

Wong Teck Huo
Ling Lee Wee

... **1st Appellant**
... **2nd Appellant**

AND

Hayati Bte Hj Abdul Kadir

... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 10 of 2008)

Power, P; Mortimer and Davies, JJ.A.
20th November, 2008.

Motor vehicle collision. Whether insured person entitled to sue tortfeasor for full amount of damage after payment by her own insurance company of the majority of that amount. Duty to her own insurer if double indemnity results.

Mr Pg Izad Ryan Bin PLKD Pg Hj Bahrin of Messrs. Pg Izad & Lee for the Appellants.
Mr. Eugene Loh Jit Kuan of Messrs. Cheok Sankaran Halim for the Respondent.

Cases cited in the Judgment:

Hjh Hasnah Bte Mohammad and 4 Others v Ting Sing Hu and Another
(HCCS No. 48 of 1997) JCBD 1998
Hobbs v Marlowe [1978] A.C.16
Morley v Moore [1936] 2 K.B. 359
Rahmaniyah Enterprise (suing as a firm) v Jati Oce Sdn Bhd [2004] BLR 191.

Power, P.:

The Nature of the Appeal

This appeal arises out of a motor vehicle accident. On 10th June 2003 a motor vehicle owned by Hayati Binti Haji Abdul Kadir (Madam Hayati), the plaintiff at trial and the respondent in this appeal, was involved in a collision with another vehicle. An action involving claims and counterclaims resulted on 12th March 2007. A consent judgment as to liability was entered with damages to be assessed.

The Senior Registrar's Award

On 11th February 2008 Acting Senior Registrar Norismayanti gave judgment on the various claims. The only matter with which we are concerned is claim for the loss of Madam Hayati's car which was total. She claimed \$12,000 being the market value of the car at the time of the accident. It was not disputed that Madam Hayati had received \$11,500 from National Insurance in settlement of her claim for loss of her car. She, nonetheless, before the Senior Registrar pursued a claim for the full \$12,000. The appellants, the defendants at trial, were ordered to pay \$500 that being the difference between the full claim and the amount paid by National Insurance. When making the award the Senior Registrar referred to *Hjh Hasnah Bte Mohammad and 4 Others v Ting Sing Hu and Another* (HCCS No. 48 of 1997, JCBD 1998) in which Sir Denys Roberts awarded \$1,750 for the loss of a vehicle of an accepted value of \$5,000 the plaintiff having already been paid \$3,250 by her insurance company. Sir Denys, without objection or argument, awarded \$1,750 simply stating "*I accept the letter from the insurance company dated 1st December 1995, showing that she received \$3,250 and that the car was worth \$5,000.*"

This decision is of no assistance in resolving the difficulties which now face this court.

The Appeal to the Intermediate Court

The decision was appealed to Intermediate Court Judge Lim Siew Yen who allowed the appeal and awarded Madam Hayati the full \$12,000 claim.

The Opposing Contentions

The opposing contentions can be simply stated.

The approach of the appellants seems to rely upon two, to an extent conflicting prongs. It is submitted first that she is not entitled to double indemnity and that she is required by law to hold that \$11,500 on trust for her insurers. If that be the law, we might ask what was the need for this appeal? It is further also submitted that as she has refused to make clear that she so holds the money, she is entitled only to an award of \$500.

For Madam Hayati it is argued that she is entitled to sue the tortfeasor for the full amount of the damage caused and that any insurance payment is a matter between herself and her insurer.

Was the present situation the result of a "knock for knock" agreement?

Neither this court nor the court below was told whether the present situation arose out of a "knock for knock" agreement, such as commonly exists between insurers, under which each company liable in an accident pays out the loss suffered by its own insured in the expectation that the cost of legal action will be avoided. Such payments take no account

of the loss suffered by an insured who loses his no claim bonus and who has the excess stipulated in his policy deducted and who further to obtain the amount of the deducted excess has to undertake the trouble and cost of litigation.

If there were a “knock for knock” payment made in the present case, we find it difficult to understand how it could be that the insurer did not stipulate that the insured must account to it if she sues the tortfeasor and recovers any damages which duplicate the claim which it has already paid.

We need not, however, concern ourselves further with such speculation as we were not informed of any such agreement in the present case.

The Appellant’s Case

The appellant contends relying upon *Rahmaniyah Enterprise (suing as a firm) v Jati Oce Sdn Bhd* [2004] BLR 191 that Madam Hayati must be held to hold the sum of \$11,500 on trust for her insurer. In that matter there was a similar payment by the insurer followed by a claim which included the amount paid by the insurer. Silke J delivered the judgment of the court said at p. 193:

“Before leaving this matter it may be useful to remark that we do not know what, if any, arrangements have been come to as between Rowther and his insurance company, but whatever they may be is not (sic) immaterial to these proceedings and any damages which he succeeds in obtaining up to the amount of B\$87,074.62: the amount paid to him by his insurance company: he will of course hold on trust for them.”

These words were obiter dicta but give a firm indication of the thinking of the court. Judge Lim, however, dismissed them as *“nothing more than a passing comment...upon which not much weight or reliance could be placed...”*

Reliance was also placed on *Hobbs v Marlowe* [1978] A.C.16 a case which involved a payment by a insurer to an insured who then brought suit for an amount which included that payment. In that case Lord Cairns reading the judgment of the court said, at p. 24:

*“The proposition that a plaintiff can recover his full damages from the defendant notwithstanding that he has been indemnified by his insurers and notwithstanding that they have a “knock-for-knock” agreement with the defendants insurers is settled so far as this court is concerned by the decision in *Morley v Moore* [1936]2 K.B. 359”* Lord Diplock also, at p. 37, referred to the decision in *Morley’s* case saying it *“was a case in which the facts were similar to those of the instant case except that (1) the terms of the knock-for-knock agreement between the insurers of the plaintiff and the defendant were not in evidence although the existence of some agreement of this kind was conceded, and (2) the plaintiff’s insurers had instructed him not to pursue his claim in respect of that part of the damage for which they had already paid him under his policy with them. It was held by the Court of Appeal that the existence of a knock-for-knock agreement*

between the insurers for the two parties did not deprive the plaintiff of his right of action against the defendant for the full amount of the damage that he had sustained, though he would be under a duty to hand over to his insurers that part of the total damages recovered for which he had already been indemnified by them.”

In *Morley’s* case the decision of Scott L.J., at p. 369, clearly sets out the reasoning of the court:

“My view is that there is no right whatever in an insurer to dictate to his assured whether he shall or shall not abstain from enforcing his remedies against a third party which go in diminution of the loss against which the policy is issued; they have an absolute right to require him to enforce his remedies, but, in my opinion, they have no right to prevent him enforcing them. Their right is a right purely consequential on the nature of the contract of indemnity, and it arises because of it being a contract of indemnity, and nothing more. If the assured by some process of recovery, whether by an action at law or by an ex gratia payment, obtains a payment in diminution of the loss, the underwriters or the insurers are entitled to the excess over the amount paid by them to him by way of strict indemnity, and no more. To my mind that is the remedy of the insurers, and that is the only remedy they have in respect of the assured’s rights of recovery at common law.”

Sir Boyd Merriman, who presided, said when dealing with £28.2.8, the amount of the double indemnity said at p. 366:

“If the insurance company insist upon their rights, those rights are perfectly plain; they can have this sum of 28l. 2s. 8d. which has been recovered, and the plaintiff has never attempted to say that they may not have it. They have said that they do not intend to take it and that the plaintiff is not entitled to recover it for them, but as far as I can see up to this very moment they have never bound themselves by any obligation not to take that money, if and when the plaintiff offers it to them.”

These authorities indicate that a party is entitled to sue for the full amount of damages even though he has been indemnified as regards part of them but that he is either bound by a trust or has a duty to hand over the indemnified amount to his insurer. They appear conclusively to establish his right to sue for the full amount.

The Respondent’s Case

For Madam Hayati it is contended

- (i) that *“there is no issue of double recovery as the respondent has never indicated to date that she will not return the sum of B\$11,500 to her own insurers as and when they claim for it if they wish to do so.”*;

- (ii) that, relying upon *Hobbs v Marlowe* and *Morley v Moore*, the right of Madam Hayati to sue was not prejudiced by the fact that she had been indemnified. There seems to be no issue in this regard.
- (iii) that the appellants have no standing to impose obligations on Madam Hayati vis-a-vis her dealings with her own insurer.

The Conclusions of the Court

The authorities cited above leave us in no doubt as to the right of Madam Hayati to make the claim and to recover the full amount of \$12,000. Madam Hayati's contention that the appellants cannot impose an obligation on her dealings with her own solicitors is also correct. That obligation, whether it be under a trust or because of a duty, is imposed by law.

The appeal must be dismissed.

The Senior Registrar was clearly wrong to have awarded only \$500. Although Madam Hayati had at that point, received an almost complete indemnity as regards her loss she was entitled to recover that amount from the tortfeasor and was entitled to appeal to establish that entitlement. The appeal of the appellant to this Court was entirely misconceived. Neither of these two prongs of argument had any hope of success. With some hesitation we make an order nisi that Madam Hayati is to have her costs paid by the appellants both here and below.

The order will become absolute at 10 a.m. on Wednesday 26 November unless earlier application be made.

Power, P

Mortimer, J.A.

Davies, J.A.