

**SAKIUSA SOLI v RAIWAQA BUSES LTD, KAMINIELI
TUIMAVANA AND THE NEW INDIA ASSURANCE CO LTD
(HBC0351 of 2009S)**

5 HIGH COURT — CIVIL JURISDICTION

AMARATUNGA M

8 February, 26 March 2012

10 **Contract — interpretation — general rules of construction — contra proferentem
rule — High Court Rules O 18 r 11, O 33 r 3.**

15 Passengers on a bus who were injured when the bus was engulfed by fire commenced
proceedings against the owner of the bus (the company) and the driver of the bus, seeking
damages for negligence. Before it filed its defence, the company issued a third party notice
to its insurer, claiming the insurer was liable under the insurance policy in respect to
passenger risk cover. The insurance policy provided, relevantly, “Passenger Risk Ext -
100,000” (the passenger extension). The passenger extension was expressed to be subject
to terms and conditions, which included the proviso: “The aggregate liability of [the
insurer] ... shall be limited to the amount stated in the said Schedule in respect of all
20 claims whatsoever and howsoever arising out of any one accident or series of accidents
arising out of the one event”. The insurer admitted liability to indemnify the company but
stated that its liability was limited to an aggregate sum of \$100,000 for all claims. The
passengers sought the Court’s interpretation of the insurance policy with respect to the
insurer’s liability. The issue for determination was whether the insurer’s liability for
25 passenger risk cover was limited to \$100,000 in respect of all passenger claims or
\$100,000 for each passenger claim. The passengers sought an order that the insurer’s
liability was limited to \$100,000 for each passenger claim.

Held –

30 (1) The limitation in the insurance policy was restricted to \$100,000 for each claim.
Queensland Insurance (Fiji) Ltd v Shore Buses Ltd [2005] FJCA 80, distinguished.

(2) The wording of the insurance policy was ambiguous as to the insurer’s liability and
any ambiguity was to be resolved against the insurer as the party who prepared the
document.

35 *London Tobacco Co v DFDS Transport Ltd* [1993] 1 Lloyds Law Reports 306;
Simmonds v Cockell [1920] 1 KB 843; *Hutton v Watling* [1948] 1 Ch 398; *London &
Lancashire Fire Insurance Co Ltd v Bolands Ltd* [1924] AC 836, followed.

(3) The restrictions in the proviso did not apply to the passenger extension.

Queensland Insurance (Fiji) Ltd v Shore Buses Ltd [2005] FJCA 80, distinguished.

First Named Third Party in Motor Comprehensive Policy is liable for passenger risk
cover of \$100,000 applied to each claimant.

40 **Cases referred to**

Davies v National Fire & Marine Insurance Co of New Zealand [1891] AC 485;
Gillespie Brothers & Co v Cheney, Eggar & Co [1896] 2 QB 59, followed.

45 *Hutton v Watling* [1948] 1 Ch 398; *Jason v Batten* [1969] Vol 1 Lloyd’s Law Report
281; *London and Lancashire Fire Insurance Co Ltd v Boland Ltd* [1924] AC 836;
London Tobacco (Overseas) Co v DFDS Transport Ltd [1993] Vol 1 Lloyds Law
Reports 306, considered.

Queensland Insurance (Fiji) Ltd v Shore Buses Ltd [2005] FJCA 80; ABU0070.
2004S (25 November 2005), distinguished.

50 *Simmonds v Cockell* [1920] 1 KB 843, considered.

D Singh for the Plaintiff

V Kele for the first and second Defendant

S R Krishna for First Named Third Party

Amaratunga M.

5 **A. INTRODUCTION**

[1] The Plaintiffs instituted the action against the Defendants for negligence due to the injuries as a consequence of the bus that they were travelling being ignited by a fire. Several passengers including the Plaintiffs got injured and some of them succumbed to injuries due to the said fire that engulfed the entire bus. 10 The Plaintiffs, including a minor, were travelling in the bus belonging to the 1st Defendant company and driven by the 2nd Defendant within the scope of his employment. The Plaintiffs are seeking interpretation of the insurance policy whether the 1st Named Third Party's liability for passenger risk cover is 15 restricted to \$100,000 in respect of all the passenger claims *or* the apparent limitation of \$100,000 applied to each claimant. After much deliberation I have come to a conclusion that the limitation is restricted to \$100,000 is for each claim as the insurance policy is not clear on that issue and in the interpretation applied *verba charatarum forties accipiuntur contra proferentem* rule. So, that any 20 ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it, and in this case the 1st Named Third Party (New India Assurance). This principle was applied in *London Tobacco (Overseas) Co v DFDS Transport Ltd* [1993] 2 Lloyd's Rep 306 at 308 held that where the policy indicate any ambiguity has to be interpreted against the insurance company. In 25 my analysis first I found that the motor comprehensive policy No 922623/3104/286256 is ambiguous on the issue of passenger liability in more than one aspect, and then proceeded to interpret it by application of the said rule of interpretation. The s 2 of the 'policy attached' which restricted the claims of 'personal and property' is a general provision that is applicable except for 30 damage or loss to persons inside the omnibus, including the Plaintiffs in this case.

B. FACTS

[2] The Plaintiffs were passengers in an omnibus belonging to the 1st Defendant and driven by the 2nd Defendant which ignited in the middle of the 35 journey.

[3] The 2nd Defendant was employed by the 1st Defendant as a driver, and he was engaged as a driver in terms of his employment, and he was driving the bus within the scope of his employment.

[4] When the bus was ignited by fire on 28th August, 2008 at Naevuevu, 40 Sigatoka on Queen Highway, there were passengers inside the bus including the Plaintiffs and some got injured, including the Plaintiffs, while few succumbed to death due to the severe burn injuries.

[5] The Plaintiffs are claiming damages from the 1st and 2nd Defendant for the alleged negligence on their part. The 1st Defendant, which is the company which 45 owned the bus, before it filed the statement of defence, issued third party notice to New India Assurance Co Ltd (1st named Third Party) and the said third party notice indicated that the said bus that ignited on 28th August, 2008 and the said bus registered under RBL001 was insured by the New India Assurance Co Ltd at the time of the incident and stated '1st Defendant is entitled to any indemnity, 50 legal cost, legal defence and third party property damage and passenger risk cover by virtue of the terms of the Motor Comprehensive Policy No

922623/3104/286256 and Compulsory Third Party Policy No 922623/3144/272916'. The said notice also contained a 2nd Named Third Party, namely Land Transport Authority.

5 [6] New India Assurance Co Ltd filed the acknowledge of service on 12th November, 2009 and on 19th November, and 2nd named third party also filed their acknowledgment of service.

10 [7] The statement of defence of the 1st Named Third Party the insurer was filed on 26th January, 2010 and admitted the paragraphs 2, 3, and 4 of the statement of claim. So the following admissions were made at the outset

- a. The Plaintiffs were passengers of the omnibus that ignited on 28th August, 2008.
- b. 1st Defendant was the owner of the bus registration number RBL001.
- c. At all material time the 2nd Defendant was driving the said bus as a servant, and or agent of 1st Defendant.
- 15 d. 'That there was in existence with respect to the said bus a contract of insurance under and in accordance with the motor vehicle (third party insurance) Act with New India Assurance Co Ltd as the licensed insurer thereof pursuant to and Insurance Policy no 922623/3144/272916 and also Motor Comprehensive Policy under policy no 922623/3104/286256.
- 20 (the 1st Defendant also admitted all the above except 'a' in the statement of defence that was filed on 19th November, 2009)

[8] The first Named third party (New India Assurance) in their statement of defence at paragraph 3 stated as follows.

- 25 'The 1st Named Third Party admits that it had issued the following Policies of insurance to the First Defendant in respect of motor vehicle registration number RBL 01:
- i Compulsory Third Party Insurance Policy No 922623/3144/272916, for the period of 23rd May, 2008 to 23rd May, 2009 covering a total aggregate sum of \$ 40,000 and;
 - 30 ii A Motor Comprehensive Policy No 922623/3104/286256 covering a period of 3rd November, 2007 to 3rd November, 2008 which provided
 - a. Third Party Property damage ext. of an aggregate sum of \$100,000 and
 - b. Passenger Risk Ext of an aggregate sum of \$100,000.00.' (emphasis is added)

35 [9] The 1st Named Third Party while admitting its liability to indemnify the 1st Defendant, also stated that their liability is limited to an aggregate sum of \$100,000 of all claims regarding the passengers. The Plaintiffs do not accept the said interpretation of the insurers and sought an interpretation from the court of the said insurance policy in terms of O 33 r 3 of the High Court Rules of 1988.

40 At this stage I need only state that word 'aggregate' is not used in the description in the comprehensive policy, and it only stated 'passenger ext \$100,000'.

[10] The Third Party Statement of Claim was filed by the 1st Defendant on 28th April, 2010 and in the prayer it stated as follows

- 45 '(a) That the 1st Named Third Party and 2nd Named Third Party to fully indemnify the 1st Defendant or as the Court may order the 1st Defendant to pay the Plaintiffs.
- (b) A declaration that the 1st Defendant is entitled to be fully indemnified by the 1st Named Third Party by virtue of Motor Comprehensive Policy No 922623/3104/286256 and compulsory Third Party Policy No 922623/3144/272916, respectively
- 50 (c) That in the event that the Court finds the 1st Defendant liable to the Plaintiff's claim, the 1st Defendant seeks declaration:

(i) That the Land Transport Authority had provided a fitness certificate confirming that the standard of the bus was in conformity with the proper standards and was mechanically and electronically sound and safe to be driven on public roads and carry passengers and

5 (ii) For damages for breach by Land Transport Authority of its statutory duty in certifying that the bus was in conformity with the proper standards and was mechanically and electronically sound and safe to be driven on public roads and carry passengers.'

10 [11] The 1st Defendant in the said statement of claim against the third party has claimed negligence against the 1st Named Third Party and has claimed indemnity in terms with the two insurance policies with them.

[12] The 1st Named Third Party has filed an amended statement of defence on 4th January, 2010 reiterating the same position as regard to the passenger liability.

15 The Plaintiff has filed the insurance policy of the 1st Named Third Party, and the relevant clauses for the interpretation are as follows.

The Motor Comprehensive Policy No 922623/3104/286256
Passenger Risk Ext- 100,000

20 Subject to terms, conditions, excesses and exclusions of the motor insurance policy attached herewith

[13] The Relevant clauses of the 'attached motor policy' deals with the terms, conditions and excess and exclusion

25 Section 2 of the said policy state as follows
'1) Your Legal Liability (Personal and Property)

If as a result of an accident caused by or in connection with us of your Vehicle or a caravan or trailer which it is towing you at held to be legally responsible. The New India will pay the damage in respect of

30 a) Death of bodily injury to persons other than –

i Any relative or friend of yours ordinary residing with you or with whom you live.
ii Any employee who at the time of the accident was engaged in your service.
iii Any person driving the Vehicle or entering or aligning form or about to enter or to alight from or being conveyed by the Motor Vehicle.

35 b Damage to the property, other than

i Property belonging to any relative or friend of your ordinarily residing with you.
ii Property belonging to you or your physical or legal custody or control.

Provided always that-

(1) This policy does not protect you against Liability for which Third Party Insurance Policy is required in accordance with the Motor Vehicles (Third Party Insurance) Act 1966. It will protect you for any amounting in excess of the amount insured by the Third Party Policy.

40 (2) The aggregate liability of the New India under s 2(a) and 2(b) shall be limited to the amount stated in the said Schedule in respect of all claims whatsoever and howsoever arising out of any one accident or series of accidents arising out of the one event.'

45 [14] The Plaintiff seeks an interpretation from the court as to the passenger liability under the said insurance policy. The Plaintiff is seeking an order of the court whether the 1st Named Third Party is liable to indemnity the Plaintiff under Comprehensive Motor Vehicle Insurance Policy No 922623/3104/286256 and also under and compulsory Third Party Policy No 922623/3144/272916 for a sum of \$100,000 for each passenger claim.

[15] At the outset, it should be noted the Plaintiffs are admittedly, the passengers of the bus that ignited, hence there cannot be a third party policy that can make any application to the loss or the damage to the Plaintiffs who were passengers and I need not venture to consider the said and compulsory Third Party Policy No 922623/3144/272916. I have not been provided with that policy and neither party referred to the said Third Party Policy, while seeking interpretation of the provision in motor comprehensive policy.

10 Interpretation of the Comprehensive Motor Vehicle Insurance Policy No 922623/3104/286256

[16] This insurance policy was not attached to the affidavit in support of this summons that sought interpretation of it, but the Plaintiffs' counsel has attached the same to his submissions, which is totally unacceptable in any court of law. So, I ordered the Plaintiffs' counsel to file and serve the said policy through a supplementary affidavit and the same was done as directed on 25th January, 2011. The 1st Named Third Party, has objected to the said supplementary affidavit being sworn by the law clerk, and has submitted a case where the court has criticized this practice. I do not think that the filing of the insurance policy through a law clerk is wrong in the circumstance of this case, here the law clerk is not deposing any factual issues before the court, he is only submitting a document that has already being discovered in the pre trial stage and also included in the lists of documents. So the objection to the supplementary affidavit annexing the insurance policy, that it the core of this summons is overruled.

25 [17] The 1st Named Third Party did not dispute the said document as the proper and full insurance policy regarding the vehicle on which the Plaintiffs were travelling, but in the submissions again stated that the plaintiffs have not proved the insurance policy. The said policy also contained the same number of the policy referred by the 1st Named Third Party and it covers the relevant duration and the relevant bus company. The policy itself, though peculiar, as it does not contain details of the vehicle, that ignited, it is not disputed that what had been filed as the insurance policy which included passenger extension. The manner in which parties reduced the terms in to a policy is a matter for the contracting parties and the manner of their agreement cannot be question as I have to interpret the policy as it stands.

40 [18] I granted the 1st Named Third Party another opportunity to submit if they are in possession of any other document that can be considered as the policy to the said vehicle, but they were unable to provide such a policy. The 1st Named Third Party has in its statement of defence has admitted both Third Party insurance and comprehensive insurance under Comprehensive Motor Vehicle Insurance Policy No 922623/3104/286256 in relation to the vehicle that ignited, namely motor vehicle registration number RBL 01. This document is also included in the affidavit verifying list of documents of the 1st Named Third Party, filed on 6th June 2010 in Schedule 1 Part 1 No 2 & 3.

45 [19] So, what is required by the court is the interpretation of the said comprehensive motor insurance policy No 922623/3104/286256 as regard to the insurance coverage that

50 Whether the appellant's liability for passenger risk cover was restricted to \$100,000 in respect of all the passenger claims or the apparent limitation of \$100,000 applied to each claimant.

C. JURISDICTION

[20] Order 33 r 3 of the High Court Rules of 1988 states as follows

5 ‘The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.’ (emphasis is added)

10 [21] The above provision in the High Court Rules of 1988 has to be read with Order 18 r 11 and in page 325 of the White Book (1999) 18/11/1 stated that it is not necessary to plead the preliminary point of law in the pleadings and stated

 ‘...or allow a preliminary point of law to be argued under O 33 r 3 without any pleadings, as in *Ramage v Womack* [1900] 1 QB 116 and *Roberts v Charing Cross Euston & Hampstead Rail Co*, (1903) 87 LT 732

15 [22] In page 325 at 18/11/2 in the Supreme Court Rules of 1999 stated under the heading Application for trial of preliminary issue on a point of law as follows

20 ‘The application should be made to the Master by summons or on the summons for directions or notice thereunder. The Master, as a rule, will only make the order when he sees that the objection raises a serious question of law, which if decided in favour of the party objecting, would dispense with any further trial, or at any rate with the trial of some substantial issue in the action dispense with any further trial, or at any rate with the trial of some substantial issue in the action.’ (emphasis is mine)

25 [23] In this case the Plaintiff is seeking an interpretation of the insurance policy, as to the liability of the 1st Named Third Defendant to indemnify the loss to the passengers. The proper interpretation of the insurance policy would help the victims as well as the Insurance Company, and would save time and money in deciding the preliminary point of law at this stage, as it is purely a matter of construction of policy.

30 [24] In a similar situation of interpretation of passenger liability in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S (25 November 2005) at paragraph 34 it was held in Fiji Court of Appeal, as follows

35 ‘In any event, the appellant’s counsel invited us to refer the matter back to the High Court. We indicated in response that we were not prepared to do so. The accident happened in May 1996, over 9 years ago. Five claims have been made and to date not one of the claimants have been paid any money. Finality is required. We indicated that we regarded the issue as a matter of construction of a written policy document and that that process would not be assisted by any further evidence.’ (emphasis is mine)

40 [25] In the said *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S (25 November 2005) the Fiji Court of Appeal did not consider any oral or documentary evidence other than the Policy itself and the extension of it in the interpretation of the passenger liability, in similar instance and I do not need any oral or documentary evidence to interpret the provision in the policy as regard to the passenger liability.

45 [26] In the said case the Fiji Court of Appeal held as stated above, and I need not add more to that as it indicates the importance of the interpretation of insurance policy and the predicament of the victims, where no such interpretation was sought early. In the said case *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S (25 November 2005) the issue before the
50 court was not identical, and the court was concerned about the interpretation of the clause regarding the liability as to the passengers. The passenger cover

contained special clauses that had the overriding effect of the said provisions and the policy and application of the provisions in the said policy that excluded to the passengers.

5 [27] The Plaintiffs, as well as the 1st Named Third Party that objects to the interpretation suggested by the Plaintiffs relied on the abovementioned *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S (25 November 2005).

10 [28] I have asked both counsel whether the interpreted clause in the said case *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S (25 November 2005) is identical to the case before me and both of them answered in affirmative, that sentiment prevailed as both of them has referred and relied on the said case *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S (25 November 2005) in support of
15 their contentions. Though the clause in the insurance policy is similar, there were additional clauses in the passenger cover extension and this created a unique situation for the interpretation of the insurance policy in case before me as regard to passenger liability and the said case differs significantly, to the case before me and cannot be applied in toto, to the case before me and I cannot rely on
20 interpretation given in the said decision to interpret the comprehensive motor insurance policy No 922623/3104/286256. So, I have to interpret the said policy using the accepted principles of interpretation, without a clear judicial interpretation on the said provision.

25 The comparison of the policy in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S with the policy No 922623/3104/286256. of the 1st Named Third Party. (New India Assurance).

[29] The said case deals with clause 6 of an Insurance Policy which was subjected to interpretation and it read as follows

30 “If as a result of an accident caused by or in connection with the use of your vehicle, or a caravan or trailer which it is towing, you are held to be legally responsible for injury or damage to property of another, QI will pay those damages.

Q.I. will also pay all Law Costs, charges and expenses incurred by you with our written agreement or which you may be ordered to pay, provided that any legal action is defended with our written agreement.

35 Q.I. will not pay damages for any injury sustained by any relative or friend who lives with you, or with whom you live, nor any employee of yours, nor any person driving the vehicle or entering or leaving the vehicle nor being carried as a passenger.

Q.I. will not pay for damage to property owned by you, in your custody or control, or which you are transporting.

40 This section does not protect you against liability for which a Third Party Insurance policy is required in accordance with the Motor Vehicles (Third Party Insurance) Act 1966. It will protect you for any amounts in excess of the amount insured by the Third Party Insurance policy.

45 The maximum amount QI will pay under this section for injury or damage to property is limited to \$30,000 in relation to any one accident or series of accidents arising from the one event.” (emphasis is added)

[30] The interpretation of the said provision is done in the said case in the light of the provisions contained in the extended passenger risk and extension which contained certain provisions and the interpretation was done in the above
50 mentioned case not in isolation but with reference to the said additional provisions contained and that is explained in the said case as follows;

[14] On the sheet of additional clauses which formed part of the policy, there is a clause which is headed "Passenger Risks" It read as follows:

"It is understood and agreed that, notwithstanding anything contained therein to the contrary and subject to the Limit of Indemnity stated in the Schedule, the indemnity granted under Item 6 of the Section "What You Are Covered For" of this Policy extends to cover the insured's liability at law for death or injury to persons (other than persons driving or any relative of the Insured or any employee of the Insured) being in or on the vehicle described herein entering into or alight from such vehicles.

[15] The respondent in consideration of an additional premium obtained additional cover. These extensions to the policy were the subject of the endorsement referred to above. We now set out the material part of that endorsement.

"ENDORSEMENT ATTACHING TO AND FORMING PART OF POLICY NUMBER 75543 ADDITIONAL THIRD PARTY AND PASSENGER RISK EXTENSION-PASSENGER RISK EXTENSION

Having paid an additional premium, the indemnity under Item 6 of Section headed WHAT YOU ARE COVERED FOR of the Policy, shall extend to cover as follows:

The Insured's liability at law for death or bodily injury sustained by persons in or on the Vehicle described herein, or entering or alighting from, or about to enter or alight from such vehicle, QI will not pay damages for any injury sustained by any relative or friend who lives with you, or with whom you live, nor any employee of yours, nor any person driving the vehicle.

ADDITIONAL THIRD PARTY COVER-PROPERTY

Having paid an additional premium, the maximum amount of liability of QI stipulated in Item 6 of this Policy is increased to \$1,000,000 INCLUSIVE OF THE ABOVE PASSENGER RISK EXTENSION."

[16] Under the passenger risks extension the indemnity under s 6 was extended to cover the respondent's "liability at law for death or bodily injury sustained by persons in or on the vehicle..... or entering or alighting from or about to enter or alight from such vehicle." Once again injuries sustained by any relative or friend or an employee or person driving the vehicle were excluded. Thus this extension like the "passenger risks" clause provided passenger risk cover which had been otherwise expressly excluded in s 6, as we have stated above.

[17] The Additional Third Party Cover – Property extension provided that the maximum amount of liability of the appellant stipulated in s 6 was increased to \$1,000,000.00. Then followed the significant words "INCLUSIVE OF THE ABOVE PASSENGER RISKS EXTENSION." This endorsement thus extended the cover in s 6 for Third Party personal injury (above the statutory cover) and Third Party property damage subject to the maximum stated."

[31] It should be noted at the outset there are no additional clauses or provisions contained in the comprehensive motor insurance policy No 922623/3104/286256 as regards to the passenger liability and it is a stand alone as the passenger risk extension \$100,000 which is 'subject to terms and conditions, excesses and exclusions of the motor policy attached herewith'.

[32] In the said insurance 'policy attached' there is no reference to the word 'passengers' and there is no definition of the word either in the said attached policy so there is no provision that can be referred directly in the interpretation on passenger risk ext- \$100,000.

[33] The said fact is an important distinction from the policy that was interpreted in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S which included the identical word 'passenger' and in the terms and conditions of the insurance policy No 922623/3104/286256 does not include the word passenger.

[34] The passenger cover does not indicate that the said cover overrides the provisions contained in the policy attached.

[35] The s 2 of policy attached is though not identical is somewhat analogous to the abovementioned clause 6 in the insurance policy that was interpreted in
5 *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S. In the said case where the Fiji Court of Appeal considered the provision which stated that ‘It is understood and agreed that, notwithstanding anything contained therein to the contrary and subject to the Limit of Indemnity
10 stated in the Schedule, the indemnity granted under Item 6 of the Section “What You Are Covered For” of this Policy extends to cover the insured’s liability at law for death or injury to persons (other than persons driving or any relative of the Insured or any employee of the Insured) being in or on the vehicle described herein entering into or alight from such vehicles’ and the said proviso is important as words ‘notwithstanding anything contained therein to the contrary’
15 was expressly used to override the provisions that excluded passengers of the bus. This is important as the comprehensive policy in the said case of *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S expressly excluded passengers.

[36] The relevant provision in the insurance policy No 922623/3104/286256
20 which is contained under the heading ‘WHAT YOU ARE COVERED FOR’

“Section 2

1). Your Legal Liabilities (Personal and Property)

If as a result of an accident caused by or in connection with use of your vehicle or caravan or trailer which it is towing you and held to be legally responsible. The New
25 India will pay the damage in respect of:

a) Death of or bodily injury to persons other than

i. Any relative or friend of yours ordinarily is residing with you or with whom you
live.

ii. Any employee who at the time of the accident was engaged in your service.

30 iii. Any person driving the Vehicle or entering or alighting from or about to enter or to alight from or being conveyed by the Motor Vehicle.

b) Damage to property, other than-

i. Property belonging to any relative or friend of your ordinary residing with you.

ii. Property belong to you or in your physical or legal custody or control.

Provided always that –

35 (1) This Policy does not protect you against Liability for which Third Party Insurance Policy is required in accordance with the Motor Vehicles (Third Party Insurance) Act 1966. It will protect you for any amount in excess of the amount insured by the Third Party Policy.

40 (2) The aggregate liability of the New India under s 2(a) and 2(b) shall be limited to the amount stated in the said Schedule in respect of all claims whatsoever and howsoever arising out of any one accident or series of accidents arising out of the one event.”

[37] Since the Comprehensive Motor Insurance Policy No 922623/3104/286256 does not contain any provision similar to the
45 ‘notwithstanding anything contained therein to the contrary’ in the “What You Are Covered For” of the Policy extending to cover the insured’s liability at law for death or injury to persons. It further excluded persons driving or any relative of the Insured or any employee of the Insured and persons entering into or alight from such vehicle. Since the policy in *Queensland Insurance (Fiji) Ltd v Shore
50 Buses Ltd* [2005] FJCA 80; ABU0070.2004S is referred again in the passenger extension and also stated exactly who are covered in the said policy there is a

clear distinction with the Motor Comprehensive Policy No 922623/3104/286256. This is the reasoning of application of the restrictions contained in the said policy in the said case, but I cannot rely on the said reasoning as the facts are different, though to a great degree the terms are similar.

- 5 [38] Another distinction is that the policy that was interpreted in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S contained the word ‘passenger’ as opposed to any such reference of word ‘passenger’ in Motor Comprehensive Policy No 922623/3104/286256. So, when application of passenger extension cannot be referred to any particular clause in
- 10 the Motor Comprehensive Policy No 922623/3104/286256, though the *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80 had a clear indication of ‘passenger’ in the terms and conditions in the said policy that contained certain restrictions, that was interpreted in that case. This again proves that the passenger extension in Motor Comprehensive Policy No
- 15 922623/3104/286256 cannot be restricted by the s 2 of the said policy, as it has not referred to word ‘passenger’.

[39] The issue before me is whether provisions contained in the above mentioned clause in Motor Comprehensive Policy No 922623/3104/286256 can be subject to the proviso (2) of the said clause which stated

- 20 “(2) The aggregate liability of the New India under s 2(a) and 2(b) shall be limited to the amount stated in the said Schedule in respect of all claims whatsoever and howsoever arising out of any one accident or series of accidents arising out of the one event.”

- 25 [40] The s 2 (a) expressly excluded ‘Any person driving the Vehicle or entering or alighting from or about to enter or to alight from or being conveyed by the Motor Vehicle’ hence this provision cannot be applied to passenger extension.

- [41] The passenger ext is \$100,000 and if the insurer desired to restrict it to all the claims it could have done so by simply saying so or if it preferred to apply
- 30 the restrictions contained in s 2 (2) quoted above in full, it needed to expressly do so by using the words notwithstanding anything contained therein to the contrary’ or meaning similar to it as done in the policy referred in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S where similar provision appeared, in the terms of the said policy.

- 35 [42] In Motor Comprehensive Policy No 922623/3104/286256 the ‘passenger ext -100,000’ and this is subject to the terms and conditions in the policy attached. Strangely, the said ‘attached policy’ does not include the word ‘passenger’ in any of the terms, conditions contained therein including the s 2 of the said policy.

- 40 [43] The policy attached does not contain a single provision that uses the word ‘passenger’ and the proviso to said s 2 applies only to 2(a) and 2(b) which expressly excluded persons ‘being conveyed by the Motor Vehicle’ cannot be applied unless this section is expressly included as done in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S.

- 45 [44] If the ‘passenger’ extension is to be included in motor vehicle insurance policy, one finds difficulty as the word ‘passenger’ is alien in the terms of the attached motor vehicle insurance policy and in the exclusion clause in s 2 of the policy state ‘Any person driving the Vehicle or entering or alighting from or
- 50 about to enter or to alight from or being conveyed by the Motor Vehicle. There clearly five categories of person travelling in the bus that are excluded namely

- a. Persons entering the vehicle.
- b. Persons about to enter the vehicle.
- c. Persons alighting from the vehicle.
- d. Persons about to alight from the vehicle.
- e. Persons being conveyed.

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[45] So, which category is to be covered under the extension cover is also not clear. This again needs to be clarified in the said motor comprehensive policy without a bare statement 'passenger risk ext- \$100,000.' So, there is ambiguity as to the application of the said passenger extension is real, and could have been avoided at least by introducing an interpretation of the word 'passenger' in relation to the policy attached.

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D. INTERPRETATION OF INSURANCE POLICY.

[46] Once the terms of the insurance is recorded in a policy there is presumption that the policy contains all the terms of the cover, with consequences that extrinsic evidence, whether oral or writing, cannot be introduced to contradict, vary, add or cut down the terms set out in the policy. *Gillespie Brothers & Co v Cheney, Eggar & Co* [1896] 2 QB 59,62; *Davies v National Fire & Marine Insurance Co of New Zealand* [1891] AC 485, 496-497

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[47] As indicated above in this ruling, the Motor Comprehensive Policy No 922623/3104/286256 indicate 'passenger extension \$100,000' and since the said provision cannot apply the restrictions contained in s 2 of the Policy attached since there is no provision that refers to 'passenger' in the said policy. *A fortiori*, The application of the restriction contained in s 2 in the motor insurance policy is not possible as it excludes all the people travelling inside including the people who are about to enter and entering the bus. So the restriction in the s 2 of the Motor Comprehensive Policy No 922623/3104/286256 cannot be directly applicable to passenger extension as the said policy excludes the people inside the bus and if one needs to include the said restrictions in s 2 of the insurance policy first the inclusion should be expressly done by using the words 'notwithstanding' or similar provision that overrides the exclusions contained in s 2 of the Policy. Secondly, since there is no reference to 'passenger' in s 2 of the policy that issue has to be addressed by inclusion of all or some of the five categories of people that are mentioned in s 2 of the policy. Without that one cannot apply the restrictions contained in s 2 the 'passenger extension' that is contained in Motor Comprehensive Policy No 922623/3104/286256. I need not reiterate here that both of the said requirements were fulfilled in the *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S and the interpretation of the provision in that case was done in the light of the said circumstances. Since the facts in the case before me is different I cannot rely on the said interpretation of the Court of Appeal.

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[48] This created an ambiguity as to the 'passenger extension \$100,000' and court's interpretation of the said policy is done through application of accepted principles in the interpretation of insurance policy namely *verba charatarum forties accipiuntur contra proferentem rule*.

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[49] As there are no *Jason v Batten (1930) Ltd; British Traders Insurance Co Ltd* [1969] 1 Lloyd's Rep 281 at 290 it was held

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'A policy of insurance is subject to the same rules of construction as any other written contract. The words used in it must be given their plain, ordinary meaning in the context of the policy looked at as a whole, subject to any special definitions contained in the

policy. In cases of ambiguity the *contra proferentum* rule will apply but apart from this there is no rule of law which requires me to strain the language of the policy favour for against the insured person.'

When the insurance policy is looked at as whole it is clear that the policy attached cannot restrict the passenger extension, since there is no reference to the 'passenger' in the terms of the policy. Even in the exclusion clause that is contained in s 2 of the policy, there is no reference to passenger. If one tries to include 'passenger' then again there is ambiguity as to the five categories of people mentioned in s 2, that can be regarded as passengers, of the bus, but without specific reference one cannot include the passenger extension to s 2 of the policy where the restrictions of the amounts are stipulated.

[50] In *London Tobacco Co (Overseas) Ltd v D F D S Transport Ltd* [1993] 2 Lloyd's Rep 306 at 308 it was held

'In construing the policy it is accepted by the insurers that if there is any ambiguity, and they say there is none, it must resolved against them; they were the proferens to the document.'

Clearly there are two ambiguities one is the application of word 'passenger' to one or more categories of people expressly excluded in the s 2 of the policy. The next ambiguity is without a provision that clearly override the provisions contained in s 2 one cannot include the passenger extension to the restrictions contained in the proviso (2) of the s 2. This ambiguity is prevalent as words similar to 'notwithstanding' is used with reference to s 2 of the Policy attached.

[51] In *Simmonds v Cockell* [1920] 1 KB 843 at 845 Roche J held as follows

'...if the warranty does not bear the meaning which I have given to it, I should hold that the language used is very ambiguous; and it is a well known principle of insurance law that if the language of a warranty in a policy is ambiguous it must be construed against the underwriter who has drawn the policy and has inserted the warranty for his own protection.'

The person who created this insurance policy is the 1st Named Third Party. If one tries to include passenger extension in s 2 of the policy, first there is unexplained fact as to why the same words utilized in s 2 was not used in the description of passenger extension. If the language is different the parties obviously meant a difference, when they could have easily done so. This rule is more applicable as the said liability is an extension to the general liability contained in the policy attached.

[52] In *Jason v Batten (1930) Ltd; British Traders Insurance Co Ltd* [1969] 1 Lloyd's Rep 281 at 290 Fisher J stated that when there is ambiguity in the insurance policy, the *contra proferentum* rule will apply and subject to that normal interpretation of contracts should be applied to insurance contracts.

[53] There is clearly ambiguity as to the application of s 2 of the Insurance Policy to the passenger extension. Passenger extension is subject to terms of the attached insurance policy. First there is no reference of word 'passenger' in s 2 of the insurance policy. This is a clear distinction of the policy in this case and the policy that was interpreted in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S.

[54] In *Hutton v Watling* [1948] Ch 398 at 403 Lord Greene MR held as follows

'The first thing we have to do, as I have said, is to construe that document. The true construction of a document means no more than the court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, ...

At p 404

'...however, that if on the true construction of this document, it is to be interpreted as containing the contractual terms and as being a true and complete record of those

terms, be could not call evidence of antecedent agreement, the object of which would be to vary or deduct something from those trends. In my opinion, when once the document is construed and understood it is only susceptible to one interpretation.'

[55] In the Motor Comprehensive Policy No 922623/3104/286256 s 2 does not include the word 'passenger' and clearly all the persons including the persons conveyed are excluded and the restriction contained in the s 2 is confined to liabilities arising from 2(2) and 2(b) of the said policy and if the drafters of the policy thought of inclusion of passenger liability it could only be done by using words similar to 'notwithstanding' as done in the policy that was discussed in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S. Without such qualification one cannot include the restrictions contained in s 2 of the policy which only expressly confined to the liabilities in 2(a) and 2(b). The meaning of the s 2 and the restrictions contained are clear and it cannot include the passenger extension. This has to be included expressly by further clause as done in *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S. Without that the passenger extension cannot be subject to restrictions contained in s 2 of the insurance policy which stated in the proviso which stated

'The aggregate liability of The New India under s 2(a) and 2(b) shall be limited to the amount stated in the said Schedule in respect of all claims whatsoever and howsoever arising out of any one accident or series of accidents arising out of the one event.'

[56] There is additional impediment in the terms of the 'policy attached herewith' as there is no definition of word 'passenger' in that. The said 'policy attached' does not contain a single provision that has used the word 'passenger' and more specifically s 2 of the said policy contained five categories of persons who can be considered as passengers of an omnibus. So, to which category the passenger extension was aimed at cannot be decided. This again indicate that restrictions contained in s 2 of the act, was furtherest from the minds of the parties when they contracted as such a thing is fundamental in interpretation of contracts. There is clearly an ambiguity as to the word 'passenger' if one were to apply s 2 of the policy as it does not contain such a word and instead described five categories of persons who can be considered as passengers, but to which category the 'passenger extension' is extended cannot be decided. So, the passenger extension cannot be subject to the s 2 limitation in the 'policy attached'.

[57] In *London and Lancashire Fire Insurance Co Ltd v Bolands Ltd* [1924] AC 836 at 848

Lord Summer held

'It is suggested further that there is some ambiguity about the proviso, and that, under the various well-known authorities, upon the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adversely to them. That, however, is a principle which depends upon their being some ambiguity- that is to say, some choice of an expression- by those who are responsible for putting forward the clause, which leaves one unable to decide which of the two meanings is the right one.'

[58] In this ruling I have indicated more than some ambiguity of the policy as required in the Lord Summer's judgment. The ambiguity in the Motor Comprehensive Policy No 922623/3104/286256 is real and it expands more than some choice of expression as explained in the said *London & Lancashire Fire*

Insurance Co Ltd v Bolands Ltd [1924] AC 836. The ambiguity is ‘real’ as word ‘passenger’ is not referred in the said s 2 of the ‘policy attached’. There are five categories of persons referred in the s 2 of the policy, that can be broadly classified as passengers. Out of that whether the persons entering and about to enter can be categorized as passenger is another ambiguity, apart from the ambiguities I have discussed in this ruling.

[59] The *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S cannot be applied to the case before me for the reasons given in this ruling and the said interpretation of the clause, though similar, but also has some distinct differences, cannot be applied to the Motor Comprehensive Policy No 922623/3104/286256

[60] The Motor Comprehensive Policy No 922623/3104/286256 stated ‘passenger extension \$100,000’ and this is not subject to limitation in the s 2 of the ‘policy attached’. There is clear ambiguity even one tries to apply the s 2 as there is no reference to word ‘passenger’. If the parties intended to apply the said restrictions contained in s 2 of the ‘policy attached’ at least same terminology would have been used or by some other means an interpretation should be included to clear any ambiguity. This could have been done easily, but parties opted not do so, and there is more than one ambiguity and rule of construction that any ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it, and in this case the 1st Named Third Party (New India Assurance); should be applied. The passenger extension cannot be subject to the restrictions contained in proviso (2) of s 2 of the ‘policy attached’.

25 E. CONCLUSION

[61] The Motor Comprehensive Policy No 922623/3104/286256 is ambiguous as to the liability of the passengers. The said policy state ‘Passenger Risk Ext-\$100,000, Subject to terms, conditions, excesses and exclusions of the motor policy attached herewith’. There is no reference to word ‘passenger’ in the s 2 of the ‘Motor Insurance Policy attached’. The s 2 is the general provision regarding the liabilities in regard to the ‘personal and property’ (Not Personnel & Property) damage or loss. This provision expressly exclude the all forms of persons who can be categorized as passengers including the persons entering the vehicle and who are about to enter. So, the restriction contained in the Proviso 2 of the s 2 expressly indicate that it only applicable to ‘The aggregate liability of the New India under s 2(a) and 2(b) shall be limited to the amount stated in the said Schedule in respect of all claims whatsoever and howsoever arising out of any one accident or series of accidents arising out of the one event’. This is a general provision which has excluded all forms of persons travelling inside the bus and also persons who are about to enter and who are entering the vehicle. So, the said restriction unless expressly included to cover the ‘passenger’, by using express provision similar to ‘notwithstanding’ cannot be resorted by the insurers to restrict all the claims of the passengers. The rule of interpretation of insurance policy requires, that any ambiguity in the wording in a policy, or slip, is to be resolved against the party who prepared it, and in this case the 1st Named Third Party (New India Assurance). I have held that the passenger extension \$100,000 cannot be subject the restrictions contained in proviso (2) of the s 2 of the ‘policy attached’. In the circumstances the 1st Named Third Party’s liability for the passenger extension is \$100,000 for each claim and not for the aggregate sum of all the claims. Considering the importance of the interpretation of the said provision and the uniqueness of the issues involved in this case and the clear

distinction of the facts contained in the Fiji Court of Appeal case *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S and the importance of the issues dealt in this ruling I would not order a cost. In conclusion I need to state that though I considered the cases that were submitted
5 by the counsel for Plaintiff as well as the counsel for the Defendant none was used for this ruling as they are not relevant. Even the *Queensland Insurance (Fiji) Ltd v Shore Buses Ltd* [2005] FJCA 80; ABU0070.2004S has not been analyzed in the way I have dealt in this ruling, in their submissions, though both parties relied on the said case without referring to important aspects that I have discussed
10 in this ruling. This is an additional reason for not awarding any cost for this application.

F. FINAL ORDERS

a. The interpretation of this court is that the 1st Named Third Party in terms of the
15 Motor Comprehensive Policy No 922623/3104/286256 is liable for passenger risk cover of \$100,000 applied to each claimant. (AND NOT THE AGGREGATE SUM OF ALL CLAIMS OF PASSENGERS).

b. No cost is awarded for this application.

Dated at Suva this 26th day of March, 2012.

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Damages awarded.

Michael Wells

Solicitor

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