IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 87 of 2011

BETWEEN : **HARMANT PRASAD** as Administrator of the **ESTATE OF AVINESH PRASAD** late of 5 Ram Asre Road, Tavakubu, Lautoka, Mechanic.

PLAINTIFF

AND : **DOMINION INSURANCE LIMITED** a limited liability company having its registered office at 1st Floor, 231 Waimanu Road, Suva.

DEFENDANT

Counsel : Mr. C.B Young for the Plaintiff
Mr. A.K Narayan for the Defendant

JUDGEMENT

INTRODUCTION

1. Satendra Prasad Construction Limited (**"insured"**) had a judgment entered against it by Mr. Justice D.D Finnigan on 15 December 2006 in the sum of $46,754.32 in Civil Action 247 of 2000 with interest at the rate of 10% pursuant to the Insurance Law Reform Act. The judgment was in favour of Harmant Prasad (**"third party"**). Some years before judgment was entered, the insured was wound up. Unable to realize the judgment against the insured, the third party now seeks indemnity from Dominion Insurance Company Limited (the **"insurer"**). By Originating Summons filed on 06 June 2011 pursuant to section 10 of the Insurance Law Reform Act 1996, Young & Associates is seeking, *inter alia*, a declaration that the insurer is liable to the third party for the said sum.

2. Notably, the insurer had represented the insured throughout the civil proceedings since 2002. The insurer was also present in the winding up proceedings against the insured in 2004.

SECTION 10

3. Section 10(1) of the Insurance Law Reform Act 1996 provides:

10.(1) Where —

(a) the insured under a contract of liability insurance is liable in damages to a person (in this Section called the "third party");
(b) the insured has died or cannot, after reasonable enquiry, be found; and
(c) the contract provides insurance cover in respect of the liability,

the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages.

(2)A payment under sub-section (1) is a discharge, to the extent of the payment in respect of —

(a) the insurer's liability under the contract; and
(b) the liability of the insured or of his or her legal personal representative to the third party.

(3) This Section does not affect any right that the third party has in respect of the insured's liability, being a right under some other law of Fiji.

(4) This Section applies to or in relation to contracts and proposed contracts to or in relation to which the Workmen's Compensation Act, Cap 94, applies and to or in relation to which the Motor Vehicles (Third Party Insurance) Act, Cap. 177 applies.

4. Under section 10(1), a **"third party"** for whose benefit a contract of insurance was entered into between an insurer and an insured, may recover from the insurer, notwithstanding that the third party was not privy to the contract of insurance between the insured and the insurer. However, to succeed under section 10, the third party must establish the following:

(i) that the insured is liable to the third party under a contract of liability insurance.
(ii) that the insured has died or after reasonable enquiry, cannot be found, and
(iii) that the contract provides insurance cover in respect of the liability

BACKGROUND

5. The third party is the administrator of the estate of his late son Avinesh Prasad (**"Avinesh"**). Avinesh had worked as a mechanic for the insured. He died on 14 February 2001 out of injuries he sustained when a tractor he was driving for the insured tipped off-balance at a worksite and crushed him. Avinesh did not hold the appropriate LTA - Class 9 license to operate the tractor.

6. The insured, at all material times, had maintained a policy of insurance with the insurer. The said policy covered workmen's compensation as well as common law claims by the insurer's employees.

7. The fact that Avinesh was unlicensed was something that the insurer claims it was not aware of at any time leading up to the trial. This fact was not pleaded by either party. It only surfaced at the trial which then led to a finding of fact and law (see below) by Finnigan J that the insured had breached its statutory obligation by allowing an unlicensed person in Avinesh to operate the forklift.

> *It is nonetheless the facts that the deceased was employed by the Defendant, in the words of Mr. Prasad, as a "mechanic boy". It was a mechanic that he was qualified. To drive a forkhoist he needed a Class 9 driving license. He did not have one*[1].

8. Notably, the insured was wound up on 30 November 2004. Notably also, the claim was defended by the insurer.
9. On 24 February 2004, some two years or so before the trial of the matter, the insurer made an interim payment of $15,958.00 to the third party pursuant to an interlocutory Order of the High Court.

WHAT THE INSURER DID AFTER LEARNING THAT AVINESH WAS NOT LICENSED TO OPERATE THE FORKLIFT

10. Immediately after it learnt of the above fact from Finnigan J's judgment, the insurer would write to the insured (which was then already wound up):

> We refer to the above claim which resulted from the death of Harmant Prasad (sic) whilst employed by you on the 14th February 2001.
>
> We have been defending your company against liability. The judgment was received last month in which the Court ruled that you were in Breach of your Statutory Obligations by allowing an unlicensed person to operate the forklift.
>
> Condition 8 of your Workers Compensation Policy requires you to take all reasonable precautions to prevent accidents and comply with all statutory obligations relating to employee safety and occupational health.
>
> As the judgment has made clear that you were in breach of this condition we must now advise that your **claim under the policy is declined.**
>
> Our solicitor believes that there are also reasons to appeal the quantum of the Judgment and you may wish to pursue this with your own solicitor.
>
> We also note that we have already made on your behalf an interim payment of $15,958 in 2004 before we were aware that Condition 8 had not been complied with. This money

[1] As Finnigan J said in his judgment at paragraph 8.

should now be returned to us and we would appreciate you adding this figure to the list of creditors."

11. Later, AK Lawyers would write a similar letter to the Official Receiver on behalf of the insurer.

INSTITUTING CURRENT PROCEEDINGS

12. It was on account of the insurer's decision to decline the claim under the policy that the third party would file the Originating Summons now before me on 06 June 2011 pursuant to section 10 of the Insurance Law Reform Act 1996 for the following orders:

    1. For a declaration that pursuant to S.10(1) of the Insurance Law Reform Act 1996 the Plaintiff is entitled to recover from the Defendant the sum of $46,754.32 and $3000.00 costs being the amount of the Judgment entered against the Defendants insured, Satendra Prasad Construction Ltd, in Lautoka High Court Action 247 of 2000.
    2. Judgment against the Defendant in the sum of $49,754.32 and compound interest thereon at the rate of 10% from 15 December 2006 to date of payment pursuant to s.34(3) of the Insurance Law Reform Act 1996.
    3. Indemnity Costs of this proceeding.
    4. Such further or other relief or orders as may seem just to this Honourable Court.

13. The third-party has sworn an Affidavit on 06 June 2011 in support of his application.

COMMENTS

14. The insurer resists the third party's application on the following grounds. Firstly, the insurer argues that in the circumstances of this case, the third party has failed to establish that the insured has died or after reasonable enquiry, cannot be found, as required under section 10(1). Secondly, while the insured is indeed liable to the third party on account of Finnigan J's judgment, the insurer argues that the insured could not be said to be liable to the third party under a contract of liability insurance, as required under section 10(1), because the insured had breached a condition precedent of the policy. This means that there is no liability for which the insurer is obliged to indemnify.

15. The third party responds that the insurer has, by election, waived its entitlement to refuse indemnity. Alternatively, it is argued that the insurer is

estopped by conduct from refusing indemnity. Both arguments are grounded on the following:

(i) that the insurer had failed to effectively terminate or avoid the policy following the breach by the insured.
(ii) that the insurer had already made an interim payment of $15,958 to Prasad.
(iii) the insurer's continuous representation of the insured throughout the civil proceedings since 2002 and in the winding up proceedings in 2004 and consequential detriment and prejudice suffered by the third party.

16. The insurer insists that it had no knowledge of the insured's breach until evidence of such emerged at the trial. It argues that its entitlement to decline the claim accrued at the point when it came upon the knowledge of the said breach.

ISSUES

17. The questions I have to determine are:

(i) firstly, whether or not the third party has conducted reasonable inquiry to locate the insured?
(ii) secondly, if the answer to (i) above is "yes", was the insured's breach of its statutory obligation in allowing an unlicensed Avinesh to operate the forklift, a condition precedent or a warranty of the policy?
(iii) thirdly, depending on the answer to (ii) above, is the insurer entitled to decline the policy of indemnity on account of the breach? Or has the insurer waived it by election or estoppel?

DISCUSSION

Has The Insured Died Or Cannot Be Found After Reasonable Inquiry?

18. Mr. Young relies on **Norsworthy & Encel v SGIC No. SCGRG-99-1083** Judgment No. S496 [1999] SASC 496 where Justice Olsson[2] held that section

[2] Olsson J relied on the following sentiments of David DCJ in Shimmin v AMP General Insurance Ltd & Anor (1998) 199 LSJS 359:

.....the defendants argue that the words 'death or disappearance' do not apply to a corporation. In my view such a narrow interpretation is ill founded. There is no reason why the word 'disappearance' set out in the policy should not cover situations where the company no longer exists for whatever reason. It would seem illogical to afford an insured person easier access to the policy because of the fact that the builder is a natural person and limit the scope of the policy because the builder happens to be a company. The fact that the plaintiff may be able to pursue the assets of the company through other means if the company is deregistered in my view is irrelevant to the present question and it does not alter the fact that by the company being deregistered it is no longer in existence and for all intents and purposes has disappeared. I therefore find that the policy applies to a corporation that has been deregistered. I find that for the purposes of the policy the building company has 'disappeared.

Olsson J went on to say as follows on the meaning of the words "*cannot be found*" at paragraph 61:

51 of the Australian Insurance Contracts Act (which is equivalent to section 10 of the Fiji Act) extended in application to deregistered companies.

19. By his affidavit (at paragraph 11) sworn on 6 June 2011, the third party deposes that, on 2 October 2008, a clerk of Young & Associates had gone to 3 Nasoki Street, Lautoka to attempt service of all court processes. This was the insured's last known registered office. It was also the place where the insured had always carried on its business. However, the said clerk was only to find that the insured had ceased trading operations.

20. The fact that the insured had been wound-up under Winding-Up Cause No. 42 of 2004 is further evidence that the insured no longer operated from its previous place of business and registered office at 3 Nasoki Street, Lautoka. I am satisfied that the clerk's attempt to serve the insured is sufficient "reasonable inquiry".

21. As a side note, I am of the view that the effect of section 10(1) in cases such as this one before me, where the insured is already would up on account of its insolvency, is that if the third party were to succeed in this case, the proceeds of the insurance policy should not have to pass to the Official Receiver for distribution amongst the insured's general creditors. In other words, any proceeds of the insurance policy in this case should not be treated as an asset of the already-wound up insured to be distributed pro rata under distribution scheme prescribed under our Companies Act to the general creditors, of whom the third party would be one[3].

..the concepts of death and inability to find are clearly disjunctive. I see no compelling reason to restrict the phrase *"cannot.....be found"* to human beings and to exclude corporations. To do so would be substantially emasculate the obvious concept of what is intended to be a remedial statute in a very arbitrary, illogical and unjust manner. Just as a person can disappear and not be found, so also can a corporation vanish by reason of deregistration, and thus not be found. In my view s51 (1) (b) is capable of extending to a factual scenario such as the de-registration of a corporation, so that it has ceased to exist.

[3] For a general reference on this point, see the contrasting views and the way the Courts have dealt with the question in various insurance-related context s in the following cases: **Bradley v Eagle Star Insurance Co Ltd** [1989] AC 957, [1989] 1 All ER 961, [1989] 1 Lloyds Rep 465, [1989] 2 WLR 568; **Hood's Trustees v Southern Union General Insurance Company of Australasia Ltd** [1928] Ch 793; **Re Harrington Motor Co Ltd, Ex parte Chaplin** ([1928] Ch 105); **Post Office v Norwich Union Fire Insurance Society Ltd CA** ([1967] 2 QB 363, [1967] 1 Lloyds Rep 216).

WHETHER THE CONTRACT PROVIDES INSURANCE COVER IN RESPECT OF LIABILITY.

22. The third party has annexed a copy of the insurance contract in question and thereby established that there was an insurance contract in existence and, secondly, that the said contract provided cover for Workmen's Compensation.

WHETHER CONDITION 8 OF THE POLICY WAS A CONDITION PRECEDENT OR A WARRANTY? WHETHER THE INSURED'S BREACH OF CONDITION 8 ENTITLED THE INSURER TO DECLINE THE CLAIM?

23. Condition 8 stipulates that the insured shall take all reasonable precautions to prevent accidents and must comply with all statutory obligations relating to employee safety and occupational health (see below).

> Condition 8
> 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.

24. Condition 8 has two stipulations. First is the stipulation that the insured **"shall take all reasonable precautions to prevent accidents"**. Second is the stipulation that the insured **"must comply with all statutory obligations relating to employee safety and occupational health"**. In this case, the relevant statutes are the Health & Safety At Work Act read together with the Land Transport Act (discussion further below).

25. On the first limb, Mr. Narayan submits that the insured had breached that condition in that it had "courted the risk". Is the Court being asked to assess whether the insured had been negligent or reckless? If so, is an objective test to be applied? Or is the court to determine the question on the basis of the subjective knowledge and intentions of the insured? I shall say no more on this.

26. AK Lawyers' submissions on the second limb of Condition 8 (see below, emphasis mine) is stronger in supporting the insurer's case.

> 3.10 ..... The second requirement of condition 8 is "to comply with all statutory obligations relating to employees safety and occupational health". This is not based on reasonableness or recklessness as does the earlier obligation to take all reasonable precautions. **As there was a failure to comply with an absolute obligation to ensure the**

deceased had a drivers licence, there was a breach as the licence did relate to the deceased's competence and consequently a health and safety issue.

27. In my view - the second limb of Condition 8 is a condition precedent to liability. Generally, a breach of a condition precedent to liability entitles an insurer to deny liability outright without having to establish that it has suffered prejudice as a consequence. This means that if the insured has breached some statutory obligations relating to employee safety and occupational health, then the insurer would be entitled to decline the claim.

28. To relegate Condition 8 as a mere warranty would be to entertain a treatment of the contract in question as an express promise by the insurer to indemnify the insured even against any liability arising out of a breach of a statutory duty.

29. Such an expansive interpretation, in my view, would be contrary to public policy. It would only encourage irresponsibility and a cavalier disposition amongst insured employers on their statutory compliance with laws such as the Health & Safety At Work Act and the Land Transport Act.

30. In my view, an insurer who enters into a contract by which the insurer promises an insured to indemnify the insured for any breach by the insured of any standard in Fiji's Health & Safety At Work Act would risk a conviction under section 7(3) of the Health & Safety At Work Act (1996) (see below).

Contracting out

7.—(1) This Act applies not withstanding anything to the contrary contained in any contract or agreement, whether entered into before or after the commencement of this Act.

(2) A contractor agreement which purports to exclude or limit the application of this Act or to exclude or limits the rights or entitlements of a person under this Act is, to that extent, null and void.

(3) A person who urges, prevails on, persuades or offers an inducement to another person to enter into a contract or agreement whereby that other person would, but for this Section, consent or agree to the application of this Act being excluded or limited in respect of that other person, or to waive or limit that other person's rights, benefits or entitlements under this Act, shall be guilty of an offence.

31. In this regard, section 6 of the Health & Safety At Work Act sets out that the provisions of the Act are in addition to and do not derogate from the provisions of any other Act, which must include the Land Transport Act.

32. Section 56(3)(b) of the Land Transport Act provides:

> **56.** - (3) No person shall -
> *(b)* employ or permit or cause or allow any other person to drive a motor vehicle unless that other person is the holder of a driver's licence of the appropriate class issued under this Part.

33. Under section 111 of the Land Transport Act:

> Liability of employers
>
> 111. If an offence under this Act is committed by an employee or agent of another person in the course of the employment or agency, the employer or principal, as the case may be, is also liable for the offence if it is shown that the act or omission constituting the offence-
> (a) was consented to or connived at by the employer or principal; or
> (b) was attributable to gross neglect on his part.

34. Section 9 of the Health & Safety At Work Act imposes an obligation on every employer to ensure the health and safety at work of all his or her workers".

35. Mr. Young submits that a breach of condition 8 does not necessarily permit or enable the insurer to cancel or avoid the policy because Condition 8 does not include any feature such as Condition 1[4] to give the insurer the right to cancel or avoid the policy on account of any breach by the insured. He argues that the policy was intended to cover the insured from a common law liability, which includes a claim for negligence[5].

36. True, a right to terminate may arise under contract where there is an express stipulation conferring such a right. However, there is also a common law right to a wronged party to terminate when the other has breached an essential term (e.g. a condition precedent), or, has committed a sufficiently serious breach of a non-essential term (i.e. a warranty), or, where the other party has repudiated or renounced the contract (see **Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited** [2007] HCA 61 (13 December 2007) where the High Court of Australia reiterated the common law position as stated by

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[4] Condition 1 provides:
Condition 1

Fraud; If any claim under this policy shall be false or fraudulent in any respect then this insurance shall be void, no benefit shall be paid, and any benefit already paid will be recoverable by the Dominion.

[5] As Mr. Young submits:
The above submission is strengthened by the nature of Condition 8 itself. If the Policy was intended to cover the insured from successful negligence claims against it, then a clause which requires the insured not to be negligent (to take reasonable precautions against accident and breach of statutory duty) would appear to defeat the whole purpose of the Policy if the insurer is able to successfully exclude liability when the insured is negligent. The entire policy is to cover for "Common Law Liability" (see annexe Affidavit of Vikash Kumar at VK-1b) which includes claims in negligence.

Jordan CJ in **Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd** (1938) 38 S.R. N.S.W. 632 and also the English Court of Appeal decision in **Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd** . (1962) 2 Q.B. 26 - (see also Kermode J's discussion of the same in **Pacific Western Equipment Incorporated v Dillingham Construction (Queensland) Proprietary Ltd** [1979] FJLawRp 34; [1979] 25 FLR 99 (11 January 1979).

37. A.K Lawyers argue that the insurer has not cancelled or avoided the policy, but had declined the claim. They argue that Condition 8 is a condition precedent to liability of the insurer to which the right to indemnity is subject. A breach of Condition 8 entitles the insurer to decline the claim[6].

38. I tend to agree with AK Lawyers' submission. As I have said above, if Condition 8 were to be treated as anything other than a condition precedent, it would open the door to a construction of the policy in such terms which would oblige an insurer to indemnify an insured against any claim notwithstanding that the claim arose out of a breach by the insured of a statutory obligation.

39. It is hard to accept that this is what the parties had intended in this case.

40. The question I ask at this point is whether or not any issue of election can arise still if a condition precedent has been breached?

41. In **Kosmar Villa Holidays plc v Trustees of Syndicate 1243** [2008] EWCA Civ 147, the English Court of Appeal (Rix, Jacob LJJ and Forbes J)[7] had to decide inter alia whether a breach of a condition precedent in a claims

[6] They submit:

3.5 In insurance law the breach of a condition precedent to liability entitles the insurer to decline the claim (**Miller v Law Union & Rock Insurance Co Ltd** (1969) 91 WN (NSW) 39).

[7] Rix LJ made the following comments on the distinction between waiver by estoppel and waiver by election:

38. In sum, therefore, election is the exercise of a right to choose between inconsistent remedies. It generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party. Those are the conditions which make the doctrine mutually fair. It typically arises where the parties to a contract have to know where they stand. Thus the choice has either to be communicated unequivocally by the party electing to the other party or else the objective circumstances have to be such that the effluxion of time by itself constitutes that communication. Since the election is the choice of the party electing, it is his conduct which is decisive. Once made the election is final and irrevocable. Estoppel, however, is a promise, supported not by consideration but by reliance. It is a promise not to rely upon a defence (per Lord Diplock) or a right (per Lord Goff). It requires a representation, in words or conduct, which must be unequivocal and must have been relied upon in circumstances where it would be inequitable for the promise to be withdrawn. The need for such unfairness probably means that the reliance of the representee has to constitute a detriment, but even the detriment has, I would think, to be such as to make it inequitable for the promise to be withdrawn. For these reasons, the estoppel may not be irrevocable, but may be suspensory only. An unequivocal representation without the necessary reliance, and reliance without the necessary unequivocal representation, are each insufficient. It follows that, as concepts each in their own way designed to hold parties to fair dealings with one another, waiver by estoppel is the more flexible doctrine.

notification clause in an insurance contract could be waived by election or only by estoppel. Rix LJ defined the issue thus at paragraph 1:

> 1. The primary issue argued on this appeal concerns the difference between waiver by election and waiver by estoppel. Can breach of a condition precedent in a claims notification clause in an insurance policy be waived as a matter of irrevocable election, or is it only susceptible to waiver in face of an estoppel caused by reliance on a representation? As will appear below, there are important differences between the two types of waiver. However, common to both is the need for communication to the other party of an unequivocal representation. Therefore, also in issue in this appeal is whether the communication was unequivocal.

42. The insurer in the above case had issued a public liability policy. The said policy contained a condition precedent which stipulated that written notice be made immediately if injury or damage should occur. The Notice in question was not given for over a year. It was argued for and on behalf of the insured that the insurer had waived the right to rely on the breach of condition precedent.

43. Immediately after receiving notification, the insurer would write to the insured and also to the third party to say that it would take over conduct of the claim, pursuant to a claims control clause in the policy. Notably, the insurer did all that without reserving its rights.

44. The English Court of Appeal started by acknowledging that an insurer might waive its strict legal rights under the contract either by election or by estoppel.

45. However, where an insured has breached a condition precedent, the insured cannot raise an argument on waiver by election. This is because the breach per se automatically allows the insurer to refuse the claim. In other words, there is no "election" to be made.

46. The Court of Appeal however said that an insured may still argue estoppel. However, to succeed, the insured must adduce evidence showing that the insurer had made a clear and unequivocal representation that the insurer will not rely on a right or remedy.

47. The onus of proving the elements of any waiver or estoppel alleged lies upon the person who asserts it (**Mathews v Smallwood** (1910) 1 Ch 777).

48. Has the third party proven the elements of estoppel?

49. Mr. Young cites **Waterman v Gerling Australia Insurance Company P/L and Anor** [2005] NSWC 1066 and **Halsbury's Laws of England 2013 Edition Volume 16(2) (Re-issue) Reference 951.** He submits that that the insurer's continuous representation of the insured throughout the civil proceedings since 2002 and in the winding up proceedings in 2004 amounts to an estoppel by conduct and that the third party suffered a detriment based upon the insurer's representation. The detriment was the initiation and continuation of proceedings against the Defendants. AK Lawyers held themselves out to be lawyers for the insurers, and also for the insured (the Company) on behalf of the Defendants.

50. Firstly, in my view, the fact that the insurer had settled an interim payment in this case cannot be used as evidence of a waiver by election on its part, nor can it be applied as a fact which should go towards establishing estoppel.

51. I say this based on my reading of Order 29 Rule 15.

Non-disclosure of interim payment (O.29, r.15)

15. The fact that an order has been made under rule 11 or 12 shall not be pleaded and, unless the defendant consents or the Court so directs, no communication of that fact or of the fact that an interim payment has been made, whether voluntarily or pursuant to an order, shall be made to the Court at the trial, or hearing, of any question or issue as to liability or damages until all questions of liability and amount have been determined.

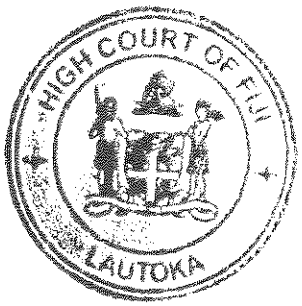
52. I also state here that I have considered section 10(2) of the Insurance Law Reform Act 1996 and in my view, the section cannot be interpreted to support the view that an interim payment is an admission or a concession to liability on the part of an insurer[8].

53. Secondly, I am of the view that where the condition precedent which the insured has breached also breaches a statutory law, for this Court to then entertain the question as to whether or not the insurer has waived liability by estoppel would still offend public policy.

[8] The section states:
(2)A payment under sub-section (1) is a discharge, to the extent of the payment in respect of —
(a) the insurer's liability under the contract; and
(b) the liability of the insured or of his or her legal personal representative to the third party.

CONCLUSION

54. I dismiss the third party's Originating Summons. The parties are to bear their own costs.



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Anare Tuilevuka
JUDGE

30 July 2018.