Hilary Term
[2015] UKPC 4
Privy Council Appeal No 0085 of 2012

JUDGMENT

The Presidential Insurance Company Ltd (Appellant) *v* Mohammed and others (Respondents)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance
Lord Wilson
Lord Carnwath
Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY LORD HODGE ON

3 February 2015

Heard on 29 October 2014

Appellant	*Respondents*
Alan Newman QC	Asaf Hosein
Shastri V C Parsad	Prakash Maharaj
(Instructed by Bankside Commercial Solicitors)	(Instructed by Yasseen Ali, Attorney at Law)

LORD HODGE:

1. This appeal concerns the Motor Vehicles Insurance (Third-Party Risk) Act (Ch 48:51; Act 39 of 1933 as amended) ("the MVIA"). The principal issue in the appeal is whether the MVIA enables someone who has suffered property damage caused by a motor vehicle accident to obtain indemnity from the vehicle owner's insurers when the driver, who caused the damage, was not authorised by the insurance policy to drive the vehicle.

Factual background

2. The Mohammed family own a shop, known as the Montrose Muffler Shop, at the corner of Montrose Main Road and Kenneth Street, Chaguanas. At about 6.30 am on 16 June 2004 Mr Ravi Rampersad, when driving a Nissan maxi-taxi with registration number HAY 3286, crashed the vehicle into the Mohammeds' shop, causing extensive property damage. Mr Kuldeep S Kocher was the registered owner of the maxi taxi. He had taken out motor vehicle insurance with the appellants ("Presidential"). The insurance policy named Mr Kocher and Mr Jagdesh Ramdial as the only authorised drivers with the proviso that they had to be authorised by relevant laws and regulations to drive the vehicle. It appears that Mr Kocher had given Mr Rampersad permission to drive his maxi-taxi, although he was neither a named driver under the insurance policy nor authorised to drive a maxi-taxi under the Maxi-Taxi Act (Act 6 of 1992 as amended).

3. Shortly after the accident, at 8.03 am Mr Rampersad and Mr Shazim Mohammed gave a statement to police officers at Chaguanas police station. The initial statement, which the police wrote in manuscript in the station duty diary, recorded that Mr Rampersad was driving the vehicle when the accident happened and that he produced his driving permit and the certificate of insurance. The police warned Mr Rampersad of prosecution. The diary also contains an entry seven minutes later which purports to correct the earlier entry and states that the driver was Mr Kocher, who produced his driving permit to the police. The police then warned Mr Kocher of prosecution and inspected the vehicle. Thereafter, both Mr Shazim Mohammed and Mr Kocher declined to give the police a written statement, saying that they would resolve the matter privately.

4. On 17 June 2004 Mr Kocher submitted an accident report form to Presidential in which he claimed to have been driving the maxi-taxi when the accident occurred. On the same day Presidential appointed Mr Esmond Maxwell to investigate the claim. He promptly visited the police station and obtained a photocopy of the

station diary entry. Presidential had discussions with the Mohammeds and at some time between 17 and 22 June 2004 agreed orally to meet their claim. That agreement was then recorded in a letter dated 23 June 2004 to Mr Haniff Mohammed and Mr Shairoon Mohammed in which Presidential undertook (a) to restore their property to its condition immediately prior to the loss caused by the accident and (b) to compensate them for any other losses. The letter was headed with the words "without prejudice" but it was not argued that the words had any legal effect in this context.

5. The Mohammeds started to repair their shop but did not complete the reinstatement after Presidential disputed their entitlement to indemnity in about August 2004. They raised an action against Mr Kocher in December 2004 (HCA No 2705 of 2004) in which they asserted that "the defendant and/or agent and/or employee" had driven the vehicle negligently and had caused them loss. They intimated the action to Presidential which applied to intervene but did not appear at a hearing to do so. Mr Kocher did not defend the action. As a result, on 7 January 2005, the court pronounced a default judgment against Mr Kocher that the Mohammeds were entitled to recover damages which would be assessed. On 31 October 2005 Master Paray-Durity awarded damages against Mr Kocher in the sums of $185,344.26 to Mr Shairoon Mohammed, $82,651.52 to Mr Saiheed Mohammed and $55,977.86 to Mr Naim Mohammed, together with statutory interest at 12% from that date and costs.

The current proceedings

6. On 20 February 2006 the Mohammeds raised an action against Presidential (HCA No 00454 of 2006) seeking a declaration that the insurance company was liable to satisfy the judgment against Mr Kocher. They founded on the oral agreement and letter of 23 June 2004 and also on the MVIA. In its initial defence and counterclaim Presidential pleaded that Mr Kocher had conspired with Mr Shazim Mohammed, who had represented the Mohammeds at the police station, to make a fraudulent insurance claim by falsely telling the police that Mr Kocher was the driver of the maxi-taxi when the accident occurred. In the counterclaim Presidential sought, among other orders, a declaration that the insurance policy covered only Mr Kocher and Mr Ramdial and also an order that the judgment against Mr Kocher and subsequent proceedings should be set aside because of the conspiracy to defraud it.

7. In June 2010 an attorney acting for Presidential wrote to the Commissioner of Transport to enquire whether Mr Rampersad had a taxi driver's permit and a permit to operate a maxi-taxi. On 30 August 2010 the licensing authority responded, certifying that he had neither. That response prompted Presidential to apply on 4 October 2010 to re-amend its defence and counterclaim to assert

that the driver was unlicensed and to refer to the proviso in its policy that the named drivers had to be authorised to drive the vehicle. In response, the Mohammeds applied to have Presidential's defence and counterclaim struck out.

8. On 20 May 2011 Madam Justice Charles, after considering the parties' written submissions, dismissed the Mohammeds' application to strike out and granted Presidential's application to re-amend its defence and counterclaim. The Mohammeds appealed and on 28 July 2011 the Court of Appeal (Weekes, Soo Hon and Narine JJA) unanimously allowed their appeal, refusing Presidential's application to re-amend on the basis that Presidential could have found out long before that Mr Rampersad had no maxi-taxi licence, and striking out its defence and counterclaim. In the leading judgment Narine JA founded on an earlier judgment of the Court of Appeal which interpreted section 4(7) of the MVIA as imposing liability on an insurer to indemnify the person insured even if the person using the motor vehicle with his consent was not covered by the insurance policy (*The Presidential Insurance Company Ltd v Resha St Hill* Civ App No 51 of 2008). The Board subsequently overturned that judgment ([2012] UKPC 33) thereby calling into question the basis on which the Court of Appeal had struck out Presidential's defence in this case. On 5 November 2013 the Board granted Presidential permission to appeal.

The legislative provisions

9. The MVIA seeks to ensure that people who drive motor vehicles have third party insurance in order to provide adequate compensation to people who are injured in or suffer property damage as a result of motor vehicle accidents. Section 3 makes it unlawful for any person to use, or cause or permit any other person to use, a motor vehicle unless there is in force a valid third party insurance policy that covers that person's use of the vehicle. Contravention of that section is a criminal offence. Section 4(1) provides that the insurance policy must insure "such person, persons or classes of persons as may be specified in the policy" against death, bodily injury or damage to property arising out of the use of the motor vehicle (section 4(1)(b)). Section 4(7) provides:

> "Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons."

10. In response to concerns about the indemnification of third parties in accidents involving taxis, Parliament in 1996 amended the MVIA by the insertion of a new section 4A which provides:

> "Notwithstanding any other law, the owner of a motor vehicle licensed to ply for hire and insured under this Act is deemed to be the employer of any person driving the motor vehicle at the time of an accident as a result of which a person has suffered death, bodily injury or damage to property unless it is shown that at the time of the accident that the vehicle was the subject of larceny."

11. In *The Presidential Insurance Company Ltd v Resha St. Hill* (above) the Board held that section 4(7) did not impose on an insurer a liability that the policy did not purport to cover in respect of the person insured or the persons driving or using the vehicle with his or her consent. The Board also addressed section 4A, holding that its primary application was to situations where a taxi was being driven with the owner's consent but arguments could arise whether the driver was an employee of the owner or an independent contractor.

12. Section 10 of the MVIA imposes duties on an insurer to satisfy judgments that third parties obtain against a person insured under one of its policies. Section 10(1) provides:

> "If, after a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability,"

together with costs and interest. The insurer's liability under this section arises only if it has been given timely notice of the commencement of the proceedings against the insured (section 10(2)). Section 10(3) allows the insurer to escape liability under this section if it raises proceedings before or within three months of the commencement of the action against the insured, and obtains a declaration that, apart from any provision in the insurance policy, it is entitled to avoid the policy on the ground that the policy was obtained by non-disclosure of a material fact or the false representation of a material fact. Section 10A, allows the plaintiff

in an action against the insured to join the insurer as a co-defendant and provides that, if it is so joined, the insurer may raise any defence that it may be entitled to under the insurance policy or otherwise.

Discussion

(i) The strike out of Presidential's defence

13. The Court of Appeal relied on sections 4(7) and 4A of MVIA to exclude the defence that Mr Rampersad was not an authorised driver and section 10(1) of MVIA to exclude Presidential's fraud defence. For the reasons set out below, the Board concludes that the Court of Appeal erred when it struck out Presidential's defence because the MVIA did not prevent it from arguing (a) that the terms of its insurance policy did not cover the Mohammeds' claim and (b) that the Mohammeds' alleged involvement in Mr Kocher's fraud in the presentation of the claim allowed it to avoid the contract to fund the reinstatement of their shop and indemnify them against other losses.

14. The starting point is section 4(1), which sets out the nature of the insurance policy that is required in order to comply with the Act. It expressly leaves it to the parties to the insurance contract to determine who is covered by the policy when it speaks of "such person, persons or classes of persons as may be specified in the policy". In this case those persons were Mr Kocher and Mr Ramdial.

15. Section 4A, which deals with motor vehicles licensed to ply for hire, does not alter that fundamental position. Subject to its larceny exception, it deems the insured to be the employer of the driver involved in the accident. Its purpose is to enable the insured to be vicariously liable for the driver's negligence. But a deemed relationship of employment does not alter the terms of the insurance contract. If the policy covered as drivers the insured and his employees or agents generically, the vicarious liability of the insured could fall within its terms, so long as other conditions in the policy (such as that the driver was driving with the insured's permission, or that the driver was licensed to drive the vehicle) did not exclude liability. In contrast with, for example, sections 8(1), 12 and 12A, section 4A does not override the language of the insurance policy to extend its cover.

16. Section 10(1) also does not alter the fundamental position set out in section 4(1). The reference in section 10 to section 4(1)(b) and the words in parenthesis, "(being a liability covered by the terms of the policy)", make it clear that the section does not prevent an insurance company from pleading successfully the defence that the claim is not covered by the terms of the policy. The subsection

prevents the insurer, which has had timely notice of the action against its insured, from avoiding or cancelling the policy, eg on ground that the insured obtained the policy by non-disclosure or through misrepresentation of a material fact. But Presidential does not seek to do so. Further, Mr Hosein for the Mohammeds conceded that section 10(1) did not prevent the insurer from seeking to set aside the judgment against the insured if that judgment had been obtained by fraud. Otherwise, section 10(2) and (3) set out the circumstances in which the insurer, whose policy covers the relevant liability of the insured, can resist a claim to satisfy the judgment against the insured. Subject to those circumstances, if the insured's liability is covered by the policy, the insurer must pay.

17. The Board considers that these statutory provisions, on which the Mohammeds relied in the Court of Appeal, do not prevent Presidential from defending the action on the basis that the claim is not covered by the policy because Mr Rampersad was not a named driver.

18. Presidential also pleads a case in fraud against the Mohammeds, namely that their representative was party to the attempt by Mr Kocher at Chaguanas police station to alter the police report of the accident in order to allow a claim under the insurance policy. This is relevant as a defence to the Mohammeds' assertion that Presidential is barred from disputing its liability by the oral contract and its letter of 23 June 2004, in which it undertook to indemnify them. If Presidential were induced by that alleged fraud to agree the indemnity, the oral contract and written confirmation may be voidable.

19. There was therefore no basis for striking out Presidential's defence. In these circumstances the Board does not need to consider the separate arguments on illegality which Mr Newman advanced on Presidential's behalf.

(ii) Refusal of Presidential's application to re-amend its defence and counterclaim

20. The application to re-amend the defence and counterclaim was governed by rule 10.6 of the Civil Proceedings Rules 1998 ("CPR 1998") which provides:

> "(1) The defendant may not rely on any allegation which he did not mention in his defence, but which he should have mentioned there, unless the court gives him permission to do so.
>
> (2) The court may give the defendant such permission at a case management conference.

> (3) The court may not give the defendant such permission after a case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known after the date of the case management conference."

21. There is no doubt that Presidential's application to re-amend its defence and counterclaim was very late and that it could have obtained the information that Mr Rampersad was not licensed to drive a taxi or maxi-taxi much sooner than it did if it had exercised reasonable diligence. Presidential had no good explanation for its delay. Charles J showed in her judgment that she was aware of the delay and of the philosophy underlying the CPR 1998 which pointed towards their strict application. She chose however to exercise her discretion to allow the re-amendment because the issue of fraud, to which the re-amendment was relevant, had been raised already and needed to be determined to achieve a just result. The Court of Appeal overturned her in this matter on the basis that there had been no significant change in circumstances.

22. In the Board's view the Court of Appeal erred in failing to distinguish between the separate questions of (a) the jurisdiction to allow the amendment of a party's defence in rule 10.6 of CPR 1998 and (b) the exercise of discretion within that jurisdiction. The Board considers that a change of circumstances under the rule can extend to a party becoming aware of information for the first time. Otherwise it may be difficult to apply the rule which does not specify a date since when the change must have occurred. But that does not allow a party to sit on his hands. The test of the reasonable diligence of a prudent litigant (in this case a prudent insurer) is relevant to the exercise of discretion within that jurisdiction. It may often form a basis for refusing to allow amendment under rule 10.6 (or, in relation to a statement of case rule 20.1), as it did in *The Great Northern Insurance Co Ltd v Hannibal* CA No 238 of 2010.

23. In this case the Board considers that Charles J acted within her discretion in allowing the re-amendment of the defence and counterclaim on the basis that (a) the defendant had already raised the issue of fraud that had induced it to admit liability, and (b) justice required the court to be in possession of all the relevant facts when it considered that allegation of fraud. Another judge might have taken a different view and considered that the unjustified delay warranted refusal of permission in order to promote discipline in litigation. But in this case either outcome was within the discretion of the judge hearing the application.

24. The Board observes that it was a matter of public record that Mr Rampersad did not possess the necessary licences. Mr Hosein did not challenge the view that

Presidential would have been entitled to adduce evidence at the trial of his lack of licences in the context of its already pleaded case of fraud.

(iii) The problem of the uninsured driver

25. The Board recognises that there remains a serious problem about innocent victims suffering bodily injury or property damage as a result of the negligence of uninsured drivers. Parliament has attempted to address this social evil but loopholes remain. In *Resha St Hill* the Board noted that there was no equivalent of the Motor Insurers Bureau or other facility to ensure that the victims of negligent but uninsured drivers did not go uncompensated. It also pointed out (para 31) that section 12 might be the natural section on which to build if the legislative aim is to provide compulsory insurance cover, regardless of the policy definition of the persons covered, when anyone uses an insured vehicle with the policyholder's consent. If the Mohammeds were not involved in what Presidential alleges was Mr Kocher's fraudulent attempt to obtain indemnity from it, they were innocent victims of the accident. The problem, which Edoo J pointed out in *Eligon v NEM (West Indies) Insurance Ltd* Case No 686 of 1974, 23 April 1982, remains.

Conclusion

26. The Board concludes that there was no basis for overturning the order of Charles J. The appeal should be allowed and the Court of Appeal's judgment in favour of the Mohammeds set aside. The deadlines which Charles J set in her order have been superseded by the appeal. The case should therefore be remitted back to the High Court to proceed accordingly.

27. The Board will consider submissions on costs if they are filed within 28 days of the judgment being handed down.