REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. S 149 of 2013
Claim No. CV2011-01896

BETWEEN

Rajendra Samsoondar

Appellant/Defendant

AND

Capital Insurance Co. Ltd.

Respondent/Claimant

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Panel:

R. Narine J.A.

P. Moosai J.A.

P. Rajkumar J.A.

Appearances:

Mr. Navindra Ramnanan for the appellant

Mr. Reshard Khan for the respondent

DATE DELIVERED: 5th May, 2017

I have read the judgment of Narine J.A. and agree with it.

P. Moosai,
Justice of Appeal.

I too, agree.

P. Rajkumar,
Justice of Appeal.

JUDGMENT

Delivered by R. Narine J.A.

THE FACTS:

1. On 29th July 2005, Doodnath Kooraja (Kooraja) was driving trailer truck registration number TBS 8117 owned by the appellant, Rajendra Samsoondar, south along the Solomon Hochoy Highway when the right wheel from the trailer flew out, went across to the **other side** of the highway and came into contact with motor vehicle registration number PBU 2370 which was owned and/or driven by Ashim Hosein at the material time and which was being driven in a northerly direction along the highway. The truck was insured by the respondent, Capital Insurance Company Limited (Capital). The policy purported to restrict the insurance to owner driver only. At the time of the accident Kooraja was an employee of the appellant and was driving with the consent of the appellant.

2. Following the accident Kooraja filled out a claim form at Capital's office. He admitted that he was wrong in the accident. The appellant subsequently paid the excess under the policy of insurance. Although Kooraja's driving was not covered

by the policy, Capital proceeded pursuant to its statutory obligation under section 4(7) of the Motor Vehicles Insurance (Third Party Risks) Act Chapter 48:51 (the Act), to settle the claim of the third party, the owner of PBU 2370 whose insurer was TATIL. Capital settled the claim which arose out of this accident with TATIL on the 23rd May 2007. The total sum paid out was $43,400.00. At no time before this payment was made did the appellant communicate to Capital that he did not consider himself liable to the third party or that he wished to defend the third party claim. Capital subsequently sought to recover this sum from the appellant as damages for breach of contract or as an indemnity for monies paid on behalf of the appellant. Capital then brought an action for repayment.

3. The appellant defended the claim. He averred that Kooraja was an authorised driver within the meaning of the policy. Alternatively, the appellant claimed that if there was in fact a breach of the policy then Capital had no authority to settle the claim. The appellant further averred in his defence that the Act contained no provisions which gave Capital the authority to settle the third party claim and because of Capital's unauthorised action the appellant was deprived of the opportunity to defend the claim. He further averred that Capital paid the third party under a mistake (presumably of law) and was entitled to recover the sum from the third party.

FINDINGS OF THE TRIAL JUDGE

4. The trial judge made the following findings:
   (i) It was clear on the face of the policy as a whole, and from the answers given in the proposal form that the parties intended to restrict the policy to the appellant only, that is, he alone was authorised to drive the vehicle.
   (ii) At the time of settlement of the claim the state of the law with respect to the interpretation of section 4(7) of the Act, was as decided by Kokaram J in **Selwyn Benjamin v. Stephen Jairam & Ors** HCA No. 1104 of 2000, in a

judgment dated 9th June 2006, to the effect that persons driving with the consent of the insured, constituted a separate class of persons who were covered by the policy of insurance. Capital was therefore obliged as a matter of law to settle the third party claim in accordance with the law as it stood at the material time.

(iii) By permitting Kooraja to drive, the appellant was in breach of the policy and Capital was entitled to recover the sum paid as damages for breach of contract.

ISSUES ON APPEAL

Whether the trial judge was wrong in finding as a fact that the policy was restricted to the appellant only

5. The trial judge found as a fact that the policy of insurance was intended by the parties to restrict the authorised drivers of the vehicle to the appellant only. He came to this conclusion after a careful examination of the proposal form, the appellant's answers to the questions therein, and the evidence of the witness Ms. Persad as to the meaning of "O/D only" which the appellant stated in answer to question 12, which related to special conditions agreed upon.

6. We have considered the submissions of both counsel on this issue and can find no valid basis for setting aside this finding of fact which is clearly supported by the documentary and oral evidence.

Whether Capital was obliged to settle the third party claim:

7. The trial judge considered that the issue as to whether Capital was obliged to settle the third party claim fell to be determined on the state of the law as it existed

at the time, that is, in May 2007. At that time the interpretation of section 4(7) of the Act, as decided by the High Court in **Selwyn Benjamin v. Stephen Jairam & Ors** (supra) and as subsequently endorsed by the Court of Appeal in **Presidential Insurance Co. Ltd v. Resha St. Hill** Civ. App. No. 51 of 2008 on February 15th 2011, was that persons driving with the consent of the insured were covered by the policy with respect to third party claims. It was not until the 16th August 2012 that the Privy Council reversed that decision, holding in effect that the insurer is not obliged to settle a third party claim in such a case if the policy provided otherwise: see **Presidential Insurance Co. Ltd v. Resha St. Hill** [2012] UKPC 33.

8. Section 4 of the Act outlines the requirements with respect to insurance policies. The applicable subsection is as follows:

> *"4(7) Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons".*

9. While we agree that the interpretation of the Privy Council in 2012, of the 1996 amendment of section 4(7) of the Act, has the effect of declaring what the amended section has always meant, it would be artificial to suggest that Capital paid the third party claim in May 2007 under a mistake of law, having regard to the interpretation of section 4(7) by the High Court in 2006, and the Court of Appeal in **Presidential Insurance Co. Ltd v. Resha St. Hill**.

10. However, even assuming that Capital was not obliged to pay the third party claim, it is clear from the facts that the appellant accepted that he was liable to the third party having regard to (i) the admission of the driver of the appellant's vehicle in

the filling out of a claim form that he was "wrong" in the accident and (ii) the appellant's payment of the excess to Capital. Under the policy of insurance Capital agreed to indemnify the appellant in respect of any liability he incurred by the use of the vehicle on the road. They fulfilled their obligation under the policy in spite of the appellant's breach of same by permitting an unauthorised driver to drive the vehicle. Having regard to the appellant's breach of the contract, Capital was entitled to recover damages arising from that breach, which was the sum paid by Capital to the third party in settlement of the claim.

11. In the alternative Capital pleaded at paragraph 17 of the amended statement of case that the monies were paid "at the direction and/or request and/or on behalf of" the appellant under the policy of insurance. We are of the view that the monies were not paid under a mistake of law to the third party but rather due to compulsion by law at that time based on section 4(7) of the Act. After reviewing the facts of this case we are in agreement with the finding of the trial judge that the policy of insurance was a restricted type policy and covered the appellant only as an authorised driver. We further find that the trial judge was correct in holding that the appellant breached the terms of the policy of insurance in allowing Kooraja to drive the vehicle. Based on section 4(7) of the Act, Capital had the right to settle the claim with the third party.

12. At the time of payment it also had the obligation to do so, moreso in the circumstances where:

    (a) by having his driver submit a claim form to Capital, the appellant himself implicitly requested that Capital settle the claim with the third party;
    (b) the description of the accident in that claim form, involving as it did a wheel flying off his vehicle and crossing onto the other side of the highway, provided no realistic basis for defending the claim by the third party;

(c) the appellant's driver did not attempt to suggest in that claim form that the accident was one for which he was not liable for damage to the third party caused by that wheel;

(d) there was no evidence at trial from the appellant that he had ever informed Capital that this was a claim that he wished defended. In fact the submission and content of the claim form suggests otherwise;

(e) he paid his excess under the policy representing the portion of the third party's claim that would not be covered by the policy . If the purpose of paying that excess was not to facilitate payment of the full amount of the third party claim no alternative explanation for that payment has been provided.

13. Accordingly it is too late in the day for the appellant to raise the issue that by Capital's settlement of the third party claim that he was deprived of the opportunity to defend the claim, since he made no attempt whatsoever to defend the third party claim. Based on the breach of the contract between the appellant and Capital, Capital was entitled to recover from the appellant the sum paid to the third party on behalf of the appellant.

14. At the close of oral submissions we invited counsel to provide further written submissions on the issue of unjust enrichment, and in particular whether the pleaded case of Capital provided an alternative basis for recovery of the sum paid from the appellant on the ground that he was unjustly enriched by the settlement of his liability. In my view the facts pleaded by Capital are sufficient to raise the issue (see: **Moule v. Garrett** (1872) L.R. 7 Exch. 101). The following are clear on the pleadings and the evidence that:

(i) the existence of the contract of insurance,

(ii) breach of the contract by permitting a person not authorised under the policy of insurance to drive the vehicle,

(iii) the accident which gave rise to the third party claim, and the liability of the appellant for same,

(iv) the request of the appellant to Capital to handle the claim of the third party, (demonstrated on the evidence by his approach to Capital after the accident via his employee, the completion of a claim form in which his driver indicated that he was the party in the wrong, and his payment of the uninsured excess);

(v) the consequential payment thereafter by Capital of the third party claim,

(vi) the inability of Capital on the state of the law as it then stood, to avoid payment of the third party's claim against the appellant ;

(vii) the appellant's obtaining, by Capital's payment, the benefit of his discharge from legal liability to the third party; and

(viii) the unconscionable refusal of the appellant to make restitution to Capital in circumstances in which he had accepted liability by having his employee fill out the claim form to this effect, and paid the excess under the policy, while yet retaining the benefit of Capital's payment on his behalf.

15. Accordingly, we are of the view that these facts were sufficiently pleaded and supported by the evidence before the judge, and would have provided an additional basis on which Capital would have been entitled to recover from the appellant the sum paid to settle his liability to the third party.

16. It is therefore our view that the trial judge was correct in this case in ordering the appellant to pay the sum of $43,400.00 together with interest and costs.

DISPOSITION:

17. It follows that this appeal is dismissed. The orders of the trial judge are affirmed. The appellant will pay the costs of the appeal assessed as two thirds of the costs below, that is, $8,233.33.

Dated the 5th May, 2017

R. Narine
Justice of Appeal