Easter Term
[2018] UKPC 9
Privy Council Appeal No 0077 of 2015

JUDGMENT

Ramsook (Appellant) *v* Crossley (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance
Lord Sumption
Lord Carnwath
Lord Hodge
Lord Briggs

JUDGMENT GIVEN ON

30 April 2018

Heard on 8 March 2018

Appellant
Asaf Hosein
Emile Pollard
Elvis O'Connor
Derick Sylvester
(Instructed by Banks Kelly)

Respondent
No appearance or representation

Amici Curiae
Thomas Roe QC
Emily Moore

LORD MANCE:

1. This appeal is another sad illustration of problems that can arise from limits on the third party cover required by motor insurance legislation. The problems have in this case combined with an apparently deficient appreciation of insurers' duties towards their insureds. The first respondent, Mrs Carol Crossley, was insured against third party motor risks with Trinidad and Tobago Insurance Ltd ("TATIL"). The Motor Vehicles Insurance (Third-Party Risks) Act Chap 48:51 ("MVITPA") required her to be insured up to but not in excess of $1m (section 4(2)(c)). In fact she was insured by TATIL up to $1.5m. But, as a result of the way in which a third party claim against her by the appellant, Mr Davidson Ramsook, was handled, judgment was in May 2011 given against her for damages to be assessed, damages were in February 2013 assessed at some $3.6m and she evidently only learned for the first time of both these facts when in July 2013 those acting for Mr Ramsook sought to enforce the judgment, and shortly afterwards threatened to bankrupt her.

2. Mr Ramsook was a police officer travelling as a passenger in a police car PCJ 9154, with which vehicle PBW 8543 driven by Mrs Crossley collided after crossing the central line on 24 May 2009. Mr Ramsook was very grievously injured, being paralysed from the chest down. On 21 September 2010 he commenced proceedings against Mrs Crossley and the Attorney General (representing the interests of the police). On 16 May 2011 des Vignes J entered judgment against Mrs Crossley for damages to be assessed, based on a defence admitting liability entered purportedly on Mrs Crossley's behalf by an attorney, Mr Rennie Gosine, instructed by TATIL. On 17 May 2011 TATIL paid into court $1m. This equates with the amount "required to be covered" that Mr Ramsook could, following a judgment against Mrs Crossley, recover directly from TATIL under section 10(1) of the MVITPA. Any additional sum awarded by the judgment and covered by insurance could only be recovered either (a) from Mrs Crossley, leaving her to recover it from her insurers, or (b), if she did not pay, then, after bankrupting her, by taking advantage of the statutory assignment of her insurance rights under section 17 of MVITPA.

3. On 4 February 2013 Master Sobion-Awai assessed damages in a total of $3,614,197.70 and awarded costs of $127,112.96. She also ordered payment out of the $1m in court. On or about 12 July 2013, as the judge found, Mrs Crossley learned of this decision from a letter dated 28 June 2013 delivered to her home by an attorney for Mr Ramsook. On or about 30 July 2013 those representing Mr Ramsook took steps to bankrupt Mrs Crossley. In response, Mrs Crossley on 19 November 2013 issued an application supported by affidavit, in which she maintained that she had not been served in the proceedings and had known nothing of them. She sought an order setting aside the judgment entered on 16 May 2011, and granting her leave to enter an appearance

within eight days and to file a defence within 28 days. On 19 January 2015 des Vignes J, after hearing oral evidence, accepted Mrs Crossley's case on the facts. She had not been served and Mr Gosine had acted without authority. On that basis, des Vignes J set aside the judgment she had entered on 16 May 2011 together with all subsequent proceedings. An appeal by Mr Ramsook was dismissed by the Court of Appeal on 11 May 2015.

4. Mr Ramsook now appeals to the Judicial Committee which granted leave to pursue four grounds: (1) whether TATIL had authority under the insurance policy issued to Mrs Crossley to enter an appearance on her behalf; (2) whether des Vignes J had jurisdiction to set aside his prior judgment; (3) whether des Vignes J was wrong in his findings on "the balance of prejudice"; and (4) whether his findings of fact could be supported. A curiosity which the Board need not in the event further examine is that des Vignes J was not asked to and did not actually set aside the appearance as being without authority, although that was the logical consequence of his conclusions of law and findings of fact.

5. Before the Board, Mr Hosein made oral submissions on behalf of Mr Ramsook. Mrs Crossley had notified the Board that she was for financial reasons unable to afford representation. The Board expresses its gratitude in these circumstances for the careful assistance rendered it by Mr Thomas Roe QC, who appeared as amicus curiae.

The course of the proceedings below

6. On the hearing to set aside before des Vignes J, the primary issue was treated on both sides as being whether Mrs Crossley had been served with the proceedings begun by Mr Ramsook. The judge identified as a second issue whether it was Mrs Crossley who submitted these documents to TATIL. He identified as a third issue whether Mrs Crossley instructed and authorised TATIL to act on her behalf, to file a defence admitting liability and to represent her at the assessment of damages. In reality, the first, second and first part of the third issues are all closely inter-related. The judge found in favour of Mrs Crossley on all aspects of all three issues. He held that it was open to Mrs Crossley to apply to him to set aside the prior judgment which had been entered in proceedings to which Mrs Crossley was not in reality a party but which were conducted in her name without authority. He concluded that, in so far as it was material to consider the prejudice to each side that might be involved in any such decision, the likely prejudice to Mrs Crossley in allowing the judgment to stand exceeded the likely prejudice to Mr Ramsook in setting it aside. On that basis, he made the order already described.

7. Before the Court of Appeal, the case changed shape. The matter came first before that court on Monday 9 March 2015, when Mr Sanguinette, by now instructed for Mr

Ramsook, sought to develop a new point, which he had only very briefly foreshadowed in written submissions dated the previous Friday 6 March. The point, based on a general statement of practice in *MacGillivray on Insurance Law* 9th ed (1997), p 791 was that TATIL "would have acted and taken over conduct of the proceedings by virtue of a condition of the policy of insurance". It seems from the language that the insurance policy had not at this stage even been inspected, and not perhaps surprisingly the Court of Appeal stood the appeal over for hearing on another occasion. When it came back (before Archie CJ, Bereaux and Smith LJJ, only the last of whom had sat on 9 March), the policy had been obtained and Mr Sanguinette read out its terms. However, in a short ex tempore judgment delivered by the Chief Justice, the point received short shrift in the light of the judge's findings that Mrs Crossley had never been served. The court distinguished *Groom v Crocker* [1939] 1 KB 194 as a case where the proceedings had been served on the defendant.

8. Clause 15 of the insurance policy reads:

> "REPRESENTATION
>
> No admission offer promise or payment shall be made by or on behalf of the *Insured* without the consent of the *Company* which shall be entitled if it so desires to take over and conduct in the *Insured's* name the defence or settlement of any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the *Insured* shall give all such information and assistance as the *Company* may require."

9. Before considering the effect of this clause, it is appropriate to examine in a little more detail the circumstances in which TATIL instructed Mr Gosine and he came to enter an appearance and a defence on Mrs Crossley's behalf. In March and April 2010 Mr Ramsook's attorneys wrote a letter before action first to TATIL and then to Mrs Crossley direct. The letter to Mrs Crossley advanced a substantial claim, asked her to confirm her and TATIL's involvement, and said that, in the absence of a response within 21 days, legal proceedings would be begun. Mrs Crossley's evidence was that she took her letter to TATIL, who said that they would deal with the matter. As to service of proceedings, there is no doubt that TATIL had the relevant claim documents (including the claim form and statement of case dated 21 September 2010) by Tuesday 9 November 2010. On that date it faxed them to Mr Gosine to act on Mrs Crossley's behalf.

10. The factual dispute before des Vignes J was as to how and from whom these documents reached TATIL. On this Mr Ramsook called two witnesses, Mr Hardath,

managing director of Hardath General Insurance Consultants Ltd, who in the course of his business was occasionally engaged by clients to serve process, and Ms Sue Ann Bailey of TATIL, who gave evidence for Mr Ramsook under subpoena. The former, in a witness statement which he attested was made "from my records and recollection", said that he had on 22 September 2010 been engaged by Mr Ramsook's attorneys to effect service on Mrs Crossley of the claim documents, that he had visited her address with these documents at about 2.30 pm on Thursday 4 November 2010 and been told that she was out, but usually back by 5.00 pm. He then returned "on the evening of the 8 November 2010", and, on his calling out her name, a woman who said that she was Mrs Crossley emerged, and invited him in. In her living room, he gave her his company's card, explained about the legal action and said that he was there to serve her with court documents, which he then did. Although he did not get her to sign any document by way of receipt, she at his request at some point produced her driver's permit. In oral evidence he said that he had made, and that he had with him, a note for 8 November which, according to the notes of his evidence, he then read out as follows:

> "First defendant/Carol Ann Crossley was serve[d] with claim documents/statement of case documents. Also had a short meeting with her. Driver's permit No 467338E issued dated 18/5/89. Date of birth 13/10/49. Expiry date 7/8/11."

11. Ms Bailey's evidence was that Mrs Crossley brought the claim documents into TATIL on 8 November 2010, to Ms Bailey's recollection sometime after 3.00 pm. Mrs Crossley said that she had been served with the documents. Ms Bailey reminded Mrs Crossley of what she had said to Mrs Crossley when the original claim was made in April, and repeated that the matter would now be handled by TATIL. On Mrs Crossley inquiring, Ms Bailey said that this meant only the civil claim, not any criminal action which might be taken against Mrs Crossley. (Mrs Crossley appears in fact to have been a defendant in criminal proceedings from January 2010 until March 2013, when a charge against her of driving in a dangerous manner was eventually dismissed.) Finally, on 8 November, Ms Bailey prepared a fax sheet to send the documents to and instruct Mr Gosine, but only sent this on the next day.

12. Mrs Crossley's account was quite different. She confirmed that she had heard from her daughter of Mr Hardath's visit to her home on 4 November, but said that he returned and they spoke on Friday 5 November 2010. She confirmed that he then gave her his company card, but said that he had stated that he came from TATIL, which she subsequently noted on the reverse of the card (which she produced). She said that Mr Hardath had simply inquired about the accident, had not mentioned any legal action and had not served her with any claim documents. She had first heard of any legal action against her in July 2013.

13. The conflict between the opposing accounts is very stark. After hearing oral evidence, making some observations critical of Mr Hardath's and Ms Bailey's failure to note times and referring to, possible inconsistences in their timings of event, including Mr Hardath's suggestion that any time after 13.00 could count as "evening", the judge found himself unable to accept that Mr Hardath had ever served the claim documents on Mrs Crossley or that Mrs Crossley had taken them in to TATIL. What Mr Hardath was doing on his visit to Mrs Crossley, why he should have presented himself as being from TATIL, when his card showed a different company, and from where TATIL received the claim documents were not explored. There was no suggestion that Mr Hardath and Ms Bailey were in cahoots or had any motive to tell a false story. Nevertheless, the Court of Appeal was clearly unmoved both by Mr Sanguinette's challenge to the judge's findings in his written submissions dated 6 March 2015 and by his comment in oral submissions that "the documents didn't come from heaven". The Board will in these circumstances examine the appeal on the basis that there was no service on Mrs Crossley, and that the documents reached TATIL in some unexplained way other than that which their witnesses averred.

14. On 12 November 2010 Mr Gosine entered an appearance stating that he did so on Mrs Crossley's behalf and that she had received the claim form on 8 November 2010. In evidence before des Vignes J he said that the information about receipt of the claim form came from a clerk about whose source of information he was unaware, and that he did not communicate with Mrs Crossley about the entry of appearance or its terms. On 8 December 2010 he asked Mr Ramsook's attorney for, and was granted, a 28-day extension of time to file a defence, saying that he required some time to consider "with my client" documents which he had now obtained. On 3 January 2011 Mr Gosine delivered a defence on Mrs Crossley's behalf, admitting liability with regard to the collision, but putting Mr Ramsook's injuries and quantum in issue.

15. With regard to a defence, rule 10.7 of the Civil Proceedings Rules 1998 provides:

> "(4) The defendant must certify on the defence that he believes that its contents are true.
>
> (5) If it is impractical for the defendant to give the certificate required by paragraph (4) it may be given by his attorney-at-law.
>
> (6) If the certificate is given by the attorney-at-law he must also certify the reasons why it is impractical for the defendant to give the certificate and that the certificate is given on the defendant's instructions."

16. Mr Gosine did not on any view comply with rule 10.7(6), since all he certified was "that it was impractical for the first named defendant to give this certificate as the first named defendant was not readily available". Mr Gosine made no suggestion in evidence before des Vignes J that he contacted Mrs Crossley in relation to the defence or its terms, and the judge clearly accepted Mrs Crossley's evidence that he did not.

17. On 12 January 2011, shortly after putting in this defence, Mr Gosine wrote to Mr Ramsook's attorney in these terms:

> "I act for the first defendant's insurer in this matter who admits liability for the collision.
>
> The limit on liability is one million. My client is willing to pay this sum in full and final settlement of its liability to its insured. You are free to pursue any sum in excess of 1 million against the first defendant (its insured) and/or the second defendant.
>
> In the event you are not minded to accept this offer I reserve the right to bring this letter to the attention of any court."

18. This is not an attractive letter. Viewing it charitably, it is possible that Mr Gosine did not know, or had overlooked, that TATIL's policy covered more than the statutory minimum. Viewing it less charitably, it appears to have been an attempt to lead Mr Ramsook's legal advisers to believe that there was no more than $1m to be obtained from TATIL. It may perhaps also have been thought that they would then be unlikely to pursue proceedings against Mrs Crossley in the hope of obtaining more from her. As to the suggestion of a "settlement" of any liability under the policy, whatever authority Mr Gosine had to act on Mrs Crossley's behalf vis-à-vis Mr Ramsook, he certainly had no authority to act on her behalf with a view to settling her insurance claim on TATIL. The proposed agreement by Mr Gosine for TATIL that the $1m be paid "in full and final settlement of its [TATIL's] liability to its insured" could not in law have prejudiced Mrs Crossley's right to recover an additional $500,000 from TATIL if she had been held liable in that amount. Nor could it, in my opinion, even have precluded a claim by Mr Ramsook against TATIL under the statutory assignment worked by section 17 of MVITPRA in the event of her bankruptcy, since it would constitute an attempt to deprive her of a credit of up to $500,000 satisfying a liability in her bankruptcy which would otherwise have been discharged to her and her other creditors' advantage.

19. In the event, the proposed offer was not accepted. However, Mr Roe drew the Board's attention to the possibility that the letter could be regarded as demonstrating to Mr Ramsook and his advisers that Mr Gosine was acting not for or with the authority of Mrs Crossley, but for and in the interests of TATIL alone.

20. On 3 January 2011 Mr Gosine, without contacting Mrs Crossley or receiving any instructions from her, delivered the defence admitting liability to which reference has already been made. What if any information he had at that stage about the circumstances of the collision is unclear, although by the time he gave evidence before des Vignes J in October 2014 he said he had a number of relevant accident documents. Clearly he should have obtained these before putting in any defence. In particular, if he had, or had obtained from the police their accident record, he would have ascertained that Mrs Crossley did not admit fault. The police accident record gives her explanation that

> "She was proceeding along Wrightson Road in the second from left lane when an unknown vehicle which was proceeding in the said direction on the left lane attempted to pull into her lane. She pulled to the left to avoid the said car and crossed the median onto the east bound lane where her vehicle collided with vehicle PCJ 9154."

So she was maintaining that she had an excuse for the collision. (In an affidavit sworn 9 November 2013, her direct account goes further: she maintained that the unknown "red vehicle driving very fast in the same direction made contact with my vehicle".) It may be that other material might have thrown further light, or doubt, on Mrs Crossley's explanation. It may be that at the end of the day it would have been fruitless to try to defend on liability. Nevertheless, in a case where so much was potentially at stake for Mrs Crossley, the Board has no doubt that insurers should at least have informed her of what was proposed, and given her the opportunity to put her position to them.

21. After delivering the defence, it is right to say that Mr Gosine did take steps to reduce quantum. Bearing in mind the level at which loss was claimed and ultimately awarded, he must in reality also have been doing this in Mrs Crossley's interests. But again, on the judge's findings, he took no steps whatever to keep Mrs Crossley informed as to her exposure. The most that Mr Gosine found he could suggest to the court in written submissions dated 17 December 2012 was that damages should be assessed at $2,352,400.40, plus interest and costs.

22. At the end of the day, this appeal turns in the Board's opinion on a short point of construction of clause 15. The starting point is that clause 15 is not limited to situations where proceedings ever come into existence. Its opening words, "No admission offer promise or payment shall be made by or on behalf of the *Insured* without the written consent of the *Company*", make this clear. They must bite from the outset, indeed from the moment of the accident. The next words, entitling TATIL "to take over and conduct in the *Insured's* name the defence or settlement of any claim", must also apply in relation to any third party claim, irrespective of whether proceedings have yet or are ever begun. The further words, giving TATIL "full discretion in the conduct of any proceedings and in the settlement of any claim", also point to the distinction between a

claim and any proceedings. The final provision, that "the *Insured* shall give all such information and assistance as the *Company* may require", applies in the Board's opinion from the moment of the accident onwards, but certainly is not limited to a situation in which proceedings have been begun.

23. In the present case, it is clear that a claim was being advanced against Mrs Crossley from at least the April 2010 letter which she received and passed to TATIL. TATIL was therefore entitled under clause 15 to take over and conduct the defence and settlement of that claim, for that purpose to retain an attorney on her behalf, and to have full discretion in its settlement. A litigant against whom a claim is made which leads to legal proceedings is entitled to waive service of the claim documents and to enter an appearance and thereafter a defence. Mr Roe in this connection helpfully drew to the Board's attention rule 9.7 of the Civil Proceedings Rules 1998 which provides that:

> "9.7(1) A defendant who wishes - […] to dispute the court's jurisdiction to try the claim […] may apply to the court for an order declaring that it has no such jurisdiction […].
>
> (5) If the defendant -
>
> (a) enters an appearance; and
>
> (b) does not make such an application within the period for filing a defence,
>
> he is treated as having accepted that the court has jurisdiction to try the claim."

24. As Mr Roe also noted, the concept of "jurisdiction" in this provision should be understood as encompassing not just territorial jurisdiction but the court's power or authority in general to try a claim, including in the light of matters concerning service. That is the position under the equivalent provision as enacted in England and Wales (CPR rule 11(5)): see *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203; [2008] 1 WLR 806, where the defendant's failure to apply under the equivalent of rule 9.7(1) was held to give the court jurisdiction even though the claim form had been served outside the period of its validity.

25. It follows that, regardless of how and from whom TATIL received the claim documents, TATIL, or Mr Gosine to whom TATIL delegated the conduct of the claim made against Mrs Crossley, was in the Board's opinion entitled to decide that there was

no point in insisting on the process of their service by or on behalf of Mr Ramsook on its insured, Mrs Crossley. Even if, as may well be the case, TATIL thought that the claim documents had been served on Mrs Crossley, TATIL has never raised any complaint about their non-service, and there is no basis on which Mrs Crossley can now do so, in view of the width of the powers conferred on TATIL by clause 15.

26. In these circumstances, once Mr Gosine had been retained to conduct Mrs Crossley's defence and had entered an appearance under the actual authority granted to TATIL by clause 15, he had apparent authority to take all the normal steps that a defendant in Mrs Crossley's position might take, including putting in a defence, admitting liability and seeking to reduce the quantum of any damages.

27. Where, on the face of it, Mr Gosine's and/or TATIL's conduct fell very seriously short was in failing to take proper instructions from Mrs Crossley and to keep her informed as to the proceedings which were being conducted in her name and the potentially very large exposure which she was risking. A clause like clause 15 is not carte blanche to insurers to conduct proceedings in their own interests, without regard to reality or to their insured's account of events or to the fact that here the claim was likely severely to affect Mrs Crossley as well as TATIL. That is clear from *Groom v Crocker* as well as from later authority: see eg *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047; [2001] CLC 1103. Mrs Crossley has from the outset sought to excuse herself from fault in relation to the accident. Mr Gosine and TATIL ought at least to have ascertained and considered her position, with a view to deciding whether it was appropriate simply to admit liability on her behalf. They ought also to have kept her informed about the continuing progress of proceedings, which would severely expose her financially. However, bearing in mind TATIL's and Mr Gosine's actual and apparent authority deriving from clause 15, any complaint which Mrs Crossley has on this score is a matter between her and TATIL and/or Mr Gosine. It cannot affect Mr Ramsook's position, as a claimant pursuing proceedings unsuspecting of any such breach of duty.

28. As the Board has already mentioned, Mr Roe drew attention to TATIL's letter dated 12 January 2011 on the basis that it might be sufficient to put Mr Ramsook's legal advisers on notice that TATIL and/or Mr Gosine were acting in their own interests and outside the scope of any actual authority granted by clause 15. The Board has already remarked on unsatisfactory aspects of that letter, but it considers that it is going too far to say that it put Mr Ramsook on notice that TATIL and/or Mr Gosine had not consulted Mrs Crossley on the defence and were acting generally in breach of duty to her in their conduct of the proceedings on her behalf.

29. It follows that the appeal must be allowed, des Vignes J's judgment dated 19 January 2015 setting aside her previous judgment dated 16 May 2011 and all subsequent

proceedings must itself be set aside, and her judgment dated 16 May 2011 and Master Sobion-Awai's assessment of damages dated 4 February 2013 must be restored.

30. It is in these circumstances unnecessary to address the other questions for which permission to appeal was granted. Briefly stated, however, the Board has no doubt that, had the proceedings been defective from the outset, as would be the case if (contrary to the Board's conclusions) neither TATIL nor Mr Gosine had any actual or apparent authority to conduct them on Mrs Crossley's behalf, it would have been open to Mrs Crossley to make that case before des Vignes J sitting as a first instance judge. The proceedings would, from the issue of the claim documents onwards, have been in effect a nullity. An appeal would not have been necessary.

31. As to the other two points, the balance of prejudice would not, in the Board's view, have come into consideration, if the proceedings after issue of the claim had been a nullity. Finally, it is unnecessary to say much more about the facts. The Court of Appeal barely addressed them, so the rule against disturbing concurrent findings of fact might only apply in a weak form. There are certainly points which can be made both on the judge's reasoning and above all on the overall probabilities, which do not seem to have received much attention at any stage. But the Board is not saying that this is a case where, exceptionally, it would have felt it appropriate to interfere with factual conclusions, arrived at after hearing oral evidence.

32. The appeal will, as stated, be allowed and des Vignes J's judgment dated 16 May 2011 and Master Sobion-Awai's assessment of damages dated 4 February 2013 restored. The Board will invite submissions as to costs within 28 days. It specifically invites submissions on the consequences in terms of costs of the failure by those acting for Mr Ramsook to rely on clause 15 and have its text available, until, it appears, the second Court of Appeal hearing.