Ref:- OES/MO/0086/2019.

LexisNexis

User Name: KALYANA KUMAR SOCKALINGAM
Date and Time: Monday, 10 April 2023 4:53:00PM MYT
Job Number: 194544648

Document (1)

1. *Loh Swee Liang (suing as administrator of the estate of Tay Guan Song, deceased) & Anor v AmGeneral Insurance Bhd [2021] MLJU 1434*

Client/Matter: -None-
Search Terms: Loh Swee Liang v Amgeneral Insurance
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
MY Cases	-None-

Loh Swee Liang (suing as administrator of the estate of Tay Guan Song, deceased) & Anor v AmGeneral Insurance Bhd [2021] MLJU 1434

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

QUAY CHEW SOON JC

APPEAL NO WA-11BNCvC-26-08 OF 2020

14 July 2021

KF Ee (Hiew Yee Ping with him) (KF Ee & Co) for the appellant.
SS Gill (CM Maran with him) (Kenneth William & Assoc) for the respondent.

Quay Chew Soon JC:

GROUNDS OF DECISIONIntroduction

[1]This is an appeal against a judgment of the Magistrate Court which dismissed the Appellants' claim after a full trial. I dismissed the appeal. These are the grounds of my decision.

[2]The parties shall be referred to as they were in the court below. Where the Appellants were the Plaintiffs and the Respondent was the Defendant ("**D**").
Background

[3]The Plaintiffs are the administrators of the estate of one Tay Guan Song ("**Deceased**") pursuant to the Grant of Letters of Administration dated 2.10.2018. The 1st Plaintiff ("**P1**") is the wife of the Deceased. The 2nd Plaintiff is the father of the Deceased.

[4]The Deceased passed away on 3.7.2018. He was found dead at Block B-19-01, Changkat View Condominium, Segambut, Kuala Lumpur ("**Condominium**").

[5]At the material time, the Deceased is the registered owner of motor vehicle no. WXQ 8399 ("**Car**"). The Car was insured with D at an agreed value of RM85,000 under an insurance policy issued by D ("**Policy**").

[6]The Car purportedly went missing around June or July 2018. P1 lodged two police reports (collectively "**Police Reports**") on 22.8.2018 ("**1st Police Report**") and 1.9.2018 ("**2nd Police Report**") respectively regarding the missing Car.

[7]On 13.9.2018, P1 submitted a claim form dated 5.9.2018 to D with regard to the missing Car. On 3.1.2019, D repudiated the Plaintiffs' claim. The Plaintiffs appealed to D on the decision to repudiate the claim. On 16.5.2019, D rejected the Plaintiffs' appeal.

[8]On 21.6.2019, the Plaintiffs appealed to the Ombudsman for Financial Services ("**Ombudsman**") in regard to the repudiation. The Plaintiffs' appeal was rejected by the Ombudsman on 11.9.2019. The Ombudsman concurred with the stand taken by D to repudiate the claim.

[9]D took the stand that the Plaintiffs were late in filing their claim in breach of clauses 2(a) and (c) of Section E of the Policy. Further, P failed to furnish proof that the Car was stolen, as per the recommendation of the Ombudsman.

[10]The recommendation of the Ombudsman reads:

> *"9. Premised on the above, it is clear that there is no evidence that the said vehicle was stolen. In order to establish theft, the Claimant must prove that the said vehicle was taken out of the possession of the owner without his consent, as per section 378* of the *Penal Code. Although, it appears that the said vehicle is missing, it cannot be proven that it was stolen,*

i.e. taken out of the possession of the owner without his consent. The proximate cause of the loss of the said vehicle cannot be established and therefore, it cannot be proven that it falls within the ambit of theft."

[11]The Plaintiffs filed a suit against D in the Kuala Lumpur Magistrate Court vide suit No. WA-A72NCvC-7394-10/2019 claiming for a sum of RM85,000 and for cost and interest. On 30.7.2020, the Magistrate Court dismissed the Plaintiffs' claim with cost of RM6,200. Hence, the Plaintiffs filed this appeal.

Findings of the Magistrate Court

[12]After a full trial, the learned Magistrate ("**MCJ**") concluded that the Plaintiffs had failed to prove their claim against D on a balance of probabilities. The MCJ made the following findings in her Grounds of Judgment:

(a) referring to sections 101 and 102 of the Evidence Act 1950 and the High Court case of *Kesang Leasing Sdn Bhd v Tetuan Zul Rafique & Partners (sued as a firm)* [2015] 7 MLJ 573, the burden of proof lies on the person who asserts. The Plaintiffs must prove that their claim is more probable through the production of evidence and calling of witnesses.

(b) clause 1(a)(vii) of Section A of the Policy stated that the insurance cover was for *'burglary, housebreaking or theft'*. The contra proferentem rule submitted by the Plaintiffs was inapplicable as the Policy specifically covered for 'theft'.

(c) although exhibits P5 (letter to Dewan Bandaraya Kuala Lumpur ("**DBKL**")) and P6 (letter to Majlis Bandaraya Shah Alam ("**MBSA**")) were adduced through PW2 (i.e. P1), there was no reply from any of these two authorities to show the status of the missing Car. Those exhibits (P5 and P6) did not prove that the Car had been stolen.

(d) although the police Investigating Officer (PW1) was called to give evidence, his investigation was incomplete. No suspect had been arrested and there was no trace of the Car which was reported missing.

(e) PW1 testified that he had opened the investigation papers under section 379A of the *Penal Code* because no other provision of the Penal Code is applicable. PW1 testified that the case was still under investigation as the Car had not been found. PW1 agreed that this was an incident of a missing car and not a stolen car.

(f) PW2 testified that she had no knowledge of the actual date the Car went missing and did not know what really happened to the Car. The last time PW2 saw the Car was in June 2018. If the Car was missing as early as June 2018, the Deceased owner would have lodged a police report. PW2 in her evidence had failed to prove on a balance of probabilities that the Car was stolen.

(g) the Ombudsman found there was no evidence the Car had been stolen.

Grounds of appeal

[13]In their Memorandum of Appeal, the Plaintiffs stated that the MCJ had erred in fact and law when she:

(a) dismissed the Plaintiffs' insurance claim against D for the loss of the Car which was insured by D for the sum of RM85,000.

(b) held that D had proven their defence against the Plaintiffs' claim.

(c) failed to consider that the Plaintiffs had complied with the terms of the Policy, amongst others Condition 2(a), (b), (c) and (d).

(d) failed to hold that the Policy covered the claim brought by the Plaintiffs.

(e) erred in finding that PW1's investigation papers were opened under section 379A of the *Penal Code* because there was no other relevant provision under the Penal Code. And failed to consider PW1's evidence whereby he agreed that the Plaintiffs' claim fell under a theft of vehicle under section 379A of the *Penal Code*.

(f) failed to consider that PW1 investigated the case under section 379A of the *Penal Code* based on the Police Reports lodged by PW2.

(g) failed to consider the evidence of PW1 and PW2.

(h) failed to consider that there is no difference between the loss or theft of a car.

(i) failed to make a finding that the Plaintiffs have proven their claim against D on a balance of probabilities.

(j) erred in finding that D had proven its defence against the Plaintiffs' claim through clause 1(a)(vii) of Section A of the Policy.

(k) failed to make a finding that D failed to call the adjusters from Darmani Adjusters & Investigators (M) Sdn Bhd ("**Adjuster**") as a defence witness.

(l) failed to make a finding that D refused or neglected to produce the adjusters report prepared by the Adjuster.

(m) failed to consider that the evidence of DW1 (manager in D company) was hearsay. And erred in accepting DW1's evidence.

(n) failed to consider that there were discrepancies in D's findings in the two notices of repudiation dated 3.1.2019 as regards the date of the loss of the Car.

(o) failed to consider that there were two versions on the findings in the two notices of repudiation dated 3.1.2019 issued by D.

(p) erred in finding that PW2 did not have knowledge of the actual date of the loss of the Car and also did not have knowledge as to what happened to the Car, when the same is not PW2's obligation and responsibility.

(q) erred in finding that the last time PW2 saw the vehicle was in June 2018 when in fact PW2 did not say so in evidence.

(r) erred in finding there was no theft of the car although PW2 had sent a letter and email to DBKL and MBSA but because there was no reply from the said authorities.

(s) failed to consider PW1's evidence that he had checked with finance and DBKL (Jinjang) on the day the police report was lodged by PW2 to see if the Car was being detained at the tow storage of DBKL. And failed to consider PW2's evidence that enquiries had been made with DBKL and MBSA.

(t) failed to reverse the findings of the Ombudsman.

Decision

[14]I am mindful that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle. (See the Federal Court cases of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* (2015) 2 CLJ 453 at 476). An appellate court would be slow to interfere unless it was shown that the decision was plainly wrong. (See the Federal Court case of *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309 at 320). A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See the Federal Court case of *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* (2010) 9 CLJ 785 at 800).

[15]An appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrust the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. (See the Federal Court case of *Merita Merchant Bank Singapore Ltd v Dewan Bahasa Dan Pustaka* (2014) 9 CLJ 1064 at 1084).

[16]In my opinion, the MCJ is not wrong, let alone plainly wrong. She is not guilty of no or insufficient judicial appreciation of evidence. She has not fundamentally misdirected herself. Her findings accord well with the probabilities of the case. She has not misapprehended the facts or applied the wrong principles of law. Her findings are not contrary to the documentary evidence. (See the Court of Appeal case of *Yoong Sze Fatt v Pengkalan Securities Sdn Bhd* [2010] 1 CLJ 484; [2010] 7 AMR 80; *[2010] 1 MLJ 85* at 106-107).

[17]I see no reason to interfere with the findings and decision of the MCJ. My reasons are as follows.

[18]The onus of proving that the loss was caused by a peril insured against lies on the assured. Unless he discharges the onus, the claim must fail. This principle of law was enunciated by the Supreme Court in *American Home Assurance Co v Nalin Industries Sdn Bhd* [1993] 3 CLJ 319 at 322 which said:

> *"It is of course* ***incumbent on the respondent as the plaintiff to establish that the loss it suffered arose out of an accident to an object covered by the policy.*** In *Regina Fur Co. Ltd. v. Bossam* [1958] 2 Lloyd's Rep 425, *Evershed MR*

held that the ***onus of proving that its case fell within the policy, remained at all times with the insured****. While this case serves only to reaffirm the trite position that the* ***onus is on the plaintiff to establish that it comes under the peril insured against,"***

[19]The Policy covers loss or damage due to theft. Clause 1(a)(vii) of Section A of the Policy reads:

"Section A: Loss or Damage to Your Own Car 1(a): Events We Cover

We will indemnify You if Your Car is lost or damaged during the Period of

Insurance arising from the following Incidents:

....

(vii) burglary, housebreaking or ***theft,"***

[20]The burden of proof is on the Plaintiffs to bring their claim within the ambit of the Policy. To succeed in their claim, the Plaintiffs must prove "theft" i.e. that the Car had been stolen. They have failed to do so on a balance of probabilities. As such, the Plaintiffs have failed to establish that their claim for the missing Car is covered under the Policy.

[21]Under the terms of the Policy, the indemnity provided by D will operate if the loss or damage arises from the incidents that are enumerated in clause 1(a)(i) to (ix) of Section A. The limb which is relevant here is paragraph (vii) i.e. "theft". The Plaintiffs have to prove that the Car had been stolen before D could indemnify them. From the evidence adduced however, it has not been proven that the Car was stolen. The Car merely cannot be located or is missing.

[22]In submissions, the Plaintiffs referred to another limb of the Policy. Namely Clause 1(a)(viii) of Section A which speaks of *"malicious act"*. However, this was not their pleaded case. Paragraph 21 of the Statement of Claim reads:

"21. Defendan telah gagal, cuai, mungkir dan/atau ingkar untul mengambil kira bahawa ***kecurian*** *kenderaan telah berlaku kepada/menimpa kereta Mazda CX-5 yang hilang tersebut pada setiap masa material.""*

[23]It is trite that parties are bound by their pleadings and the trial must be confined to the pleadings. In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors and other appeals* [2015] 1 MLJ 773 at 810, the Federal Court said:

"[89] It is trite law that the ***parties are bound by their pleadings*** *and the trial* ***of a suit must confine to the pleadings.*** *The court is* ***not entitled to decide a suit on a matter that has not been pleaded.***"

[24]The evidence given by PW1 (the police Investigation Officer) is this. In his Witness Statement, PW1 had used the word *"kehilangan"* (loss) numerous times and not 'kecurian' (theft)". PW1 agreed that the word that was used in the 2nd Police Report is *"hilang"* and not 'kecurian kereta'. PW1 also agreed that the word *"disalahguna"* in the 1st Police Report is not the same as 'dicuri'. PW1 stated that he had no choice but to open an investigation for a missing car under section 379A of the *Penal Code* (the provision concerning theft of a motor vehicle) as there is no provision for missing cars in the Penal Code.

[25]The result of PW1's investigation is this. There were no further details available to detect the missing Car and no suspect had been arrested. The case status notification dated 15.11.2018 stated:- *"Setelah siasatan dijalankan, didapati tiada keterangan lanjut bagi mengesan* ***kenderaan yang hilang*** *dan tiada tangkapan saspek yang terlibat"*. PW1 agreed that he investigated concerning a missing car and not a stolen car. The result of the investigation did not show that the Car had been stolen.

[26]In his Witness Statement (Q&A 23 and 24), PW1 stated that he had drawn the sketch plan at the Condominium where the Deceased died and also took photographs. However, no police sketch plan nor photographs were produced in court. No explanation was given as to why the said sketch plan and photographs were not exhibited.

[27]According to both Police Reports, the last time PW2 saw the Car was in June 2018. Which is about 2 months

before the Police Reports were lodged on 22.8.2021 and 1.9.2018 respectively. However based on her oral statement to PW1, PW2 had stated that she last saw the Car on 3.7.2018. Which is the date the Deceased was seen driving out the Car from their residence in Prima Duta Condo ("**Residence**").

[28]If it is true that PW2 last saw the Car on 3.7.2018, it means that the Car was still in the possession of the Deceased in June 2018. PW1 agreed that the delay of about 2 months in lodging the Police Reports was because PW2 herself was not convinced that the Car was stolen.

[29]PW1 agreed that during his investigation, he did not go to the parking spot at the Condominium where the Deceased died to confirm whether the Car was parked there or to get the CCTV recording. PW1 did not know how many keys there are for the Car. If it is true that the Car had been stolen, the Plaintiffs should be able to produce two set of keys. However, PW1 did not investigate into this. PW1 admitted there is reasonable doubt whether the Car was actually stolen as there is only one key for the Car.

[30]PW1 did not investigate who owns the access card to the Condominium. PW1 agreed there is a possibility that the Deceased could have given the access card to a known person. And that the Car would not be considered as stolen if the owner himself had given the access card to a known person to exit and enter the Condominium.

[31]The evidence given by PW2 (i.e. P1) is this. The Police Reports lodged by her stated the Car is missing (*"hilang"*) or misused (*"disalahguna"*). PW2 never once in the Police Reports stated that the Car is suspected to be stolen. From the contents of the Police Reports and the delay in lodging the same, it appears PW2 herself doubted that the Car was stolen as she had tried locating the Car.

[32]In the 1st Police Report dated 22.8.2019, P1 expressed fear that the Car could be misused (*"disalahguna"*). It reads:

> *"... saya telah cuba cari m/kar milik mendiang di tempat kerja dan bertanya kepada rakan-rakannya tetapi semua tidak tahu dimana m/kar tersebut berada.*
>
> *... Kali terakhir saya melihat m/kar tersebut pada bulan **Jun 2018** sebelum suami saya meninggal dunia. Saya buat covering pasal **takut** m/kar **disalahguna** oleh pihak lain".*

[33]In the 2nd Police Report dated 1.9.2018, PW2 said she suspected the Car is missing. It reads:

> *"... saya telah cuba cari m/kar milik mendiang di tempat kerja dan bertanya kepada rakan-rakannya tetapi semua tidak tahu dimana m/kar tersebut berada.*
>
> *... Kali terakhir saya melihat m/kar tersebut pada bulan **Jun 2018** sebelum suami saya meninggal dunia di **rumah saya alamat B1-01-06 Prima Duta Condo** Jalan Dutamas Raya K.L. Tujuan saya buat laporan ini kerana **syaki** m/kereta milik suami saya telah **hilang** dan mahu siasatan dibuat".*

[34]According to the Police Reports, the last time PW2 saw the Car was in June 2018. The Deceased died on 3.7.2018. However, PW2 only lodged the Police Reports on 22.8.2018 and 1.9.2018 respectively. The delay in lodging the Police Report suggest that PW2 herself was not convinced that the Car had been stolen. If it was true that the Car had been stolen, she would not have waited until 22.8.2018 and 1.9.2018 to lodge the Police Reports. Even then, the Police Reports were about a missing or misused car instead of a stolen car.

[35]The delay in reporting the loss of the Car contravenes clauses 2(a) and (c) of Section E of the Policy. It reads:

> *"Section E: Conditions – These apply to the whole Policy*
>
> *This section spells out the **terms and conditions that You must observe to ensure this insurance remains effective.** Basically these conditions are of three types:*
>
> *What You must do*
> *What You must not do*
>
> *What we can do*

Conditions Precedent to Policy Liability

The following conditions are ***conditions precedent to Our liability to indemnify*** *You under this Policy and* ***have to be observed by You strictly****. We* ***can repudiate this Policy and/or will not pay claims under the Policy if You breach*** *any of the relevant conditions. These conditions also apply to Your Authorised Driver and any legal representative who seek indemnity under this Policy.*

...

2. Accidents and Claims Procedures

If Your Car is involved in any Incident that could lead to a claim under this Policy, You must do the following:

(a) ***Notify Our claims department*** *of the Incident and get a Claim Form. You must notify Us of the Incident as soon as possible but in any event:*

Within seven (7) days *if You are not physically disabled or hospitalised following the Incident; or*

Within thirty (30) days or as soon as practicable if You are physically disabled and hospitalised as a result of the Incident.

We may allow a longer notification period if You can provide specific proof and justification for the delay.

(b) ***Report the Incident to the police*** *as required by law and do all that is required to assist the police authorities to secure a conviction against the offender.*

(c) ***Complete the Claim Form in full and return to Us within twenty-one (21) days*** *from the date of Your notification as per (a) above. You are required to answer all the questions in detail in all applicable sections and provide Us with all the necessary documents to support Your claim. We will not be held responsible if there is any delay on Your part to submit the Claim Form duly completed together with all necessary documents.*

A longer claims submission period may be allowed by Us subject to specific proof and justification by You for the delay."

[36]Clause 2(a) of Section E of the Policy requires the insured to notify D's claims department within 7 days of the loss of the Car. The Plaintiffs did not comply with this requirement. Clause 2(c) of Section E of the Policy requires the insured to submit the completed claim form within 21 days of notification. Likewise the Plaintiffs did not comply with this requirement.

[37]The aforesaid requirements are conditions precedent to D's liability to indemnify the insured under the Policy. They have to be strictly observed. Otherwise D can repudiate the Policy or not pay claims under the Policy. Owing to the Plaintiffs' breach of the aforesaid conditions, D is entitled to repudiate the Policy.

[38]On 3.1.2019, D repudiated the Plaintiffs' claim. The notice of repudiation reads ("**1st Repudiation Notice**"):

"Our investigation reveals that the ***loss of your vehicle did not fall within the ambit of theft****. Your wife Loh Swee Liang has* ***no knowledge on the vehicle whereabouts*** *and did not witness the loss as the vehicle appears to be missing after insured demise.*

...

In view of the above, we regret to advise that we are repudiating all liabilities in respect of your claim and any other claims which may arise due the loss and we shall be closing our file accordingly."

[39]D issued another notice of repudiation dated the same day (3.1.2019) ("**2nd Repudiation Notice**") which reads:

"We regret to note that Tay Guan Song had failed to respond to our adjuster's (M/s Darmani Adjusters & Investigators (M) Sdn Bhd) request for an interview despite their letters dated, and.

We wish to draw your attention to the Terms and Conditions of our policy under Condition 2(d) which stipulates as follows:-

Conditions – these apply to the whole policy

2. Accidents and claims procedure

(d) Every communication, writ, summons and/or process from other parties must be sent to us immediately. You must also tell us if You know of any impending prosecution, inquest or fatal inquiry without delay, In case of theft or other act which may give rise to a claim under this Policy, You must without undue delay make a report to the Police and co-operate with us in securing the conviction of the offender.

Since tay guan song had chosen not to render co-operation to us, we have no alternative but to repudiate all liabilities in respect of your claim and any other claims which may arise due the loss and we shall be closing our file accordingly."

[40]It appears the 2nd Repudiation Notice cited an incorrect provision (clause 2(d)). Be that as it may, that does not preclude D from relying on the applicable provision i.e. clauses 2(a) and (c) of Section E of the Policy. In any event, the 1st Repudiation Notice still holds true. Namely the loss of the Car did not fall within the ambit of "theft" under the Policy.

[41]PW2 had also given contradictory evidence as regards the occupants at the Condominium when the Deceased passed away on 3.7.2018. Based on PW1's investigation, he stated that according to PW2, the occupant at the Condominium on 3.7.2018 was the family of the Deceased. However, PW2 testified the Condominium was rented out to a friend of the Deceased named "Kingsley". However, "Kingsley" was not called as a witness. Furthermore, PW2 also testified that there were no occupants at the Condominium on 3.7.2018 as the tenant had left the premise and the Deceased went there to clean up the said premise.

[42]There is also the issue of only one key belonging to the Car. During cross-examination, PW2 admitted she had only one Car key in her possession and another key was with the Deceased. PW2 agreed to the following:

(a) she is not aware whether the Deceased had given the Car key which was in his possession to anyone else to use the Car while he was at the Condominium.

(b) there is a possibility that the Deceased had given the said key to his friend i.e. "Kingsley", or anyone else who is unknown to her.

(c) she could not be sure that the Car was stolen and could only say that the Car cannot be traced or located.

(d) in the claim form, she had answered "No" to the question "Was your vehicle locked?". PW2 herself had agreed that anyone could have had access to the Car.

(e) she did not enquire from PIAM (Persatuan Insuran Am Malaysia) or JPJ to check whether the insurance of the Car had been renewed after the death of the Deceased or whether ownership of the Car had been transferred to a new owner.

[43]"Theft" is not defined in the Policy. However, the definition of "theft" under *section 378* of the *Penal Code* may be applied. This is in line with the approach taken by the Federal Court in *Wong Kon Poh v New India Assurance Co Ltd [1970] 2 MLJ 287* which equated the term "robbery" in an insurance policy to what the term is defined as in the Penal Code. The Court said (at page 288):

"... the appellant's contention was that, theft being an essential element of robbery, robbery is still theft, although in an aggravated form. Indeed, counsel was perfectly right in his submission, for section 390 of the Penal Code enunciates that "in all robbery there is either theft or extortion", and here it was a plain case of robbery. Theft is not severable from robbery any more than is a statue from the marble out of which it was hewed."

[44]*Section 378* of the *Penal Code* reads:

"Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit ***theft****".*

[45]To prove "theft", the Plaintiffs need to show that the Car was taken from the Deceased's possession without his consent. In the instant case, since PW2 is only in possession of one spare key, it raises the possibility that the other Car key might have been given voluntarily by the Deceased to a third party, whether "Kingsley" or someone else.

[46]I refer to the High Court case of *Chua Ek Leng (t/a sole proprietor under the style and firm name of Tenaga Tiasa Enterprise Co) v Tokio Marine Insurans (M) Bhd* *(2011) 3 MLJ 63*. The Court dismissed the plaintiff's claim for the loss of his excavators as his evidence about the circumstances of the alleged theft of the excavators was hearsay. Because the plaintiff was not at the scene and had no personal knowledge that the excavators were taken. There was no direct or circumstantial evidence that the excavators were stolen. As such, the plaintiff had failed to prove his case on a balance of probabilities.

[47]The Court said (at page 72-73):

"[10] ... the plaintiff has to prove on a balance of probabilities that the vehicles were stolen ... The plaintiff was far away from the scene when the alleged incident occurred. ... The crucial fact that must be proved before the plaintiff can claim under the policy is that the insured peril caused the loss of the excavators. The peril in question is theft, ie the excavators were stolen ... The plaintiff who was the only witness on his behalf ... admitted that he was not at the scene and had no personal knowledge that the excavators were taken ... Therefore, his evidence about the circumstances of the alleged theft of the excavators is complete hearsay ... The defendant put the plaintiff to strict proof that the excavators were stolen from Malaysian soil. Therefore it was incumbent upon the plaintiff to prove, by either direct or circumstantial evidence, that the excavators were stolen, The plaintiff completely failed to do that as he had no personal knowledge whether the excavators were taken by force from the Malaysian side of the border."

[48]In the instant case, PW2 has no actual knowledge as to when the Car went missing. In her testimony, PW2 said she last saw the Car on 17.6.2018. However, based on the investigation conducted by PW1, he testified that PW2 last saw the Car on 3.7.2018 when the Deceased drove out the Car from the Residence. Further, PW2 has only one spare Car key in her possession. PW2 has no personal knowledge that the Car was stolen or taken without the Deceased's consent.

[49]The Plaintiffs seek to rely on the *contra proferentem* rule. Namely if there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases, against the insurance company. However, I concur that the said rule does not apply here as there is no ambiguity in the word "theft" used in the Policy.

[50]The Plaintiffs contend that an adverse inference under *section 114(g)* of the *Evidence Act 1950* ought to be drawn from the failure of D to call the Adjuster as a defence witness or to produce the adjusters report prepared by the Adjuster. However, the law is clear that there must be evidence of suppression of material evidence or a material witness, by the party who does not call the witness. (See *DNC Asiatic Holdings Sdn Bhd & Ors v Honda Giken Kogyo Kabushiki Kaisha & other appeals* [2020] 1 CLJ 799 at 821).

[51]Here, there is no evidence of any withholding or suppression of material evidence or a material witness simply because D did not call the Adjuster to testify. The Plaintiffs were at liberty to subpoena the Adjuster as a witness if they so wish. In these circumstances, I do not think drawing an adverse inference against D pursuant to *section 114(g)* of the *Evidence Act 1950* is justified.

Conclusion

[52]In my judgment, appellate intervention is not warranted in this case. I therefore dismissed the appeal. I made no order as to costs.

End of Document