

Record

the use of the Defendant's motor lorry No. J 7962 against all sums which the Defendant would be legally liable to pay to third parties

4. On the 18th day of January, 1961 at or about or in the area of Kampong Parit Bengkok, Gresik, Muar while the insured motor lorry was being driven by one Gan Yau Chong, a servant or agent of the Defendant, it was involved in a collision with motor cycle No. MA 1397 whereby the rider Sayunan bin Mosni died. 10

5. On the 29th day of October, 1961 the said Gan Yau Chong was charged in the Magistrates' Court at Muar in Summons Case No. MS. 417 of 1961 for driving on the road without reasonable consideration for other persons using the road contrary to Section 36 (1) of the Road Traffic Ordinance, 1958 and on which charge he was acquitted and discharged. 20

6. It was a condition in the Policy that the Insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition.

7. It was adduced at the hearing of the Inquest in Muar Inquest No. 13 of 1961 that at the time of the said accident, motor lorry No. J 7962 had not been maintained in an efficient condition in that: 30

- (i) handbrakes - not working
- (ii) steering - offside track rod ball joints worn
- (iii) tyres - front; near and off side both bald
- (iv) front and rear spring shoulder shackle pins and brushes worn
- (v) off side front axle wheel bearing very slack.

The Defendant had therefore through his servant or agent committed a breach of conditions of the said Policy of Insurance under Condition 3 40

of the Policy No. MV (C) 615/04/08748/60 covering the said motor lorry at the material time and the Plaintiff Company has thereby suffered damage.

8. The Plaintiff Company on the 21st day of August, 1961 gave a written notice repudiating liability.

PARTICULARS

10 On a claim being made by the third party in Muar High Court Civil Suit No.21 of 1963 the Plaintiff Company paid the sum of £2,709-60 and £1,819-35 being the judgment awarded by His Lordship and costs respectively. The said judgment was given on the 4th day of December, 1966 and the Bills of Costs and Certificate of Taxation given by the Assistant Registrar on the 23rd day of February 1967. The Plaintiff Company had further to meet and pay costs for defending the said Civil Suit to their Solicitors amounting to £2,022-10.

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9. And the Plaintiff Company therefore prays that Judgment may be entered against the Defendant for:-

(i) £6,551-05 made up as follows:

(a) Judgment given in Muar Civil Suit No. 21 of 1963 amounting to £2,709-60;

30 (b) Costs of the Plaintiff in Muar Civil Suit No.21 of 1963 amounting to £1,819-35;

(c) Costs of the Plaintiff Company's Solicitors in defending the said Civil Suit No.21 of 1963 amounting to £2,022.10;

(ii) Interest thereon at the rate of 6% per annum from the date hereof to date of realisation or satisfaction of the said sum;

40 (iii) Further and/or other relief as to this Honourable Court may seem just; and

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(iv) Costs."

3. Section I of the said Policy headed "Loss or Damage" was deleted and the Schedule in the Policy expressly provided:

"It is hereby understood and agreed that Section I of this Policy is deemed to be deleted".

Conditions 3 & 10 in the Policy provided as follows:-

p. 61

"3. The Insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition and the Company shall have at all times free and full access to examine the motor vehicle or any part thereof or any driver or employee of the Insured. In the event of any accident or breakdown the motor vehicle shall not be left unattended without proper precautions being taken to prevent further loss or damage and if the vehicle be driven before the necessary repairs are effected any extension of the damage or any further damage to the motor vehicle shall be excluded from the scope of the indemnity covered by this policy."

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"10. The due observance and fulfilment of the terms of this policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this policy."

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4. In his Defence, dated the 25th May, 1968, the Defendant admitted paragraphs 1 to 6 of the Statement of Claim and continued:-

p.6 1.21

"2. The Defendant denies paragraph 7 of the Statement of Claim and states that his vehicle was maintained in a efficient roadworthy condition at the material time. The Defendant will contend that he had not committed a breach of the conditions of the Policy and that the Plaintiff Company had not suffered damages.

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10 3. In answer to paragraph 8 of the Statement of Claim the Defendant will state that the Plaintiff Company after repudiating liability proceeded to act for the Defendant by engaging Counsel of their own choice without of the Defendant in all litigations in connection with the said fatal accident viz. Muar Inquest No.13 of 1961; Muar Magistrates' Court Summons Case No. MS 417 of 1961 and Muar Civil Suit No.21 of 1963.

4. Save as herein admitted the Defendant denies each and every allegation contained in the Statement of Claim as if the same were set out seriatim and traversed". p.7 1.7

5. The action was heard in the High Court at Muar on the 26th November, 1969, both Counsel agreeing that there was only one issue to be tried, namely

20 "Whether the Defendant was in breach of Condition No.3 of the policy issued by the Plaintiff to the Defendant." p.8 1.8

6. Evidence was given by P.W.1 Chow Teik Khoon, a vehicle examiner, Road Transport Department, Kuala Lumpur. He said that on 22nd January, 1961, he examined the Defendant's lorry J 7962 and made a report, the relevant portions of which read as follows:

- "(2) the foot-brake was in order p.8
- (3) the hard brake was not working
- (4) re the steering, the O/S Tract rod ball joints worn
- 30 (5) re the tyres, both front tyres were bald and both rear 90% (bald)
- (6) re the other components (1) front and rear spring shackle pins and bushes worn.
(2) O/S front wheel bearings very slack.
(3) Vehicle discharges excessive smoke.
(4) Rear floorboards holed.
- (7) damage which appeared to have been caused in an accident was O/S front mudguard panel badly dented
- 40 (8) the general condition of the vehicle

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discounting the effects of accident damage was Not Roadworthy Items 3, 4, 5 and 6 above refers."

- pp.10 to 15 7. For the Defendant, evidence was given by the Defendant himself D.W.1 Yeoh Beng Chow, D.W.2 Lee Pan Hoi, a mechanic attached to Keng Hock Workshop, Muar and D.W.3 Yan Yeow Chong, the lorry driver. The purport of this evidence was to show that despite what P.W.1 said, the lorry was roadworthy and efficient. 10
- p.17 8. In a Judgment dated 26th November, 1969, the learned trial Judge held, it is submitted correctly, as follows:-
- p.17 1.3 "I find on the evidence of P.W.1 that the lorry was not kept in a roadworthy condition by the Defendant and that the Defendant was in breach of condition No.3 of the policy.
- D.W.2 is not a reliable witness. I am also not prepared to place much reliance on D.W.1 and D.W.3. 20
- The defects specified in A31 were, at least some of them, so obvious that they should have invited immediate attention.
- Judgment for the Plaintiff as prayed for in Pr. 9 (i) of the Statement of Claim together with costs of the suit."
9. The Defendant appealed to the Federal Court on grounds which basically challenged the trial Judge's findings of fact and his conclusion that the defects found in the lorry rendered the vehicle unroadworthy in breach of condition 3 of the policy. 30
- p.38 10. In a Judgment given on the 6th July, 1970, Ong, C.J. allowed the appeal with costs, but on entirely different grounds which were neither taken in the Defendant's pleadings, nor in the Court below nor in the Defendant's Memorandum of Appeal. He held, it is submitted wrongly, as follows:-
- p.41 1.39 (a) That the assumption accepted by the learned trial Judge below that Condition 3 was binding was erroneous. The learned Chief Justice took the view that the deletion of Section I in the 40

policy affected the interpretation of Condition 3, so that the said Condition was no longer plain and binding on the Defendant as a condition which he knew or ought to have known.

(b) That the words "in efficient condition" in Condition 3 of the Policy were wrongly regarded as being synonymous with "roadworthy condition" by the trial Judge. p.43 1.37

10 (c) That even if the Plaintiffs were to succeed, they could not claim the costs to their Solicitors (Item 9 (i) (c) of the Statement of Claim) because the word "costs" in S.80 (1) of the Road Traffic Ordinance do not include Solicitor and Client costs. p.46 1.43

20 11. The Appellant respectfully submits that the whole approach of Ong, C.J. to the problem was erroneous. It is plain, notwithstanding the contra proferetum principle, that Condition 3 was binding on the Defendant, as was accepted by the trial Judge and both Counsel below. It is further submitted that it was not open to the Federal Court to take this point at that stage. It is submitted further that the deletion of Section I in the Policy has no bearing on the interpretation of Condition 3 which operates independently of Section I, and which Condition applies to both Third Party and Comprehensive Policies. Furthermore, the learned Chief Justice's interpretation of the words "efficient condition" as not necessarily meaning "roadworthy condition" is in clear conflict
30 with established authority.

12. Being dissatisfied with the said Judgment, the Plaintiff Company applied for leave to appeal to His Majesty The Yang di-Pertuan Agong and an Order granting such Final Leave was made on the 8th February, 1971.

13. The Appellant respectfully submits that this appeal should be allowed with costs and the Judgment of the High Court restored for the following among
40 other

REASONS

1. BECAUSE the trial Judge rightly found that the Respondent's lorry was not kept in a roadworthy condition.

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2. BECAUSE the trial Judge rightly held that the Respondent was in breach of Condition No.3 in the Policy.
3. BECAUSE it was not open to the Federal Court to take the point about the binding nature of Condition No.3 on the Respondent since the Respondent did not rely on this point at any stage of the proceedings.
4. BECAUSE in any event Condition No.3 is binding on the Respondent and the Federal Court wrongly held otherwise. 10
5. BECAUSE Condition 3 applies whether the Policy is a Third Party or Comprehensive Policy.
6. BECAUSE the Court failed to pay any or sufficient heed to the accurate statement in the Plaintiffs' written submission that it is the invariable practice of motor insurers in the United Kingdom to include in the Policy a Condition similar in form and effect to Condition 3, when the cover given is "Road Traffic Act" only; and failed to pay any or sufficient heed to the illustration of this practice which was included in the written submission. 20
7. BECAUSE the deletion of Section I in the Policy does not affect or invalidate the binding nature of Condition 3 and the Federal Court wrongly held otherwise.
8. BECAUSE the Federal Court wrongly held that if a vehicle is not in a "roadworthy condition" then it is not necessarily in an "inefficient condition." 30
9. BECAUSE the Federal Court wrongly held that the Appellants were not entitled to claim the costs which they paid to their own Solicitors under paragraph 9 (i) (c) of the Statement of Claim.
10. BECAUSE the Federal Court wrongly held that the Appellants were not entitled to recover the said Costs under the terms of the Policy.
11. BECAUSE the Federal Court wrongly held that the general law, apart from the Policy, did not afford the Appellants a right to recover the 40

said Costs.

12. BECAUSE the Judgment of the trial Judge is right and of the Federal Court wrong.

RAYMOND KIDWELL

EUGENE COTRAN

No.9 of 1971

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL
COURT OF MALAYSIA

B E T W E E N :

THE NEW INDIA ASSURANCE
COMPANY LIMITED Appellant
(Plaintiff)

- and -

YEO BENG CHOW alias
YEO BENG CHONG Respondent
(Defendant)

CASE FOR THE APPELLANT

T.L. WILSON & CO.,
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