

No. 2 of 1977

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

B E T W E E N :

PANG LIN alias PHANG YOKE LIN
(Plaintiff)

Appellant

- and -

10 CHINA INSURANCE COMPANY LIMITED
(Defendant)

Respondent

CASE FOR THE APPELLANT

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1. This is an appeal by leave of the Federal Court of Malaysia (Appellate Jurisdiction) at Kuala Lumpur from an Order, dated the 27th August 1975, of the said Federal Court (Suffian, L.P., Wan Suleiman F.J. and Chang Min Tat. J.) dismissing an appeal by the Appellant from a Judgment, dated 14th March 1975, of the High Court in Malaya at Kuala Lumpur (Hashim Yeop A. Sani. J).
- 20 pp. 51-53
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2. The Appellant, the owner of a motor car, No. P.H. 800, whose use was covered by a policy of insurance ("the policy") issued to him by the Respondents on the 30th October 1970, had instituted proceedings in the High Court against the Respondents claiming:
- pp. 20-32
- 30 (a) A declaration that the deletion of Clause 2(b) of Section II of the policy was null and void and of no effect.
- (b) Rectification of the policy by reinstating the deleted clause.
- (c) A declaration that the Respondents were, subject to the conditions stated in the policy, liable to indemnify the Appellant
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against any damages and costs which he might become liable to pay to any person in respect of death or bodily injury consequent upon an accident which had occurred on 4th April 1971 involving a motor car No. B.P. 1064 being driven by the Appellant.

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3. On the 7th October 1970 the Appellant applied to the Respondents for a policy of insurance for his said motor car. He signed a Proposal Form which was the usual type of form supplied and used by the Respondents. Since the Appellant did not understand English, the form was filled in for him by the manager of the motor car dealers that had sold the car to the Appellant, to whom the Appellant had stated that he wanted "a first class" policy.

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4. On the subject of the type of policy required the Proposal Form contained the following printed question:-

"Is a Comprehensive, Third Party or "Act Only" cover required?"

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To this question the answer given on the Appellant's behalf was "Comprehensive". At the foot of the Proposal Form were stamped the words:

"Please note: all passengers' liability is not included in private car insurance."

But nowhere in the Proposal Form was the Appellant specifically asked whether he wished to have a policy to cover his driving a private motor car not belonging to him and not hired to him under a hire-purchase agreement, nor was there any notice or warning that the Respondents' private motor policy did not include such cover.

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5. In the Proposal Form the Appellant agreed that the statements and particulars made therein by him should form the basis of the contract between the Respondents and himself.

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6. On the same day the Respondents issued to the Appellant a cover note wherein it was stated that the Appellant was to be held covered in the terms of the Respondents' usual form of comprehensive policy applicable thereto for the period of 9.00 a.m. on 7th October 1970 to midnight on 6th October 1971.

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7. On the 30th October 1970 the Respondents issued the policy wherein it was stated by way of pre-amble that the proposal and declaration of the Appellant should be the basis of the contract of insurance and should be deemed to be incorporated in it. There was a conflict of evidence which

remained unresolved as to whether the Appellant ever received the policy.

Prior to issue, the Respondents had deleted Clause 2(b) of Section II of the policy which, insofar as is relevant reads as follows:

"2. In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify

10 (b) the Insured whilst personally driving a private motor car but not belonging to him and not hired to him under a hire-purchase agreement."

20 8. The printed words of the policy (as opposed to the various endorsements and deletions) were prescribed by the Motor Tariff Regulations issued by the Malaysian Insurance Association ("the Association") of which the Respondents are members. The Regulations and rates of premium are deposited with the Commissioner for Insurance, a civil servant, and, after approval, are published by the Association. By a circular letter, dated 10th January 1964, all members of the Association were required to print and use the standard policy wording as laid down by the Tariff. By a further circular letter, dated 7th September 1972, the Committee of the Association informed all members that any deletion of Clause 2(b) of Section II of the standard policy which had the effect of their avoiding liability if their Assured met with an accident whilst driving a motor car not belonging to him was incorrect and was regarded as a breach of the Tariff.

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9. The Appellant's case was :-

- (i) That the Proposal Form and Cover Note together constituted a binding contract to issue the Appellant a policy in their usual form and that the usual form was that prescribed by the Association.
- 40 (ii) That the Respondents' deletion of Clause 2(b) of Section II was unauthorized and/or unlawful in that it contravened the Association's Tariff.
- (iii) That since the Respondents had charged no lesser premium despite the deletion of the said clause, the deletion lacked consideration.

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- (iv) That if the Respondents accepted the Appellant's proposal, the terms of the subsequent policy must not be repugnant to those of the Proposal Form.

10. The Respondents' case was that the Appellant was only entitled to their usual form of policy which, at the relevant date, was the policy with the deletion. They produced twenty policies of insurance issued during the relevant period with Clause 2(b) of Section II deleted.

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11. The learned Trial Judge (Hashim, Yeop. A. Sani J) decided that the regulations of the Association formed a code of conduct for its members but that a breach of these regulations entailed no legal consequences. Having reviewed the authorities, he said:

"The crucial question in this case to my mind will be this: What was the "usual policy" or the "ordinary policy" that the Plaintiff expected from the defendants when he signed the proposal form (P3) on 7th October, 1970, and conversely, what was their "usual form of comprehensive policy" that the defendants meant in their cover note issued to the plaintiff (P2) on the same date? Was the deletion of clause 2(ii)(b) of Section II of the policy issued by the defendants to the plaintiff (P.1) on 30th October, 1970, a deletion of an ordinary term of the defendants' comprehensive policy? Is the policy (P1) in accord with the proposal in P2 and P3?

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What would be the most reasonable conclusion of the Court when reading the three documents P1, P2 and P3 in determining the nature of the bargain between the plaintiff and the defendants? The contract between the Plaintiff and the defendants, like any other contract, must be construed reasonably; it must be construed not only by the words used but also with regard to the surrounding circumstances. To answer the crucial question satisfactorily therefore we must fall back to the facts of this case. What are the facts? It is clear from the evidence, including that of the plaintiff himself, that the policy in question (P1) was not the first policy that he obtained from the defendants. It is also clear from the evidence that in respect of the policy which he had obtained for his previous car and the policy for the present car the same procedure was taken by him with D.W.1. The policy which he obtained in respect of the

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previous car also contained the deletion of the same clause. Therefore it would only be reasonable to conclude under the circumstances that the Plaintiff would have expected the same policy as he had obtained before, in the absence of any strong evidence that he actually and expressly asked for a policy without the deletion. There is no such evidence. Merely to ask for a "comprehensive" policy is not enough. The deletion of clause 2(b) of Section II of the policy does not contravene the requirements of Part IV of the Road Traffic Ordinance, 1958.

On the other hand, it is clear that the defendants during the material period issued a comprehensive policy in accord with sections 74 and 75 of the Road Traffic Ordinance, 1958 but in each of these policies issued clause 2(ii)(b) was deleted (D14, D15). It cannot be argued therefore that clause 2(ii)(b) was an ordinary term in the policy of the defendants during the material period. My own conclusion is that under the terms of the proposal (P2 and P3) the plaintiff was entitled to a policy in the ordinary form issued by the defendants and on the evidence itself the deletion of the clause is indeed a part of the ordinary policy of the defendants. The question of the plaintiff having been asked to pay the "standard premium" does not arise and does not have any bearing in the present case. With these facts it would be impossible to come to any other conclusion than that the policy in question was in fact issued by the defendants to the plaintiff to give accord to the real bargain between the parties and in fact represents the actual contract."

12. From this Judgment the Appellant appealed to the Federal Court. The appeal was heard on 24th June 1975 by a bench consisting of Suffian L.P., Wan Suleiman F.J., and Chang Min Tat J. and the judgment was given by Chang Min Tat. J. on 27th August.

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13. Chang J. noted that the Appellant did not understand English, and that there was an issue of fact between the Appellant and the seller of the car as to whether the latter had explained to the Appellant that a "first class" policy would include cover whilst driving a car belonging to some other person. The Appellant's evidence had not disclosed what was the exact policy he had asked for. "In the circumstances of this case"

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said the learned Judge, "it must be a matter for grave doubt that this untutored motorist did have any requirement for the cover which was deleted."

14. On the subject of the "usual form" of policy and the effect of the Association's regulations, the learned Judge said:-

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"It is my view clear that whether a member had committed a breach (of the regulations) was strictly a matter between the general body and the member concerned and could have no bearing on the question whether the act leading to the breach was lawful or within the power of the member to do.

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As to this there can be no doubt that the cover given in Clause 2(b) of Section II in the standard form of policy which was mandatory for members to use was not a statutory requirement for compulsory Third Party insurance under the Road Traffic Ordinance 1958".

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15. Having said that the Association's regulations were no more than a code of conduct, the learned Judge went on to say:

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"The basic difficulty encountered by the appellant was that in a contract with his insurers, it was the insurers' usual form of policy that he asked for and was given, not the common policy of the M.I.A., and that he could not dispute that the insurers' usual policy as used at the relevant time was with the sub-clause deleted."

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16. The learned Judge then concluded that, on the facts as found by the Trial Judge, this was not a case where the insured got a policy for which he did not bargain and that Croisdale's Case 1931 40 Lloyds List Reports p.22, did not apply. The Appellant had obtained substantially the policy he had asked for. Nor had there been any question of mutual mistake within the provisions of Section 30 of the Specific Relief Act 1950.

17. Accordingly, by Order of the Federal Court, dated 27th August 1975, the appeal was dismissed with costs.

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18. The Appellant submits that both the learned Trial Judge and the Federal Court misdirected themselves as to the nature of the insurance cover which he was requesting from the Respondents. Due to the manner in which the Respondents' standard Proposal Form was designed and printed, the choices of cover stated to be available were:

- (i) Comprehensive
- (ii) Third Party
- (iii) "Act only".

Consequently, any person wishing to obtain insurance cover whilst driving someone else's vehicle would be bound to select the first of these, since the others would clearly be inadequate.

10 19. It is therefore submitted that, in the circumstances of this case the proper construction of the word "comprehensive", and that which would be understood by ordinary reasonable men, includes cover whilst driving someone else's vehicle.

20 20. Such a construction is supported by the fact that the standard printed form of policy current at the time, which all members of the Association were obliged to use, contained an express clause which provided such cover. The deletion of such a clause was the exception rather than the rule and was, in fact, a breach of the Rules of the Association.

30 21. It is therefore submitted that the correct interpretation of the answers given on the Appellant's behalf in the Proposal Form which were stated to be the basis of the contract of insurance and deemed to have been incorporated in the policy subsequently issued, was that the Appellant was offering to purchase from the Respondents insurance cover whilst driving someone else's vehicle. It is submitted that the learned Trial Judge was wrong to hold that there must be strong evidence to show that the Appellant specifically asked for a policy without the deletion; and the Federal Court also erred in saying that it was incumbent upon the Appellant to disclose the exact type of policy for which he was asking. If the Respondents wished to exclude certain types of risk from the standard policy, it was for them to indicate clearly on the Proposal Form that cover in respect thereof would not be available unless specifically asked for (In re Bradley 1912 1 K.B. 415).

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22. It is also submitted that the learned Trial Judge was wrong in concluding that the Appellant would have expected the same type of policy which he had had for his previous

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motor car. The learned Judge overlooked the significance of the Appellant having asked (in Chinese) for a "first class policy". The conclusion to which the learned Judge came on the aspect of the case pre-supposes that the Appellant had read the policies, whereas his evidence, which was not rejected, was that he had neither received nor read either policy. It is submitted that, as a matter of law, he was not bound to read the policies (South East Lancashire Insurance -v- Croisdale 1931 40 T.L.R. 22). No inferences adverse to the Appellant should have been drawn from the fact that he had had a previous policy which, unbeknown to him, had contained the deletion.

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23. By issuing to the Appellant a policy on the basis of and incorporating the Proposal Form without indicating sufficiently or at all that Clause 2(b) of Section II had been deleted, the Respondents must be taken to have accepted the Appellant's proposal in the terms made. Thus the policy containing this deletion of the said Clause does not correctly record the agreement arrived at between the parties and should be rectified by the reinsertion of the said clause.

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24. Alternatively, the deletion of Clause 2(b) of Section II, when compared with the proper construction of the Proposal Form constitutes a patent ambiguity which ought to be resolved in a manner adverse to the Respondents. In the further alternative, the Proposal Form should be deemed to override the policy where they are inconsistent (Bradley's case supra: per Farwell, L.J.).

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25. It is further submitted that, by issuing the policy without any sufficient indication that they were not prepared to afford cover to the Appellant whilst driving someone else's vehicle, the Respondents were, in effect, representing to the Appellant that they were accepting his proposal in the terms made and are therefore estopped from relying on the deletion of Clause 2(b) of Section II.

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26. Alternatively, it is submitted that the Respondents "usual form of policy", to which the Appellant was entitled, was their standard printed form without deletions. Having used such a printed form, as they were obliged to do by virtue of the Rules of the Association, the Respondents should not be allowed to make a material alteration in the nature and extent of the cover afforded without specific notice to their Assured.

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27. The Appellant humbly submits that this appeal

should be allowed, that the Judgments and Orders of the Federal Court and of the High Court should be set aside, and that instead:-

- (i) It should be declared that the deletion of Clause 2(b) of Section II of the policy is null and void and of no effect.
- (ii) The said policy should be rectified by reinstating the said clause.
- (iii) It should be declared that the Respondents are, subject to the conditions contained in the policy, liable to indemnify the Appellant against any damages and costs which he may become liable to pay to any person in respect of death or bodily injury consequent upon an accident which occurred on the 4th April 1971 involving motor car No. B.P. 1064 whilst being driven by the Appellant.

And that the Respondents should be ordered to pay to the Appellant his costs of this appeal and of the proceedings in the Federal Court and in the High Court for the following, amongst other,

R E A S O N S

- (1) The deletion of Clause 2(b) does not accurately record the agreement made between the parties.
- (2) That insofar as the policy with the said clause deleted is inconsistent with the terms of the Proposal Form, the latter should prevail.
- (3) That the Respondents are estopped upon relying upon the said deletion.

RICHARD ROUGIER

K.C. LIM

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