Privy Council Appeal No. 8 of 1992

Eagle Star Insurance Company Limited *Appellant*

v.

Provincial Insurance Public Limited Company *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MAY 1993

Present at the hearing:-

LORD GRIFFITHS
LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD WOOLF

*[Delivered by **Lord Woolf**]*

This appeal is from a decision of the Court of Appeal of The Bahamas. It concerns the rights to contribution between two insurance companies where both companies, having issued a certificate of insurance, are under a statutory liability to meet an injured person's claim when the driver responsible fails to do so.

The injured person was Brian Simms. He suffered his injuries on 9th March 1986 as a result of the negligent driving of Michael O'Reilly. The car he was driving had been lent to him by Strachan's Auto Repairs Limited ("the repairers"). On 20th February 1989 Mr. Simms obtained judgment against Mr. O'Reilly for damages which on 14th July 1989 were assessed at B$109,067.25 and costs which were subsequently taxed at B$30,491.11. Mr. O'Reilly did not meet that judgment. Mr. Simms therefore brought proceedings against Mr. O'Reilly's insurers, Eagle Star Insurance Company Limited ("Eagle Star") and the repairers' insurers, the Provincial Insurance Public Limited Company ("Provincial"), under section 12 of the Road Traffic Act, Ch.204. The principal issue in Mr. Simms' proceedings against the two insurance companies
[22] was whether Mr. O'Reilly had been authorised to drive by

the repairers. If he was not, then Provincial would be under no liability to Mr. Simms. The trial judge decided that Mr. O'Reilly was an authorised driver and as a result on 27th July 1990 Mr. Simms obtained judgment for the full amount of his claim against both insurance companies.

At the trial Eagle Star contended that it was entitled to be indemnified by Provincial because it had cancelled its policy before the accident and therefore only Provincial was on risk at the time of the accident. Provincial contested these claims and contended that it was entitled to a 50% contribution from Eagle Star.

The trial judge, Thorne J., decided that, by the time of the accident, Eagle Star had cancelled its policy, that therefore there was only one policy in existence at the time of the accident, that of Provincial, and so Provincial were liable to indemnify Eagle Star in respect of any amount paid by Eagle Star to Mr. Simms. The judge dismissed Provincial's counterclaim for contribution against Eagle Star.

Provincial appealed and the Court of Appeal of The Bahamas allowed the appeal, by a majority, Melville J.A. dissenting, and held that Provincial were entitled to 50% contribution from Eagle Star. Eagle Star now seek to have the judgment of Thorne J. restored.

The statutory requirements as to the insurance of motor vehicles in The Bahamas and the United Kingdom are similar. The relevant statutory provisions are contained in Part III of the Road Traffic Act, Ch. 204 which is entitled "Protection of third parties against risks arising out of the use of motor vehicles". Section 8 creates an offence of using, causing or permitting any other person to use a motor vehicle on the road unless there is in force in relation to the user of the vehicle a policy of insurance which complies with that part of the Act. Section 10 contains general requirements in respect of such motor policies. However it is the provisions of sections 11 and 12 which are important for the present purposes.

Section 11 provides:-

> "Any condition in any policy issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall be of no effect in connection with such claims as are mentioned in paragraph (b) or paragraph (c) of subsection (1) of section 10 of this Act:
>
> Provided that nothing in this section shall be taken to render void any provision in a policy requiring the person insured to repay to the insurer any sums which the insurer may have become liable to pay under the

policy and which have been applied to the satisfaction of the claims of third parties."

The terms of section 12 are:-

"12.(1) If, after a certificate of insurance has been issued under sub-section (4) of Section 10 of this Act 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) or paragraph (c) of subsection (1) of section 10 of this Act (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.

(2) No sum shall be payable by an insurer under the provisions of subsection (1) of this section -

(a) in respect of any judgment, unless before or within 21 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either -

(i) before the happening of the said event the certificate was surrendered to the insurer, or the person to whom the certificate was delivered made a written declaration before a magistrate stating that the certificate had been lost or destroyed; or

(ii) after the happening of the said event but before the expiration of a period of 14 days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was

delivered made such a written declaration before a magistrate as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of 14 days the insurer has commenced proceedings under this Act in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided ...

(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 16 requires that, where a certificate of insurance has been delivered and the policy is cancelled either by mutual consent or by virtue of any provision of the policy, both the insurer and the person to whom the certificate was delivered shall, prior to the taking effect of the cancellation, report the cancellation to the Controller and that if this is not done the failure to do so shall be an offence.

Condition 7 of the Eagle Star policy entitled Eagle Star to cancel a policy upon sending 30 days' notice by a registered letter to Mr. O'Reilly at his last known address. Prior to the accident on 22nd December 1985 Eagle Star had cancelled the policy in accordance with condition 7 but had failed to comply with the requirements of section 12(2)(c)

due to an administrative error. Eagle Star therefore remained liable to Mr. Simms under the Act. Eagle Star had however given credit in relation to the premium paid for the unexpired period of the policy.

Both the policy issued by Eagle Star and the policy issued by Provincial contained a condition under which the company was not liable to pay or contribute more than its rateable proportion of any loss, damage or expense and a condition that the company should not be liable if the person insured was entitled to an indemnity under any other policy.

Thorne J., having come to the conclusion that, although Eagle Star were not in a position to avoid statutory liability, it had cancelled its contractual liability to Mr. O'Reilly, explained clearly the basis of his decision in the following passage of his judgment:-

> "... where there are two enforceable policies covering the same risk, if each policy contains an exception relieving the insurer of liability where the claimant is entitled to indemnity under another policy, then each policy is liable for its rateable proportion of the loss. So both insurers would be liable. In my view, it is clear that the pre-requisite for invoking the rateable proportion clause in this case is the existence of two enforceable policies containing the same condition, and under which each insured is entitled to be indemnified. As was said in *Albion Insurance Company Limited v. Government Insurance Office of New South Wales* (1969) 121 C.L.R. 342, at p. 346:
>
> > 'There is no double insurance unless each insurer is liable under his policy to indemnify the insured in whole or in part against the happening which has given rise to the insured's loss or liability.'
>
> Having come to the conclusion, as I have, that there was only one valid policy of insurance covering the loss and that there was no double insurance, it follows that Provincial was the only company liable to indemnify its insured in respect of the loss. I hold, therefore, that Provincial is not entitled to contribution as claimed and the counterclaim against Eagle Star is dismissed."

The approach of the majority of the Court of Appeal (Henry P. and Campbell J.A.) is indicated in a passage from the judgment of Henry P. which is in these terms:-

> "In the present case the Appellant and the Respondent are equally liable to Mr. Simms both as judgment debtors and as statutory insurers and their obligation is in respect of the same loss. In my view they can properly be regarded as statutory co-insurers for the purpose of the application of the principle of contribution, and since neither is under

> the statute primarily liable, each ought to contribute one-half of the amounts awarded to Mr. Simms."

In his dissenting judgment, Melville J.A. followed the decision of the majority of the Court of Appeal in England in the case of *Legal and General Assurance Society Ltd. v. Drake Insurance Co. Ltd.* [1992] Q.B. 887 and concluded that Eagle Star was entitled to be indemnified by Provincial because Eagle Star had cancelled the policy prior to the occurrence of the collision.

A contention of Provincial, of importance before the Board and which, although raised in the courts below, was only treated as of marginal importance and referred to in the judgment of Melville J.A. above, is that, under the Provincial policy, the company was not liable to indemnify any person unless that person observed, fulfilled and was subject to the terms of the policy, insofar as they could apply. One of those terms was that notice should be given as soon as possible to the company with full particulars of any occurrence which might give rise to a claim. Provincial contended that neither Mr. O'Reilly nor the repairers had given them details of the accident. The fact that Provincial was relying upon this contention was not made clear in their pleadings. However, as the pleading point was not taken before the trial judge nor the Court of Appeal, it could not be relied upon before the Board. Mr. Mackay did however, with some justification, criticise the quality of the evidence relied upon by Provincial to establish the failure of the repairers or Mr. O'Reilly to report the accident. However, having examined the documents and transcripts which constitute the record of the proceedings in the courts below, their Lordships are satisfied that they contain sufficient material to establish a strong probability that the accident was never reported to Provincial and accordingly the outcome of this appeal has to be determined on the basis that Provincial were entitled to repudiate liability.

As was pointed out by Lloyd L.J. at the beginning of his judgment in the *Legal and General* case (at page 891), in general "the principles on which one insurer is entitled to recover from another in a case of double insurance have been settled since Lord Mansfield's day". As Kitto J. stated in *Albion Insurance Company Limited v. The Government Insurance Office of New South Wales* (1969) 121 C.L.R. 342 at pages 349-350 "a principle applicable at law no less than in equity, is that persons who are under co-ordinate liabilities to make good the one loss (e.g. sureties liable to make good a failure to pay the one debt) must share the burden pro rata": the object being, as Hamilton J. stated in *American Surety Company of New York v. Wrightson* (1910) 103 L.T. 663 at page 667:-

> "To put people who have commonly guaranteed or commonly insured in the same position as if the principal creditor or the assured had pursued his remedies rateably among them instead of doing as he is entitled to do, exhausting them to suit himself against one or other of them ..."

The distinguishing feature of the present case, to which these principles have not previously been directly applied, was that in this case it was not the insured who was seeking an indemnity but a third party with whom neither insurance company had any contractual relationship. Instead of the liability arising under contract, it arose under statute. However, this distinction in the source of the liability does not by itself justify any departure from the normal approach. If the position of the two insurers was otherwise identical, that is to say, they were both equally under a contractual obligation to indemnify Mr. O'Reilly or were both equally under no such contractual liability, then it would be fair, and this was accepted by both insurers, that the approach of the majority in the Court of Appeal should be adopted so that the insurers, as between themselves, would have to share equally the liability to Mr. Simms.

In order to avoid this being the result of this case, Mr. Mackay, in his very clear submissions, made two points. First, he contended that though Eagle Star could not rely on this as against the claim based on the statute by Mr. Simms, before the accident Eagle Star had cancelled the insurance so that, except for the purposes of the statute, they were no longer liable to indemnify Mr. O'Reilly. Secondly, he contended that if, contrary to his first submission, (as their Lordships have found) Provincial would have been able to avoid their liability to Mr. O'Reilly, if he had made a claim, because of the failure to give notice, that did not alter the fact that at the time of the accident Mr. O'Reilly was insured by Provincial. This he submitted meant that Provincial were in a critically different position from that of Eagle Star in relation to a claim for contribution.

As to Mr. Mackay's first contention, there is no dispute on the facts. It is whether the second contention is correct which is determinative of the outcome of this appeal.

It is argued on behalf of Provincial that, as Provincial were entitled to reject a claim from Mr. O'Reilly, the person whom they insured, this is a situation where, both under the terms of the respective policies and in accordance with section 12(4) of the Act, both insurers were in an identical position and would have been entitled to recover from Mr. O'Reilly.

In support of his contentions, Mr. Mackay claimed that he was entitled to rely on the decision of the majority in the *Legal and General* case. In that case the Legal and General had insured a driver who injured a third party and when the third party brought proceedings Legal and General settled the third party's claim. Legal and General then discovered that the Drake Insurance Company had also insured the driver, so Legal and General claimed a 50% contribution from the co-insurers. On an appeal from the decision at first instance that Legal

and General were entitled to 50% contribution, the Court of Appeal, (by a majority of Lloyd and Nourse L.JJ., Ralph Gibson L.J. dissenting) held that where an assured had effected insurance with two different insurers to cover the same loss, the right of one insurer to contribution from a second insurer as to the costs of meeting a claim accrued at the time of the loss. Therefore even if Drake Insurance Company were entitled to establish that their cover had lapsed because of late notification, the cover would not have lapsed until after the loss, and accordingly the right of Legal and General to contribution was not affected.

The reasoning of Lloyd L.J. for coming to this conclusion appears from the following passage of his judgment (at page 893):-

> "But when I say potentially liable, there is a sharp distinction between steps required to enforce a valid claim under a policy in force at the time of the loss, and a claim which never was valid, and never could be enforced. Thus if B has a good defence to the assured's claim on the basis of misrepresentation or non-disclosure, there is no double insurance. Since the effect of the defence is that the contract is avoided ab initio, it is as if B had never been on risk at all. So also where the assured is in breach of condition, or has repudiated the contract, prior to the loss, even if (though this is not so clear) the repudiation is only accepted thereafter. It may be said that the distinction between breach of condition prior to the loss and breach of condition subsequent to the loss is a narrow one. So it may be. But the difference is crucial. For it is at the date of the loss that the co-insurer's right to contribution, if any, accrues."

As to Lloyd L.J.'s reference to misrepresentation or non-disclosure, it has to be remembered that, until the insurer takes the step of avoiding the contract, it remains in existence. Therefore while there remains a distinction between a situation where an insurer repudiates liability on the ground of misrepresentation or non-disclosure after a loss has incurred and the position where the insurer takes the same action on the grounds of delay in notifying the claim, the difference is marginal where the policy (as in the case of the Provincial policy), in accordance with the usual practice, makes due notification a condition precedent to liability.

In the paragraph following that which has been cited, Lloyd L.J. acknowledges that "it is often said that, though the right to contribution is founded in equity, yet it may be varied or excluded by contract". Lloyd L.J. then accepted that for the purpose of contribution the assured and the insurer by contract can limit the amount of the insurer's liability or provide that the insurer should not be liable beyond his rateable proportion. However Lloyd L.J. distinguishes a provision requiring the assured to give notice of a claim because it does not "modify or exclude the equitable right to contribution in the same sense".

Approaching the issue as a matter of principle, in a case such as the present where both insurers are required to indemnify a third party by statute, there can only from a practical point of view be two solutions to the question of contribution: either the insurers should contribute in accordance with their respective statutory liabilities so that, if they are statutorily equally liable, they will so share the loss; or contribution is determined in accordance with the extent of their respective liabilities to the person insured under the separate contracts of insurance. Of these two alternatives, the contractual approach is the more appropriate since the extent of their respective liabilities to the person insured will indicate the scale of the double insurance.

If the contractual approach is adopted, then there can be no justification for departing from the contractual position by creating for the purposes of contribution between the co-insurers a special cut-off point which requires the position to be judged at the date of the loss. Having such a cut-off point could produce results which do not reflect the contractual situation so far as liability to the insured is concerned. Looking at the issue from the insurer's and insured's standpoint, it makes no difference if an insurer defeats a claim by relying on action taken before or after the loss has occurred. If both insurers would be under no liability to the person who would be insured, then they should share the statutory liability for loss equally irrespective of the date upon which they repudiated liability. If both insurers are liable at least in part to the person insured, then they should contribute to their statutory liability in accordance with their respective liability to the person insured for the loss. While this could have the result that the action of a person insured in relation to one insurer can affect the rights of contribution of the other insurer, this is an inevitable consequence of one insurer being able to take advantage of any limitation of his contractual liabilities on the question of contribution. However before suggesting this could be unfair it has to be remembered that it is unlikely that the existence of the other insurer would have been known at the time that the contract of insurance was made.

So far as other authorities are concerned, Ralph Gibson L.J. was correct in his analysis of *Weddell v. Road Transport and General Insurance Company Limited* [1932] 2 K.B. 563 and that case in fact provides no support for the majority view of the Court of Appeal. *Weddell* was not dealing with any principle of contribution but a question of construction as to the liability of insurers when there are two policies, each of which excludes liability where there is another policy covering the same loss. Rowlatt J. decided that the respective clauses in each policy cancelled each other. The only case which had a direct bearing on the issue now being considered is the decision of Judge Rogers in the Mayor's and City of London Court in *Monksfield v. Vehicle and*

General Insurance Company Limited [1971] 1 Lloyd's Rep. 139. That case was disapproved of by the majority in the Court of Appeal because it did not accord with their conclusion that the date of the loss was the cut-off point at which contribution had to be decided. However, far from that decision being wrong, it is correctly decided and properly regarded in Halsbury's Laws (4th Ed.) (Vol.25 para. 539) as being support for the third of the conditions which Halsbury accurately states must be satisfied before a right of contribution can arise. That condition is that:-

> "Each policy must be in force at the time of the loss. There is no contribution if one of the policies has already become void or the risk under it has not yet attached; the insurer from whom contribution is claimed can repudiate liability under his policy on the ground that the assured has broken a condition."

In this case therefore both insurers are in the same position. They were both under a statutory liability in relation to the claim of the third party but they both would have been entitled to repudiate liability to the insured person. No distinction should be made in relation to their respective positions and accordingly they should each contribute equally to the amount payable to Mr. Simms.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.