

## Litigating against insolvent insureds under Cayman law: whose money is it anyway?

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When a plaintiff obtains judgment against an insured but insolvent defendant in the Cayman Islands, is the plaintiff entitled to the policy proceeds or do they have to be paid to the liquidator for the benefit of the defendant's creditors? The answer is the plaintiff is entitled to the policy proceeds when the claim involves a vehicle but is less clear in other cases. This article considers the arguments for and against a plaintiff being entitled to the policy proceeds in cases that do not involve a vehicle.

### Background

On 28 January 1927 Mr Chaplin was knocked down by a taxi belonging to the Harrington Motor Company Limited. He sued and was awarded damages and costs in the sum of £541 13s. 5d. However, before he could recover, the company went into liquidation and the insurers paid the money, less some outstanding premiums, to the liquidators. Mr Chaplin issued a summons seeking an order that the liquidators pay him the money and lost. He appealed to the Court of Appeal and lost again. The position was clear: Mr Chaplin had no contract with the insurers under which he could recover the money; and, under the law of insolvency, the assets of an insolvent company are to be distributed equally amongst its creditors.

*In Re Harrington Motor Company Limited, ex parte Chaplin* [1928] Ch. 105, led to the passing, in England, of the Third Party (Rights against Insurers) Act 1930, which, in the event of insolvency or winding up, transferred the rights of the insured under the policy to the person to whom the liability was incurred. The 1930 Act was subsequently re-enacted in England as the Third Party (Rights against Insurers) Act 2010.

### Section 9 of the Vehicle Insurance (Third Party Risks) Act (2012 Revision)

But what is the position under Cayman law? Section 9 of the Vehicle Insurance (Third Party Risks) Act (2012 Revision) is in very similar terms to the equivalent English section and does not, itself, refer to vehicles. But, whereas the English section is clearly of general application, section 9 is to

be found in an Act that is entitled the, "Vehicle Insurance (Third Party Risks) Act," and which in all other respects deals entirely with vehicle insurance. Is section 9 also of general application or is it limited to cases involving vehicles?

Suppose that the general partner of a Cayman Islands exempted limited partnership successfully sues the manager for something in respect of which the manager is insured. Suppose then that the manager becomes insolvent. Should the damages be paid to the general partner for the benefit of the fund's limited partners, or should they be paid to the liquidators for the benefit of the manager's creditors? In England they would be paid to the general partner for the benefit of the limited partners, and the position would be the same under Cayman law as long as section 9 is not limited to cases involving vehicles.

To what extent then is the title to an Act admissible as an aid to its interpretation? There is, as yet, no Cayman Islands decision on this aspect of section 9.

The English textbook, *Bennion on Statutory Interpretation*, says, "The short title [to an Act] may be used as an aid to construction but is unlikely to be a reliable guide:" (Section 16.2) although, "the short title is sometimes alluded to by judges as being at least confirmatory of one of two opposing constructions." *Bennion* then goes on to say that, "It is now beyond doubt that the long title is part of an Act and may be used as an aid to construction." In the case of the Vehicle Insurance (Third Party Risks) Act (2012 Revision) there seems to be only one title, which would suggest that the title could be used to restrict section 9 to cases involving vehicles. However, in *R v Galvin* [1987] QB 862,<sup>[1]</sup> Lord Lane CJ said that the title cannot be used, "to restrict what is otherwise the plain meaning of the words of the statute simply because they seem to be unduly wide," which would tend to support the view that section 9 is not limited to cases involving vehicles.

The only reported case in which section 9 has been considered is *Woods v Thompson and Saxon Motor and General Insurance Company Limited* [2016 (1) CILR 1] in which Mangatal J said,

"36. Before the enactment of sections such as s.9 of the Law and s.1 of the English Act referred to above, when an injured person got judgment against a wrongdoer who was insured and the wrongdoer then went bankrupt, the injured person had no direct claim against the insurance moneys. He could only prove in the bankruptcy. The insurance moneys went into the pool for the benefit of the general body of creditors. That, as Lord Denning declares (*ibid.*, at 373),<sup>[2]</sup> was "so obviously unjust that Parliament intervened."

However, it would be unwise to place too much reliance on this *dictum* in support of either interpretation of section 9. On the one hand *Woods* was a case involving injury caused by a vehicle; the reference to a "person" getting "injured" is consistent with section 9 being limited to cases involving vehicles; and *Woods* was not about this issue anyway, the question there being whether the plaintiff was entitled to commence proceedings against the insurer before he had established liability against the insured (he wasn't). On the other hand Mangatal J did not say that section 9 was limited to cases involving vehicles, and the reference to a "person" getting "injured"

is also consistent with the section being of wider application.<sup>[3]</sup>

## Section 29 of the Insurance Act (2010 Revision)

At first blush section 29 of the Insurance Act (2010 Revision) might seem to provide an alternative route to recovery. However, the Insurance Act is concerned with what is described as, "long term insurance business," and its effect is to exclude from the estate of an insolvent policy holder, or beneficiary,<sup>[4]</sup> the proceeds of such things as life assurance and permanent health insurance. It is unlikely to help the general partner or the fund's limited partners in our example.

## Pepper v Hart

The uncertainty as to the scope of section 9 raises the question whether the answer might be found in the parliamentary material that led to its enactment by application of the principle in *Pepper v Hart* [1993] A.C. 593. It is well-established that the principle in *Pepper v Hart* is part of Cayman law: see, for example, *Thompson (by her mother and next friend) v Health Service Authority* [2016 (1) CILR 93] per Williams J.

Section 9 seems to have been introduced into Cayman law as long ago as 1964 (or possibly 1965). Unfortunately, however, the online edition of Hansard in the Cayman Islands only goes back to 1971, and Parliament's own copy from before 1971 was destroyed in 2004 by Hurricane Ivan. It is possible that there is a copy at the National Archive in Kew, and there are archivists who will undertake a search for a fee, but it may be too much to hope that Kew would provide a definitive answer to the question.

## Conclusion

What is needed to resolve the question, once and for all, is someone, like the general partner in our example, who finds that the person against whom he has obtained judgment becomes insolvent between the date of judgment and the date of execution, or someone who is prepared to litigate against an insolvent insured and run the risk that he ends up litigating at his own expense for the benefit of the general body of the insured's creditors. Until then it remains unclear whether (other than in cases involving a vehicle) a plaintiff in the Cayman Islands can recover the whole of the sum that an insolvent insured is entitled to receive from his insurers, or whether he has to share it with the general body of the insured's creditors.

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[1] Referred to in *Bennion* at Section 16.3 in the text at note 3.

[2] *Post Office v Norwich Union Fire Insurance Society Limited* [1967] 2 Q.B. 363.

[3] For an illuminating discussion of the history of the Vehicle Insurance (Third Party Risks) Act

(2012 Revision), particularly as it relates to limitation, see *Annette Andrade v Patrick Fredrick* (unreported) 2 February 2021, per Ramsay-Hale J. The case does not, however, touch on section 9.

[4] And to make the proceeds otherwise unavailable to meet the claim of any creditor except where the policy was effected for the benefit of the creditor.

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