IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 0049 of 2012
(High Court of Suva Civil Action No. 22 of 2005)

BETWEEN : **DOMINION INSURANCE LIMITED**

Appellant

AND : **TEBARA TRANSPORT LIMITED**

1st Respondent

AND : **MOTOUILA NEMANI**

2nd Respondent

AND : **RAVINDRA KISHORE**

3rd Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Kumar JA

Counsel : **Mr. D. Prasad for the Appellant**
Mr. R. Naidu for the 1st & 2nd Respondent
Mr. D. Singh for the 3rd Respondent

Date of Hearing : **3 May 2017**

Date of Judgment : **26 May 2017**

JUDGMENT

Basnayake JA

[1] This is an appeal by the third party/appellant, against the judgment of the learned High Court Judge dated 1 June 2012. By this judgment, the plaintiff/3rd respondent was awarded a sum of $172,458.35 together with costs in the sum of $3000.00 against the 1st and the 2nd defendants who are the 2nd and the 1st respondents respectively in this appeal. The court also ordered that the 1st respondent (Tebara Transport Limited) be entitled to be indemnified by the appellant (Dominion Insurance Limited) under a Motor Vehicle Compulsory Third Party Policy Certificate, the total amount of damages together with costs awarded to the plaintiff.

[2] After a careful consideration of the submissions, written and oral, of learned counsel, I am of the view that this appeal be allowed without costs and the judgment of the learned Judge set aside.

[3] The plaintiff was an employee of the 1st respondent. He was travelling to work by bus belonging to the 1st respondent. He was authorized to travel free. On 3 August 2002 while travelling to work by bus (belonging to the 1st respondent) the bus collided. The bus was driven by the 2nd respondent. The plaintiff sustained multiple injuries. The plaintiff sued the 1st and the 2nd respondents for damages, general and special etc. Alternatively the plaintiff claimed under the Workmen's Compensation Act 1964 (Vol. 14 pg. 75,561).

[4] The 2nd respondent who was the driver of the bus was convicted for dangerous driving. Relying on sections 17 (1) and 17 (3) (a) of the Civil Evidence Act, 2002 (Vol. 2), the court found that the accident was due to the negligence of the 2nd respondent. The 1st respondent was found guilty under vicarious liability. The appellant was brought in to the case on the application of the 1st respondent. The court after trial allowed the 1st respondent to be indemnified by the appellant under a Third Party policy.

The grounds of appeal

[5] 1. The learned Judge had erred in law by finding that the plaintiff was not an employee of the 1st respondent when travelling to his work place using the 1st respondent's bus but was travelling as a general public. Therefore it was covered under the Compulsory Third Party Policy with an increased coverage of up to $250,000.00.

2. That the learned trial Judge had erred in law and in fact by finding that the appellant's 3rd party Motor Vehicle Policy exclusion in section 2, clause 22 (b) did not apply as it is contrary to the proviso (a) (ii) of section 6 (1) of the Motor Vehicles (Third Party Insurance) Act 1948 (Vol 16 page 260,021).

3. That the learned trial Judge had failed to consider that the 3rd respondent was given a privilege to travel free in the 1st respondent's bus as he was an employee and the Motor Vehicle Third Party policy has an exclusion that any employee of the insured is not covered to the increased coverage of $250,000.00 but limited to $4000 under the Motor Vehicles (Third Party Insurance) Act 1948 (Vol. 16 pg. 260,021).

The only issue

[6] The liability of the 1st and the 2nd respondents was not in issue. The negligence was not challenged. The only issue before the trial court was the liability of the appellant to indemnify the 1st respondent. The 1st respondent had two policies with the appellant and sought relief under both these policies. One policy is on the workmen's compensation. The learned Judge having found that the plaintiff was not obliged to travel in the bus belonging to the 1st respondent concluded that the plaintiff was not within the course of employment and hence this policy has no application.

Workman's Compensation Policy

[7] In the judgment the learned Judge held that the plaintiff was not obliged to travel by bus and "not in the course of his employment". The learned Judge relied on Lord Denning in

Vandyke v Fender and another (Sun Insurance Office Ltd, Third Party (1970) 2 All ER 335 at 340 referring to **St. Helen's Colliery Co. Ltd v Hewitson**, (1924) AC 59 and **Weaver v Tredegar Iron & Coal Co. Ltd**. (1940) AC 955, that "They show, to my mind quite conclusively, that when a man is going to or coming from work, along a public road, as a passenger in a vehicle provided by his employer, he is not then in the course of his employment-unless he is obliged by the terms of his employment to travel in that vehicle. It is not enough that he should have the right to travel in that vehicle, or be permitted to travel in it. He must have an obligation to travel in it. Else he is not in the course of his employment. That distinction must be maintained: for otherwise there would be no certainty in this branch of law".

[8] The learned Judge also relied on the case of **Smith v Stages** [1989] 1 All ER 833 at 847 where Lord Lowry agreed with Lord Denning in **Vandyke v Fender** (supra). Lord Lowry mentioned the facts in Fender's case as follows, "Both the plaintiff and Fender (who was driving) were undertaking their customary journey from their homes to their regular place of work. The employers provided a car and travelling allowance no doubt as an inducement to the men to accept their employment but the men were not paid for the time during which they were travelling to work; they were not on duty and not in the course of their employment".

[9] Considering the fact that;

- The plaintiff was a non-paying passenger,
- Travelling in a bus belonging to the 1st respondent,
- On his way to work, but not reached the place of work,
- He was authorised by the 1st respondent to so travel,
- Not obliged to so travel by the terms of employment.

The learned Judge held that he was not in the course of employment and therefore the Workman's Compensation Policy inapplicable.

Motor Vehicle (Third Party) Policy

[10] This policy undertakes legal liability for personal injuries to third parties, passengers, paid and unpaid up to $100,000.00. This limit has been extended up to $250,000.00. Section 2, clause 22 (b) of the policy excludes liability in respect of death or bodily injury sustained by the employees.

[11] The learned Judge in his judgment finds that the exclusion in Section 2, clause 22 (b) is contrary to the requirement in proviso a (ii) of section 6 (1) of the Motor Vehicles (Third Party Insurance) Act 1948 which mandates compulsory insurance "where persons carried by reason of or in pursuance of a contract of employment".

[12] Considering the legal liability clause in the policy, "for personal injury to passengers (who are not fare paying passengers), the learned Judge found the appellant liable under the Compulsory Third Party Motor Vehicle Policy to indemnify the 1st respondent the increased coverage of $250,000.00.

Section 6 (1) of the Motor Vehicles (Third Party Insurance) Act 1948

6 (1) *In order to comply with the provisions of this Act, a policy of insurance must be a policy which-*

(a) Is issued by an approved insurance company;

(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or her or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle,

Provided that-

(a) Such policy shall not be required to cover-

(i) Liability solely arising by virtue of the provisions of the Workmen's Compensation Act 1964; or

(ii) save in the case of a passenger carried for hire or reward in a passenger vehicle or where persons are carried by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) liability in respect of the death of or injury to a relative of the person using the vehicle at the time of the occurrence of the event out of which the claim arises, or to a person living with the person so using the vehicle as a member of

his or her family in this paragraph "relative" means a relative whose degree of relationship is not more remote than the fourth;

(iv) ***such policy shall not be required to cover liability in excess of $4000 for any claim made by or in respect of any passenger in the motor vehicle to which the policy relates*** *or in excess of $40,000for all claims made by or in respect of such passengers. The amount herein specified shall be inclusive of all costs incidental to any such claim or claims (emphasis added).*

Sub section (2), (3) and (4) are not reproduced as they are not relevant.

Submissions of the learned counsel for the appellant

[13] The learned counsel for the appellant submitted that the plaintiff travelled by bus as an employee. Hence he is excluded under section 22, clause 2 (b) of the policy. The learned counsel submitted that the plaintiff was given the privilege of travelling without a payment of the fare as he was an employee. If the plaintiff was a normal passenger he ought to have paid a fare. The plaintiff was allowed to travel free due to an understanding and not due to a contractual obligation.

[14] In the written submissions tendered to court the learned counsel specifically admitted that the plaintiff had a cover of $4000.00 (pg. 12 para. 5.5). The learned counsel for the appellant relied on the written submissions made at the trial which is reproduced as follows:

"6.8 The appellant agreed to indemnify the 1st respondent if there was any legal liability especially when any fare paying passengers sustained any personal injuries arising from the use of any vehicle that has been insured by the 1st respondent.

6.9 As per the legal liability under the policy, the plaintiff is considered as a non-fare paying passenger as he did not pay the required fare when boarding the bus. Thus any personal injuries sustained by him which arose from the use of the insured bus will not and should not be indemnified by the appellant as the plaintiff boarded the bus as a non-fare paying passenger.

6.10 Besides being a non-fare paying passenger, the plaintiff was an employee of the 1st respondent. As per the Third Party Policy, the injuries sustained by the plaintiff were not covered under it as the policy does not insure any employee of the 1st respondent who has sustained bodily injury".

[15] The learned counsel for the appellant heavily relied on the Supreme Court judgment in **Sun Insurance Company v Mukesh Chandra** (CBV 0007 of 2011, 9 May 2012). In this case the respondent was a fare paying passenger in the van bearing registration No.BU802. This vehicle was insured with the petitioner. He was injured when this van collided with another vehicle bearing registration No.AC133. The driver of this vehicle did not have a driving licence and was convicted for the offence. The respondent obtained judgment against the drivers and the owners of both vehicles. The respondent then brought this action against the petitioner being the insurer of both vehicles. The High Court found the petitioner liable to pay the judgment sum of $233,295 etc. to the respondent. On appeal, the Court of Appeal having set aside the liability in respect of the vehicle No.AC133, ordered the petitioner to pay in respect of vehicle No.BU802. The court held that the petitioner would be liable to pay the injured the sum of $4000, which is included in the sum of $233,295 together with interest.

[16] In a special leave to appeal application the Supreme Court (Mukesh Chandra's) set aside the judgment of the Court of Appeal where the main issue was in respect of the liability of the petitioner an insurer, against third party risks. The Supreme Court held that a policy stipulating conditions other than those contemplated in s. 10 (Motor Vehicles Third Party Act) can be included in the policy and the particulars of such conditions should be incorporated in the Certificate of Insurance. The court held that the policy issued to vehicle NO.BU802 would not permit to carry fee paying passengers. In such circumstances the insurer would not be liable to pay the respondent the amount stipulated in section 6 (1) (b) ($4000). The court also held that under the statute the insurer can impose certain conditions in the insurance policy. If the conditions stipulated in section 10 are included in the insurance policy and the vehicle is used in contravention of those conditions, and a third party has suffered death or bodily injury as a result of the same, liability of the insured can be met by the insurer vis-a vis third party. In such circumstances the insurer has a right to claim the sum paid to the third party from the insured.

[17] The Supreme Court further held that, "the certificate of insurance gives two categories of conditions, namely, (a). A person or a class of persons entitled to drive and (b). Limitations

as to use. If the vehicle is used in breach of any of the conditions coming under these categories, the insurer is exempted from third party liability. The Supreme Court held that as there was a contravention of a condition in the policy issued by the Sun Insurance excluding their liability in respect of the person driving the vehicle they cannot be held liable in respect of the claim of the third party. The third party will have to be satisfied with their claim against the insured and take whatever steps they could to enforce the same against the insured".

Submissions of the learned counsel for the respondents

[18] The learned counsel for the 1st and the 2nd respondents submitted that the insurance policy was a comprehensive policy. Under the policy the passenger liability was increased from $4000.00 imposed under the Motor Vehicles (Third Party) Insurance Act to $250,000.00 (pg. 249 of the Record of the High Court (RHC)).

[19] The learned counsel submitted that the exclusion clause referred to under section 22 (b) does not apply as the plaintiff was a non-fare paying passenger travelling with the general public in the insured vehicle. He further submitted that the plaintiff was not travelling by bus as an employee. He was in the bus as a non-fare paying passenger. The appellant had agreed to indemnify the 1st respondent (insured) under section 2 of the policy.

Section 2 of the policy

[20] "The Dominion will pay any amount subject to the limitation contained below for which you shall become legally liable to pay for accidental physical loss or damage to property of others or personal injury to **passengers.**

The Dominion liability in respect of any one accident or series of accidents arising out of one occurrence and also during any one period of insurance is limited to $100,000.00. Any claim payment or settlement agreed will be net of the applicable deductible and/or sub-limit (this amount had been increased to $250,000.00)".

Section 2 qualifies in the policy as follows:-

Under the heading, "*IN RESPECT OF SECTION 2 LEGAL LIABILITY*": "You shall become legally liable for accidental physical loss or damage to property of others or for personal injury to passengers (*who are* ***not fare paying passengers***) arising out of the use of any vehicle insured under section 1. Thus the cover was extended to *"not fare paying passengers"* as well.

[21] The learned counsel also submitted that the provisions of the policy are not clear. In the written submissions the learned counsel submitted that the term "*employee*" used in the exclusion clause under Section 2 clause 22 (b) is used in a wide context and is ambiguous. The insurer is the party that drafted the policy. The learned counsel submits that ambiguous words must be construed "*contra proferentem*" and be interpreted in favour of the insured. The learned counsel referred to the Law of Insurance by Colin Vaux 4th Edition pg. 45 para 2-10 (cited the case of **New India Assurance Company Limited v D. Gokal and Company Limited** Civil Appeal ABU 0035 of 2001 (16 August 2002) explaining as follows: *"Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties drafted them to mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentem, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt".*

[22] The learned counsel for the plaintiff/3rd respondent submitted that the plaintiff was covered under the Motor Vehicle Policy Schedule. The policy provided for comprehensive coverage in excess of the $4000 limit pursuant to section 6 (1) of the Motor Vehicles

(Third Party) Insurance Act. He submitted that the plaintiff was not being carried for hire nor pursuant to a contract of employment. Hence section 6 (1) did not apply to him.

[23] The learned counsel further submitted that the plaintiff was covered under section 2 (pg. 252 of RHC) as a non-fare paying passenger. He submitted that this provision had an extended cover up to $250,000.00 for all passengers including fare paying passengers. He submitted that the policy covered passengers such as the plaintiff and the bus conductor.

Analysis

[24] Clause 22 (b) of the policy is the issue in this case. This is an exclusion clause. The heading for these 22 clauses is as follows:- **"WHAT YOU ARE NOT INSURED FOR: DEDUCTIBLES, SUB-LIMITS AND EXCLUSIONS".** Under this heading there is another sub heading as, "Section 1 and 2 PLEASE NOTE". Under the above headings there are 14 clauses. At the end of the 14th clause a sub heading appears as "SECTION 1 ONLY". Under that heading there are six clauses. They are numbered as 14, 15, 16, 17 18 and 19. At the end of clause 19, a sub heading appears as, "SECTION 2 ONLY". Under this heading three clauses are mentioned as Nos. 20, 21 and 22.

The original section 2

[25] Section 2 states as follows:-"IN RESPECT OF SECTION 2 LEGAL LIABILITY". Under this it states that, "You shall become legally liable for accidental physical loss or damage to property of others or for personal injury to passengers (who are not fare paying passengers) arising out of the use of any vehicle insured under section 1".

Clause 22

[26] 22. In respect of death or bodily injury sustained by:

(a) Any relative or friend who permanently reside with you.

(b) **Any employee of yours**.

(c) Any person driving the vehicle at the time of the accident.

[27] The area of cover given by section 2 has been narrowed down by clause 22. However the exclusion under section 22 (c) above has been removed. This is under a separate heading which states *"ADDITIONAL PROVISIONS AND BENEFITS APPLICABLE TO SECTION 2-LEGAL LIABILITY"*. Only a single item appears under this heading which states, *"Employees Indemnity: This policy is extended to indemnify any employee of the insured, as if he or she were the insured, against liability arising in connection with the use of any insured vehicle in charge of that employee"*. The exclusion of any driver mentioned under clause 22 (c) has been removed for drivers who are employees.

[28] Section 22 (b) therefore applies to employees other than drivers. The policy gives cover to passengers and those who travel without a payment. The question is whether an employee can be considered under the category of *"not fare paying passenger"*. I am of the view that there is no ambiguity with regard to the employees mentioned under clause 22 (b) of the policy. The insurer has removed the drivers employed by the insured from the exclusion. In the same way the insurer could have removed other employees too from the exclusion. This was not done.

[29] The plaintiff was not considered as an employee mainly for the purpose of considering liability under the Workmen's Compensation policy. The workmen's compensation policy gives cover to work related accidents. To consider under this policy the work has to be within the scope and course of employment. While the worker is away from his work one cannot say that he is within the course of employment. However, just because a worker is away from work, he does not cease to be an employee. As long as the worker is in the pay sheet, he is an employee.

[30] Being an employee, he comes under clause 22 (b) of the policy and excludes the insurer from extended liability. In terms of proviso (a) (iv) to section 6 (1) of the Motor Vehicles (Third Part Insurance) Act, an insurance policy is required to give a cover of $4000 for any claim made by a passenger in the motor vehicle. This cover was extended to $250,000.00

for paying and non paying passengers and drivers who are employees. However this extended cover has been specifically excluded for the employees of the insured. The plaintiff being an employee is eligible to receive only $4000.00 from the policy and the 1st respondent will be entitled to be indemnified by the appellant for that amount.

[31] I am of the view that the learned Judge erred by concluding that section 2, clause 22 (b) of the policy not applicable as the plaintiff had not reached his work place and not in the course of employment. I have already said that the plaintiff had always been an employee. While considering the liability of the insurer under the Workmen's Compensation Policy the court was invited to consider whether the plaintiff was within the course of employment. The learned Judge held correctly that the plaintiff was not within the course of employment and therefore cannot claim under the Workmen's Compensation Policy. For all other purposes the plaintiff was an employee of the 1st respondent.

[32] The learned Judge also erred by stating that section 2, clause 22 (b) of the policy was contrary to proviso (a) (ii) of section 6 (1) of the Motor Vehicles (Third Party Insurance) Act which mandates compulsory insurance *"where persons are carried by reason of or in pursuance of a contract of employment"*. The transport that the plaintiff got was not by reason of or in pursuance of a contract of employment. It was only an ex-gratia facility. Therefore proviso (a) (ii) of section 6 (1) has no application.

[33] I am of the view that the learned Judge erred by holding the appellant liable by considering the clause under "*Legal Liability*" (section 2 of the policy) where the insurer undertakes liability "for personal injury to passengers (who are not fare paying passengers). Although the plaintiff could be considered as a *"not fare paying passenger"*, being an employee of the 1st respondent, was excluded by section 2, clause 22 (b) of the policy.

[34] The learned counsel for the appellant admitted its liability under proviso (b) to section 6 (1) and to pay $4000.00. Hence I will refrain from expressing any opinion on that. Only that the exclusion is clearly laid down in the policy under section 2, clause 22 (b) of the policy. The exclusion under section 2, clause 22 (c) has been removed by another specific clause

in the same policy. Thus it stands. But not section 2, clause 22 (b). That is the contract between the insured and insurer wherein I find no ambiguity.

[35] Hence the appellant's appeal has to be allowed subject to the indemnity of $4000.00 to the 1st respondent. In view of the $4000.00 indemnity payment by the appellant, I am of the view that the costs of this action should be borne by the parties. The judgment of the High Court is set aside.

Lecamwasam JA.

[36] I agree with the reasoning and the conclusions arrived at by Basnayake JA.

Kumar JA.

[37] I agree with the reasons given by Basnayake JA and that appeal be allowed with no order to as costs.

Orders of the court are:

1. *Appeal is allowed.*
2. *Judgment dated 1 June 2012 is set aside.*
3. *The appellant is required to indemnify the 1st respondent a sum of $4000.00.*
4. *No costs.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice K. Kumar
JUSTICE OF APPEAL