

Civil Action No. 300 of 2009 : Aarkay Motors Limited v Dominion Insurance Limited

In the High Court of Fiji

At Suva

Civil Action No. 300 of 2009

Between: Aarkay Motors Limited

Plaintiff

And: Dominion Insurance Limited

Defendant

Appearances: Mr Shelvin Singh for the plaintiff

Mr A.K. Narayan for the defendant

Dates of hearing : 7th and 23rd May, 2013

JUDGMENT

1. The plaintiff, a company engaged in the fabrication and repair of motor vehicles had taken out a public liability insurance policy with the defendant. A fire occurred at the plaintiff's premises destroying properties of the plaintiff and third parties. The plaintiff notified the defendant of the loss and damage to its customer's vehicles. The defendant declined to meet the claim relying on an exclusion clause in the policy. The plaintiff seeks a declaration that the defendant is liable to indemnify the plaintiff against liability under the policy for the loss and damage to property belonging to third parties to the limit of \$ 250,000.

2. *The statement of claim*

2.1 The statement of claim recites that the defendant insured the plaintiff against liability arising from accidents "*in connection with the business..in respect of accidental death or bodily injury of any person and accidental loss of or damage to property*" for \$250,000.00.

2.2 On 7th February, 2009, a fire occurred at the plaintiff's premises during the period of the policy, destroying all its property, including property belonging to third parties.

2.3 The defendant denied liability stating that loss and damage was excluded under clause 3(a) of the policy which provided that the "*indemnity in the policy shall not apply to or include..liability in respect of loss or damage to property belonging to or held*

under a hire purchase agreement...or in the charge or under the control of the insured or any servant or agent of the insured whilst in the ordinary course of his duties..”.

2.4 The defendant's employee Vikash had assured the plaintiff that the policy covered loss or damage to vehicles brought to the plaintiff by its customers, for repair. The defendant is estopped from relying on the exclusion, by reason of the assurances made.

2.5 Alternatively, the plaintiff pleads that:(i) the exclusion does not apply, as the loss or damage occurred outside normal working hours and the ordinary course of its duties, and (ii) the exclusion clause is void for ambiguity and should be interpreted against the defendant.

3. *The statement of defence*

The defendant, in its statement of defence, states that the plaintiff was in default of payment of the premium due on the policy. The defendant admits that its employee, Vikash explained the terms of the cover to the plaintiff's representative and informed him that the policy excluded cover for loss to third party property. The defendant declined to pay as the loss is excluded under clause 3(a) of the policy.

4. *The reply to defence*

The plaintiff denies that it was in default of payment of its premium. The plaintiff “notes” the admissions in the statement of defence, and maintains its claim.

5. *The hearing*

5.1 PW1(*Rajendra Chauhan, Managing Director of the plaintiff company*) testified that the repairs of his customer's vehicles were completed and ready for delivery, when they were destroyed in a fire on 7th February, 2009. At the time of the fire, the plaintiff had a motor vehicle, fire and hurricane, worker's compensation and public liability insurance cover with the defendant.

He shifted from his earlier insurers, New India Assurance to the defendant company, as the defendant gave the plaintiff more business and he had a very good relationship with Vikash Kumar, an underwriter of the defendant company.

Vikash visited his office with his colleague Benjamin. He discussed matters pertaining to the providing of business insurance policies for his building, motor vehicle and third party property. PW1 said that he asked Vikash, whether vehicles

belonging to third parties were covered by the public liability policy, if an accident occurs. He informed Vikash of two incidents that occurred in his workshop during the period of his prior insurance. In the first instance, a vehicle got damaged when it fell from the ramp, and in the other, a vehicle was caught up in flames. Vikash told him not to worry, "*everything is covered by general public liability*".

PW1 called his wife to his office, when the discussion commenced. At the end of the discussion, he gave Vikash, a copy of his New India Assurance policy, as requested. Vikash said that he will look into it and meet his requirements.

Vikash had a copy of the defendant's policy. Mr Singh, counsel for the plaintiff queried whether the terms of the policy were explained to him. His answer was in the negative. PW1 said that he did not read the policy.

Application to amend the statement of claim

At this stage, Mr Narayan, counsel for the defendant objected to this line of questioning on the ground that the question posed is outside the scope of the pleadings and the agreed issues recorded at the PTC. It is now being alleged that the policy was not read and explained to PW1, when *non est factum* is not pleaded.

Mr Singh's riposte was that paragraph 6 (a) of the statement of defence admits that the defendant's employee, Vikash explained the terms of the cover to the plaintiff's representative. The plaintiff's reply to defence maintains that the defendant gave assurances to the plaintiff. Mr Singh submitted that the issue was raised in the statement of defence.

Mr Narayan, in reply, submitted that paragraph 6 (a) of the defence, has been admitted in the reply to defence. The plaintiff had not joined issue with the defendant on that averment.

Mr Singh then sought leave to amend his statement of claim. He moved that the trial be adjourned in the interest of justice, in terms of Or 35, r 3.

Mr Narayan opposed the application. He submitted that the proposed amendment should have been foreseen beforehand, not at the hearing.

I upheld Mr Narayan's objection. I declined the application for an adjournment and leave to amend the statement of claim. My reading of the statement of claim pointed to an action founded on misrepresentation. The plaintiff was seeking to introduce a new cause of action, viz, that the policy was not read and explained to the plaintiff.

PW1, continuing his evidence in chief said that Vikash had explained that everything was "*under control*". He accepted Vikash's assurances, as he was a good friend of his.

PW1 said the he received claims from five customers. The claims were produced.

By letter of 3rd April,2009, PW1 informed the defendant of the loss. The defendant declined the claim, citing the exclusion clause in the policy. PW1 said that he cannot understand that clause. Vikash did not tell him about that clause. He would not have purchased the policy, if he was aware of the exclusion. Mr Singh marked for identification, a printout from the defendant's website. The witness was requested to read it.

In cross-examination, PW1 said that there were 20 vehicles of his customers in the workshop. Some were under repair, while the other vehicles were ready and awaiting payment. The documents were burnt, so he could not establish the number of vehicles waiting for insurance approval. When asked if he attempted to get copies of documents from his customers, he said that they did not come back nor make a claim. PW1 agreed that the plaintiff is seeking an order that it be reimbursed by the defendant, in respect of claims made by some of his customers. It transpired that the plaintiff had not paid damages to any of its customers.

He said that five customers,viz Nasa Tavaga,(DV701),Jione Cama,(EP 819),V.K.Rattan,(KSSL) J.Kirton,(DA 829) and Avinesh Mani,(AL974) had forwarded written claims to the plaintiff. The claims were produced. PW1 said that he was unaware whether their vehicles were insured and its owners had received payments from their insurance. Many of the other vehicles were insured and the owners recovered from their insurance, as he(PW1) did from the defendant company, in respect of his vehicle DH 198.

In the course of his cross-examination, PW1 explained that it was the practice of customers to leave their cars with the keys, in the carpark. He or his workmen would move it to the workshop.

Mr Narayan asked PW1, if he told Vikash that he would be happy if the defendant had given him a policy that "*matched*" the New India Assurance policy. PW1 said that he could not say so, as he had not gone through the policy and did not understand it. But he was happy with the price. He changed from New India Assurance, since Vikash gave him business and his friend at New India Assurance had migrated. In both cases, he did not get broker's advice. Vikash said that he could give a "*better explanation, better service and better everything*".

PW1 said that he gave a copy of the New India Assurance policy to Vikash He discussed that policy with him. Benjamin was present. It transpired that the New India

Assurance policy was identical to the policy issued by the defendant. It contained the same exclusion clause.

It transpired that the plaintiff's solicitors had by their letter of 9th June, 2009, informed the previous solicitors for the defendant that their client had a similar policy with New India Assurance, and the cover was discussed with Vikash before the plaintiff took out the policy with the defendant. A similar exclusion clause was contained in page 2 of the New India Assurance policy.

In 2004, when a car on his ramp was damaged and another ignited, New India Assurance honoured their claim. All copies of documents as regards that claim were destroyed. He informed Vikash of the two incidents and was assured that such accidents would be covered. He did not tell the defendant that New India Assurance had paid the claim.

It was put to him that Vikash told him that the defendant's policy was very similar to that of New India Assurance with a similar exclusion clause. There was no discussion with Vikash as regards property of third parties. PW1's replied that Vikash said "*everything was taken care of.. there was not much discussion*". It was also put to him that he never discussed the incident of a car falling from the ramp with Vikash. PW1 vehemently stated that he did. Vikash assured him "100%" that it was covered. PW1 explained that he was an ordinary mechanic, not an educated person. He was guided by an officer from New India Assurance and later, Vikash.

Mr Narayan asked PW1, if he reads documents. He said that he is not so educated. When he takes a loan from a Bank, he only looks at the interest component and numericals. He has no problem in reading English, but did not bother to read it nor download the defendant's website. He obtained the "*Policy Description*" from the defendant on 25th February, 2009, after the fire had occurred.

In re-examination, PW1 confirmed that he did not go through the New India Assurance policy with Vikash. All vehicles are repaired in the workshop. The responsibility for any damage or burglary lies with the customer, not the plaintiff. The fire destroyed all his documents, including his soft copies in his computer. He concluded that he expected the defendant to provide coverage for third party vehicles, as New India Assurance did.

- 5.2 PW2, (a Director and Administrative Officer of the plaintiff company) in her evidence, said that she was in attendance, when Vikash came to their office. Her husband, (PW1) wanted her to give Vikash a copy of the policy. PW1 informed Vikash that

third party vehicles are covered under the existing New India Assurance policy. Vikash said everything was covered. PW1 related two accidents that had occurred at their garage.

In cross-examination, PW2 said that PW1 had given her the New India Assurance policy to file. She read the first page of the policy. She did not know the differences between the defendant's policy and that of New India Assurance. She said PW1 had mentioned specific instances to Vikash, when minor accidents had occurred in their workshop. Vikash assured him that everything was covered under their policy. It was put to her that Vikash had not said that the defendant would provide general cover. She said he did. She gave Vikash the premium page of the New India Assurance policy.

5.3 DW, (Vikash Kumar, Claims Manager of the defendant company) said that the defendant had a business relationship with the plaintiff. The defendant continues to give business to the plaintiff. Until 2009, the defendant provided insurance cover to the plaintiff for fire, workmen's compensation and public liability. PW1 requested a copy of the insurance policy from him, as he had lost all his documents in the fire. He recounted that in July, 2008, he went with his underwriting officer, Benjamin to the plaintiff's office and discussed the various types of business insurance policies, his company could provide. PW1 told him that he had a policy with New India Assurance and would like to change for a similar cover. DW denied that PW1 gave him a copy of his New India Assurance policy. He did not want to see the policy. It was not relevant. PW1 showed him a copy of his policy schedule setting out the sum insured.

PW1 wanted a policy to cover general liability. DW said that he did not tell PW1 that it would cover every third party loss or damage. In answer to Mr Narayan's question whether he told him that there were restrictions and limitations, he said that he advised him that the policy provides for general liability, subject to limitations and exclusions. He took a specimen form and explained the coverage to PW1.

PW1 did not inform him that a vehicle caught fire and that the damage was covered by his prior policy.

DW said that the defendant provided a standard policy. Exclusion 3 (a) is contained in all public liability policies. It covers general liability which is not in the charge or control of the insured.

Mr Singh put it to DW that he knew the nature of the plaintiff's business. PW1 relied on his advice. It was also put to him that it is relevant to advise an insurer what is

covered as well as what is excluded. DW said that he did not consider it relevant to advise PW1 that all third party vehicles were not covered. He said that he did not tell PW1 that the policy covered loss and damage to client's vehicles. He maintained that he did not inform PW1 nor PW2 that the policy would cover all damage. It was not an "open blanket". It was subject to exclusions.

In cross-examination, DW said that he had been dealing with the plaintiff for 15 years, giving them business worth thousands of dollars each month. His colleague Benjamin had migrated. It emerged that DW did not have a copy of the plaintiff's proposal. He said that it was in his office. He did not think it was important and would be discussed. Mr Singh put it to the witness that the proposal form would contain the client's requirements. DW disagreed.

Next, DW was questioned on the defendants' website. It was created in 2007. The website contains copies of the defendant's proposal form and standard policy with the limitations and exclusions relied on. The home page of the website covers loss and damage to property of third parties. The general outlook protects liability and property damage to third parties. DW said that the website contained "just information", not the policy contract. It was put to him that the representation in the website was false. He admitted that the advertisement in the website provides that third party property was covered under "general liability". He said what was excluded was third party property not in the care and control of the insured.

Finally, it was put to DW that the plaintiff contends that the representation he made to PW1 was the same representation contained in the website.

6. The determination

6.1 The plaintiff claims indemnity in terms of a public liability insurance policy effected with the defendant. The policy provided an indemnity "*in respect of all sums which the Insured shall become legally liable to pay consequent upon Property damage..and in connection with the business.*"

6.2 On the night of 7th February, 2009, a fire occurred at the plaintiff's garage. The agreed facts provide that some of the property of the plaintiff's and third parties were damaged and/or destroyed.

6.3 In due course, the plaintiff made a claim under the policy, in force, at the time of the fire. The defendant insurers declined the claim relying upon exclusion clause 3 of the policy, which takes away the coverage in specified circumstances.

6.4 The agreed issues for determination, as recorded at the pre-trial conference read:

1. *Whether damage to third party property is excluded from cover by virtue of 3(a) of the said policy?*
2. *Whether the Defendant through its employee Vikash assured the Plaintiff that the said policy provided cover to loss or damage to vehicles belonging to third parties whilst the vehicles were with the Plaintiff for repair works?*
3. *If the assurance in 3 above was given, did the Plaintiff purchase the policy upon reliance of the assurance of Vikash?*
4. *If the assurance in 3 above was given, is the Defendant stopped from relying on exclusion 3(a) of the Policy?*
5. *Whether the loss or damage occurred outside normal working hours and outside the ordinary course of duties of the Plaintiff, its servants and agents and the relevance of this to the issue of Interpretation of Exclusion 3(a) of the Policy.*
6. *Whether the said exclusion 3(a) is ambiguous and if so should it be interpreted against the Defendant?*
7. *Whether either party is entitled to costs and if so, on what basis?*

6.5 The plaintiff posits that PW1, its Managing Director was induced to purchase a public liability policy from the defendant, in reliance of assurances given by DW(Vikash), an underwriter of the defendant company that the policy covered loss or damage to vehicles belonging to third parties. This is denied by DW.

6.6 I do not find it necessary to go on to consider these issues, in view of the crucial evidence that unfolded in the course of the cross-examination of PW1, the principal witness for the plaintiff. This raises the preliminary question whether there is a live issue before me for determination.

6.7 The schedule to the statement of claim lists twenty vehicles belonging to the plaintiff's customers that were "*destroyed*", in the aftermath of the fire. The evidence revealed that fifteen of them had been paid by their own insurers. The remaining five have made claims, but none have been paid by the plaintiff. PW1 said that he is unaware whether any of them have received monies from their insurers.

6.8 I reproduce an extract of PW1's cross-examination:

Q. This list is not a list of people who made a claim against you.?

A. Not all. Only couple of them have made a claim to Aarkay Motors.

Q. What you are seeking is a declaration that Dominion Insurance Ltd reimburse you or pay you for only the claim that may have been made against you by some people of this list ?.

A. Yes

Q. Of 20, how many people have you paid out of list for damage suffered to their vehicles in your garage ?.

A. No one, I have not paid to anybody.

Q. How many still ask you to pay out of this list ?

A. 5 customers.

Q. Have not paid them anything yet ?.

A. No.

Q. Many of these customers were insured as well.? They were paid from their insurance companies.

Q. It is correct to say. Your own vehicles..suffered damages?.

A. (My vehicle) was insured. DH 983 and defendant paid insurance.

Q. Do you know whether the list of 5 were insured and paid by their Insurance Company?.

A. I do not know.

Q. Do you know if in fact the 5 received payment from any other party re loss of fire?

A. I do not know if they received monies.

Q. All vehicles (20) were given by insurers or owners gave vehicles ?.

A. Yes, some for repairs, waiting for insurance, approval, parts.

Q. Many of them are regular customers?

A. Yes. (emphasis added)

6.9 Significantly, none of the five customers were called to support their claims and establish that their vehicles were destroyed. PW1 said that he is unaware whether any of them have received monies from their insurers. Moreover, none of them have pursued legal proceedings against the plaintiff.

6.10 In order to be indemnified, an insured must be legally liable to pay damages. Item 1 of the policy provides that the defendant will indemnify the insured in respect of sums the insured “*shall become legally liable to pay consequent upon Property damage...*”

6.11 It is axiomatic that in a contract of indemnity, a policyholder must establish his actual loss. As Chandra J declared in *Jaswant Lal v The New India Assurance Co*

Ltd, (Civil Appeal no. CBV0003 of 2013) “..in a claim under an insurance policy the claimant is indemnified for the loss incurred by him..to the satisfaction of the Court”.

6.12 On this basic principle of insurance law, I would also refer to *Halsbury, Laws of England*, Vol 25(4th Ed), para 3 which states:

The principle of indemnity. Most contracts of insurance belong to the general category of contracts of indemnity in the sense that the insurer's liability is limited to the actual loss which is in fact proved. The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy; the event must in fact result in a pecuniary loss to the assured, who then becomes entitled to be indemnified subject to the limitations of his contract. He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss. The contract being one of indemnity, and of indemnity only, he can recover the actual amount of his loss and no more, whatever may have been his estimate of what his loss would be likely to be... ”.(footnotes omitted, emphasis added)

6.13 In my view, the plaintiff's complaint is of an academic character. At best, it raises a hypothetical issue. As Mr Narayan states, in his closing submissions, the Court is asked to declare that if claims are brought against the plaintiff by third parties, the defendant is liable to indemnify the plaintiff.

6.14 I conclude my judgment with a passage from *Halsbury, Laws of England*, Vol 25(4th Ed), which states:

The power to make binding declarations of right is a discretionary power, but the court will not generally determine academic or hypothetical questions”.(footnotes omitted)

6.9 In my judgment, the plaintiff's action is misconceived and fails.

7. *Orders*

- (a) The plaintiff's action is dismissed.
- (b) The plaintiff shall pay the defendant \$ 5000 as costs summarily assessed.

25th February, 2015



A. L. B. Brito-Mutunayagam

Judge