The Educator

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Are insurers protecting their insureds?

In the UK Privy Council case of ***Ramsook v Crossley*** [2018] (Delivered April 30, 2018), on Appeal from the Court of Appeal of the Republic of Trinidad and Tobago, the Board said:

> This appeal is another sad illustration of problems that can arise from limits on the third party cover required by motor insurance legislation. The problems have in this case combined with an apparently deficient appreciation of insurers' duties towards their insureds. The first respondent, Mrs Carol Crossley, was insured against third party motor risks with Trinidad and Tobago Insurance Ltd ("TATIL"). The Motor Vehicles Insurance (Third-Party Risks) Act Chap 48:51 ("MVITPA") required her to be insured up to but not in excess of $1m (section 4(2)(c)). In fact she was insured by TATIL up to $1.5m. But, as a result of the way in which a third party claim against her by the appellant, Mr Davidson Ramsook, was handled, judgment was in May 2011 given against her for damages to be assessed, damages were in February 2013 assessed at some $3.6m and she evidently only learned for the first time of both these facts when in July 2013 those acting for Mr Ramsook sought to enforce the judgment, and shortly afterwards threatened to bankrupt her.

On 24 May 2009, Mr Ramsook a police officer was travelling as a passenger in a police car, when a vehicle driven by Mrs Crossley, after crossing the central line, collided with the police car. Mr Ramsook was very grievously injured, being paralysed from the chest down. The police accident record gives Mrs Crossley explanation that:

> "She was proceeding along Wrightson Road in the second from left lane when an unknown vehicle which was proceeding in the said direction on the left lane attempted to pull into her lane. She pulled to the left to avoid the said car and crossed the median onto the east bound lane where her vehicle collided with [the police] vehicle …."

Mrs Crossley was insured with TATIL. Clause 15 of the TATIL motor insurance policy reads as follows:

> "REPRESENTATION
>
> No admission offer promise or payment shall be made by or on behalf of the *Insured* without the consent of the *Company* which shall be entitled if it so desires to take over and conduct in the *Insured's* name the defence or settlement of any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the *Insured* shall give all such information and assistance as the *Company* may require."

On 21 September 2010 he commenced proceedings against Mrs Crossley and the Attorney General (representing the interests of the police).

On 12 January 2011, shortly after putting in this defence, the Attorney for TATIL wrote to Mr Ramsook's attorney in these terms:

> "I act for the first defendant's insurer in this matter who admits liability for the collision. The limit on liability is one million. My client is willing to pay this sum in full and final settlement of its liability to its insured. You are free to pursue any sum in excess of 1 million against the first defendant (its insured) and/or the second defendant.
>
> In the event you are not minded to accept this offer I reserve the right to bring this letter to the attention of any court."

This proposed offer was not accepted.

On 16 May 2011 des Vignes J entered judgment against Mrs Crossley for damages to be assessed, based on a defence admitting liability entered purportedly on Mrs Crossley's behalf by an attorney, instructed by TATIL. The most that the Attorney for TATIL found he could suggest to the court in written submissions dated 17 December 2012 was that damages should be assessed at $2,352,400.40, plus interest and costs.

On 17 May 2011 TATIL paid into court $1m. This equates with the amount "required to be covered" that Mr Ramsook could, following a judgment against Mrs Crossley, recover directly from TATIL under section 10(1) of the MVITPA. Any additional sum awarded by the judgment and covered by insurance could only be recovered either (a) from Mrs Crossley, leaving her to recover it from her insurers, or (b), if she did not pay, then, after bankrupting her, by taking advantage of the statutory assignment of her insurance rights under section 17 of MVITPA.

On 4 February 2013 Master Sobion-Awai assessed damages in a total of $3,614,197.70 and awarded costs of $127,112.96. She also ordered payment out of the $1m in court. On or about 12 July 2013, as the judge found, Mrs Crossley learned of this decision from a letter dated 28 June 2013 delivered to her home by an attorney for Mr Ramsook. On or about 30 July 2013 those representing Mr Ramsook took steps to bankrupt Mrs Crossley. In response, Mrs Crossley on 19 November 2013 issued an application supported by affidavit, in which she maintained that she had not been served in the proceedings and had known nothing of them. She sought an order setting aside the judgment entered on 16 May 2011, and granting her leave to enter an appearance within eight days and to file a defence within 28 days. On 19 January 2015 des Vignes J, after hearing oral evidence, accepted Mrs Crossley's case on the facts. She had not been served and that the attorney for the insurer had acted without authority. On that basis, des Vignes J set aside the judgment she had entered on 16 May 2011 together with all subsequent proceedings. An appeal by Mr Ramsook was dismissed by the Court of Appeal on 11 May 2015.
Mr Ramsook appealed to the Judicial Committee of the Privy Council.

Referring to the letter above, the Board said:

> This is not an attractive letter. Viewing it charitably, it is possible that Mr Gosine did not know, or had overlooked, that TATIL's policy covered more than the statutory minimum. Viewing it less charitably, it appears to have been an attempt to lead Mr Ramsook's legal advisers to believe that there was no more than $1m to be obtained from TATIL. It may perhaps also have been thought that they would then be unlikely to pursue proceedings against Mrs Crossley in the hope of obtaining more from her. As to the suggestion of a "settlement" of any liability under the policy, whatever authority Mr Gosine had to act on

> Mrs Crossley's behalf vis-à-vis Mr Ramsook, he certainly had no authority to act on her behalf with a view to settling her insurance claim on TATIL. The proposed agreement by Mr Gosine for TATIL that the $1m be paid "in full and final settlement of its [TATIL's] liability to its insured" could not in law have prejudiced Mrs Crossley's right to recover an additional $500,000 from TATIL if she had been held liable in that amount. Nor could it, in my opinion, even have precluded a claim by Mr Ramsook against TATIL under the statutory assignment worked by section 17 of MVITPRA in the event of her bankruptcy, since it would constitute an attempt to deprive her of a credit of up to $500,000 satisfying a liability in her bankruptcy which would otherwise have been discharged to her and her other creditors' advantage.

At the end of the day, this appeal turns in the Board's opinion on a short point of construction of clause 15. The starting point is that clause 15 is not limited to situations where proceedings ever come into existence. The Board said:

> Its opening words, "No admission offer promise or payment shall be made by or on behalf of the *Insured* without the written consent of the *Company*", make this clear. They must bite from the outset, indeed from the moment of the accident. The next words, entitling TATIL "to take over and conduct in the *Insured's* name the defence or settlement of any claim", must also apply in relation to any third party claim, irrespective of whether proceedings have yet or are ever begun. The further words, giving TATIL "full discretion in the conduct of any proceedings and in the settlement of any claim", also point to the distinction between a claim and any proceedings. The final provision, that "the *Insured* shall give all such information and assistance as the *Company* may require", applies in the Board's opinion from the moment of the accident onwards, but certainly is not limited to a situation in which proceedings have been begun.

On the conduct of the insurer, the Law Lords said:

> Where, on the face of it, Mr Gosine's [attorney for TATIL] and/or TATIL's conduct fell very seriously short was in failing to take proper instructions from Mrs Crossley and to keep her informed as to the proceedings which were being conducted in her name and the potentially very large exposure which she was risking. A clause like clause 15 is not carte blanche to insurers to conduct proceedings in their own interests, without regard to reality or to their insured's account of events or to the fact that here the claim was likely severely to affect Mrs Crossley as well as TATIL. …. Mrs Crossley has from the outset sought to excuse herself from fault in relation to the accident. Mr Gosine and TATIL ought at least to have ascertained and considered her position, with a view to deciding whether it was appropriate simply to admit liability on her behalf. They ought also to have kept her informed about the continuing progress of proceedings, which would severely expose her financially. However, bearing in mind TATIL's and Mr Gosine's actual and apparent authority deriving from clause 15, any complaint which Mrs Crossley has on this score is a matter between her and TATIL and/or Mr Gosine. It cannot affect Mr Ramsook's position, as a claimant pursuing proceedings unsuspecting of any such breach of duty. [References omitted]

The appeal was allowed and des Vignes J's judgment dated 16 May 2011 and Master Sobion-Awai's assessment of damages dated 4 February 2013 restored.

A reality check

In the Antigua and Barbuda High Court case of ***Omari Samuel v. Paul Chet Green and Ansley Charles*** [2018](Delivered May 11, 2018), the claimant sued the defendants for damages for personal injuries sustained as a result of a motor vehicle accident. The at-fault vehicle was owned by the first defendant Paul Chet Green and being driven by the second defendant, Ansley Charles.

Mr. Green's motor policy was limited to a statutory maximum of $250,000.00. Clause 5 of the policy reads as follows:

> "No admission offer promise or payment shall be made to or on behalf of the Insured without the consent of the Corporation which shall be entitled if it so desires to take over and conduct in its name the defence or settlement of any claim or to prosecute in its name for his own benefit any claim for indemnity or damage or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the insured shall give all such information and assistance as the Corporation may require."

Mr. Green said that upon being served with the claim, and pursuant to the terms of his policy, he immediately took the documents to his insurance company, for the insurer to either settle or defend the claim.

Based on the provisions of Clause 5 above, and consistent with Privy Council decision in ***Ramsook v Crosley*** [2018], it is clear that the insurer was entitled to put forward any defence or take any steps that the first defendant would by law be entitled to advance including a reduction of damages or a settlement of proceedings.

However, guided by the authority in ***Ramsook,*** the court noted that the insurer can act in the dual role of the agent of the first defendant and in its own interest. In fact, Clause 5 of the policy gives the insurer the right to take-over proceedings and or decide on an appropriate course of action provided the insurer also takes cognisance of the interest of the insured. As it is not contended that the insurer acted to the detriment or without the knowledge and authority of the first defendant the insurer was therefore also capable of in its own interest and as agent for the first defendant.

On 11th November 2013 the claimant, pursuant to section 7(2) of the Motor Vehicles Insurance (Third Party Risks) Act of Antigua and Barbuda, also gave notice to Mr. Green's insurer of commencement of proceedings against him in the instant claim. On 13th November 2013 Mr. Green filed an acknowledgment of service signalling his intention to defend the claim.

On 28th January 2014, a "**Commercial Motor Bodily Injury Release**" was executed by the insurer and counsel for the claimant and certified the payment of the sum of $250,000 by the insurer to the claimant. A "**Release**" was issued and signed by only counsel for the claimant, dated 10th February 2014 and stipulated that the insurer alone was released from further liability.

However, no defence was filed and on 22nd January 2016 judgment in default of defence was entered against both defendants. The matter thereafter proceeded for assessment of damages and the requisite directions were issued – it appears for an amount greater than the policy limit.

Subsequently, on 14th August 2017 Mr. Green filed an application for a permanent stay of the proceedings. The basis of the application is that the acceptance of the sum of $250,000.00 by the claimant from the first defendant's insurer released the first defendant from liability from claims for compensation consequent on the accident.

The claimant in defence of this application acknowledges payment but denies that this precluded him from continuing an action against the first defendant in circumstances where the sum received was not sufficient to cover the damages sustained. The claimant also denies that either

of the two documents is tantamount to a release from liability. The claimant asserts that both documents were only referable to the insurer and not the first defendant. Moreover the claimant contends that the release dated 10th February 2014 was issued on the basis that the policy of the first defendant was limited to a statutory maximum of $250,000.00. The claimant contends that this limitation continued to render the first defendant liable for any additional damages.

The claimant relies on a two documents in particular "Commercial Motor Bodily Injury Release" and a "Release" to evidence that the matter was settled fully and thereby precludes further proceedings in the matter.

The "Commercial Motor Bodily Injury Release"

It is a well-known principle of law that notwithstanding the title of any document the court is entitled to examine the contents thereof to determine its true nature. As such, the court undertook an examination of the "Commercial Motor Bodily Injury Release" to determine whether the document is in fact indicative of an agreement and/or a release from liability. The court noted the following:

- The document in its entirety comprises a total of three lines.

  The brevity of the document is not significant provided it contains all the essential elements of an agreement and/or a release from liability.

- There is a reference to an acknowledgment of the sum of $250,000.00 "for bodily injury done to me as a result of motor vehicle accident on 23rd March 2013: Claim No MC-2013-03-00034" and the signature of counsel for the claimant (on his behalf) and the insurer.

From its analysis, the court noted the following deficiencies in the "Commercial Motor Bodily Injury Release":

1. The document contains no terms of agreement.

   The court could not determine on the face of it whether there was any mutuality of obligations or a meeting of the minds of the parties.

2. There being no terms there is nothing contained in the document which would render it enforceable in a court of law as an agreement.

3. The document does not state that the receipt of the money acts as a discharge of liability from any proceedings or further proceedings capable of or arising out of the consequence of the accident.

4. The document notwithstanding its title does not rise to the level of a contract and further is not indicative of an agreement releasing the claimant from any further liability but rather is a receipt of moneys paid and received.

Clearly if it were the intention of the Insurer it being the drafter of the document, it would have included an agreement in the document releasing the claimant from any further liability.

The 'Release"

This document unlike the "Commercial Motor Bodily Injury Release" was only signed by counsel for the claimant on his behalf. It was not notarised and there were no parties thereto. That document acknowledges the payment of the sum of $250,000.00 and purports to be in full and final satisfaction and to operate as a discharge of the insurer from any part or future claims or proceedings in connection with the lawsuit.

the failure of the insurer to expressly contract with the claimant to fully discharge the matter upon receipt of the maximum payable under the policy, leaves the court to conclude that there was no full and final settlement of the claim.

Further the second purported release of the insurer alone from any further liability cannot be extended to the first defendant as a release from liability but rather operate to exempt the insurer from any further liability if damages are found to have exceeded the sum paid by the insurer.

Citing ***Ramsook***, Master Jan Drysdale found:

> In the absence of a release from liability the payment of the contractual maximum of $250,000.00 under the policy can only serve as a measure to reduce the potential financial liability for damages in the circumstances. The first defendant therefore remains liable for any damages exceeding the sum paid by the insurer.

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Strange but true

Scope of Insurance Coverage

It has long been argued that where there is ambiguity in the policy wording, that any ambiguity should be resolved in favour of the insured. Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction to resolve it, so long as the resulting interpretation can be supported by the text of the policy. However, the Supreme Court of Canada in ***Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*** [2010], noted that any ambiguity should be resolved in accordance with the reasonable expectations of the parties, not necessarily in favour of the insured or the insurer.

Insurance policies would come down to providing the kind of coverage that some future court found to be "fair", even though the insured never contracted for that coverage, and the insurer never priced the risk accordingly. As it was put in ***Progressive Homes*** "Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded."

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