REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA No. CV 2011-00701

BETWEEN

GULF INSURANCE LIMITED

Claimant

AND

NASEEM ALI

AND

TARIQ ALI

Defendants

Before The Hon. Madam Justice C. Gobin
Appearances:

Mr. R. V. Persad for the Claimant
Ms. S. Bidaisee for the Defendant

JUDGMENT

1. On 14th October, 2009, twenty-one (21) year old Tariq Ali was driving motor vehicle registration PBM 4635 owned by Naseem Ali, along the Audrey Jeffers Highway when in his words "the vehicle collided with PBZ 280 which then 'went forward' and collided with HBT 4185." The use of the vehicle was insured with Gulf Insurance Ltd. (Gulf). The policy purported to restrict the insurance of drivers under the age of twenty-five (25) such as

Tariq. The effect of S. 12 (1) of the Motor Vehicles Insurance (Third Party Risks) Act Ch. 48:51 "The Act'" is agreed. That term is void as against third parties.

2. Following the accident, Tariq provided Gulf with an accident report. It contained no more than what is set out above. There was no litigation. Although Tariq's driving was not covered by the policy, Gulf proceeded pursuant to its statutory obligation under S. 12(1) of the Act, and after negotiations, to settle the claims of the third parties, the owners of PBZ 280 and HBT 4185. The total sum paid out was ninety-three thousand, two hundred and eighty-three dollars and sixty-eight cents ($93,283.68). It subsequently sought to recover this sum from the defendants through written requests without success. Gulf then brought these proceedings for repayment.

3. The Defendants have refused to pay on the ground that Gulf is not entitled to reimbursement either under the terms of the policy or under S. 12(2) of the Act. At first the thrust of the defence appeared to be that Gulf would only be legally liable to pay third party claims if there was a judgment of a Court establishing the owner's liability and since there was no judicial determination of liability of any of the parties herein, if the insurer chose to settle and make voluntary payments outside the policy, those payments fell outside of the scope of S.12(2) and were not recoverable.

4. I have considered the full and helpful submissions of Counsel on both sides and find that the Claimant is entitled to judgment in the sum claimed for the following reasons:

(a) First, the Defendants' submission that an insurer becomes "legally liable to pay" third party claims only when and not until there is a judgment of the court which S. 10(1) of the Act requires to be satisfied, must be rejected for to do otherwise would result in an absurdity. As it stands, running down actions including third party claims for property and personal injuries constitute a high proportion of cases in our dockets. If all of them proceeded to a trial the administration of civil justice would collapse. The system relies on settlement before they reach trial and on the established practice of settlement of the majority of them even before proceedings are filed. Any judicial construction of the terms under which the insurer's legal liability arises, whether in context of the standard form insurance policy or of legislation as in S. 12(1) of the Act must have regard to this reality. Such construction ought to avoid the chaos and absurdity that would result if the insurer's legal liability arose only when a court declared it in a judgment.

(b) I therefore accept the Claimant's submission that a judicial determination of a third party claim is not essential and that liability can be established in certain circumstances in the absence of such. Counsel for the claimant relied on the statement of Salmon L. J. in ***Post Office v Norwich Union Fire Insurance Society Ltd. [1967] QBD 363 at 378***, to the effect that liability to pay can be ascertained not only by action but also by arbitration or agreement. In this case by its agreement to pay the sums claimed Gulf settled the issues of the First Defendant's liability, quantified it and established its own 'legal liability to pay' under the policy as well as under S. 12(1).

(c) In response to this particular submission, counsel for the Defendant accepted that Salmon L. J's statement represented the true legal position and while he was then forced to concede that an action and therefore a judicial determination was not a pre-condition as had been previously argued, he submitted that the "agreement" contemplated in the statement of Salmon L. J. above, was the express agreement of the insured as opposed to that of the insurer to pay. Counsel for the Defendant submitted, the insurer had no authority to settle a claim such as this one where the loss was not expressly covered by the policy. The argument continued, that any decision to pay otherwise must be regarded as an "economic decision" of the insurer and payments made as a result of such are not recoverable from the insured. Any financial loss was its own to bear.

(d) I reject this argument. I find that what is contemplated in the statement of Salmon LJ is the agreement of the insurer and not the insured. Indeed the Defendant's argument is untenable in the light of clause (5) of the policy which provides as follows:-

> *"no admission offer promise or payment shall be made by or on behalf of the insured without the written 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 or to prosecute in the name of the insured for its own benefit any claim for indemnity to 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."*

This clause as the Claimant submits gives the insurer an unfettered discretion to settle as has been done here.

(e) The Claimant's submission in this regard is supported by the decision in the case of ***Beacon Insurance Co. Ltd. v Langdale [1939] 4 All E.R. 204***, in which the breadth of the discretion conferred by a clause in identical terms was considered. It was held in the Court of Appeal that the clause gave the insurer the power to settle the claim without consulting the insured. The opinion of Sir Wilfred ***Greene MR in Groom v Crocker*** was cited:

> *"The effects of the provision in question is I think to give the insurers the right to decide upon the proper tactics to pursue in the conduct of the action provided that they do so in what they bona-fide, consider to be the common interest of themselves and their assured."*

In the light of this authority and the clear terms of clause (5) of the policy, I consider the power to settle, so long as it is exercised with the requisite bona-fides, is unfettered.

(f) This brings me to another issue raised by the defendants. Counsel has sought on their behalf to vigorously argue that if the insurer has an unfettered discretion to settle claims and then recover any sums paid out from an insured, then the insured (the economically weaker of the two parties in the relationship) may be placed at risk of serious financial loss by having to reimburse what might amount to unwarranted payments. I am not persuaded that there is any proper or reasonable cause for such a concern. It cannot be

to the advantage of an insurer to pay out monies in the hope of recovering from the insured, so long as there is a good possibility that litigation might ensue as in this case, and where the insurer would be bound to incur further legal costs and run the risk of having to pay costs if it were unsuccessful. This seems to make little business sense.

(g) In any case the law imposes a duty of bona-fides on the insurer, the breach of which can in appropriate cases be relied upon by an insured. In situations where for example there are credible allegations of collusion between the insurer and third parties or their insurers, reckless settlements of obviously over inflated claims, settlements in favour of third parties where the insured could not on any reasonable assessment or consideration of the circumstances of an accident be considered to be at fault, a lack of bona-fides might properly avoid the insured's obligation to repay. But the insured must raise the issue frontally on the pleadings.

(h) This was not done here. The issue of lack of bona-fides had not been raised on the pleadings. Counsel for the Defendant in the course of submissions attempted to introduced it. When he was asked to identify the paragraphs of the defence which gave rise to it, he identified several paragraphs which included statements to the effect that settlement payments were made without any admission of liability by the driver, without any authority or legal obligation. I am unable to agree that these general statements could give rise to a plea of a lack of bona-fides. A plea of a lack of bona-fides requires, both by its nature and under the Civil Proceeding Rules (CPR) a greater degree of particularity. Since too, it would have been raised with the intention of avoiding a statutory obligation on the part of the insured to repay sums to the insurer, I would have thought that the allegations would have had to be more compelling as in the examples I have given above.

(i) Far from finding a lack of bona-fides, I find that the bare statement of Tariq in which he described the collision, left Gulf with little choice but to settle. Reference was made in correspondence between the claimant and the third parties (of which the Defendants were aware), to Tariq's admission of liability at the St. James Police Station immediately following the accident. He may have done so in breach of the policy. But that is immaterial for the purpose of determining whether there would have been a bona fide defence available to the defendants in the running down action if it had to come to that. The allegation that

Tariq made the admission to the police has not been disputed in these proceedings. Indeed the Defendants here have truly not put forward any facts for consideration which suggest that the third party claims were improperly settled. In any case I consider it significant that the claims were settled specifically without any admission of liability on the part of the Defendants.

(j) On a completely different note, I find too that the obligation to repay monies which the Claimant paid under the two settlements is specifically provided for by Section X (Avoidance of certain terms and Rights of Recovery) of the policy which says:

> "*Notwithstanding in this Policy or any endorsement hereon shall affect the right of any person entitled to indemnity under this Policy or of any other person to recover an amount under or by virtue of the Legislation.* ***But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the Legislation****"*. (emphasis mine)

This express term covers the situation here. Gulf's liability to pay arose only by operation of the Act, as a consequence this clause was triggered.

(l) In the course of his submissions, Counsel for the Defendants contended that S. 12(1) of the Act must be read together with and subject to S. 10(1). I reject this submission. Section 10(1) simply imposes the statutory obligation to satisfy judgments in respect of third party claims even where the insurer is not made a party to the proceedings, unless liability is excepted as provided. No issue of recoverability arises under S. 10(i). Under the usual terms of a contract of indemnity it would not. The Section also deals with liability covered specifically by the terms of the policy.

On the other hand S. 12(1) deals with liability which is avoided under the terms of the contract but which terms are rendered ineffective, only by virtue of the provision. The liability to pay is imposed by operation of law. It is only in this extraordinary situation provided for by S. 12(1) that the insured is required, in a complete reversal of roles and obligations to indemnify the insurer. There is nothing which suggests that sections are to be read, one subject to the other, and indeed the subject matter as I have pointed out suggests that they are distinct and irreconcilable.

(m) Finally, I make this observation, that I believe puts paid to the Defendant's submissions. If the Defendants' arguments were to be accepted and since the contention is that it is because S.12 (2) imposes this liability to repay, then the insured must be a party to the agreement to pay, then the result would be that a person who breaches the policy would be in a better position to influence the outcome of a claim than one who abides by its terms. In other words one who knowingly permits a breach of the policy as did Naseem, by permitting an under-aged driver to use the vehicle, and who as a result causes the insurer to incur statutory liability to third parties, would be better placed than an insured who causes third party loss in circumstances expressly provided for under the policy. This too, would lead to an absurdity and would actually reward the mischief that the Act aims to address.

Disposition

5. There shall be judgment for the Claimant in the sum of $93,283.68 with interest thereon at the rate of 5% per annum from the 22nd February 2011 to the 24th April 2012. The defendants to pay the claimant's prescribed costs of the action.

Dated this 12th day of April, 2012

CAROL GOBIN

JUDGE