insured was out of cover temporarily at the time of the event does not avail you against the third party statutory claim against you but you have a right of redress against your insured in these circumstances.

(3) **There is one circumstance in which you can avoid liability to the third party and that relates to the *uberrima fidei* nature of the insurance contract.** If there has been material non disclosure or false representation in the proposal by the insured you can operate a procedure for a declaration that you do not have to pay out the third party even although he has obtained judgment against the insured.”(emphasis added)

16. The findings in **Sun Insurance v Pranish Prakash Chand** (supra) has been reinforced in **Repeka Naba v Tower Insurance (Fiji) Limited** Supreme Court CBV0002 of 2011, 12th May 2011 and **OBE Insurance (Fiji) Limited v Ravinesh Prasad** Supreme Court CBV 0003 of 2009, 18th August 2011. So, it is clear that Section 11(3) of Cap 177 cannot be resorted to avoid liability, when the circumstances relate to alleged violation of non compliance of policy condition.

17. The above position was again reinforced by Fiji Supreme Court in the case of **Sun Insurance Company Ltd v Chandra** [2012] FJSC 8; CBV0007.2011 (9 May 2012, Unreported) and in paragraph 20 stated as follows

‘.....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.’(emphasis is mine)

18. The originating summons was made in terms of Cap 177 of Section 11(3) and the affidavit in support does not allege issues relating to *oberrima fidei*, instead dealt with alleged non compliance of Clause 6 of the third party insurance policy by the insuree. In my judgment this summons should be struck off *in limine* as they do not relate to issues relating *oberrima fidei* of the 1st Defendant. The avoidance of policy in terms of the Section 11(3) of Cap 177, according to the Supreme Court decision in *Sun Insurance vs Pranish Prakash Chand* (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010) is limited to issue of *oberrima fidei* of the 1st Defendant. This position was reinforced again by the Fiji Supreme Court in *Sun Insurance Company Ltd v Chandra* [2012] FJSC 8; CBV0007.2011 (9 May 2012, Unreported). In the circumstances this summons should be struck off *in limine*.
19. The proviso to the Section 11(3) of Cap 177, alleviates any ambiguity as it sets out two prerequisites to the insurer if it desired to avoid policy under said provision of law. One such prerequisite is the time period of the notice and the other prerequisite is the notice specifying the non-disclosure or false representation on which the insurer propose to rely. Fulfillment of both of these are *sine qua non* for the Plaintiff in order to benefit from avoidance under Section 11(3) Cap 177. The ‘notice’ required under the said provision is not notice of action, but rather notice as to **‘specifying the non-disclosure or false representation on which it proposes to rely and that it intends to seek a declaration.’** Any other notice (ie. notice of action) is clearly non compliance with the said mandatory proviso. In *Zurich General Accident and Liability Insurance Co Ltd v Morrison and Others* [1942] 1 All ER 529 held that the true construction of the Road Traffic Act 1934, s 10(3) of UK, which is identical to Section 11(3) of Cap 177 in Fiji, the insurers were prevented from relying either directly or indirectly on any matter not specified in the notice as a ground for avoiding the policy as against a third party. This decision demonstrate the importance of the stipulated ‘notice’ under the Section 11(3) of Cap 177 and that the said ‘notice’ is clearly not a mere notice of action, but a more detailed and specific and mandatory notice as to the particulars of alleged misrepresentations which the insurer relies on the said action. This UK decision was applied by the Fiji Supreme Court in *Sun Insurance vs Pranish Prakash Chand* (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010). This demonstrate that avoidance in terms of Section 11(3) of Cap 177 is limited to issues relating *uberrima fidei* as details of such misrepresentation is a mandatory

requirement for the insurer to benefit from the avoidance of the policy against third party, the non-compliance, is fatal to such application in terms of the Section 11(3) of Cap 177.

20. In **Zurich General Accident and Liability Insurance Co Ltd v Morrison and Others** [1942] 1 All ER 529 at 532 Atkinson J hel,

‘In my judgment, a declaration obtained on grounds of which notice was not given within 7 days does not avail an insurer against a third party judgment creditor. I do not think the court has any power to vary the section and to dispense with the condition laid down. I think its duty is to give effect to it, and, respectfully, I entirely agree with the views indicated by the Court of Appeal. I would add this. It seems to me that there is a very good reason why the legislature should have laid down this condition. A plaintiff about to sue, or suing, a motor car owner is to be told early on that the insurance company is going to repudiate liability.’

21. The Fiji Supreme Court has applied the said UK decision in **Sun Insurance vs Pranish Prakash Chand** (unreported) Civil Appeal No CB V0005 of 2008S (decided on 15th October, 2010). Both authorities indicate the utility of Section 11(3) of Cap 177, should be confined to declarations relating to issues relating *uberrima fidei* and this provision of law cannot be utilized for avoidance based on non-compliance of the restrictive clauses in the third party policy.
22. Even though I need not go further to dismiss the present summons, since the said summons also contained inherent power of the court I will deal with the other issues without prejudice to what was stated above. The Plaintiff was given an opportunity to amend its summons, but did not amend to indicate any specific provision of law in order to obtain the orders sought which are far reaching, even affecting an existing action. In the circumstances I am not obliged to address other issues, but I venture to do so for completion and also since it raised important points of law.
23. The counsel for the Defendant had raised an issue of validity of the clause 6 of the third party insurance policy. For this both parties had relied on the decision of **Sun Insurance Company Ltd v Chandra** [2012] FJSC 8; CBV0007.2011 (9 May 2012, Unreported), but when I requested the learned counsel for the 1st and 2nd Defendant to show how that judgment could support his contention he was unable to do so. In the written submissions

filed on behalf of the said Defendants, at paragraph 13 quoted paragraph 15 of the *Sun Insurance Company Ltd v Chandra* [2012] FJSC 8; CBV0007.2011 (9 May 2012, Unreported) which stated that such a clause in the third party insurance would narrow down the scope of protection to third parties. But dealing specifically to a clause identical to clause 6 of the third party insurance policy, the Fiji Supreme Court held in paragraph 44 as follows

‘.....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.....**’(emphasis is mine)

24. From the above findings of the Fiji Supreme Court, it is clear though the clause 6 of the third party insurance policy restricts the cover, it is within the statutory limits of Cap 177. *Sun Insurance Company Ltd v Chandra* (supra) further held at paragraphs 50 as follows

“(a) Under the statute the Insurer can impose certain conditions in the insurance 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 –a vis third party. In such circumstances the insurer has a right to claim the sum paid to the third party from the insured.

(b) A policy stipulating conditions other than those contemplated in S.10 can be included in the policy and the particulars for 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 conditions namely (a) person or class of 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.’

25. So, I do not think that clause 6 of the third party insurance policy of the Plaintiff violates provisions of Cap 177 and that contention should be rejected, but by the same token the Plaintiff cannot seek avoidance under Section 11(3) of Cap 177 as its proviso makes it clear that avoidance in terms of said provision requires mandatory notice of the details of

the misrepresentation that the insurer relies in order to avoid. Since the present summons does not allege any misrepresentation this summons filed in terms of Section 11(3) of Cap 177 should be struck off.

26. Without prejudice to what was stated above in this judgment, I would deal with the issue whether the Plaintiff could avoid the policy in terms of Clause 6 of the policy. First, from the admitted facts the 2nd Defendant was not driving the vehicle when the incident happened as he had parked the vehicle and alighted from it and was walking along the street, when the mishap happened. The argument that vehicle was parked for a short time and since the journey was not completed the 2nd Defendant should be considered as the ‘driver’ of the vehicle the alleged injury happened to the 3rd Defendant, cannot be accepted in terms of clause 6 of the third party policy on which the Plaintiff relied in this originating summons. Avoidance of policy even under *uberrima fidei* is not a blank cheque for an insurer and it should be material and, and avoidance under ‘driver exception’ should follow the same rule as they belong to limited categories of exceptions allowed under Cap 177 for the avoidance of the policy. The alleged non compliance as to the ‘driver exception’, should be material and once the driver had parked a vehicle in a location and alighted from it, under normal circumstances, cannot be considered as a driver of the vehicle as regard to third party liability in terms of the clause 6 of the said policy. The word used in the said Clause 6 is ‘person driving’ and in the absence of special interpretation in the said policy should be given the general meaning to ‘person driving’ at the time of the incident and clearly on the undisputed facts the 2nd Defendant who was outside the vehicle, walking away from the vehicle cannot be considered as a person driving at that time. In the circumstances the 2nd Defendant cannot be considered ‘person driving’ as he was outside the vehicle, walking along the street having parked the vehicle. So, clause 6 of the third party insurance policy has no relevance to the accident, hence the reliance on the said clause to avoid the Policy should be rejected.

D. CONCLUSION

27. The Plaintiff filed this originating summons seeking orders contained in it in terms of Section 11(3) of the Cap 177. I have held that this section has no application since the

allegation does not relate to issue of *uberrima fidei*. The summons should be struck off *in limine*, but considering other issues raised it is evident that the 2nd Defendant who had parked the vehicle and walking along the street cannot be considered as ‘person driving’ in terms of the clause 6 of the said policy. The originating summons dated 9th July, 2012 struck off. Considering the circumstances of the case, and the importance of the issues involved in it, I will not award any cost.

E. FINAL ORDERS

- a. The originating summons dated 9th July, 2012 is struck off.
- b. No costs.

Dated at **Suva** this 14th day of **November, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva