THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 56 of 2008
H.C.A. No. CV2006-02110

BETWEEN

MARITIME GENERAL INSURANCE COMPANY LIMITED

APPELLANT

AND

INTERNATIONAL OIL POLLUTION COMPENSATION FUND

RESPONDENT

APPEARANCES: Mr. F. Hosein, S.C. and Mr. Dass for the Appellant
Mr. C. Hamel-Smith, S.C and Mr. J. Pantin for the Respondent

PANEL: A. Mendonça, J.A.
P. Jamadar, J.A.
R. Narine, J.A.

DATE OF DELIVERY: July 23rd, 2012

I agree with the judgment of Mendonça J.A. and have nothing to add.

P. Jamadar,
Justice of Appeal

I also agree.

R. Narine,
Justice of Appeal

JUDGMENT

Delivered by A Mendonça, J.A.

1. This is an appeal from the decision of the Judge below dismissing the Appellant's application for a declaration that the Court has no jurisdiction to try this claim and granting summary judgment in favour of the Respondent on the latter's application for summary judgment.

2. The surrounding facts and circumstances in this appeal are not in dispute. The action in which the applications were made involved the claim by the Respondent for the sum of €1,289,482.94 together with interest and costs under judgments of a foreign court namely, the Tribunal de Grande Instance de Basse-Terre (the Tribunal) dated May 2nd, 2000 and Cour d'appel de Basse-Terre of France - Gaudeloupe Island (the Cour d'appel) dated February 9th, 2004.

3. The judgments related to the sinking of the barge Vistabella on March 6th, 1991 in international waters off the island of Nevis. The barge was transporting fuel oil and its sinking caused an oil spill which polluted French territories. This necessitated clean-up operations by the French state.

4. On April 24th, 1991 the French state commenced an action before the Tribunal against the owners of the Vistabella, claiming compensation for the clean-up operations necessitated by the

sinking of the Vistabella. The Appellant, who at all material times was the insurer in respect of the Vistabella, was later joined in the proceedings by the French State.

5. On January 13th, 1994 the Respondent, the International Oil Pollution Compensation Fund (the Fund), reimbursed the French Government in respect of its expenditure in the clean-up operations and acquired the French state's claim by subrogation. Consequently the French state withdrew from the proceedings.

6. The Fund, by Article 2 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution dated December 18th, 1971 (the 1971 Convention), is recognized as a legal person capable under the laws of each contracting state to the Convention of assuming rights and obligations and of being a party in legal proceedings before the courts of that state. It is not in dispute that France is a contracting party to the Convention. Nor is it in dispute that the provisions of the 1971 Convention have been incorporated into the domestic law of France.

7. France also ratified (on June 26th, 1975) and incorporated into its domestic law the International Convention on Civil Liability for Oil Pollution Damage dated November 29th, 1969 (the 1969 Convention). Under Article III of the 1969 Convention, the owners of the Vistabella at the time of the incident, subject to certain exceptions that are not relevant to this appeal, shall be liable for any pollution damage caused by oil which has escaped or has been discharged from their vessel as a result of the incident. The 1969 Convention further provided at Article VII(8) that any claim for compensation for pollution damage may be brought directly against the insurer or other persons providing financial security for the owners' liability for pollution damage. It was in that light that the Appellant insurer was joined in the proceedings.

8. On July 4th 1996 the Tribunal ordered the owners of the Vistabella to pay to the Fund the sum of ₣8,239,852.00 and other sums for interest and expenses. The Tribunal further ordered, inter alia, that before ruling on the liability of the insurer that it should produce to the Tribunal *"submissions on the merits concerning its legal liability under the insurance contract linking it to the other defendants".*

9. On March 2nd, 2000 the Tribunal ordered, inter alia, that the Appellant "must take responsibility for and guarantee all orders pronounced" against the owners of the Vistabella.

10. The Appellant lodged an appeal against the judgment of the Tribunal before the Cour d'appel.

11. According to an English translation of the decision of the Cour d'appel, the Appellant argued before that Court that the 1969 Convention did not apply to the matter since Trinidad and Tobago had not ratified the Convention and accordingly English law must govern the contract. Consequently a direct action by the injured party against the insurer was not available. The Appellant further relied on certain terms in the policy and also argued that the proceedings before the Cour d'appel should be adjourned pending a decision of the High Court in Trinidad and Tobago in an action brought by the owners of the Vistabella against the Appellant to obtain full compensation for the loss of the Vistabella in which it had denied liability.

12. On February 9th, 2004 the Cour d'appel gave its judgment in which:

(a) it declared that the appeal by the Appellant was ill founded;

(b) it supported in all its "provisions" the judgment of the Tribunal of March 2nd, 2000;

(c) it stated that the right of the Appellant to a fair and equitable trial was respected;

(d) it found that the guarantee due by the Appellant was "due";

(e) it held that the direct action brought by the Fund was admissible, and

(f) it rejected the application of the insurer for the adjournment of the proceedings pending the decision of the High Court of this jurisdiction.

The Cour d'appel also ordered, inter alia, that the Appellant pay to the Fund the further sum of €10,000.

13. The Appellant did not lodge an appeal before the French Cour de Cassation. On February 9th, 2004, the Cour de Cassation issued a *Certificat de non pourvoi* (a certificate of no further right to an appeal) in the matter. The effect of that according to French law was that the judgment

rendered by the Cour d'appel was final and conclusive upon the Appellant as the Appellant declined to exercise the opportunity to lodge an appeal against the decision and as the time for so doing had expired, the Appellant had no further opportunity to do so.

14. It is relevant to note at this stage that neither the 1969 Convention nor the 1971 Convention have been incorporated into the domestic law of this jurisdiction. Indeed it was only on May 6th, 2000, long after the sinking of the Vistabella, that Trinidad and Tobago acceded to the protocols to the Conventions. In a letter dated October 30th, 2006 from the Ministry of Foreign Affairs the effect of that is:

> *"These protocols entered into force for Trinidad and Tobago twelve months after the date of deposit in 2000 of the relevant Instruments of accession.*
>
> *Each protocol provides that a State, party to the Protocol but not party to its earlier Convention, shall be bound by the provisions of the Convention as amended by the Protocol".*

It is however not disputed that the Conventions have not yet been incorporated into the municipal law of Trinidad and Tobago.

15. The Appellant did not pay the sums outstanding under the judgments and on July 21st, 2006 the Respondent commenced these proceedings against the Appellant claiming the amount outstanding under the judgments. Shortly after service of the proceedings the Appellant applied to the Court for a declaration that the Court had no jurisdiction to try the claim and for an order, inter alia, dismissing the action. The Fund, in its turn, applied for summary judgment.

16. The Judge below dealt with both applications together. He dismissed the application for the declaration that this Court had no jurisdiction to try the claim and gave judgment in favour of the Respondent on its application for summary judgment.

17. Before the Judge the Appellant submitted that the judgments of the foreign courts ought not to be enforced on the ground of public policy on two bases. First, it was contended that the action was an attempt to enforce the 1969 Convention although it was not enacted into Trinidad and Tobago municipal law and secondly, that the cause of action on which the foreign judgments were based is contrary to public policy.

18. The Judge did not agree with the submissions. He noted that the argument that the action was an attempt to enforce the 1969 Convention was misconceived because the judgments were founded on French domestic legislation which forms part of the law of France. The Respondent therefore was not seeking to enforce the 1969 Convention but was seeking to enforce the judgments by action, which was founded on French domestic law. With respect to the second argument that the cause of action was contrary to public policy, the Judge stated that the cause of action was founded on *"general accepted principles* [in this jurisdiction] *of tort 'the recognition of corporate personality, the rights of subrogation/assignment and the direct rights against an insurer for the actions of its insured*'*"*. In those circumstances the Judge concluded that *"it is thus incontrovertible that this is a cause of action recognized by the law of Trinidad and Tobago"* and so was not contrary to public policy. The Judge was therefore of the opinion that the Appellant had no real prospect of successfully defending the claim.

19. In its initial written submissions before this Court, the Appellant submitted in support of the appeal that the recognition or enforcement of the foreign judgments was manifestly contrary to public policy:

(a) because the Statement of Case was based or founded on the provisions of the 1969 Convention and the 1971 Convention which did not allow for recognition or enforceability by virtue of Article X when Trinidad and Tobago was not a contracting party and in any event had not incorporated same into its domestic laws;

(b) because of the use of direct action against the Appellant under the conventions and French domestic law, defences that would ordinarily be available to the Appellant in accordance with the terms of the insurance contract that had been entered into with its insured, were not available to it, thereby placing it at an unacceptable disadvantage.

20. At the hearing of the appeal, the Appellant by notice filed the day before, sought to amend its notice of appeal to introduce new grounds of appeal, which were not argued in the Court below. The application was refused. The Court however, gave leave to the Appellant to elaborate on (b) above in so far as it had been raised in its initial submissions. The Appellant made further submissions in writing on (b), but also raised other issues which do not fall within the leave granted and which are not properly before the Court. In so far as the further submissions are within the

permission granted, the Appellant contends that the recognition and enforcement of the foreign judgments are contrary to public policy and ought not to be recognized on the grounds that:

1. the applicable French law imposed strict liability on the insurer for its insured without a possibility of mounting an effective defence is unknown and repugnant to our law;

2. a foreign court which acts in breach of our legislative choice of law and jurisdiction as set out in the Insurance Act at section 195(2) is contrary to public policy as determined by Parliament.

3. the enforcement of the foreign judgments will override the contractual limitation on liability of TT$ 3,000,000 which is repugnant to our laws.

21. A foreign judgment can be enforced at common law or by statute. The parties are in agreement that there is no applicable statute which regulates the enforcement of the foreign judgments in this matter. The Respondent has therefore sought to avail itself of the common law.

22. Under the common law, a judgment creditor seeking to enforce a judgment cannot do so by direct execution of the judgment. He must bring an action on the foreign judgment. The judgment of Colman J in **Airbus Industrie G.I.E v Patel and others** (The Times May 21st, 1996) contains useful guidance as to the position at common law on the enforcement of foreign judgments. The decision of Colman J was reversed by the Court of Appeal and later reinstated by the House of Lords but on points of law not relevant to this issue. In his judgment Colman, J referred to the Lord Chancellor's Committee which was set up in 1931 *"to consider, inter alia, what legislation was necessary or desirable to enable international conventions with foreign states to be entered into for the mutual enforcement of foreign judgments on the basis of reciprocity".* He went on to say that the Committee recommended that certain changes should be made but explained *"the current position"* or the position at common law in these terms:

> "5. *Enforcement of foreign judgments for a sum of money by action upon the judgment.*
>
> *If a foreign judgment fulfills the conditions required for its recognition in England as final and conclusive, and any sum of money certain is payable by one party to the other thereunder, the judgment itself creates in England a cause of action as for a debt in respect of the sum due thereunder. An action can be brought to recover the sum of money due under the judgment, and unless the defendant in the action in England (judgment debtor in the foreign court) can establish that the judgment in question does not fulfill one or more of the*

> *conditions necessary for its recognition in England, the plaintiff will obtain judgment in England in respect of the sum of money due under the judgment, and the English Courts will not allow the question adjudicated upon in the foreign court to be re-opened for consideration on its merits.*
>
> *Proceedings to recover money due under a foreign judgment can be commenced by specially endorsed writ, and the summary procedure provided in Order XIV of the Rules of the Supreme Court is applicable.*
>
> *In effect, therefore, (though the form of the proceedings may be different) foreign judgment for sums of money can be readily and speedily enforced in England, provided that they fulfill the conditions necessary for their recognition in England as being final and conclusive of the question adjudicated upon".*

23. In view of the above it is clear therefore that at common law an action may be brought on the judgment for the recovery of the moneys due under the judgment. The question adjudicated upon in the foreign court will not be reopened for consideration on its merits. There are few defences available to the defendant and unless he can establish one or more of them, the claimant will obtain judgment in respect of the money owing under the foreign judgment. In the action the claimant may apply for summary judgment under Part 15 of the Civil Proceedings Rules 1998 and would be entitled to judgment if the court considers that the defendant has no realistic prospect of success on his defence to the claim.

24. The only ground relied on by the Appellant is that the enforcement of the foreign judgments in this jurisdiction is contrary to public policy. It is not disputed that the Court may refuse to enforce the judgments on grounds of public policy. The scope of the public policy ground may be seen from the following cases.

25. In **Cable Vision Systems Development Co. and others v Shoupe and others** (1986) 39 WIR 1, the issue as to enforceability of a judgment obtained in New York came before the Court. The facts were that the plaintiffs held a franchise under which they were entitled to provide cable television programmes to subscribers in New York and New Jersey. The signals were encoded and scrambled and the plaintiffs provided descramblers to their subscribers to enable them to receive the programmes for which they had paid. They instituted proceedings in a court in New York against the first defendant and others for piracy and theft of the television service by the sale of the descramblers and were awarded a substantial sum which included an award of punitive damages.

The plaintiffs recovered part of the judgment by execution proceedings, but a substantial sum remained outstanding. They discovered, however, that the first and second defendants had fixed deposits with a bank in the Bahamas and sought judgment against them and claimed that the fixed deposits as money had and received by the bank for the use of the first and second defendants. The enforceability of the judgment of the New York court was tried as an issue of law.

26. It was held that there was no rule that the Courts could not enforce a judgment merely because the cause of action was not known within the jurisdiction where the judgment is sought to be enforced, nor was there any reason why a judgment debt including punitive damages should not be enforced; there being no offence to any fundamental principle of justice and no offence to any prevalent concept of morality, the Court would be prepared to give effect to the judgment.

27. Georges CJ in his judgment stated:

> *"Certainly as far as the decision in **Re MacArtney** is based on the doctrine of public policy, the validity of the doctrine is unchallengeable, although the breadth of its application in that case may be subject matter for disagreement. In so far as it is based on a doctrine that courts should not enforce foreign judgments based on causes of action unknown in the municipal jurisdiction, I would be inclined to express reservations. The overriding concern appears to me to be the issue of public policy. Even if the cause of action may be unknown in the municipal jurisdiction there seems no valid reason why a judgment so based should not be enforced, unless it does violence to some well-established principle or underlying concept of the municipal law".*

28. Georges CJ found support for this approach in the following words of Cardozo J in **Loucks v Standard Oil Co. of New York,** 224 N.Y. 99 (1918) at pages 110,111 quoted in **Phrantzes v Argenti** [1960] 2 QB 19,33:

> *"If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare.... Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives a right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is*

not to be exalted into an indispensable condition. The misleading word "comity" has been responsible for much of the troubles. It has been fertile in suggesting a discretion unregulated by general principles…The sovereign in its discretion may refuse its aid to the foreign right... From this it has been an easy step to the conclusion that a like freedom of choice has been confided in the courts. But that, of course, is a false view... The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception or good morals, some deep-rooted tradition of common weal".

29. In **Beals v Saldanha** [2003] SCC 72, one of the issues was whether a judgment obtained in Florida, U.S.A. should not be enforced in Canada on grounds of public policy. In speaking for the majority Major, J stated (at paras 71 and 72):

"71 The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice...

72 How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased".

30. In **Vervaeke v Smith and others** [1983] 1 A.C. 145 it was held that the principle of res judicata and cause of action estoppel were principles of public policy and that it would be contrary to such principles and hence public policy to give effect to a foreign decree of nullity which was inconsistent with an earlier decision of the English court that the marriage was valid

31. In **Philip Alexander Securities and Futures Ltd. v Bamberger and ors.** [1997] I.L.Pr 73,115 it was held that where someone proceeded to obtain judgments abroad in breach of and with notice of an injunction granted by the English court, those judgments should not as a matter of public policy be recognized in the United Kingdom. Similarly in **WSG Nimbus Pte Ltd**. v **Board of Control for Cricket in Sri Lanka** [2002] 3 S.L.R 603 the court was of the opinion that (at para 65) "*it would be manifestly against public policy to give recognition to the foreign judgment at the behest of defendants who have procured it in breach of order emanating from this court"*.

32. It can be seen from those cases that it is contrary to public policy to enforce a judgment which is contrary to our concept of justice such as where the judgment is based or founded on a cause of action or a law contrary to some fundamental principle of our law, or where it has been rendered by a foreign court proven to be corrupt of biased, or where the enforcement of the judgment would offend some deep rooted or well-established principle of our law, or where the judgment has been obtained contrary to an injunction or order of the court in the jurisdiction where it is sought to be enforced. In my judgment, the effect of the authorities may be succinctly summarized by saying that it would contrary to public policy to enforce a foreign judgment where to do so would be contrary to a fundamental policy of our law.

33. According to the submissions of the Appellant, its public policy argument rests on three submissions namely:

(i) the statement of case in the action was based or founded on the provisions of the 1969 and 1971 Conventions. Article X of the 1969 Convention did not allow for recognition or enforceability of the judgment when Trinidad and Tobago was not a contracting party to the Conventions and in any event had not incorporated same into its domestic law;

(ii) that the French law on which the judgment was obtained is repugnant to our law in that it allowed a direct action against the Appellant as insurer, imposed strict liability on it without the possibility of mounting an effective defence, deprived it of defences that would have been available to it under the contract of insurance and allowed for the enforcement of a foreign judgment over and above the contractual limit of three million dollars: and

(iii) the reliance on French law by the foreign courts contrary to section 195(2) is contrary to public policy as determined by Parliament.

34. With respect to the first submission, Article X of the 1969 Convention to which reference is made provides as follows:

> *"(1) Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State except:*
>
> *(a) where the judgment was obtained by fraud;*

(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

(2) A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merit of the case to be re-opened".

Article IX which is referred to in Article X provides in essence that where an incident has caused pollution damage in the territory of one or more Contracting States, actions for compensation may only be brought in the courts of any such Contracting State or States.

35. Article X therefore allows for the recognition and enforcement of the judgment obtained pursuant to Article IX except on two very limited grounds. It is however incorrect to say that the Respondent in this action has relied on Article X. Nowhere in the Statement of Case has Article X been referred to and that Article is not relied upon. Neither is any other provision of the Convention relied upon. It is not true to say that the Statement of Case is based on or founded on the Conventions.

36. The statement of case in the action does refer to the 1969 Convention. It sets out that under the 1969 Convention at Articles III, VII and VIII, the ship owners shall be liable for any pollution damage caused by oil which has escaped or has been discharged from a ship and that any claim for compensation for pollution may be brought directly against the insurer or other persons providing security for the owner's liability for the pollution damage. The statement of case, however, also sets out, which is not disputed, that the 1969 Convention was implemented into French domestic law on June 26th, 1975. It is clear therefore that the relevance of the 1969 Convention in the Statement of Case is that it is part of French domestic law.

37. The statement of case goes on to set out the judgments of the French courts, that they remain unsatisfied and that the Respondent seeks an order that the Appellant pay the outstanding sums. On a fair construction of the statement of case what the case is about, is the recovery of the sums outstanding on foreign judgments rendered pursuant to French domestic law. As the Judge noted (at para. 25):

"The claimant is not relying on the enforcement provisions of the 1969 Convention nor is it seeking to enforce the 1969 Convention per se. Rather, it is seeking to enforce by common law action, a judgment obtained through the French domestic legal process which applied legal principles applicable thereto".

38. Of course French law did give effect to the 1969 Convention and the 1971 Convention. However, it is not entirely clear to what extent the French courts applied the law that gave effect to the Conventions. In the decision of the Tribunal it is stated under the rubric "Responsibility of the Owners":

"Whereas none of the defendants argued that the sinking [of the Vistabella] was caused by any other party or event of a force majeure, it is clear, regardless of whether the 1969 Convention applies that they are responsible for the loss of the barge in the ensuing consequences."

39. And under the heading "Applicability of the 1969 Convention" the Tribunal stated:

"Whereas, since the Government of Trinidad [and Tobago] has not ratified the Convention of November 29th, 1969, there is no basis for applying the Convention in the context of the present proceedings.

Once more the court must turn to generally accepted principles of law to determine the liability of the owners and the effect of the insurance contract with their insurer".

40. In the judgment of the Cour d'appel in dealing with whether a direct action by the Respondent against the Appellant was maintainable, the Court referred to cases of the Supreme Court of Appeal predating the 1969 Convention and concluded:

"Therefore, according to dominant case law, direct action escapes the body of law governing the insurance contract and is subject to the law of the territory in which the damages occurred... It is thus French law that applies in this case given the location where the damages effectively were suffered and French law must therefore be the body of law that governs the direct action brought by [the Fund] against [the Appellant]. The direct action is therefore admissible, both in terms of contractual law and the French law and the disputed judgment is therefore supported".

41. Even if the foreign courts did apply the law giving effect to the Conventions that in itself would not render the judgments open to challenge on the ground of public policy. The fact that Trinidad and Tobago was not at the time a contracting party and has not as yet given effect in its

domestic law to the Conventions would not be sufficient to say that the foreign law is contrary to public policy. As earlier mentioned, the Appellant would need to show that the foreign law violated some fundamental policy of our law. In its other submissions, the Appellant has sought to challenge aspects of the French law itself and the fact that French was applied. It is to these submissions that I now turn.

42. The Appellant has argued that the enforcement of the foreign judgments is contrary to public policy as the applicable French law is repugnant to our law in that:

1. It allows for a direct action against the Appellant and deprives the Appellant of defences that would ordinarily be open to it under its contract of insurance with its insured.

2. It imposes strict liability on the Appellant without the possibility of mounting an effective defense.

3. It overrides the contractual limitation on liability of TT$3,000,000 which is expressed in the contract of insurance with its insured.

4. The application of French law is in breach of the legislative choice of law and jurisdiction as set out in section 195(2) of the Insurance Act and so violates the public policy as determined by Parliament.

43. The first three points raised by the Appellant may be taken together. First I do not think that it is correct to say that the applicable French law imposed strict liability on the Appellant. French law gave effect to the Convention. When reference is made to the Convention it is clear that strict liability for pollution damage is not cast on the insurer. Article VII (8) of the Convention provides for the bringing of a direct action against the insurer states that the insured "*may avail himself of the defence (other than the bankruptcy or winding-up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence of the pollution damage resulted from the willful misconduct of the owner himself, but the defendant shall not avail himself of any defences which he might have been entitled to invoke in proceedings brought by the owner against him"*. It is clear therefore that the Convention does allow the insurer to raise certain defences, albeit limited defences.

44. If no regard is paid to the Conventions, it does not appear from a perusal of the reasons of the Tribunal or the Cour d'appel that strict liability is imposed on the insurer. In any event the onus

is on the Appellant to show that this is the burden of French law and it has not attempted to produce evidence of French law other that what is contained in the decisions of the Tribunal and the Cour d' appel, which as I have said do not establish that there is strict liability on the Appellant.

45. Although French law appears not to impose strict liability on the Appellant, it is clear that it allows for a direct action against the Appellant and prevents the Appellant from raising defences that would ordinarily be available to it under our law in an action between insurer and insured. As the Cour d'appel put it *"direct action [against the insurer] escapes the body of law governing the insurance contract and is subject to the law of the territory in which the damages occurred".* However, as the Respondent has submitted, a law which deprives an insurer of raising defences under a contract of insurance or which allows for a direct action against the insurer cannot, for those reasons only, be contrary to public policy, since:

1. a direct action by the injured party against an insurer is a recognized concept under our law; and

2. a deprivation of possible defences that may arise under the relevant insurance contract or policy is also a recognized concept under our law.

This can be seen from the **Motor Vehicles Insurance (Third-Party Risks) Act** which provides for direct action by the injured third party against the insurer of the person committing the injury (see section 10A and also limits the defences that may be available under the contract of insurance (see section 12(1). It, therefore, cannot be reasonably argued that a law which permits a direct action against the Appellant and limits the defences available to it that may arise under its insurance contract violates a fundamental policy of our law. In my judgment therefore the first three points raised by the Appellant do not establish that the enforcement of the foreign judgments in this jurisdiction would be contrary to public policy.

46. The fourth point however in my judgment has far more substance and I will now consider this.

47. Section 195(2) of the Insurance Act is as follows:

"Every policy issued in Trinidad and Tobago through a person or an office in Trinidad and Tobago shall, notwithstanding any agreement to the contrary, be governed by the

laws of Trinidad and Tobago and shall be subject to the jurisdiction of the Courts of Trinidad and Tobago.

48. This section enacts a rule of the conflict of laws (see **Irish Shipping Limited v Commercial Union Assurance Co. PLC and Another** [1991] 2 Q.B 206). It provides that in the case of any policy issued in Trinidad and Tobago through a person or an office in Trinidad and Tobago, it shall, notwithstanding any agreement to the contrary be governed by the laws of Trinidad and Tobago and shall be subject to the jurisdiction of the Courts of Trinidad and Tobago. This is an example of an overriding statute. It lays down a mandatory rule as to the applicable law of the policy or contract of insurance and the relevant jurisdiction. The parties cannot contract out of that provision.

49. In **Dicey, Morris and Collins on The Conflict of Laws,** 14th Ed. Vol. 1 (para 1-060) it is stated that overriding statutes "might be described as crystallized rules of public policy because they lay down mandatory rules which the parties cannot contract out of, directly and indirectly". I think this applies to section 195(2) which is to be regarded as laying down or crystallizing a rule of public policy.

50. Insurance companies fulfill an important role in the national financial and economic systems. The State has an obvious interest in protecting and regulating those systems. Section 195(2) is designed to serve that interest. It is, therefore contrary to our public policy to apply to a policy of insurance issued in Trinidad and Tobago or through a person or an office in Trinidad and Tobago, a law other than the law of Trinidad and Tobago.

51. The Appellant in this matter is an insurance company doing business in this jurisdiction and there is no dispute that the policy of insurance was issued in this jurisdiction. As I had mentioned earlier, there is no doubt that the foreign courts applied French law. This gave the injured party the right to pursue the indemnity under the policy directly against the Appellant, which would not have been possible under our law. Further, by treating the policy of insurance as governed by French law, it is not disputed that the Appellant was not able to rely on defences that it might have done had Trinidad and Tobago law been applied, and was found liable for sums far in excess of the contractual limit.

52. What defences the Appellant might have raised can be gleaned in proceedings which were begun in this jurisdiction, subsequent to the action before the Tribunal. In the local action the owners of the Vista Bella sued the Appellant claiming the insured sum of TT$3,000,000 in respect of the loss of the Vistabella, which they alleged had become a total loss as a result of its sinking. The Appellant denied liability on the basis, inter alia, of: (a) material non-disclosure; (b) that the owner was in breach of an implied condition under the policy, namely to carry out the adventure involving the Vistabella in a lawful manner; and (c) that the sinking of the Vistabella was as a consequence of its unseaworthiness and consequently the alleged loss was not due to any peril insured against. The Appellant succeeded in that action and obtained a declaration that it is not liable under the policy to the owners or anyone claiming under the policy. The effect of that declaration on the foreign judgments is not an issue in this appeal, but I have mentioned that action to show the defences that might have been raise if the policy had been subject to Trinidad and Tobago law.

53. It has been submitted by the Respondent that on ordinary principles the applicable law would be French law. That may be so but this overlooks the overriding effect of section 195(2) of the Insurance Act.

54. It was also submitted by the Respondent that it was not sufficient to rely on one statutory provision, namely section 195(2), to say that the foreign judgments were contrary to public policy where there are other legislative schemes and other obligations reflective of our concept of justice and morality. This so particularly where: (a) in our own domestic examples may be found where the insurer is prevented from relying on contractual provision in the contract of insurance and is open to a direct action by the injured party, and (b) Trinidad and Tobago acceded to the 1992 Protocols to the Conventions which reflect a broad international consensus, as to the appropriate manner to respond to the problem of oil pollution, which by acceding to the Conventions we chose to support.

55. I do not accept these submissions. It is of course true, as I mentioned above, that an example may be found in our law which provides a direct action against the insurer and limits the contractual defences it may raise in that action. It would therefore be difficult to argue that a foreign law that has these elements, is for that reason only contrary to public policy. That by itself would therefore not be a basis for refusing the enforcement of the foreign judgments in this jurisdiction. However

that is not the position here. Section 195(2) of the Insurance Act crystallizes a rule of public policy that the policy or contract of insurance issued in this jurisdiction should be governed by the law of Trinidad and Tobago and be subject to the jurisdiction of the Courts of Trinidad and Tobago. To enforce a judgment pursuant to French law in which the French courts have assumed jurisdiction and applied French law, it seems to me, would be contrary to that policy.

56. As I mentioned, it has been held that it would be contrary to public policy to recognize a judgment obtained in breach of an anti-suit injunction (see **WSG Nimbus Pte Ltd. v Board of Control for Cricket in Sri Lanka,** supra, and **Phillip Alexander Securities and Futures Ltd. v Bamberger**, supra). This appeal seems to me to be an a fortiori case, as the judgments have been obtained by the application of a law contrary to an act of Parliament setting out a rule of public policy.

57. It is also correct to say that Trinidad and Tobago has acceded to the 1992 Protocols to the Conventions. But the protocols were acceded to several years after the policy of insurance in this matter was issued and the sinking of the Vistabella which gave rise to claim against the Appellant. Moreover the Conventions have not been enacted into our domestic law and the policy as laid down by section 195(2) therefore remains unchanged.

58. In my judgment therefore the foreign judgments should be refused enforcement in this jurisdiction on the ground of public policy. In the circumstances I would allow this appeal from the order of the Judge below made on the application for summary judgment and that application is therefore dismissed. In view of the above the claim against the Appellant must also be dismissed and I so order as well. As the submissions of the Appellant did not seek to challenge the order made on the Appellant's application for a declaration for want of jurisdiction, for completeness, I would dismiss the appeal from that order.

59. We will hear the parties on costs.

Dated the 23rd day of July, 2012

Allan Mendonça
Justice of Appeal