

NTUC Income Insurance Co-operative Ltd v Toh Kheng Boon
[2007] SGHC 117

Case Number : DA 32/2006

Decision Date : 23 July 2007

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Madan Assomull, Vivian Chew, Muna Talib and Chong En-Lai (Assomull & Partners) for the appellant; Andrew Hanam (Andrew & Co) for the respondent

Parties : NTUC Income Insurance Co-operative Ltd — Toh Kheng Boon

Civil Procedure – Pleadings – Amendment – Application for leave to amend defence on first day of trial – Whether proposed amendment served to define the issues in dispute – Whether injustice caused to opposing party in manner not compensable with costs

Insurance – General principles – Claims – Whether insured vehicle used for reward – Whether insurer entitled to repudiate liability

23 July 2007

Judgment reserved.

Tan Lee Meng J:

1 The appellant, NTUC Income Insurance Co-operative Ltd ("NTUC Income"), who issued a motor policy to the respondent, Mr Toh Kheng Boon ("Mr Toh"), with respect to his motor vehicle, SFQ 8349K ("the insured vehicle"), repudiated liability to the latter after the said vehicle was involved in an accident on 3 August 2005 ("the accident"). NTUC Income, which pointed out that the motor policy did not cover the use of the insured vehicle for hire or reward, alleged that the said vehicle was being used for reward when the accident occurred. The district judge held that NTUC Income was required to indemnify not only Mr Toh but also the other parties involved in the accident. NTUC Income appealed against the decision of the district judge.

Background

2 On 8 January 2005, Mr Toh purchased the insured vehicle on hire purchase terms. He took a ten year loan to finance the purchase of the said car and obtained from NTUC Income the requisite insurance cover.

3 It was not disputed that Mr Toh had an arrangement with his "god-niece", one Ms Cookie Wong Wai Che ("Ms Wong"), under which the latter would have the use of the insured vehicle but had to pay the down payment for the insured vehicle, the monthly instalments to the finance company and the miscellaneous outgoings in relation to the purchase and maintenance of the insured vehicle. According to both Mr Toh and Ms Wong, this arrangement was made because Ms Wong was unable to obtain a loan for the insured vehicle in her own name.

4 At the time the insured vehicle was purchased in January 2005, Ms Wong had thoughts about going to Hong Kong for further studies. When she finally made up her mind to go to Hong Kong for three years, she wanted to hand over the insured vehicle to her boyfriend's brother, Mr Teo Kai Meng ("Mr Teo"), who offered to give her around \$568 per month to help pay for the monthly instalments for the said vehicle. Ms Wong, who said that she refused to accept the offer, brought Mr Teo to meet

Mr Toh at a restaurant to obtain Mr Toh's consent for the insured vehicle to be used by Mr Teo while she was in Hong Kong. Mr Toh gave his consent.

5 On 3 August 2005, while the insured vehicle was being driven by Mr Teo along Changi Coast Road, it was involved in the accident with two motor lorries, bearing numbers YL 2689R and YZ 8898A.

6 Mr Toh's insurer, NTUC Income, repudiated liability under the motor policy issued to him on the ground that his motor policy did not cover any use for hire or reward. In a letter dated 7 September 2005, NTUC Income informed him as follows:

Our finding shows that the insured vehicle has been used for hire and reward at the time of accident. This was not made known to us at the time of purchase. In this instance, we regret to advise that we would not be handling the third party claim against you. Please make arrangement to settle the claim with the third party owner.

7 Mr Toh instituted DC Suit No 3979 of 2005 against NTUC Income. In the meantime, the owners of the two lorries involved in the accident instituted suits, namely MC Suit No 26675 and MC No 2704 of 2005, against Mr Teo, the driver of the insured vehicle at the time of the said accident, to recover compensation for the damage caused to their lorries in the accident. Mr Teo denied that he was at fault. To date, the suits instituted by the lorry drivers have not been heard.

8 On the first day of the trial, NTUC Income unsuccessfully sought to amend its defence to include non-disclosure and misrepresentation, without specifying the alleged non-disclosure or misrepresentation. This application was not allowed.

9 The district judge held that NTUC Income was liable to indemnify Mr Toh under the terms of the motor policy. She ordered NTUC Income to pay for repairs to the insured vehicle, the towing costs incurred as a result of the accident, loss of use of the insured vehicle, damages for personal injury and legal costs. Surprisingly, she also accepted Mr Toh's contention that NTUC Income was liable for the repairs, loss of use, damages for personal injury and legal costs in respect of the two lorries involved in the accident.

10 NTUC Income appealed against the decision of the district judge on a number of grounds. First, it asserted that Mr Toh's claim for damages for personal injury and towage charges should have been dismissed because there was no proof that he had suffered any personal injury or had incurred towing charges. Secondly, it argued that the district judge should not have made a ruling on its liability to the owners of the lorries that were involved in the accident because that issue was outside the ambit of the case before her. Thirdly, it alleged that the district judge erred when she did not allow it to amend its pleadings on the first day of the trial. Finally, it contended that the district judge erred when she held that this was not a case of hire or reward.

Mr Toh's claim for towage charges and damages for personal injury

11 As for NTUC Income's contention that the respondent is not entitled to towage charges and damages for personal injury, Mr Toh's counsel, Mr Andrew Hanam, confirmed at the hearing of the appeal that his client had agreed to withdraw his claim for towage charges as well as damages for personal injury. That being the case, the appeal with respect to Mr Toh's claim for towage charges and damages for personal injury need not be further considered.

NTUC Income's liability to the lorry owners

12 NTUC Income asserted that the issue before the district judge was whether or not it had the right to repudiate the motor policy and there was no basis for the district judge to order it to indemnify the owners of the two lorries involved in the accident for, *inter alia*, repairs, loss of use, damages for personal injury and legal costs arising from the accident.

13 At the outset, it must be noted that the owners of the two lorries involved in the accident *are not parties to the present action and no evidence was tendered at the trial on the cause of the accident and who was to blame for it*. In fact, as mentioned earlier, the owners of the two lorries in question have sued Mr Teo in the Subordinate Courts with respect to the accident. It cannot be overlooked that in both these cases, which have not been heard, Mr Teo has denied liability to the owners of the lorry drivers and has commenced third party proceedings against NTUC Income to indemnify him in the event that the court finds that he is liable to the owners of the said lorries. It is in these two MC suits that the extent of Mr Teo's responsibility, if any, for the damage caused to the lorries in question will be determined.

14 NTUC Income's counsel, Mr Madan Assomull, rightly pointed out that even if the motor policy issued to Mr Toh had not been validly repudiated, NTUC Income's liability to indemnify the owners of the lorries does not arise until the extent of Mr Teo's liability for the said accident has been determined in the two MC suits. It follows that the ruling in the court below that NTUC Income is liable to indemnify the owners of the lorries involved in the accident must be overruled.

NTUC Income's application to amend its pleadings

15 Whether or not NTUC Income should have been allowed to amend its pleadings on the first day of the trial will next be considered. NTUC Income had sought to amend its defence to include a new paragraph 6, which was as follows:

In the alternative, the defendants are not liable to the plaintiff for the sum claimed thereunder or for any other sum

PARTICULARS

(a) The Plaintiff failed before the conclusion of the contract for insurance to disclose fully and faithfully material facts relating to the matter to the Defendants. This was not disclosed in the Proposal for Insurance dated 8 January 2005 ("the Proposal").

(b) The representations in the Proposal was material in that it would have influenced the judgement of a prudent insurer and did influence the judgment of the Defendants in fixing the premium and/or determining whether they would take the risk.

(c) The Defendants will rely on the said Proposal for insurance for its meaning and effect at trial or earlier hearing of this matter.

16 Why material non-disclosure, which is so widely relied on by insurers that Lord Sumner warned in *Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll L R 75 at 82, that this indispensable shield for an insurer should not be turned into an engine of oppression against the insured, was not pleaded from the very start cannot be fathomed. For the record, it ought to be noted that Mr Assomull, who represented NTUC Income at the hearing of the appeal, was not the defence counsel at the trial in the court below.

17 Whether an amendment to pleadings should be allowed is a matter of discretion for the trial

judge. NTUC Income's application to amend the defence was not allowed by the trial judge for a number of reasons. To begin with, she pointed out that the proposed amendment was flawed from the very start because there was a complete absence of particulars regarding the alleged material non-disclosure. Amendments to pleadings are to define the issues in dispute and she found that the proposed amendments did not achieve this objective. Secondly, NTUC Income had no supporting affidavit to explain the delay in the application to amend the defence. Thirdly, injustice would be caused to the opposing party in a manner that could not be compensated with costs. If the amendment was allowed, there would be a delay in the trial and the plaintiff, Mr Toh, had been waiting anxiously for relief for a long time. In this context, it is worth noting that in *Ketteman v Hansel Properties Ltd* [1987] AC 189, at 220, Lord Griffiths stated as follows:

Another factor that the judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

18 Lord Griffiths' approach has been endorsed in a number of local cases, including *Sin Leng Industries Pte Ltd v Ong Chai Teck* [2006] 2 SLR 235, *Lam Soon Oil and Soap Manufacturing Sdn Bhd v Whang Tar Choung* [2002] 2 SLR 395 and *Hong Leong Finance Ltd v Famco (S) Pte Ltd* [1992] 2 SLR 1108.

19 For the reasons given by the district judge, I agree that the application to amend the defence on the first day of the trial should not be allowed.

Whether the insured vehicle was used for reward

20 NTUC Income's assertion that it is entitled to repudiate liability on the ground that Mr Toh had breached the terms of the motor policy by using the insured vehicle for reward will next be considered.

21 The motor policy in question did not cover any use for "hire or reward". The words "hire" and "reward" are not synonymous. In *Albert v Motor Insurers' Bureau* [1972] AC 301, Lord Pearson explained at pp 330-331 that the words "or reward" were added because "reward" is a wider term which covers some arrangements for which the words "for hire" may, as in the present case, be inappropriate. NTUC Income's case is not that Mr Toh hired the insured vehicle to Ms Wong. Instead, it was that Mr Toh allowed Ms Wong to have the use of the said vehicle for a "reward".

22 In the main, the cases that have dealt with whether or not a vehicle was used "for hire or reward" relate to the giving of lifts by the insured to other persons. For such a situation, one applies a "business test" and the relevant question is whether there is "a systematic carrying of passengers for reward which goes beyond the bounds of mere social kindness" (*per* Lord Donovan in *Albert v Motor Insurers' Bureau* [1972] AC 301, at p 319). For the purpose of this test, the smallness of the reward is irrelevant.

23 The facts in the present case have nothing to do with the carriage of passengers. Regrettably, the basis on which NTUC Income claimed that the insured vehicle had been used for reward by Mr Toh was rather confusing from the very start and it shifted from time to time. NTUC Income's initial position was put in its Further and Better Particulars as follows:

The Defendants say that the vehicle was first passed on by the Plaintiff to one Cookie Wong and

that the said Teo paid the Plaintiff and/or Cookie Wong as agent of the Plaintiff and/or for the use of the Plaintiff and/or to the Plaintiff a sum of \$500.00.

24 The assertion in NTUC Income's Further and Better Particulars was not proven. The district judge explained as follows in her judgment at [27]:

[T]he act which was said by the defendants to constitute usage of the insured vehicle for reward was as follows: "... the vehicle was first passed on by the Plaintiff to one Cookie Wong and that the said Teo paid the Plaintiff and/or Cookie Wong as agent of the Plaintiff and/or for the use of the Plaintiff and/or to the Plaintiff a sum of \$500.00".... *No other act has been pleaded by the defendants as being an act amounting to usage for reward.* On the evidence adduced, there was never any payment of \$500 by Teo to the plaintiff, or by Teo to Wong in her alleged capacity as the plaintiff's agent.... Based on the defendants' pleadings (including the further and better particulars filed), therefore, the very act which the defendants were relying on as usage for reward was not established on the evidence available.

[emphasis added]

25 In her closing submissions, NTUC Income's former counsel did not rely on her client's pleaded case. She contended, instead, that the usage of the insured vehicle for reward arose from Ms Wong's payments of the loan instalments, road tax and car insurance and from Mr Teo's "agreement" to pay a monthly sum to Ms Wong for the use of the insured vehicle in her absence. These new material facts relating to the basis for alleging that the insured vehicle was used for reward had not been pleaded and the district judge rightly pointed out that, strictly speaking, NTUC Income should not have asked the court to make a finding on material facts that have not been pleaded. Even so, as both parties had dealt with the fresh allegation in question, the district judge considered the matter and came to the conclusion that the payment of the loan instalments, road tax and car insurance were not intended as a "reward" to Mr Toh. Furthermore, Mr Teo made no payment to Ms Wong even though he had offered to pay her around \$500 to help pay for the monthly instalments on the insured vehicle. Ms Wong had said that she could not accept the money as Mr Teo was her future brother-in-law. The district judge explained in her judgment at [30] as follows:

Both Wong and the plaintiff gave evidence that the arrangement they had – whereby the plaintiff registered the car in his name but Wong made all the necessary payments – arose purely from the plaintiff doing Wong a favour in securing a bank loan she might not otherwise have secured. Both gave evidence that they had known each other for some eight years and that Wong was treated as the plaintiff's god-niece: there existed, in other words, a certain degree of closeness between them. I accepted their evidence. Both Wong and the plaintiff also gave evidence that the plaintiff derived no benefits – financial or otherwise – from this arrangement.. I accepted this evidence as well. The bank statements exhibited in Wong's AEIC showed clearly that the monthly instalment payments were made directly to the finance company; and on the evidence available, there was no hint of any payments to the plaintiff himself. Nor did the plaintiff benefit by having use of the insured vehicle: his evidence, which went unchallenged, was that he already had his own car, and he had no need of the insured vehicle. Applying the test in *Albert's* case, I was satisfied that this was no business arrangement, however informal, whereby the plaintiff derived some sort of gain like that seen in the case of the vehicle owner in *Albert* and again in *Meanen*. In my view, the arrangement between the plaintiff and Wong fell wholly within the bounds of social kindness. It was purely a social arrangement arrived at between friends, allowing the older and financially more stable friend to help the other secure a car loan.

26 During the appeal, NTUC Income's counsel, Mr Assomull, took a different approach. Among other

things, he pointed out that it was noteworthy that Mr Toh remained the legal owner of the insured vehicle and that he would be liable to the finance company if Ms Wong did not pay the monthly instalments. He also pointed out that Mr Toh exercised control over who was to drive the car while Ms Wong was away in Hong Kong. He referred to the cross-examination of Mr Teo, during which Mr Teo explained that Ms Wong had asked him to meet Mr Toh because she was not the "rightful owner" of the car and Mr Toh thus had to give him permission to drive the car. However, the issue before the court is not whether Mr Toh is the legal owner of the insured vehicle but whether he received a reward for allowing Ms Wong to have the use of his car. In regard to this, Mr Assomull emphasized that when Mr Toh purchased the insured vehicle, he had made no plans for the insured vehicle in the event that Ms Wong left for Hong Kong. He urged the court to take into account the following part of the cross-examination of Mr Toh:

Q You mentioned that on [the day the car was bought] Cookie Wong didn't know if she would get a place in Hong Kong University. On 8 January 2005, was Cookie Wong contemplating going to Hong Kong?

A Yes

Q *What would happen in the event that Cookie Wong left for Hong Kong?*

A *No plans yet.*

[emphasis added]

27 Mr Assomull argued that if Mr Toh had merely lent his name to Ms Wong to buy the insured vehicle, then he ought to have known how he would have dealt with the insured vehicle in the event that Ms Wong left for Hong Kong for further studies. He said that it would have been up to Ms Wong to decide what she wanted to do with the car and added that by leaving things flexible, Mr Toh could, when Ms Wong left for Hong Kong, have kept the car or sold it. He might have kept some of the proceeds of sale, in which case, the insured vehicle would have been used for reward. Mr Assomull also submitted that there was no evidence to suggest that Ms Wong had any beneficial interest in the insured vehicle.

28 The difficulty with Mr Assomull's argument is that it was never a part of NTUC Income's pleaded case that the reward that Mr Toh received from Ms Wong was that he *might* be able to retain part of the proceeds of sale *if* the insured vehicle was sold. NTUC Income's former counsel did not probe further during the trial when Mr Toh said that at the time the insured vehicle was purchased, he had "no plans yet" in relation to the insured vehicle if Ms Wong left for Hong Kong. Mr Toh was not cross-examined on whether or not he had intended to sell the insured vehicle and if he did, whether he would have paid the entire proceeds of sale to Ms Wong. In the absence of further evidence on this issue, the court cannot speculate and assume that the insured vehicle would be sold by Mr Toh at a future date or that he might keep a share of the sale proceeds if the said vehicle was sold. Furthermore, as Mr Toh was given no opportunity by NTUC Income's counsel at the trial to rebut the allegation that he might profit from a sale of the insured vehicle in the future, the rule in *Brown v Dunn* (1894) 6 R 67 prevents NTUC Income from asserting that he might profit in the future if the insured vehicle was sold. In any case, interesting questions regarding a resulting trust would arise if Mr Toh tried to keep any part of the potential sale proceeds as he has not paid a single cent for the insured vehicle.

29 Although NTUC Income's counsel, Mr Assomull, must be commended for his well-researched arguments, the fact remains that he was severely handicapped because he did not act for NTUC

Income before and during the trial and his client's appeal was clearly affected by important findings of fact by the district judge. I took note of Mr Assomull's assertion that there were a number of inconsistencies in the evidence of Mr Toh, Ms Wong and Mr Teo that had been glossed over by the district judge. One example cited by Mr Assomull was that Mr Teo had stated in writing that he had promised to pay \$568 per month to Ms Wong "for her to settle the instalment of \$768" whereas Ms Wong claimed that no money had been paid to her. It cannot be overlooked that an appeal court should be slow in overturning findings of fact made by a judge in the court below as the latter has had the opportunity of assessing the credibility and demeanour of the witnesses during the trial. In this regard, the district judge had made it very clear that Mr Toh, Ms Wong and Mr Teo had impressed her as "honest witnesses not given to embellishing the truth" and that the few inconsistencies that NTUC Income found in their evidence were not material and did not damage their credibility.

30 In the absence of satisfactory proof that Mr Toh, the legal owner of the insured vehicle, had actually received a reward for the use of the insured vehicle, I have no basis for overruling the district judge's decision that the insured vehicle had not been used for reward.

Costs

31 Taking all the circumstances into account and the fact that NTUC Income succeeded in part of its appeal, Mr Toh is awarded only 50% of the costs of the appeal.

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