DOMINION INSURANCE LTD v ALI SHER

COURT OF APPEAL — CIVIL JURISDICTION

REDDY P, BARKER and DAVIES JJA

21 February, 1 March 2002

[2002] FJCA 95

Insurance — act of God — appeal — indifferent insurer denying liability — Rickman report — damages reduced — interest up to judgment date.

Respondent sought indemnity from appellant under an insurance contract for damaged stock valued caused by flood and itemised by a "Rickman report". Appellant denied liability alleging that the policy did not cover stock stored below 160 cm above the ground level, although it agreed that respondent had suffered "considerable loss". The High Court ruled in respondent's favour and allowed interest.

Held — (1) The $10,000 sum was not payable as excess under the insurance contract since it has not been accounted for in the award. Thus, the damages awarded were reduced by $10,000 from $227,378.73 to $217,378.73.

(2) The parties had agreed that interest should run from 1st of May 1993 and the judge determined that date to be 7th of August 1996, but gave no reasons for doing so. The Respondent was entitled to interest up to the date of judgment, which is 31st of January 2001. There is no reason to deny him interest for the period 7th of August 1996 – 31st of January 2001. The respondent was kept out of the funds, to which he was entitled, from 1st of May 1993, when the appellant denied liability, to the date of judgment.

Appeal dismissed.

Cases referred to

Jefford v Gee [1970] 2 QB 130, cited.

Jovilisi Kamea and Attorney-General v Mateo Raisalawake FCA ABU 0049/1999S; *Newton v Grand Junction Railway Co* (1846) 16 M & W 139; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588, considered.

A. K. Narayan and M. B. Patel for the Appellant

M. S. Sahu Khan for the Respondent

Judgment

Ali Sher (Respondent) is a dealer in new motor vehicle parts in Nadi town. Nadi town is a flood-prone area.

On the 27th of February 1992 there was extensive flooding in Nadi. As a result, water got into the Respondent's two shops, causing damage to his stock (the stock). At the time the stock was insured against flood damage, of the kind that had occurred, with Dominion Insurance Ltd (Appellant).

Background history

Shortly after the flood, the Respondent lodged a claim with the Appellant, for indemnity under the contract of insurance. He gave the Appellant a list of the stock that was damaged, altogether valued at $340,773.

By letter dated 17th March 1993, the Appellant declined liability under the contract of insurance, on the basis that the policy did not cover stock stored below 160 cm above the ground level, although it agreed that the Respondent had

suffered "considerable loss". It was after that letter of 17th March, that the Respondent engaged Messrs Koya & Co Solicitors of Lautoka to represent his interests. On the 7th April 1993, the Respondent wrote to Koya & Co In that letter it again denied liability, and furthermore, disputed the Respondent's quantification of the loss, until such time as its representative was allowed to crosscheck the damaged stock, against the list prepared by the Respondent. The letter went on to say that until the quantum of loss had been established, the Respondent could not be a party to any agreement concerning the disposal of the damaged stock. The penultimate paragraph of that letter reads as follows:

> *We must again refer to Condition 6 of the Policy and state that we require our representative Mr Rickman of Sturt & Associates to identify and cost each damaged item before they are removed from the premises. If this is not agreed to then we shall consider this policy condition to have been breached.*

Shortly after that letter was written, Mr Ronald Thomas Rickman (Rickman) went to the Respondent's premises in Nadi town, and, carried out an inspection of the damaged stock. The damaged stock was itemised, was costed by the Respondent, and the costings were checked by the Appellant's employees. The result of this joint undertaking by the Respondent, and the Appellant's representatives, was the schedule referred to as the "Rickman Report".

The Appellant sent the Rickman report to the Respondent's solicitors with its letter of 21st May 1993. According to this report, the total value of all the damaged goods was $207,387. If these goods were totally lost to the Respondent, and he claimed that they were, then that would be the measure of his damages (less proceeds of any salvage sale). On the other hand Mr Rickman, the Appellant's loss assessor valued the extent of the loss at $107,755.25. He arrived at this figure by ascribing a percentage loss against each item on the list, and according to the Appellant, this was the extent of the damages suffered by the Respondent.

The letter of 21st May 1993 refers to the Rickman report as a "schedule of damaged parts, showing the date of purchase, total cost and assessed percentage of loss" and concludes with the following paragraph:

> *We would emphasis that whilst we are prepared to agree on the figure of $107,755.25 as the Insured's loss we continue to maintain that the loss is not covered under the terms and conditions of the policy issued by us.*

On 7th July 1993, the Respondent's present solicitors Messrs Sahu Khan & Sahu Khan wrote to the Appellant disputing Mr Rickman's quantification of the loss suffered by the Respondent, and invited the Respondent to sell the salvaged parts, if it wished to do so. Furthermore, the letter said that the damaged parts were deteriorating, and, that the Respondent was not able to dispose of them without the Appellant's authority. The letter invited a response from the Appellant.

On the 14th of July 1993, the Appellant replied to the Respondent's solicitor's letter of 7th July 1993, and the second paragraph of that reads as follows:

> *It is not for us to suggest how your client should deal with the sale, salvage or repair of his damaged goods. We have declined his claims under the policy and therefore your client must do as he sees fit.*

The letter concluded, by saying that there was no change in its stand in the matter.

In September 1993, the Respondent issued the writ of summons herein out of the High Court at Lautoka, claiming the sum of $347,000 as special damages, and interest thereon at 13.5%, from 1st day of March 1993.

After the close of pleadings, and on the 7th of August 1996, the matter came up for hearing before Sadal J. At this stage, and after the Respondent had given some evidence, counsel representing the parties decided to split the trial by separating the issue of liability from the issue of damages. The learned judge was asked to first rule on the issue of liability, and evidence from both sides was directed to that issue. Judgment was given on the 15th of June 1997, and the learned judge found that the Appellant was liable to the Respondent under the contract of insurance, and that the exclusions relied upon by the Appellant in that contract did not apply. The Appellant then appealed to this court. The appeal was heard on 11th May 1999, and judgment delivered on 14th of May 1999. The decision given by Sadal J was affirmed, albeit for different reasons. The case was relisted for continuation before the same judge on the 15th of January 2001. At the resumed hearing, the parties agreed to amend the Rickman report and the amended report was produced and exhibited. The total value of the damaged stock was now increased from $207,387 to $237,378.73. The value of the loss as quantified by Mr. Rickman was increased from $107,755.25 to $116,752. By now the issue of damages had crystalized. If there was total loss of stock as claimed by the Respondent then he was entitled to $237,378.73 by way of damages. But if there was only partial loss, as assessed by Mr. Rickman, then the Respondent was entitled to $116,752.00. This is the way in which the matter was put to the court, and it is the way in which the learned judge approached it.

The parties also agreed that the damages as assessed by the learned judge would carry interest at 11% per annum from the 1st of May 1993 to a date to be fixed by the court.

The Respondent gave evidence, and called Mr Etuate Cikaitoga Koroi, an engineer and senior lecturer at the Fiji Institute of Technology as his witness. The Appellant called three witnesses, Mr Rickman, the loss assessor, Mr Adrian Michael West, National Service manager for Asco Motors, and Mr Ronesh Chandra Chauhan, a chartered accountant.

Analysis of Rickman report

The learned judge analysed the Rickman report critically and in some detail. He pointed out that the damaged stock enumerated in the report exceeded that found in the Respondent's original claim. This did not suggest that the Respondent was exaggerating his claim. The judge pointed out that Mr Rickman himself had ascribed 100% loss in respect of a large number of items, which meant that they were totally lost, and therefore had no salvage value. He pointed out, that although Rickman admitted in evidence that some parts such as coils, regulators, clutch plates, pressure plates, pistons, would be useless when damaged by water, yet he ascribed partial loss in respect of those items. While admitting that a water-damaged universal joint cannot be used at all, Mr Rickman assessed its loss at 80%; furthermore, he could not explain how one can have 80% loss to two water damaged universal joints. According to the learned judge, Mr Rickman had similar difficulty explaining losses in percentage terms to mountings, silencers, steering arm, disc pads, centre bearings, scissor jerks, automatic clutches and other items. The learned judge said that Mr Rickman gave inconsistent answers to some questions put to him in cross-examination, and in some respects his evidence supported Mr Koroi who was called for the Respondent. Mr Rickman did not give evidence as to how the percentage values which he considered to remain in the goods could be recovered. Mr Sher's business was that of selling

in new parts, not damages parts. Mr Rickman did not give evidence as to how the damaged parts could be restored or who would be prepared to buy them.

Judge's findings

Having subjected the Rickman report and Mr Rickman's evidence to such scrutiny, the learned judge came to the conclusion, that he could not accept his evidence, wherever it was in conflict with the evidence given by the Respondent. The learned judge found as a fact that goods itemised in Rickman's report were water-damaged, and that the Respondent had suffered losses valued at $237,378. He then gave credit for the sum of $10,000, being the value of the damaged stock sold as salvage by the Respondent, to Railtown Motors. He entered judgment in the Respondent's favour in the sum of $227,378.73. He allowed interest from 1st of May 1993 to the 7th August 1996, which is the date of the resumed hearing. He gave the Respondent costs to be taxed in default of agreement.

The appeal

The notice of appeal sets out some 18 grounds of appeal. These were argued by Mr A K Narayan Counsel for the Appellant under two broad and general submissions.

First, Mr A K Narayan submitted that the learned judge was wrong in accepting and acting upon the evidence of the Respondent, and he was wrong in rejecting the evidence of Mr Rickman. Second, he submitted that the learned judge was wrong in not finding that the Respondent had not discharged his contractual obligation to minimise his losses.

The learned judge had the advantage, that we do not have, of seeing and hearing the evidence. He had the advantage of observing the demeanour of the witnesses. Unless it could be shown that he failed to use, or misused that advantage, we cannot and should not reverse his conclusions. In order to reverse those findings we need to be convinced that the judge was wrong. We are satisfied, that on the evidence before him, the learned judge was justified in arriving at the findings that he did, and there is no basis for disturbing those findings. In coming to this view, we note the comments of the High Court of Australia in *State Railway Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 180 ALR 588. According to that authority, an appellate court can find the trial judge's assessment of credibility too fragile a base for finding a witness unreliable if the documentary evidence provided significant support for the witness's testimony. That case is a timely reminder to appellate courts that the right of appeal conferred by statute on an appellant is a right to appeal both factual and legal findings of a trial judge. However, the decision in that case has no application to the present straightforward case where the judge's assessment of the witnesses was crucial and where the judge's view of the documents — especially the Rickman report — was tenable.

In attacking the learned judge's findings, Mr Narayan placed considerable reliance on the Respondent's financial statements for 1993. The financial statements did not show any diminution in the Respondent's stocks. They showed that sales and profits were up. From this, Mr Narayan argues, that the learned judge should have concluded that the Respondent had salvaged, and, sold most if not all the stock that he says was destroyed by the floods. We cannot agree. We do not think that the financial statements lead one to that conclusion. For a start, such a conclusion would not sit happily with other evidence before the court. In May 1993, the Appellant quantified the Respondent's loss at $107,755.25 although it continued to maintain that such loss was not covered under the terms

of the policy. That was the value of the loss assessed by Mr Rickman. In its letter of 14th July 1993, to Messrs Sahu Khan and Sahu Khan, the Appellant insisted that this was the extent of the Respondent's loss, arrived at by an independent assessor, and, that would be used in any future legal proceedings that the Respondent may take.

Mr Ronesh Chandra Chauhan's conclusions drawn from the financial statement were based on assumptions he made. He did not carry out an audit of the Respondent's stocks, he could not say if stocks were inflated or deflated. The learned judge, in our view was correct not to treat the financial statement as persuasive evidence that the Respondent did not suffer any loss.

It was also urged upon us that the Respondent failed to minimise his loss. The Respondent gave evidence, that soon after the floods; he spoke to the Respondent's claims manager, Mr Uday Singh, and sought his advice on how to deal with the damaged stock: that evidence was not challenged. The Respondent was told to do as he liked. The correspondences, to which we have made reference earlier, clearly show that the Appellant was totally indifferent to the salvage. It was denying liability, and was not going to be drawn into any discussion on the disposal of the salvage. The Appellant could have cooperated with the Respondent, in the disposal of the salvage, with a view to achieving the best possible price, thus minimising the loss. That would have made good commercial sense. Left to deal with the salvage, as well as he could, the Respondent sold what remained of the damaged stock to Railtown Motors. We do not think that any criticism can be levelled against the Respondent in this regard. In the circumstances, the Respondent acted reasonably. The learned Judge's findings are justified on the evidence. However, we consider that the Respondent should have discovered some documentation relating to the Railtown transaction, such as bank deposit records.

Insurance excess allowed

The Respondent concedes that a sum of $10,000 is payable as excess under the contract of insurance. This has not been accounted for in the award. So, the damages awarded by the learned judge is further reduced by $10,000 from $227,378.73 to $217,378.73.

Interest

As stated earlier the parties had agreed that interest should run from 1st of May 1993. Interest was to run to a date to be determined by the learned judge. He determined that date to be 7th August 1996, but gave no reasons for doing so. The Respondent is entitled to interest up to the date of judgment, ie 31 January 2001. There is no reason to deny him interest for the period 7th of August 1996–31st of January 2001. The Respondent was kept out of the funds, to which he was entitled, from the 1st of May 1993, when the Appellant denied liability, to the date of judgment.

As was said by this court in *Jovilisi Kamea and Attorney-General v Mateo Raisalawake* [2002] FJCA 46:

> *Interest is awarded to a Plaintiff for being kept out of money which ought to have been paid to him. See Jefford v Gee [1970] 2 QB 130, 146. The expression "being kept out of money that ought to have been paid" is not used to pejoratively. It simply expresses the concept that the plaintiff was entitled to the amount of the judgment as from a certain date but in fact, as events occurred, the money was not available to the plaintiff,*

but remained with the opposite party, "fructifying in the wrong pocket" as was said in the course of argument in Newton v Grand Junction Railway Co (1846) 16 M & W 139, 141.

For the above reasons the appeal is dismissed but the judgment of the High Court is varied as follows:

(1) Damages are reduced by $10,000 to $217,378.73.

(2) Interest is awarded on $217,378.73 from 1st of May 1993 to 31st of January 2001 at 11% per annum amounting to $207,234.38.

(3) Costs of this appeal to the Respondent are fixed at $1500.

Appeal dismissed.