

In the High Court of Fiji  
at Suva  
Civil Jurisdiction  
Civil Action no. HBC 167 of 2014

Vusuya Enterprises Ltd

First plaintiff

And

Shiu Kamal Singh

Second plaintiff

v

Dominion Insurance Limited

Defendant

Counsel: Mr K. Maisamoa for the plaintiffs  
Mr Diven Prasad with Ms E. Dauvere for the defendant  
Date of hearing: 30<sup>th</sup> and 31<sup>st</sup> May, 2018  
Date of Judgment: 22<sup>nd</sup> March, 2019

**Judgment**

1. The statement of claim states that the second plaintiff, a Director of the first plaintiff, had purchased a second hand Nissan ten wheeler truck truck, (CH 751). The purchase was financed by Credit Corporation. The truck was insured with the defendant for a period of one year until 14<sup>th</sup> August, 2013. The truck caught fire on 11<sup>th</sup> October, 2012, at the Sawani junction. The plaintiffs allege that the defendant negligently prolonged and failed to repair the engine of the truck and its "wear and tear" to their expectation, in breach of the contract of insurance. It acted "fraudulently" by its delay, failing to salvage, reimburse the salvage costs and install the engine in a running condition. The defendant denied their legitimate expectation that it will repair and install their engine within a reasonable time.
2. The statement of claim continues to state that as a result of the delay, the second plaintiffs' contract with Arial Logging Consultant (Fiji) Ltd, (ALCFL) was terminated. The second plaintiff claims general damages for pain and suffering, denial of his legitimate expectations, negligence of the defendant and breach of contract. He also claims special damages of \$800, as salvage costs and \$84,000, as loss of income. The defendant denies the claim.

### *The determination*

#### 3. *The sequence of events*

- i. On 11<sup>th</sup> October, 2012, the engine caught fire. On 18<sup>th</sup> October, 2012, the first plaintiff made a claim to the defendant. The defendant's assessor inspected the engine on the same day.
- ii. On 24<sup>th</sup> October, 2012, the defendant's assessor reported that the fire damaged the inlet hose of the turbo charger. The claim for replacement of other parts is fraudulent.
- iii. On 23<sup>rd</sup> November, 2012, the defendant requested Aarkay Motors, (AM) to repair the engine and provide a full diagnosis after dismantling.
- iv. On 6<sup>th</sup> December, 2012, the assessor informed the defendant that he re-inspected the engine after it was opened.
- v. On 13<sup>rd</sup> December, 2012, AM informed the defendant that it has carried out the repairs. After dismantling the engine, it was found that the fire damaged only the top cover.
- vi. On 21<sup>st</sup> December, 2012, the defendant informed the plaintiffs that the fire related damages have been repaired. There was excessive wear and tear. The starter motor, (starter) and the bottom end of the engine were not damaged by the fire. The defendant requested a starter in order that the engine could be installed in the truck.
- vii. On 21<sup>st</sup> January, 2013, the second plaintiff lodged a complaint with the Reserve Bank of Fiji, (RBF).
- viii. On 19<sup>th</sup> April, 2013, the defendant agreed to give a warranty only on the parts changed at the RBF meeting. The second plaintiff agreed to provide the starter. He requested 4 weeks to repair the vehicle and have the engine fitted and tested.
- ix. On 9<sup>th</sup> August, 2013, the defendant informed the RBF that the extended two weeks sought by the first plaintiff after 19<sup>th</sup> May, 2013, had lapsed.
- x. On 3<sup>rd</sup> June, 2014, the first plaintiff's solicitor informed the defendant that his client insists that the engine be "*re-instated*" in the truck between 3<sup>rd</sup> and 5<sup>th</sup> June, 2014.
- xi. The defendant replied by email of 5<sup>th</sup> June, 2014, stating that AM is willing to install the engine at the first plaintiff's yard in Nausori on 9<sup>th</sup> June, 2014, and requested that batteries be provided to start the engine, as it had been diagnosed to have "*blow back*".
- xii. On 23<sup>rd</sup> June, 2014, the second plaintiff filed writ and statement of claim. The writ was filed in the first instance by the second plaintiff against the defendant. It was amended to include the first plaintiff. The policy of insurance was issued by the defendant to the first plaintiff

4. The case for the first plaintiff is that the defendant negligently and fraudulently delayed and failed to repair the engine to its expectation and install it in a running condition in its truck. It is also contended that the defendant failed to tow the truck and pay the salvage costs.
5. The defendant denies that it delayed to repair the engine and states that it repaired the damage caused by the fire. The plaintiff's claim for replacement of the entire engine was rejected. The plaintiff has to-date failed to collect the engine.
6. The main question for determination turns on what was the actual damage to the engine and the reason why the engine continues to be with the defendant.
7. The second plaintiff, (PW1) in evidence in chief said that the defendant nominated AM to repair the engine, without his consent. The starter was burnt by the fire. After the repair, he checked the engine with his mechanic, and the Consumer Council in January, 2014. It was not "running". The engine is still with the defendant. He complained to the RBF. As a result of the delay, the first plaintiffs' contract with ALCFL was terminated. In cross examination, it transpired that PW1 did not assess the damage caused by the fire. He denied that the defendant repaired the damage and only the top part of the engine was damaged by the fire.
8. PW3, (*Raj Chand of Autoforce Mobile Repairs*) in evidence in chief said that AM reported that it had replaced the conrod bearing, main bearing, fuel filter, oil filter and oil and reassembled the engine, but the excessive oil blowing in the engine does not seem to be repaired. He inspected the engine, only after it was repaired. In his Report of 16<sup>th</sup> January, 2014, he recommended that the engine be overhauled and the overhaul gasket, conrod bearing, main bearing and piston rings replaced. In cross-examination, he said that those parts get "worn out...by fair wear and tear".



9. DW1, (*Richard Kwon, the defendant's Assessor*) said that he inspected the engine at PW1's house. The fire had caused minor damage to the top cover of the engine and the external parts of the engine on the right side, viz, the air cleaner and the inlet hose of the turbo charger. The internal parts on the left side were not damaged by fire. The exhaust was not burnt. In November, 2012, he informed the defendant that the engine liner, main bearing, conrod bearing, turbo charger and other parts were not damaged. The overhead gasket, conrod bearing, main bearing and piston rings suggested by PW3, to be replaced were "worn out". The engine was overrun. The insurer only pays for the actual damage caused and not for wear and tear.
10. DW3, (*Saukat Ali, Mechanic, RPA Group( Fiji) Ltd*) said that he inspected the engine at the request of the defendant, at AM. There were no fire marks. He discovered the presence of immense back pressure from the breather hose, oil filler and dip stick. That was a result of the compression rings being worn, out due to normal wear and tear. Piston rings cannot get damaged by fire.
11. DW4, (*Rajendra Chohan, Managing Director, AM*) said that the "top component" of the engine had partial burns and was fixed. The valve cover gasket wiring, oil passage hose and few lines were damaged by fire and repaired. In January, 2014, he gave a report stating there was "lot of blow back from the engine breather..and dip stick outlet this saw that the engine compression ring and the internal component have worn out badly. This is normal wear and tear and there is nothing to do with fire of engine which he claims". The engine was overrun. There was "oil starvation", due to a modified oil strainer. There was no damage to the bottom of the engine.
12. DW5, (*Vikash Kumar, Manager of the defendant*) said that the defendant did not decline the claim. The defendant agreed to replace the external components of the engine. PW1 wanted the entire engine to be replaced. The policy excluded wear and tear. On 21<sup>st</sup> December, 2012, the defendant informed the plaintiffs that on a diagnosis of the entire engine, its experts found the top cover of the engine was damaged. There was no damage to the bottom of the engine by the fire. The internal "components had suffered wear and tear from normal usage". The starter and internal components had no relevance to the fire. The "engine was over run...excessive marks on the Main Bearing & the Conrod Bearing are also indicative of excessive wear and tear..".

13. The evidence reveals that neither PW1 nor PW3 had assessed the damage caused by the fire. PW1 said that he "*never knew what was wrong*". The first plaintiff did not produce a report on the damage caused to the engine or the starter. It is trite law that the burden of proving that the loss was caused by a peril insured against is on the assured.
14. DW1 and DW3 denied that the starter was burnt by the fire. They said that the starter was removed from the engine, as depicted in the photographs produced. DW1 said that the starter was burnt earlier and cannot be related to the part of the engine which got burnt. DW3 pointed out that the blue insulation tape signifies that the starter was not burnt by the fire.
15. Significantly, PW1 agreed to provide a starter to AM at the RBF meeting on 19<sup>th</sup> April, 2013. DW2, (*James Baledrokadroka, Manager, Legal, RBF*) said it transpired at the meeting, that the starter was not damaged by the fire. He said that RBF did not find that the defendant to be in breach of the policy of insurance nor negligent.
16. DW1, DW3 and DW4 confirmed the evidence of PW3 that the internal parts he recommended to be replaced were "*worn out...by fair wear and tear*". PW1, PW3 and DW3 said that the engine was well used. It was overrun.
17. On a review of the evidence as a whole, I accept the evidence of the witnesses for the defence on the damage caused by the fire. I found DW1, DW3, DW4 and DW5 to be truthful and objective witnesses. Their testimony on the condition of the engine and the wear and tear of the internal parts was supported by contemporaneous reports and consistent with the evidence of PW3.
18. I hold that only the top part of the engine was damaged by the fire and was repaired by the defendant. The starter was not damaged by the fire. The evidence conclusively revealed that the "*blow back*" condition of the engine was due to wear and tear and not the fire.
19. In my judgment, wear and tear of the internal parts of the overrun engine is not covered under the policy. The truck was insured against "*sudden accidental physical loss or damage not excluded elsewhere in this policy*". Wear and tear is excluded under section 18.



20. Next, the plaintiff complains that AM dismantled the engine without his consent and the defendant declined to give a warranty on the engine.
21. In my view, the defendant was entitled to dismantle the engine, in order to repair the vehicle *"to a condition substantially the same as (but not necessarily) better than) its condition immediately before the loss.."*(section 1 of the policy) and ascertain if the internal parts were damaged by the fire, as claimed by the first plaintiff.
22. The evidence discloses that it was necessary to dismantle the engine. PW1 said that he was unaware of the damage, since he did not dismantle the engine. PW3 said that the piston rings and overhead gasket are visible when the engine is dismantled. DW4 said that PW1 consented to the dismantling. The engine was not taken to pieces. Only the sump at the bottom and valve cover on top were removed.
23. AM declined to give a warranty on a second hand engine for the reason that *"it require(d) an installation of original oil pump with complete strainer and engine needs a general overhaul; due to normal wear and tear, considering the age"*, as stated by its Manager in his email of 13<sup>th</sup> December, 2012, to DW5. Subsequently, at the RBF meeting, AM agreed to give a limited warranty on the parts replaced.
24. In my view, the defendant was justified in declining to give a warranty on the entire engine, since the engine was admittedly old, well used and overrun.
25. I do not find that there has been a delay on the part of the defendant in repairing the engine for the following reasons.
26. The engine was repaired by AM on 13<sup>th</sup> December, 2012, and the first plaintiff was accordingly, informed by letter of 21<sup>st</sup> December, 2012.
27. On 21<sup>st</sup> January, 2013, the second plaintiff lodged a complaint with the RBF. At the final RBF meeting on 19<sup>th</sup> April, 2013, PW1 requested 4 weeks' time to repair the vehicle before the engine is fitted and tested and agreed to pay the policy excess to AM before the truck is discharged.

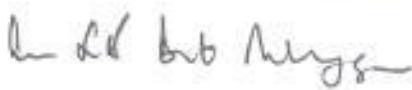
28. On 9<sup>th</sup> August, 2013, the defendant informed the RBF that the extended time frame which lapsed on 19<sup>th</sup> May, 2013, has also "*lapsed by months*" and the engine is still at AM.
29. On 3<sup>rd</sup> June, 2014, the first plaintiff's solicitors wrote to the defendant requesting that the engine be re installed in the truck between 3<sup>rd</sup> and 5<sup>th</sup> June, 2014. The defendant replied by email of 5<sup>th</sup> June, 2014, stating that AM is willing to install the engine at the first plaintiff's yard in Nausori on 9<sup>th</sup> June, 2014, and requested that batteries be provided to start the engine, as it was diagnosed to have "*blow back*" caused by low compression.
30. There followed this action filed in June, 2014, as Mr Prasad, counsel for the defendant points out in his closing submissions.
31. DW5 said that the first plaintiff did not permit AM to install the engine.
32. Mr Maisamoa, counsel for the plaintiffs put it to DW4 that the first plaintiff did not collect the engine, as it was not happy with its performance. DW4 said that PW1 wanted the engine to "*tip-start at the first rank*", which meant to start as the key turned. That was not possible due to the condition of the overrun engine due to wear and tear.
33. I conclude and find it is the first plaintiff which delayed and failed to collect the engine for the reason.
34. In my judgment, the plaintiff's claim for general damages for pain and suffering, negligence and fraud on the part of the defendant, breaching the legitimate expectation of the first plaintiff fails and loss of income is unfounded and declined.
35. Finally, I deal with the first plaintiff's claim for salvage costs of \$800, as specifically pleaded in the statement of claim
36. The policy of insurance provides that the defendant will pay the "*reasonable cost of removing the insured vehicle to the nearest repairer or place of safety*".

37. DW5, in cross examination stated that where liability is admitted, the insurer would reimburse the cost of salvage to the insured.
38. PW1 testified that he towed the truck from Sawani junction. It cost \$ 800, as it contained logs. His evidence on this point was not challenged in cross examination, as quite correctly submitted by Mr Maisamoa in his closing submissions. Nor did the defendant call any evidence to prove that the claim was unreasonable.
39. In the circumstances, I accept the evidence of PW1 that he incurred \$800 to tow the truck.
40. In *Narendra Kumar v Sairusi Drawe, Minister for Home Affairs and Auxillary Army Services and The AG*, [1990]36 FLR 90 at page 95, Palmer J stated:
- Notwithstanding that not a single receipt has been produced in evidence  
I am satisfied from the Plaintiff's evidence that he paid those amounts*
41. In my judgment, the first plaintiff is entitled to be reimbursed the cost of salvage of \$800 by the defendant together with interest, as claimed.

**42. Orders**

- i. The plaintiff's claim for damages against the defendant is declined.
- ii. The plaintiff's claim for loss of income is declined.
- iii. The defendant shall pay the first plaintiff salvage costs of \$ 800 together with interest at 3% per annum from 11<sup>th</sup> October, 2012, to 25<sup>th</sup> June, 2016( date of filing amended writ).
- iv. The defendant shall pay the first plaintiff costs summarily assessed in a sum of \$ 1000.



  
**A.L.B. Brito-Mutunayagam**  
**JUDGE**  
22<sup>nd</sup> March, 2019