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Compulsory Motor Insurance: The Insurers' Exposure to Third Party Liability

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Third party motor insurance is compulsory in Malaysia under the Road Transport Act 1987 (Act). In this context, 'third party' often refers to the victim involved in a road accident. A heavy onus is placed upon the insurers for they will be liable to pay third parties '*notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy*'[1]. Having said that, insurers are accorded with a defence under Section 96(3) of the Act, where it is stated that:

> '… *if before the date the liability is incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable …*'

In the recent case of *Abuseman bin Jamaluddin v Etiqa Takaful Bhd*,[2] the Court of Appeal held that the insurer should be liable to pay the third party although the insurer had previously obtained a declaration from the High Court that the policy was void. The question which this alert discusses is whether an insurer's exposure to third party liability is now widen?

Background Facts

The 1st Respondent was the registered owner of the car bearing registration number QAU 1314 which was insured by the policy of the Insurer.

On 2 September 2012, an accident had occurred between the 1st Respondent and the 2nd Respondent who was the rider of the motorcycle bearing registration number QAR 2278. The 2nd Respondent had sustained severe injuries. As such, sometime in 2016, the 2nd Respondent commenced a civil suit against the 1st Respondent in the Sessions Court at

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[1] See S. 96(1) of the Act
[2] [2020] 6 MLJ 386

Kota Samarahan to claim for damages arising out of the accident.

On 23 March 2017, the Insurer filed an originating summons in the High Court for declarations that the insurance policy is void and unenforceable to cover the 2012 accident; and that the Insurer is not responsible to comply with any orders following the Sessions Court suit. The Insurer's basis was that clause 2 of the policy required that the 1st Respondent notifies the Insurer regarding the accident within specific time frame and obtains the Insurer's prior written consent before entering into any negotiation – but this were not complied with by the 1st Respondent.

The High Court accepted the Insurer's argument that the 1st Respondent had breach of the conditions precedent of the policy. The High Court was of the view that the requirements under Section 96(3) of the Act were satisfied, thus, conferring the Insurer a complete defence against recovery proceeding by the 2nd Respondent. Dissatisfied, the Respondents appealed to the Court of Appeal.

Decision

Save for the decision that the policy is void and unenforceable by the 1st Respondent, which is affirmed, the appeal was allowed by the Court of Appeal. The Court of Appeal's decision is premised on the statutory interpretation of the Act, specifically the interrelation between Sections 96(3) and 94. Section 94 reads:

> *"Certain conditions in policies or securities to be of no effect*
>
> *Any condition in a policy or security issued or given for the purposes of this Part providing that no liability shall arise under the policy or security 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 or security shall be of no effect in connection with such claims as are mentioned in paragraph 91(1)(b)..."*

In short, the Court of Appeal took the view that clause 2 of the policy fell under the 'condition' in Section 94 and was therefore of no effect in connection with the 2nd Respondent's claim in the Sessions Court suit. Accordingly, the 2nd Respondent's rights against the Insurer was fully preserved notwithstanding the High Court's declaration given under Section 96(3).

Commentary

Under Section 96(1), an insurer will only be liable to pay if the liability in question is '*covered by the terms of the policy*'. Previously, the Supreme Court in *Malaysian National Insurance Sdn Bhd v Lim Tiok*[3] held that '*insurers against third party risks are not obliged to carry a wider scope of liability than they have agreed by their policy to carry*'.

Post-Abuseman case, it is now clear that it would not matter even if the terms of the policy demand compliance or even strict compliance with certain conditions – so long as such conditions fall within the scope of Section 94. Having said that, it is likely that Section 94 does not cover situations where the policy is voided by reason of non-disclosure or misrepresentation of material facts prior to the entering into of the insurance contracts. This is because these are obviously not matters that occur '*after the happening of the event giving rise to a claim*' as envisaged by Section 94.

There are also procedural safeguards available to insurers, which unless satisfied, no sums shall be payable by an insurer. They are mostly set out in Section 96(2) of the Act, which can be summarised as follows:

- The certificate of insurance must have been delivered by the insurer to the assured.
- The insurer must have notice of the proceedings in which the judgment was given, before or within seven days after the commencement of the proceedings.
- There is no stay of execution of the judgment.

[3] [1997] 2 MLJ 165

- The policy must not have been cancelled by mutual consent or by virtue of the provision in the policy before the happening of the event which was the cause of the death or bodily injury giving rise to the liability.

- The certificate of insurance must not have been surrendered in the specified circumstances.

Finally, whilst insurers may not escape liability to third party, Section 94 does not prohibit insurers from claiming reimbursement or indemnity from the assured. A term regarding this right of reimbursement should therefore be included in the insurance contract.

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