23 of 1977

No. 19 of 1974

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN:

1. TAN KENG HONG

2. YOONG LEOK KEE CORPORATION LIMITED

Appellants
(Defendants)

- and -

NEW INDIA ASSURANCE COMPANY LIMITED

Respondents
(Third Party)

CASE FOR THE RESPONDENTS

Record

1. This is an Appeal in Third Party proceedings from a judgment and order of the Federal Court of Malaysia (Suffian, C.J. Gill, F.J., Ong Hock Sim, F.J.) dated and entered on the 2nd March, 1974 dismissing the Appellants Appeal from the judgment and Order of the High Court of Malaysia (Wan Suleiman, J.), dated 23rd October, 1973, whereby judgment was entered for the Plaintiffs against the Appellants (the Defendants) on the Plaintiffs' claim for damages arising out of a fatal accident, and the Appellants' action against the Respondents (the third Party), claiming an indemnity under a policy of insurance, was dismissed. An order granting leave to appeal to his Majesty the Yang Dipertuan Agung was made in the Federal Court of Malaysia on 19th August, 1974.

pp.59-62
p.65
pp.43-50
p.51
pp.66/67

2. The principal question raised in this appeal is the true construction to be given to an exception in the insurance policy which relieved the insurers from liability in respect of the death of ... any person (other than a passenger

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carried by reason of or in pursuance of a contract of employment) being carried in or upon ... the motor vehicle at the time of the occurrence out of which any claim arises.

3. The Plaintiff died as a result of a motor accident which occurred on the 1st June, 1963. He was a passenger in the Appellant's Company's timber lorry being driven by their servant or
p.46 l.33 agent the First Appellant. The learned trial Judge held that the cause of the accident was excessive speed and that accordingly the Appellants were liable to the Plaintiffs.
p.50 l.4 He awarded $ 21,600 by way of general damages.

4. The facts of the accident material to this Appeal are as follows :-

(1) that the motor lorry was owned by the Appellant Company who carried on business in the timber trade and had a timber concession in the jungle at Bukit Tinggi, and a sawmill at Seremban;

(2) that the deceased was a forest ranger in the employment of the Government;

(3) that on the day of the accident the lorry was being driven, fully laden with timber, from the concession area in the jungle to Seremban;

(4) that within about a quarter of a mile of the Government checking station at Kuala Pilah (and after the vehicle had been checked there), the deceased stopped the lorry, and asked for and was given a lift towards Seremban;

(5) that the driver agreed to give the deceased a lift because the deceased was an employee of the Forest Department and the driver did not want to upset him for fear of reprisal.

5. The Appellants were insured with the
pp.78-81 Respondents under Motor Vehicle Insurance Policy No. MV (C) 619/04/10223/63, which provided the Appellants (subject to stated exceptions) with indemnity in the event of an accident caused by or arising out of the use of the motor vehicle, for all sums which they should become legally liable to pay in respect of inter alia, the death of any person.

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6. By the General Exceptions to the policy (clause 1) it was provided that the Respondents should "not be liable in respect of :

"Any accident loss damage or liability caused sustained or incurred ... whilst the motor vehicle is (i) being used otherwise than in accordance with the limitations as to use". The learned trial Judge considered the limitations as to use endorsed on the Schedule to the policy, which provided cover for : pp.47-49

(1) Use in connection with the Insured's business;

(2) Use for the carriage of passengers (other than for hire or reward) in connection with the Insured's business.

(3) Use for social, domestic and pleasure purposes. He found on the evidence that the gratuitous giving of a lift to the deceased did not come within any of the above uses and that for that reason there was no liability on the insurers to indemnify the Appellants. p.49 l.12

Exception (iii) under Section II of the policy provided that:

"The Company (the respondents) shall not be liable in respect of ...

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon ... the said motor vehicle..."

This provision excluded passenger liability for which a higher premium was payable and limited liability to that required by Section 75 of the Road Traffic Ordnance 1958 (CAP.92).

The Learned trial Judge went on to consider whether on the evidence before him it had been established that the deceased was being carried "by reason of or in pursuance of a contract of employment", and having regard to the case of Izzard v. Universal Insurance Company 1937 A.C.773, he found that the mere taking of a free lift could not be construed as such. pp.49 ll. 29-33

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pp.55-58

7. By their Memorandum of Appeal to the Federal Court, the Appellants relied on two grounds only in relation to the Third Party proceedings. In effect, they contended that the use of the vehicle on the day in question fell within each of the three uses set out in paragraph 6 above. In the course of argument and at the invitation of the Court the Appellants argued that Exception iii under Section II did not relieve the Respondents of liability under the policy.

8. The Federal Court did not specifically deal with either of the written grounds in their Judgment, but after considering the case of Izzard, and Baker v. Provident Accident and White Cross Insurance Co. Ltd. 1939 2. All. E.R. 690, they held that the deceased was not being carried either "in pursuance of" nor "by reason of a contract of employment."

p.62 ll. 21-28

9. It is respectfully submitted that the learned trial Judge was correct in his findings, that the use of the vehicle on the occasion in question was outside the limitations as to use set out in the schedule. For while the vehicle was in fact being used by the driver in connection with the Insured's business, the actual use connected with the carrying of the deceased, out of which the claim arose, did not fall within any of the limitations as to use.

10. It is respectfully submitted that notwithstanding that they did not deal with any of the arguments under the limitations as to use, the Federal Court were correct and in particular were correct in their construction of Exception (iii) in Section II of the policy. It is submitted that it had to be shown that the deceased was under a contract of employment with a party other than the insured, and that there was sufficient practical or business reasons for him to be carried in the vehicle by reason of or in pursuance of that contract. No direct evidence was given of the terms under which the decesaed was employed by the Government. There was no evidence that the deceased was required to be carried in the vehicle in the course of, by reason of or in

pursuance of his employment. On the contrary the vehicle had already been checked at the Government station and there was no evidence that the deceased was travelling to Seremban for any other than his own purpose.

11. Further it is respectfully submitted that by the use of the expression "carried" as opposed to "travelled", a proper construction requires that the insured must be acting on behalf of and as agent for the employer of the passenger, in circumstances in which he knows of the terms of the contract of employment and that it is by reason thereof the passenger is being carried. It is submitted that the contract of employment must have some relevance to the undertaking of the carriage.

12. While there was some evidence that it was not uncommon for Forest Rangers to obtain lifts, there was no evidence that the obtaining of such lifts constituted a part of or obliation of their contracts of employment, and there was no evidence that the Insured knew of or believed that the deceased contract of employment raised any need or requirement for such a lift to be given.

13. The Respondents respectfully submit that this Appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the carrying of the deceased was outside the uses permitted by the terms of the policy;

(2) BECAUSE there was no evidence that the deceased was being carried by reason of or in pursuance of a contract of employment;

(3) BECAUSE of the reasons given by the learned trial Judge and the Federal Court.

GEORGE NEWMAN

No. 19 of 1974

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O N A P P E A L

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Appellants
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- and -

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(Third Party)

CASE FOR THE RESPONDENTS

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London, E.C.2.

Solicitors for the Respondent