IN THE SUPREME COURT OF SEYCHELLES

PALM CARS (PTY) LTD
(a car rental company represented by one of
its Directors Mr Michael Lavigne) **PLAINTIFF**

VERSUS

MASSIMO BRUNO **DEFENDANT**

Civil Side No 244 of 2004

Mr. F. Bonte for the plaintiff
Mr. B. Georges for the defendant

JUDGMENT

Perera J

The defendant hired a motor vehicle bearing No. S 14993 from the plaintiff company on a rental of Euro 60 per day from 13th August 2004 to 23 August 2004. The plaintiff avers that on 16th August 2004, the defendant, negligently and recklessly parked the said vehicle on a downhill slope without engaging the handbrake, and that consequently the vehicle rolled down and sustained extensive damage, to the extent that it has now been "*written off*". The plaintiff company avers that although the "*collision damage waiver contract*" (CDW) entered by parties limit liability to Euros 1000 in respect of damage caused to the vehicle, yet as the damage was caused by the negligence and recklessness of the defendant, the total cost of repair or the replacement cost of the vehicle would become payable. The defendant maintains that liability is limited to Euro 1000, which amount he is prepared and willing to pay.

Mr Joseph Lavigne, representing the plaintiff company testified that upon inspection of the vehicle subsequent to the accident, it was found that the defendant had left the gear in the "*drive*" position and that the hand brake had also not been engaged. He produced the originals of the contract of rental (exhibit P1), and the collision damage waiver contract (exhibit P2). He stated that the CDW Contract should be read with the main contract of rental, and not in isolation. He further stated that the limitation of liability up to a limit of Euro 1000 under the CDW Contract would apply in a "*normal traffic accident*", and not when damage is caused to the vehicle due to the negligence and recklessness of the hirer.

No evidence was adduced on behalf of the defendant. In paragraph 2 of the defence, it has been admitted that the vehicle was damaged as a result of rolling down a slope.

The issue before Court is whether the defendant's liability is limited to Euro 1000 by virtue of the CDW Contract, or for the total costs of the damage, as damage occurred due to his gross negligence and recklessness.

In this respect, the relevant Clauses of both contracts should be considered. Obviously, the main contract is the contract of rental (P1). In accepting the vehicle on hire, the defendant has initially agreed to the term, "*I understand that I am fully responsible for any single vehicle accident".* This has necessarily to be so, as the hired vehicle has only a Third Party Insurance Policy, which has limited coverage in respect of Third Party bodily injury or death liability and limited property damage liability. Such Policy does not cover "*own damage*". Under the heading "*Insurance",* the contract further provides that "*in the event of damages to the vehicle, due to driving on unsealed roads or where conditions are not suitable for the vehicle, or where no other vehicle is involved, the hirer is liable for the full loss".* This confirms the liability for a "*single vehicle accident*", and the basis of a Third Party Policy.

These were the general terms which the defendant accepted under the contract of hire. However, that contract had also the following condition-

> "**Collision Damage Waiver (CDW)**
> *The hirer is kindly advised to take out collision damage waiver (CDW) at a cost of Euro ten (E. 10.00) per day. In the event of an accident where the hirer is at fault and has paid for C.D.W, the hirer is only liable to pay the first euro one thousand (E. 1000.00). Failure to take out CDW will render the hirer liable for the full cost of the loss or damage to the vehicle in the event of an accident where the hirer is at fault".*

It is not in dispute that the defendant entered into a CDW Contract on the same day as the contract of rental *(P2).* The relevant clause therein is as follows-

> "I understand and hereby agree that by taking and paying for collision damage waiver (CDW), I will automatically *limit my liability to the maximum of US $ 1000.00 in damages for payment of US $ 10.00 per day CDW …….. should I be involved in an accident which causes any damage to the hired vehicle, and this also when, as a result of a breach of the terms of the hire contract, which in turn results in damages to the hired vehicle".*

The CDW contract has to be read as part and Parcel with the main contract of rental. Hence all liabilities

undertaken in the contract of rental became limited to the amount agreed upon by both parties under the CDW Contract. The fact that the damage was caused as a consequence of the defendant leaving the automatic gear transmission vehicle in the "*drive"* position on a slope without activating the hand brake, remains undisputed. That indeed was gross negligence and utter recklessness. Would liability of the hirer in these circumstances, be still limited to the amount agreed in the CDW Contract?

A CDW Contract came to be considered in the case of ***Praslin Holiday Car Rental v. Brigit Manella Friedel (C.S. 277 of 1994).*** In that case the defendant, a tourist, was not available to testify, and on the basis of the other evidence in the case, it was established that the defendant had left the vehicle on the beach and that it was partly submerged in water when the tide rose. Bwana J *(as he then was)* accepted the contention of Counsel for the plaintiff that the CDW Contract applied only in cases of "*collision"* and that hence the defendant was fully liable for the damage caused by her negligence.

The CDW Contract which binds the parties in the present case seem to be much wider in scope. It limits liability to Euro 1000 where the hirer is involved in an accident which is caused "*as a result of a breach of the terms of the hire contract".* In this respect the relevant clause in the contract of rental reads "*the hirer agrees to take proper care of the vehicle, paying for normal upkeep of the said vehicle and is fully responsible for all damages of the rented vehicle due to neglect ……".* The word "*collision"* means not only a striking against, but also a striking together.

In the Canadian case of ***Aberdeen Paving Ltd v. Guildhall Insurance of Canada (1966) 58. M.P.R. 288*** *(reported in the Cumulative Volume B of the English and Empire Digest, Page. 459)* the Court was called upon to interpret the word "*collision"* in a Vehicle Insurance Policy. In that case a tractor accidentally slid over a bank into a lake and was damaged. The vehicle was insured against "*collision".* It was held that the Policy covered such an event and that the water and bed of lake were "*objects"* contemplated by the word "*collision".* Obviously what is relevant in a CDW Contract is not the nature of the collision, but the damage caused to the vehicle thereby, by striking against or striking together. The report of the motor vehicle assessor *(exhibit P3)* sets out the visual damage to the vehicle, and states that there was the possibility of discovering further damage after the vehicle was dismantled. In his assessment of how the damage would have been caused, he states thus-

> "I am of the opinion that this vehicle, which has an automatic transmission, was not parked according to normal procedure, which is to shift the gear lever to the parking (P) position from the drive (D) position and applying the handbrake. I therefore conclude that the vehicle was left in drive (D) or neutral (N) position and the handbrake was not applied, and the vehicle had cause to move slowly backward out of the garage, pickup speed when beginning to roll down the steep slope of the driveway, and it is evident that with the speed it was travelling down the slope, the vehicle left the driveway, *hit with force against a rock and overturned, thus resulting in damage stated above."*

Hence the collision against the rock was due to the negligent parking of the vehicle. Failure to take proper care of the vehicle is a breach of a term of the contract of rental. But however illogical it may seem, such eventuality has been covered in the CDW Contract, wherein it is stipulated "*and this also when as a result of a breach of the terms of the hire contract, which in turn results in damages to the hired vehicle".* Here the *Contra Proferantes* rule must be applied against the insurer *(the plaintiff company)* who has chosen the language to the CDW Contract. Accordingly I hold that the liability of the defendant for the damage to the vehicle will be limited to the payment of Euro 1000.

The plaintiff has also sought to recover Rs.64,800 for loss of use of vehicle, on the basis of a daily rental of Rs.360 for six months. On a consideration of the CDW Contract, the defendant had undertaken liability for "*the complete cost of damages, repairs and/or replacement of the motor vehicle ……"* by *"not taking and not paying for the collision damage waiver".* This Clause is superfluous as it appears in the main contract of rental, which is the more appropriate place for that. Hence as the CDW Contract has been taken and paid for, the defendant will not be liable to pay for loss of use or replacement costs.

Accordingly judgment is entered in favour of the plaintiff in a sum of Euro 1000, together with costs of action.

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A.R. PERERA

JUDGE

Dated this 9th day of March 2006