BETWEEN

**National Insurance Co Bhd** **Appellant**

AND

**Qazi Mohammad Salman** **Respondent**

**(High Court of Brunei Darussalam)**
**(Civil Appeal No. 12 of 2006)**

**Power, P.; Mortimer, and Litton JJ.A.**
**21st May, 2007.**

Cyclist injured in road accident gave notice reserving his rights under section 9 of the Motor Vehicle Insurance (Third Party Risks) Act Cap 90 to the insurer of the registered owner (who had sold the insured motor car before the accident). The Cyclist intends to seek judgment against the registered owner and/or the unauthorised driver. He has not obtained judgment on either liability or quantum and has no claim against the insurer until he does. It is not known whether he will have a claim against the insurers or whether he will pursue it. Insurers application for a declaration that it is not liable to the cyclist struck out by Registrar under O.15 r.16 as disclosing no reasonable cause of action and an abuse of process. Upheld by judge. Insurers appeal dismissed by Court of Appeal with costs on an Indemnity basis.

Miss Lee of Messrs. CCW Partnership for the Appellant.
Miss Rashid of Messrs. Sandhu & Company for the Respondent.

**Cases cited in the judgment:**

*Burghes v Attorney General* [1911] 2 Ch 139
*Carpenter v Ebblewhite & Others* [1939] 1KB 347
*Dyson v Attorney General* [1911] 1 KB 410
*Gouriet* v *Union of Post Office Workers* [1978] AC 435
*National Insurance Co BHD and Sym Chong and Liza Binti Afandi* (Unreported 31 January 2005 No. 58 of 2003)
*Naylor v Wrotham Park Settled Estates* (unreported, 24 February 1987)
i*n re Clay* [1919] 1 Ch 66

**Mortimer, J.A.:**

This is an appeal against the decision of Hayati J on 2 October 2006 in which she dismissed an appeal against the registrar's order of 24 May 2006 striking out the appellant's (the plaintiff's) originating summons for a declaration against the respondent (the third defendant) on the grounds that it disclosed no reasonable cause of action and was an abuse of process.

**The Background**

*The Accident*

The plaintiff was the insurer of a motor car KD9733. On 25 April 2004 there was a collision between that motor car driven by Hwong Haw Yee (Hwong) and the third defendant who was riding a bicycle. The registered owner of the vehicle was Runai Anak Jembau (Runai). At the time of the hearings below the third defendant intended to bring proceedings against both Runai as registered owner and Hwong as the driver. He has now begun those proceedings which are not yet concluded.

*The Application for Declarations*

The plaintiff insured the motor car under a policy issued to Runai, the registered owner, on 2 July 2003. On 30 August 2003 Runai sold the vehicle to a Mr Wong. In turn on 3 April 2004 Wong sold the car to the driver Hwong who is not an authorised driver under the policy. The policy issued to Runai was not surrendered or cancelled and at the time of the accident he remained the registered owner of the vehicle.

On 18 July 2005 through his solicitors the third defendant gave notice to the plaintiff, as insurer, under Section 9(2) of the Motor Vehicle Insurance (Third Party Risks) Act, Cap 90 (the Act) that he intended to take proceedings against Hwong as driver and Runai as owner of the vehicle for loss and damage. In the same letter the plaintiff was asked to confirm whether the vehicle was insured by it at the time of the accident; whether it admitted liability; and whether it wished to settle the claim amicably.

The notice was to preserve any right of recovery given to a third party, such as the third defendant, under section 9 of the Act when an insurer has avoided, or is entitled to avoid, the insurance policy vis a vis the driver and the owner. section 9 of the Act provides:

> "Not withstanding 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…"

In these circumstances, and subject to a number of other conditions which must be satisfied, an insurer is liable to compensate an injured third party even though it has avoided or cancelled the insurance policy covering an insured against whom a third party has succeeded.

The Plaintiff's response to the section 9 notice and the accompanying correspondence was to take these proceedings against the registered owner, Runai, the driver Hwong and the injured third defendant asking for declarations:

that the policy did not cover an "unauthorised driver",

> that the policy did not cover Runai as registered owner or Hwong as driver because Hwong was an "unauthorised driver" under the policy, and
>
> that the insurer was not at risk or liable for any loss, damage or injury sustained by Runai, Hwong or the third defendant whether under the Act, the policy or otherwise.

After hearing the applications on 3 and 15 December 2005 the registrar granted the declarations against Runai the registered owner and Hwong as unauthorised driver but struck out the application against the third defendant cyclist.

The appeal against the registrar's striking out was heard by Hiyati J on 2 October 2006. Relying in particular upon *Carpenter v Ebblewhite & Others* [1939] 1KB 347 at 357 and 358 per Greer LJ and at 363 per McKinnon LJ she dismissed the appeal. In *Carpenter's* case the plaintiffs sued the registered owner, the driver and the owner's insurers, following a road accident, asking for a declaration against the insurers that they were obliged to satisfy any Judgment obtained against the defendants. The master and judge refused such a declaration and the Court of Appeal affirmed their Orders. Greer LJ said:

> "It seems to me that the making of such a claim is contrary to anything that has ever been decided in regard to actions for declarations. It has never been determined that in an action by a plaintiff against a defendant that there can be a claim by the plaintiff for a declaration of liability against a third person for the relief claimed in the action where no dispute has yet arisen between the plaintiff and that person."

Although *Carpenter's* case is the reverse of that in the instant case Hiyati J dismissed the appeal in these terms:

> "I cannot see any reason why the principles embodied in the Motor Vehicle Insurance (Third Party Risk) Act and in the Carpenter case should not equally apply, in cases such as here, when it is the insurance company itself who is seeking a blanket declaration of non-liability against a third party, when the issue of liability or non-liability of the plaintiffs to the third party is still purely hypothetical at this stage."

## The Appeal

### *The Issue on Appeal*

The issue for our determination is whether the registrar and in turn the judge were right to hold that the application for the declaration against the third defendant disclosed no reasonable cause of action and was an abuse of process.

*The Appellant's Submissions*

Miss Lee, who appears for the plaintiff, sought to raise a number of procedural points at the outset of the appeal but we asked her to confine her submissions to the main issue to which we have referred.

On this she makes a number of submissions. First she relies upon the Section 9(2) notice. This she submits raised a dispute of law between the third defendant and the plaintiff which the third defendant has refused to abandon in correspondence. She is therefore entitled to ask the court to resolve the issue at this stage. The application is for a declaration of right because it resolves the dispute and if granted would declare that the third defendant has no right of recovery against the plaintiff even if he succeeds in his action. Such a declaration would resolve the issue and avoid any further proceedings by the third defendant against the plaintiff if he obtains judgment in his action for damages.

She relies upon the wide powers of the court and Order 15 Rule 16 of the RSC:

> "16. No action or other proceedings shall be open to objection on the ground that a merely declaratory judgement or order is sought thereby and the court may make binding declarations of right whether or not consequential relief is or could be claimed."

Further to counter the argument that no claim can arise against an insurer until judgment has been given against the insured she points out that the dispute of law will arise in the event of the third defendant obtaining judgment against Runai or Hwong. In this respect she refers to a passage in *Gouriet* v *Union of Post Office Workers* [1978] AC 435 at 501 where Lord Diplock reviewed the applicable principles in a passage which included:

> "Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between the parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked."

In these circumstances she urges that the judge was wrong to categorise the dispute as hypothetical.

As to *Carpenter's* case she submits that the judge erred in law when she relied upon this judgment. She submits that it is to be distinguished as the application in that case was by an injured person for a declaration of liability against the insurer whereas in the instant case it is the reverse.

Finally Miss Lee relies upon *National Insurance Co BHD and Sym Chong and Liza Binti Afandi* (unreported 31 January 2005 No. 58 of 2003) in which Findlay J

dismissed an appeal against the registrar's order granting a declaration similar to that prayed for in this case.

On these grounds Miss Lee submits that the appeal ought to be allowed and the declaration granted.

*The Third Defendant's Submissions*

Miss Rashid, who appears for the third defendant, relies upon the judge's reasons but additionally seeks to distinguish Findlay J's decision in *National Insurance Co BHD and Sym Chong and Liza Binti Afandi* on the grounds that judgment had already been obtained against the unlicensed driver insured by the plaintiff and any possible claim by the third party under the Act had crystallised.

*The Submissions Considered*

Turning to the appeal. We have already noted that the order asked for in these proceedings is to the effect that the plaintiff is not at risk or liable for any loss, damage or injury sustained by the third defendant whether under the Act, the policy or otherwise.

Although the possible claim against the plaintiff is not formulated, by giving notice under Section 9 of the Act the third defendant informed the plaintiff that if he succeeds against the driver or registered owner of the car he will look to the plaintiff as a third party for compensation under the Act. Where, as in this case, the plaintiff has avoided the policy any possible claim against it will only bite (if at all) when the third defendant succeeds in his action against the driver and/or the owner.. Even though he has invited the plaintiff, as insurer, to settle the case the fact remains that such rights as he may have against the plaintiff will not arise until these events happen.

Limitations to the apparently wide powers of the court to grant declarations of right in RSC Order 15 r.16 were recognised by Lord Diplock in *Gouriet's* case at 501:

*"Nothing that I have to say is intended to discourage the exercise of the juridical discretion in favour of making a declaration of right in cases where the jurisdiction to do so exists. But that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights."*

He noted in the same passage that authorities on the jurisdiction of the court to grant declaratory relief 'are legion'. The consequence of this 'legion' of authority is that words used by judges, if construed literally and out of factual context, can be misleading.

To illustrate the point, the declaration applied for in this case was accurately described in argument as a declaration of non-liability. The question arises therefore whether it is truly for a declaration of right at all. Even these words are not easy to apply. The jurisdiction is not limited to declarations of positive legal rights, especially where illegal and possibly oppressive acts are concerned. See for example *Burghes v Attorney*

*General* [1911] 2 Ch 139. A first instance case in which a declaration was granted to the effect that the Commissioners of the Inland Revenue were not entitled to demand certain information from those receiving rent for land, with penalties in default of compliance. Obviously this was a case in which the remedy was properly granted to define the rights of the parties, when potentially one was behaving oppressively, although the form of the order was negative.

However, the correct determination of this appeal becomes clear, even obvious, when the detailed circumstances in which this application was made are considered. At the outset it is important to note again that no claim against the plaintiff by the third defendant can be made until he has succeeded in obtaining judgment for damages against either the registered owner or the driver. Until then the claim remains no more than a possibility. His notice under Section 9 of the Act is simply a necessary reservation of his rights in circumstances which may or may not come to pass in the future. The situation is similar to that which arose in *Naylor v Wrotham Park Settled Estates* (unreported, 24 February 1987). There, tenants were concerned about their potential liability under repairing covenants. The landlord, although he had asserted no claim against the tenants, had reserved his rights which included a possibility of the surrender of the lease. Mervin Davis J accepted the submission that a party to an instrument is not entitled to issue proceedings to determine that the other party to the instrument does not have some specified right if that party has never asserted the right. Inter alia he relied upon I*n re Clay* [1919] 1 Ch 66 to which we will refer.

The invitation to admit liability and settle the case and the later refusal by the third defendant to abandon his notice under Section 9 of the Act takes the matter no further. It is only a query, asking whether the plaintiff will accept not only that the third defendant will succeed in his action for damages but also that he will establish his section 9 claim.

So, no right of recovery had arisen at the time of the application, nor will it arise at all unless in due course the third defendant succeeds in obtaining judgment in his action, perhaps not even then. No practical issues have yet arisen between the parties for determination by the court by declaration or otherwise and it is not possible to say whether the third defendant will ever establish any of his reserved rights against the plaintiff.

The present proceedings are therefore wholly unnecessary. If in the event no action is taken against the plaintiff under the Act the present proceedings will prove to be a complete waste of time, money and effort. The decision *In re Clay* to which we have referred is in point. It demonstrates the law's longstanding approach to applications for a declaration in similar circumstances.

In *Clay's* case an executor under a will had been granted an indemnity by the beneficiaries. Having paid a cheque for costs, he reserved his rights under a Deed of Indemnity when paying the cheque but made no claim under the indemnity. The Vice Chancellor granted the beneficiaries a declaration that he was not entitled to repayment

but the Court of Appeal held that the Vice Chancellor had no jurisdiction to make that order when no claim had been ascertained or formulated. The declaration was discharged. At page 75 Swinfen Eady MR pointed out:

> "All that he did was to reserve his rights whatever they might be. Not only did he never formulate any claim to be repaid or ask for repayment, but he never in terms said that he had the right to be repaid. That was the position when the present Originating Petition was presented. When, later, he was served with the Petition with a view of drawing him to see whether he made any, and if what, claim, he considered his position, and wrote on 30 November 1919, that his claims, if any, had not been ascertained or formulated, and probably could not do so until after the close of the administrative action. He made no claim then and formulated no claim; he intimated that he was not in a position to say whether he would or would not have a claim, and if he had, what that claim would be. He was going to wait until the end of the administration and see what costs were provided for in the course of the proceedings before he determined whether any claim would, in fact, arise under the Deed.
>
> That being the position the question arises: Had the court any jurisdiction upon the Petition to make an order that, under the Deed, the defendant Booth had no right to obtain repayment?"

On page 77 he continued citing relevant observations made by Cozens Hardy MR in *Dyson v Attorney General* [1911] 1 KB 410 at 417:

> "But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The court may well say: 'Wait until you are attacked and then raise your defence'…"

Although not quite on all fours with the present appeal this case demonstrate both the approach and the principle. We would therefore say to the plaintiff, as did Cozens Hardy MR in *Dyson's* case, "Wait until you are attacked and then raise your defence". Pre-emptive proceedings of the sort taken by the plaintiff here are unnecessary and serve no useful purpose.

There is one final matter. These proceedings are in their nature oppressive. The **i**njured third defendant seeks to recover damages against the driver and owner and in doing so preserves his rights against a possible insurer. The plaintiff has taken pre-emptive action against the third defendant cyclist. If the declaration is granted, the possibly innocent third defendant must pay the costs or at least he is at risk for costs. Why should he be at such risk in these circumstances? This is eloquently demonstrated in the present application where in spite of having the plaintiff's proceedings struck out in front of the registrar as an abuse of process, the third defendant found himself paying half the costs of his application.

In passing we refer to section 9(3) of the Act. It should not be thought to give some general right to insurers to apply for declarations. This subsection provides that no sum shall be payable by the insurer to a third party if, subject to constraints of time, the insurer obtains a declaration that it is entitled to avoid the policy on the grounds of a non-disclosure of a material fact or a false representation of a material fact. This is a limited provision which does not give an insurer an entitlement to seek a general declaration that it is not liable to pay a third party under the Act before any action is commenced. It is a desirable statutory exception to the general rule about declaratory relief.

As an insurance contract is one requiring utmost good faith the consequence of a non-disclosure of a material fact, or a false representation of one, is that no valid contract of insurance is made. It is void. In the absence of an insurance policy a third party cannot rely upon the provisions of Section 9 at all. The burden of establishing non-disclosure is on the insurer and it would be inequitable were he not entitled to establish the necessary facts at an early stage without waiting for proceedings against its potential insured to be completed.

**Conclusion**

For the reasons we have endeavoured to set out we are satisfied that the application for the declaration sought against the third defendant was premature, unnecessary, a waste of the court's time, a waste of costs, oppressive and served no useful purpose. Before judgment is obtained upon which any claim must be founded, as the judge rightly said, the issue is hypothetical. Consequently we are satisfied that the proceedings disclosed no reasonable case of action and were an abuse of process as the registrar held. She correctly acceded to the application to strike out the proceedings against the third defendant under RSC Order 18 Rule 18. The judge correctly upheld her decision.

This appeal is dismissed.

**Costs**

In the particular circumstances of this case and in view of our conclusion that these proceedings are both an abuse of process and oppressive against the third defendant we see no reason at present why the third defendant should not be fully compensated in costs. Accordingly we make an order nisi that the third defendant should have his costs of the appeal on an indemnity basis. This order will become absolute at 4 p.m. on 24 May 2007. If either party wishes to make further submissions on costs it must notify the court, with notice to the other party, before the order becomes absolute and the parties will be heard at 9.a.m on Saturday 26 May 2007.