Privy Council Appeal No. 7 of 1984

Bankers & Traders Insurance Co. Ltd. *Appellant*

v.

National Insurance Co. Ltd. *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 25TH FEBRUARY 1985, DELIVERED THE 2ND APRIL 1985

Present at the Hearing:

LORD SCARMAN
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD TEMPLEMAN
SIR WILLIAM DOUGLAS

*[Delivered by **Lord Scarman**]*

In this appeal from the Federal Court of Malaysia the issue is which of two insurance companies is liable under section 80 of the Road Traffic Ordinance (No. 49 of 1958) to satisfy a judgment obtained by a third party in respect of a road traffic accident. At the conclusion of the hearing their Lordships indicated that they would report their opinion to His Majesty the Yang di-Pertuan Agong that the appeal ought to be allowed with costs before the Board and below and that they would give their reasons later.

On 15th June 1969 Abdul Hafidz and Mohamediah bin Jali ("the third parties") suffered personal injuries in a road accident. They were run into and knocked down by a motor vehicle owned by Kwang and driven with his consent by Ko Beng Lai. They sued Ko, the driver, and on 28th July 1981 obtained judgment against him for a total sum of $44,098 and interest from date of judgment at 8% per annum. The judgment was and remains unsatisfied.

Ko was insured under a policy of insurance issued to him by the National Insurance Co. Ltd, respondent to this appeal. Their Lordships will refer to this

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company as "the driver's insurers". The policy was in respect of a vehicle other than the one involved in the accident and contained an extension of cover in these terms:-

> "The Company will indemnify ...
> ... the insured whilst personally driving a private motor car ... not belonging to him and not hired to him under a hire purchase agreement."

Ko was driving at the time of the accident a private motor vehicle which belonged not to him but to Kwang. Kwang was insured with the Bankers and Traders Insurance Co. Ltd, the appellant, to whom their Lordships will refer as "the owner's insurers". His policy was issued to him in respect of the car which Ko was driving, and it provided, *inter alia*, that:-

> "The Company will indemnify
> (a) an authorised driver who is driving the motor vehicle provided that such authorised driver
> ...
> ....
> ... is not entitled to indemnity under any other policy."

Ko was the authorised driver: but he was entitled to an indemnity under his own policy. He was, therefore, not covered by Kwang's policy.

Section 80 of the Ordinance imposes a duty upon insurers to satisfy judgments against persons insured in respect of third party risks. Uncertain as to which company was on risk, the third parties issued a writ against both companies on 14th November 1976. The ensuing litigation has been between the two insurance companies, the ultimate question being which of the two companies must satisfy the judgment obtained against the driver.

The case was heard in the High Court of Malaya by Mr. Justice Mohamed Yusoff. The two issues for the court's decision were defined as follows:-

(a) whether the policy of the first defendants or the second defendants were on risk at the material time of the accident; and

(b) whichever defendants are found to be liable to satisfy the judgment sum and costs, could they call for contribution from the other for 50 per cent in view of the condition 7 of the policy of insurance.

The judge held that the driver's policy provided him with cover and that upon the true construction of the Ordinance his insurers were liable to satisfy the judgment against Ko. This being the judge's decision on the first issue, the second did not arise.

On appeal the Federal Court took a different view. Like the trial judge they thought the case to be one of double insurance. They differed, however, from the judge in construing the Ordinance as being primarily concerned with the insurance of the car and only secondarily, if the car was not insured, with the insurance of the driver. They put their view thus:-

> "As this car was insured with the second defendants, [the owner's insurers who are the appellants in this appeal] it is their policy which was on risk",

and again:-

> "The decisive factor which is the subject matter of the insurance is the specified motorcar. It is because of the use of the motorcar that an insurance is required."

Accordingly, they allowed the appeal of the driver's insurers and held the owner's insurers liable to satisfy the judgment against the driver.

Their Lordships cannot accept the Federal Court's view that this was a case of double insurance. It is plain from the terms of the owner's policy that the owner's insurers were not on risk when the car was being driven by another who had a policy of his own which covered him. Once it is recognised that only one of the two policies, namely the driver's policy, was on risk when Ko was driving it becomes plain upon the wording of section 80 (1) of the Ordinance that the driver's insurers must satisfy the third parties' judgment.

The sub-section is in these terms:-

> "(1) If, after a certificate of insurance has been delivered under sub-section (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 sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against the insured person, 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, 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."

The driver's insurers had delivered to Ko a certificate of insurance in relation to his policy.

The liability to the third parties, being in respect of personal injuries, was a liability covered by the terms of the driver's policy; and judgment had been given against Ko, himself being a person insured by the policy. The driver's insurers were, therefore, on risk.

In their Lordships' view it is not necessary to go further than the terms of section 80(1) in order to determine that the driver's insurers were under a duty to satisfy the judgment. The Federal Court did, however, go further: they examined other sections within Part IV of the Ordinance, notably section 74(1) and section 75(1)(b), from which they drew the inference that it was the legislative purpose of the Ordinance to require that, in all cases where there were in existence more than one policy of insurance, the insurers of the vehicle's owner are to satisfy the third party's judgment and that exclusions of cover contained in the owner's policy are to be disregarded. They believed this view of the Ordinance's purpose to be reinforced by the use of the definite article in the references to the vehicle which are to be found in section 74(1) and section 75(1)(b) of the Ordinance.

Their Lordships respectfully disagree. First, though certain conditions if found in a policy issued under the Ordinance are to be of no effect, the exclusion of an owner's cover when the car is being driven by an authorised driver who has his own insurance is not included among the specified excluded conditions: section 78. Section 79 also avoids certain restrictions on the scope of third party cover but does not include this exclusion amongst those avoided. An attempt was made before the Board by counsel for the driver's insurers to argue that in construing section 80(1) one must disregard the terms of the policy. The submission is flatly contradicted by the language of the subsection which expressly directs attention to the liability covered by "the terms of the policy". The Ordinance proceeds upon the basis of the terms of the policy, subject only to the specified exceptions and restrictions contained in sections 78 and 79. No doubt it is for this reason that any person against whom a third party claims damages for personal injury arising out of a road accident is under a duty to provide the third party with information as to his insurance cover: section 82(1).

Secondly, their Lordships cannot accept the Federal Court's view as to the legislative purpose of the Ordinance. The heading to Part IV of the Ordinance is "Provisions against third party risks arising out of the use of motor vehicles". Section 74(1) provides that it shall not be lawful for any person "to use, or to cause or permit any other person to

use" an uninsured motor vehicle. (emphasis supplied). Section 75(1)(b) requires a policy, if it is to comply with the Ordinance, to specify the person, persons, or classes of persons covered in respect of third party liability. Thus the heading to Part IV and each sub-section clearly indicate that it is not the vehicle but the use of the vehicle which has to be insured, and that the Ordinance applies primarily to the use and only secondarily to any person who causes or permits another person to use the vehicle. The Federal Court read references to "the motor vehicle" in section 74(1) and section 75(1)(b) as references to the vehicle named in the insurance policy. But in their Lordships' view it is plain that "the motor vehicle" referred to in each sub-section is the vehicle being used and is not confined to a motor vehicle named in an insurance policy. Though Ko's policy did not name the vehicle he was driving when the accident occurred, there is no doubt that it covered the vehicle in use at that time; nor can there be any doubt that it was his use as the authorised driver at that time which was covered by the policy issued by Ko's insurers. Conversely the owner's policy did not cover Ko's use of the car at the time of the accident.

Their Lordships, therefore, conclude that the driver's insurers were on risk at the time of the accident, and not the owner's insurers. The respondent, being the driver's insurers, are liable to satisfy the third party judgment against their insured. A number of other points were adumbrated by counsel for the respondent both in the written case for the respondent and in argument. None of these points is open to the respondent, being outside the agreed issues (quoted above) which were put to the Federal Court: their Lordships do not, therefore, deal with them. Their Lordships answer the first of the agreed issues by declaring that the policy of the driver's insurers was the only policy at risk at the time of the accident: the second question (apportionment of liability) does not arise because the owner's insurers were not on risk at the time.

Their Lordships would finally draw attention to a disturbing feature of the case. The third parties obtained judgment on 28th July 1981. Because of the dispute between the two insurance companies their judgment has remained unsatisfied for over three years. The time elapsed between the accident and final determination of the dispute between the insurance companies is an unacceptable fifteen and a half years. The companies who conduct motor insurance business and accept the responsiblities and, no doubt, the profits of the business of authorised insurers under the Ordinance, should surely be able to devise an agreed scheme under which the satisfying of a third party's judgment does not have to wait

upon the resolution of a dispute between the insurers concerned. And, if such a scheme is not forthcoming, their Lordships would suggest that the Ordinance be strengthened so as to obviate delay such as the third parties have suffered in this case.