IN THE COURT OF APPEAL OF BELIZE, A.D. 2021
CIVIL APPEAL NO 2 OF 2018

KLAAS REIMER (AS ADMINISTRATOR FOR THE ESTATES OF GERHARD THIESSEN, DORA THIESSEN, MARTHA REIMER AND DUANE REIMER) **Appellant**

v

INSURANCE CORPORATION OF BELIZE LIMITED **Respondent**

BEFORE:

The Hon Sir Manuel Sosa	President
The Hon Madam Justice Hafiz-Bertram	Justice of Appeal
The Hon Mr. Justice Lennox Campbell	Justice of Appeal

A Marshalleck SC for the Appellant
D Bradley for the Respondent

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13 March 2019 and 25 February 2021

HAFIZ BERTRAM JA

[1] I had the opportunity of reading the draft judgment of my learned brother, Campbell JA, and I concur in the reasons for judgment given and the orders proposed in the judgment.

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HAFIZ BERTRAM JA

CAMPBELL JA

[2] On the 2nd June, 2003, the Respondent insurance company issued a cover note to Jemabal S.A. by which it covered liabilities incurred by the insured to third parties through use of motor bus licensed Guatemala C134586 for the period 2nd June, 2003, to 2nd July 2003. The cover note is certified to have been issued in accordance with the provisions of the ***Motor Vehicle Insurance (Third Party Risks) Ordinance, 1980***.

[3] On the 23rd June, 2003, the motorbus was involved in a collision with a minivan on what is now known as the George Price Highway. The minivan was driven by Duane Reimer with passengers, Gerhard and Dora Thiessen and Martha Reimer. As a result, all four occupants of the minivan were killed and the vehicle destroyed.

[4] On the 22nd June, 2004, the Appellant brought Action No. 299 of 2004 in the Supreme Court against Francisco Mayen Sevalles, the Guatemalan driver, and Linea Dorada, the company that operated the bus line.

[5] The Action was heard that same year and judgment reserved by Mr. Justice Awich (as he then was) and delivered on the 4th May, 2012. The judgment allowed for recovery of $580,271.94 plus prescribed costs (the first claim).

[6] The Respondent declined to make any payment toward the judgment and the Appellant claimed the full value of the judgment debt on the basis that Third Party Liability coverage provided by the cover note issued by the Defendant was unlimited in value.

[7] On 8th June, 2012, the Respondent paid $108,754.02 to the Appellant under the judgment in the first claim, contending that the said sum constituted the full value of its liability under the judgment, being the statutory minimum value of coverage required under the ***Motor Vehicle Insurance Third Party Risk Act***. Dissatisfied with the Respondent's contention, the Appellant filed an action to recover the judgment sum in the first claim.

[8] This second trial was brought by the administrator for the Estates of the Appellant. The trial was completed in 2012 and on 10th November, 2017, the learned Chief Justice ruled that the cover note issued by the Respondent on which the claim was founded did not cover unlimited liability because by the terms of the cover note in its plain and ordinary meanings, liability was in fact limited to only the statutory minimum values required by the Act.

[9] The Chief Justice accordingly ruled that the Claimant was only entitled to recover the statutory minimum cover under the Act and not the full amount awarded on the judgment (paragraph 28 of judgment).

[10] Dissatisfied with the Chief Justice's ruling the following grounds of appeal were filed:

(i) The learned trial judge erred in law and misdirected himself in construing the terms of the cover note to find that the cover note fixed upper limits on the insurance coverage it provided in accordance with the lower limits of the coverage required by the Motor Vehicles Insurance (Third Party) Risks Act.

(ii) The learned trial judge erred in law and misdirected himself in ordering that judgment should be entered for the Claimant for interest on the sum paid from May 6th 2012, a date arbitrarily determined, until payment in full and for prescribed costs on that sum.

[11] The Respondents applied for a variation of judgment relying on the following grounds:

(i) Having found correctly that the Claimant's policy were the minimum statutory limits, the learned trial judge erred in law in awarding the Claimants interests and costs on the sum awarded in so far as those costs and interest exceeds the mandatory statutory limits of liability and the Respondent's Policy limit.

(ii) The learned trial Judge erred in law and misdirected himself in finding that the Claimant is entitled to recover interest on the sum paid pursuant to the cover note and costs thereon pursuant to ***section 19(1) of the Motor Vehicle Insurance (Third Party Risks) Act*** even where such interests and costs is over and above the statutory minimum, which was the cover provided by the Claimant.

(iii) The learned trial judge erred in law and misdirected himself in finding that the word "including" in section 19(1) of the Legislation was to be construed as meaning "in addition to" or "as well as", and so found that section 19(1) imposes an obligation on an insurer to pay costs and

interests over and above the limit imposed by the Policy without reference to said limit.

The Appellant's submission

[12] Mr. Marshalleck submitted that the learned Chief Justice was wrong in not finding that the cover note issued by the Respondent was ambiguous on its face. Further, having so found, the *contra proferentem rule* should apply and the ambiguity construed against the interest of the insurer. Learned Senior Counsel relied on ***Paragraph 87, Volume 25 Halsbury's Laws of England, 4th Edition and Houghton v Trafalgar Insurance Company Ltd [1953] 3 W.L.R 985***.

[13] Mr. Marshalleck further submitted that the Act itself does not impose any limits or cover into any policy of insurance. He contended that freedom of contract allows the parties to negotiate and settle the terms of the policy and then determine whether or not the terms of the policy are compliant with the requirements of the Act.

[14] In this case the cover note describes coverage as Third Party Act. Mr. Marshalleck submits that it is clear that this is a reference to the ***Motor Vehicle Insurance Third Party Risk Act***. The Act does not prescribe any upper limits of coverage, it in fact provides for the minimum limits of coverage. It sets the floor low so that there is a cheap policy available but what it does not do is set an upper limit because if you can afford to buy more you buy more.

[15] The words "Third Party Act", was ambiguous because it can mean any of several things. The judge found it can mean only the minimum coverage required by the Act. However, it can also mean in accordance with the Act or in compliance with the Act in which case a policy with a higher limit also complies with the Act.

[16] Learned Counsel contends that the cover note is in compliance with and accords with the provision of the ACT and there is no upper limit on the coverage therein.

[17] Mr. Marshalleck admitted that in respect to the *contra proferentem rule*, all the learning he has examined is between parties to the contract but sees no reason why there shouldn't be a natural extension of it where the contract itself is for the benefit of a Third Party and Statute provides the Third Party a right of recovery.

The Respondent's Submissions

[18] The interpretation to be given to the cover note is a matter of fact, that is, evidentiary in nature. Unless a decision of a court below could be shown as plainly wrong in its factual considerations it ought not to be disturbed.

[19] Mr. Bradley contended that the construction relied on by Mr. Marshalleck would lead to uncertainty, as the policy would have no upper limit. The construction found by the Chief Justice on the limits were the bare minimum provided for by the Act.

[20] Mr. Bradley further submitted that the *contra proferentem rule* is governed by the principle of contract. There is no authority to support the contention that the principle is available at the behest of a party lacking in privity. The authorities on which the Appellant relies are between the insured and the insurance company. The principle is very clear; it obtains to only parties to a contract. The Appellant's redress lies not with the contract; the Appellant's redress lies with the Statute.

[21] According to Mr. Bradley, the Appellant is saying; pay me under the ***Third Party Act*** because I am entitled to be insured from your coverage. The Statute provides a benefit to the road user, (the Third Party), and affordable insurance to the insured. It is therefore not merely a commercial question but also policy consideration.

[22] The fixing of the premium is based on the risk involved. Counsel relied on ***Harker v Caledonian Insurance Co., [1979] 2 Lloyd's Rep. 193, C.A.***; ***[1980] 1 Lloyd's Rep. 556***, to support his submission that ***Harker*** makes the point very clear that an insurance company cannot be called upon to pay more than the statutory minimum, whether or not damages, interest or costs is included.

[23] It is clear on its face that the word "including" was meant to mean that the sum payable should include interest and costs. See ***Jackilyn Henry McGibbon v National General Insurance Corporation N.V. (unreported) Eastern Caribbean Supreme Court, Claim #AXA HCV 2008/0048***. The Appellant's authority of ***Prudential Insurance Company Limited v Stafford***, these are majority decisions.

[24] Mr. Marshalleck in reply on the question of construction, argued that the Chief Justice construed the ordinary meaning of the words used and this Court is in as good a position as he was to examine those words in the context of that contract and to come to its own construction.

Discussion
Legislative background

[25] Both sides relied on the *locus classicus* in ***Harker***, a case from the then colony of British Honduras, in which a British solider on duty in the colony was severely injured and after a period in a near vegetative state died as a result of those injuries. On April 27th, 1971, an action was pursued in the Belize Supreme Court against the driver, notice having been given to the insurer, damages were agreed. The insurance company resisted the claim. On October 24th, 1973, the then Chief Justice gave judgment for Mr. Harker. Third Party insurance was compulsory in British Honduras as in the United Kingdom. The insurance company although they had agreed the damages, resisted the claim. As they do here, the insurers said their liability was limited to the cover note. A writ was issued in the High Court in England against the insurance company claiming the full judgment awarded in Belize.

[26] Donaldson J as a matter of construction found for the insurers. He held that the mere fact of the disparity between the quantum in the United Kingdom and the Colony was no reason to do violence to the plain words of the Ordinance. The plaintiff appealed.

[27] In the Court of Appeal , (Lord Denning MR, Roskill , Cummings-Bruce LJJ) delivered a majority judgment, on the 5th February 1979, Denning MR, in his minority judgment noted that the driver was insured against Third Party Risks and said at page 195;

> *"… : What is the use of compulsory motor insurance if it enables an insurance company to defeat so just and meritorious a claim as this? … … …, and even the citizens themselves, might well feel aggrieved if insurance companies are allowed to limit their liability to such a minimal amount."*

[28] Denning MR, chronicled the reasons that led to the enactment of the "parent" legislation in the United Kingdom. He, along with other members of the Court, noted that the British Honduras legislation was almost verbatim to the UK legislation but for the quantum of amount payable. In looking at the history of the Act, Lord Denning noted sometimes the owner of a vehicle would be insured in full or in part or not at all. The injured third party had no call upon any funds payable under the policy, quite often the injured party only recourse was against the owner who had no funds. The British government enacted legislation for compulsory third party insurance.

[29] What is clear to me is that the injured third party has attained a status granted by the Ordinance and not rights that are contractual in nature as learned counsel, Mr. Marshalleck, has submitted. I accept the submission of Mr. Bradley that the third party rights are statutory and not contractual. It is

important to identify the mischief that the legislation came to remedy. It was to fill a *lacuna* that existed in the insurance of motor vehicles which caused injures to third parties, through their operation on the public thoroughfare. The injured party had no calls on funds payable under the policy as so clearly laid out in the judgment of Lord Denning in ***Harker***.

[30] Lord Denning in finding for the plaintiff had considered the fact that the legislation had not named an upper limit for liability as being significant. He opined that the legislation made the insurance company liable as to the classes of liability which they were bound to ensure, but no limit to quantum at all. His Lordship was of the view, that even if a limit was placed, it was of no effect against the third party. (See page 196). Lord Denning concluded at page 197:

> *"… … … . In short the insurer is liable to the third party for the full amount of the judgment but can recover the excess from the insured."*

[31] His Lordship, to support his conclusion relied on the judgment in three cases: ***Jamaica Co-operative Fire and General Insurance Co. Ltd. v Sanchez (1968) 13 W.I.R. 138***, where the insurance company was paid the full premiums on the basis, that if the third party was injured, they would have to pay the full amount of damages. The company answered the claim for full damages, what they agreed to do not matter; you are limited to the statutory minimum. In ***Gillett v Motor & General Insurance Co Ltd (unreported) September 1978, Supreme Court of Belize***, *a* bus fell into the Belize River, several

persons died or were injured. They were entitled to a large amount of damages. However, the insurance company resisted on the basis that the claim was limited to the provision of the Statute. His Lordship agreed with Chief Justice Malone in the ***Gillett*** case. In ***Free Lanka Insurance Co. Ltd v A. E. Ranasinghe (1961) 63 N.L.R. 529***, a case from Ceylon, the learned Master of the Rolls, preferred the rulings and conclusions of the Supreme Court of Ceylon to that of the Judicial Committee of the Privy Council, which had overturned the lower court.

[32] Lord Roskill, in diverting from Lord Denning's findings, said at page 201;

> *"… … If the plaintiff's argument be right, it is difficult to think of a case in which the insurer would not always be liable to pay the judgment creditor 100 per cent of the amount of the judgment*."

His Lordship was of the view, that if that were the intent of Parliament, much clearer language would have been used. Such a finding would lead to a consequential increase in the cost of insurance. Lord Roskill refused to allow the sympathy for the loss of the plaintiff's son and the small amount recoverable "*to lead to a misconstruction of the relevant legislation*".

[33] All three judges in the Court of Appeal commented on the mitigating role of the Motor Insurers Bureau to provide indemnity in cases not covered by legislation, thereby avoiding injustice. In June 17, 1946, in an agreement between the Minister of Transport and the Motor Insurers' Bureau, the Secretary of State, in what Lord Cumming-

Bruce later described as "'encouraging" because "compelling", would be too forceful a word – the insurance companies to get together to satisfy judgment in respect of any liability which is required to be covered by a policy of insurance within seven days of the time it would have become enforceable. Legislation in the colonies mirrored the British model, much of the language is taken from the 1934 UK Act. The local conditions were found by His Lordship to be "*extremely risky*" to construe the colonies legislation by reference to "*any preconceived concept of what is or is not just having regard to the history of the UK legislation*".

[34] Lord Cummings-Bruce was persuaded by Luckhoo JA reasoning in *Sanchez*, that in other legislatures there are expressed words which make it plain beyond peradventure that the limitations on the total amount payable on a policy in consequence of the (iv), (v) and (vi) provisions to paragraph (b) of subsection (1) of section 4 in the case of those legislatures there were *"quite deliberate limitations on the third party rights granted by the legislation."*

[35] The Court of Appeal applied the reasoning in ***Sanchez***, that nuances in the legislation was not determinative of its construction. The common model provided by the UK legislation and its historical antecedents are of more importance than the discernment of the intention of the local draftsman. In ***Sanchez***, Luckhoo took the view that the policy of the legislature was the same in that regard in a number of islands, although the language was rather different. Luckhoo opined that in construing the legislation, one should avoid the

preconception as to what the legislature intended to do, having regard to the history of the English legislation. Lord Roskill states at page 200:

> *"… … … …. . The present problem arises because in the crucial respect additional provisions appear in the ordinance which are not to be found in the U.K. legislation."*

Their Lordships by a majority agreed that the appeal should be dismissed.

[36] To my mind despite the fact that the Belizean Ordinance was verbatim the 1934 UK legislation, there is a crucial distinction between both instruments, that is important in resolving the issue before this Court. In ***Harker***, the House of Lords, (Diplock, Edmund-Davies, Fraser of Tullybelton, Lord Russel, Lord Keith), Lord Diplock held that the UK legislation required the policy of insurance to cover the assured third party liability without any limit to the amount. **However, with the Ordinance the requirement is not to cover the liability in excess of the monetary limits specified.** The Ordinance entitles the victim of an insured persons' negligence who recovers judgment against him to proceed directly against the insurers. I reject the submission on behalf of the Appellant that the Chief Justice was incorrect in finding that the construction to be placed on the words can mean only the minimum coverage required by the Act. Neither can I accept the submission that a policy with a higher limit than the statutory minimum specified also complies with the requirements of the Act.

[37] Third party having acquired his rights pursuant to the ordinance there is no statutory requirement to cover the liability in excess of the monetary limits expressed in the ordinance. The deliberate limitation placed on third parties rights, is that the insurer has no statutory obligation to cover any liability in excess. Any liability in excess of the specified minimum, must include costs and interests. Lord Diplock in the House of Lords notes at page 559;

> *"…. … …. …. . To limit the insurers liability to his assured to a modest figure but to leave them with unlimited liability to the victim of the assured's negligence would make a similar reduction of premium commercially impossible and, if this were the effect of S.20(1), the legislation would appear to get the worst of both worlds ."*

[38] I accept Mr. Bradley's submission that the Ordinance strives for certainty and to make available to the motoring public an inexpensive insurance policy. The Court of Appeal in *Harker* endorsed the views of Chief Justice Malone in ***Eric Gillett, et al v Motor & General Insurance Co ., Supreme Court Action No. 141 of 1976***. The issue was whether a defendant is liable to pay the whole of the judgment sum awarded. It was contended that the rights conferred by the Ordinance on the third party is not affected by the limitation which may be placed on the contract between the insured and the insurer. This is because section 20 permits the third party to recover from the insurer a sum greater than the amount the insurer undertook to indemnify the insured. The learned CJ accepted

the judgment of Donaldson J and noted that although the Ordinance in both Guyana and Belize turn the award obtained by the third party into a judgment debt, it was submitted that section 4(1) and section 20(4) gave the right to the insurer to recover from the insured any sum in excess of the amount on the indemnity given by the insurer to the insured. The learned Chief Justice thought that the legislature had a good reason for so doing by giving full protection to the third party whilst ensuring that the insurer could recover for amounts in excess of the indemnity. The Chief Justice noted that on the face of it, the Schedule to the policy in question limits the liability of the Defendant for any one accident to $8000.00. He noted that is not in conflict with the ordinance.

[39] ***Free Lanka (supra)*** considered the effect of a limitation of liability provision in ***section 128(1) (c) of the Ceylon Ordinance***. Although the Ceylonese Ordinance differed in certain respects from the pattern in the Commonwealth Caribbean, ***section 133(1) of that Ordinance*** was for all material purposes the same as ***section 20(1) of the Ordinance***. The Board in construing the section said, "the liability ... required to be covered by a policy of insurance. It follows that the liability to be covered which shall not be less than $20,000 but need not exceed that figure. So that any liability in the present case (having regard to the terms of the policy) in excess of $20000 was not one required to be covered by the policy." That the construction placed on the Ceylonese and Guyanese, were to the effect that any liability in excess of the stated minimum was not regarded as required to be covered by the policy. The

sum in excess of the stated amount as proposed by Mr. Marshalleck would therefore be not in compliance with the Ordinance.

[40] As I understand it, the ambiguity on which the Appellant relies comes about because the words "Third Party Act" according to Mr. Marshalleck, would allow both a basic payment and unlimited liability. For the reasons given, the Appellants have failed to demonstrate any ambiguity in the contract of insurance. **I find that the learned Chief Justice was correct in holding that the Claimant was only entitled to recover the statutory minimum cover under the Act and not the full amount awarded at the judgment**. That to my mind, is an answer to the Appellant's appeal.

[41] However the appellant did forward the principle of the *contra proferentum rule*, that where there is doubt as to the meaning and scope of limiting term, the ambiguity should be resolved against the party who inserted and seems to rely on it . To my mind, the principle of privity of contract, poses an insurmountable hurdle in the path of the Appellant mounting this argument. Learned Counsel offered no authority or precedent on which he would support his submissions. He was asking this Court to provide such an authority, with this decision. I am constrained to decline such a course. Mr. Marshalleck has offered no argument how the issues of consideration and consideration moving from the promisee should be treated.

On the application for variation of judgment

[42] On a true construction, section 19 (1) provides that even though section 4 lists the various sums to be paid, also included are interests and costs as the sum to be paid. The items of interests and costs are subsumed under the broader head of liability to be covered by the Ordinance.

[43] I cannot accept the Appellant's reply submissions to the application to vary the learned Chief Justice's finding on the payment of interest and costs. Counsel for the Appellant had argued that section 19 imposes an obligation to pay "any sum" payable under the judgment "including" costs and interest of the type mentioned. Further, the use of the word "including" is expansive of the obligation and does not in any way seek to confine liability particularly when regard is had to the construction.

[44] I accept that the limits of statutory cover would be rendered nugatory if the insurer is required by virtue of the Statute to bear liability in excess of what contracted for. I accept that any sum in excess of the stated monetary minimum is not required by the ordinance. I would vary the learned Chief Justice's judgment as it concerns costs and interest.

[45] The inordinate delay that has been incurred in this matter is regrettable. The action in this matter was filed on the 23rd June 2004 and delivered on the 4th May, 2012. The trial in the direct action was completed in 2012 and on 10th November, 2017, judgment was delivered. These delays constitute a

contravention of the Appellants' constitutional rights to a trial within a reasonable time. That's a right guaranteed by the State to each citizen. The Appellants ought not to be put to the task of securing a remedy after such a prolonged delay.

[46] In ***Harker*** and ***Griffiths***, both matters from this jurisdiction, the judges have commented on the harshness of the law on the third party. Chief Justice Malone, having found against the third party in ***Griffiths***, recommended that Parliament take the necessary steps to mitigate the seeming unfairness which the law attends on third parties. Those comments were endorsed in the House of Lords in ***Harker***. Barbados has taken steps to ease the harshness of the law.

Conclusion

[47] For the reasons that I have discussed, I would propose the following orders:

(a) The appeal is dismissed.

(b) The judgment of the court below is confirmed except for the variation sought by the Respondent as it relates to the order of the trial judge on interest and costs.

(c) The cross-appeal of the Respondent is allowed.

(d) Costs are awarded to the Respondent in this court and the court below. The costs order is provisional, to be made final after seven days. In the event either party should apply for a contrary order

within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application.

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CAMPBELL JA