IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBA 21/19

BETWEEN	:	**DEL-CEE GARMENTS (FIJI) LIMITED**
		Appellant
AND	:	**ASHOK KUMAR & NEMIA VUNIMAKADRE**
		First Respondents
AND	:	**KIRT PRABHA SINGH**
		Second Respondent
Before	:	**A G Stuart- J**
Appearance	:	Mr R.R Gordon for the Plaintiff/Appellant No appearance for the First Defendants/Respondents Mr K.P Singh (Second Defendant) representing himself
Date of Hearing	:	28 November 2019
Date of Judgment	:	**10th December 2019**

DECISION

1. This is an appeal against a judgment of the Magistrates Court at Lautoka in Civil Cause # 36/2018. The date of the Magistrate's Court decision was 10 July 2019.

2. The appellant was the plaintiff in the Magistrates Court action. Its claim was for the cost of repairs to its motor vehicle (a Toyota Hiace panel van), damaged in an accident that occurred on 26 October 2012 at Navutu, between the plaintiff's vehicle (driven by and employee), and a rental vehicle owned by the First Respondents and driven by the Second Respondent.

3. The plaintiff's vehicle was deemed uneconomic to repair. The plaintiff's insurer wrote the vehicle off. The pre-accident value of the vehicle was assessed as $33,000, with the value of the wreck assessed as $15,000. So the amount of the plaintiff's loss is the difference between those figures, i.e. $18,000. Evidence on the court file suggests that the amount paid to the plaintiff by its insurer was $29,000 being the amount for which the vehicle was insured ($30,000), less the policy excess ($1,000), but the amount paid out by the insurer reflects only the arrangements between the insurer and its client, and does not necessarily correspond to the plaintiff's loss. To

the extent that any recovery from the defendants exceeds the amount which the insurer is entitled to, the insurer will need to account to the plaintiff for the difference.

4. The plaintiff's writ of summons was filed in the Magistrates Court on 18 May 2018, not quite six years after the date of the accident. The first defendants have taken no steps, which is perhaps unsurprising since (as counsel for the appellant acknowledges) the statement of claim does not allege any facts upon which the first defendants might be liable. The second defendant filed a statement of defence on 1 October 2018, in which he admits that the collision was caused by his own mistake, and does not explicitly contest the amount claimed.

5. The matter was set down for trial on 8 May 2019 on a formal proof basis. It seems from the court record that there was no appearance for the first defendant, and although the second defendant was present he was not willing to give evidence. As stated, judgement issued on 10 July 2019. In his judgment the learned magistrate dismissed the plaintiff's claim, and awarded cost of $800 in favour of the2nd defendant in t. The magistrate's view of the matter is expressed in paragraph 19 of his judgment as follows:

> *The insurance company has paid the total damage of $29,000 to the plaintiff. As per the evidence the insured amount is $30,000 even though [the vehicles] pre-accident value was $33,000. After considering the cost of repairs, insurance company has proposed the plaintiff the sum of $29,000 as a full and final discharge of their liability which the plaintiff has agreed to (Page 12, 13 & 14 of PEx1). Therefore, full restitution has been done to the Plaintiff in this incident. Accordingly, the plaintiff cannot have any claim whatsoever on this incident against any party. Any such attempt as in this case amounts to an unjust enrichment.*

6. The plaintiff appealed this decision. The Notice of Appeal was filed on 11 July (the day after the decision). In it the appellant/plaintiff sets out the grounds of appeal as follows:

   i. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying Order 15 (XV) Rules 1 and 4 of the Magistrates ' Court Rules in that the Second Defendant/Second Respondent had signed a statement admitting the Plaintiff/Appellant's claim and/or liability and accordingly the Learned Trial Magistrate ought to have entered judgment and/or consent judgment against the Second Defendant/Second Respondent and/or such admission and/or statement was to be received as admission without further proof.*

   ii. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying Order 16 (XVI) Rule 3(e) of the Magistrates Court Rules in that every allegation of fact, if not denied specifically or by necessary implication or stated to be not admitted, was to be taken as established at the hearing.*

   iii. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying 'magistrates court rule VI:08 (sic)'*

iv. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying 'magistrates court rule VI:09 (sic)'.*

v. *That the Learned Magistrate erred in law and/or in fact in finding and/or holding that the Plaintiff/Appellant had no cause of action against the Defendants/Respondents.*

vi. *That the Learned Magistrate erred in law and/or in fact in finding and/or holding that the Plaintiff/Appellant cannot have any claim whatsoever on the incident against any party.*

vii. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying and/or in incorrectly and/or improperly interpreting and or misapplying the law and principles of subrogation and/or insurance subrogation.*

viii. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying and/or in incorrectly and/or improperly interpreting and/or misapplying the law and principles of indemnity and/or insurance indemnity.*

ix. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying and/or in incorrectly and/or improperly interpreting and/or misapplying the law and principles of restitution and/or insurance restitution.*

x. *That the Learned Magistrate erred in law and/or in fact in correctly and/or properly interpreting and/or applying and/or in incorrectly and/or improperly interpreting and/or misapplying the law and principles of unjust enrichment.*

xi. *That the Learned Magistrate erred in law and/or in fact when he made inappropriate comments about the Plaintiff/Appellant and/or its legal advisor.*

xii. *That the Learned Magistrate erred in law and/or in fact when he awarded costs against the Plaintiff/Appellant in favour of the Second Defendant/Second Respondent.*

xiii. *That the Learned Magistrate erred in law and/or in fact when he dismissed the Plaintiff/Appellants claim.*

7. It will be noted that the appeal does not relate to the claim against the first defendant. As I have noted above, no allegations were made in the statement of claim that might result in the first defendants being liable to the plaintiff. So although the failure of the first defendant to file a defence or take any steps can be treated as an admission of the allegations made (O.16, r.3(e), that does not assist the plaintiff in its claim against the first defendant, for the reasons given.

8. The second defendant appeared at the appeal, again unrepresented. He acknowledged – again – that the accident arose from his error.

9. I fully understand the Learned Magistrate's concern to ensure that the self-represented second defendant was not unfairly disadvantaged by the fact that he did not have legal representation. If this concern was reflected in the Court's reluctance to apply default mechanisms such as Order 15, Rule 4 (relating to admissions by a defendant) and Order 16, Rule 3(e) (the requirement that a defendant answers all the allegations against him, and is assumed to admit them if he does not) against an unrepresented defendant, and instead require formal proof of the plaintiff's claim, I would certainly not criticise that approach. I do not think it appropriate to demand standards of pleading of a self-represented litigant that it would be reasonable to expect of a lawyer, and the assumptions that are legitimate (and that the rules impose) where pleadings prepared by a lawyer make admissions, or fail to deny allegations, need to be applied to lay litigants (particularly defendants, who may not be unrepresented by choice) with care. The purpose of the Rules is to assist the Court and the parties in the management of court proceedings, with the objective of achieving a proper and fair adjudication of the issues before the Court. There is no prejudice to a plaintiff in a case such as this if it is asked to prove its claim, rather than rely on assumptions being made on the basis of deficiencies in the pleadings.

10. Counsel argued on behalf of the appellant that the Learned Magistrate erred in failing to treat the second defendant's statement of defence as a full admission of both liability and damages such that judgment should be entered without formal proof. In his statement of defence on the issue of liability the second defendant pleaded:

> 2. *Since that accident I have not driven any motor vehicle and never got my licences back as I was only charged and was suspended for 6 months only. The guilt is still within me that my mistake made a collision. That incident was a life changer for me and my family as I was scarred for life and live with it daily and to note my sister was also involved in the said accident. She was bed ridden for two years and took a total of three years to recover.*

11. On the question of damages the statement of defence did not expressly deny the assertions in the statement of claim related to the claimed loss. In relation to this issue the statement of defence states:

> 4. *I would not be able to pay the claim monies as I do not earn as much and my basis expenses use up my income.*

12. The difficulty with the appellant's argument on this issue is that if it were correct, the plaintiff would be entitled to judgement for $33,000 because that it the amount that the plaintiff has claimed as its loss, notwithstanding that the evidence shows, and the plaintiff accepts, that credit of $15,000 must be allowed for the value of the wreck. Clearly the rules must be applied in a way that does not result in the plaintiff obtaining judgement that it is not entitled to, and I think that that outcome can be achieved by applying the rule with discretion and care, as the Learned Magistrate did in this case in requiring the plaintiff to prove its loss.

13. However it seems that the Learned Magistrate, having heard the evidence of loss, allowed himself to be distracted by the fact that the plaintiff had insurance, and had - at the time the proceedings were commenced - already received from its insurer New

India Insurance payment for the amount of its loss. In doing so I agree with counsel for the appellant, the Learned Magistrate has improperly interpreted and/or misapplied the law and principles of subrogation.

14. Quoting from **Insurance Law** (McGillivray & Parkington , 6th Ed, 1975) para 1861 on the general rule of subrogation:

> *If a person suffers loss for which he can recover against a third party and that person has insured himself against such a loss, the insurer cannot avoid liability on the ground that the insured has a claim against the third party. Conversely, the third party cannot avoid liability on the ground that the insured has been or will be fully compensated by his insurers. These principles are fundamental to the law of insurance, since the purpose of insurance contracts would be largely defeated if the law were otherwise, and the right of subrogation is a corollary of them. Subrogation is the right of an insurer, who has paid for a loss, to receive the benefit of all the rights and remedies of the insured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained.*

15. The extent of the doctrine is described by Brett LJ in **Castellain v Preston** (1883) 11 QBD 380 at 388 as follows:

> *... as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort ... or in any other right whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such a right could or could not be enforced by the insurer in the name of the assured.*

16. In the present case, having paid out the claim of the plaintiff by compensating it for the value of its damaged vehicle the plaintiff's insurer is entitled to initiate and conduct the claim against the defendants in the plaintiff's name. That is what was happening in this case. It is not, with respect to the Learned Magistrate, a case of the plaintiff seeking 'unjust enrichment' or being compensated twice, nor does the doctrine of subrogation require the insurer to make the claim in its own name, as the judgement of the Learned Magistrate contemplates in paragraph 29. What is happening here is that the plaintiff's insurer, having paid out the plaintiff for its loss – as it was presumably obliged to do under is insurance contract with the plaintiff – is enforcing the plaintiff's right to be compensated for loss caused by the negligent actions of the second defendant. The plaintiff's loss includes the full pre-accident value the plaintiff's motor vehicle, less the value of the wreck which the plaintiff-or its insurer retained. The fact that the plaintiff had insured its vehicle only for $30,000, and had agreed with the insurer to an excess of $1,000 (and therefore only received $29,000 from its insurer) does not alter the fact that – on the evidence presented at the trial – the vehicle was worth $33,000 at the time of the accident. The insurer, having indemnified the plaintiff, is entitled to exercise all the plaintiff's rights of recovery. To the extent that doing so results in the insurer receiving more from the defendant than the insurer had paid to the plaintiff, the insurer is (in the absence of special arrangements between them) obliged to account to the plaintiff for the excess.

17. As stated, the evidence in the Magistrates Court showed that the pre-accident value of the plaintiff's vehicle was $33,000, and the value of the wreck was $15,000. Hence the loss to the plaintiff as a result of the second defendant's negligence was $18,000. That is the amount for which the plaintiff seeks judgment, and for which I am satisfied that it is entitled to judgment.

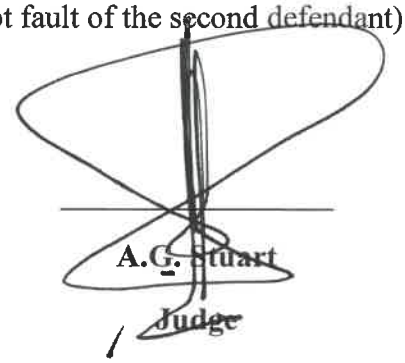
18. For the reasons given I am satisfied that the appeal must be allowed, and the judgment of the Magistrates Court must be set aside. Accordingly I make the following orders:

    i. The order made in the Magistrates Court on the 10th July 2019 dismissing the plaintiff's claim is set aside.

    ii. Judgment is entered for the Appellant/Plaintiff against the second defendant in the sum of $18,000.00 plus costs of $800.00 for proceedings in the Magistrates Court.

    iii. The plaintiff seeks and is entitled under O.32, r.8 Magistrates Court Rules 1945 to post judgment interest on the judgment amount at 5% per annum.

    iv. There is no order for costs in the High Court (the fact that the Magistrates Court erred is not fault of the second defendant).



At Lautoka this 10th day of December 2019

SOLICITORS:

Gordon & Co, Lautoka – Plaintiff/Appellant