Third Party Motor Vehicles Insurance : Who the law protects

by Manley Nicholson, Litigation Partner

A dichotomy exists between the preeminence of contract law versus legislative intent of statutory provisions with respect to third party motor vehicle insurance. The policy of insurance between an insurer and its Insured is governed by principles of contract law. **The Motor Vehicles Insurance (Third Party Risks) Act,** ("the Act") stipulates instances where notwithstanding breach of contractual terms and the insurers right to cancel or void its' Insured's policy of insurance, an innocent third party is protected; that is to say contract law comes into conflict with legislative intent and our Courts are left to give interpretation.

There are inconsistencies in the opinions of the judges of the Supreme Court in how and whether they should grant a declaratory order ("declaration") to an insurer who seeks (for various reasons) not to indemnify its Insured or satisfy a third party judgment. Equally, there is confusion on the part of an insurer as to when a declaration should be sought to relieve them of liability. The following seeks to offer some clarity on the subject against the backdrop of having brought several declaration applications before the Courts on behalf of insurance companies on the one hand, as well as advancing several private client (third party) claims against insurers who seek to avoid indemnity.

There should be an appreciation of the distinction between a declaration of a breach of a condition of an Insured's policy *after* the event which gave rise to the claim (e.g. in respect to an age restriction, the use of the vehicle for hire or reward or failure to report an accident; all of which are contrary to the terms of the policy), entitling the insurer to repudiate liability in respect of that particular event; and a declaration provided for by statute that an insurer is entitled to avoid or cancel a policy due to the Insured's non-disclosure of a material fact or misrepresentation (e.g. the Insured falsifying on the proposal to have never been in any prior accidents or to have never been charged/convicted of any driving offence). I now expand on these two types of applications.

1. Declaration for breach of policy

I find the Court's criteria in granting a declaration against a third party claim to be stringent when the Insured has breached a condition of the policy the result of which merely allows the insurer to repudiate liability in respect of that particular event.

Firstly, section 18(1) of the Act protects a third party judgment and obligates the insurer to satisfy that judgment sum, notwithstanding that the insurer may have been entitled to avoid or cancel the policy[1].

Secondly, subsections 8(1) and (2) of the Act further protect a third party claim in instances where an Insured does not report the accident, the driver being under aged, the

[1] Provided, pursuant to s. 18(2,) that notice of the proceedings was given before or within ten (10) days after the commencement of the proceedings.

mechanical state of the vehicle is impaired or there is overloading of the vehicle. That is to say an insurer cannot rely on any of the above as defenses in not honouring a third party claim.

In the circumstances, where a third party has rights protected by statute; and the insurer may recover from its Insured sums it has been mandated to pay to a third party on the basis of a breach of the policy. Caselaw in this area appears to be very clear on the subject. In a Trinidadian case, **Trevor Francis v. Paul John and Capital Insurance Limited Co. (HCA 1897 & 2734 of 2003)**, the Court was confronted with the issue of whether the insurer is entitled to rely on a condition in the policy which purported to restrict the driving of the vehicle to the policyholder and persons 25 years of age and over who held a valid driver's permit for 2 years or more. In applying similarly worded section of the relevant law, the Court held that:

> "Where the insurer is liable to pay a judgment where there has been a breach of a condition covered by section 12, the insurer is entitled to recover such sum from the insured.
> It is clear then, that the intention of the Act is that a policy of insurance issued by an insurer must cover the insured's liability for death, bodily injury or property damage to third parties. This is the clear intention of the Act In order to avoid liability in respect of a judgment obtained by a third party against an insured person, an insurer must bring himself within subsections 10(2) and 10(3). He is not permitted to refer to the terms of the policy as a basis for relief. Section 12 makes it all the more clearer that an insurer is not entitled to rely on a condition in the policy in order to avoid his obligation under section 10(1) to pay a judgment obtained by a third party. Such conditions, however, remain binding on his insured, who is a party to the contract of insurance.
> This makes perfect sense. The rights and obligations of the parties to the contract of insurance are regulated by the terms of the policy. The rights of the third party are, however, created and regulated by statute. It would be absurd, in my view, if the insurer were to be able to contract out of his obligation to issue a policy which complies with the requirements of Section 4(1)(b), merely by including a condition in the policy which purports to restrict his liability.
> It seems to me that such a condition will not affect the insurer's liability to satisfy a judgment obtained against his insured under Section 10(1). In such a case, however, the insurer will be able to recover from the insured any sum he pays out in satisfaction of the third party judgment".

For these reasons the Courts are disinclined to grant a declaration which would have the consequence of depriving a third party claim. This disinclination however, does not make the application for a declaration redundant or to be bound for failure when there is a breach of a term of the policy.

In sum, if the nature of the breach is not one specifically excluded by legislation, examples of which would include driving with a license for a period less than that period stipulated in the policy; use of the vehicle for hire and reward contrary to use stipulated in the policy; and where there is an unauthorized driver in a 'named driver' policy; an insurer can obtain a declaration against its Insured to avoid satisfying a third party judgment. The utility or economics of applying for such a declaration may however be another issue.

2. Declaration to avoid or cancel policy

In the second instance, pursuant to section 18(3) of the Act, an insurer can obtain a declaration to avoid or cancel the policy and relieve itself from liability to satisfy third party claims in instances of non-disclosure or misrepresentation of material facts. The following conditions must be met:

(a) There must be proof of the non-disclosure or misrepresentation of material facts which induced the insurer to enter into the contract;

(b) an application for a declaration must commence before or within three (3) months after the commencement of the proceedings in which the judgment was given; and

(c) where third party proceedings have been commenced before the action for the declaration the third party/Claimant must be served with Notice of the Declaration application within 10 days of the commencement of the application.

The statutory provision clearly makes a declaration herein relatively straightforward provided that the insurer acts swiftly and within the time lines allowed; hence instructing attorneys in ample time is crucial to the process. However, the courts are guarded in the interpretation of what constitutes 'non-disclosure' of a material fact or 'misrepresentation'.

Confusion arises where insurers construe the intention of section 18(3) to include various breaches that allow them to merely repudiate liability in respect to that particular event. I contend that the act or inducement envisaged by section 18 that will permit the avoiding or canceling of a policy is an act or inducement occasioned **before** the policy of insurance was issued. The statute clearly defines 'material' non-disclosure to be that which would have influenced the insurer to take the risk.

In **UGI Co. Ltd. v. Leroy McDonald** **(Claim No. 0836 of 2005)**, Sykes J recited that "[i]t is well established that a misrepresentation has to be an existing fact". Where the insurers through their Counsel relied on the allegation that eighteen persons were in the van at the time of the accident to say that that 'fact' established the misrepresentation; the learned judged held: "[t]his is a quantum leap in reasoning. There would need to be good evidence that at the time Mr. McDonald concluded the contract with UGI he had no intention of carrying the number of passengers that the vehicle was licensed to carry".

The 'non-disclosure' or 'misrepresentation' cannot be of a future act; it must be an existing fact at the time of applying or issuing the policy. The Court will therefore not accept an allegation that the Insured represented not to allow anyone under the age of say 25 to drive, or represented not to use or cause to use the vehicle for hire, or represented not to overload the vehicle, or represented to report all accidents. This is not what the legislators intended by section 18(3) of the Act.

As motor vehicle accidents account for much damage, fatality and injuries to third parties – whether other motorists, passengers or pedestrians - our Courts are inundated with claims involving the rights and protection of respective parties. The policy of Insurance

by nature of who prepares them contains terms designed to protect insurance companies. Often times the policies or terms do not alter radically from one insurance company to another. Despite legislative safeguard against contractual terms that may be prejudicial to Insured and particularly third parties, in practice insurance companies are at a distinct advantage as they have the financial resources when there is a breach of their Insureds' policy to simply deny third party claims. Rightfully or wrongfully, they also advance that there is a breach of policy and often get reprieved from honouring third party judgements. Suffice it to say that the powerful often win; the quandary herein is that we all lose as we traverse our roads apparently at our peril.

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