Easter Term
[2018] UKPC 8
Privy Council Appeal No 0101 of 2016

JUDGMENT

Maharaj and another (Appellants) *v* Motor One Insurance Company Limited (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance
Lord Kerr
Lord Wilson
Lord Sumption
Lady Black

JUDGMENT GIVEN ON

30 April 2018

Heard on 1 March 2018

Appellants	*Respondent*
Reeyah Chattergoon	Shawn A Roopnarine
Taurean Dassyne	Helen Lochan
Prakash Maharaj	Shanta Balgobin
(Instructed by Reeyah Chattergoon & Associates)	(Instructed by Roopnarine & Co)

LORD WILSON:

1. On 17 September 2013 Mr Rampersad Maharaj and Mr Radesh Maharaj ("the claimants") brought a claim in the High Court against Motor One Insurance Company Ltd ("the insurer"). On 13 April 2016 the Court of Appeal (Narine JA, who gave the substantive judgment, and Moosai and Jones JJA, who agreed with it), in the course of reversing a judgment given in the High Court by Kangaloo J on 29 July 2015, held that their claim was barred by section 3(1)(c) of the Limitation of Certain Actions Act ("the Limitation Act"). The claimants appeal as of right to the Board under section 109(1)(a) of the Constitution of the Republic.

2. On 1 August 1988 the first claimant was driving a motorcycle in the town of Penal. The second claimant was his pillion passenger. Their motorcycle collided with a motor car, registration number PT 6676, driven by Mr Parmashwar. The claimants suffered serious injuries.

3. On 13 February 1990 the claimants sued Mr Parmashwar for having negligently caused their injuries. Ever since then, the history has been one of astonishing forensic delay, perhaps testament to the past difficulties of progressing litigation in the courts of the Republic. It was only on 28 April 1998 that judgment was given for the claimants against Mr Parmashwar, with damages to be assessed. It was only on 11 August 2005 that the damages were duly assessed - in substantial sums for each claimant. Mr Parmashwar has not paid the damages or any part of them.

4. The claimants' claim against the insurer is founded on section 10(1) of the Motor Vehicles Insurance (Third-Party Risks) Act ("the Insurance Act"). It provides:

> "If, after a certificate of insurance has been delivered under section 4(8) 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 section 4(1)(b) (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 …"

5. Were the present claim to proceed to trial, there might be an issue as to whether Mr Parmashwar was a "person insured by the policy". It is clear that he was not the policy-holder; and the insurer (which has assumed the obligations of a different company which issued the policy) does not appear to have assisted the claimants or the court to learn whether he was a permitted driver under the policy and was thus insured by it. Were the claim to proceed, the terms of the policy in that respect would need to be disclosed. But the issue before the Board is whether the Court of Appeal was wrong to hold that the claim was time-barred under section 3(1) of the Limitation Act, which provides:

> "The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:
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> …
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> (c) actions to recover any sum recoverable by virtue of any enactment."

6. The insurer contends, at any rate before the Board, that the alleged cause of action against it under section 10(1) of the Insurance Act accrued on 28 April 1998, when judgment on the liability of Mr Parmashwar to the claimants was given. It points to the words of section 10(1) and contends that the cause of action accrues when a "judgment in respect of any … liability covered by the terms of the policy … is obtained against any person insured by the policy" even if the "sum payable thereunder in respect of the liability" is identified only after its accrual; and in that respect it cites the decision of the Court of Appeal of England and Wales in *Hillingdon London Borough Council v ARC Ltd* [1999] Ch 139, in the words of Potter LJ at para 25, that

> "for the purposes of limitation, a cause of action may accrue for 'any sum recoverable by virtue of any enactment' although that sum has yet to be quantified by some process of agreement or adjudication."

The claimants dispute that their alleged cause of action under section 10(1) accrued prior to 11 August 2005, when, in the action against Mr Parmashwar, their damages were assessed; and such was the date of its accrual accepted by the Court of Appeal. But, were the Board to agree with the Court of Appeal that the time for bringing the action which the claimants brought against the insurer on 17 September 2013 was only four years from accrual of the cause of action, it would be barred irrespective of whether the cause of it accrued on 28 April 1998 or 11 August 2005.

7. The main issue therefore is whether, as the Court of Appeal concluded, the action of the claimants under section 10(1) of the Insurance Act is an action "to recover any sum recoverable by virtue of any enactment" within the meaning of section 3(1)(c) of the Limitation Act and is therefore on any view time-barred.

8. In challenging the Court of Appeal's conclusion Ms Chattergoon on behalf of the claimants makes a variety of submissions which the Board will assemble in the paragraphs which follow.

9. The context of her argument is the legislative background to section 3(1)(c) of the Limitation Act. The Act came into force on 17 November 1997, in other words just prior to the date in 1998 when the claimants obtained judgment against Mr Parmashwar and thus on any view prior to the accrual of any cause of action against the insurer. Prior to the Act's commencement the period of limitation for the bringing of a claim against an insurer under section 10(1) of the Insurance Act was governed by section 3 of the Limitation of Personal Actions Ordinance ("the Ordinance"). This had provided that all "actions … brought to recover any sum of money secured by any … specialty … shall … be brought at any time within 12 years next after a present right to receive … the same shall have accrued …" There is no doubt that under English law the concept of a right secured by a "specialty" has included a right of recovery conferred by a statute, to which in the UK is attached the Royal Seal: see the exposition of Oliver LJ in the English Court of Appeal in *Collin v Duke of Westminster* [1985] QB 581 at 601-603.

10. The Limitation Act does not refer to a "specialty" and Ms Chattergoon argues that there is a lacuna in the Act which, while providing by section 22(2) for the repeal of the Ordinance, failed to provide any substitute period of limitation for various actions, including for an action under section 10(1) of the Insurance Act. She is certainly correct to say that the Limitation Act failed to cater for one type of action founded on a specialty: for section 3(1)(a) of the Act expressly excludes from the ambit of the section actions which are founded on contracts made by deed in circumstances in which no other section applies to them. In *Republic Bank Ltd v Peters* HCA No S-496 of 2005 Boodoosingh J at paras 41 to 43 declined to accept that Parliament intended not to apply a period of limitation to such actions and held that, in not having provided any different period of limitation, it must have intended that the period of 12 years provided by the Ordinance should continue notwithstanding the latter's repeal.

11. Ms Chattergoon invites the Board to reach a conclusion similar to that of Boodoosingh J in relation to the different type of action on a specialty now brought by the claimants. On what basis, however, does she say, generally, that the Limitation Act provides no period of limitation for their action under section 10(1) of the Insurance Act and, specifically, that their action is not "to recover [a] sum recoverable by virtue of any enactment" within section 3(1)(c) of the Limitation Act?

12. The answer (submits Ms Chattergoon) is that an action under section 10(1) of the Insurance Act is for the recovery of a sum recoverable by virtue of a contract, not by virtue of an enactment. The contract to which she refers is the contract between the policy-holder and the insurer; and (so her argument continues) the effect of section 10(1) is no more than to displace the doctrine of privity of contract by enabling a judgment-creditor of a person insured by the policy to sue under the contract as if he had been a party to it. She likens the effect of section 10(1) to that of section 17(1) of the same Act under which, when a person liable to a third party but entitled to be indemnified against the liability under a contract of insurance becomes bankrupt or in the case of a company is wound up, that person's rights under the contract are transferred to the third party.

13. Ms Chattergoon seeks support in section 3(2) of the Limitation Act, which provides that an "action shall not be brought upon any judgment after the expiry of 12 years from the final judgment". The facility to bring an action upon a judgment is largely archaic; but it seems that in the past a claimant was occasionally allowed to proceed to a second judgment in order to take enforcement proceedings no longer available under the first. At all events, in circumstances in which Parliament intended that the claimants should have 12 years in which to seek recompense under the judgment by means of a further action against Mr Parmashwar, how (asks Ms Chattergoon) could it have intended that they should have only four years in which to seek recompense under it by means of an action against the insurer under section 10(1) of the Insurance Act?

14. An initial question is whether Ms Chattergoon's alleged parallel between rights under sections 10(1) and 17(1) of the Insurance Act would, even if valid, avail the claimants. In her rush to escape the coils of section 3(1)(c) of the Limitation Act by alleging rights under section 10(1) to be contractual, does she not fall headlong into section 3(1)(a), which provides for a limitation period of four years for the bringing of actions founded on contract?

15. But, with respect to her, the alleged parallel is in any event invalid. Section 10(1) does not provide for the transfer of rights under a contract. It is not a displacement of the doctrine of privity. Claimants under section 10(1) do not sue insurers under the policy: their right is to sue the insurers for the amount identified in the judgment obtained by them against the person insured but it is subject to qualifications set by the subsection which may make their recovery there under higher or lower than any yield under the terms of the policy. Thus the subsection provides that any entitlement on the part of the insurer to avoid the policy should be overridden: this provision may therefore precipitate a recovery higher than under its terms. Equally, however, the subsection limits the insurer's obligation to make payment under the judgment in respect only of "such liability as is required to be covered by a policy" under the Act, irrespective of any wider liability actually covered by the policy: this provision may therefore precipitate a recovery lower than under its terms.

16. The invalidity of Ms Chattergoon's parallel is demonstrated by the judgment of the Board in *Matadeen v Caribbean Insurance Co Ltd* [2002] UKPC 69, [2003] 1 WLR 670. Mr Matadeen had sued the insurer under section 10(1) of the Insurance Act but had secured payment only of a small part of the judgment which he had obtained against the insured company; indeed, by virtue of the qualification in the subsection noted above, it was a payment lower than would have been payable under the terms of the policy. Since the company had meanwhile gone into liquidation, Mr Matadeen therefore commenced a second action against the insurer under section 17(1) of the Act. But was the second action time-barred? His cause of action had accrued prior to the commencement of the Limitation Act so the period of limitation was governed by the Ordinance. The Board rejected his assertion that his action under section 17(1) was an action on a specialty, ie brought under statute, and so could be brought within 12 years. It held that it was an action in contract which under section 5 of the Ordinance had to be brought within four years and that it was therefore time-barred. Lord Scott of Foscote, delivering the judgment of the Board, said:

> "39. … an action under section 10 of the Act is an action on a statutory cause of action created by the section. It is not subject to defences that the insurer might have been able to raise if sued by the insured.
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> …
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> 41. In a section 17 case, per contra, the cause of action derives from the insurance policy. All that the section does is to transfer the contractual rights. That does not turn a contractual right of action into an action on a specialty."

17. The Board is clear that the action brought by the claimants under section 10(1) of the Insurance Act is an action to "recover [a] sum recoverable by virtue of [an] enactment" within the meaning of section 3(1)(c) of the Limitation Act and that, subject to any postponement of the limitation period of four years there set, it is thus time-barred.

18. Albeit faintly, Ms Chattergoon adds a contention that the claimants are entitled to a postponement of the limitation period by virtue of section 14(1)(b) of the Limitation Act. This provides that, if a defendant deliberately concealed from a claimant a fact relevant to his right of action, the period of limitation prescribed by the Act should run only from the time when the claimant discovered the concealment or could with reasonable diligence have discovered it.

19. What is clear, however, is that within six months of the collision the claimants had learnt that the motor car driven by Mr Parmashwar had been the subject of a policy, then in force, issued by the insurer (or, more accurately, by its predecessor); and that on the date of the commencement of their action against Mr Parmashwar, they had, by their attorneys, given its predecessor the notice of the commencement of the action which under section 10(2) of the Insurance Act is a condition of any later action against an insurer under section 10(1). The claimants' action against the insurer was ultimately commenced only on 17 September 2013, by which time they were presumably aware of each "fact relevant to [their] right of action"; and they have not identified any fact of which they were then aware but which at some earlier stage the insurer had deliberately concealed from them. The Board has already noticed the insurer's apparent failure to date to disclose whether Mr Parmashwar was a "person insured by the policy". But its failure does not amount to the deliberate concealment of a fact relevant to the right of the claimants to have brought the claim against it. In *C v Mirror Group Newspapers* [1997] 1 WLR 131 the English Court of Appeal, when construing the English statutory provision (section 32, Limitation Act 1980) equivalent to section 14, held at p 138 that a "relevant fact" is one that the claimant will have to prove in order to establish a *prima facie* case. If proved, the facts pleaded by the claimants in their Statement of Case would have established a *prima facie* case.

20. So the Board dismisses the claimants' appeal, the hearing of which was conducted, with a reasonable measure of ultimate success, by video-link between San Fernando and London; and, subject to powerful contrary argument which it finds hard to conceive, it will order the claimants to pay the insurer's costs of the appeal. The constitutional right of litigants in the Republic to appeal without permission to the Board in prescribed circumstances is no doubt regarded as precious. But a few of the recent appeals as of right to the Board from various jurisdictions has led it to regret on behalf of the litigants that permission to bring them had not been required. Had the Court of Appeal and the Board been able to rule that the appeal of the present claimants to the Board was (as is the case) unarguable and so should not be submitted to the Board, the burden of costs upon them as a result of this appeal would have been greatly reduced.