



Michaelmas Term

[2015] UKPC 47

Privy Council Appeal No 0063 of 2014

JUDGMENT

Insurance Company of the Bahamas Ltd (Appellant) v Eric Antonio (Respondent) (The Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lady Hale

Lord Mance

Lord Wilson

Lord Reed

Lord Toulson

JUDGMENT GIVEN ON

7 December 2015

Heard on 3 November 2015

Appellant

Brian M Moree QC

Genell K Sands

(Instructed by Charles Russell Speechlys)

Respondent

Cedric L Parker

Kahlil D Parker

(Instructed by Cedric L Parker & Co)

LORD MANCE:

General

1.

Whether a victim of negligent driving can look to insurers of the negligent driver can be vitally important for the victim. But it is a matter over which the victim has commonly no control. It depends upon whether insurance has been arranged by or on behalf of the driver or driver's employer, and it also depends upon the terms of that insurance, subject to limited statutory qualifications to ensure that these cannot always be relied upon as against a third party victim. There are as a result cases including the present - as the Board will humbly advise Her Majesty for reasons which will appear - in which the victim has no insurer to which to look.

2.

That is a problem which could only partially be addressed by extended statutory intervention of the sort which the Board noted as possible in *The Presidential Insurance Co Ltd v Resha St Hill*[2012] UKPC 33, para 31 and *The Presidential Insurance Co Ltd v Mohammed*[2015] UKPC 4. Any complete solution, covering in particular situations where no relevant insurance cover exists at all, requires more wide-ranging arrangements, such as the long-established extra-statutory Motor Insurers' Bureau in the United Kingdom and the other national insurers' bureau now required throughout the European Union under Directive 2009/103/EC of 16 September 2009.

3.

The solution is not for courts to impose on insurers liabilities which they are not required to bear either under the insurance cover which they have properly issued or under current legislation. Insurance is based on an assessment of the risks undertaken and of the premiums appropriate to cover such risks. Named driver policies are a means by which insureds and insurers identify the cover required and define and limit the premiums payable. They are permissible under current law in The Bahamas. To impose on insurers liability for accidents caused by other drivers not named on the relevant policy is to expand the risks and to undermine the purpose of named driver cover. If such liability is imposed in respect of insurances already issued, insurers will have received no premiums for such risks. In relation to future insurances, higher premiums would have to be charged across the board, and individual motorists will be unable to obtain the benefits of reduced premiums under named driver cover. Some motorists might not be able to afford the resulting increased premiums.

4.

It is for the legislature in each country where the above problem continues to exist to consider whether and how to address it. The Board endorses the observations made by the President, The Hon Mrs Justice Allen, in the Court of Appeal in para 60 of her judgment in this case, commending to the relevant authorities measures to address the problem for the future.

This appeal

5.

In this appeal, the respondent, Mr Antonio, tragically lost his sight when the car he was driving was on 29 January 2004 in collision with a bus (bus 304, serial no HDB50-0001570) belonging to Convenient City Transit Services Co Ltd ("CCT") and being driven by Stevan Edgecombe in the course of his employment by CCT. The collision was due to Mr Edgecombe's negligence, and on 20 September 2010 Mr Antonio obtained judgment against him and CCT for damages in the sum of \$521,943.12 and costs. No part of this has, it appears, been paid.

6.

Pursuant to a proposal dated 2 February 2001, CCT had taken out a policy of insurance with the appellant, Insurance Company of the Bahamas ("ICB"), in respect of six Toyota Coaster buses, including bus 304. The policy was evidently renewed from time to time, at least as regards third party coverage, and bus 304 was, at the time of the accident, the subject of a certificate no 31148001 effective from 9 September 2003 to 28 February 2004. The certificate identified CCT as policyholder and 11 individuals, not including Mr Edgecombe, as "persons or classes of persons entitled to drive".

7.

On 16 December 2010 Mr Antonio issued the present proceedings against ICB claiming, inter alia, that the judgment he had obtained against Mr Edgecombe and CCT was in respect of a liability required to be covered by CCT's policy within the meaning of Part III of the Road Traffic Act, that to

the extent that the policy purported to exclude coverage of such liability it was void and that ICB was liable to satisfy the judgment under section 12(1) of the Act.

8.

The Chief Justice, Sir Michael Barnett, held on 9 December 2011 that ICB was not liable, as Mr Edgecombe was not a named driver. The Court of Appeal (Allen P, Blackman JA and John JA) reversed the Chief Justice on 30 May 2013, holding that CCT was as policyholder covered in respect of liability incurred through Mr Edgecombe driving in the course of his employment, and also expressing the view that, even if this had not been so, section 12(1) of the Act invalidated any policy term which purported to limit ICB's third party liability. ICB appeals with leave granted by the Court of Appeal.

Road Traffic Act

9.

Part III of the Road Traffic Act includes these provisions:

"8. (1) Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance as complies with the requirements of this Part of this Act.

...

10. (1) In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which -

...

(b) in the case of a public service vehicle (other than a self-drive vehicle), insures such person, persons or classes of persons as may be specified in the policy in respect of liability which may be incurred by him or them in respect of -

(i) the death of or bodily injury to any person (including any passenger being carried for hire or reward) caused by or arising out of the use of the vehicle on a road ...

(3) Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

(4) A policy shall be of no effect for the purposes of this Act unless and until there is issued by the authorised insurer in favour of the person by whom the policy is effected a certificate (in this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances, by regulations made by the Minister under this Act, and in the absence of any such regulations, then by the Controller.

...

11. Any condition in any policy issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a

claim under the policy, shall be of no effect in connection with such claims as are mentioned in paragraph (b) ... of subsection (1) of section 10 of this Act:

Provided that nothing in this section shall be taken to render void any provision in a policy requiring the person insured to repay to the insurer any sums which the insurer may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties.

12. (1) If, after a certificate of insurance has been issued under subsection (4) of section 10 of this Act 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 paragraph (b) ... of subsection (1) of section 10 of this Act (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 ...

15. (1) Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) ... of subsection (1) of section 10 of this Act shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act, or would have been so insured if the insurer had not avoided or cancelled the policy, and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance delivered in respect thereof under subsection (4) of the said section 10."

10.

The policy stated at its outset:

"Under the Policy Terms and Endorsements, we will insure you against certain legal liability, loss or damage which occurs during any period of insurance for which we have accepted your premium.

The Proposal Form and Declaration signed by you forms the basis of this Contract."

There followed an Introduction stating that the policy was comprised of "The Contract ..., The Schedule ..., Definitions ..., Coverage Descriptions ..., General Exceptions ..., General Conditions ... and Certificate of Insurance ...". Under General Exceptions appeared the note "exclusions that apply to the entire contract". The General Exceptions were themselves set out in section 3 of the policy. Under Certificate of Insurance appeared the note:

"proof for the authorities that you have the minimum insurance required by law. It also shows the persons who are covered to drive under your Policy."

11.

The Introduction also included a passage headed in capitals "Very important", stating that "Two very important issues require critical attention". The second was that:

"The Certificate of Insurance is the most important component of this Policy. The law requires you to have a current one of these in your possession before you use or permit your vehicle to be used on the public roads. ... You also have to return it to us if you want to make any change to your policy, such as adding a new driver, changing your vehicle or cancelling your Policy. ..."

12.

The Definitions included these:

“CERTIFICATE OF MOTOR INSURANCE

A certificate which proves that you have the motor insurance required by law. It states who can drive your vehicle and for what purposes it can be used. ...

YOU

The policyholder (the person named in the schedule). ...

AUTHORISED DRIVER(S)

The person(s) named on the Certificate of Insurance who are covered to drive under the Policy.”

13.

Section 1 of the policy relates to cover for loss or damage of or to the vehicles insured. This (it seems) was not taken out or continued at the time of the accident. Section 2 relates to “Liability to Others” and reads as follows:

“YOU, THE POLICYHOLDER

We will insure you for all sums which you may have to pay for death of, or injury to other people or damage to their property, as a result of any accident involving any vehicle which your Certificate of Insurance allows you to drive or use.

We will also pay any expenses you have our written permission to incur.

OTHER PEOPLE

We will also insure:

- anyone you allow to drive or use your vehicle as long as your Certificate of Insurance allows this.”

14.

Section 3 headed General Features includes:

“GENERAL EXCEPTIONS

Your policy does not insure the following:

(1) Any liability, injury, loss or damage arising while any motor vehicle insured by this policy is being:

- used for a purpose for which the motor vehicle is not insured;
- driven by anyone who you know is disqualified from driving or has not held a Drivers Licence or is prevented by law from holding one;
- driven by or is in the care, custody or control of anyone who is not an Authorised Driver;
- driven with the knowledge of the Insured or Authorised Driver in an unsafe or unroadworthy condition or in a damaged condition, unless the damage is of such a nature as not to render the driving of the vehicle unsafe;
- transported over sea.

(2) Anyone who does not meet the Policy Terms and Conditions. ...”

15.

The policy schedule identified CCT as the “Account name” and “The Insured” in respect of its six buses, identified the coverage as Third Party, and contained the note:

“AUTHORISED DRIVERS: The persons or classes of persons defined in Item 5 of the Current Certificate of Insurance. Provided that the person driving holds a licence to drive the Motor Vehicle or has held and is not disqualified from holding or obtaining such a licence. ... LIMITATIONS AS TO USE: As defined In Item 6 of the current Certificate of Insurance.”

16.

The Certificate of Insurance (dated 8 October 2003) identified bus 304 as the vehicle in Item 1 and the policy holder as CCT in Item 2. Items 3 and 4 identified the commencement and expiry date of the “insurance for the purposes of the Act”. Item 5 listed the 11 names of “Persons or classes of persons entitled to drive”, with the qualification “Provided that the person driving holds a licence to drive the Motor Vehicle or has held and is not disqualified for holding or obtaining such a licence”. Item 6 headed “Limitations as to use” provided:

“Use for the carriage of passengers or goods in connection with the Policy Holder’s business.

Use for social domestic and pleasure purposes

This Policy does not cover:

(1) Use for racing ...

(2) Use while drawing a trailer ...”

17.

In the case of a policy (such as the present) covering a specified vehicle or vehicles, regulation 3(1)(a) of the Motor Vehicles Insurance (Third Party Risks) Regulations, made under section 24 of the Road Traffic Act, prescribes the issue of a certificate in Form A scheduled to the Regulations. The format used in the Certificate relating to bus 304 follows largely, even though not precisely, that so prescribed. The difference to which, in the Board’s view rightly, no significance was attached during the parties’ submissions, consists principally in the description of Item 2 as “Policy Holder”, rather than “Policy” as specified in Form A. The description “Policy Holder” appears in Form B in the Schedule to the Regulations, which is the form prescribed under regulation 3(1)(b) for use in the case of a policy not relating to any specified vehicle or vehicles. The difference in the description of Item 2 as between Forms A and B is mysterious, and it is even possible that the word “Holder” was omitted by mistake from Item 2 of Form A. In any event, the Board, as indicated, sees no present relevance in the difference. The submissions for Mr Antonio in fact positively rely on the identification of CCT as Policy Holder in Item 2, and the appeal falls to be determined on the basis of what the Certificate actually states, not what it might (or perhaps even should) have stated.

The scope of policy cover

18.

Approaching the appeal on that basis, the primary case advanced on behalf of Mr Antonio and accepted by the Court of Appeal is that (a) CCT as the policyholder was covered under section 2 of the policy in respect of third party liability for death or personal injury as a result of any accident involving bus 304, and that (b) under section 2 and/or to give business efficacy to the insurance, such cover embraces any such liability arising through the negligence of any employee such as Mr Edgecombe driving in the course of his employment, even though he was not named in Item 5 of the

Certificate. On behalf of Mr Antonio, it is further submitted that, even if this is not clear, the policy should be construed contra proferentem against ICB, to arrive at the same result. It is submitted that the focus should be on the policy, not on the certificate.

19.

The Board has no hesitation in rejecting these submissions as advancing an impossible construction of the policy. For a start it is clear that the policy must be read with the Certificate. The Certificate is not only said in the policy Introduction to “comprise” part of and be “the most important component of” the policy, it is in any event referred at various key points in the policy. Thus, in the Introduction and in the Definitions, the Certificate of Insurance is described as showing “the persons who are covered to drive under your Policy”, in the Definitions the Authorised Drivers are defined as the persons named on the Certificate who are covered to drive under the Policy, in section 2 the cover in favour of the policyholder relates to “any accident involving any vehicle which your Certificate of Insurance allows you to drive or use” and in section 3 General Exception 1 states that “Your [ie the Policyholder’s] policy does not insure” any liability arising while the vehicle is being “driven by or is in the care, custody or control of anyone who is not an Authorised Driver”. The policy and Certificate must therefore be read together and as a whole.

20.

Secondly, the policy is at pains to identify the persons who are covered to drive “your” [ie CCT’s] vehicle or who are covered under “your” policy as the persons stated in the Certificate and to point out that “adding a new driver” would involve a “change to your policy” which would require return of the Certificate. This in turn links with the General Exception 1 in section 3, which excludes cover in respect of liability while any of the insured buses is being “driven by or is in the care, custody or control of anyone who is not an Authorised Driver”, a term again defined by reference to “the person(s) named on the Certificate”.

21.

Thirdly, the submission made on behalf of Mr Antonio that CCT is a person named on the Certificate must be rejected. The only persons or classes of persons named on the Certificate as entitled to drive were the 11 persons named in Item 5. Item 2 named the Policyholder. The policyholder, if an individual, does not have to be insured to drive the vehicle, and does not therefore have to be named as a driver if he or she does not want to drive it. But if an individual policyholder does want to drive, he or she needs to be identified as a named driver in Item 5 of the Certificate. Similarly, if the policyholder is a company, which cannot personally drive, it must identify as named drivers in Item 5 of the Certificate the persons or classes of person entitled to drive under the insurance it arranges. The Board has no doubt that this is what the Motor Vehicles Insurance (Third Party Risks) Regulations both contemplate and require by Item 5 of prescribed Form A or B (“Persons or classes of persons entitled to drive”). It is also what the printed standard form proposal completed by CCT envisaged, when it asked for “details of all persons likely to drive (including Proposer)”, although the words “including Proposer” no doubt contemplated situations where the proposer/policyholder is an individual, rather than as here a company. In this respect, though in this respect only, the Board therefore differs from the analysis adopted by the Chief Justice in his judgment (in particular at para 29).

22.

Fourthly, the submission that, because the policyholder CCT is a company, therefore the cover afforded under section 2 must, in order to have business efficacy, embrace driving or use by any employee on CCT’s behalf, even though the employee is not named on the Certificate, is fallacious.

CCT as policyholder will incur liability as a result of the negligent driving or use of bus 304 by any of the 11 persons listed in Item 5 of the Certificate acting in the course of employment by CCT. The first part of the cover afforded under section 2 represents vital protection for CCT. The second part represents vital protection for the 11 individuals (whoever they may be) whom CCT employs to drive or allows to use bus 304 within the scope of the use permitted by Item 6 of the Certificate.

23.

A slightly unsatisfactory feature of the way this appeal comes before the Board is that there is no very direct evidence about the actual status of the 11 named individuals. In the event this does not matter, because the Board can reach a clear conclusion without further consideration of their status. But, if further attention is given to this aspect, it only confirms the Board's conclusion. Common sense is assisted by a reading of the proposal, even though this too is unfortunately only available without its attachments. The proposal makes clear that CCT is a public bus company, and that "all" [ie the only] the purposes for which its six buses would be used were "carriage of fare paying passengers". In answer to the proposal request to give details of all persons likely to drive, CCT wrote "Various Drivers see Proposals attached". There followed in the proposal form various questions directed to ascertain more about such drivers: whether anyone under 25 would be driving (question 11), whether any such person had held a driving licence for less than two years (question 12), or been charged with a motoring offence (question 13), or been involved in an accident during the last five years (question 14), and whether "you or any operator suffer from any physical impairment or medical condition" (question 15). Questions 11 and 15 were answered "No", but questions 13 and 14 were answered "Yes", leading to a further proposal request for details, which was met by the submission of "see attached traffic records" (question 13) and an anonymous attachment (question 14). Finally, in a box headed "Office Use Only" the proposal contains the unexplained words "Driver warranty" against which is written "See attached schedule of drivers". This is on the face of it in identical handwriting to that in which the rest of the proposal is written, but, since there is no evidence and no submissions were made about it, the Board will put it aside. Even doing so, it remains evident that the overwhelming likelihood is that the 11 named drivers were those whom CCT employed to drive its six buses, at least in early 2001 when the proposal was completed. Whether CCT updated the list, as the policy was at pains to point out would be required (see para 20 above) is a different matter. The idea that the 11 named drivers were all neighbours on the block whom, for unexplained reasons unconnected with its business, CCT was prepared to allow to drive its buses is not only inconsistent with the proposal answer that the only purposes for which the six buses were to be used were carriage of fare paying passengers, but is absurd. But, even if (inconceivably) only one of the 11 named drivers was an employee of CCT, that is sufficient to give the first part of section 2 a commercial rationale, since CCT would be exposed to third party liability by that driver's negligent driving.

24.

Fifthly, it is Mr Antonio's case that leads to business incongruity, for two reasons. First, it would mean that, despite the care taken by the proposal to identify all those persons likely to drive, and to assess their record, ICB was insuring all and any persons whom CCT cared to employ to drive its six buses, without disclosure of their identity or driving record to ICB and so without ICB having any means to decline, assess or rate the risks thereby presented. Second, it would mean that, while CCT was covered under the first part of section 2 in respect of any liability which it might incur as a result of the negligent driving of drivers whom it employed apart from the 11 persons named in Item 5 of the Certificate, such additional drivers would not themselves be covered under the second part of section 2. Quite apart from any obligation which an employer may or may not have in this regard as a matter

of law, it is implausible that a responsible employer or insurance scheme would operate on such a basis.

25.

Finally, Mr Cedric Parker, representing Mr Antonio, was ultimately constrained to accept that, of the five heads of situation mentioned in General Exception 1, the first two and the last two heads must, on his case, apply to exclude ICB's liability both when drivers named in Item 5 of the Certificate were driving and when drivers not so named were employed by CCT to drive its buses and negligently caused an accident. Otherwise, driving or use by unnamed drivers would be free of key limitations applicable to named drivers. It is implausible that the third head of situation, included in between, should not have the same width. Mr Parker submitted that, if the third head applied to claims by the policyholder under a policy which (unlike it seems the present) afforded comprehensive cover, then reading its wording literally, a policyholder could face a difficulty in recovering for loss or damage while the vehicle was (for example) parked overnight at the policyholder's premises under the care of a night-watchman or (to take another possible example) under repair at a garage. A likely answer to that hypothetical problem is in the Board's view that the first four heads of General Exception 1 all concern situations when the insured vehicle is being driven or used, rather than being kept or repaired with a view to future driving or use. Be that as it may, the tail cannot wag the dog, and this submission cannot undermine the obvious general effect of the policy and Certificate, read together, in a context where CCT incurs third party liability due to negligent driving or use of one of its insured buses by one of its employees.

26.

For all these reasons, the Board concludes that the effect of the policy read with the Certificate is clear, and that under their terms CCT was not insured in respect of its third party liability to Mr Antonio arising from Mr Edgecombe's negligent driving of bus 304, because Mr Edgecombe was not a person or within a class of persons named as persons entitled to drive in Item 5 of the Certificate. The Court of Appeal therefore erred in its decision on the primary ground on which it over-ruled the Chief Justice.

Section 12(1) of the Road Traffic Act

27.

However the Court of Appeal went on to state a second ground for reversing the Chief Justice, one which it described, rightly, as involving "an issue of greater general public importance". That was that section 12(1) of the Road Traffic Act "invalidates so much of any policy which purports to limit the insurer's third party liability" (paras 27 and 55). It recognised that the conclusion reached in its judgment "may cause some consternation in the motor insurance industry", and indeed (as it the case, since its second ground of decision could not be avoided by simply rewording insurance policies) would "have a sizeable impact on ordinary persons who must buy insurance if they are to drive or use their vehicles on the road" (para 58).

28.

The Court of Appeal's second ground for reversing the Chief Justice is, like the first, unsustainable. Section 12(1) has nothing to do with the present case. It is expressly concerned with cases where a judgment is obtained against an insured for third party liability "covered by the terms of the policy". In such a case, the insurers is obliged to meet the judgment and is precluded by section 12(1) from relying upon any entitlement to avoid or cancel, or any avoidance or cancellation of, the policy, subject to protections and qualifications provided in section 12(2).

29.

The Court of Appeal relied on the Board's decision in *Motor and General Insurance Co Ltd v Pavy* [1994] 1 WLR 462 on the wording of section 10(1) of the Motor Vehicles Insurance (Third Party Risks) Act of Trinidad and Tobago, which was in like terms to section 12(1). The Court of Appeal apparently derived from that decision a conclusion that any restriction on the scope of cover afforded is of no effect as against a third party victim of negligent driving obtaining a judgment against the insured. That conclusion involves a misreading of the Board's decision in *Pavy*. *Pavy* was dealing only with a situation where there had been after the accident a breach (failure to forward a writ to insurers) which under the policy terms entitled the insurers to evade a liability which was otherwise "covered by the terms of the policy": see pp 472C-D and 474E. Nothing in *Pavy* or in the language of section 12(1) of the Road Traffic Act makes insurers liable to meet a third party liability judgment against their insured regardless of any restriction in the scope of cover. The Court of Appeal's second ground of decision amounts to deleting from section 12(1) the critical bracketed qualification "being a liability covered by the terms of the policy". Recognising the force of these points, Mr Parker in his oral submissions effectively withdrew any reliance on *Pavy* or on the brief passage in his written case asking the Board to support the Court of Appeal's second ground.

30.

There is further authority confirming that legislative provision in the form of section 12(1) does not override a policy restriction to named drivers: see eg under the then United Kingdom equivalent, *Herbert v Railway Passengers Assurance Co* [1938] 1 All ER 650, 653C-D, and most recently, again under the equivalent section 10(1) of the Trinidad and Tobago Act, *The Presidential Insurance Co Ltd v Mohammed* [2015] UKPC 4, para 16.

Conclusion

31.

The Board will therefore humbly advise Her Majesty that the appeal should be allowed and the Chief Justice's order refusing the relief sought by Mr Antonio in his Originating Summons restored. The parties have 14 days in which to make submissions in writing on costs before the Board with a further seven days thereafter in which to reply in writing to each other's submissions.