BETWEEN

CHONG MING LOO **First Plaintiff**
KUAN CHEE MING **Second Plaintiff**

AND

NATIONAL INSURANCE COMPANY BERHAD **Defendant**

(High Court of Brunei Darussalam)
(Civil Suit No. 3 of 2010)

Before Judicial Commissioner James Findlay in Court.
Dates of Hearings: 20, 21, 22, 23, and 25 January, 2014.
Date of Handing Down Judgment: 3rd February, 2014

Ms Subrina Tan of Messrs Sandhu & Co for the Plaintiffs.
Mr Rajiv Prabhakaran and Ms Jelphine Lim of Messrs Y C Lee & Lee for the Defendant.

Case cited in the Judgment:

Nicolson v Icepak Coolstores Ltd 3 NZLR 475

J U D G M E N T

Findlay, J.C.:

On 9 November 2009, the plaintiffs obtained judgment against Robert Nacional Pacis (Robert) and Hong Geok Fwong (Hong) in respect of damages they suffered arising from a vehicle collision on 2 August 2007.

Robert was the driver of the offending vehicle and Hong was the owner. Hong was insured by the defendant.

The plaintiffs are seeking to recover the amounts awarded by the judgments from the defendant.

The defendant repudiated liability on the basis that Robert was not an authorised driver at the time of the collision. This gives rise to the only issue in this case: Whether or not Robert was an authorised driver at that time. The plaintiffs accept that, if Robert was not an authorised driver, their claims must fail. The

defendant accepts that, if Robert was an authorised driver, it is liable. The onus is on the plaintiffs to establish that Robert was an authorised driver.

The plaintiffs' case is that, although Robert was not specifically authorised to drive the vehicle at the time of the collision, he had a general unrestricted permission from Hong to drive the vehicle.

To discharge the onus of showing that Robert was an authorised driver, the plaintiffs led evidence from Laurento Ginez Madayag (know as "Chris"), Robert himself, Hong, Hong's wife Tew Kim Hong and Richard Besosano Valdez (Richard). Mrs Hong was wrongfully allowed to be in court during part of the plaintiffs' evidence.

This evidence does indicate that Robert had the general unrestricted permission pleaded by the plaintiffs. I do not intend to examine this evidence in detail because, if the defendant has adduced evidence to show that Robert was not an authorised driver and this evidence cannot be rejected, the plaintiffs have failed to discharge the onus upon them.

However, I do say that, generally, I was not impressed by the overall effect of the plaintiffs' evidence; certainly not sufficiently impressed to prefer this evidence to the very strong evidence to the contrary adduced by the defendant. Robert, in particular, was a very poor witness. He said himself, at least twice, that he was confused and I gained the very strong feeling that he was not sure what he was supposed to say in evidence.

As for the evidence of Hong himself, it may be unsafe for me to draw firm, detailed conclusions from apparent contradictions in his evidence because, for part of the time he gave evidence, the interpreter through whom he gave that evidence was unreliable. She was a student without adequate training as an interpreter and there must be some doubt that his evidence was always interpreted accurately.

Before outlining the evidence adduced by the defendant that has convinced me that it is strong and cannot be rejected, I should say that Ms Tan fought her case with courage and determination. It is a pity that she did not have a case that justified these usually admirable qualities. In my view, she allowed her enthusiasm her overcome her common sense and proper prudence.

The main evidence adduced by the defendant was from Ms Linda Lee, a practising lawyer in Brunei of some 20 years experience. She was instructed by the defendant in relation to the claim by Hong and Robert under Hong's insurance policy. When it became apparent that she would be a witness in this litigation, she ceased to act for the defendant.

Ms Lee interviewed Robert on 29 August 2007 and recorded what he told her in a hand-written note. In that note, she recorded him as saying "I don't know if [Hong] knew I used his car". There may be some room for ambiguity here in the sense that Robert may have been saying that he did not know if Hong knew he used the car *at the time of the accident*.

However, Ms Lee interviewed Robert again on 20 September 2007. She recorded a statement by him and typed it on her computer as he spoke. He told her that he had never sought Hong's consent to drive the vehicle and that he knew Henry Tumbaga Magbuai (Henry), an employee of Hong, was prohibited from lending the vehicle to him. There is no ambiguity here. This statement is in some detail.

I should say here that Henry was interviewed by Ms Lee, but he did not give evidence. Apparently, he had returned to the Philippines.

On 9 January 2014, the defendant issued a hearsay notice in which it said that it proposed to adduce as evidence the contents of a statement by Henry dated 1 September 2007 and a statutory declaration by him of the same date. I am not sure that it is permissible to accept these statements by Henry to prove the truth of what he said, which would be the only purpose for producing them. It would be different if the plaintiffs had adduced evidence that Henry had not said these things, but the plaintiffs' case is silent on this. Accordingly, I believe the safe course is to take no account of these statements by Henry.

Ms Lee interviewed Hong on 30 August 2007. She conversed with Hong in Mandarin or Hokkien; she cannot remember which, but she had no doubt that there was no difficulty in communication. The recorded statement from Hong is detailed and makes it quite clear that Hong told her that Robert had no authority to drive the vehicle at the time of the collision or at all. In this statement, Hong said that the lending of the vehicle to Robert was without his knowledge and that he had reprimanded Henry for lending the vehicle against his instructions.

The substance of these statements by Robert and Hong were also recorded in statutory declarations sworn before commissioners of oaths who told me that both said that they understood the contents of the declarations.

Ms Tan's cross-examination of Ms Lee left her unshaken and without the slightest dent in her credibility. Because it was not clear to me whether or not Ms Tan was suggesting that Ms Lee had been dishonest, I obliged Ms Tan to put to Ms Lee, in fairness to Ms Lee, whether she was suggesting that Ms Lee had deliberately falsified the documents or had been simply neglectful. Ms Tan said she was not suggesting fraud, only neglect.

It cannot be so that Ms Lee recorded what Hong and Robert told her incorrectly. The detailed nature of the statements militate strongly against there being some kind of mistake. Ms Lee was focused on whether or not Robert was an authorised driver; that was what she wanted to know. The suggestion that, somehow, in these circumstances, she wrote down the opposite of what they told her is ludicrous.

But Ms Lee's evidence that Hong had said that Robert was not authorised by him does not stand alone.

Firstly, there is the letter dated 8 December 2009 from Messrs Cheok, advocates and solicitors, who were acting for Hong at that time. That letter makes it quite clear that Hong told his lawyers that Robert was not his authorised driver. It said "We understand from our clients that Mr Hong did tell his staff not to lend his car to others . . . ".

Then there is the evidence of Hong's appeal application relating to a third party application. This is undated but signed by Hong. In that, Hong says ". . . whilst there is a question whether or not express consent was given by me to Robert Pacis to drive the vehicle, I have given express consent to Henry . . . As such it was beyond my control or knowledge if Henry . . . then lends the car to . . . Robert without notifying me or obtaining my consent." It is inconceivable that Hong would have written this if he had given Robert authority to drive.

Hong told me that this statement by him came from an opinion prepared by Messrs Sarjeet & Co who were consulted by Hong. Although this document does not say expressly that Hong told these lawyers that Robert was not an authorised driver, neither does it say that Hong told them that Robert was so authorised. Hong told me that he had told these lawyers what had happened and, if he told them that Robert had been authorised by him to drive, it is strange that this was not recorded and even more strange that it is recorded that there was "a question" as to whether or not Robert was so authorised.

On 3 April 2008, Hong wrote to the defendant's lawyers about the statutory declaration. He made various complaints about the making of this declaration but did not, in clear terms, say that the contents of the declaration were incorrect. On his evidence, he knew at this stage that the declaration was false. When writing to complain about it, the probability is that the first thing he would complain about would be that it was false. He does not do so.

On 28 December 2009, Hong wrote to the defendant complaining about Ms Lee's conduct. Although he maintains that he signed the documents against his will, nowhere does he say in clear terms that Ms Lee wrote down what he had not said.

On the same day, Hong wrote to the Law Society in similar terms. Again, he complained about being tricked, but he does not say categorically that Ms Lee had incorrectly recorded his statements.

This other evidence strongly supports the conclusion that Ms Lee had correctly recorded what she was told by Hong and Robert.

Ms Tan, in her written submissions, makes no attempt at all to deal with the defendant's strong case and, in oral submissions to me and during the conduct of the trial, she did nothing more than suggest that the statements that tell so powerfully against the plaintiffs' case were all the result of misinterpretation. I reject that as utterly implausible.

In what I suspect was a measure of desperation, Ms Tan sought to argue at the eleventh hour that all the communications by Robert, Hong and Henry to Ms Lee, their statutory declarations and Ms Lee's evidence itself, should be ruled inadmissible because these communications were all privileged. This remarkable and totally groundless submission hardly deserves any rebuttal, but I will show why this is so.

In the first place, this spurious privilege does not belong to the plaintiffs. Ms Tan acts for the plaintiffs, not Robert, Hong or Henry.

Secondly, it there were such a privilege, it could only, by some weird stretch of the imagination, belong to Hong, not Robert or Henry.

Most importantly, there cannot possibly be any privilege of communication between Ms Lee and any of the plaintiffs' witnesses. At no time was Ms Lee acting for any of them. She acted, as the evidence makes abundantly clear, only for the defendant. If fact, if anything, she was acting *against* Hong and Robert.

Ms Tan cites as authority for her extraordinary submission the case of *Nicolson v Icepak Coolstores Ltd* 3 NZLR 475. The first few lines of that case make it perfectly clear that the solicitor in that case was instructed by the insurer to act for the insured. So, in that case, there was a solicitor-client relationship between the solicitor and the insured. This case has no application at all to the matter before me and Ms Tan should have known this.

The evidence adduced by the defendant is, in my judgment, overwhelming in establishing the defendant's case that Robert was not an authorised driver. At the very least, it is more than sufficient to raise a case that cannot be rejected and, therefore, it must be held that the plaintiffs have not discharged their onus. It follows that the plaintiffs suit must be dismissed.

On two occasions, Ms Tan asked me to recuse myself. It is convenient to recount here what happened.

At the end of the first day of evidence, I suggested to Ms Tan that I thought that she should re-think her position in the light of the evidence and all the facts appearing from the documents before the court.

What I had in mind was that the onus was on the plaintiffs to show that Robert was an authorised driver. Against the evidence of Chris and what I had heard from Robert, neither of whom were impressive witnesses, was the evidence that Hong himself had told three different lawyers, independently of each other, two of whom were Hong's own lawyers, quite clearly that Robert was not an authorised driver. In these alleged statements by Hong, there was no room for any mistake or misunderstanding; they were too detailed for that.

This assessment may have been inaccurate in that, on a closer reading of Messrs Sarjeet's opinion as to the authority to drive, it was not as clear as the other statements. It was more of negative value to the defendant than positive in that, instead of a positive statement that Robert was an authorised driver, it records "a question" that he was not.

So, if Hong was telling the truth, these three lawyers had deliberately and possibly criminally falsified the documents concerned. Even if, at the end of the day, I could not say who was telling the truth, the plaintiffs had to fail.

I do not think I spelled this out to Ms Tan at the end of the first day. I assumed that she had read all the papers and knew this. I believe a simply intimated to her that, so far, the plaintiffs' witnesses had not impressed me and she had a difficult case.

The next day, counsel met me in chambers. Then, Ms Tan told me that, after consulting her colleagues, she was determined to proceed. Then, I did spell out to Ms Tan the difficulties facing her as I have outlined above. I said that I would interpose Ms Linda Lee at this stage. My intention here was that, if Ms Tan heard Ms Lee, she might think again.

At that stage, Ms Tan asked me to recuse myself. I declined to do so.

When the matter resumed, Ms Lee's affidavit was produced in which she emphasised the contradictory statements Hong had made, including to his own lawyers. I asked Ms Tan if she was impressed by this affidavit and she said she was not, saying that Hong had explanations for these seeming contradictions.

In view of Ms Tan's attitude, I saw that there was no point in interposing Ms Lee as a witness and I instructed Ms Tan to proceed with her case.

At this stage, I said to Ms Tan that, if at the end of the day, I were to find that the plaintiffs, in the light of all the evidence, should not have brought the

proceedings because they had no real chance of success, I would entertain a application to award costs on an indemnity basis.

At the outset of the second day, Ms Tan renewed her application for me to recuse myself. She said that what I had said about the plaintiffs' witnesses, the evidence generally and indemnity costs showed that I could not judge the matter with an open mind.

I refused the application, saying to Ms Tan that –

I had formed an unfavourable impression of the plaintiffs' witnesses so far and I believed it was right that counsel should know what I was thinking so that counsel could deal with this and conduct the case accordingly. I did not believe that a judge should keep his views secret and spring them on counsel only when counsel could not deal with them.

In explaining to Ms Tan the strength of the case against her, I believed that it was right that she should appreciate this. I have to say that I pointed out to Ms Tan several times during the hearing that she had the difficult task of showing that the three lawyers had falsified the statements by the witnesses, because, if she could not do this and I was satisfied that the statements were accurate, or even that I could not decide one way or the other, her case had to fail. Ms Tan seemed to have difficulty in understanding this and kept saying simply that her case was that Hong had given permission to Robert. I told her repeatedly that she had to consider, not only her case, but the evidence against her. At one stage, I asked her if she thought it was probable that these three lawyers, including two of them acting for Hong himself, and acting quite independently, had committed the most fundamental and irresponsible of acts by recording the opposite of what they had been told. She told me that she did think this was probable. Of course, it is not probable; by some stretch of the imagination, it may be said to be possible in the sense that all things are possible, but it cannot be said to be remotely probable.

As for my remarks about indemnity costs, I thought it was appropriate for Ms Tan to appreciate that this was a possible consequence of pressing a case that, after a complete examination, proved to be so hopeless that it should never have been brought to court.

I freely concede that I made every effort to persuade Ms Tan to look at her case afresh and take into account the matters I raised. I regard it as one of my duties to seek to avoid wasting time and costs. I have always believed that a judge should tell counsel of his concerns about a case so that counsel is able to consider these and deal with them. Nevertheless, I was satisfied that I was quite capable, after long experience in the courts, to judge the matter fairly and properly after all the evidence and arguments were presented.

For these reasons, I dismissed her application.

I have to say that acceding to Ms Tan's application would have achieved nothing but a waste of time and costs because I cannot believe that any judge could possibly have found, in the light of the overwhelming case presented by the defendant, that the plaintiffs had discharged their onus.

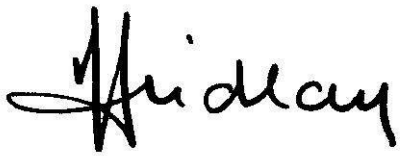
As to costs, Mr Prabhakaran asks that I award costs against the plaintiffs on a full indemnity basis. I have no doubt that such an order in this case is fully justified. In my judgment, no sensible lawyer, acting in the best interests of his clients, and in the light of all the evidence, could reasonably have come to the conclusion that this action had any real prospect of success. A lawyer bringing a case before this court has a duty to act prudently in the interests of his clients and with a eye to counsel's duty to the court. This case was conducted, in my view, not prudently, but without due care as to the consequences of pressing it to trial. Accordingly, I award costs against the plaintiff on the basis of full indemnity.

I should say that, otherwise, I would not have awarded a certificate for two counsels. This was essentially a simple case.

That is one side of the coin. The other side of that coin, on the face of it, is the position in which the plaintiffs have been brought by the rash conduct of this case by their lawyers. They are now facing a heavy bill of costs due to the defendant and the fees and expenses that would be claimed by their lawyers.

Ms Tan told me, several times, that the plaintiffs were innocents. If that is the case, they are entitled to have me consider some protection for them. Before I can, in all justice, allow the plaintiffs to be subjected to this heavy burden of costs, I must be satisfied that they went into this litigation with their eyes open; that is, that they were fully and properly advised of the strength of the case against them and the consequences of losing the action. And with that knowledge, they instructed that the case should proceed.

In these circumstances, I must consider making orders under Order 59, rule 8 of the Supreme Court Rules (Cap. 5), so that the plaintiffs' lawyers assume some responsibility for the costs. Accordingly, I direct the plaintiffs' lawyers to show cause why such orders should not be made at 2 pm on 8 February 2014. I suggest that it would be appropriate if the lawyers were represented by other counsel. I also direct that the plaintiffs be served with a copy of this judgment by their lawyers and told that they may appear before me on that date to make such representations as they think fit.



JAMES FINDLAY
Judicial Commissioner

BETWEEN

Chong Ming Loo	**First Plaintiff**
Kuan Chee Ming	**Second Plaintiff**

AND

National Insurance Company Berhad	**Defendant**

(High Court of Brunei Darussalam)
(Civil Suit NO. 3 of 2010)

Before: Judicial Commissioner James Findlay In Chambers.
Date of Hearing: 8th February, 2014.
Date of Handing Down Judgment: 12th February, 2014.

Mr Vincent Joseph appeared for the Plaintiffs' lawyers.

Case cited on Judgment on Costs:

Nicolson v Icepack Coolstores Ltd 3 NZLR 475
Orchard v South Eastern Electricity Board 1 QB 565

JUDGMENT ON COSTS

Findlay, J.C.:

In my main judgment, after awarding full indemnity costs against the plaintiffs, I said this -

> "That is one side of the coin. The other side of that coin, on the face of it, is the position in which the plaintiffs have been brought by the rash conduct of this case by their lawyers. They are now facing a heavy bill of costs due to the defendant and the fees and expenses that would be claimed by their lawyers.
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> the plaintiffs be served with a copy of this judgment by their lawyers and told that they may appear before me on that date to make such representations as they think fit."

On 5 February 2014, the plaintiffs' lawyers wrote a letter to me saying, in essence, that Ms Tan would be away from Brunei from 8 to 12 February and asking for an adjournment of the matter. This surprised me in view of my suggestion above that the lawyers be represented by other counsel so Ms Tan's absence from Brunei was irrelevant. I directed that plaintiffs' lawyers appear before me as scheduled.

When they did so, sensibly, they were represented by Mr Vincent Joseph of Sandhu & Co. Mr Joseph presented arguments against me making an Order 59 with skill and sensitivity. He said all there was to be said in favour of the lawyers.

Essentially, Mr Joseph argued that I should be cautious about using this power on the basis that it should be used only in the most serious cases. I accept that this is the case.

In support of his argument, Mr Joseph cited the case of ***Orchard v South Eastern Electricity Board*** **1 QB 565**.

That case is somewhat different from the one before me in that there the question was whether or not the solicitors concerned owed a duty to the opposing party to conduct the litigation "with due propriety". The Court of Appeal held that this was doubtful. In the matter before me, the issue is the duty a party's lawyers owe to their own client. In that situation, there can be no doubt that the lawyers owe a duty to their clients to conduct the litigation with "due propriety". They, of course, also owe that duty to the court.

There is also the difference that, in that case, the plaintiff's claim was supported by independent witnesses and expert evidence. Here, the plaintiffs' witnesses were all, to one degree or another, connected with each other and there was no fully independent evidence at all.

In the matter before me, I am not concerned with protecting the opposing party; that has been dealt with by my order for payment of indemnity costs. I am also not concerned with punishing the plaintiffs' lawyers; that is not my function. What I am concerned with here is considering whether or not the plaintiffs have been ill-advised and ill-served by their lawyers and should be protected.

There cannot be any doubt that, although lawyers for a party may not have a duty to the opposing party to conduct litigation with due propriety, there is such a duty to their clients and the court.

In the Orchard case, at page 580E, Dillon L.J. said –

> "The power of the court to order a solicitor to pay the costs personally where litigation has been initiated or continued unreasonably when it has no or substantially no chance of success is, in an appropriate case, a very salutary power."

Mr Joseph produced a letter by Sandhu & Co to the plaintiffs in which they explained my judgment and advised them that they could appear before me to make representations. They did not so appear.

Although, of course, because of professional privilege, I had no power to order the plaintiffs to disclose the advice that was given to them by their lawyers, that advice has been disclosed. The letter I have just mentioned spelled out the advice that had been given to the plaintiff regarding the litigation. The letter said "You had also been advised that if the Courts rejects Mr Hong's evidence that he was not aware of the contents of the statutory declaration before he had signed them and accepts the statutory declaration as the truth, then your action would be dismissed and you would be liable for costs."

Mr Joseph also produced a letter dated 5 February 2014 signed by the plaintiffs in which it is said ". . . we were advised of the conflicting nature of Mr Hong's evidence . . . and that we may not succeed . . . if the Court rejects Mr Hong's evidence . . . "

So, the advice given to the plaintiffs made no mention at all of the strong case available to the defendant.

I do not know who drafted these letters, but, from them, it is quite clear that the advice given to the plaintiffs was woefully inadequate.

This advice reflects Ms Tan's whole approach to this matter. In giving her advice, it seems that Ms Tan, as she did throughout the trial, concerned herself only with the plaintiffs' evidence and paid no or little attention to the strong case available to the defendant. Several times during the trial, Ms Tan told me that she did not understand me when I said that, for the plaintiffs' to succeed, they had to show that the evidence of Ms Linda Lee and the evidence that supported her testimony was false.

Ms Tan clearly did not understand that, for the plaintiffs to fail, it was not necessary for the defendant to show that Hong's evidence should be rejected. The defendant did not have any onus to show that. The onus was on the plaintiffs and to succeed they had to show that the statements of the three lawyers, two of whom were acting for Hong and were acting quite independently, had to be rejected as false and, if that could not be done, the plaintiffs had to fail.

The strength of the defendant's case should have been emphasised in the advice given to the plaintiffs and they should have been told that, in the light of this, their case had no real chance of success. This, on the basis of the letters produced by Mr Joseph, is not what they were told.

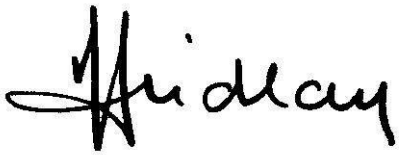
In view of what I have said in the main judgment (and nothing I heard or read subsequently changes that view) I have no doubt at all that this "litigation has been initiated or continued unreasonably when it has no or substantially no chance of success". In the words of Order 59, costs were incurred here improperly and without reasonable cause.

I am conscious of the fact that an order under Order 59 should not be made where a lawyer makes a simple mistake of judgment or does not assess correctly which evidence would be accepted and which rejected, but the case before me is, in my view, extreme. This case is not a matter of making a wrong decision that any lawyer might make, but one, in my judgment, in which no lawyer acting sensibly and properly in the interests of his clients and her duty to the court could have made in the light of the evidence that Ms Tan knew would be advanced in support of the defendant's case and which, in Ms Linda Lee's case, she knew she could

only suggest, most implausibly, was the result of a serious professional mistake and not fraudulent.

I am reinforced in this view by the way Ms Tan advanced the case of ***Nicolson v Icepack Coolstores Ltd*** 3 NZLR 475 when she must have known that it had no relevance at all to the matter before me. This demonstrates, in my view, Ms Tan's cavalier approach to this litigation.

In these circumstances, I believe that the right order to make is that I should disallow all the costs between the plaintiffs and their lawyers and I do so. This means that the plaintiffs' lawyers may not recover any costs, including any fees and expenses, from the plaintiffs. It should be noted that I have not gone further than this by ordering the plaintiffs' lawyers to pay costs incurred by the defendant. In my view, that order should be reserved for more serious cases, such as where there has been dishonesty, falsity or overreaching. The plaintiff should be informed of this decision.



JAMES FINDLAY
Judicial Commissioner