Privy Council Appeal No. 9 of 1971

The New India Assurance Company Ltd. – – – *Appellant*

v.

Yeo Beng Chow alias Yeo Beng Chong – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH MARCH 1972

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* VISCOUNT DILHORNE]

The appellant Company on 8th June 1960 issued to the respondent a policy of insurance covering him against third party liability in respect of the use of an Austin lorry. The policy issued was one designed for comprehensive insurance. It was adapted to and limited to third party liability by the deletion of section I of the policy, which provided cover against loss or damage, so that the policy ran as follows:

> "Now this Policy witnesseth:
>
> That in respect of events occurring during the Period of Insurance and subject to the terms exceptions and conditions contained herein or endorsed hereon (hereinafter collectively referred to as the Terms of this Policy)
>
> * * * * *
>
> SECTION II—LIABILITY TO THIRD PARTIES
>
> 1. The Company will . . . indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle . . . against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of:
>
> (*a*) death of or bodily injury to any person
>
> (*b*) damage to property"

The policy contained the following conditions:

> "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 Motor 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 granted by this policy.

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."

On 18th January 1961 there was a collision between the lorry and a motor cycle as a result of which the rider of the motor cycle died. At the inquest evidence was given as to the condition of the lorry and on 21st August 1961 the appellant Company gave notice repudiating liability under the policy on the ground that there had been a breach of Condition 3 in that the vehicle had not been maintained in an efficient condition.

The respondent's driver was on 29th October 1961 prosecuted for driving without reasonable consideration for other persons using the road and was acquitted.

Civil proceedings then ensued and in consequence thereof the appellant company paid $2,709–60 in damages and $1,819–35 in costs. The Company also incurred costs in relation to these proceedings amounting to $2,022–10.

The appellant Company then claimed these sums totalling $6,551–05 from the respondent.

In paragraph 6 of their Statement of Claim they alleged that:

"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."

In his Defence the respondent admitted this paragraph of the Statement of Claim so at the trial no question was raised as to the applicability of Condition 3. It was agreed by Counsel that the only issue to be tried was:

"Whether the Defendant was in breach of Condition 3 of the policy issued by the Plaintiff to the Defendant."

After hearing evidence for the appellant Company from a vehicle examiner that the vehicle was not roadworthy and that "The owner of that lorry had not kept the lorry in an efficient or roadworthy condition" and after seeing the examiner's report on the vehicle which stated:

"(2) the footbrake was in order.

(3) the hand brake was not working.

(4) *re* the steering, the O/S track rod ball joints worn.

(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 bearing 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.

(8) the general condition of the vehicle discounting the effects of accident damage was Not Roadworthy. Items 3, 4, 5 and 6 above refers."

the trial judge, Sharma J., gave judgment for the amount claimed against the respondent.

The respondent then appealed. In his memorandum of appeal it was alleged that the Judge had come to a wrong conclusion on the evidence in holding that the vehicle was not roadworthy. So far as can be judged from the notes taken by the Judges of the Federal Court this appears to have been the only matter argued before that Court. At some stage it would seem that other questions were raised for a written submission was made to the Court by the appellant Company on the question, not raised at the trial, whether Condition 3 of the policy applied, section I having been deleted.

In that submission no reference was made to whether the appellant Company were entitled to recover from the respondent the costs they had paid to their solicitors for defending the third party claim, a matter dealt with by Ong C.J. delivering the judgment of the Federal Court on the appeal.

The appeal was allowed, it being held that Condition 3 was not binding on the respondent 'as a condition which he knew or ought to have known'. Ong C.J. posed the question, section I being deleted, could "it still be true to say that Condition 3 was wholly unaffected? Could it survive intact the excision of section I?" In his view as liability for loss or damage was not covered by the policy "so much of the condition as required" the respondent "to safeguard the vehicle from loss or damage manifestly could have no application" and he said "So far as the" appellants "are concerned, Condition 3 had been mutilated".

Their Lordships are unable to accept these conclusions. It may be that those parts of Condition 3 which related to loss and damage were inserted in the policy bearing in mind that it was drafted to provide comprehensive cover but it does not follow from a limitation of the cover that there was any alteration to be implied in the Conditions precedent contained in the policy. Insurance companies can insert such conditions as they choose and if the conditions inserted are accepted by the insured, they are binding upon him. There is no obligation on an insurance company to relate the conditions to particular aspects of the policy.

In their Lordships' opinion Condition 3 could and did survive the deletion of section I. It was a condition precedent to the liability of the appellant Company and the policy was issued subject to it. Its language is clear and not ambiguous and any reader of it must have known that it imposed an obligation on the insured to take all reasonable steps to maintain the vehicle in an efficient condition.

It may be that if the insured had pointed out to the appellant Company that, as he was not to be covered against loss or damage, the parts of the condition relating to that were unnecessary, their deletion might have been agreed to but the insured accepted the policy without amendment of the condition and in their Lordships' opinion is bound by it. Even if it had been amended in that way, it is to say the least, unlikely

that the appellant Company would have agreed to the deletion of the obligation to take all reasonable steps to maintain the vehicle in an efficient condition and it is that part of the condition that is material in this case.

Ong C.J. went on to say, mistakenly as the extract quoted from the examiner's evidence shows, that nothing had been said at the trial about the vehicle not being efficient. He said the word "efficient" in "efficient condition" and "roadworthy" had been treated as synonymous. There was ample evidence at the trial that the lorry was not roadworthy. Motor vehicles are intended for use on the roads. A vehicle in an efficient condition is fit for use on the roads, that is to say, roadworthy, and the converse is equally true. A vehicle which is not roadworthy is not in an efficient condition.

At the conclusion of his judgment Ong C.J. expressed the opinion that even if the appellant Company were entitled to succeed, they could not recover from the respondent the costs they had themselves incurred in defending the third party claim.

The policy in a paragraph headed "Avoidance of Certain Terms and Right of Recovery" entitled them to recover from the insured "all sums paid by the Company which the Company would not have been liable to pay but for the Legislation" and it is in consequence of this provision that this action was brought.

The legislation in question is section 80 (1) of the Road Traffic Ordinance of Malaysia which requires an insurance company which has issued a certificate of insurance, even though the company may be entitled to avoid or cancel the policy,

> "to pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest . . . ."

The costs the appellant Company paid to their solicitors were not an amount they were liable to pay by virtue of the legislation and in their Lordships' opinion Ong C.J. was right in holding that they were not recoverable.

Their Lordships have thought it right to deal with the questions of substance raised by Ong C.J. and have not in the circumstances found it necessary to consider or to express any opinion on whether it was open to the Federal Court of Malaysia to decide that Condition 3 did not apply when it was admitted in the Defence that it did, and to decide the point as to the appellant's costs when that point had not been raised in the Defence or in the memorandum of appeal, or so far as appears, in argument.

For these reasons their Lordships will report their opinion to the Head of Malaysia that the appeal should be allowed and judgment entered for the appellant Company not for $6,551–05 but for $4,528–95 and that the respondent should pay the costs of this appeal and in the courts below.

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In the Privy Council

THE NEW INDIA ASSURANCE COMPANY LTD.

v.

YEO BENG CHOW alias YEO BENG CHONG

DELIVERED BY
VISCOUNT DILHORNE

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