Local Court
New South Wales

Citation:	PhoungYarng v Shannons Ltd [2014] NSWLC
Hearing Date(s):	1 April 2014
Decision Date:	9April 2014
Jurisdiction:	Civil – Small Claims Division
Before:	Assessor Olischlager
Decision:	Verdict for the Plaintiff. Judgment for the Plaintiff in the sum of $2,111.27 together with interest pursuant to section 100 of the Civil Procedure Act from 7 March 2009. Costs awarded in favour of the plaintiff in the sum of $114.00 and professional costs of $993.00. Judgment payable within 28 days.
Catchwords:	Motor Vehicle damages, insurance contracts, failure to lodge claim, failure to pay excess, prejudice to insurer.
Legislation Cited:	Law Reform (Miscellaneous Provisions) Act 1946 Insurance Contracts Act 1984 (Cth)
Cases Cited:	*Bede Polding College v Limit (No3)Ltd [2008] NSWSC887* *Steffen v ANZ Banking Group [2009] NSWSC 666* *Tzaidas v Child & 3 Ors [2004] NSWCA 252* In *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd [1993]HCA 5; (1993) 176 CLR 332* *QBE Insurance Ltd v Moltoni Corporation Pty Ltd [2000] WASCA 82*
Category:	Principal judgment

Parties:	PhoungYarng (Plaintiff) Shannons Limited (Second Defendant)
Legal Representation:	Mr D'Arcy (for the plaintiff) Mr Fernie (for second defendant)
File number(s):	2009/00437438
Place of Hearing:	Local Court Sydney
Publication Restriction:	Nil

JUDGMENT

1. The plaintiff seeks damages arising from a motor vehicle collision that occurred on 29 November 2008. The proceedings were commenced against Mr Anderson in 2009 as the driver of the motor vehicle alleged to have caused the plaintiff's damages. The plaintiff has not effected service of the statement of claim upon Mr Anderson. On 28 May 2013 the plaintiff filed a notice of motion seeking leave to file an amended statement of claim to join Shannons Limited (Shannons) as a second defendant. On 4 June 2013 the Registrar at North Sydney granted the motion. The amended statement of claim, which was annexed in draft form to the motion, claims damages against Shannons as the insurer of the first defendant pursuant to s6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* and s51 of the *Insurance Contracts Act 1984 (Cth)*.

2. A preliminary issue raised at the hearing of the matter is the question as to whether the second defendant has been properly joined as a party to proceedings. Section 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* provides that, except in circumstances where the insured is a corporation that is being wound up, no action may be brought against the insurer without leave of the Court. Although certain Registrars have delegated powers of the Court to amend documents no delegation exists for Registrars to exercise the power of the Local Court with respect to granting

leave pursuant to s6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946.*

3. Accordingly, before finally determining the merits of any claim, it is necessary for the Court to consider whether leave should be granted.

Preliminary Question as to Joinder

4. Section 6(1) and(4) of the Act provide:

"Amount of liability to be charged on insurance moneys payable against that liability

(1) *If any person (hereinafter in this Part referred to as the insured) has, whether before or after the commencement of this Act, entered into a contract of insurance by which the person is indemnified against liability to pay any damages or compensation, the amount of the person's liability shall on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability.*

....

(4) *Every such charge as aforesaid shall be enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured; and in respect of any such action and of the judgment given therein the parties shall to the extent of the charge have the same rights and liabilities and the court shall have the same powers as if the action were against the insured.*

Provided that, except where the provisions of subsection (2) apply, no such action shall be commenced in any court except with the leave of that court. Leave shall not be granted in any case where the court is

satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim, have been taken."

5. The test to be applied in relation to granting leave pursuant to s6(4) of the Law Reform (Miscellaneous Provisions) Act 1946 was referred to in *Bede Polding College v Limit (No3)Ltd [2008] NSWSC887* at par 6. Leave shall be granted if it is shown:
   a. Firstly that there is an arguable case against the insured;
   b. Secondly, that there is an arguable case that the policy responds; and
   c. Thirdly, there is a real possibility that if judgment is obtained, the Insured would not be able to meet it.

6. The plaintiff's statement shows an arguable case against the insured. Mr Yarng states that he was stationary in the left lane on the Great Western Highway when the vehicle registration AR09XX driven by Mr Anderson collided into the rear of his vehicle causing damage. The plaintiff claim damages for the loss of use of his vehicle while it was being repaired. Theplaintiff alleges that the collision was due to a failure on the part of Mr Anderson to drive at a speed and maintain a sufficient distance so that he could stop his vehicle and avoid a collision. The plaintiff took his vehicle to a smash repairer and lost the use of his vehicle between 18 February 2009 and 5 March 2009 while repairs were carried out. This is a compensable loss.

7. In relation to the second element, Mr Furnari, a claims officer, on behalf of Shannons, has conceded that at the time of the collision a policy of insurance with respect of the motor vehicle AR09XX was in existence at the time of the collision and held by Shannons. The schedule to the policy identifies Mr Anderson as the insured. The policy document states under the heading *"Comprehensive Cover – Agreed Value"*:

"The significant features of this cover are:

Damage to someone else's property caused by or in connection with your vehicle - $20,000,000 (no cover if the driver of your vehicle has been refused motor vehicle insurance)."

8. The defendant submits that the insured failed to make a claim and failed to pay an excess and this would entitle the insurer to disclaim liability.

9. This is not a basis for refusing leave. Firstly the policy of insurance is an events based policy rather than a claims made policy. Accordingly, liability arises on the occurrence of the event rather than being dependent upon the making of a claim.

10. Secondly, there have been no necessary steps taken to establish an entitlement to disclaim liability. In *Tzaidas v Child & 3 Ors [2004]NSWCA 252* the Court of Appeal at [18] stated; *"Satisfaction as to taking necessary proceedings cannot be passed over. The application for leave pursuant to s6(4) can not amount to taking necessary proceedings, since the necessary proceedings must be something outside the application".*

11. Thirdly, in any event, section 54 of the Insurance Contract Act 1984 applies to the effect that the insurer would not be entitled to disclaim liability by reason of the failure to lodge a claim.

12. Section 54 provides:

"(1) Subject to this section, where the effect of a contract of insurance would but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not

refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act."

13. Section 54(1) prima facie prohibits an insurer from asserting that it can disclaim liability on the basis of a failure to be notified. It may be possible for an insurer to argue that it has been prejudiced, or has suffered a loss by reason of the insured's conduct (s54(2)), however, until there is a final determination of that issue it cannot give rise to a prohibition on the granting of leave under section 6(4).

14. The third issue is whether there is a real possibility that if judgment is obtained, the Insured would not be able to meet it.

15. In the present case there is a real possibility that a judgment may not be obtained, let alone satisfied. The plaintiff knows almost nothing of Mr Anderson. The plaintiff does not know the usual place of abode of Mr Anderson. The inquiries made through a process server suggest that he does not usually reside at 5 Wellington Street Wakeley. The plaintiff faces a real difficulty in serving the statement of claim as a precondition to obtaining a judgment. The plaintiff would be unlikely to obtain orders for substituted service of the statement of claim at the address in circumstances where it appears that Mr Anderson rarely attends the address and there is little assurance that leaving a copy of the statement of claim at that address will come to the attention of Mr Anderson. If service of the statement of claim cannot be effected the plaintiff cannot obtain a judgment. Even if the plaintiff managed to effect service and obtain a judgment against Mr Anderson the plaintiff does not know of the whereabouts of any property of Mr Anderson against which a levy might be made.

16. The Court grants leave for the joinder of Shannons pursuant to section 6(4) of the Law Reform (Miscellaneous Provisions) Act 1946.

Substantive Claim

17. The plaintiff was the owner of a Nissan Datsun 350z motor vehicle. It was damaged in the collision. The plaintiff lodged a claim through his insurer QBE Insurance. His insurer managed the claim relating to the cost of repairs. This claim relates to the uninsured loss being the loss of use of the vehicle while repairs were undertaken. The plaintiff took his vehicle to Regatta Motor Body Repairs Pty Ltd on 2 December 2008 for a quote to be prepared. The plaintiff took the vehicle back to the repairer on 18 February 2009 for the repairs to be carried out.

18. The plaintiff obtained a replacement hire vehicle through Compass Claims. The plaintiff took possession of a Lexus IS 250 as a replacement between the 23 February and 6 March 2009 when his vehicle was available for collection. The Lexus IS 250 is said to be an inferior vehicle to the plaintiff's vehicle in terms of cost and features. The base rate charged for the replacement vehicle was $165.00 per day together with additional charges. The total cost of the hire was $2,111.27. The hire of the replacement was on a credit hire basis. The plaintiff has provided evidence that the cost of the hire was within the market range existing at the time. Mr Adams, an employee of Compass Claims, provides evidence of comparative rates for a Lexus IS250 from Luxury Car Hire at the rate of $165.00.

19. Shannons have not put any evidence before the Court challenging the plaintiff's version of events or the quantum of the claim. The Court is satisfied that plaintiff's version of events established that the damage sustained to the plaintiff's vehicle was caused by Mr Anderson. Loss of use of a private vehicle is a compensable loss.

20. The Court is satisfied that the damages for loss of use of the plaintiff's vehicle are to be assessed at $2,111.27.

21. At the time of the collision Mr Anderson held a policy of insurance with Shannons that covered this liability.

22. The plaintiff claims against Shannons pursuant to both section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 as well as section 51 of the Insurance Contracts Act (Cth). Both provisions allow a claimant to bring proceedings directly against the insurer of the at fault party. Although there is a degree of overlap between the provisions each contains different preconditions that must be satisfied before liability is established.

23. In relation to the claim under section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 Shannons asserts that the first defendant is in breach of the terms of the conditions of the policy and is not required to indemnify the first defendant. The defendant asserts that there was a breach on the part of Mr Anderson in failing to lodge a claim and failing to comply with the policy conditions in relation to payment of excess.

24. As indicated at paragraphs 11 to 13 above, the alleged failure to notify the insurer is not, of itself, a basis to avoid liability under the policy. The failure to notify may be conduct that prejudiced the insurer within the meaning of section 54(1). Similarly, Shannons asserts that the failure to pay an excess charge of $500 by the insured is conduct that falls within the ambit of section 54(1) of the *Insurance Contracts Act 1984* and has prejudiced the insurer.

25. In *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd [1993]HCA 5; (1993) 176 CLR 332* the High Court stated that prejudice under s54(1) *"will consist in the existence of a liability which, in whole or in part, would not have been borne by the insurer if the act had not been done or the omission had not been made".*

26. Shannons asserts that had a claim been lodged it would have been able to obtain information regarding the collision at an earlier time. In *QBE Insurance Ltd v Moltoni Corporation Pty Ltd [2000] WASCA 82* the Supreme Court of

Western Australia held that a failure to give notice of a claim may give rise to prejudice through the lost opportunity to investigate and potentially take steps to limit liability. While the lost opportunity may give rise to prejudice depending on the facts, Shannons' has failed to show that it has, in the present case, suffered any prejudice. Shannons' does not give evidence that it would have taken any particular investigation of the claim at an earlier stage. It has not provided any evidence as what steps it has taken to investigate the claim or contact witnesses and how this investigation has been hampered by the delay in notification. There is no evidence to suggest that if Shannons' had been informed of the claim earlier it would have made any particular arrangements that would have reduced the period in which the plaintiff was deprived of his vehicle and therefore reduced the liability.

27. Accordingly, Shannons fails to establish any prejudice caused by the delay in notification that would warrant a reduction in liability.

28. In relation to the failure to pay the excess, the policy states in Part 1 of the Product Disclosure Statement:

"When you make a claim under this policy you may be required to pay an excess in respect of your claim."

29. There is no evidence of any demand being made upon Mr Anderson to pay an excess. In the absence of a demand requiring payment the failure to pay the excess is not a breach of a condition of the insurance policy.

30. Even if it were shown that failure to pay the excess constituted a breach of the policy the payment of an excess is not something that reduces Shannons' liability in respect for the claim. Irrespective of whether or not the excess was paid the extent of the liability for the claim would remain unchanged.

31. This omission cannot be said to have caused the liability.

32. Shannons have failed to provide any evidence responding to the question of negligence. As the evidence of the plaintiff establishes, at a prima facie basis, fault on the part of Mr Anderson and there is no evidence challenging the plaintiff's version of events the Court is satisfied that the collision was due to the negligence of Mr Anderson and Mr Anderson is liable for damages arising from the collision.

33. Pursuant to section 6(1) of the Act a charge applies with respect to insurance moneys that may become payable in respect of that liability.

34. The plaintiff also seeks to recover against Shannons' pursuant to section 51 of the Insurance Contracts Act 1984 (Cth). That section provides:

"Where:

(a) the insured under a contract of liability insurance is liable in damages to a person (in this section called the third party);
(b) the insured has died or cannot, after reasonable enquiry, be found; and
(c)the contract provides insurance cover in respect of the liability;

The third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages."

35. Mr Anderson was the named party to the policy of insurance and is the "insured" within the meaning of section 51 of the Act. Mr Anderson has been found liable in damages to the plaintiff and the contract provides insurance cover with respect to that liability. The only issue raised by the defendant is whether the plaintiff has made "reasonable enquiry" to find Mr Anderson. The test differs from the test applicable in section 6 of the Law Reform (Miscellaneous Provisions) Act 1946.

36. The plaintiff commenced proceedings against Mr Anderson in 2009. The plaintiff engaged commercial agents Rapid Process Services. Attempts were made to serve Mr Anderson at 5 Wellington Street Wakeley. A report dated 17 January 2011 indicates numerous attempts were made to serve Mr Anderson without success. On one occasion a process server spoke with an elderly person who failed to indicate when or if Mr Anderson was to return. On 10 January 2011 a different process server attended the property and was informed by a male occupant that Mr Anderson *"comes and goes... he's rarely here".*

37. The report by the process server indicates that the Wakeley address is not the usual place of abode of the defendant. Although persons at that address know of Mr Anderson, it cannot be said that Mr Anderson has been found.

38. The question of whether the plaintiff has made sufficient inquiries to locate Mr Anderson is a question of fact. In *Steffen v ANZ Banking Group [2009] NSWSC 666* McDougall J considered the term "reasonable inquiries" in the context of preliminary discovery. McDougall J expressed the view at [15]:

"What are 'reasonable inquiries' is a question of fact, to be considered in all the circumstance of the particular case. Clearly, the court is entitled to take into account whether there are other means of obtaining the information, and, equally clearly, the cost and delay of resorting to those alternative means is also relevant. As I said in Sinopharm at [32], 'what is reasonable cannot be determined in some a priori fashion. The determination must take into account the facts of the particular case including, so far as those facts demonstrate it, the relationship (if any) between the applicant and the prospective defendant."

39. In the present case the plaintiff has made reasonable inquiries. The plaintiff had no pre-existing relationship with Mr Anderson and therefore has no information to go from in locating Mr Anderson other than the details exchanged after the collision. These proceedings are in the small claims

division of the Local Court and involve a claim for $2,111.27. The cost of making extensive inquiries would make it uneconomical to pursue the claim. The steps taken by the plaintiff in engaging a process server to make attempts for service at the only address at which the plaintiff had been provided is reasonable in the circumstances.

40. The claim against Shannons under section 51 of the *Insurance Contracts Act (Cth)* has been made out by the plaintiff.

41. The Court will enter a verdict and judgment in favour of the plaintiff. Judgment will be given in the sum of $2,111.27 together with interest pursuant to section 100 of the Civil Procedure Act 2005 from the 7 March 2009. The Court will allow costs of the filing fee and service fee in favour of the plaintiff in the sum of $114.00 together with professional costs in the sum of $993.00. The judgment amount is payable within 28 days.

Assessor Olischlager
Local Court