

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 42 of 2009L

BETWEEN : **MUKESH CHANDRA** (father's name Venkat Dass) of
Korovuto, Nadi, Garment Worker
Plaintiff

AND : **SUN INSURANCE COMPANY LIMITED**
Defendant

FINAL JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr Babu Singh for the Plaintiff
Mr Suresh Maharaj for the Defendant

Solicitors: Babu Singh & Associates for the Plaintiff
Suresh Maharaj & Associates for the Defendant

Date of Hearing: 9 September 2009
Date of Judgment: 10 September 2009

INTRODUCTION

[1] This is an application by Originating Summons filed on 18 March 2009 for declarations against the Third Party Insurer, Sun Insurance Company Limited, that it is liable to pay the judgment sum and costs awarded to the Plaintiff for personal injuries suffered in a motor vehicle accident. The application is made pursuant to Order 7 of the **High Court Rules 1988** and s 17 of the **Motor Vehicle (Third Party Insurance) Act** [Cap 177].

[2] Sun Insurance also filed an application and supporting affidavit on 28 April 2009 for declarations that it is not liable to pay any judgment sum.

[3] The Plaintiff seeks the following relief:

1. A Declaratory Order that the Defendant is liable to pay the judgment sum of \$233,295 plus interest and costs in the sum of \$3,000 to the Plaintiff in respect of the Lautoka High Court Civil Action No 50 of 2007.
2. An order that the Defendant pays the said judgment sum plus interest and cost to the Plaintiff forthwith.
3. That the Defendant pays the cost of this action.

THE BACKGROUND

[4] The facts in this matter are not disputed and are extracted from the affidavit of the Claims officer of Sun Insurance filed on 28 April 2009. There are several High Court Actions in respect of the same accident: HBC 110/2006, 203/2006 and 50/2007. HBC 50/2007 was filed on 19 February 2007 and Sun Insurance was served two days later with the writ.

[5] The Plaintiff was a fare paying passenger in a van registration number BU802 that was insured with Sun Insurance. He was injured when the van collided with a second vehicle, AC133, also insured with Sun Insurance. The Plaintiff obtained judgment against the drivers and the owners of the two vehicles and is pursuing enforcement of his judgment against those persons in other proceedings. Action HBC 50/2007 is the action in which the Plaintiff obtained judgment against the drivers and owners of the two vehicles. The First and Second Defendants in that action were the driver and registered owner, respectively, of van BU802. The Third and Fourth Defendants were the driver and registered owners of vehicle AC133, respectively. The Plaintiff's present application is to obtain the above declarations from the Court and hopefully secure payment from the insurer.

THE ARGUMENTS

[6] Sun Insurance says that van BU802, was insured for private use only so it's use in this case was in breach of the Third Party Policy so it is not liable. In respect of the second vehicle, AC133, it says the driver was not licensed to drive so it is not liable there as well. Mr Maharaj, Counsel for Sun Insurance, further submitted that the owner of the vehicle AC133 had already sold the vehicle to someone else at the time of the accident, even though he remained the registered owner, so that defendant did not have an insurable interest so his client is not liable on that ground also.

[7] Mr Singh for the Plaintiff argued that Sun Insurance has come too late. His client has formally proved his case and the insurer should not be allowed to deny liability. He relied on **s 11** of the **Motor Vehicles (Third Party Insurance) Act** [Cap 177] (the "Act") and the case of **Chand v Sun Insurance Co Ltd** [2008] FJCA 113; ABU0042.2006S (11 July 2008). I am grateful for the copy of **Chand** supplied by Mr Singh because the version of this case in the *paclii* website is only a "draft". I point this out so that the webmaster can remove it and replace it with the final version that was delivered in the Court of Appeal.

CONSIDERATION OF THE ARGUMENTS

[8] Mr Maharaj for Sun Insurance relied on four cases **Sun Insurance Co Ltd v Kurisoru & Others** [2002] FHC; HBC 238 of 2002 (23 September 2004); **Kumar v Sun Insurance Co Ltd** [2005] FJCA 63; ABU0072 of 2004S (11 November 2005); which is the appeal from **Sun Insurance Co Ltd v Kumar & Ors** [2005] FHC; HBC 152 of 2006 (11 July 2006); and **Sami v Dominion Insurance Ltd** [2004] FJHC 410; HBC0173.2003L (26 April 2004).

[9] Both Counsel advised the Court that the insurance policy in this case is exactly the same as the ones considered in the above Sun Insurance cases. Both policies were current at the time of the accident.

[10] **Kumar** (supra) has been held by the Court of Appeal in **Chand** (supra) to be correct and authority for the proposition that the insurer can restrict cover to the owner and any person driving with the owner's permission provided that the person driving held a licence. Thus is in so far as the defendants in respect of the second vehicle, AC133, are concerned, Sun Insurance is not liable to indemnify them. Byrne J in **Kurisor** (supra) also came to the same conclusion.

[11] Thus, the success of the Plaintiff's application will depend on the circumstances of the van BU802.

[12] The facts in **Chand** (supra) are similar to this case. There, the owner hired his vehicle out to a Mr Bala for a week for a fee. Mr Bala used the vehicle to convey Mr Singh for a fee. On the way the vehicle crossed onto the wrong side of the road and collided head-on with a vehicle carrying the plaintiff and injured him. The plaintiff sued the vehicle owner and Mr Bala. Neither of them defended the action so the plaintiff obtained default judgment in liability and proved damages for \$137,674.20. The plaintiff then sued the Third Party insurer, Sun Insurance, seeking payment from it for his judgment against the insured owner and Mr Bala.

[13] The issue in **Chand** was whether the Policy properly construed excluded cover to the vehicle on this occasion (because of that use) and, if so, was the insurer prevented from relying on such exclusion by the **Act**.¹

[14] The Court of Appeal in **Chand** said this:

"29. It seems to this Court that an exclusion based on the purpose for which a vehicle is being used offends section 6(1) of the Act which provides that the policy **must** be a policy which insures the person, persons or classes of person "in respect of any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of that vehicle", and

¹ Para 19 of the Judgment.

which section specifies the liability that can be excluded, which does not include an exclusion based on the purpose for which the motor vehicle was being used...

31. The scheme of the Act is this. Section 6 mandates that a third party insurance policy must cover any liability arising out of the **use of the insured vehicle**, apart from specified matters. Section 10 permits an insurer, as between the insurer and the insured in relation to eight specified matters, to restrict the insurer's liability to the insured, but provides that those restrictions will be of no effect as between the insurer and the injured third party...

32. The words in section 11(1) "being a liability covered by the terms of the policy" have to be read as being a liability covered by the policy in accordance with the Act...

35. It follows from the foregoing that the use that was being made of the van at the time of the accident is irrelevant to Mr Chand's claim against the Insurer and, section 11 of the Act having been complied with, the insurer is obliged to pay Mr Chand the moneys."

[15] I am bound by this decision as a matter of precedent. The facts are identical in so far as the First and Second Defendants in action HBC 50/2007L are concerned.

[16] For these reasons, I find that Sun Insurance Company Limited is bound to indemnify the First and Second Defendants in civil action HBC 50/2007L for the Plaintiff's judgment for personal injuries suffered by him as a result of a motor vehicle accident involving the vehicle BU802 insured with the Defendant.

ORDERS

[17] I therefore grant the Orders sought in the Plaintiff's Originating Summons filed on 18 March 2009 paragraphs 1 and 3 with interest and costs as calculated below, with paragraph 2 amended to say that payment is to be made within 28 days.

[18] Interest is to be calculated at 6% pa for one year on the full Judgment sum of \$233,295.

[19] I also award costs to the Plaintiff of \$3,500 for this application and in action HBC 50 of 2007L.

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Sosefo Inoke
Judge