Marios Aristou

Insurance companies not liable to pay if statutory conditions not met

May 17 2016 | Contributed by Andreas Neocleous & Co LLC

Litigation, Cyprus

Introduction

A recent Supreme Court case finally settled a series of issues arising from events that took place in the mid-1990s.**(1)** The first appellant was the driver of a vehicle, owned by the second appellant, which was involved in a collision with another vehicle. The second vehicle was owned by an individual, whose insurance was provided by the first respondent, an insurance company. At the time of the collision the vehicle was being driven by a mechanic, to whom it had been given for repair and who was road testing it. The mechanic's insurance for his professional activities was provided by the second respondent.

Initial proceedings

In the initial proceedings regarding liability, a judgment for damages was issued against the mechanic in favour of the appellants, who had withdrawn their claim against the owner of the second vehicle.**(2)**

At the time of the collision there were two policies in existence, one issued by the first respondent to the owner of the second vehicle and the second issued by the second respondent to the mechanic. The insurance companies did not pay the amounts issued in favour of the appellants, which led them to file a separate action against the two insurance companies for their damages, as the mechanic had not paid the damages personally and was declared bankrupt in 2005.

The insurance policy provided by the first respondent covered the owner of the vehicle and anyone driving with his authorisation. However, it disclaimed liability on the grounds that the judgment was not against the vehicle owner, but rather the mechanic. It contended that the fact the action against the owner had been withdrawn supported its defence.

The second respondent claimed that it had no duty to cover the damages since the mechanic, its insured, had been held liable, as decided in the initial case. It contended that the first respondent was liable to cover the damages, since the mechanic was driving the insured vehicle with the owner's consent, whether express or implied.

During the trial of the new action at first instance the following facts were admitted by all parties:

- The initial Action 608/1995 had been filed in the Nicosia District Court on January 24 1995;
- The appellants had given no notice of the impending Action 608/1995 to the second respondent at that time;
- When the action had been filed, no notice had been given to the second respondent within seven days of the action commencing, as the previous statutory law dictated;
- No oral or written notice regarding the accident had been given to the second respondent, whether before or after the filing of Action 608/95; and
- The policy issued by the first respondent regarding the second vehicle covered the owner and any other person driving with the order or consent of the insured.

The claim against both insurers was rejected at first instance, despite the fact that they had provided no witnesses or testimony. It was determined that the appellants had not established that the mechanic was driving with the express or implied consent of the owner, which would have been required to establish liability on the part of the first respondent. Further, the second respondent received no notice of the initial Action 608/1995 required under third-party insurance law and so could not be held liable.**(3)**

The appeal to the Supreme Court was based on the following grounds:

- The court of first instance was wrong to decide that it had not been proven that the mechanic was driving with the express or implied consent of the owner of the second vehicle;
- The court of first instance had misinterpreted Article 10 of the third-party insurance law;
- The court of first instance was wrong to absolve the second respondent of liability as it had issued an insurance policy covering the mechanic against third-party liability; and

- The fact that the appellants did not provide the statutory seven-day notice should not absolve the second respondent of its liability to cover its insured's damages.

Supreme Court appeal

The Supreme Court adopted the court of first instance's views regarding the first two reasons for appeal:

> "*[The second vehicle owner] gave [the mechanic] his vehicle to repair and [the mechanic] was involved in an accident while test driving it. The only testimony provided was, despite being indirect, the summary of the judgment in Action 608/1995 Exhibit 2, where [the mechanic] stated at trial that he had repaired the vehicle and decided to test drive it, as he does with all cars.*
>
> *It goes without saying that this summary in Exhibit 2 is not enough to become a finding for the court in the present procedure. Is it implied that a mechanic will drive the owner's car when the latter gives the former his car for repair? There is no evidence before me as to what repairs the mechanic had to undertake and it is neither taken for granted that for each repair the driving of the vehicle by the mechanic is a given. Neither is it taken for granted that the driving of the vehicle must take place in a public road and not in the area of repair.*
>
> *The issue of consent was denied in the pleadings (Defence) and yet the Claimants did not provide evidence or testimony to prove [the mechanic] was covered by the policy and was driving with [the owner's] consent.*
>
> *It is not judicial knowledge nor is it implied that the mechanic will drive the insured's vehicle after repair, as the Claimants' lawyers claimed. Testimony or evidence should have been provided during trial to ensure the Court could determine [the mechanic] was driving with the implied or written consent of [the vehicle's owner] and therefore was covered by [the first respondent's] policy.*"

The Supreme Court agreed with the district court's approach. It rejected the appellants' submission that the onus of proof lay with the first respondent to prove that the mechanic was not driving with the consent of the vehicle's owner, as this would overturn the burden of proof which lies with the claimants. The claimants had a duty to prove that the mechanic was covered by the policy and had failed to do so.

The remaining two reasons regarded whether the second respondent had received the statutory notice. The law that applied at the time has since been repealed and replaced with a new law with different provisions.**(4)** However, the relevant article of the new law provides that any insurance policy issued under the old law continues until the end of the policy, as in this case.

Article 10(2)(a) of the old law provided that no sum must be paid by an insurer regarding any court judgment unless the insurer was notified before or within seven days of the commencement of the procedure in which judgment was awarded. Further, under Article 10(2)(b), the insurer must be notified within six months of the creation of the actionable right – if it concerns material damage – that the party intends to file a claim and will give the insurer reasonable time to inspect the damages before the repair of the vehicle. As the district court's judgment correctly noted, Article 15 of the new law raised this threshold from seven to 14 days.

In the present case, it was admitted that no statutory notice had been given to the second respondent before or after the filing of Action 608/1995. The submission that the mechanic had notified the second respondent orally was not proven in the district court. Given these uncontested facts, it was determined that the second respondent, which was legally obliged to cover its insured, was not liable for the appellants' damages, since the conditions of Subsections (a) and (b) of Article 10(2) had not been met regarding the notices that should have been given.

The appeal was therefore rejected.

For further information on this topic please contact Marios Aristou at Andreas Neocleous & Co LLC by telephone (+357 25 110 000) or email (marios.aristou@neocleous.com). The Andreas Neocleous & Co LLC website can be accessed at www.neocleous.com.

Endnotes

(1) Civil Appeal 1/2011, judgment issued December 4 2015.

(2) Action 608/1995 in the Nicosia District Court.

(3) The Motor Vehicle (Insurance against Third Parties) Law Cap 333.

(4) Motor Vehicle (Insurance against Third Party) Law 2000 (Law 96(I)/2000).