

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 24 of 2023

BETWEEN : **DALIP SINGH** of Tacirua, Suva, Fiji as the Administrator of
the **ESTATE OF MELVEEN RONALD SINGH**

PLAINTIFF

AND : **SUN INSURANCE COMPANY LIMITED** an insurance
company having its business at Level 1, Kaunikuila House,
Laucala Bay, Suva.

DEFENDANT

Before: Hon. Mr. Justice Deepthi Amaratunga

Counsels: Mr. Shelvin Singh for the Plaintiff
Mr. R. Singh for the Defendant

Date of Judgment: 28 May 2025

JUDGMENT

INTRODUCTION

- [1] Plaintiff had obtained judgment against insured of Defendant who was not joined to the action as third party by insured. (see Supreme Court decision of Sun Insurance Co Ltd v Qaqanaqele [2017] FJSC 23; CBV0009.2016 (21 July 2017))
- [2] Plaintiff is seeking orders in terms of Section 11 of Motor Vehicle (Third Party) Insurance Act 1948 (Repealed)¹ read with Section 33 of Accident Compensation Act 2017.
- [3] In terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948, Defendant was liable for the satisfaction of judgment entered against insured, only if it had 'notice' in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948. Supreme Court held in Dominion Insurance Ltd v Bamforth [2003] FJSC 3; CBV0005.2002S (24 October 2003) held that there is no discretion to extend time period beyond seven days and strict compliance of that is required.

¹ Motor Vehicle (Third Party) Insurance Act 1948 and its Regulations were repealed by Section 31 of Accident Compensation Act 2017.

- [4] So the burden of proof is with Plaintiff to prove that Defendant was served with 'notice' in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.
- [5] Plaintiff in this action relied on a letter of Defendant to insured dated 3.11.2011, which had denied receipt of any 'notice' in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948. This letter was copied to Plaintiff's then solicitors and if Plaintiff's solicitors notified about the said action instituted against insured, they could have stated so. Absence of such evidence show that Plaintiff had failed to inform Defendant about the '*proceeding in which judgment was given*'.
- [6] This is the only evidence Plaintiff produced for the satisfaction of 'condition precedent' in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948 in terms of Supreme Court decision of *Dominion Insurance Ltd v Bamforth* [2003] FJSC 3; CBV0005.2002S (24 October 2003).
- [7] Plaintiff has failed to prove that '*before, or within 7 days after the commencement of the proceedings in which the judgment was given, the insurance company has notice of the bringing of the proceedings*' which was a condition precedent for enforcement of judgment against Defendant as the insurer, when it was not joined as third party to the proceedings where judgment was obtained against the insured.
- [8] Supreme Court decision of *Sun Insurance Co Ltd v Qaqanagele* [2017] FJSC 23; CBV0009.2016 (21 July 2017) was an action where insurer was joined as third party by the insured in contrast to present action where Plaintiff is seeking to enforce the judgment obtained against insured.
- [9] So this Supreme Court decision can be distinguished and had not overruled ratio of *Dominion Insurance Ltd v Bamforth* [2003] FJSC 3; CBV0005.2002S (24 October 2003).

ANALYSIS

- [10] The Plaintiffs Originating Summons filed on 30.1. 2023 sought the following Orders:
1. An Order that the Defendant, Sun Insurance Company Limited do satisfy the judgment obtained by the Plaintiff against the Defendant's insured Bernadette Sera Filipo Nicholls t/a Plumbing & Property Services in Suva High Court Civil Action No. 322 of 2011 (pronounced on 22 August 2018) and in Fiji Court of Case No. ABU 97 of 2018 (pronounced on 30 September, 2022).
 2. An order that pursuant to section 11 of the Motor Vehicles (Third Party) Insurance Act, Chapter 177 and section 33 (1) of the Accident Compensation Act 2017, the Defendant Sun Insurance Company Limited pay the Plaintiff.
 - a. The sum of \$48,820.00
 - b. Costs of \$10,000.00
 - c. Interest on Judgment in such rate and on such amount

- [11] Plaintiff in support of his Originating Summons filed Affidavit and the facts in the said affidavit are not disputed including the documents annexed.
- [12] There is no evidence that either Plaintiff and or his then solicitors notified the Defendant regarding action instituted against insured.
- [13] So the short answer to the issue is Plaintiff cannot seek to indemnify its judgment against the insured wrongdoer without fulfillment of 'condition precedent' contained in Section 11(2)(a) of Motor Vehicle (Third Party) Insurance Act 1948
- [14] Defendant filed its Affidavit in Opposition but in that affidavit Defendant had not denied relevant facts but Plaintiff had not provided evidence of 'notice' of '*proceedings in which the judgment was given*' except annexed letter marked 'E' to the affidavit in support.
- [15] Plaintiff's contention is made in speculation rather than proof of a fact on balance of probability.
- [16] This letter marked 'E' to the affidavit in support is a communication of Defendant to insured which was also copied to Plaintiff's then solicitor. In this letter Defendant stated *inter alia*
- i. Admit receipt of writ of summons regarding '*proceedings in which the judgment was given*' on 1.11.2011.
 - ii. The '*proceedings in which the judgment was given*' commenced on 21.10.2011.
 - iii. Breach of Section 11(2) [a] 'condition precedent'
 - iv. Will not participate or indemnify
 - v. Refuses to take part in proceedings.
 - vi. Requested insured to seek legal advice.
- [17] So the insured as well as Plaintiff were informed by Defendant its position of denial of service of proceedings in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.
- [18] If Plaintiff desired indemnification of the judgment by insurer in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.
- [19] The insured could have sought to join Defendant if desired. This was held in Supreme Court case of Sun Insurance Co Ltd v Qaganaqele [2017] FJSC 23; CBV0009.2016 (21 July 2017). Plaintiff in this action relied on that decision, but the legal position in that case was different as insurer was already joined as third party by insured.
- [20] The Plaintiff filed his Affidavit in Reply state in the paragraph seven that 'obligation to satisfy the judgment against insured' is not exempted in terms of Section 11(2) of

Motor Vehicle (Third Party) Insurance Act 1948. This is correct, provided other requirements under said Act were met and if insured sought to join Defendant as third party to proceedings in terms of High Court Rules 1988. (see Sun Insurance Co Ltd v Qaganaqele [2017] FJSC 23; CBV0009.2016 (21 July 2017))

- [21] Plaintiff's position is different as he is seeks to enforced the judgment, where Defendant was not joined as third party in terms of High Court Rules 1988, by insured.
- [22] In this instance for reasons best known such course of action was not taken by insured party, despite being informed of refusal to indemnify on if judgment made against insured 3.11.2011. Insured is not a party to this originating summons.
- [23] Plaintiff had obtained judgment against insured, and in this originating summons seeks an order of the court against Defendant based on Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.
- [24] In order for Plaintiff to obtain such an order there is a 'condition precedent' that required proof in this action. So what evidence presented to court for the proof of 'condition precedent'.
- [25] This is the fact of 'notice' to Defendant about '*proceedings in which the judgment was given*' within seven days from commencement said proceedings where claim against insured made or 'before' such commencement.
- [26] The only evidence of 'notice' of the 'proceedings' is letter annexed 'E' to the affidavit in support. This is a latter of Defendant to insured against whom judgment was obtained in Court of Appeal.
- [27] The burden of proof of 'notice' in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948 is with Plaintiff.
- [28] In Supreme Court decision of Dominion Insurance Ltd v Bamforth [2003] FJSC 3; CBV0005.2002S (24 October 2003) held,

"The nature of s.11(2)(a) as a condition precedent to the insurer's statutory liability suggests that its satisfaction **is a matter to be demonstrated by a plaintiff seeking recovery against the insurer** rather than its non-satisfaction being a matter which the insurer must show in order to resist a plaintiff's claim against it. This appears from decision of the Court of Appeal in Wake v. Wylie. "(Emphasis is mine)
- [29] So the issue before this court is, whether Plaintiff had proved 'notice' in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.
- [30] The letter marked 'E' to the affidavit in support only shows Defendant had denied any notice in terms of law and it had notified both insured as well as Plaintiff that it would not indemnify as the 'notice' of proceedings was not brought to its 'notice' within seven day time period.

[31] There is no dispute that Defendant was 'noticed' after seven day time period from "commencement of proceedings in which judgment was given".

[32] Section 11(2)(a) of Motor Vehicle (Third Party) Insurance Act 1948 required strict compliance and this was held in Supreme Court decision of Dominion Insurance (supra). According to said Supreme Court decision there is no room for court to extend the time period.

[33] Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948, states

"Duty of insurance company to satisfy judgements against persons insured

in respect of third party risks

11.-(1) If, after a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under the provisions of paragraph (b) of subsection (1) of section 6, being a liability covered by the terms of the policy, is obtained against any person insured by the policy, then, notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company shall, subject to the provisions of this section, pay to the persons entitled to the benefit of such judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable by virtue of any written law in respect of interest on that sum.

(2) No sum shall be payable by an approved insurance company under the provisions of subsection (1)-

- (a) **in respect of any judgment unless before, or within 7 days after the commencement of the proceedings in which the judgment was given**, the insurance company has notice of the bringing of the proceedings; or
- (b) in respect of any judgment so long as execution thereon is stayed pending an appeal; or
- (c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein and either-
 - (i) before the happening of such event, the certificate of insurance was surrendered to the insurance company or the person to whom the certificate of insurance was delivered made a statutory declaration stating that the

certificate of insurance had been lost or destroyed and so could not be surrendered; or

- (ii) after the happening of such event but before the expiration of 14 days from the taking effect of the cancellation of the policy, the certificate of insurance was surrendered to the insurance company or the person to whom the certificate of insurance was delivered made a statutory declaration that the certificate of insurance had been lost or destroyed and so could not be surrendered; or
- (iii) either before or after the happening of the event but within a period of 14 days from the taking effect of the cancellation of the policy, the insurance company had commenced proceedings under this Act in respect of the failure to surrender the certificate of insurance.

(3).....”

[34] There is no dispute that Defendant in annexed ‘E’ to the affidavit in support on 3.11.2011 had denied receipt of ‘notice’ of proceedings before the court where judgment was obtained in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.

[35] Plaintiff admit that proceedings seeking damages against the insured commenced on 21.10.2011. The only evidence of service of such proceedings is annexed ‘E’ to the affidavit in support. This letter was dated 3.11.2011. In that affidavit Defendant had admitted receipt of ‘copy of writ of summons’ on 1.11.2011.

[36] So the said service of ‘notice’ through receipt of ‘copy of writ of summons’ was ten days after commencement of ‘*proceedings in which the judgment was given*’. This is not proof of ‘condition precedent’.

[37] Plaintiff seemed to rely on the word ‘before’ contained in Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948. This is nonstarter. Plaintiff cannot speculate on the first sentence of annexed ‘E’ to the affidavit in support which stated some communication between insured and Defendant around 11.12.2010. This was nearly eleven months and ten days prior to institution of action by Plaintiff seeking damages and also sought some ‘rectification’ of an outstanding issue by the insured.

[38] In the letter ‘E’ stated;

‘Further to our letter of 22nd December, 2010 we noticed that you have not taken any action to rectify the situation.

Be that as it may, we confirms having received a copy of Writ of Summons issued by the Plaintiff’s Solicitor. The cop was received on 1st November,

2011, however it was not clear whether it was forwarded from your office or from the Plaintiff's Solicitor.

The problem is that this Writ of Summons was issued on 21st October, 2011 and was not brought to our notice within 7 days as required under Section 11(2) of...."

- [39] There was no reference in said letter of 22.12.2010 refers to 'proceedings' instituted by Plaintiff against Defendant. This only proves that insured and Defendant were communicating regarding some 'rectification' of an outstanding issue which neither party had shed light. Defendant state they do not have correspondence as more than twelve years lapsed. This communication was copied to Plaintiff's then solicitors and this shows Defendant had notified that they would not satisfy the judgment against insured, and Plaintiff proceeded with the said action.
- [40] Plaintiff's then solicitors were aware of the said legal position and obtained judgment against insured knowing that it could not be enforced against insurer in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.
- [41] Plaintiff's present solicitors who also represented Plaintiff, in Court of Appeal has no evidence to prove 'notice' of said proceedings against insured, to Defendant. Annexed 'E' to the affidavit in support falls short of such proof required in terms of law.
- [42] Supreme Court in Dominion Insurance Ltd v Bamforth [2003] FJSC 3; CBV0005.2002S (24 October 2003) was dealing with an insurer who was made a party to an action but the service of 'notice' was thirteen days from the institution of the said action. Supreme Court held,

"It is possible, with a purposive approach to the construction of s.11 (2)(a) to eschew formality in the kind of notice required provided that it meets the substantive object of the provision. That object is to make the insurer aware, one way or the other, of the proceedings which are contemplated or have been commenced against a person covered by the policy. The term "notice" is sufficiently wide to allow a wide construction to be adopted which serves the purposes of the section. The language of s.11(2)(a) itself supports a wide construction as it matters not how the insurer gets notice of the proceedings **as long as it "has notice" within the requisite time.**

But the nature of the condition in s.11 (2)(a) as a condition precedent which marks out the boundary of the insurer's liability does not allow any "substantial compliance" construction. The condition is either met or not. No question of "compliance" arises for, unlike section 16, it does not purport to impose any duty on any person to notify. It simply requires that the insurer "has notice." Who then is to comply? "Substantial compliance" in this context must equate to "substantial fulfilment" of the requirement. So far as the time limit is concerned a construction which permits fulfilment after the expiry of the time limit is a construction which involves a legislative redrafting of the provision. This is not a function which the Court is authorised to undertake. In some jurisdictions the Court is empowered to relieve a party from the

effects of non-satisfaction of the condition where no prejudice is suffered by the insurer as the result of the delay – see for example s.29A of the Motor Vehicle (Third Party) Insurance Act (W.A.). To so provide is to provide for the enlargement of the statutory liability imposed on the insurer by the section.”(emphasis added)

[43] Supreme Court in Dominion Insurance (supra) further identified the harshness and injustice that may result from the interpretation and further held,

“While Courts should construe legislation, where possible, in a way that renders it workable rather than unworkable they must accept that the language may in some cases not permit a construction preferred on that basis. In such a case the legislature has made the judgment as to workability and the Court cannot substitute its own judgment to rewrite the Act.

It is almost always the case that strict time limits for doing anything will work injustice in some cases. It may be desirable that the legislature should make provision for Courts to ameliorate those injustices by permitting discretionary relief from the requirement of the time limit as for example does s.29A of the Motor Vehicle (Third Party) Insurance Act (W.A.).”

[44] Supreme Court had in Dominion Insurance (supra) had stated in that time period must be complied though it may cause ‘injustice’ in some cases. It also held that mode of communication can vary, but not seven day window to ‘notify’ from commencement of an action.

[45] So if Plaintiff desired indemnification of judgment Plaintiff must satisfy ‘condition precedent and Plaintiff had failed to do so. So Plaintiff cannot seek an order against Defendant to satisfy the judgment against insured.

[46] This legal provision had created some ambiguity, but Supreme Court had cleared the air in 2003 in Dominion Insurance (supra). This is still the legal position applicable to Plaintiff, who seeks an order from court to satisfy the judgment against insured, without joining Defendant as third party.

[47] In Dominion Insurance (supra) the insurer was a Defendant and not joined as third party. So it cannot be applied to cases where insurer, joined as third party.

[48] Plaintiff cannot rely on Sun Insurance Co Ltd v Qaganagele [2017] FJSC 23; CBV0009.2016 (21 July 2017) as this was an action where insured joined insurer as third party in terms of High Court Rules 1988. In such a case the basis of judgment against an insurer joined as third party is the determination of third party claim hence legal positions is different from Plaintiff’s position. So said Supreme Court decision cannot be misapplied to present scenario.

[49] For completeness following provision is considered as above legal provision is repealed but remains applicable due to ‘grandfather provision’, in Section 33 of Accident Compensation Act 2017.

[50] Plaintiff had also relied on Section 33 of Accident Compensation Act 2017 which reads;

[ACC 33] Claims under the repealed Act

“33.—(1) Any proceeding, claim or action for compensation for personal injury or death arising from a motor vehicle accident in Fiji which occurred before 1 January 2018 involving a motor vehicle that is covered by a policy of insurance under the repealed Act must be dealt with in accordance with the repealed Act.

(2) Any claim for compensation for personal injury or death as a result of a motor vehicle accident in Fiji which occurred on or after 1 January 2018 involving a motor vehicle that is covered by a policy of insurance under the repealed Act must be made by way of an application to the Commission in accordance with section 20.

(3) Where any claim is made to the Commission under subsection (2), the Commission must, with respect to any claim for compensation under subsection (2), consider and determine the claim in accordance with Part 3, and the insurance company must pay to the Commission such amounts as are required under Part 3.”

[51] In terms of Interpretation provision of Accident Compensation Act 2017

“Repealed Act means the Motor Vehicle (Third Party Insurance) Act 1948.”

[52] So the interpretation should be in terms of repealed Motor Vehicle (Third Party) Insurance Act 1948 though this law was fully repealed by Accident Compensation Act 2017, as the cause of action arose prior to 1.1.2018.

[53] Accordingly, ratio of Supreme Court decision of Dominion Insurance (supra) is binding.

CONCLUSION

[54] Admission of service of writ of summons in the said proceedings instituted against to Defendant about ten days after institution of proceedings, did not satisfy the ‘condition precedent’ required by Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948.

[55] Plaintiff on the balance or probability had failed to prove that Defendant was notified of the proceedings for damages against the insured in terms of Section 11(2) of Motor Vehicle (Third Party) Insurance Act 1948. No cost awarded considering the circumstances of the case.

FINAL ORDERS:

- a. So this originating summons struck off.
- b. No cost awarded.




.....
Deepthi Amaratunga
Judge

At Suva this 28th May, 2025.

Solicitors

Shelvin Singh Lawyers
Sherani & Company Lawyers