IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO G 229 of 2015

BETWEEN

ROBERT WOODS

Plaintiff

AND

1. **FLORIS THOMPSON**
2. **SAXON MOTOR & GENERAL INSURANCE COMPANY LTD.**

Defendants

IN CHAMBERS

Appearances: **Ms. S Dobbyn and Ms. B Tomascik of Sinclairs on behalf of the Plaintiff**
Mr. P Keeble and Ms. S Tummala of Hampson & Co on behalf of the Defendants

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **22 April 2016**

Further written submissions requested by the Court and received
From Defendants: **23 June 2016**
From Plaintiff: **27 June 2016**

Draft Judgment Circulated: **6 July 2016**

Judgment Delivered: 12 July 2016

HEADNOTE

Insurance Law - Civil procedure and practice - Motor Vehicle Insurance (Third Party Risks) Law (2012 Revision), s.4, 15 and 17 - Limitation Law (1996 Revision), s. 30, GCR. O.20, O.14, O.14A, O.15, Rule 6 - Whether Third Party can properly sue Insurance Company for consequential relief, before obtaining judgment against insured - Whether declaration would be just in relation to all parties - Whether the most effective way of resolving the issues. – Application to Strike Out and Summary Judgment Application by insurer.

JUDGMENT

The Plaintiff, Robert Woods, was injured in a motor cycle accident on 27 December 2013 whilst riding his motor bike along Shamrock Road. The Amended Statement of Claim avers that the collision was caused by the negligence of the First Defendant, Floris Thompson ("Mrs. Thompson") who drove her 2007 Kia Sorento out of Prospect Drive and into the path of Mr. Woods as he proceeded along Shamrock Road. Mrs. Thompson pleaded guilty in the Summary Court on 17 November 2015 to the offence of careless driving in relation to the accident.

2. The Second Defendant, Saxon Motor and General Insurance Company Ltd ("Saxon") is the insurer of Mrs. Thompson's motor vehicle, the Kia Sorrento.

3. The Plaintiff issued a generally endorsed Writ of Summons against only Mrs. Thompson on 23 December 2015, the service of which was acknowledged on 8 February 2016.

4. Before any further steps had been taken in the proceedings, the Plaintiff issued an amended Writ of Summons and at the same time, a Statement of Claim on 19 February 2016, both naming Saxon as the Second Defendant.

5. The Plaintiff pleads that the accident was caused by the negligence of Mrs. Thompson. He seeks both declaratory as well as consequential relief against Saxon, as according to the Plaintiff's attorneys, they are "*a party who is vitally interested in the outcome of the proceedings, being the only defendant with a significant financial interest in the proceedings.*" In the general endorsement to the Amended Writ of Summons, the Plaintiff claims against Saxon :

> *"...a declaration that the Second Defendant is required to indemnify the First Defendant pursuant to the ...motor insurance policy and to satisfy*

any judgment obtained by the Plaintiff against the First Defendant in respect of the collision on 27 December 2013."

6. In the Amended Statement of Claim, the Plaintiff claims against Saxon a declaration that it is liable to satisfy any award of damages, interest and costs obtained by the Plaintiff against Mrs. Thompson. It also claims against the Second Defendant damages to be assessed, interest and costs.

APPLICATIONS

7. There are two applications before the Court. On 26 February 2016 a summons was issued on behalf of the Plaintiff seeking the following orders:-

> "……..
>
> *1. That the Plaintiff be granted leave to amend the Writ of Summons to join a second defendant as a party to the proceedings, namely Saxon Motor and General Insurance Company Ltd, in accordance with Order 20 r3(a) of the Grand Court Rules.*
>
> *2. That the amended writ of summons filed on 19th February 2016 in the form attached showing joinder of Second Defendant be approved.*
>
> *3. Costs in the cause; and*
>
> *4. Such other orders as the court thinks fit."*

8. On 17 March 2016 Saxon issued a summons to strike out, to dismiss and/or for determination of a question of law as follows:-

> "…..
>
> *1. An order pursuant to GCR Order 18/19(1)(a)(c)(b) and/or (d) striking the writ and Statement of Claim as against the 2nd Defendant herein in its entirety on the grounds that the Statement of Claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious, may prejudice and delay the action as*

against the 1st Defendant and /or is an abuse of the process of the Court;

2. *An order pursuant to GCR Order 14/12 dismissing the Plaintiff's claim as against the 2nd Defendant and entering judgment for the 2nd Defendant on the ground that the Plaintiff's claim has no prospect of success; and/or*
3. *A determination under GCR Order 14A as a point of law whether the Plaintiff has in the present circumstances pleaded, and prior to bankruptcy of the 1st Defendant, or judgment against 1st Defendant, any entitlement to a declaration as to coverage, or the other relief claimed against the 2nd Defendant as the alleged motor vehicle insurer of 1st Defendant.*
4. *The 2nd Defendant's costs of this application on the indemnity or other basis, and such further and other relief as to this Honourable Court may seem just."*

9. An affidavit in support of Saxon's summons was filed on 15 April 2016, sworn to by Erwin Freeland, Saxon's Claims Manager, in which the facts pleaded in the Defence were verified and stating that in the deponent's belief, the Plaintiff has no prospect of success against Saxon.

10. Saxon summarises the grounds for its application as follows:-

> *"1. The Plaintiff has no legal relationship with, cause of action, nor entitlement to declaratory or other relief against the 2nd Defendant as the 1st Defendant's putative motor vehicle insurer, unless and until*
>
> *i. bankruptcy of the 1st Defendant and/ or*
>
> *ii. judgment against the 1st Defendant, as contemplated by s.9 and s.15 respectively of the Vehicle Insurance (Third Party Risks) Law (2012 Revision) neither of which events have arisen;*

2. *The Plaintiff's claim against the 2nd Defendant is unsustainable in law, premature, frivolous, and vexations, hopeless and an abuse of process, and*

3. *Despite repeated efforts by the attorneys for the 2nd Defendant to engage with the attorneys for the Plaintiff, including by letter of 22 February 2016 explaining that the Plaintiff has no present cause of action against the 2nd Defendant, and that these proceedings against the 2nd Defendant are premature and improper, the Plaintiff by his attorneys has persisted with these proceedings, and has rejected invitations of a consent dismissal as against the 2nd Defendant."*

11. A Defence was also filed on behalf of Mrs. Thompson on 3 March 2016, in which Mrs. Thompson denies negligence on her part, and says that the accident was wholly caused or contributed to by the negligence of the Plaintiff. Mrs. Thompson admits that she pleaded guilty to careless driving in the Summary Court. However, she avers that this is not determinative of negligence in these civil proceedings and she claims that she pleaded guilty to the charge of careless driving for the purpose of bringing that charge, which had been pending for two years previously, to an end, and not because she considered that she had driven carelessly or was at fault for the accident.

12. A Defence was filed on behalf of Saxon on the same date as the summons to strike out and or dismiss the Plaintiff's claim. The Defence essentially raises the same points as are set out in the summons, in particular that the Plaintiff has no cause of action against Saxon that the claim is frivolous and vexatious, and further that the Plaintiff has no entitlement to declaratory relief against Saxon.

13. A Reply to Mrs. Thompson's Defence was filed on 17 March 2016, and a Reply to Saxon's Defence was filed on 30 March 2016.

14. Ms. Dobbyn, Counsel for the Plaintiff, made a number of submissions, in an attempted justification of what I view as quite unusual, that is a proceeding by a third party against

an insurer prior to obtaining judgment against the insured, and not pursuant to the ***Vehicle Insurance (Third Party Risks) Law*** (2012 Revision) (" the ***Law***).

15. She submits that prima facie, a plaintiff is entitled to choose the person(s) against whom he wishes to proceed. Reference was made to the well-known case of ***Gurtner v Curtis*** [1968] 2 Q.B. 587. Although that was plainly a case in which it was the Motor Insurers' Bureau that sought leave to intervene, Counsel submitted that the principles are nevertheless relevant in the instant case. Reference was made to page 595 of the judgment, where Lord Denning observed as follows:

> *"It seems to me that when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to "be effectually and completely determined and adjudicated upon." between all those directly concerned in the outcome."*

16. According to Counsel, if Saxon had made an application to intervene in these proceedings as an interested party, its application would certainly have been granted. Reference was made to page 596 of the judgment, where Lord Denning stated as follows:

> *"...it is thus apparent that the Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights but in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who will have to foot the bill."*

17. Ms. Dobbyn further submitted that in the ***Gurtner*** case, Lord Diplock noted that usually insurance companies would not be seeking of their own motion to become a defendant party, because they would typically have the contractual right to conduct the defence in the name of the insured party. However, she submits that Lord Diplock adds, at page 603 of the judgment:

> *"I do not think the rules of natural justice depend upon a technicality as to the procedure by which the liability of a person who is bound to satisfy the judgment obtained by the Plaintiff in the... action is enforceable. So long as it is legally enforceable against that person either directly by the Plaintiff or indirectly....for the Plaintiff's benefit under such contract as exists in the present case, the court has jurisdiction to add that person as a party and normally to exercise its discretion in granting his application to be added".*

18. The argument continues, that it follows, that if the Court would certainly grant an application by Saxon itself to intervene and be added as a Defendant, then logically, the Court should exercise its discretion to allow the Plaintiff the right to join such defendant right at the start of the proceedings, as the very party against whom he will be seeking to enforce any judgment awarded.

DECLARATORY RELIEF AGAINST SAXON

19. Counsel referred to GCR Order 15, Rule 16, which provides as follows:

> ***"Declaratory judgment***
>
> *No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."*

20. Ms. Dobbyn submits that Counsel for Saxon are in effect seeking a determination of the merits of the declaratory judgment which the Plaintiff seeks, as a preliminary issue, masked as a question of law. She states that the Plaintiff's primary contention is that interlocutory applications should not be used as "mini-trials" or to determine preliminary issues. Counsel submits that at this juncture, the Court need only be satisfied that the Plaintiff has a reasonable prospect of succeeding in its claim for a declaratory judgment against Saxon in dismissing Saxon's application for strike out or dismissal of this claim. Counsel submits that the claim by the Plaintiff for a declaration has strong merit.

21. It was Counsel's submission that the Plaintiff's claims are not limited to the remedy of bringing an action pursuant to section 15(1) of the ***Law.***

22. Reference was made to ***Gouriet v HM Attorney General*** (quoted in ***Milebush Properties Ltd-v. Tameside Metropolitan Borough Council*** [2011] EWCA Civ 270, where Lord Diplock described the declaratory jurisdiction as follows:

> *" So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right* ***or as one which may come into existence in the future conditionally on the happening of an event.***
>
> *.....the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights,* ***subsisting or future,*** *of the parties represented in the litigation before it and not those of anyone else."*
>
> (Counsel's emphasis)

23. Counsel argued that it was well settled that the Court may make declaratory judgments in respect of future rights. Reference was made to ***Milebush, Curtis v Sheffield*** (1882) 21 Ch D 1, and ***In re Staples. Owen v Owen.*** [1916] 1 Ch 322. It was submitted that a

declaration as to future rights can be made when all parties are known and before the court, such as in this case.

24. It was further Counsel's submission, that while earlier authority had once doubted whether declaratory relief could be granted in relation to the validity of a contract in respect of which the Plaintiff was not a party, the case law has now moved on. Reference was made to the case of ***Feetum v Levy*** [2005] EWCA Civ. 1601, applied in ***Milebush***, which Counsel asserts is authority for the proposition that declaratory relief as to the effect of a contract should not be refused on the ground that the Plaintiff is not a party to the contract. Counsel submits that in the ***Milebush*** case, the Court of Appeal specifically held that the Plaintiff was entitled to declaratory relief concerning the construction of a contract, because it was directly affected by it, even though it had not been party to the principal agreement.

25. It was submitted that the fact that the Plaintiff's right to a declaration that Saxon are required to pay any damages, interest and costs awarded against Mrs. Thompson is a right that is contingent upon his obtaining a judgment, and is in the future, is no bar whatsoever to his being entitled to claim, and ultimately being, granted declaratory relief. It was submitted that the Plaintiff is directly affected by the indemnity provisions of the insurance contract when it comes to enforcing any judgment against Mrs. Thompson and against Saxon under the ***Law.***

26. It was further Ms. Dobbyn's submission that based upon ***Feetum*** and ***Milebush*** , the fact that the Plaintiff is not a party to the insurance contract does not prevent the court from granting the declaratory relief sought, and she accordingly submits that Saxon's contention that the claim ought to be struck out or dismissed is fallacious.

ALLEGED RISK OF LIMITATION ISSUES

27. In addition to these reasons, Ms. Dobbyn claims that a further reason why it is just and convenient for Saxon to be joined as a Defendant party is in order to eliminate the risk

that Saxon could attempt to rely upon a three year limitation period in relation to section 17 of the ***Law***.

28. Counsel points out that the date on which the Plaintiff's cause of action accrued for his injury and damage was 27 December 2013. She submits that based upon the clear wording of section 17, it would remain open to Saxon to contend that unless the Plaintiff has (i) reached an un-appealed judgment against Mrs. Thompson and (ii) commenced an enforcement action against Saxon by 27 December 2016, that such claim under the ***Law*** would be time-barred by this section.

29. Reference was also made by Counsel to the decision of Foster J in ***Cole v. N.E.M. Insurance Company Ltd*** [2009 CILR 367]. Her understanding of that decision, and its interplay with limitation issue risks for the Plaintiff, is set out at paragraphs 43-45 of her written submissions as follows:

> *"43. It is noted that an insurance company advanced exactly this limitation argument in the case of Cole v N.E.M.... . In that case, Mr. Justice Foster, who no doubt had very considerable sympathy for the plaintiff who had been left a quadriplegic following a serious car accident, rejected such limitation argument finding that liability had been established in due time. With the greatest of respect to Mr. Justice Foster, there is no certainty that another judge of the Grand Court would find that this persuasive non-binding authority, had in fact been correctly decided as a matter of law and should be followed.*
>
> *44. In construing section 17 of the Vehicle Insurance (Third Party Risks) Law, Mr. Justice Foster held: (paragraph 12 of his decision, page 371)*
>
> > *"I do not consider that the section is intended to or does create a three-year statutory limitation period in respect of actions brought under the Law* ***once liability has been established*** *through a personal injury claim brought*

within the three-year limitation period, as is the case here." [Counsel's emphasis]

45. *This finding by Mr. Justice Foster is (with the utmost respect to the learned judge) both worrying and confusing. The Plaintiff in the Cole case had not "established liability" within the time frame of the limitation period. He had merely asserted it. Judgment in default against the first insured tortfeasor was in fact not "established" until March 2008, some two months after the limitation for personal injury had expired in January 2008. It is submitted that liability is only established once judgment has been given, not merely by the assertion of a claim. While the Court no doubt arrived at a very just and fair result in the specific and tragic circumstances of Cole v NEM ....., it cannot be relied upon as good law. Sinclairs have therefore advised the Plaintiff, that it would be a risk to rely on this decision without further judicial confirmation or support for the proposition that the Cole ruling is correct as to the interpretation of limitation under section 17 of the said Law."*

THE *LAW*

30. Sub-sections 4(1), 15 and 17, of the ***Law*** , in so far as relevant to this issue, provide as follows:

*"**Requirements in respect of policies:***

4(1) In order to comply with this Law, the policy of insurance shall be a policy which-

(a) Is issued by a person who is an insurer;

(b) Insures such person, classes of persons, as may be specified in the policy in respect of any liability specified in paragraph (d) which may be incurred by him or them in respect of the death of, or bodily injury to, any person or persons caused by, or arising out of, the use of the vehicle on a road;

(c) Insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the damage to any property caused by, or arising out of, the use of the vehicle on a road; and

(d) Covers liability –

(i) Of not less than one million dollars in respect of the death of, or bodily injury to, any person; and

(ii) Of not less than five million dollars in the aggregate in any one event:

……."

*"**Duty of insurers to satisfy judgments against persons insured in respect of third party risks:***

15(1) If, after a certificate of insurance has been issued under section 4(3) in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 4(1) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any law relating to interest on judgments.

(2) No sum shall be payable by an insurer under subsection (1)-

(a) Liability for which is exempted from the cover granted by the policy under any proviso to section 4(1);

(b) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; such notice to be deemed to be given by the posting of a registered prepaid envelope containing the notice to the address of the insurer given in the certificate of insurance and such notice being deemed to have reached the insurer within fourteen days of the time at which it was posted;

(c) in respect of any judgment, so long as execution thereof is stayed pending an appeal; or

(d) in connection with any liability, if before the happening of the event which was the cause of the death, bodily injury or damage to property giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein and

(i) before the happening of the said event, the certificate was surrendered to the insurer or the person in whose favour the certificate was issued, made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person in whose favour the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Law in respect of the failure to surrender the certificate.

(3) *No sum shall be payable by an insurer under subsection (1), if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:*

Provided that an insurer who has obtained such a declaration in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment contained in proceedings commenced before the commencement of that action, unless before or within ten days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given, shall be entitled, if he thinks fit, to be made a party thereto.

....."

"***Limitation of actions***

17. *Notwithstanding anything contained in any other law or in any rule of law or equity, no action shall be brought in any court by or on behalf of any person after the end of the period of three years from the date on which a cause of action accrued for any injury or damage against or in respect of which a vehicle is required to be insured under this Law.*"

31. Section 30 of the ***Limitation Law (1996 Revision)*** , is in my view arguably relevant, and provides as follows:

> *"**Enforcement of judgments***
>
> *s.30 An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable."*

32. In the course of preparing this Judgment, I came across a number of authorities which I considered relevant, and invited Counsel to make further submissions (which they have), in relation to the following:

a) *Halsbury's Laws of England*-INSURANCE/VOL 60 (2011/9;

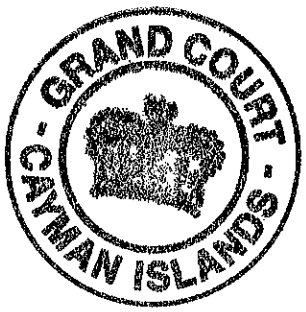
b) ***Post Office v Norwich Fire Insurance Society Ltd.*** [1967] 2 Q.B.63;

c) ***Carpenter v Ebblewhite*** [1967] 2 Q.B. 363.

Discussion and Analysis

33. This is not an instance where the insured has become bankrupt, thus section 9 of the ***Law***, which makes special provision for that instance, by transfer of rights of the insured against the insurer under the contract, to a third party to whom an insured liability has been incurred, is not relevant. That subsection provides as follows:

> *"**Transfer of rights of insured against insurer on bankruptcy***
>
> *9 (1) Where, under any contract of insurance, a person (hereinafter referred to as "the insured") is insured against liabilities to third parties which he may incur, then-*
>
> *(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or*
>
> *(b) in the case of the insured being a company, in the event of a winding up order being made, or a resolution for voluntary winding up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken*



by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge,

if, either before or after that event, any such liability is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any other law to the contrary, be transferred to and vest in the third party to whom the liability is so incurred..."

34. However, even in that instance, where the liability under the contract of insurance is to indemnify the insured in respect of all sums " *which the insured shall become legally liable to pay...*", the third party cannot maintain an action against the insurer until he first obtains a judgment against the insured - see ***Post Office v Norwich Union Fire Insurance Society Ltd*** [1965] , where section 1 of the English ***Third Parties (Rights Against Insurers) Act, 1930,*** although not dealing with vehicles per se, is in *pari material* to section 9(1) of the ***Law.*** **See also *Bullen and Leake,*** *Precedents of Pleadings*, page 557.

35. This is because, as summarized in the Headnote to the ***Post Office*** case, *"the rights of the insured against the insurers, which vested in an injured third party by virtue of the Act of 1930, were transferred subject to the conditions in the contract of insurance; and that since the contractors* [who had gone into compulsory liquidation] *could not have claimed to be indemnified by their insurers until their liability had been established, the Post Office could be in no better position, and was therefore not entitled to sue the insurance company direct until the contractors' liability had been determined; a fortiori when liability was disputed."*

36. Before the enactment of sections such as section 9 of the ***Law***, and section 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 at page 373 of the ***Post Office*** judgment, was "....*so obviously unjust that Parliament intervened.*"

37. Lord Denning then proceeded to analyze the matter and the effect of section 1 in this way:

> *"Under that section the injured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoer's rights under the contract." What are those rights? When do they arise? So far as the "liability" of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide. But the "rights" of the insured person against the insurers do not arise at that time.*
>
> *The policy says that "the company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss or damage to property." It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement."*
>
> (My emphasis).

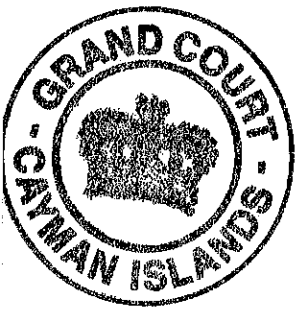
38. Harman LJ (at page 375), described the Plaintiff's action in suing the insurance company directly, as "taking a shortcut". At page 377, Lord Salmon reasons the issues in this way:

> *"The case really resolves itself into this simple question: Could Potters* [the insured party/ the assured] *on June 17, 1965, have successfully sued their insurers for the sum of £839 10s. 3d. which they were denying they were under any obligation to pay the Post Office? Stated in that way, I should have thought the question admits of only one answer. Obviously Potters could not have claimed that money from their insurers. It is quite true that*

if Potters in the end are shown to have been legally liable for the damage resulting from the accident to the cable, their liability in law dates from the moment when the accident occurred and the damage was suffered. But whether or not there is any legal liability and, if so, the amount due from Potters to the Post Office can, in my view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for any assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action and there is nothing in law that makes such an action possible."

39. At page 378 Salmon LJ points to a not unimportant practical commercial consideration from the insurer's point of view, as follows:

"It is quite true that this is a narrow procedural point and from one point of view it cannot matter very much whether the defendant is called the Norwich Union Fire Insurance Society Ltd. or A.J.G. Potters & Sons Ltd. It might be said that the action would proceed in exactly the same way whoever may be the defendant because under the insurance policy the insurers are entitled to conduct the defence. That may be so; but from a broad commercial point of view I can well understand why insurers do not want their name to appear on the record as defendants. If this Act gave third parties the right to sue insurance companies direct, it would mean that the cause lists would contain the names of many insurance companies; and this could not be good for their business. If an insurance company were constantly being sued, any customer or potential customer would or might assume, quite wrongly, that the company was habitually repudiating liability under its policies with its own customers. Therefore, I can understand the reason why this case has been fought up to this court."



40. Counsel for Saxon, Mr. Keeble, in response to my request for further submissions, also referred to the more recent decision in ***Bradley v Eagle Star Insurance Co. Ltd.***[1988] EWCA Civ J0325-7 where the English Court of Appeal followed and applied the ***Post Office*** case, and the House of Lords [1989] UKHL J0302-1 held that the Court of Appeal had rightly considered itself bound by the decision in ***Post Office*** and went on to consider, and opined, that ***Post Office*** was correctly decided.

41. In England, section 151(1) of the *Road Traffic Act, 1988*, is in terms, similar to section 15 of the ***Law***. The first condition of the obligations of an insurer to satisfy a judgment is that there must be a judgment –see ***Halsbury's Laws of England*** –Volume 60 (5th Ed, 2011). In England, there is an alternative form of direct action conferred with effect from January 19, 2003, pursuant to the ***European Communities (Rights against Insurers) Regulations*** *2002* which allows entitled parties, including persons who are residents of a member State of the European Union, who is a victim of a driver covered by insurance to bring a direct action against the insurers themselves which may then be enforced against the insurers under section 151 of the 1988 Act. The Court can take judicial notice of the recent Referendum in the United Kingdom on June 23 2016, by which the UK voted to cease being a member of the European Union. The future applicability of these Regulations in the United Kingdom is therefore unclear. However, the important point for present purposes is that no legislation similar to these EU Regulations exists in the Cayman Islands.

42. Ms. Dobbyn, in her further submissions asked me to take account of these Regulations in exercising my discretion in deciding whether the Plaintiff is entitled to at least declaratory relief against Saxon as the insurer of Mrs. Thompson. However, that would plainly not be correct, as I have to deal with the law as it currently stands in the Cayman Islands and which is completely different to these EU Regulations.

43. It also appears to me, respectfully, that Ms. Dobbyn has misunderstood Foster J.'s plainly correct decision in ***Cole v NEM***. Foster J. was not saying that liability had to be established within the three year limitation period. The learned Judge was saying that

proceedings in the personal injury claim against the insured had to be brought within the limitation period. (My emphasis). Liability had to be established in those proceedings before a claim could be brought by the third party against the insurer under section 15 of the ***Law***. There was no three year limitation period created under the ***Law*** for actions brought against the insurer. Indeed, Saxon understandably rely upon Foster J.'s decision in support of their application to strike out/ obtain summary judgment. Setting out the full text of paragraph 12, and a portion of paragraph 13 of the judgment makes this clear. Foster J. discussed the issues as follows:

*"**Conclusion***

12. In my opinion, s. 17 of the Law is not intended to create two limitation periods in respect of motor vehicle accidents. The section, in my opinion, clearly relates to a cause of action arising from injury or damage in respect of a motor vehicle required to be insured under the Law, which, pursuant to s.3 of the Law, is all motor vehicles. I accept the argument that the section supersedes the provisions of the Limitation Law in relation to personal injuries sustained in an accident involving a motor vehicle required to be insured pursuant to the Law..... I do not consider that the section is intended or does create a three-year statutory limitation period in respect of actions brought under the Law once liability has been established through a personal injury claim brought within the three- year limitation period, as is the case here. In the present case the accident occurred on January 19th, 2005 and the plaintiff's proceedings claiming damages for negligence as a result of the accident were issued on July 19th, 2007, well within the limitation period. In my view, the intention of s. 17 of the Law is not to create a further limitation period in respect of claims made pursuant to s. 15(1) of the Law, such as the plaintiff makes in the present proceedings.

13. *An application under section 15(1) of the Law cannot be made until judgment on liability is obtained against any person insured by the required policy. The plaintiff obtained judgment on liability against the estate of the negligent party, the driver, on March 31st, 2008."* (My emphasis)

44. In ***Carpenter v Ebblewhite*** [1938] 4 All E.R. 41, where the provisions of the English ***Road Traffic Act*** *1934* arose for consideration, The Headnote summarizes the facts and decision as follows:

> *"The plaintiffs had been injured by a motor car driven by the Defendant B. It was in dispute whether the defendant E had sold the car to B, or whether B was driving it as his agent. The plaintiffs obtained leave to add E's insurance company as a defendant. In the statement of claim, the plaintiffs claimed, inter alia, a declaration that the insurance company was liable to satisfy any judgment obtained against E or B. An application was made to strike out such portions of the statement of claim as referred to the insurance company as being frivolous and vexatious:-*
>
> *Held: (i) (per Greer, L.J.) the claim against the insurance company was frivolous and vexatious, as there could not be any claim for a declaration in view of the fact that there was not at that time any dispute between the plaintiffs and the insurance company.*
>
> *(ii) (per Slesser, L.J.) the addition of the insurance company as a defendant would tend to embarrass the fair trial of the action. The old practice, whereby a jury should not be informed that a defendant motorist is insured, has not been altered by the passing of the Road Traffic Act 1934.*
>
> *(iii)(per MacKinnon, L.J.) the question of the liability of the insurance company depended primarily upon fact. A*

declaration of future liability is not, in such circumstances, a suitable remedy."

45. In her further submissions, Ms. Dobbyn advanced a number of cases based upon which the reasons for the decision in ***Carpenter*** can be distinguished. Firstly, she suggested that there does not appear to be any dispute about whether Mrs. Thompson was insured by Saxon at the time of the accident (although, she says, neither Defence admits this). Thus, Saxon would be liable to indemnify Mrs. Thompson once a judgment is obtained by the Plaintiff.

46. Counsel referred to page 47 of the judgment, where MacKinnon LJ stated:

> *"I would only add that the alternative claim against the insurance company is a claim for a declaration of future liability. Such a claim is permissible, and it is one within the discretion of the court."*

47. It was submitted, that even if the court were minded to strike out the claim for direct relief against Saxon, as being premature in the absence of a judgment against the insured, the court may still permit the Plaintiff to seek a declaration.

48. Ms. Dobbyn made the point that ***Carpenter*** was decided 78 years ago, and she referred to the far more recent case law on declaratory relief set out in her earlier submissions, for example ***Milebush*** and ***Feetum v Levy***, which in Counsel's submissions show that it is now well settled that the Court may make declaratory judgments in respect of future rights.

49. *In* ***Milebush***, the English Court of Appeal was concerned with the issue of availability in private law proceedings between non-contracting parties, of a declaration on the meaning and effect of a planning obligation in a deed made pursuant to provisions in the planning legislation. It was a majority decision in which Mummery L.J. and Jackson LJ agreed with the Judge that it was inappropriate to grant a declaration in the private proceedings

brought, when the proceedings should be by way of judicial review, involving the relevant planning authority, and agreed with his determination of certain issues of construction. Moore-Bick LJ, on the other hand, while agreeing with the Judge's determination of the construction issues, felt that the Judge was wrong to hold that no useful purpose would be served by granting the declarations giving formal effect to his decisions.

50. It is a very interesting decision, and there are many passages that are worthy of quotation in full. I will confine my references to paragraphs [35],[37], [38], [40], and [41], of the judgment of Mummery LJ and paragraphs [83] –[88] of the judgment of Moore-Bick LJ, where they respectively stated as follows:

"Mummery LJ:

.....

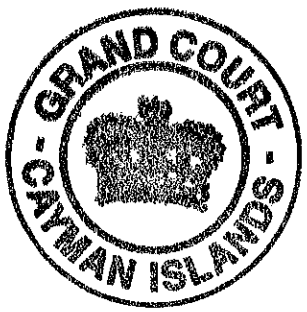
*[35] In **Gouriet v HM Attorney-General** [1978] AC 435 at 501, [1977] 3 All ER 70, 141 JP 552 Lord Diplock described the jurisdiction to grant declaratory relief as discretionary, useful and more and more extensively used, but warned that it is subject to limits. A declaration could only be of legal rights.*

.....

[37] He added at 501G that, while it was not necessary for a person claiming a declaration to have a subsisting cause of action:

"... the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

[38] The general tenor of later cases is that this passage in Lord Diplock's speech should not be treated literally as precluding the grant of a declaration on the construction



of a contract to which the Claimant is not a party cf. ***Meadows Indemnity Co Ltd v ICI*** *[1989] 2 Lloyd's Rep 298 at 304-305 and 309 where the court refused a declaration relating to the validity of a contract of insurance to which the Claimant was not a party.*

.....

[40] Neuberger J in ***Financial Services Authority v Rourke*** *(2002) CP Rep 14 said that, when considering whether to grant a declaration, the court should take into account what was just for both parties, whether the declaration would serve a useful purpose and whether there were special reasons why the court should not grant a declaration.*

[41] In ***Feetum v Levy*** *[2005] EWCA Civ 1601, [2006] Ch 585 at para 82, [2006] 2 BCLC 102 Jonathan Parker LJ observed that things had "moved on" since the* ***Meadows*** *case and that declaratory relief as to the effect of a contract should not be refused on the ground that the Claimants were not parties to the contract (see para 81 of that judgment).*

....."

"Moore-Bick LJ:

[83] In ***Financial Services Authority v Rourke*** *[2002] CP Rep 14 the present Master of the Rolls, then Neuberger J held that the court had an unfettered power to grant declaratory relief whenever it is appropriate to do so, having regard to the need to do justice as between the parties and to whether to do so would serve a useful purpose.*

[84] In ***Feetum v Levy*** *[2005] EWCA Civ 1601, [2006] Ch 585 the Claimants were members of a limited liability partnership which had given a counter-indemnity to a third*

party as part of the arrangements for securing a substantial loan to the partnership. Acting under a power given by a debenture the third party had purported to appoint administrative receivers over the partnership who under their statutory powers had required the claimants to submit a statement of affairs and to comply with certain other requests. The Claimants sought a declaration that the appointment of the receivers was invalid because no event had occurred to cause the partnership's insolvency. The Defendants argued that the Claimants were not entitled to obtain such relief because the declaration concerned the rights of the LPP alone. Having referred to the ***Gouriet*** *case, the* ***Meadows*** *case,* ***In re S*** *and other authorities, Jonathan Parker LJ, with whom Sir Peter Gibson and Ward LJ agreed, rejected that argument, both because the Claimants were directly affected by the existence of any duty to comply with the statutory provisions and because it would not be right to refuse declaratory relief simply because the Claimants were not parties to the contract whose meaning they were seeking to have clarified. The court observed that things had moved on since the* ***Meadows*** *case.*

[85] The last case to which I need to refer is ***Rolls-Royce plc v Unite the Union*** *[2009] EWCA Civ 387, [2010] 1 WLR 318, in which the Court was asked by Rolls-Royce to declare whether it would be illegal under the* ***Employment Equality (Age) Regulations*** *2006 for it to include within a selection matrix for redundancy a length of service criterion that had been agreed with the union as part of two collective agreements. The court held by a majority that, although there was no immediate dispute between the*

parties, the point was not academic and that a decision would serve a useful purpose: see the judgments of Wall LJ (as he then was) at 332 E-333G and Arden LJ at p. 358H-359 C.

[86] Aikens LJ dissented, primarily because he considered that, since those who might be directly affected by the use of the length of service criterion were not before the court and would therefore not be bound by the decision, a declaration would serve no useful purpose. However, his judgment contains the following principles that he considered were to be derived from the earlier cases:

> *"(1) The power of the court to grant declaratory relief is discretionary.*
>
> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the Claimant does not need to have a present cause of action against the Defendant.*
>
> *(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*
>
> *(4) The fact that the Claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly 'moved on' from Meadows).*
>
> *(5) The court will be prepared to give declaratory relief in respect of a 'friendly action' or where there is an 'academic question' if all parties so wish, even on 'private law' issues. This may particularly be so if it is a 'test case', or it may affect a significant number of other cases, and it is*

in the public interest to decide the issue concerned.

(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.

(7) In all cases, assuming that the other tests are satisfied, the court must ask: Is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

[87] Although I am generally in agreement with that summary, I think, with respect, that para (2) is expressed somewhat too narrowly. In the ***Gouriet*** *case Lord Diplock himself recognized that the dispute could relate to rights that might come into existence in the future upon the happening of an event and in the* ***Mercury*** *case (which does not appear to have been cited to the court) the dispute did not directly concern the existence or scope of any private rights or obligations vested in the parties themselves. It concerned the correct interpretation of BT's licence, a document that stood in the realm of public rather than private law, but which was central to the negotiations between Mercury and BT.*

[88] In my view the authorities show that the jurisprudence has now developed to the point at which it is recognized that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings. That was certainly the view of the court in ***In re S*** *and it is also the clear implication of the*

*observations in **Feetum v Levy** and the **Rolls-Royce** case that things have moved on since **Meadows**. In the **Mercury** case it was not considered relevant that BT had rights under the licence and it was no bar to the proceedings that **Mercury** did not. To that extent the position is mirrored in this case, in which Tameside has obligations under the agreement but **Milebush** has no rights. I can see no reason in principle why the nature of the underlying obligation should be critical, although there may well be other reasons why in the particular case a declaration should not be granted. The most important consideration is likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose, and whether to do so would prejudice the interests of parties who are not before the court."*

51. In my judgment, the principles in ***Gurtner v Curtis*** are clearly distinguishable. In that case it was the insurer who wished to be joined, and made an application to be joined as a party. The Court therefore took into account the fact that the insurer was a party that would be affected financially and had an interest in defending the matter. Here the insurer does not want to be joined; indeed Saxon is applying to strike out the claim against it. Saxon wishes to have the matter dealt with as set out in the ***Law***, and in the usual course, where the third party's right to bring an action against the insurance company directly is contingent upon judgment being obtained against the insured. Saxon appears to have in fact exercised its contractual rights and is defending the claim brought against Mrs. Thompson.

52. My view is that Mr. Keeble is correct in submitting that the Plaintiff has no cause of action against the insurer at this time. Saxon has not even said that it is denying liability to indemnify Mrs. Thompson in respect of the Plaintiff's claim.

However, I must say that Ms. Dobbyn has very effectively explored the broader parameters of the remedy of a declaration that exists today. Thus, it does seem clear that even if there is no subsisting cause of action, even though the Plaintiff is not a party to the insurance policy, and even though the Plaintiff and Mrs. Thompson presently may have no vested right against Saxon before liability of Mrs. Thompson is established by a judgment, that is not an end of the matter. The relevant factors and considerations have to be examined closely.

54. At common law, the third party had no right to pursue the insurer directly. It is the ***Law*** that has allowed the third party to proceed against the insurer directly, and one of the conditions upon which this direct pursuit arises is that judgment has first to be obtained against the insured. If the Plaintiff does not succeed in establishing liability against Mrs. Thompson, then there would be no triggering of the indemnity coverage under the policy. Thus, whilst at this stage the Plaintiff may desire to obtain a declaration, such a declaration would have no useful purpose for Saxon. I would just add that although Mrs. Thompson pleaded guilty to the traffic offence of careless driving, her guilty plea would form part of the evidence to be considered at trial, alongside all of the relevant evidence, and does not lead to any presumption of negligence on her part.

55. There are also certain conditions that the ***Law*** sets out, for example, in section 15 (2)(b) where it is stipulated that no sum shall be payable by the Plaintiff on a judgment, unless the Plaintiff has given the insurer notice of the proceedings brought, either before, or within 30 days after the commencement of the proceedings. The Court has to have regard to the insurer's rights and interests also, and not just those of the third party.

56. It follows that on one possible outcome, if the Plaintiff fails to obtain judgment against Mrs. Thompson, there would have been little point or purpose to a declaration against Saxon. To have such an unnecessary declaration made would be a waste of the Court's scarce resources. There is no basis for the Plaintiff to fear about the three year limitation period, since this claim has been brought against Mrs. Thompson well within that period.

There is absolutely no foundation or merit in the concern that Saxon could contend that unless the Plaintiff has (i) reached an un-appealed judgment against Mrs. Thompson and (ii) commenced an enforcement action against Saxon by 27 December 2016, that such claim under the ***Law*** would be time-barred by this Law. Saxon cannot, and does not, take that position. Foster J 's judgment in ***Cole v NEM*** has made it very clear that the three year limitation applies only to the claim against the insured for damage arising from the accident, and not to the claim against the insurer after judgment is obtained against the insured.

57. Indeed, it seems to me, although it is not necessary for me to decide this point, that by virtue of section 30 of the ***Limitation Law,*** the Plaintiff would have six years to bring an action against Saxon in respect of any judgment obtained against Mrs. Thompson.

58. In my judgment, the granting of a declaration in these circumstances would be quite wrong, and is not the most effective way of resolving the issues raised. There are other options for resolving the issues, in the usual conventional way, of proceeding against the insured alone, and then if judgment is obtained if necessary suing the insurer on the judgment obtained against the insured - see paragraphs [40] and [86]-[88] of ***Milebush***.

59. To allow this matter to proceed and to grant declarations against insurers in these circumstances would to my mind potentially open up a floodgate of litigation against insurers, with attendant costs, and no doubt other commercial considerations as to the undesirability of having multiple law suits proceeding against such entities carrying on the business of motor insurance. As Neuberger J (as he then was) stated in ***Financial Services Authority v Rourke*** , referred to at paragraph [40] of ***Milebush***, the court should take into account what is just for all the parties[as opposed to one, or some]. Thus, whilst the Plaintiff has no doubt considered one possible outcome, the Court has to consider all the possible outcomes and consequences.

60. Notwithstanding the breadth of relief nowadays obtainable by declaration, therefore, in my judgment, it is clear that the claim against Saxon for a declaration in this case should not be entertained, and has no real prospect of success.

61. Even if the foregoing legal analysis of the statutory wording of the ***Law***, and the underlying principles involved in motor insurance and third party liability in respect thereof in this jurisdiction and in respect of declarations is flawed, this Court would not in my view be exercising its case management powers effectively if it were to allow Saxon to remain in the law suit.

62. In my view, Saxon is entitled to summary judgment against the Plaintiff on the basis that the Plaintiff has no real prospect of succeeding against Saxon for the relief sought. The Plaintiff's summons is therefore dismissed, and the Defendant's summons succeeds.

63. In her further submissions, Ms. Dobbyn had sought to argue that in the event that Saxon's application succeeded, the Court should make no order as to Saxon's costs "in prematurely preparing a Defence or any other unnecessary costs incurred at a time when its proposed joinder as a party was still pending before the court for approval".

64. However, this was a very curious approach by the Plaintiff. It seems to me, that in filing the Amended Writ of Summons and Statement of Claim naming Saxon as a Second Defendant, before, and instead of seeking the Court's approval, the Plaintiff was putting "the cart before the horse".

65. Further, it cannot be said that Saxon incurred unnecessary costs, since the filing of a Defence by Saxon occurred after an extended exchange of correspondence, in which Saxon's Attorneys sought (unsuccessfully) to engage the Plaintiff's Attorneys in a consensual dismissal of the action against Saxon. Further, O. 14 r. 12, unlike O.18 r.19 which deals with Striking Out, requires a Defendant to have filed a Defence before it can make an application for summary judgment.

66. Costs are awarded to Saxon on the Plaintiff's summons to be taxed if not agreed.

67. Although Saxon sought indemnity costs in respect of its summons, in my view it is not appropriate to order costs on an indemnity basis. Costs are awarded to Saxon on its summons on a standard basis, to be taxed if not agreed.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT