JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 121 OF 1994

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	**BEVERLEY'S TRANSPORT LTD.**	**PLAINTIFF/ APPELLANT**
A N D	**THE JAMAICA GENERAL INSURANCE COMPANY LTD.**	**DEFENDANT/ RESPONDENT**

David Muirhead, Q.C. and Dr. Adolph Edwards for Appellant

Ms. Ingrid Mangatal and Miss N. Small instructed by Dunn, Cox, Orrett & Ashenheim for Respondent

May 1 and 30,1995

RATTRAY P:

The question posed in the Originating Summons for determination of the Supreme Court was:

> "Whether a person who intends to travel on a motor bus and who while standing on the

> "ground outside of the bus is assisting the conductor and sideman to load his goods on to the top of the bus can be said to be a person who is 'being carried in or upon or entering or getting on to or alighting from the motor vehicle' as provided in Endorsement 19 (m) or whether he can be said to be a person who falls within Section II 1 (a) of the Policy of Insurance."

Consideration was required to be given to one section of a Policy of Insurance [(Section II 1 (a)] and an Exception thereto [Exception (iii) to Section (II)] as well as Endorsement 19 (m) which cancelled Exception (iii) and provided instead lower limits of liability "in respect of death or bodily injury to any person being carried in or upon or entering or getting on to or alighting from the motor vehicle," issued by the respondent Jamaica General Insurance Company Limited to the appellant Beverley's Transport Limited in relation to a Leyland Comet bus owned and operated by the appellant.

The facts are set out in an affidavit of one Lawrence Anson in support of the Originating Summons which relates that one George Anderson had carried his goods to the terminus where the appellant's bus was parked with the intention of loading his goods thereon and thereafter boarding the bus. The narrative in the affidavit continues:

> "
> ...
>
> 7. That while the said Anderson was standing on the ground outside of the bus assisting the conductor and sideman to load his goods on to the top of the bus, a bag of flour owned by him fell on him while being loaded on to

"the top of the bus.

8. That at the time Anderson suffered his injury he was standing beside the bus which was parked for the purpose of facilitating the embarkation of passengers and the loading of goods on to the bus."

Clause 1 of Section II of the Policy of Insurance reads as follows:

"The company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of:

(a) death of or bodily injury to any person;

(b) damage to property."

The Clause headed: "Exceptions to Section II" reads as follows:

"The Company shall not be liable in respect of:

...

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment with a person insured by the Policy) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."

Endorsement 19 (m) to the Policy states that as and from the 22nd of December 1982:

> "It is hereby understood and agreed that Exception (iii) to Section II of the Policy is deemed to be cancelled."

The Endorsement however continues:

> "It is further understood and agreed that notwithstanding anything contained to the contrary in the Limits of Liability the limit of the Company's liability under Section II (1) (a) in respect of death of or bodily injury to any person being carried in or upon or entering or getting on to or alighting from the motor vehicle shall not exceed:
>
> (a) in respect of death of or bodily injury to any one person - $100,000.00."

The limit of liability in the Policy under Clause 1 of Section II in relation to death or bodily injury to any person is $750,000.00.

The Learned Trial Judge posed for himself as:

> "The real question to be determined ... whether or not the words 'entering or getting on to' can be so construed as to embrace or encompass a person who intending to travel on the bus, is 'standing on the ground outside of the bus assisting the sideman and conductor to load his goods on to the top of the bus'."

He settled that question as follows:

> "I am of the view that the phrase 'getting on to' was used to embrace conducts necessarily connected with embarkation, thus a person may be said to be 'getting on to' the bus if he does certain acts which unquestionably demonstrate the intention of 'entering' the bus."

He was led to find support for this conclusion in a case cited to him of **Brien v. Bennett** [8 CAR & P. p.724.

In the interpretation of a Policy of Insurance the governing principle is that what has to be construed is the language in fact used in the Policy. The words used must prima facie be interpreted in their plain, ordinary and popular meaning. [**Stanley v. Western Insurance Co**. [1868] L.R. 3 Ex. 71 at p. 73, per Kelly C.B.]. The Court when presented with a conflict between the parties as to what a particular provision in the Policy means must construe what the parties have in fact stated in their contract as to what the words really mean.

At the time when the injury was suffered by Mr. Anderson the event which was taking place was the loading of the motor vehicle. The accident took place "in connection with the loading of the motor vehicle", and therefore falls squarely within Clause 1 of Section II of the Policy. In such event the limit of liability of the Insurer is $750,000.00.

We need to look at the Exceptions to Section II to determine whether any provision in these Exceptions limits the liability of the Insurers to a sum less than $750,000.00.

A careful reading of Exception (iii) will establish that the Exception did not deal with an accident taking place in connection with the loading of the motor vehicle. Neither does Endorsement 19 (m) which cancels the Exception and replaces it by a limit of liability in the circumstances originally covered by the Exception.

In the differential between the two limits of liability that in respect of Clause 1 Section II of the Policy and Endorsement 19 (m) lies the genesis of the dispute.

It is well established that Exception Clauses in a contract are construed strictly against the party for whose benefit they are inserted and clear words must be used by those who wish to introduce an Exception Clause to shield themselves. [See **Blankett v. Royal Exchange Assurance Co.** [1832] 2 Cr. & J. 244 at 251 and **Fowkes v. Manchester and London Assurance Association** [1863] 3 B. & S. 917].

If, as I hold, it is clear that the accident arose in connection "with the loading ... of the motor vehicle", then the Trial Judge was clearly in error in seeking to determine whether Mr. Anderson was "a person being carried in or upon or entering or getting on to or alighting from the motor vehicle" a question

which does not arise at all in this case, and in so doing deciding in the affirmative by adopting a strained interpretation that "Mr. Anderson had begun the process of 'getting on to' the bus by assisting them in loading his goods on to the bus."

He was lured into this error by his belief that the answer to the question posed lay in a determination as to whether Mr. Anderson was a passenger or not. The proper interpretation of Clause 1 of Section II does not require a determination as to whether the injured person is or is not a passenger.

It is this misconception which led the Trial Judge to rely on the decision in **Brien v. Bennett** (supra), a negligence action having nothing to do with interpretation of documents, the determination of which depended upon whether the person injured whilst putting his foot on the step of a bus with the intention of entering the bus which had stopped on his signal, was a passenger or not. This decision is singularly unhelpful in deciding this case.

The answer to the question posed in the Originating Summons must therefore be that:

> "A person who intends to travel on a motor bus and while standing on the ground outside of the bus is assisting the conductor and sideman to load his goods on to the top of the bus is a person who falls within Section II 1 (a) of the Policy of Insurance."

I would allow the appeal with costs to the appellant to be taxed if not agreed.

DOWNER JA

The dispute between the Beverley's Transport Ltd (the appellant) insured and The Jamaica General Insurance Company Limited (the respondent) is whether the liability of the insurer in these proceedings is a maximum of $750,000 as the appellant contends or $100,000 as the insurer insists. To resolve the issue, there must be a true construction of the relevant clauses of the standard form insurance policy. The question framed in the amended originating summons runs thus:

> " 1. Whether a person who intends to travel on a motor bus and who while standing on the ground outside of the bus is assisting the conductor and sideman to load his goods on to the top of the bus can be said to be a person who is 'being carried in or upon or entering or getting on to or alighting from the motor vehicle' as provided in Endorsement 19(m) or whether he can be said to be a person who falls within Section II 1(a) of the Policy of Insurance." (Emphasis supplied)

and Smith J answered the question by stating that the endorsement clause 19(m) was applicable. The policy must now be examined to see whether that determination was correct.

The relevant clause in the policy

Section (II) (1) (a) of the policy reads as follows:

> " SECTION II - LIABILITY TO THIRD PARTY

> 1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of
>
> (a) death of or bodily injury to any person."

Then the relevant schedule stipulates the limits of liability thus:

> " Limit of the amount of the Company's Liability under Section II-1(a) .....$750,000 ..."

As for the facts, Smith J sets this out appropriately.

> " ... The undisputed facts as appear in the affidavit of Mr. Lawrence Anson a Director of the plaintiff company are as follows:
>
> Anderson carried his goods to the terminus where the plaintiff's bus was parked with the intention of loading his goods on the bus and thereafter to board the said bus. While Anderson was standing outside the bus on the ground assisting the conductor and sideman to load his goods on to this bus, a bag of flour owned by Anderson fell on him while being loaded on to the bus. The bus was parked for the purpose of facilitating the embarkation of passengers and the loading of goods thereon."

Mr Muirhead QC for the appellant contended that in the light of these undisputed facts, the relevant clauses referred to were applicable.

Further, there were no other clauses in the policy which would serve to lessen the liability of the insurer.

Miss Mangatal in an elegant submission contended otherwise. In support of the approach followed by Smith J she agreed that an exception governed the facts. That clause reads as follows:

> " **EXCEPTIONS TO SECTION II**
>
> The Company shall not be liable in respect of:
>
> (iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment with a person insured by the Policy) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."

Then the endorsement which was effective from the 22nd day of December 1982 states:

> " It is further understood and agreed that notwithstanding anything contained to the contrary in the Limits of Liability the limit of the Company's liability under Section 11-1(a) in respect of death of or bodily injury to any person being carried in or upon or entering or getting on to or alighting from the Motor Vehicle shall not exceed-
>
> (a) in respect of death of or bodily injury to any one person $100,000.00"

It would require a strained construction to find on the facts of this case that Anderson while loading was " being carried in or entering, or getting on to , or alighting from the motor vehicle" . Each of the alternatives refers to those who are passengers as distinct from Anderson who was loading and was an intending passenger. In **Kaye v Hougham [1964] 108 Sol Journal p. 358** Lord Parker said as regards the word alight:

> " ... The court had every sympathy with this taxi driver in these circumstances, but the word 'alight' could not be construed in any way other than the physical act of getting out of the taxi."..

and this passage is relevant to the facts and circumstances of this case.

Conclusion

In the light of all this I find that the construction relied on by the appellant was correct. The order of Smith J must therefore be set aside and the insurer must pay the costs both here and below.

GORDON J A

I agree. Mr. Anderson was not a passenger but an intending passenger and the exception apply only to passengers and cannot be extended to include intending passengers. The appeal must be allowed, the order of Smith J set aside with costs here and below to the appellants to be taxed if not agreed.