JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 91 OF 2004

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**NEWTON BENTLEY**	**APPELLANT**
AND	**UNITED GENERAL INSURANCE COMPANY LIMITED**	**RESPONDENT**

Miss Carol Davis for the Appellant

Mrs. Andrea Walters-Issacs instructed by Palmer and Walters for the Respondent

7th, 8th, 9th, 10th, November 2005 & 7th April 2006

HARRISON, P.

I have read the judgment of Cooke, J.A. and I agree with his reasoning. The appeal ought to be dismissed.

COOKE, J.A.

1. On the 4th May 2000 the appellant, Newton Bentley completed a Motor Proposal Form with a view to obtaining insurance coverage for his Honda Civic Motor Car from the respondent company. On that same day he was issued a cover note which showed that the appellant had paid the annual premium of

$45,990.00 plus tax. At this time the appellant did not have a driver's licence. On the proposal form, Herbert Gayle was stipulated as an additional driver with respect to the motor car. The estimated value of the car was stated by the appellant to be $620,000.00. All this took place at the respondent's offices on Trafalgar Road in New Kingston.

2. On the 4th June 2000, while Herbert Gayle was driving the appellant, there was an accident in which the Honda Civic "ran off the road". The motor car was extensively damaged and the appellant received serious injury. When the respondent company refused to settle the appellant's claim, he filed a suit on the 2nd October 2001 (subsequently subject to amendment). In this suit it was sought to recover damages for (a) replacement cost of the Honda Civic; (b) personal injury; and (c) lost personal effects and loss of earnings consequent upon his injuries. These claims were based on the appellant's contention that the respondent was in breach of contract as "the Defendant insured the Plaintiff comprehensively against the loss and damage to property and bodily injury arising by reason of accident in relation to the Plaintiff's Honda Civic motor vehicle" (see para. 1 of the Statement of Claim).

3. Originally, the respondent resisted the appellant's claim on two grounds. Firstly, it was asserted that Herbert Gayle was not driving the Honda Civic at the time of the accident. Secondly, it was averred "that its [i.e. respondent's] refusal to pay the Plaintiff the sums claimed is based, with respect to the claim for bodily

injury and loss or damage to personal effects on the fact that his said Policy does not extend coverage to injuries sustained by the Plaintiff or to losses and expenses consequential thereto" (see para. 7 of the Amended Defence).

4. It would seem that the respondent resiled from its position in respect of the first ground (para. 3 of this judgment) because on the 29th July 2003 there was a consent judgment for the appellant in these terms:

> "1. Judgment for the Plaintiff against the Defendant in the sum of $573,000.00 plus interest at 6% per annum from 4th June, 2000 to 29th July, 2003.
>
> 2. The above relates to $569,000.00 for the cost of the vehicle and $4,000.00 with respect to wrecker fee. Liberty is given to the Plaintiff and the Defendant to put forward in case management trial their respective contentious [*sic*] for the interpretation of the policy of insurance (if any) with respect to all amounts not covered aforesaid.
>
> 2. (*sic*) Matter otherwise adjourned to 13th October, 2003 for 1 hour case management.
>
> 3. Costs to the Plaintiff in the assessment agreed at $40,000.00."

5. No policy was issued to the appellant. The case was conducted in the court below, as here, on the basis that the proposal had been accepted by the respondent and that the proposal form contained the terms of the contract of insurance between the parties.

6. The debate in this case principally concerns the significance of what is contained in what has been conveniently called "box 25". This is set out below, as well as "box 26" since the latter was sought to be utilized by the appellant as material to support his submissions. What is contained in these two boxes are to be characterized as terms of the contract of insurance between the parties.

25. EXTRA BENEFITS (ON REQUEST AT ADDITIONAL PREMIUM)

MANSLAUGHTER	WINDSCREEN	MEDICAL EXPENSES	PERSONAL ACCIDENT	INCREASED T/P LIMITS	HURRICANE & EARTHQUAKE	RIOT, CIVIL COMMOTION
$15,000.00	$10,000.00	$1,500.00	1,000.00 Units	YES / NO	YES / NO	YES / NO

26. Indicate Limits of Liability required:-

□ A. Standard Limits				□ B. INCREASED LIMITS		
	PERS. INJURY	PROP. DAMAGE	PASS. LIAB. (U/DRIVE ONLY)	PERS. INJURY	PROP. DAMAGE	PASS. LIAB (U/DRIVE ONLY)
Any claimant	$250,000	$50,000	$5,000	$750,000	$250,000	$50,000
Series of Claims	$1,000,000	$250,000	$50,000	$2,000,000	$500,000	$250,000

7. The trial commenced on the 18th July 2004, but was adjourned to the following day to facilitate the provision of a further witness statement from Lorraine Moore, a witness for the respondent. She bears the title of Motor Claims Superintendent of the respondent company. Paragraph 6 of this further statement said:

> "6. Insofar as his personal injury claim is concerned the Defendant acknowledges that Mr. Bentley is entitled to the sum of Two Thousand Five Hundred Dollars ($2,500.00) as contracted for in the said Proposal Form."

This paragraph 6 of Moore's further statement had the effect of dramatically reversing the stance of the respondent in that initially there was a denial of any

coverage in respect of "bodily injury" (see para. 3 *supra*). So the respondent then admitted that there was coverage in respect of "bodily injury", but such coverage was limited to the sum of $2,500.00. Not surprisingly, counsel for Bentley applied for judgment on an admission. The learned trial judge ruled in his favour. However, two unanswered questions remained. Did the contract of insurance, properly construed, have a term that limited the insured to the receipt of no more than $2,500.00 in respect of injuries sustained? Did this contract cover loss for personal effects arising from an accident in which the Honda Civic was involved? Sykes J., the presiding judge came to the conclusion that there was a limit of $2,500.00 as regards "Medical Expenses" and "Personal Accident" in "box 25". He further decided that "box 26" was relevant only to third party claims. The aggrieved party now appeals.

8. The grounds of appeal were:

> "(i) The Learned Trial Judge erred in construing the proposal form as limiting personal injury to $2,500: $1,500 for medical expenses and $1,500 for medical expenses (*sic*).
>
> (ii) The Learned Trial Judge erred in assessing damages at $2,500.
>
> (iii) The Learned Trial Judge erred in permitting the Defendant in the assessment of damages to rely on a Defence that there was a limitation of the contract, because the issue had not been pleaded in the Defendant's Defence or set out in the pre-trial memorandum.

(iv) The Learned Trial Judge erred in finding that the figures inserted in Box 26 of the Proposal Form represented pay out limits.

(v) The Learned Trial Judge erred in that he failed to appreciate that the policy of insurance was for comprehensive coverage, and on the proper construction comprehensive coverage would include both personal injury and property damage occasioned by a motor vehicle accident.

(vi) The Learned Trial Judge erred in his construction of box 25 and box 26 of the proposal form.

(vii) The Learned Trial Judge erred in that he failed to interpret box 25 and 26 of the proposal form contra proferentem, the said proposal form being the document of the insurer.

(viii) The Learned Trial Judge erred in that he failed to consider that as a passenger in the motor vehicle the Claimant was in fact a third party and entitled as a third party to insurance coverage for his injuries and personal effects."

9. Ground (v) is the fulcrum of the challenge to the decision of the court below. All the other grounds except for (iii) which was not pursued, and (viii) which will be dealt with subsequently, are born of ground (v), and are contingent on the success or failure of this ground.

10. On the proposal form the appellant was given a choice of five types of cover. They were: Comprehensive; Own Damage; Third Party; T. P. Fire and Theft; and Act. He chose to have comprehensive cover.

Miss Davis submitted:

> "That the Learned Trial Judge erred in that he failed to properly construe the contract between the parties. It is submitted that on a proper interpretation the intention of the parties was that the Respondent would insure the Appellant 'comprehensively' with respect to all risks arising from the private use of his motor vehicle. In this context 'comprehensive' cover is equivalent to all risk cover in the marine insurance cases, and the Appellant is entitled to recover so long as the loss results from the accident, as it clearly does in this case."

To buttress this submission there was resort to the dictionary meaning of comprehensive as "comprising much; Of large content or scope". She further relied on a passage to be found at p. 185 of a work by Robert Mehr entitled *Principles of Insurance*. This reads:

> "Several uses of the term 'comprehensive' are noted in insurance. A comprehensive policy covers under a single insuring agreement all exposures within the general scope of the contract, except those specifically excluded. The comprehensive automobile liability policy covers liability arising from the ownership, maintenance or use of *any* automobile, unless otherwise excepted."

Accordingly, the insurer had provided coverage "for all damage that would arise from all perils that are reasonably foreseeable with respect to the use of the motor car".

11. As earlier indicated, Sykes J. declined to accept the view propounded by the appellant as to the effect of the appellant having chosen comprehensive insurance in respect of his Honda Civic. His reasons as expressed in his judgment were, *inter alia*:

> "(2) Box 25 is captioned 'EXTRA BENEFITS (ON REQUEST AT ADDITIONAL PREMIUM)'. Extra benefits here must mean all the benefits of comprehensive insurance and *something more*. It seems that this *something more* would be indicated by either by ticking or marking in some way, the relevant spaces in box 25. In this case the extra benefits were identified by figures being written under the agreed extra benefits. Here the identified and agreed extra benefits were: manslaughter, windscreen, medical expenses and personal accident.
>
> (3) The natural and ordinary meaning of the caption of box 25 is that the claimant would be entitled to the extra benefits below each head if and only if he paid additional premiums. Their bracketed words were placed there to make it clear that the additional benefits would only be available if the purchaser was willing to pay more. In other words the caption is saying, '*Mr. Bentley, UGI will pay you these extra benefits only if you agree to pay additional premium.*' The document could not be interpreted otherwise. If the words were something like 'on request at these premiums' then the claimant's interpretation might have prevailed."

12. I cannot fault the analysis of the learned trial judge. The appellant contended that "box 25" was otiose, in that it was impermissible for the insurer to seek to whittle down in any way benefits of comprehensive coverage. I do not agree. "Box 25" was a term of the contract. It is necessary to construe this term within the "general scope of the contract" (see excerpt from Mehr's work (para. 10 *supra*)). In my view, the appellant, by agreeing to "Extra Benefits" is a recognition that "comprehensive" did not include those "Extra Benefits". This is how a reasonable person would construe "box 25" within the context of all the

other terms in the contract. "Box 25" was further said to be of no effect because under the heading "Personal Accident" was the stipulation "1000 Units". It was argued that since what "units" meant was uncertain and unascertainable, therefore "box 25" in its entirety should be of no regard. If this submission were to succeed, success may have disastrous consequences for the appellant. In this case, "comprehensive" does not embody the breadth of undertaking by the insurer as the appellant says. There is no evidence that in the prevailing conduct of business in motor car insurance "comprehensive" insurance is not subject to contractual terms of agreement. Therefore, if the term in "box 25" were to be regarded as uncertain in its entirety, it could result in the conclusion that the parties never agreed on an essential term. Therefore, there was no contract of insurance. The appellant would then have to return the sum obtained under the consent judgment (para. 3 *supra*). Notwithstanding, the appellant need not fear.

13. The learned trial judge, without giving any basis for so doing "took" the word "units" in "box 25" "to be referring to dollars". Perhaps he was led to that assumption because the figures in the other compartments of the box had dollar signs. This assumption was not totally unjustified. The main purpose of this contract of insurance was to provide coverage in respect of damage to the Honda Civic and for third party claims, as is required by law. "Extra Benefits" means what it says. I am of the view that the term in "box 25" pertains to a subsidiary purpose. There has been agreement on the essence of the contract. I am mindful of the submission of Miss Walters that in the circumstances of the

present case, the compartment in relation to "Personal Accident" could be properly severed from the rest of the contract, as being unintelligible. That is because there is no evidence within the contract from which the meaning of the word "units" is explicable. No authority was cited. However, in the preparation of this judgment I encountered ***Nicolene Ltd v Simmons*** [1953] 1 All E.R. 822. The headnote which is an accurate representation of this case is now reproduced hereunder.

> "By a letter dated Aug. 10, 1951, the plaintiffs offered to buy from the defendant specified goods on certain terms and conditions set out in an enclosed order. On 16 August, 1951, the defendant wrote a letter accepting the offer, the letter containing, inter alia, the following words: 'I assume that we are in agreement that the usual conditions of acceptance apply'. There were no 'usual conditions' in operation between the parties. The defendant having failed to deliver the goods, in an action by the plaintiffs for breach of contract,
>
> HELD: since there were no such 'usual conditions' and hence nothing to which the clause could apply, it was meaningless, and being clearly severable from the rest of the contract, and capable of being rejected without impairing the sense or reasonableness of the contract as a whole, it should be rejected; the defendant's letter of 16 August, constituting an unqualified acceptance of the plaintiff's offer; and, therefore, there was a concluded agreement between the parties."

This case tends to support the submission as to severance. This could have the consequence of altering the award of the court below in that there would be no award of $1,000.00 in respect of "Personal Accident", leaving the contract valid and enforceable, in particular, in respect of the remaining categories in box 25,

namely, manslaughter, windscreen and medical expenses. However, the award of $1000 was not made an issue, in the circumstances of this case. The respondent's witness Lorraine Moore admitted that it was payable. She said, "Mr. Bentley is entitled to the sum of ...($2500) as contracted for ..." and the learned judge awarded it. The learned trial judge described the sums under "Medical Expenses" and "Personal Accident" as "paltry". In using this epithet he was quite euphemistic. Let those who seek motor vehicle insurance be warned to read carefully the terms on the proposal form.

14. There is no merit in ground (viii). A perusal of the record does not indicate that the appellant canvassed this aspect in the court below. In any event, the insured is only indemnified by the insurer if the third party obtains a judgment against the insured (see section 18 of the *Motor Vehicles Insurance (Third Party Risks) Act*). There was misplaced reliance on ***Digby v General Accident Fire And Life Assurance Corporation*** [1943] A.C. 121. In this case the owner and insured of a motor vehicle was injured as a result of an accident involving her motor car and another vehicle. At the relevant time she was a passenger and being driven by ***Digby***, her chauffeur, an authorized driver within the contract of insurance. The passenger/owner at first sued the driver of the other vehicle and subsequently joined ***Digby*** as a co-defendant. ***Digby*** was found to be contributorily negligent. The question now arose as to whether ***Digby*** should be indemnified by the insurer in respect of the judgment against him. The case was resolved by a majority in the House of Lords, that on the

interpretation of the relevant clause in the insurance policy the passenger/owner was a third party and that ***Digby*** should be indemnified. The critical factor is that there was a judgment against ***Digby***, the driver. In this case there is no such judgment against Herbert Gayle, the driver at the time of the accident.

15. The learned trial judge was not in error when on his construction of the contract of insurance between the parties he decided that comprehensive cover did not include loss of personal effects nor loss of earnings consequent upon the receipt of personal injury. Further, he was correct in holding that "box 26" referred to third party claims.

16. By a counter-notice the respondent sought to have the order for costs awarded on the Resident Magistrates' scale. Reliance was placed on section 131 of the *Judicature (Resident Magistrates) Act*. The relevant part of this section is set out below:

> "131. (1) If any action or suit is commenced in the Supreme Court for any cause for which an action might have been instituted in any Court and the plaintiff –
>
> (a) in an action founded on contract or tort, recovers a sum less than one hundred and fifty thousand dollars; or ...
>
> that plaintiff shall recover no more costs than he would have been entitled to had he brought his action or suit in a Court, unless in any such action, suit or proceedings a Judge of the Supreme Court certifies that there was sufficient reason for bringing the action, suit or proceedings in the Supreme Court."

This was an action founded on contract. There was a consent judgment in favour of the appellant in the sum of $573,000.00 which sum already exceeded the figure of one hundred and fifty thousand dollars in section 131(1)(a). Therefore the relief sought in the counter-notice is denied.

17. In conclusion, the appeal is dismissed. The judgment of the court below is affirmed. The respondent shall have its costs of the appeal.

HARRISON, J.A.

I have read the judgment of Cooke, J.A. and I agree with his reasoning. The appeal ought to be dismissed.

HARRISON, P.

ORDER

The appeal is dismissed. The judgment of the court below is affirmed, with costs to the respondent to be agreed or taxed.