Privy Council Appeal 16 of 1992

Jonathan Noel *Appellant*

v.

Royal Insurance Company Limited *Respondent*

FROM

THE COURT OF APPEAL OF THE REPUBLIC OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD GRIFFITHS
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD MUSTILL

*[Delivered by **Lord Mustill**]*

On 7th April 1973 a traffic accident took place in Trinidad which involved a motor vehicle, registration number PE 9051, driven by Franklyn Mylan. In the course of this accident, Jonathan Noel (the appellant in the present appeal) suffered grievous burns. He brought an action for damages against Mr. Mylan and succeeded in obtaining, first, a judgment in his favour on liability, and then on 12th July 1978 an assessment of damages in the sum of $105,020.00. It may be assumed that Mr. Mylan had no funds with which to satisfy this judgment, and since there is in Trinidad no organisation corresponding to the Motor Insurance Bureau in the United Kingdom, against which a person injured by an uninsured driver can have recourse, the appellant's only hope of redress is to prove that the vehicle was insured against third party risks on terms which embraced the liabilities of Mr. Mylan, and then to claim against the insurers under section 10 of the Motor Vehicles Insurance (Third Party Risks) Act, Chapter 48:51 of the laws of Trinidad and Tobago. To pursue such a claim the appellant began a second action in November 1978 alleging that at the time of the accident the liabilities of Mr. Mylan in respect of the vehicle were insured by the present respondents. After a trial before Permanand J. this action was dismissed. Now, some fourteen years after

the commencement of the action, and nearly twenty years after the accident, he appeals against the decision of the Court of Appeal of Trinidad and Tobago upholding the decision of the trial judge.

It is convenient to state at the outset the primary facts - and they are very few - which had been firmly established by the end of the trial.

1. Until 19th February 1973 Fergus Lionel was the registered owner of a motor vehicle with registration number PE 9051. (Some of the documents refer to this man as Lionel Fergus, others as Fergus Lionel. Their Lordships shall simply call him "Lionel").

2. On a date unknown the respondents had insured Lionel under a policy of motor insurance which was due to expire on 28th February 1973.

3. In the Vehicle Register, a certified copy of which was put in evidence at the trial, the names of Lionel and Mylan were successively entered in a column headed "Name of Owner". The date shown against the name of Mylan was 19th February 1973.

4. On 7th April 1973 the accident occurred whilst Mylan was driving the car, and as a result of his negligence.

5. LICENCE PARTICULARS INSURANCE PARTICULARS

Year	Date	Date of renewal	Date Expires	Insured with	Policy Number
72	3/1	...	28/2/72	Royal Insurance	MP-1681
73	9/4	...	28/2/74	Royal Insurance	MP-1681

It was assumed at the trial, no doubt correctly, that the second of these entries reflected an application to re-licence the vehicle, two days after the accident.

The facts just stated were established by admissions in the pleadings and by concessions at the trial. Neither side called oral evidence and no insurance documents of any kind were before the court.

It was on these meagre foundations that the appellant sought to erect a case under the Act, in face of denials by the respondents that they had made any (or any valid) contract of insurance which covered the vehicle at the time of the accident and that if there was any such cover it extended to the liabilities of Mylan.

The issues raised by this essentially negative defence must be approached in stages. The first step is to decide

who owned the car at the time of the accident. The trial judge did not discuss this point, but it is implicit in her judgment as a whole that the entry of Mylan's name in the register, against the date of 19th February 1973, reflected a change of ownership on that date, and McMillan J., delivering the leading judgment in the Court of Appeal, explicitly found that this was so. Given the way in which the appellant had himself pleaded the matter this inference was inevitable, and it is no longer in dispute.

The next stage is to identify the party in whose favour the insurance is said to have been effected. In this respect, as in others, the action followed an unusual course. By his statement of claim filed on 14th November 1978 the appellant pleaded that in consideration of a premium paid by Mylan the respondents agreed to insure Mylan, and that they delivered to Mylan a certificate in respect of that insurance. This remained the appellant's only case on the terms of the insurance until in July 1980 he obtained leave to add a new and inconsistent version of events. This was to the effect that the respondents had issued a certificate of insurance to Lionel in respect of the policy year expiring on 28th February 1974 and that they agreed to treat Mylan as covered by it. The particulars under this plea alleged that in February 1973 Mylan orally informed the respondents that he had purchased the car and requested a transfer of the cover to himself, whereupon the respondents informed Mylan "that he would be treated as being insured until the end of the subsisting period of cover when the transfer would be made". (These particulars are puzzling, since any conversation during February 1973 would have happened during the currency of the 1972/73 cover, and not the cover for the following year, which was the year in which the accident took place). The appellant also amended to plead that Mylan's negligence was covered under the certificate issued to Lionel since he was driving the vehicle with the knowledge, consent and permission of Lionel.

So matters stood at the beginning of the trial. At this point counsel for the appellant announced to the judge that he abandoned both the original plea that Mylan had from the outset been the person by whom and in whose favour the insurance was effected, and the particulars which described a meeting at which Mylan was informally added to the cover. Thereafter, the trial proceeded on the basis that if the appellant was to succeed,it must be on the basis that he was covered as a permitted driver by a policy effected by Lionel in his own name for the 1973/74 policy year. The appellant's case in the Court of Appeal was maintained on a similar basis, but when the present appeal came before the Board counsel for the appellant sought to contend that the certificate for the 1973/74 policy year had after all been issued in the name of Mylan. Their Lordships cannot permit the appellant to entertain this argument, not only because it seeks to

resurrect a case which was explicitly abandoned eight years ago, but also because since the first day of the trial the case has been fought on a basis which it directly contradicts. Their Lordships will say only that in their opinion the appellant has lost nothing through the tactics adopted by the counsel who represented him at the trial, since the abandoned pleas could not have succeeded in the absence of any evidence to sustain them.

Their Lordships must therefore consider whether the appellant has proved that the respondents issued a certificate in the name of Lionel for the year 1973/74. The trial judge appears to have assumed, without discussion, that the appellant had succeeded to this limited extent. The Court of Appeal took the opposite view, and their Lordships agree. Three grounds were advanced before the Board in support of the appellant's case. The first is that the respondents had admitted in their amended defence that a certificate had been issued for the year in question, and that since *ex hypothesi* it was not in the name of Mylan it must have been in the name of Lionel. Their Lordships consider, as did the Court of Appeal, that the premise of this argument is unsound. The respondents admitted only that they had issued a certificate to Lionel, but not that it related to the year 1973/74, rather than the previous year, the position in respect of which was never in dispute.

The appellant's second line of argument was founded on section 25 of the Motor Vehicles and Road Traffic Act, Chapter 48:50, which stipulates that the Automotive Licensing Officer shall not renew a licence unless he is satisfied that the provisions of the Regulations made under the Motor Vehicle Insurance (Third Party Risks) Act have been complied with. Regulation 9(1) of those Regulations requires any person applying for the renewal of a licence to produce to the Licensing Officer a certificate indicating that when the licence comes into operation there will be in force a policy or security in relation to the use of the motor vehicle by the applicant or other persons on his order or with his permission. In the light of this requirement, so the argument runs, it must be presumed that when someone applied for the renewal of the licence two days after the accident he presented a current certificate in his own name; and that since if the certificate was not in the name of Mylan it must have been in the name of Lionel, that someone must have been Lionel.

Their Lordships find it unnecessary to express an opinion on the question, not fully developed in argument, whether an argument on these lines is admissible in principle, given the absence of any evidence as to the practice in the Licensing Office. It is sufficient to say that when the shortcomings of the Register are combined with the implausibility of any version of events consistent with the appellant's case, it becomes impossible to draw the inference for which the appellant contends.

As to the former, the entries in the register relating to this vehicle inspire no confidence in the meticulousness with which it was compiled. On four of the nine occasions on which the vehicle was licensed no entry was made in the column reserved for the date of renewal of the certificate of insurance, and on one occasion neither the dates of renewal nor the date of expiry were recorded. Moreover, in two instances the stated date of renewal was later than the date of the licence, which appears to indicate a breach of the Regulations. It is true that there may be acceptable explanations for these anomalies, but since no witness was called to provide them, great caution would be required before drawing any inference founded on the assumption that the register is reliable.

Even so, the assumption made by the trial judge that the insurance had indeed been renewed by Lionel might perhaps have been sustainable if the entry in the register had chimed with any plausible hypotheses about the circumstances of the renewal and the terms of the new certificate. There appear to be only three possibilities. The first is that, just as the vehicle was licensed after the accident, so also was it insured after the accident. This hypothesis, which would of course have been fatal to the appellant's case, was never advanced on his behalf and their Lordships need say nothing about it. This leaves only the suppositions that the policy was renewed by Lionel (a) before 19th February 1973 or (b) after that date but before the accident. As to the latter, counsel has been unable to suggest any reason why Lionel should have effected an insurance which was to run for a year from a date in the future on a vehicle which he no longer owned. The former is a possibility, if Lionel is endowed with sufficient foresight to have effected a renewal well in advance of the expiry of the current policy. Even on this hypothesis however the clerk who re-licensed the car in the name of Mylan must, in breach of the Regulations, have done so in the face of a certificate naming Lionel as the insured. The logical implications of the appellant's case thus undermine the reliability of the register on which his entire argument is founded.

In order to answer this objection counsel for the appellant advanced before the Board a new theory, never previously pleaded or even suggested, to the effect that Lionel's certificate might have specifically named Mylan as a permitted driver and therefore might have led the clerk to issue a licence in his name. Quite apart from the fact that this new case could not properly be admitted at such a very late stage, it carries no more conviction than the old. As their Lordships read the Regulation a certificate in such a form could not properly have been used to procure the licensing of the vehicle to Mylan. Moreover, their Lordships are unable to envisage, and counsel has been unable to suggest, any reason why Lionel should have procured a certificate for the 1973/74 year naming both himself and Mylan either (a) before he sold the car, at a time when Mylan had no interest in it, or (b)

afterwards, when for an entire policy year he (Lionel) would have had no connection with the vehicle at all.

There remains for consideration the appellant's third ground, to the effect that since the insurance documents were not in the possession of the appellant, and must (if they existed) have been the subject of records retained by the respondents the latter's failure to produce them at the trial founds an inference that they contained something favourable to the appellant's case, and makes it unfair to dismiss the claim for want of proof. In support of this contention counsel for the appellant drew attention, after the close of the oral arguments, to the observations of Lord Shaw of Dunfermline in *Murugesam Pillai v. Manickavasaka Pandara* (1917)44 L.R. Ind. App. 98, at page 103, on the duty of parties to disclose relevant materials in their possession, and on the adverse inferences which may be drawn if they are withheld. Whilst respectfully endorsing these observations in full, their Lordships find them of no assistance in the unusual circumstances of the present case. It will be recalled that until more than seven years after the supposed issue of the certificate the appellant was maintaining that it had been issued to and paid for by Mylan. Some proof of this allegation would plainly have been needed, and if the appellant could not obtain the certificate from Mylan himself (as appears to have been the case) his advisers might have been expected to press the respondents to disclose a copy of the certificate, or at least an extract from the relevant records. In fact the opposite happened, for the respondents themselves spent several months during 1989 and 1990 in attempts to compel the production of the certificate by the appellant. These yielded no direct result, but may well have been the impetus for the decision to amend the statement of claim. Even afterwards no attempt was made on behalf of the appellant to extract documents from the respondents in support of his claim. It is impossible now to tell what the response would have been if the appellant's advisers had displayed more urgency, but it is at least possible that either the respondents would have made a nil return on the ground that no insurance for the relevant policy year had ever been made, or that the lapse of time was so great that no documents or records remained in existence. Furthermore, no implication that damaging materials had been deliberately withheld could properly be made without a clear formulation of what would have been revealed had they been disclosed - a requirement which the case for the appellant in its various mutations has conspicuously failed to fulfil.

These conclusions are sufficient to dispose of the appeal. Their Lordships should however mention that even if it had been possible to infer the existence of a certificate for the 1973/74 policy year in favour of Lionel the appellant's argument would have been broken down at the next stage, when he sought to establish his pleaded case that Mylan was covered under Lionel's insurance because he was driving with Lionel's permission. There are two objections to this argument, each of them fatal. The first is that there is no

means of knowing whether the cover extended to all persons driving with the consent of Lionel, or only to certain named persons; and if the latter, who those persons were. Secondly, it is an abuse of language to say that a person who has bought a car is driving it with the consent of the previous owner, for the latter no longer has the power to consent or to withhold consent to the use of it by the new owner. See *Peters v. General Accident etc. Corporation* [1938] 2 All E.R. 267, per Lord Greene M.R. at page 271.

In conclusion their Lordships should record that yet further objections to the claim were relied upon by the respondents. Thus, they submitted that no valid insurance, effective to confer rights on Mylan, could have been effected by Lionel at the time when he no longer owned the car; and that the appellant had failed to discharge the burden, which according to the respondents rested upon him, of proving that notice of his action against Mylan had been given to them within the period stipulated by section 10(2)(a) of the Motor Vehicles (Third Party Risks) Act. Since a decision on these points, which (especially in the case of the latter) are of some general importance, is unnecessary for the determination of the appeal their Lordships prefer to express no opinion upon them.

In giving their reasons for dismissing this appeal, the Board has entered into more detail than the Court of Appeal, recognising that a plaintiff who, after waiting for nearly twenty years, finds that the only hope of recourse for recompense in respect of his grievous injuries has once again been frustrated by lack of evidence may feel a sensation of grievance. In truth however a claim based on the materials brought forward at the trial was always hopeless, and the decision of the Court of Appeal in the respondent's favour was undeniably right.

Their Lordships accordingly dismiss the appeal with costs.