Privy Council Appeal No. 34 of 1987

P.W.G. Suttle
(as active underwriters of Shead Motor Policies Lloyd's Syndicate No. 886 as successors in title to JSB Motor Policies at Lloyd's and Harnett & Richardson (Insurance Brokers) Ltd.) *Appellant*

v.

Eleanor Joyce Simmons *Respondent*

FROM

THE COURT OF APPEAL OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MAY 1989

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD LOWRY

*[Delivered by **Lord Keith of Kinkel**]*

On 6th August 1978 Miss Simmons, the respondent in this appeal, was seriously injured through the negligent driving of a motor car by one Kenneth Simons. The car was owned by Mrs. Minna McCallan, who was insured in respect of its use under a policy issued by underwriters who are represented by the appellant.

Under the heading "Section II Liability to Third Parties (Persons and Property)" the policy provided *inter alia*:-

> "3. In the terms of and subject to the limitations of and for the purposes of this section the Underwriters will indemnify:-
>
> (A) any authorised driver who is driving the Motor Vehicle provided that such authorised driver
>
> (i) shall as though he were the insured observe fulfil and be subject to the terms of this Insurance insofar as they can apply."

Under the heading "General Exceptions" it was provided *inter alia*:-

> "The Underwriters shall not be liable in respect of:-
>
> (1) any accident loss damage or liability caused sustained or incurred
>
> (a) ...
>
> (b) whilst any motor vehicle in respect of which indemnity is provided by this Insurance is
>
> (i) ...
>
> (ii) being driven by or is for the purpose of being driven by him in the charge of any person other than an Authorised Driver."

In a Schedule to the policy the expression "authorised driver" was defined for purposes of it as being the insured and any person driving on the insured's order or with his permission, with the following proviso:-

> "Provided that the person driving is permitted in accordance with the Licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a court of law or by reason of any Enactment or regulation in that behalf from driving the Motor Vehicle."

By an endorsement to the policy it was provided that the underwriters' liability in respect of death or bodily injury to a third party was limited to $125,000 in respect of any claim by any one person.

On the day of the accident to the respondent Mrs. McCallan had given Mr. Simons permission to drive the car provided that her daughter Dianna, who lived with her mother and was a member of her household, was a passenger in the car at all times when he was driving it. Mr. Simons and Dianna were friends at the time and have since married. The reason for Mrs. McCallan's stipulation lay in the provisions of section 16(12)(d) of the Motor Car Act 1951, the effect of which was to prohibit Mr. Simons from driving the car unless a member of the same household as the person holding the motor car licence in respect of it was a passenger. At the time of the accident Dianna was not a passenger in the car, with the result that Mr. Simons was not then a person permitted by law to drive it. In consequence, he was not then an "authorised driver" within the definition contained in the policy of insurance.

The respondent brought an action in the Supreme Court of Bermuda claiming damages for personal injuries against Mr. Simons, Mrs. McCallan and Dianna McCallan. The trial judge found Mr. Simons and Mrs. McCallan to be jointly and severally liable in damages, Mr. Simons on the ground of negligence and Mrs. McCallan on the ground of having caused or permitted him to use the car without there being in force a policy of insurance against third party risks as required by section 3 of the Motor Car Insurance (Third-Party Risks) Act 1943. Mrs. McCallan appealed, and on 5th November 1982 the Court of Appeal reversed the finding of liability against her, on the ground that her policy of insurance did indeed cover the driving of the car by Mr. Simons, because the purported exclusion therein of liability in relation to non-authorised drivers was rendered ineffective by section 8 of the Act of 1943, which their Lordships will have occasion to consider in detail later. On 21st August 1984 Mr. Simons consented to judgment against him in the respondent's favour for payment of the sum of $100,000 and costs.

The action out of which the present appeal arises is concerned with the respondent's claim to payment of the whole of that sum of damages and costs by the appellant as representing the underwriters of Mrs. McCallan's policy of insurance. The appellant maintains that by virtue of the relevant provisions of the Act of 1943 his liability is limited to the sum of $24,000, which he has already paid to the respondent. The respondent's claim succeeded before Melville J. in the Supreme Court of Bermuda, and his judgment was affirmed by the Court of Appeal there (Sir Alastair Blair-Kerr P. and Henry J.A., Da Costa J.A., dissenting) on 15th December 1986. The appellant now appeals to Her Majesty in Council.

The relevant provisions of the Act of 1943, omitting immaterial words, are these:-

Section 3(1)

> "Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor car on a highway or on an estate road unless there is in force in relation to the use of the motor car by that person or that other person, as the case may be, such a policy of insurance in respect of third-party risks as complies with the requirements of this Act.
>
> For the purposes of this subsection -
>
> (i) a person who causes or permits another person to have the control and use of a motor car shall be deemed to permit the use to which the motor car is put by that other person; ..."

Section 4(1)

"In order to comply with the requirements of this Act, a policy of insurance must be a policy -

(a) which is issued by a person who is an insurer; and

(b) which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or of bodily injury to any person or damage to the property of any person caused by or arising out of the use of the motor car on a highway or on an estate road:

Provided that such a policy shall not be required to cover -

(i) liability in respect of the first twelve dollars of any claim by any person;

(ii) liability in respect of any sum in excess of twelve thousand dollars arising out of the death or bodily injury to any person being carried in or upon or entering or getting into or alighting from a motor car, other than a person being carried for hire or reward;

(iii) liability in respect of any sum in excess of twenty four thousand dollars arising out of any one claim by any one person;

(iv) liability in respect of any sum in excess of forty-eight thousand dollars arising out of the total claims for any one accident for each vehicle concerned; and

(v) in the case of an auto-bicycle or an auxiliary bicycle, liability in respect of the death or bodily injury to persons being carried upon that vehicle at the time of the occurrence of the event out of which the claim arose."

Section 6

"(1) If, after a certificate of insurance has been delivered under subsection (4) of section 4 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 paragraph (b) of subsection (1) of section 4 (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, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

...

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section ...

(b) the expression 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

..."

Section 8

"Where a certificate of insurance has been delivered under subsection (4) of section 4 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters, that is to say -

...

(j) the driving of the motor car by the insured, or by any other person with the knowledge and consent of the insured, while the insured or that other person is not permitted by law to drive that motor car,

shall, as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 4, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person."

By virtue of the General Exception in Mrs. McCallan's policy which is quoted above, as interpreted in the Schedule to the policy, the underwriters purported to restrict the insurance of the persons insured thereby by reference to the driving of the car by a person at a time when he was not permitted by law to drive it. Mr. Simons was such a person. Section 8(j) rendered ineffective the restriction so far as the driving by him was concerned. That is why Mrs. McCallan was held not to have been in breach of section 3. She did have in force a third party insurance policy which covered Mr. Simons' use of the car at the material time. The pecuniary liability of the underwriters under the policy as respects any one third party claim was stipulated to be $125,000. This was greater than the maximum cover which by virtue of section 4(1) and proviso (iii) thereto Mrs. McCallan was required to effect. A third party, Miss Simmons, obtained a judgment against a person insured by Mrs. McCallan's policy, namely Mr. Simons, so the underwriters are bound, under section 6(1), to make payment to Miss Simmons. The question is whether they are bound to pay her the whole sum payable under the judgment with interest and costs, or whether the liability is limited to the sum of $24,000, that being the total amount for which Mrs. McCallan was required by section 4(1) read with proviso (iii) to be insured in respect of any one third party claim.

There can be no doubt that had the underwriters' liability for any one third party claim been limited by the terms of the policy to $24,000, as it might lawfully and effectively have been, Miss Simmons would not have been entitled to claim any more from them, notwithstanding that her judgment against Mr. Simons was for $100,000. That must be regarded as settled by the decision of the House of Lords in *Harker v. Caledonian Insurance Co.* [1980] 1 Lloyd's Rep. 556, which was given in relation to the third party risks legislation of British Honduras, the terms of which corresponded very closely with those of the Bermudan Act of 1943. In that case the plaintiff had been injured by the negligence of a driver covered by an insurance policy which complied with relevant legislation to the effect that insurance against third party risks was required only to the extent of $4,000 in respect of any one claim. The plaintiff's judgment against the negligent driver was for $175,000, but the insurers' liability was held to be limited to $4000. The House did not, however, have to consider the proper construction of any enactment corresponding to section 8 of the Act of 1943 , which renders ineffective certain restrictions on the insurance cover of a policy, and so the question at issue in the present appeal is to that extent an open one.

In the present case Mrs. McCallan's policy, as has been seen, purported to restrict the insurance of Mr. Simons, being a person driving the car with her

knowledge and consent, by reference to the circumstance that he was not at the time permitted by law to drive the car. Section 8(j) rendered that restriction ineffective, but only as respects such liabilities as were required to be covered under section 4(1)(b). The liabilities in question were in general liabilities to third parties for death or personal injury or damage to property arising out of the use of the car on a highway or an estate road. But the provisos to section 4(1)(b) limited the extent to which these liabilities were required to be covered. In particular, by virtue of proviso (iii), there was no requirement to insure against liability in respect of any sum in excess of $24,000 arising out of any one claim by any one person. So the argument for the appellant is that in this case section 8 rendered ineffective the restriction of the insurance by reference to persons who were not permitted by law to drive the car only in so far as liability up to $24,000 for any one claim was concerned. The restriction remained effective as regards the excess over that amount of any claim. Likewise, in so far as section 6(1) requires the insurer to pay to a third party the amount payable under a judgment obtained by the latter against the assured, that requirement only extends to a liability required to be covered by a policy under section 4(1)(b) read with the provisos thereto, and accordingly the insurer cannot be required to pay more than the sum of $24,000 in respect of any one claim.

Counsel for the respondent argued that the words "such liability" in section 6(1) and "such liabilities" in section 8 referred to the nature of the liability and not to its amount. That view was accepted by Gunasekara J. in the Supreme Court of Ceylon, in relation to an enactment corresponding to section 6(1): *Free Lanka Insurance Co. Ltd. v. Ranasinghe* (1961) 63 N.L.R. 529, 535. However, the decision in that case was reversed by the Judicial Committee of the Privy Council: [1964] A.C. 541. Lord Evershed said at p.554:-

> "It therefore follows that in the case of a lorry the liability 'required' to be covered is a liability which shall be not less than Rs.20,000 but need not exceed that figure - so that any liability in the present case (having regard to the terms of the policy) in excess of Rs.20,000 was not one 'required' to be covered by the policy."

In *Harker v. Caledonian Insurance Co.* [1980] R.T.R. 241 Lord Denning M.R., in the course of a dissenting judgment in the Court of Appeal, approved of the judgment of Gunasekara J. in the *Free Lanka* case, and expressed the opinion that the judgment of the Judicial Committee was wrong. However, Roskill and Cumming-Bruce L.JJ. took a different view, and the result they arrived at was sustained by the House of Lords, [1980] 1 Lloyd's Rep. 556 in the decision already cited. The enactments under consideration were sections 4(1) and

20(1) of the British Honduras Motor Vehicles Insurance (Third Party Risks) Ordinance of 1958, which corresponded respectively to section 4(1) and section 6 of the Bermudan Act of 1943, and were very similarly expressed. Lord Diplock said at p.558:-

> "In a sentence the question of construction is - Is 'liability in respect of any sum in excess of four thousand dollars arising out of any one claim by any one person' which by proviso (v) to subsection (1)(b) of section 4 a policy is not required to cover, nevertheless included in 'such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 4' where that expression is used in section 20(1)? So stated, the only possible answer is, in my view, 'no'."

It was further argued for the respondent that the reference in section 6(1) of the Act of 1943 to paragraph (b) of section 4(1) does not include the provisos to section 4(1), because the provisos apply to both paragraphs (a) and (b) of section 4(1). It is not clear, however, what content the provisos could have if applied to paragraph (a). Further, it is to be observed that proviso (v) is concerned not with the quantum of any liability but with its nature. If a passenger carried on an auto-bicycle were entitled to recover from the insurer under section 6(1), notwithstanding that the insurer was entitled to avoid the policy in question with the person insured in relation to the auto-bicycle, proviso (v) would be deprived of all content. It must be inferred that the reference in section 6 to section 4(1)(b) was intended to incorporate proviso (v) and there is no room for discrimination between that proviso and the others.

It was submitted for the respondent that the decision of the House of Lords in the *Harker* case was incorrect, and that the dissenting opinion in the Court of Appeal of Lord Denning M.R. was to be preferred. Their Lordships are satisfied, however, of the correctness of the decision. It was further maintained that even if the decision were correct, that did not preclude an answer in the respondent's favour to the question raised by the present case. It was pointed out that Lord Diplock said in *Harker, (supra)* at page 557:-

> "The only question in this appeal is whether, as the insurers contend, the amount recoverable by the deceased in the direct action against the insurers for which the Ordinance provides is limited to the maximum amount for which the insurers undertook by the policy to indemnify the assured, since this was an amount which was not lower than the minimum provided for in the Ordinance; or whether, as is contended on behalf of the deceased's estate, the amount recoverable in a direct action against the insurers is not subject to any monetary limit, whatever the terms of the policy itself may be."

In the present case the amount covered by the policy, namely $125,000, was greater than the statutory minimum of $24,000 and the action by the respondent against the insurers is for a sum within the amount so covered, namely for $100,000. Thus the question at issue here is different. It is whether, where the amount covered by the policy exceeds the statutory minimum, an injured third party can recover from the insurers a sum above the statutory minimum but within the amount generally covered by the policy. So the *Harker* case is said to be distinguishable.

It is true that the *Harker* case was in certain respects different in its facts from the present one. But the reasoning of Lord Diplock may nevertheless be applicable. That reasoning indicates that so far as the Act of 1943 is concerned the words in section 6(1) "such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 4" do not include liability in respect of any sum in excess of $24,000 arising out of any one claim by any one person, since by virtue of proviso (iii) to section 4(1)(b) such a liability is not required to be covered. It is, in their Lordships' opinion, nothing to the point, so far as the construction of section 6 is concerned, that the insurers might under the terms of the policy be bound to indemnify the insured in respect of any excess over the statutory minimum for which an injured third party might have obtained judgment against the insured. The effect of section 6(1) is to limit the amount which the injured third party can recover directly from the insurers.

Their Lordships were referred to the case of *Jamaica Co-Operative Fire and General Insurance Company Limited v. Sanchez* (1968) 13 W.I.R. 138. It was there decided by the Court of Appeal of Jamaica, on the construction of the Jamaican legislation corresponding to the Bermudan Act of 1943, that where the policy of insurance afforded cover for an unlimited amount an injured third party was entitled to recover directly from the insurers, under the equivalent enactment to section 6 of the Bermudan Act, a sum in excess of the statutory minimum for which he had obtained judgment against the insured. The reasoning of Luckhoo J.A., who delivered the leading judgment, would appear to be in certain respects inconsistent with that of Lord Diplock in the later case of *Harker*. However, the Jamaican enactment equivalent to section 20 of the British Honduras Ordinance and section 6 of the Bermudan Act contained a subsection (2) providing:-

> "No sum shall be payable by an insurer under the foregoing provisions of this section:
>
> (a) liability for which is exempted from the cover granted by the policy pursuant to section 4, subsection (1) of this Law. ..."

Section 4(1) of the Law was in terms similar to section 4(1) of the British Honduras Ordinance and section 4(1) of the Bermudan Act. It was argued that the effect of the quoted provision was that the amount recoverable by the injured third party from the insurers was not limited by any of the provisos to section 4(1) unless the policy itself expressly provided for such limitation. Accordingly, their Lordships would not be prepared, without hearing fuller argument, to hold that the case was wrongly decided.

It is a special feature of the present case that the policy of insurance purported to exclude liability for damage to third parties arising out of use of the car by a person who was an unauthorised driver within the meaning of the relevant exception and the Schedule. So the insurers would have been under no liability but for section 8(j) of the Act of 1943. That rendered the restriction ineffective, but only "as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 4". These words must fall to be construed in the same sense as the very similar expression in section 6(1). The only difference is that in the latter the opening words are "in respect of any such liability as is". It follows that the restriction is removed, so far as is relevant to the present case, only in respect of a liability up to $24,000 arising out of any one claim by any one person. The restriction stood good as regards any excess over that sum. However, the striking down of the restriction as regards liability up to $24,000 meant that liability up to that amount was covered by the terms of the policy. So for purposes of section 6(1) the parenthetical words "(being a liability covered by the terms of the policy)" must in this case refer to liability up to $24,000 arising out of any one claim by any one person. It may be that the insurers are to be treated as entitled to avoid or cancel the policy as against the insured as respects this liability, and the proviso to section 8 indicates that the insurers must pay the amount of the liability to the injured third party and may then recover the amount of it from the insured. If that be so, the provision of section 6(1) about cancellation or avoidance of the policy would come into play, but only to the effect of causing the liability up to $24,000 to be within the parenthetical expression. In the result, the two conditions which by section 6(1) are required to be satisfied before an injured third party can recover directly from the insurer the amount payable under a judgment obtained by him against an insured person are in this case satisfied as regards the sum of $24,000 but are not satisfied as regards any excess over that amount.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed. The respondent was legally aided in the courts below but was not successful in obtaining legal aid for the

proceedings before the Board, in which her legal advisers most admirably acted for her upon a no fee basis. The appellant did not ask for costs in the event of his success, and their Lordships think it appropriate to make no order for costs in the proceedings either before the Board or in the courts below. On the other hand the order for costs against the appellant in the courts below should be set aside.