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HCA2585/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO.2585 OF 2005

BETWEEN

FALCON INSURANCE COMPANY (HONG KONG) LIMITED — Plaintiff

and

NG KWOK FAI — 1st Defendant

TACLON INDUSTRIES LIMITED — 2nd Defendant

Before : Hon Burrell J in Chambers
Date of Hearing : 19 May 2006
Date of Decision : 19 May 2006
Date of Reasons for Decision : 23 May 2006

R E A S O N S F O R D E C I S I O N

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1. This is an application by the 2nd defendant to stay proceedings issued by the plaintiff in favour of arbitration. The 1st defendant has consented to the stay in advance of the hearing. At the conclusion of the hearing I granted the application with costs to the 2nd defendant. I now give brief reasons.

2. The case concerns a motor insurance policy. The 1st defendant was driving a vehicle owned by his employer, the 2nd defendant, when he was involved in a collision with a Mr Yuen. Mr Yuen sued the 1st and 2nd defendants. Their insurers, the plaintiff in these proceedings, took over the claim (pursuant to a provision in the policy) and settled Mr Yuen's claim.

3. The plaintiff now seeks to recover from the 1st and 2nd defendants the money and costs they paid out when settling Mr Yuen's claim. The basis of their right of recovery against the 2nd defendant is that it is in breach of clause 18(d) of the insurance policy issued to the 2nd defendant.

4. Clause 18(d) provides :

> "The Insured shall take all reasonable steps to safeguard the Motor Vehicle from loss or damage and to maintain it in efficient condition and the Company shall have at all times free and full access to examine the Motor Vehicle or any part thereof or any driver or employee of the Insured. In the event of any accident or breakdown the Motor Vehicle shall not be left unattended without proper precautions being taken to prevent further damage or loss and if the Motor Vehicle be driven before the necessary repairs are effected any extension of the damage or any further damage to the Motor Vehicle shall be excluded from the scope of indemnity granted by this Policy."

5. After the accident both defendants pleaded guilty in a Magistrates Court to an offence of using a defective vehicle, the particulars being that one of the tyres had insufficient tread.

6. The policy also contained an arbitration clause (clause 18(g)). There is no need to recite it because both parties agree that it does

constitute an arbitration agreement. The 2nd defendant relies on the clause in seeking a mandatory stay of the plaintiff's writ action in favour of arbitration. The plaintiff however submits that clause 18(g) is "null and void and/or inoperative and/or incapable of being performed". Their submission is that by virtue of the guilty plea in the Magistrates Court there is an unarguable breach of clause 18(d) which amounts to a repudiation of the contract of insurance between the parties. That repudiation, it is submitted, has been accepted by the plaintiff which thereby renders clause 18(g) null and void, inoperative and incapable of being performed.

7. If, by virtue of their guilty plea to using a defective vehicle it can be said that there can be no dispute between the parties, the plaintiff is right.

8. The 2nd defendant however strongly maintains that a dispute plainly exists between the parties. They rely, primarily, on two grounds in support of this contention. Firstly, that there is a crucial difference to being guilty of the Road Traffic offence on the one hand and being in breach of clause 18(d) on the other. The offence of using a vehicle with a bald tyre is proved simply by proving the bald tyre and no more. Breach of clause 18(d) however requires a failure by the insured to "take all reasonable steps to safeguard the vehicle". The 2nd defendant's defence to the plaintiff's claim will be that it did "take all reasonable steps". In short, they dispute the allegation that they were in breach of clause 18(d).

9. Secondly, the 2nd defendant points out that they have never admitted liability for the accident. The plaintiff "took over" Mr Yuen's

claim pursuant to the subrogation clause (clause 18(c)) in the policy. The 2nd defendant had no say in the matter but has always, in correspondence, "reserved their rights and remedies". From an early stage it was apparent that the 2nd defendant's position was that any liability that did arise stemmed, not from any defective tyre, but from the 1st defendant's negligence. The 1st defendant's negligence, if any, does not necessarily put them in breach of clause 18(d).

10. The threshold which the 2nd defendant must meet in establishing that a dispute exists between the parties is a low one. I am satisfied, for the reasons advanced by the 2nd defendant outlined above, that they have met the threshold in this case.

11. Accordingly, a dispute exists, an arbitration clause exists and the 2nd defendant is therefore entitled to a mandatory stay of proceedings.

(M.P. Burrell)
Judge of the Court of First Instance
High Court

Ms Julia Lau, instructed by Messrs Deacons, for the Plaintiff

Mr Thomas Lee, instructed by Messrs Haldanes, for the 2nd Defendant