Easter Term

[2015] UKPC 22

Privy Council Appeal No 0022 of 2012

JUDGMENT

Elizabeth Ram (Administrator of the estate of Pearl Baboolal) (Appellant) v Motor and General Insurance Company Limited (Respondent) (Trinidad and Tobago)

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

before

Lord Mance

Lord Clarke

Lord Sumption

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

18 May 2015

Heard on 24 February 2015

Appellant	Respondent
Stanley I Marcus SC	Christopher H Dunkley Russell Huggins Cherisse Huggins
(Instructed by Temple Vale & Law Solicitors)	(Instructed by Blake Morgan LLP)

LORD HODGE:

1.
Pearl Baboolal was killed in a motor vehicle accident on 22 December 1993 when she was a passenger in a maxi-taxi driven by the late Mr Roland Gokool. Several people were killed or seriously injured in the accident, resulting in legal claims against the driver. On 16 December 1997 Ms Elizabeth Ram, who is the administratrix of Ms Baboolal's estate, commenced an action (HCA No 3222 of 1997) in the High Court against Mr Gokool. She gave notice of the action to Mr Gokool's insurers ("MGI") on 22 January 1998. On 22 October 1998 Ms Ram obtained judgment against Mr Gokool under Order 19 Rule 6 of Supreme Court Rules and on 13 July 1999 damages were assessed by Master Paray-Durity in the sum of $81,000.

2.
On 19 September 2001 Ms Ram raised an action (HCA No 2605 of 2001) against MGI under section 10 of the Motor Vehicles Insurance (Third-Party Risks) Act (Chapter 48:51) ("the Act") in which she claimed the $81,000, together with interest and costs, which the High Court had awarded on 13 July 1999 in its judgment against the driver. On 16 October 2001 MGI lodged a defence in which it asserted that its liability to third parties in respect of the claims arising out of one accident was limited to $1m both by contract and by statute. MGI pleaded that it had already paid out the maximum $1m to third parties with claims arising out of the accident and that it had thus already discharged its contractual liabilities to its insured, which reflected the statutory requirements in section 4(2)(f) of the Act.

3.
MGI's defence was supported by an affidavit by Amryl Vialva, a legal secretary, which listed the twelve claims that MGI had settled. The list stated the parties to each action, the registered High Court number of each action and the amount paid out. From that list it appears that two of the claims (action HCA No 3236 of 1997 - Sinanan v Gokool - and action HCA No 3252 of 1997 - Frederick v Gokool) which MGI met were claims in actions raised after the date when Ms Ram commenced her action against Mr Gokool. The appellant submits that MGI has acted unfairly and to her prejudice in selecting claims to pay out.

4.
The principal issue in this appeal is whether an insurance company, before it pays third party claims under an insurance policy which has a contractual monetary limit on the aggregate of claims arising out of one event which equates with the statutory minimum cover, must (a) ascertain the total claims arising from the event and (b) where the total exceeds the limit, devise a scheme for the proportionate payment of the claims.

The statutory provisions

5.
The Act provides (in section 3(1)) that it is not lawful for any person to use or cause or permit any other person to use a motor vehicle or licensed trailer on a public road unless there is in force an insurance policy in respect of third party risks that meets the requirements of the Act. Section 4(1) provides that that policy of insurance must (a) be issued by a person who is an insurer and (b) insure the persons specified in the policy:

"in respect of any liability which may be incurred by him or them in respect of any death of or bodily injury to … or damage to the property of any person caused by or arising out of the use of the motor vehicle or trailer mentioned in the policy on a public road."

6.
MGI's policy of insurance contained a contractual limit of $1m on its liability for the aggregate of claims arising out of the same event. This contractual limit complied with section 4(2)(f) of the Act which provided:

"In the case of death or of bodily injury, a policy of insurance shall not be required to cover -

… (f) liability in respect of any sum in excess of one million dollars arising out of the total claims for any one accident for each vehicle concerned."

7.

Section 10 (1) provides:

“If … 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 … 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 …” (emphasis in italics added)

In order to allow a person to invoke this provision to obtain payment directly from the insurer section 10(2)(a) provides for a plaintiff to give timely notice to the insurer of the legal proceedings which he or she raises against the insured person, as Ms Ram did in this case.

The current legal proceedings

8.
In the action against MGI Ms Ram applied for summary judgment under Order 14 of the Rules of the Supreme Court and after a hearing on 4 June 2004, at which MGI were not represented, Tiwary-Reddy J granted her decree for $81,000, interest and costs. On 4 October 2004 MGI applied for that order to be set aside and thereafter lodged Ms Vialva’s affidavit (para 3 above). Myers J set aside the order on 21 February 2005 and the application for summary judgment proceeded to a contested hearing. In a judgment dated 12 April 2006 Ventour J granted summary judgment to Ms Ram, finding that MGI had failed to take into account the “total claims” as section 4(2)(f) of the Act required. He held that the insurance company had first to ascertain who the third party claimants were and the extent of their claims before it could apply the insurance moneys to meet the total claims. The Act did not give an insurance company a free hand to select which claims to settle and which third parties it would leave without a remedy. MGI should have applied to the court so as to devise a scheme to allow it to meet its liability under section 4(2)(f) of the Act.

9.
MGI appealed that decision. On 5 February 2009 the Court of Appeal (Warner, John and Yorke-Soo Hon JJA) allowed MGI’s appeal. In the leading judgment, Warner JA referred to Cox v Bankside Members Agency Ltd [1995] 2 Lloyds LR 437 and held that where an insurer had a limited fund to meet the claims of multiple claimants it was legitimate to pay the claims in chronological priority until the insurance was exhausted. She observed that the Act made no provision for the proportional or partial settlement of claims and there was no suggestion that MGI had paid out the sums up to the limit otherwise than in good faith. The court dismissed Ms Ram’s application for summary judgment and, on the basis that the decision finally disposed of the whole action, dismissed the action. By order dated 28 September 2009 the Court of Appeal granted Ms Ram final leave to appeal to the Board.

10.
Ms Ram’s arguments before the Board generally followed her contentions before the Court of Appeal. In summary Mr Stanley Marcus SC submitted on her behalf:

(i) that MGI was required by necessary implication from section 4(2)(f) of the Act to take reasonable steps to ascertain the total claims before making any payments to claimants;

(ii) that by failing so to do, MGI had “lost the statutory protection of section 4(2)(f)”; and

(iii) that the evidence presented by Ms Vialva (a) suggested that MGI had paid out claims after it had received intimation of Ms Ram’s claim against its insured on 22 January 1998, (b) showed that two actions (referred to in para 3 above) had been raised against Mr Gokool after Ms Ram had raised her

action against him and (c) and in any event did not disclose that the claims had been paid as they were presented.

In relation to the first submission, counsel had argued in his written submissions that the insurer was under a duty to treat the claimants in a multiple victim accident in a fair manner by advertising for claims and either (a) paying over the insurance fund to the supervisor under section 143 of the Insurance Act (Chapter 84:01) in order to obtain a discharge or (b) seeking the assistance of the court to devise a scheme for the proportionate distribution of the insurance fund.

11.
In the course of argument it became clear that there was a factual dispute as to the basis on which MGI had paid out the claims. The appellant disputed MGI's assertion that it had paid the claims in a proper chronological order. It was clear that neither party when debating in the courts below had focussed on the chronology of when each claimant had established his or her claim for damages against Mr Gokool either by court order or negotiated settlement. The Board therefore invited further written evidence and submissions to clarify what MGI had done, but reserved judgment as to whether Ms Ram was too late in raising this challenge because it had not been explored in the courts of Trinidad and Tobago.

12.
MGI's representatives produced an affidavit dated 16 March 2015 of Mr Michael Toney, the liquidator of MGI together with a report by Mr Russell Huggins, Attorney at law, of his examination of the court files of claims against Mr Gokool. Mr Toney stated that it was the policy of MGI to settle claims once they were established either by a court assessment of the damages against its insured or by a negotiated settlement and that MGI had implemented that policy in processing the claims against Mr Gokool. Although Mr Huggins' report revealed that there were some gaps in the court records, it supported the assertion that claims against Mr Gokool which exhausted the $1m insurance had been established before Ms Ram established her claim by obtaining the assessment of damages by Master Paray-Durity on 13 July 1999. On 30 March 2015 the appellant lodged affidavits by two attorneys at law, Mr Selwyn Ross and Ms Patricia Dindyal, together with exhibits, which principally addressed the circumstances of the Sinanan action (HCA No 3236 of 1997). The Board summarises in the annex to this judgment the position which the new evidence disclosed.

13.
In five of the cases listed in the annex (actions 1, 6, 8, 10 and 11) the plaintiffs' claims against Mr Gokool were established by court order and in one (action 12) by a consent order for interim damages. While the court records may be incomplete, the others (actions 2-5, 7 and 9) appear to have been settled by negotiation before Ms Ram's claim was established when Master Paray-Durity assessed her damages on 13 July 1999. The surviving records are consistent with Mr Toney's evidence as to MGI's practice. The Board is satisfied on balance of probabilities that MGI exhausted the $1m insurance in meeting claims against Mr Gokool that had been established before Ms Ram had established her claim. The remaining issue therefore is that stated in para 4 above.

Discussion

14.
Section 4(2)(f) of the Act did not create a mechanism for the insurance company to pay third parties. Like section 4(2)(e), which required cover of $200,000 in respect of liability arising out of any one claim by any one person, it specified the minimum level of cover which an insurance policy had to provide in order for the vehicle owner to comply with his or her obligation under section 3 of the Act.

Thus section 4(2)(f) did not provide “protection” to the insurer, contrary to Mr Marcus’s submission. Instead the issue is how is an insurance company lawfully to administer a limited insurance fund to meet third party claims arising from a multiple-victim accident. For the reasons set out below, the Board is satisfied that MGI acted lawfully in paying out the insurance fund as and when each claimant established his or her claim against its insured.

15.
Section 10 imposed the obligation on the insurer to pay third parties once they had obtained judgment against the insured. The Board has consistently interpreted section 10 of the Act, and similar provisions in statutes in other jurisdictions, as limiting the third party claimant’s right to recover directly from the insurance company the sums which the relevant statute requires the policy to cover (Goberdhan v Caribbean Insurance Co Ltd [1998] UKPC 25 (Trinidad and Tobago), applying the decision of the House of Lords in Harker v Caledonian Insurance [1980] 1 Lloyds LR 556 (Belize) and the Board’s decision in Suttle v Simmons [1989] 2 Lloyds LR 227 (Bermuda)). The Act, as it was in 1993, restricted each claim to a maximum of $200,000 (section 4(2)(e)) and the aggregate of claims arising out of one event to $1m.

16.
Ms Ram’s complaint, which reflects the concerns which Lord Denning MR expressed in his dissenting judgment in the Court of Appeal in Harker v Caledonian Insurance [1979] 2 Lloyds LR 193 (at 197), is that the operation of an aggregate limit on insurance cover may result in injured persons being “left in the cold” if the insurer pays out the available funds to other claimants before all injured persons have established their claims. It is clear that this may be a problem in motor vehicle accidents where there are many victims, as can occur in accidents involving maxi-taxis. But the question which the Board has to address is whether the Act, which creates the victim’s right of action against the insurance company, requires the insurance company to put in place an arrangement which prevents a victim being left in the cold.

17.
In the Board’s view, such an arrangement is inconsistent with the Act as it is currently drafted. Section 10 of the Act expressly provides for what is implicit in the United Kingdom in the Third Parties (Rights against Insurers) Act 1930, namely that the injured third party acquires a right of action against the insurance company only once he or she has obtained judgment against the insured and his or her claim in damages has been ascertained either by judgment, arbitration award or agreement: Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 QB 363; Bradley v Eagle Star Insurance Co Ltd [1989] AC 957; Cox v Bankside Members Agency [1995] 2 Lloyds LR 437. More recently, the United Kingdom Supreme Court has confirmed that an insurer cannot manipulate the order of payment of third party claims to its own advantage but must pay out claims in chronological order of their ascertainment against their insured: Teal Assurance Co Ltd v WR Berkley Insurance (Europe) Ltd [2013] UKSC 57, paras 13-19 and 26 per Lord Mance.

18.
Section 10 of the Act envisages that a third party will establish his or her claim against the insured and imposes on the insurance company the obligation to pay that claim. It contains no provision authorising the insurer to delay paying a claim established against its insured in order to enable other claimants to catch up so as to allow the rateable payment of multiple claimants on a limited insurance fund. Such delays could be significant, particularly if liability were in issue in some claims. On the contrary, the Act would enable a claimant in an appropriate case to take enforcement proceedings against an insurer’s assets. In addition, an insurer that delayed payment would be exposed to

additional interest charges, which it could have avoided by prompt payment, if the insurance fund turned out to be sufficient to meet all claims. As with the 1930 Act in the United Kingdom (Cox v Bankside (above), Sir Thomas Bingham MR at 457-458, Saville LJ at 467) the Act did not address the problem of multiple claimants on a limited insurance fund.

19.
Where there is a contractual or statutory limit on a liability insurance fund and multiple claimants whose claims are likely to exceed the fund, there may be good policy arguments for the creation of a scheme for the rateable payment of claimants to avoid injured persons being left out in the cold. In Trinidad and Tobago, serious motor vehicle accidents involving maxi-taxis or larger public transport vehicles may readily give rise to such problems. But the answer does not lie in developing the common law in a way that would be inconsistent with the existing statutory provision. Unless the insurance industry can devise a scheme for obtaining the consent of all victims in an accident to the rateable distribution of an insurance fund, it is a problem which, if so advised, Parliament will have to address.

20.
The Board acknowledges that this conclusion is consistent with the careful judgment of Master Patricia Sobion in another case that arose from the same tragic accident: Patricia Dindyal and Others v Motor and General Insurance Co Ltd (HCA 1654 of 2001), unreported 11 November 2003.

Conclusion

21.
For these reasons the appeal is dismissed. Subject to any further submissions, it appears to the Board that MGI is entitled to its costs both here and in the courts in Trinidad and Tobago against Ms Ram in her capacity as administratrix of Ms Baboolal’s estate. The Board invites the parties to agree a form of order to include the issue of costs. In the absence of agreement parties should make written submissions on the form of order and costs within 14 days of this judgment.

Annex

(1)
HCA No 3006 of 1995 (Balladin v Gokool and LJ Williams Services Co Ltd (Third Party)) Master Parity-Durity made an order dated 17 January 1997 and entered on 20 February 1997 in which agreed damages of $200,000 were ordered. That sum was paid and a notice of full satisfaction and discontinuance signed dated 4 April 1997.

(2)
HCA No 3648 of 1994 (Maharaj v Gokool and LJ Williams Services Co Ltd (Third Party)) $124,500 was paid before notice of full satisfaction and discontinuance was signed dated 25 April 1997.

(3)
HCA No 1150 of 1994 (Garib v Gokool and LJ Williams Services Co Ltd (Third Party)) $15,000 was paid before a notice of full satisfaction and discontinuance was signed dated 25 November 1997.

(4)
HCA 4170 of 1995 (Umrau v Gokool and LJ Williams Services Co Ltd (Third Party)) Kangaloo J by order dated 2 April 1997 gave judgment against Mr Gokool and ordered damages to be assessed. $190,000 was paid and there is no assessment order on file.

(5)
HCA No 3833 of 1994 (Ramdial v Gokool and LJ Williams Services Co Ltd (Third Party)) An order dated 28 October 1997 and entered on 3 March 1998 gave judgment against Mr Gokool and ordered damages to be assessed. Thereafter $140,372.96 was paid.

(6)
HCA No 2217 of 1997 (Meetoo v Gokool) Master Doyle assessed damages in the sum of $15,500 by order dated 3 April 1998 and that sum was paid.

(7)
HCA No 1694 of 1997 (Duntin v Gokool) $61,370.00 paid before the plaintiff lodged a notice of full satisfaction and discontinuance dated June 1998.

(8)
HCA No 2388 of 1997 (L Ramnarine v Gokool) Master Doyle by order dated 10 July 1998 and entered by consent on 29 July 1998 assessed damages in the sum of $45,000 and that sum was paid.

(9)
HCA No 3252 of 1997 (Frederick v Gokool) an order for judgment by default was made on 30 April 1998 and subsequently $30,000 was paid before a notice of full satisfaction and discontinuance was signed dated 22 September 1998.

(10)
HCA No 2462 of 1997 (K Ramnarine v Gokool) Master Doyle by order dated 31 July 1998 and entered on 29 September 1998 assessed damages at $17,000 and that sum was paid.

(11)
HCA No 2463 of 1997 (A Ramnarine v Gokool) Master Doyle by order dated 31 July 1998 assessed damages at $12,000 and a cheque dated 21 June 2000 in that sum was made payable to the Registrar of the Supreme Court.

(12)
HCA 3236 of 1997 (Sinanan v Gokool) a judgment in default of defence was made on 21 October 1998 and a hearing for assessment of damages fixed for 19 February 1999. A consent order for payment of interim damages in the sum of $149,358.04 was made on 26 February 1999 and that sum or a sum close to it was paid before a notice of full satisfaction was signed on 12 May 1999.