[2015] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 29/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**ADVANTAGE GENERAL INSURANCE COMPANY LIMITED**	**APPELLANT**
AND	**LLOYD HEMAN**	**RESPONDENT**

Kevin Powell instructed by Michael Hylton and Associates for the appellant

Jeffery Daley instructed by Betton-Small and Co for the respondent

18 June 2013 and 26 February 2015

PANTON P

[1] I agree with the submissions made on behalf of the appellant herein that-

(1) the policy of insurance does not cover the respondent; and

(2) the learned judge misinterpreted the reason advanced by the appellant in contending that it was not liable.

I have read the judgment of Dukharan JA. I agree with it and have nothing more to say. In the circumstances, I am of the view that the appeal ought to be allowed and costs both here and in the court below awarded to the appellant.

DUKHARAN JA

[2] The respondent Lloyd Heman was seriously injured in a motor vehicle accident on 30 December 2005, which claimed the life of the driver. The vehicle was owned by Claudia Palmer who was insured by the appellant Advantage General Insurance Company Limited (AGIC). On 21 January 2008, the respondent's attorney wrote to the appellant requesting compensation for the respondent. The appellant, by letter dated 15 February 2008, refused same on the ground that, contrary to the terms of the insurance policy with the insured, the driver at the time of the accident had a driver's licence for less than three years.

[3] On 12 May 2008, the appellant applied to the Supreme Court for a declaration that, pursuant to the terms of the insurance policy, it was not entitled to indemnify the insured for any damage or loss sustained from the motor vehicle accident which took place on the date in question because of the aforementioned reason, and/or in the alternative, that a declaration under section 18(3) of the Motor Vehicles Insurance (Third-Party Risks) Act, it is entitled to avoid the insurance policy as a result of non-disclosure of a material fact. This order was obtained on 20 January 2010. It is to be noted that the respondent was not aware of the application nor the subsequent order. The court made the following declaration:

> "[AGIC] of 4-6 Trafalgar Road, Kingston 5 in the parish of St. Andrew, is granted a declaratory judgment under Part 8.6 of the Civil Procedure Rules 2002, that pursuant to Section IX (1) (ii) (a) of the Motor Vehicle Policy, that it is not liable for loss, damage or liability caused or sustained in respect of the motor vehicle accident on 30th day of December 2005 involving Toyota Corolla licensed PC 2194, nor is under any duty to indemnify the Defendant, **CLAUDIA PALMER** of Comfort Hall District, Walderston P.O. in the parish of Manchester, or to satisfy any judgement [sic] obtained against the said Defendant in relation to a motor vehicle accident for at the time of the accident the said insured vehicle was being driven without having the required licence for at least three years."

[4] The respondent commenced proceedings for damages for personal injuries on 6 June 2008 and obtained judgment in his favour on 3 November 2009 at an uncontested assessment of damages hearing. The judgment was subsequently served on the appellant on 19 November 2009. The appellant again rejected liability on the same basis that there was a breach of the policy.

[5] The respondent then filed a suit on 2 February 2010 against the appellant for failure to satisfy the judgment. The matter came up before Sinclair-Haynes J on 10 February 2011, where the appellant disclosed the declaratory judgment to the court and the respondent for the first time, claiming res judicata. On 11 February 2011, the court ruled in favour of the respondent and made the following orders:

> "i. By the Declaration, that the Defendant's refusal to compensate the Claimant amounts to a breach of statutory duty under Section 18(1) of the MOTOR VEHICLES INSURANCE (THIRD PARTY) RISKS [sic] ACT.

ii. By Declaration, that the Defendant is bound to honour the Claimant's claim up to the policy limit sum for its insured whose motor vehicle was involved in an accident in which the Claimant was seriously injured, notwithstanding that the Defendant is claiming breach of its policy by its insured.

iii. That the Claimant be awarded for breach of statutory duty in the sum of the Defendant's policy limit, proof of which is to be submitted to this Honourable Court.

4. An order that interest at the commercial rate of 9% be awarded to the Claimant pursuant to the Law Reform (Miscellaneous Provisions) Act from the date of Judgment in Claim No. 2008 HCV 03460 being the 3rd November, 2009 until payment.

5. Cost [sic] to the Claimant to be agreed, if not taxed."

[6] It is against this background that the following amended grounds of appeal were filed on 12 February 2013.

"a. The learned judge erred in law by failing to take into consideration the provisions of section 18(1) of the Act and to hold that the liability that was the subject of Claim No. 2008 HCV 03460 was not a liability covered under the terms of the insurance policy between the Appellant and the insured.

b. The learned judge misdirected herself on the law and erred by finding that Claim No. 2008 HCV 02480 was not decided on its merits because neither the insured nor the Respondent was present.

c. The learned judge erred in law by failing to recognise that that [sic] Claim No. 2008 HCV 02480 was by fixed date claim form which could not be determined otherwise than on its merits.

d. The learned judge misdirected herself on the law and erred in determining that the Declaration granted in

Claim No. 2008 HCV 02480 was of no effect because the judgment in Claim No. 2008 HCV 03460 was first in time.

e. The learned judge misdirected herself on the law and erred in determining that the Declaration granted in Claim No. 2008 HCV 02480 was of no effect because the judgment in Claim No. 2008 HCV 03460 was obtained without notice to the Respondent.

f. The learned judge erred in finding that the declaration granted in Claim No. 2008 HCV 02480 was made under and pursuant to section 18(3) of the Act.

g. The learned judge misdirected herself by finding that on proper exercise of the overriding objective that the Respondent did not have to apply to set aside the Declaration granted in Claim No. 2008 HCV 02480.

h. The learned judge erred by finding that Rule 9.6 of the Civil Procedure Rules was applicable to a consideration of the principles of Res Judicata and the Appellant was required to comply with that rule.

i. The learned judge erred by finding on the evidence before her that the Appellant was seeking to avoid the policy based on an isolated act of infringement of the policy based on the insured operating the vehicle as a carriage for hire.

j. The learned judge erred in awarding commercial interest on the judgment debt in Claim No. 2008 HCV 03460."

[7] The 10 grounds of appeal filed may be conveniently considered as raising the following issues:

(a) Whether the appellant was entitled to avoid liability under the terms of the Motor Vehicles (Third Party Risks) Act ("the Act").

(b) Whether the court below could have properly made the orders it made given that the declaration made in the declaration claim was not set aside.

(c) Whether the court below could have properly awarded the respondent commercial interest on his claim.

Whether the appellant was entitled to avoid liability under the Act

[8] Counsel for the appellant Mr Powell, submitted that the issue for determination was whether the liability incurred by the insured on the occurrence of the accident in which the respondent was injured, was a liability covered by the terms of the insurance policy between the insured and AGIC, so as to render AGIC liable to a claim under section 18(1) of the Act. Counsel contended that, under this section, AGIC could only be held liable for damages sustained by the accident in question if it could be proved that the vehicle was covered by its policy. It was submitted that, since at the time of the accident, the policy was breached by having the motor vehicle being operated by a person who did not possess the requisite driver's licence, the policy between itself and the insured was in effect nullified. It was further submitted that on a proper construction of section 18(1) of the Act, a third party could not recover sums payable under a judgment against an insured on the basis of that section, unless the liability resulting in the judgment against the insured is a liability covered by the policy of insurance. If a vehicle was used outside of the scope of the insurance policy then no liability exists under that policy and section 18(1) does not apply.

[9] It was also counsel's submission that Sinclair-Haynes J approached the issue on the basis that the appellant's case was that the vehicle, which was involved in that accident with the respondent, was being operated as a "carriage for hire" at the material time and that this was the breach of the insurance policy on which the

appellant was relying to avoid liability under the Act. It was the finding of the learned judge that there was no evidence suggesting that the vehicle was being used as carriage for hire and consequently the appellant could not avoid the policy and was therefore liable to the respondent under section 18(1) of the Act. Counsel contended that the learned judge misconstrued both the appellant's case and the evidence that was before her. The evidence, he argued, indicated that the appellant refused to indemnify the insured because there was a breach of the insurance policy between them, in that, the driver involved in the accident did not have a driver's licence for three years or more as required under the policy. Counsel further submitted that whether or not the vehicle was being operated as a carriage for hire was not an issue and it was not the basis on which the appellant sought to avoid liability under the Act.

[10] Counsel, in conclusion, submitted that on the issue above, the appeal should be allowed. Counsel, in support of his submissions relied on the following cases: **The Administrator General (Administrator Estate Hopeton Samuel Mahoney, deceased) v National Employers Mutual Association Limited** (1988) 25 JLR 459, **Conrad McKnight v NEM Insurance Company (Ja) Limited** Claim No 2005 HCV 3040, delivered 13 July 2007 (unreported), **Leymon Strachan v The Gleaner Company Limited and Anor** 2005 UKPC 33.

[11] Mr Daley, for the respondent, in his written and oral submissions, submitted that under section 18(1) of the Act, the insurer is required to honour judgments obtained by a third party against its insured, even if it is exempted from covering the insured

himself or herself. Counsel further contends that section 18(2) of the Act outlines the exceptions under which an insurer must prove before it can claim exemption from honouring a judgment obtained by a third party. Counsel used the case of **Conrad McKnight**, differentiating it from the instant case, by stating that the insurer in the former had raised a clear defence and had rightly sought a declaration from the court of its right to avoid liability.

[12] Counsel further contended that a distinction should be made where an insurer claims that there was no insurance coverage at the time of the occurrence in question because of an act or omission of its insured, as opposed to the claim that there was a policy in place but it was breached by the insured or its agent. Counsel contends that in the first case, if there was no coverage, then the insurer may be exempted from the coverage granted under an exception under section 18(2), while in the latter event, a breach of a condition of an insurance policy merely amounts to a breach of contract between the insurer and its insured, but does not exempt the insurer from fulfilling its statutory obligations to honour the judgment of a third party.

[13] Counsel relied on the case of **The Administrator General v National Employers Mutual Association Limited** where it stated that, third parties would still be protected in cases where an insurer could avoid or cancel a valid policy for a breach. Counsel further submitted that in the instant case, the declaratory judgment obtained by the appellant speaks to a breach of policy and not that the vehicle was being used

for any purpose for which it was covered. It cannot therefore release the appellant from its statutory liability.

[14] The respondent also relied on the Bahamian case of **Eagle Star Insurance Company Ltd v Provincial Insurance Plc** (1993) 42 WIR 14 to emphasize the appellant's liability. In this case, it was stated that it was not the insured that was claiming liability of the insurer, but a third party with whom neither insurance company had a contractual relationship, therefore concluding that although liability may not have arisen under contract, it arose under statute.

Analysis

[15] The main issue is whether the appellant was entitled to avoid liability under section 18(1) of the Act. The Act states as follows:

> "18.-(1) 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 the amount covered by the policy or the amount of the judgment, whichever is the lower, 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 enactment relating to interest on judgments.

(1A) The right of payment under subsection (1) shall not be limited by reference to-

(a) the minimum liability coverage required under subsection (1), (2) or (3) of section 5;

(b) any limitation of liability to claim specified in subsection (4) of section 5.

(2) Subject to subsection (1A), no sum shall be payable by an insurer under the foregoing provisions of this section –

(a) liability for which is exempted from the cover granted by the policy pursuant to subsection (4) of section 5; or

(b) in respect of any judgment, unless before or within ten days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(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 or 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 either-

(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; or

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

(3) No sum shall be payable by an insurer under the foregoing provisions of this section, 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 as aforesaid in an action shall not thereby become entitled to the benefits of this subsection as respects any judgment obtained 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 said 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.
>
> (4) …
>
> (5) …
>
> (6) …"

[16] Section 18(1) and (2) was the subject of consideration by this court in **The Administrator General v National Employers Mutual Association Limited**. In that case, the Administrator General, representing the estate of the deceased driver who died in a motor vehicle accident successfully sued the driver of the vehicle involved in the accident. Having being unable to satisfy the judgment against the driver, the Administrator General brought an action pursuant to section 18(1) of the Act against the respondent, the driver's insurers. It was the contention of the insurers that they had no liability under the Act, on the ground that the policy of insurance entered into with the driver, exempted it from liability from any loss suffered while the vehicle was being used for hire or reward, and that the accident giving rise to the claim took place while the vehicle was being used for that purpose. At first instance, the court found for the insurers on the basis that the vehicle was being used for hire and reward contrary to the purposes specified in the insurance policy. The Administrator General appealed

on the ground that it was unreasonable for the judge to have found that the vehicle was being used for hire and reward, given the inconsistencies in the evidence.

[17] This court considered how section 18(1) should be applied as a matter of law. In construing the section, Forte JA (as he then was) held that:

> "The sub-section requires the following condition precedent to the third party's right to recover from the insurers –
>
> (1) A certificate of insurance must have been issued by virtue of section 5 (4);
>
> (2) Judgment in respect of any such liability as is required to be covered by a policy under section 5 (1) (b) has been obtained against the insured;
>
> (3) The liability must be a Liability covered by the terms of the policy.
>
> It is conceded that both (1) and (2) were fulfilled in this case. The question therefore is whether or not the liability was one which was covered by the terms of the policy …. In my opinion, unless it can be shown that the liability was one which was covered by the terms of the policy, the section cannot avail the appellant."

Forte JA continued:

> "… If the use to which the vehicle is put is contrary to the contract of insurance between insured and insurer, then it is my view that its user is outside the scope of the policy, and the vehicle is therefore not insured for that particular user. Any liability arising out of such user would therefore not be covered by the terms of the policy. Indeed, any such user would be subject to a criminal prosecution by virtue of section 4 of the Act – in that it is an offence to use or permit to be used a motor vehicle on the roads "unless there is in force in relation to the USER of the vehicle … such a policy of insurance."

[18] It can be gleaned from this case that a third party, in an action brought under section 18(1) of the Act, cannot recover the sums payable by virtue of a judgment obtained against an insured, unless the insurer's liability is covered by a policy of insurance, and if it can be established that the vehicle was being used for a purpose outside of the scope of the existing policy of insurance, then no liability would exist under that policy and the third party could not recover.

[19] The case of **Conrad McKnight v NEM Insurance Company Limited**, which was a case at first instance, was referred to by both the appellant and the respondent. In this case, McDonald-Bishop J had to decide whether the defendant, an insurance company, was in fact liable to the claimant against an insured of the defendant under section 18(1) of the Act. In considering the issue, the learned judge noted that an insurer and its insured were free to decide on the terms and conditions of an insurance policy, subject to the law of the land. Sections 8(1) and 8(2) of the Act outlined certain statutory restrictions to be considered when deciding on the terms of an insurance policy. As McDonald-Bishop J found, the insurer was entitled to avoid liability as the driver at the time of the accident was not authorised to operate the vehicle, thus rendering the policy inoperative. The learned judge further stated that in allowing the motor vehicle in question to be operated outside the terms of the policy, the insured was in effect, allowing it to be used without a policy that insured him.

[20] In the instant case, the appellants had stipulated in the insurance policy that it would only insure the vehicle according to the terms stipulated. The respondent claims that the use of an unauthorised driver amounts to a mere breach of conditions rather

than making the policy itself inoperative. This breach, however, in my view, goes to the heart of the policy. The appellant's defence of the motor vehicle being operated by an unauthorised driver at the material time is also, in my view, a clear defence.

[21] The appellant's contention that the learned judge, in arriving at her conclusion, took the wrong things into consideration in relation to the use of the vehicle has some merit. In her judgment, Sinclair-Haynes J stated that the appellant's argument was that the motor vehicle was being operated as a "carriage for hire" at the material time. However, as the appellant stated in their submission, their contention ab initio was that the policy with the insured was breached as the motor vehicle was being operated by a driver without the stipulated driver's licence. In my view, that was the main issue, and not whether the vehicle was being operated as a carriage for hire.

[22] As unfortunate as this may be for the innocent third party, this should not be a reason to find the insurers liable for injuries and damage sustained when the evidence shows that the policy had been breached at the material time. Once the insured is found not to be covered by the terms of the policy, the insurer is absolved from liability even to third parties.

[23] In my view, the appellant company is not required to indemnify the respondent and is therefore exempted from cover under section 18(1) of the Act. In my view, the appellant succeeds on this issue.

[24] Based on my finding on the above issue, it then becomes unnecessary to discuss the other issues. I would allow the appeal with costs to the appellant to be taxed, if not agreed.

LAWRENCE-BESWICK JA (AG)

[25] I have read in draft the judgment of Dukharan JA and agree with his reasoning and conclusion.

PANTON P

ORDER

The appeal is allowed.

The judgment delivered on 11 February 2011 is hereby set aside.

Judgment is entered for the appellant.

The costs of the appeal and in the court below are awarded to the appellant, such costs to be agreed or taxed.