

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

[illegible]

- and -

CHINA INSURANCE COMPANY LIMITED Respondents
(Defendants)

CASE FOR THE RESPONDENTS

RECORD

Pp.43-51

Pp. 20-33

Pp. 4-5

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vehicle number PH.800 and submitted the same to the Respondents in their usual Motor Insurance Proposal Form. The Appellant further averred that a policy was issued to him by the Respondents bearing No. 396684. The Appellant went on to allege in his said statement of Claim

P.5,1.10-

P.6,1.9

"10. The Plaintiff avers that the Defendants in the said Policy of Insurance purported to delete Clause 2(ii) b of Section II of the policy which should have read:-

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'2. In terms of and subject to the limitation of and for the purposes of this section the Company will indemnify (ii)(b) the insured whilst personally driving a private motor car (but not a motor cycle) not belonging to him and not hired to him under a hire purchase agreement.'

11. The Plaintiff avers that as on the 7th October 1970 when the Defendants issued the aforesaid cover note there was an agreement between the Plaintiff and the Defendants wherein the Defendants agreed to indemnify the Plaintiff in term of the Defendant Company's usual Comprehensive policy.

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12. The Plaintiff avers that the policy issued to the Plaintiff on the 30th day of October, 1970 was not the Company's usual comprehensive policy.

The Plaintiff avers that the Company's usual Comprehensive policy is the policy as issued on the 30th October, 1970 without the purported deletion of Clause 2(ii)b.

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The Plaintiff claims therefore that the policy issued to him on the 30th October, 1970 be rectified accordingly.

13. Further and in the alternative the Plaintiff avers that the aforesaid purported deletion of Clause 2(ii)b of Section II of the policy is null and void and of no effect whatsoever for reason that

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(a) the Plaintiff did not at any time agree to the said deletion and the said deletion was a unilateral act on the part of the Defendants.

(b) the Defendants had agreed to issue the Defendant Company's usual comprehensive policy which is one

without the purported deletion.

- (c) there is no consideration for the purported deletion of Clause 2(ii)b of Section II of the policy."

10 The Appellant further averred in his Statement of Claim that he had been involved in an accident whilst he was driving a motor car not belonging to him and not hired to him on the 4th day of April, 1971 whereby two persons had died and three people had suffered serious injuries. The Appellant also averred that he was entitled to an indemnity under the said Policy of Insurance in respect of the said accident from the Respondents. Accordingly in his Statement of Claim the Appellant claimed

P.6,11.
10-32

- 20 "(1) A declaration that the deletion of Clause 2(ii)(b) of Section II of the Policy of Insurance issued on the 30th October, 1970 by the Defendants is null and void and of no effect.

P.6,1.
33 -
P.7,1.9

- (2) Rectification of the policy issued to the Plaintiff on the 30th October, 1970 by reinstating Clause 2(ii)b of Section II.

- 30 (3) A declaration that the Defendants are, subject to the conditions in the Policy, liable to indemnify the Plaintiff against any sum including costs he shall become liable to pay to any person whomsoever in respect of death of or bodily injury to any person or damage to any property in consequence of the said accident on 4th April, 1971 at or about 8.00 p.m. at 1½ m.s. Rawang - Ipoh Road, Selangor, by the driving of the Plaintiff of car No. BP.1064."

40 4. By their Statement of Defence which was dated and delivered the 13th day of April, 1972 the Respondents admitted the substance of the first nine paragraphs of the Statement of Claim. They specifically contended that the Policy of Insurance that was issued to the Appellant was in the Respondents' usual form of comprehensive policy for the material period. This was reiterated in those parts of the Statement of Defence dealing with paragraphs 10-13 of the
50 Statement of Claim where the Respondents pleaded

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P.8,11.
8-26

"6. With regard to Paragraph 10 of the Statement of Claim, the Defendants contend and will contend that the said Policy of Insurance issued by them to the Plaintiff was in the terms of the Defendants' usual form of Comprehensive Policy for that material period and was in pursuance of the proposal form submitted by the Plaintiff and was in compliance with the requirements of Part IV of the Road Traffic Ordinance, 1958.

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7. With regard to Paragraph 11 of the Statement of Claim, the Defendants contend and will contend that the Policy of Insurance issued by them to the Plaintiff was in the terms of the Defendants' usual form of Comprehensive Policy for that material period.

8. Paragraphs 12 and 13 of the Statement of Claim are denied."

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5. The trial of the action commenced on the 30th day of September, 1974 before Mr. Justice Datuk Hashim Yeop A. Sani at Kuala Lumpur. The Policy of Insurance No. 3966684 which is the subject of the instant Appeal was admitted in evidence by agreement. The material Clause is in Section II, Clause 2. This provided

P.9,1.15

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

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P.83,28-44

(a) any Authorised Driver who is driving the motor vehicle provided that such Authorised Driver

(i) shall as though he were the Insured observe fulfil and be subject to the Terms of this Policy insofar as they can apply

(ii) is not entitled to indemnity under any other policy

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(b) ~~The Insured whilst personally driving a private motor car (but not a motor cycle) not belonging to him and not hired to him under a Hire Purchase agreement"~~

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6. The Appellant gave evidence on his own behalf and two witnesses were called on behalf of the Respondents at the trial. So far as the evidence of the Appellant himself and Lim Koon Sia (the first of the Respondents' witnesses) is concerned the effect of their evidence is, in the Respondents' submission, correctly summarized by the learned Trial Judge in his Judgment where he states

Pp.11-14

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"The Plaintiff gave evidence to the effect that he had been dealing with one Lim Koon Sia (D.W.l.) in matters relating to the insurance covers of all his motor cars. D.W.l. at all material times was an agent of Kow Toong Sdn., Bhd., Alor Star, who was an agent of the defendants. In his testimony the plaintiff said he had asked for a 'first class policy' which he said was explained to him by D.W.l. to mean to cover driving one's own vehicle or other person's vehicle. D.W.l. however, in his testimony said that the plaintiff told him to buy a first class insurance, i.e. a comprehensive policy but did not ask for anything else. In his own testimony the plaintiff also said in practice he depended on the vendor of the car to do the insurance for him. The vendor he meant is D.W.l. who was the manager of the Federal Auto Sdn. Bhd., Alor Star, from whom he bought the new car PH.800 and also the previous one. Before he bought motor car PH.800 he also owned an old Volvo car (also bearing the same registration number) and the insurance for this car was also done for him by D.W.l. (D9, D10, D11 and D12). In the certificate of insurance and the policy of insurance of the previous car (D12 and D11) the same clause was also deleted."

P.22,11.
12-39

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7. The Respondents called as their second witness Soh Wai Chak, a claims executive of the Respondents. He produced an earlier Motor Car Insurance Policy and Certificate of Insurance issued to the Appellant on the 10th day of July, 1970. These are exhibits D11 and D12. These documents show that the Appellant under that policy was not insured whilst personally driving a private motor car (but not a motor cycle) but not belonging to him and not hired to him under any Hire Purchase Agreement, for the Clause granting such cover had been deleted. The witness went on to produce a further twenty duplicate policies issued by the Respondents but

Pp.15-16

P.83,11.
40-44
and
P.103, 11.
8-11

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P.16,11.
1-7
Not reproduced

Counsel for the Appellant objected to the admission of the same. Accordingly the hearing of the trial was adjourned and not resumed until the 31st day of January, 1975. At the resumed hearing it appears from the Record that Counsel for the Appellant withdrew his objection to the admission of the said policies. The two sets of policies, the first bearing the nos. 396674-396683 (all dated 30th October, 1970) was marked D14; the second set bearing nos. 396685-396694 (the policy 396685 is dated 30th October, 1970; the remainder are all dated the 31st October, 1970) was marked D15. These policies all show that the same deletion had been effected to each of them as in the instant case. 10

P.10,11.
2-25
Pp.56-57,
Pp.98-100

8. It appears from the Record that certain documents emanating from the Insurance Association of the Federation of Malaya (apparently also called the General Insurance Association) were admitted in evidence as part of the Appellant's case by agreement. These documents were marked P4 - 8 respectively. The effect of these various documents was reviewed, it is submitted correctly, by the Learned Trial Judge in the following way 20

P.24,11.
16-53

" . . . it is not disputed that the Malaysian Insurance Association, of which the defendant company is a member, does from time to time issue regulations for the conduct of member companies. Among matters regulated which are relevant for consideration here is the amount of premium to be charged. Unlike the United Kingdom where insurance companies are not bound to follow one premium, insurance companies in this country subscribe to the regulations on premium. The Association also from time to time issue circulars. The circulars relevant for consideration here are those pertaining to deletions. The history of the stand of the Malaysian Insurance Association on matters of deletion can be traced to as early as 1964. On 10th January, 1964, the Secretaries by order of the committee of the Association wrote to members advising them on the subject of motor policy forms and restriction of cover. In that circular letter (P6) members were advised that the committee had decided that in respect of the motor policy forms - (1) all members were required to print and use the standard policy wording as laid down in the Tariff; and (2) any restriction in cover must be effected either by endorsement or deletion or both. In 1968 the Secretaries again wrote a circular letter dated 29th August, 1968, (P4) 30 40 50

reminding members that it was mandatory for members to use the policy forms as given in the Tariff and that any alterations to the standard forms must be made by endorsement. It was also mentioned in that circular letter that the Insurance Commissioner had however agreed that these endorsements placed on the policy form by means of a rubber stamp would be acceptable provided they were clearly legible."

The learned Trial Judge further considered the effect of the later circulars of 1972 (P7) and 1973 (P8). It is respectfully submitted however that as they relate to a period after the issue of the policy in the instant case they are in no way material thereto.

9. The trial concluded on the 31st day of January, 1975 and the learned Trial Judge reserved his Judgment until the 14th day of March, 1975. In his Judgment the learned Trial Judge made the following findings which it is respectfully submitted are correct:

(a) That the policy that is the subject of this action was not the first policy the Appellant had had issued to him by the Respondents and that the previous policy which had been issued to him in respect of another motor vehicle contained the same deletion as that set out in paragraph 5 above.

P.31, 11.
29-39

(b) That there was no evidence that the Appellant had asked for a policy without the specific deletion that is the subject of the instant case. That accordingly it was only reasonable to conclude the Appellant would have expected the same policy as he had obtained before. It is respectfully submitted that by this finding the learned Trial Judge rejected the evidence of the Appellant to the effect that he considered his policy to be a first class policy which covered the Appellant driving his own vehicle or other persons' vehicles.

P.31, 11.
39-47

(c) That the said deletion did not contravene Part IV of the Road Traffic Ordinance, 1958. It is convenient to observe at this stage that the statutory requirements for the contents of policies of motor insurance are set out in Section 75(1) of the said Ordinance. This (with the exception of the proviso which is not relevant) reads as follows

P.11, 11.
33-38

P.31, 1.47-
P.32, 1.3

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"In order to comply with the requirements of this part of this Ordinance a policy of insurance must be a policy which -

- (a) is issued by a person who is an authorised insurer within the meaning of this part of this Ordinance

and

- (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 them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

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provided that . . ."

It is also to be observed that Section 79 of the Ordinance contains provisions for the avoidance of restrictions on the scope of Third Party Risk Policies but that none of these provisions affect the instant case. Furthermore Section 90 of the Ordinance gives the Minister a general power to make rules for the carrying into effect of the Ordinance but no rules have been made relevant to the instant case thereunder. The conclusion reached by the learned Trial Judge that the policy was lawful is therefore, it is submitted, correct.

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- P.31, 1.51- (d) That a policy issued by the Respondents which had the relevant deletion made was an ordinary policy of the Respondents; and therefore, it is submitted is a policy in the Respondents "usual form" by implication.

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- P.32, 11. (e) That the relevant policy was issued by the Respondents to the Appellant in accordance with the real bargain between the parties and was the policy that the Respondents had represented they would deliver.

15-21

- P.32, 11. 10. The learned Trial Judge then dismissed the Appellant's claim against the Respondents. No order was made as to costs because the learned Trial Judge considered the case to be a test case.

22-27

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- Pp.34-35 11. By a Notice of Appeal dated the 7th day of April, 1975 the Appellant appealed to the Federal Court against the whole of the Decision of the learned Trial Judge. The Appellant's Grounds of

Pp.35-37

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Appeal were set out in a Memorandum of Appeal dated the 16th day of May, 1975. Various issues both of fact and law were raised in the said Memorandum of Appeal and the Appellant submitted

" . . . the usual form of the Defendant's policy is not what the Defendant's own idea of the usual form of the policy was but the printed policy in the standard form envisaged by the Motor Tariff Regulations."

P.37, 11.
1-6

12. The Appellant's Appeal to the Federal Court came on for hearing on the 24th day of June, 1975 and on the 27th day of August, 1975 the unanimous Judgment of the Federal Court was delivered by Chang Min Tat, J. on behalf of the Court (of which the other members were Suffian, L.P. and Wan Suleiman, F.J.). The learned Judge commenced the Judgment of the Federal Court by setting out the relevant deletion from the Respondents' policy and referring to the role of the Malaysian Insurance Association. The Judgment continued by reviewing the nature of the cover that the Appellant had asked for in relation to the cover that was actually accorded to him by the Respondents. It is to be observed that the reference to the rubber stamp excluding passenger liability did not relate to any liability that was required to be covered under compulsory insurance provisions in Part IV of the Road Traffic Ordinance, 1958. Furthermore the Cover Note (Exhibit P2) gave cover "in respect of motor car described in the Schedule" set out therein; not in respect of the Appellant himself.

Pp.43-49

P.43, 1.25-
P.45, 1.10

P.45, 11.
11-34

Pp.78-79

13. The learned Judge continued the Judgment of the Federal Court by summarizing the evidence adduced before the learned Trial Judge. The learned Judge then reached, it is submitted correctly, the following conclusion

P.45, 1.39-
P.46, 1.39

"In the circumstances of this case, it must be a matter of grave doubt that this untutored motorist did have any requirement for the cover which was deleted."

P.46, 11.
40-43

After reviewing the facts as found by the learned Trial Judge the Federal Court stated that the facts found by the learned Trial Judge could not on the evidence be faulted. The arguments advanced before the Federal Court on behalf of the Appellant were then summarised and it appears that the issue before the Federal Court turned almost

P.46, 1.44-
P.47, 1.6
P.47, 11.
7-27

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entirely on the meaning of the usual form of the Respondents' policy. After recalling that the learned Trial Judge had taken the view that the Regulations of the Malaysian Insurance Association formed only "a code of conduct" for its members breach of which did not give rise to any legal consequences the learned Judge stated

P.47,11.
33-40

"With respect, I agree. It is in my view clear that whether a member had committed a breach 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 powers of the member to do."

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The Respondents respectfully submit that the learned Trial Judge and the Federal Court were correct in reaching these conclusions.

P.47,1.41-
P.48,1.21

14. The Judgment of the Federal Court then dealt with the statutory position and approved the finding of the Trial Judge that the policy issued by the Respondents was in accordance with the statutory requirements governing compulsory third party insurance. The learned Judge then acknowledged, it is submitted correctly, that the Appellant was unable to dispute that the Respondents' usual policy at the relevant time was issued with the relevant deletion having been effected.

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P.48,11.22-
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P.48,1.30-
P.49,1.20

The Judgment of the Federal Court then dealt with a subsidiary submission advanced on behalf of the Appellant that the relevant deletion had not been properly effected and, it is submitted correctly, dismissed the same. The Final submission made on behalf of the Appellant before the Federal Court which was dealt with in the Judgment was that the Appellant had had issued to him a policy which was different from the one that the Respondents had contracted to provide. The case of South East Lancashire Insurance Co. Ltd. v. Croisdale (1931 40 Ll.L. L.R. 22) was, in the Respondents' submission, correctly distinguished. The Federal Court thereby adopted the conclusion of the learned Trial Judge that the Appellant was bound to accept the policy that was in fact supplied to him by the Respondents.

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P.49,11.
21-34

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P.49,11.
27-35

15. The Federal Court concluded that, because of the findings of fact made by the learned Trial Judge with which they concurred, the Appellant was not entitled to the declaration that he had sought

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and, the Respondents respectfully submit, was correct in doing so. So far as a claim for rectification was made by the Appellant the Federal Court held that there was no question of fraud or mutual mistake within the provisions of Section 30 of the Specific Relief Act, 1950 which would entitle the Appellant to such relief. That Section reads as follows

10 "When, through fraud or a mutual mistake
 of the parties, a contract or other
 instrument in writing does not truly
 express their intention, either party,
 or his representative in interest, may
 institute a suit to have the instrument
 rectified: and if the Court find it
 clearly proved that there has been fraud
 or mistake in framing the instrument,
20 and ascertain the real intention of the
 parties in executing the same, the Court
 may in its discretion rectify the
 instrument so as to express that
 intention, so far as this can be done
 without prejudice to rights acquired by
 third persons in good faith and for
 value."

 In the premises it is submitted that the
 conclusion reached by the Federal Court in
 relation to rectification was correct.
30 So far as the instant Appeal is concerned it is
 further submitted that because of the findings
 of fact made in the Courts below it is not
 now open to the Appellant to pursue a claim
 for rectification. Further or alternatively
 it is submitted that as the remedy of
 rectification is discretionary and the Courts
 below having expressed no indication that
 discretion could appropriately be exercised
 in the Appellant's favour, it is not now
40 open to the Appellant to seek to have discretion
 exercised in his favour for an Order of
 Rectification to be made in the instant Appeal.

16. The Federal Court dismissed the Appellant's
Appeal on the 27th day of August, 1975. On the
10th day of November, 1975 an Order was made
granting the Appellant Final Leave to Appeal
to His Majesty the Yang di-Pertuan Agong.

Pp.50-51

Pp.52-53

50 17. The Respondents respectfully submit that
 because the Appellant had a statutory obligation
 to be insured before driving a motor vehicle on
 a road it was concomitant upon him to satisfy
 himself that he was so insured before driving
 any motor vehicle. The Respondents respectfully

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adopt the observation of Lord Goddard, C.J., in giving the Judgment of the Divisional Court (of whom the other members were Humphreys and Lewis J.J.) in Rennison v. Knowler (1947) 1. All E.R. 302, at p.304 (A - C) speaking in relation to the English legislation which was then similar to the relevant statutory provisions in the instant case

"The Act requires every person who uses a motor vehicle or causes or permits it to be used on a road to be insured against third party risks. The obvious duty, therefore, of the owner is to see that he is insured and to make himself acquainted with the contents of his policy. He is not obliged to have a motor vehicle, but, if he does, he must see that he has such a policy as the law requires. If he does not understand his policy, he can seek guidance and instruction, but, if he neither informs himself of its provisions nor gets advice as to what it covers, we are unable to see that he has any reasonable ground for believing that the policy covers something which it does not."

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Pp.79-80

In the premises because the Appellant had only applied for insurance in respect of his own motor vehicle in the proposal form upon which the Respondents issued the policy that is the subject of the present appeal he was not, it is respectfully submitted, entitled to assume that he was insured in respect of driving any other vehicle.

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18. The Respondents herein respectfully submit that this Appeal should be dismissed with costs for the following amongst other

R E A S O N S

- (1) BECAUSE there are concurrent findings of fact.
- (2) BECAUSE the relevant policy of insurance was issued in the form of the Respondents' usual comprehensive policy at the material time.
- (3) BECAUSE the policy of insurance issued to the Appellant by the Respondents was the policy of insurance the Respondents had contracted to issue to the Appellant.
- (4) BECAUSE the requirements of the Malaysian Insurance Association as to the form of policy its members including the Respondents should issue to the public generally were irrelevant

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so far as the contractual relationship between the Appellant and the Respondents was concerned.

(5) BECAUSE if the Respondents were bound to issue policies in the form prescribed by the Malaysian Insurance Association they satisfied this requirement in the instant case by issuing the relevant policy in the required printed form.

10 (6) BECAUSE if the Respondents were required to issue the relevant policy of insurance in the standard printed form prescribed by the Malaysian Insurance Association they were at liberty to impose such restrictions in cover as they deemed appropriate.

20 (7) BECAUSE in the instant case the relevant deletion from the Respondents' printed form of policy was effected in accordance with the requirements of the Malaysian Insurance Association.

(8) BECAUSE the Appellant never requested and/or required of the Respondents cover for his driving of the motor vehicle involved in the relevant accident.

(9) BECAUSE the Appellant failed to ensure he was insured in accordance with his statutory obligation as referred to more specifically in paragraph 17 hereof.

30 (10) BECAUSE the Appellant is not entitled in law to the declarations sought in the Statement of Claim and/or it is not open to the Appellant to now seek rectification.

(11) BECAUSE the Judgments of the Federal Court and the High Court are right for the reasons given therein.

NIGEL MURRAY

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

B E T W E E N :
PANG LIN alias PHANG YOKE LIN

Appellant
(Plaintiff)

- and -

CHINA INSURANCE COMPANY LIMITED

Respondents
(Defendants)

CASE FOR THE RESPONDENTS

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