

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 235 of 2009

BETWEEN : ASHIK HUSSEIN

Plaintiff

AND : PACIFIC GENERAL BUILDERS

Defendant

AND : DOMINION INSURANCE LIMITED

Third Party

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr D. Singh for the Plaintiff
Mr R. Vananalagi for the Defendant
Ms. N. Lal for the Third Party

Date of Hearing : 3 August 2017

Date of Decision : 7 August 2017

DECISION

1. This is the Plaintiff's Summons seeking determination of the question whether the Third Party (Dominion) is entitled to repudiate liability pursuant to the Workmen's Compensation Policy and is thereby not obliged to indemnify the Defendant against the Plaintiff's claim.
2. The application is made pursuant to Order 33 rules 3 and 7 of the High Court Rules and is supported by the affidavit of the Plaintiff which annexes the relevant page of the said policy.
3. At the hearing of the Summons, Counsel for the Plaintiff submitted that the case of Woodfall & Rimmer Ltd v Moyle And Another [1941] 3 All E.R. Annotated 304 (Woodfall) which was applied in Pita Ilaisa Waqa v. Standard Concrete Industries Limited and Dominion Insurance Ltd (Third Party) Suva Civil Action No. HBC 155 of 2012 (Waqa) meant Dominion cannot repudiate liability here.
4. Counsel for Dominion then submitted. He said clause (sic) 8 of the policy required the Defendant to take precautions and comply with statutory regulations which the Defendant was in breach of. However he did not have documents from any government department that showed the Defendant had committed these breaches. Dominion had pleaded these breaches in their defence and it was entitled to repudiate liability.
5. Counsel for the Defendant in his submission said no investigation had been conducted by Dominion of the accident. If any were done they would have done this after the completion of the building. He said the alleged breach of policy condition is an afterthought of Dominion.

6. Plaintiff's Counsel in his reply said that Dominion did not state that it was repudiating liability under condition 8 of or under the policy.
7. Counsel for Dominion in his reply said he had no authorities to cite. He had earlier informed the Court that Dominion was not filing any affidavit in response.
8. At the conclusion of the arguments I informed I would take time for consideration. Having done so I now deliver my decision.
9. The sole issue before me is whether Dominion can repudiate liability based on alleged breaches of the Occupational Health and Safety regulations and the Factories Construction Regulations. This issue was canvassed by Dominion through different Counsel in Waqa's case. It is therefore surprising that they and their Counsel appear to be unaware of my decision in Waqa's case which is on point. Anyway, I shall be quoting here extensively from my judgment there.
10. The express condition on which Dominion founds its stand to repudiate liability is condition 8 of the policy. Condition 8 reads "Precautions: the insured shall take all reasonable precautions to prevent accidents and must comply with all statutory obligations relating to employee safety and occupational health".
11. Going through the Dominion policy, in the Annexure with a fine tooth comb, from the start to its finish, does not disclose even an iota of evidence that Dominion is entitled to repudiate liability, if the Defendant fails to take all reasonable precautions or to comply with all statutory obligations relating to its employees. This should bring this matter to an ultimate end here or anywhere else. *Cadit quaestio* (the matter admits of no further argument), especially as Dominion's

Counsel concedes they have no documents to substantiate their allegations of the Defendant's breaches of statutory regulations.

12. The situation once again before this Court was faced by the English Court of Appeal in *Woodfall*. The insurance policy condition concerned read "The assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations". These words are similar to the words of condition 8 here. Lord Greene, M.R. said at 308-9 that "If the construction which is urged on behalf of the underwriters is the right one, I do not think that it would be an exaggeration to say that this document is really a trap for the insured. In using that expression, let it not be thought for one moment that I use it as implying that a trap is intentionally set. I mean nothing of the kind. All I mean is that, if the intention of the underwriters was to limit their risk in the way in which counsel for the appellants would have it limited, they have used language which entirely fails to make that intention clear. I cannot help thinking that, if underwriters wish, by some qualifications, to limit a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is". Goddard LJ said if they were to read the condition that the assured shall take reasonable precautions to prevent accidents in the way in which counsel for the appellants (underwriters) had invited them to read it, it seems to him that it would follow that the underwriters were saying " I will insure you against your liability for negligence on condition that you are not negligent", because if the employer had taken all reasonable precautions to prevent accidents, it follows that he cannot be liable in negligence. The Court dismissed the appeal against the judgment for the plaintiff (the insured employer) for all the sums claimed.
13. I accept as persuasive authority the decision of the English Court of Appeal. If I may say so, their Lordships' strictures on the Lloyds' underwriters are equally applicable 76 years later to any insurance company.

14. In my opinion, Dominion's attempt to rely on condition 8, to repudiate liability collapses for 2 reasons: viz
- (i) It is not provided anywhere in the policy that Dominion can repudiate liability if there is a failure by the insured (Defendant) to take all reasonable precautions.
 - (ii) It is precisely to cover such a contingency that the Defendant pays a premium to Dominion as the consideration for Dominion covering it in the event that contingency occurs. It would then be untenable for Dominion to say they are not covering the Defendant as they are attempting to do here.
15. In the result I shall determine the question as follows:
- The Third Party is not entitled to repudiate liability pursuant to condition 8 of the policy concerned and is therefore obliged (liable) to indemnify the Defendant against all general and special damages interest thereon and costs (the Plaintiff's claim) which the Defendant may be ordered to pay the Plaintiff at the conclusion of the hearing of the instant action.
16. The Third Party shall pay the Plaintiff, only, costs of this Summons summarily assessed at \$750.

Delivered at Suva this 7th day of August 2017.



David Alfred
Judge
High Court of Fiji