

11/85

No. 7 of 1984

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

BANKERS & TRADERS INSURANCE CO. LTD. Appellant
(Second Defendant)

- and -

10 NATIONAL INSURANCE CO. LTD. Respondent
(First Defendant)

CASE FOR THE APPELLANT

1. In this appeal from the federal Court of Malaysia the issue is which of two insurance companies is liable, by virtue of Section 80 Road Traffic Ordinance (No. 49 of 1958), to satisfy a judgment obtained by a third party in respect of a road traffic accident.

20 2. Section 80 of the Road Traffic Ordinance is one of a number of sections contained in Part IV of The Ordinance under the heading: "Provisions Against Third Party Risks Arising Out of The Use of Motor Vehicles". The sections material to this appeal are set out in Appendix A to this case.

Section 80 sub-section (1) provides in its material parts as follows:

30 "If, after a certificate of insurance has been delivered under subsection (4) of Section 75 of this Ordinance 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 75 of the Ordinance (being a

RECORD

liability covered by the terms of the policy) is given 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

Section 74 subsection (1) of the Ordinance provides: 10

"Subject to the provisions of this Part of the Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this part of this Ordinance". 20

Section 75 subsection (1) (b) in its material part provides that in order to comply with the requirements of the Ordinance it must be a policy which -

"(b) insures such person, persons or classes as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road" 30

Section 79 specified certain types of restrictions on the scope of third party risks which if stipulated for in a policy are to be treated as ineffective. A restriction upon liability in circumstances where the driver is an "authorised driver" already covered by insurance under another policy is not within Section 79. 40

3. THE FACTS.

p.10-11 The facts are not in dispute. They are
p.13-16 set out in a Statement of Agreed Facts and are
recited fully in the judgments delivered below.

p.21-28 The user of the motor vehicle at the time of
the accident was one Ko Beng Lai("Ko"). The vehicle,

an Opel Rekord Saloon, registration number JF 5143 was insured by the Appellant according to the terms of a policy issued to one Kwang Shi Ching. Clause 2 (a) of Section II provides:

RECORD

p.38

"2. In terms of and subject to the limitations of and for the purposes of this section the Company will indemnify

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(a) an Authorised Driver who is driving the motor vehicle provided such Authorised Driver

(ii) is not entitled to indemnity under any other policy."

It appears that at all times Ko has been treated by all parties as an Authorised Driver.

Ko was at all material times entitled to indemnity under another policy, namely a policy issued to him by the Respondent herein in respect of a Morris Minor motor car registration number JE 8143. Clause 2(b) in Section II of that policy provides:

p.42

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p.42

"2. the Company will indemnify

(b) the Insured whilst personally driving a private motor car (but not a motor cycle) not belonging to him and not hired to him under a hire purchase agreement".

There is no issue that Ko was driving a private motor car not belonging to him, and not hired to him. He was therefore at the material time entitled to indemnity under the policy of insurance issued by the Respondent, and by the terms of the Appellant's policy issued to Kwang Shi Ching no liability to indemnify arose.

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4. Judgment in the High Court and Reasons for Judgment in the Federal Court

In the High Court the learned Judge treated the case as an instance of double insurance. It is respectfully submitted that in such respect he was wrong but he nevertheless held (it is submitted correctly) that the Respondent was liable for the whole amount of the Judgment.

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The principal ground of appeal to the Federal Court comprised a submission that the

p.18-19

RECORD

p.26 1.10 intention of the Ordinance is to make the owner/
 user primarily liable. The reasoning of the
 Federal Court proceeded by way of three main
 steps, each it is respectfully submitted wrong.
 Firstly that once that it is admitted that the
 driver is an authorised driver then section 80
 of the Ordinance applies. Secondly that section
 80 is concerned with insurance which attaches to
 the vehicle as opposed to the driver. Thirdly
 p.25 that the proviso in section 80 (1) "notwithstanding
 that the insurer may be entitled to avoid or
 cancel the insurer shall pay" excluded
 p.26-27 the Appellant from relying upon Clause 2(a) (ii). 10

5. It is respectfully submitted that the
 Federal Court fell into error. In order to be
 lawful it is essential that there should be in
 force in relation to the user of a motor vehicle a
 policy covering liability to third parties in
 respect of death or bodily injury arising out of
 the use of the motor vehicle (S.74 and S.75(1)(b).) 20
 Section 79 excludes certain terms from being
 effective. A restriction upon liability arising
 where an Authorised Driver is already covered by
 insurance is not within S.79. One would not expect
 it to be bearing in mind that the legislative
 purpose is not to create double indemnity but to
 establish indemnity. The critical question not
 considered by the Federal Court was whether Ko
 was a person insured by a policy in respect of a
 liability required to be insured by S.75 (1)(b) 30
 (which he was) in respect of which liability
 judgment had been given (which it had) and that
 the liability for which judgment had been given
 was a liability covered by the terms of the
 policy (which it was under the Respondent's
 policy but not the Appellants').

It is submitted that there is nothing in the
 Ordinance to justify the view that the pivotal
 consideration is the vehicle, and further the
 Federal Court erred in treating clause 2 (a) (ii) 40
 of the Appellant's policy as cancelling or
 avoiding the policy when it had the effect of
 preventing liability arising.

6. The Appellant respectfully submits that this
 appeal should be allowed for the following, among
 other

R E A S O N S

- (1) BECAUSE the Appellant insurance company was
 not on risk at the time the accident occurred.

- (2) BECAUSE the Appellant insurance company is not liable to make payment by virtue of Section 80 Road Traffic Ordinance.
- (3) BECAUSE the learned trial Judge was right and the Federal Court was wrong.

GEORGE NEWMAN

LEE BIAN TIAN

APPENDIX A TO THE APPELLANT'S CASE

PART IV

10 PROVISIONS AGAINST THIRD PARTY RISKS ARISING
OUT OF THE USE OF MOTOR VEHICLES

74. Motor vehicle users to be insured against third third party risks.

(1) Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be,
20 such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Ordinance.

(2) If a person acts in contravention of this section, he shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine, and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order
30 thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for holding or obtaining a driving licence under Part II of this Ordinance for a period of twelve months from the date of the conviction.

(3) A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a driving licence shall, for the purposes of Part II of this
40 Ordinance, be deemed to be disqualified by virtue of a conviction under the provisions of that Part:

Provided that a person shall not be convicted of an offence against this section if he proves -

- (a) that the vehicle did not belong to him and was not in his possession under a contract of hiring or loan; and
- (b) that he was using such vehicle in the course of his employment; and
- (c) that he neither knew, nor had reason to believe that there was not in force in relation to such user a policy of insurance or such security as complies with the provisions of this Part. 10

(4) Notwithstanding any written law prescribing a time within which proceedings may be brought before a court, proceedings for an offence under this section may be brought -

- (a) within a period of six months from the date of the commission of the alleged offence; or
- (b) within a period which exceeds neither three months from the date on which it came to the knowledge of the prosecutor that the offence had been committed nor one year from the date of the commission of the offence, 20

whichever period is the longer.

(5) This section shall not apply -

- (a) to a vehicle owned by -
 - (i) any Government in Malaysia;
 - (ii) the Government of the Republic of Singapore;
 - (iii) a Municipality or other local authority approved by the Minister charged with the responsibility for local government; or 30
 - (iv) a public body,

whilst the vehicle is being used for the purpose of any such Government, Municipality or other local authority or public body owning the same; or

- (b) to any motor vehicle at any time when it is

being driven for police purposes by or under the direction of a police officer; or on a journey to or from any place undertaken for salvage purposes pursuant to Part X of the Merchant Shipping Ordinance, 1952; or

- 10 (c) to any motor vehicle at any time when it is being driven by or under the direction of a road transport officer for the purpose of examining or testing the mechanism of the motor vehicle or of testing the ability of a person to control or to drive a motor vehicle in connection with an application for a licence to drive a motor vehicle; or
- 20 (d) to a motor vehicle in respect of which the registered owner has deposited with the Accountant General the sum of one hundred and twenty-five thousand dollars at any time when such motor vehicle is being driven by the registered owner or by his servant in the course of his employment, or is otherwise subject to the control of the registered owner.

75. Requirements in respect of policies.

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

- (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and
- 30 (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover -

- 40 (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- (ii) except in the case of a motor vehicle in which

passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) any contractual liability.

(2) (i) Where any payment is made (whether or not with any admission of liability) by - 10

- (a) an authorised insurer under or in consequence of a policy issued under this Ordinance; or
- (b) the owner of a motor vehicle in relation to the user of which a security under section 77 of this Ordinance is in force; or
- (c) the owner of a motor vehicle who has made a deposit under paragraph (d) of subsection (5) of section 74 of this Ordinance,

in respect of the death of or bodily injury to any person arising out of the use of a motor vehicle on a road, and the person who has so died or been bodily injured has to the knowledge of the authorised insurer or such owner as the case may be received treatment at a hospital, whether as an in-patient or as an out-patient, in respect of the injury so arising, there shall also be paid by the authorised insurer or such owner to such hospital the expenses reasonably incurred by the hospital in affording such treatment, after deducting from such expenses any moneys actually received by the hospital in payment of a specific charge for such treatment: 20 30

Provided that the amount to be paid by the authorised insurer or such owner shall not exceed four hundred dollars for each person so treated as an in-patient or forty dollars for each person so treated as an out-patient.

(ii) For the purposes of this subsection the expression "hospital" means an institution (not being an institution carried on for profit) which provides medical or surgical treatment for in-patients and the expression "expenses reasonably incurred" means - 40

- (a) in relation to a person who receives treatment

10 at a hospital as in in-patient, an amount for each day such person is maintained in such hospital representing the average daily cost for each in-patient of the maintenance of the hospital and the staff thereof and the maintenance and treatment of the in-patients therein: provided that in respect of a Government hospital which admits paying patients, "expenses reasonably incurred" means the amount chargeable to a member of the general public, in a ward of the class occupied by the person who received treatment, in accordance with the scale of fees from time to time in force at such hospital; and

(b) in relation to a person who receives treatment at a hospital as an out-patient, reasonable expenses actually incurred.

20 (3) Notwithstanding anything in any written law 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.

30 (4) A policy shall be of no effect for the purposes of this Part of this Ordinance unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Ordinance 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.

(5) In this Part of this Ordinance the expression "policy of insurance" includes a cover note.

76. Authorised insurers.

40 (1) For the purpose of this Part of this Ordinance "authorised insurer" means a person lawfully carrying on motor vehicle insurance business in the States of Malaya who is a member of the Motor Insurers' Bureau.

In this subsection "Motor Insurers' Bureau" means the Motor Insurers' Bureau which has executed an Agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance.

- (2) The Minister may require the insurer -
 - (a) (Repealed).
 - (b) (Repealed).
 - (c) to furnish such returns and information relating to the motor vehicle insurance business carried on by the insurer as the Minister may require;
 - (d) (Repealed).
 - (e) (Repealed).
- (3) (Repealed).
- (4) (Repealed).
- (5) (Repealed).

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77. Requirements in respect of securities.

(1) In order to comply with the requirements of this Part of this Ordinance a security must -

- (a) be given either by an authorised insurer or by some body of persons approved by the Minister after consultation with the Minister of Finance which carries on, in the States of Malaya, the business of giving securities of a like kind; and
- (b) consist of an undertaking by the giver of the security to make good, subject to any conditions specified therein and up to an amount, in the case of an undertaking relating to the use of public service vehicles, of not less than two hundred and twenty-five thousand dollars, and in any other case, of not less than forty-five thousand dollars, any failure by the owner of the vehicle or such other persons or classes of persons as may be specified in the security duly to discharge any such liability as is required to be covered by a policy of insurance under section 75 of this Ordinance which may be incurred by him or by them.

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(2) A security shall be of no effect for the purposes of this Part of this Ordinance unless and until there is issued by the person giving the security to the person to whom it is given a

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certificate (in this Ordinance referred to as a "certificate of security") in the prescribed form and containing such particulars of any conditions subject to which the security 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.

78. Certain conditions in policies or securities to be of no effect.

10 Any condition in a policy or security issued or given for the purposes of this Part of this Ordinance providing that no liability shall arise under the policy or security 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 or security shall be of no effect in connection with such claims as are mentioned in paragraph (b) of subsection (1) of section 75 of
20 this Ordinance:

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

30 79. Avoidance of restrictions on scope of third party risks policies.

Where a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters -

- (a) the age or physical or mental condition of persons driving the motor vehicle; or
- 40 (b) the condition of the motor vehicle; or
- (c) the number of persons that the motor vehicle carries; or
- (d) the weight or physical characteristics of the goods that the motor vehicle carries; or

- (e) the times at which or the area within which the motor vehicle is used; or
- (f) the horse-power or value of the motor vehicle; or
- (g) the carriage on the motor vehicle of any particular apparatus; or
- (h) the carriage on the motor vehicle of any particular means of identification other than any means of identification required to be carried by or under Part II of this Ordinance; or 10
- (i) the driver of the motor vehicle at the time of the accident being under the influence of intoxicating liquor or of a drug; or
- (j) the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle; or
- (k) the motor vehicle being used for a purpose other than the purpose stated in the policy; 20

shall, as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person. 30

80. Duty of insurers to satisfy judgments against persons insured in respect of third party risks.

(1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance 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 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the 40

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, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

- 10 (2) No sum shall be payable by an insurer under the foregoing provisions of this section -
- (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings; or
- (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
- 20 (c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either -
- (i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a
- 30 statutory declaration stating that the certificate had been lost or destroyed; or
- (ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the
- 40 certificate was delivered made such a statutory declaration as aforesaid; or
- (iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part of this Ordinance in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

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Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

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(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

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(5) In this section the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and if so at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the terms of the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

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(6) In this Part of this Ordinance reference to a certificate of insurance in any provisions relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the

certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

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Respondent
(First Defendant)

CASE FOR THE APPELLANT

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