Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2005 HCV 05031

BETWEEN	*MAURICE ANDERSON*	*CLAIMANT*
A N D	*UNITED GENERAL INSURANCE COMPANY LIMITED (now known as Advantage General Insurance Co. Ltd.)*	*DEFENDANT*

CONSOLIDATED WITH

CLAIM NO. 2004 HCV 2932

BETWEEN	*KYMAI BROWN*	*CLAIMANT*
A N D	*UNITED GENERAL INS. CO. LTD. (now known as Advantage General Ins. Co. Ltd.)*	*DEFENDANT*

Appearances

Mr. Ainsworth Campbell for the claimants.

Mrs. A. Walters-Isaacs for the defendant.

Heard: November 25, 2008 and September 23, 2009

P.A. Williams, J.

On the 25th of March 1997 Maurice Anderson and Kymai Brown, the claimants, were walking along the Bog Walk main road in Saint Catherine when they were hit by a motor vehicle licence number PP159R owned and driven by Daulton Cole. The motor vehicle had been insured by the United General Insurance Company Limited, the

defendant (as it was then known) effective the first of February 1997 to the thirtieth of October the same year.

The claimants sued Mr. Cole and both their actions were uncontested resulting in their obtaining default judgments against him.

Final judgment was obtained for Mr. Anderson the 20th of May, 1998 in the amount of $284,045.35 with interest and cost.

Final judgment was entered for Mr. Brown on the 22nd of May, 2003 in the amount of $5,018,612.35 inclusive of interest and cost.

Having failed to get their judgments satisfied by Mr. Cole, the claimants sought to enforce these judgments against the defendant as Mr. Cole's insurers.

The defendant has refused to pay the respective judgments. Originally they raised three grounds by which they sought to avoid payment but at trial they abandoned two and relied solely on their assertion that there had been a breach of contract by Mr. Cole and thus they were under no obligation to honour any judgment obtained against him.

This matter therefore stands to be resolved on the question of whether the defendant is entitled to avoid the policy of insurance pursuant to the provisions of the Motor Vehicle Insurance (Third Party Risk) Act.

The relevant provision to be construed is section 18 (1) which provides inter alia:-

> If after a certificate of insurance has been issued under subsection (9) of section 5 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 subsections (1) (2) and (3) of section 5 (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 the provisions of this section pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability including amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment.

It is of course to be recognized that this provision existed at the time this action was commenced and the section has been since amended namely in 2005. The amendment related to the sums to be paid by the insurer on the judgment.

It is not disputed that Mr. Daulton Cole had duly completed a motor proposal form around the 31st of October 1996. The Legal Motor Superintendent of the defendant- Lorraine Moore gave evidence that Mr. Cole entered into a contract of insurance on that date. She stated that the defendant agreed thereby to insure the Lada motor vehicle registered PP159R subject to the several terms and conditions of the policy.

The motor proposal form and the Certificate of Insurance are exhibited and relied upon by the defendant. On the motor proposal form they point to the question at box 13 which ask- "Is the vehicle to be driven by any one other that the proposer?

Instead of a name and description of any such driver, appearing

in answer to this question is the response "any driver approved by U.G.I".

As a follow-up to this question it is stated in this proposal form that "For PPV and CMC vehicles a driver application must be completed.

Mr. Cole had clearly indicated that this vehicle was for use as a "PPV".

Also to be noted from this form is that in response to the question posed at box 14: how long have you held a valid drivers licence, inserted in the area immediately beside this question is, "insured will not drive"

The certificate of insurance issued states that the persons or classes of person entitled to drive was "any driver approved by the company". The provision to this section seeks to recognize the need for compliance with other relevant laws.

Ms. Moore was permitted to amplify her witness statement/evidence-in-chief and described the procedure applicable to become an approved driver.

This driver would have to fill in the requisite application form and submit a driver's licence to be checked to verify he is over twenty-five years of age with a maximum driving experience of three (3) years. Once it is proven that the person can read and has no adverse driving experience i.e. accidents, a letter of approval to drive the insured vehicle would be issued.

She pointed out that if the proposer is to be the driver such a letter would not be required as he would then only need to be noted in the schedule as a driver.

She disclosed that there had been an approved driver for this Lada motor car – one Fredrick Grey. Under cross-examination, she admitted that this fact had not previously been disclosed to the claimants or their attorneys.

Mr. Campbell for the claimant urged the court that the defendant should be forced to honour these policies which were issued to benefit third parties such as these claimants.

There is no dispute that the certificate was valid on the date of the collision and based on this Mr. Campbell submitted the defendant should now be prevented from claiming any breach.

He considered the sections of the proposal forms that the defendant seeks to rely upon as outlined earlier. He opined that as regards box 13 the word "other" is of great significance in that its usage in this context means the insured did not need to get approval from the insurers to drive his motor car.

As regards to box 14 – he notes that the insertion "the insured will not drive" is not initialed and in any event seems ambiguous. He submitted that since the actual question remained unanswered, it can only be construed that the defendant and its agent did not require the answers at the time proposal was made. He opined that if this was an oversight or calculated omission the third party – the claimants – cannot be penalized.

He acknowledged the late assertion that there was indeed an approved driver but queries why he had not been named in the proposal form.

He further submitted that there is no sanction set out in the proposal and/or certificate if someone not approved by the insurer i.e., the defendant, the claimant third party would be denied the protection the law affords him. He also argued that there is no evidence that the defendant forfeited the policy of insurance and any defect in the relevant document which may allow for an indemnity from the insured cannot be vested on the claimant – the third party.

In conclusion he submitted that there are no particulars of breach of any contract pleaded or evidence supplied neither was an amendment sought or made.

This final submission of Mr. Campbell needs to be considered first. In its defence filed from February 2, 2006 in the claim brought by Anderson, the defendant outlined the reasons for it refusal to pay the judgment sum. The reasons outlined are, substantially as discussed above, arising from the information contained in the motor proposal form and the certificate of insurance and the policy schedule. It is true that they did not expressly state that they were relying on a breach of contract as their defence but it can be inferred from how the defence is stated.

They stated that "the insured, Daulton Cole who was the driver of the vehicle at the material time was not an authorized driver under the terms of the contract on insurance" and further they averred to the fact that he had expressly represented that "the insured will not drive"

In its amended defence in the claim filed by Mr. Brown dated the 21st of February 2006 the defendant asserted that from November 11, 1998 they had written to the claimant's attorney advising of their reason for refusing to pay any monies of the policy. They outlined the correspondence that served to give the claimant and/or his attorney sufficient notice of their intention to breach Cole's policy.

It is expressly stated that they were entitled to avoid liability for, inter alia, breach of contract.

The submission by Mr. Campbell that this defence was never pleaded no evidence supplied is without merit.

The question ultimately to be determined is whether there was in fact a breach which entitled the defendant to avoid liability pursuant to section 18 (1) of the relevant Act.

The case of the Administrator General **(Administrator Estate Hopeton Mahoney deceased) v. National Employees Mutual Association (1988) 25 J.L.R. at** page 459 provides useful guidance.

Mr. Justice Gordon at page 477 said:-

> "The frequent use of the words liability "covered by the terms of the policy" recognizes that the policy of insurance embodies a contract between the insured and the insurers and this policy can contain terms limiting the user of the vehicle and providing for avoidance of liability if the user does not conform to the terms stipulated in the contract'.

This case re-enforced the principle that a third party in any action brought under section 18 of the Motor Vehicle (Third Party Risk) Act will not be able to recover sums payable by virtue of a judgment obtained against an insured unless the insurer's liability is covered by the policy of insurance.

In the instant case the defendant maintains that only persons approved by them to drive the motor vehicle insured would be covered by the policy.

The Certificate of Insurance has no named driver – not even Mr. Cole was so named. Mr. Cole accepted a policy which defines and clearly limits the category of persons entitled to drive.

The defendant has provided what they describe as the evidential basis on which it is to be found that Cole was not in fact an approved driver under the policy of insurance.

The proposal form clearly forms the basis for the terms of the contract between the insured and the insurers – the policy.

Hence the answers and/or "non-answers" to the question posed on the proposal form must be seen to provide the requisite information for the drafting of the policy. Ultimately the defendant issued to their insured a policy which does not name him a driver but calls for drivers to be approved by them.

For there to be the enforcing of the judgments obtained by the claimants the liability would have to be one covered by the terms of the policy. This policy did not cover persons driving the vehicle who had not been approved by the defendant. Hence judgment cannot be entered against them.

Order

Judgment on these claims for the defendant with costs to be taxed if not agreed.