IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV0078

BETWEEN	**DONOVAN BENNETT**	**CLAIMANT**
AND	**ADVANTAGE GENERAL INSURANCE CO. LTD**	**DEFENDANT**

IN CHAMBERS

Sean Kinghorn, Ms. Danielle Archer and Ms. Nicole Haynes

instructed by Kinghorn & Kinghorn for the claimant

Manley Nicholson

instructed by Nicholson Phillips for the defendant

HEARD: 6 May & 20 July 2010 & 28 July 2011

Insurance – motor vehicle insurance – claim for indemnity - policy covers loss due to theft - vehicle stolen - vehicle parked at time stolen - vehicle parked by a driver to whom restriction in policy applies – whether unauthorized person was driving vehicle or had it in his charge for the purpose of driving at the time vehicle stolen - whether liability excluded by terms of policy - incorporation of proposal into contract - whether insurer justified in refusing to honour claim for indemnity

McDONALD-BISHOP, J

[1] This case concerns an insurer's refusal to honour a claim for indemnity under a policy of insurance on the basis that the insured had breached the terms of the policy. The unrefuted evidence has given way to the following facts.

[2] Donovan Bennett, the claimant, is the registered owner of a motor car registered 1076 EX. He entered into a contract with Advantage General Insurance Company Limited, the defendant, for the insurance of that motor car pursuant to the Motor Vehicle Insurance (Third Party Risk) Act. A certificate of Insurance was duly issued by the defendant to the claimant indicating the terms and nature of the coverage. The coverage was a comprehensive coverage for one year commencing October 2, 2006. By the terms of that coverage, the defendant agreed to, *inter alia*, indemnify the claimant in the event that the said motor vehicle was stolen.

[3] On the 24 April 2007, the motor vehicle was driven to Guys Hill, St. Catherine, from where it was stolen. The theft of the car was reported to the Guys Hill police. The loss of the motor vehicle gave rise to a claim by the claimant against the defendant for indemnity pursuant to the policy of insurance. The defendant has refused to indemnify the claimant for the loss on the basis that at the time the car was stolen it was being driven by, or was in the charge of, a driver who was the holder of a driver's licence that was less than one year old. Such a person would have been unauthorized under the policy of insurance to drive the car. The basic argument of the defendant is that the claimant had breached the terms of the contract of insurance and so it is not obliged to honour the claim because the liability is one that is not covered.

[4] That stance on the part of the defendant compelled the claimant to initiate these proceedings by way of Fixed Date Claim Form filed on 13 January 2009. By that claim, the claimant seeks, *inter alia,* the following relief.

(i) A declaration that a valid and enforceable contract of insurance exists between the claimant and the defendant in respect of the claimant's motor vehicle registration number 1076EX.

(ii) An order that pursuant to the said agreement, the defendant pays over to the claimant the sum of $950,000 for the loss of motor vehicle registration number1076EX, which said motor vehicle was stolen on 24 April 2007.

(iii) An order that interest of 12% or such other interest as this Honourable Court deems just be paid upon the said sum from the 7 January 2008 to the date of payment.

[5] The claimant's counsel, Mr. Kinghorn, in view of the dispute that has arisen has asked the court to pay regard to certain issues. In an effort to end all controversy between the parties, I have seen it fit to address the issues as delineated by Mr. Kinghorn.

[6] The first thing the claimant contends, albeit only by way of submission by counsel on his behalf, is that the defendant has not established that there was a policy of insurance between the parties which indicated the limitations of the policy to the effect that the person driving the motor vehicle should not have a licence less than one year old. It was submitted that the limitation was not proposed by the claimant nor was it communicated to him. Also, that the limitation referred to has been mentioned only once in a document produced in evidence by Ms. Ruth-Ann Morrison-Anderson, on behalf of the defendant, and that the unsigned policy exhibited by the defendant does not confirm that the policy was signed by the claimant. He contended further that what has been exhibited by the defendant to be the Motor Vehicle Insurance Proposal Form that was

submitted by the claimant, which appears to have unintialled amendments, does not speak to such a limitation.

[7] The question that arises from this contention is whether there was a contract of insurance embodying the limitation in question and, if so, whether it was communicated to the claimant. In considering this question, I must state for the record that I have noted that the claimant has not given evidence concerning the policy as to what matters were communicated to him or not. I am impelled to point out, that which ought to be known, that evidence cannot be given through counsel's submissions. There has to be positive evidence of that which is asserted. So, the appropriate thing for the claimant to have done was to respond to the defendant's affidavit and to assert by affidavit evidence the facts within his knowledge. To introduce what should have been evidence through the speech of counsel is unacceptable and is really of no evidential value.

[8] Having said that, though, I will now say that since the defendant is the one relying on the restriction, limitation, exclusion or whatever it may be called, I do accept that the onus of proof falls on it to prove that the particular term existed in the contract and was subsisting and valid at the material time. I will, therefore, take the claimant's arguments within that context and will examine the question raised by the claimant (it being a mixed question of law and fact) as to whether there is a contract of insurance bearing such a restriction and exclusion as to liability.

[9] It is well established that in order for a binding contract of insurance to arise, there must first be an offer put forward by one party to the contract and the acceptance of it by the other. An offer, it is said, is usually made by the proposer (the proposed

assured) who completes a proposal form and sends it to the insurers for their consideration. The insurers would then accept the proposal made leading to an agreement. In some situations, counter-proposals may be made by the insurer so that negotiations may end with the insurer making a final offer for insurance cover to the proposer which is up to the proposer to accept by, for instance, tendering the premium due.

[10] It has been noted, however, that there is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued. Once the terms of the insurance have been agreed upon by the parties, there is, *prima facie*, a binding contract of insurance and the assured is obliged to pay a premium as agreed, while the insurers, for their part, must deliver a policy containing the agreed terms. (See **MacGillivray & Parkington on Insurance Law**, sixth edn. p. 86).

[11] In light of the legal significance of the proposal, the defendant, in seeking to show that the claimant ought not to succeed, has commenced its case in response to the claim with evidence of the proposal form that it is saying was signed by the claimant. It is duly noted that the form exhibited does bear a signature purporting to be that of the claimant. Mr. Kinghorn has raised the point, albeit only by way of submissions, that there are unintialled amendments in this form. However, there is no evidence that this form was not signed by the claimant or that such amendments did not exist at the time he signed the form. There is thus no evidence rebutting the evidence of the defendant that this form was signed by the claimant. I accept as a fact, in all the circumstances,

that the proposal form exhibited by the defendant was signed by the claimant and submitted to the defendant for the issuance of a policy of insurance. It stood as the offer made by the claimant to the defendant for the policy of insurance in respect of his motor car. There can be no dispute that such an offer was accepted as evidenced by the payment and acceptance of a premium and the issuance of a policy and a certificate of insurance in accordance with the law.

The proposal form

[12] Of course, the policy is usually treated as the document that records the contract between the parties. In this case, the claimant is maintaining, through his counsel's submissions, that he did not sign the policy of insurance and so the limitation now being relied on by the defendant was not brought to his attention or agreed to by him. The question that would still remain to be answered, before this argument can avail the claimant, is what were the terms and effect of the proposal form he completed and submitted to the defendant which stood as his offer.

[13] In this regard, the learned editors of the text **Insurance Disputes,** second edition at page 141, para. 6.10, helpfully explain:

> ***"The proposal form, when filled in and signed by the proposed assured and sent to the insurer will contain representations about the risk to the insurer but otherwise, without more, will merely constitute a formal offer by the proposed assured to the insurer to enter into a contract of insurance. Ordinarily, once a policy is issued and accepted in response to a proposal form, it will be a policy that is the contractual document. A mere reference to the proposal as having been made will not have the effect of its being incorporated into the contract. Unless the proposal form or its contents are***

expressly incorporated into the contract of insurance, the proposal form will not be a contractual document and the statements will have no contractual status unless individually they amounted in law to a warranty. Furthermore, if the proposal form is not incorporated into the contract of insurance, it cannot be referred to for the purpose of construing the policy."

[14] The learned writers further instructed that the proposal form can be given contractual effect if incorporated into the contract by means of what is sometimes referred to as a "basis of contract" clause. According to them, at page 142, para. 6.11:

"Such clauses will often be found in a proposal form in the guise of a declaration to be signed by the proposer to the effect that all or any of the answers to the questions on the proposal shall form the basis of the contract of insurance. By this means, the insured warrants the truth of his answers. The fact that the "basis of contract" clause is in the proposal form and that the policy itself does not contain express words of incorporation does not prevent the proposal becoming part of the contract of insurance. It will therefore often be of importance when seeking to ascertain the terms of the contract to check whether the proposal from contains a "basis of contract" clause. Such a clause may also be found in the policy itself, sometimes without the clause being included in the proposal form..."

[15] The guidance obtained from the following passage has led me now to the pivotal consideration which is whether the limitation in question as to driver was a representation made by the claimant in the proposal form and whether such representation, if any was made, was incorporated into the policy of insurance subsequently issued by the defendant.

[16] In an attempt to resolve this question, I have examined the proposal form that I accept was signed by the claimant. It is seen that there is the section headed, '**VEHICLE OWNWERSHIP CONDITION AND USE**'. Under this heading, the only

question concerning driver is whether anyone under 21 or 25 or over 70 would be driving the motor vehicle. Following that, the claimant completed a section as to the cover required which he indicated as *'comprehensive'* and that he required "*standard cover"* for the drivers. He indicated in that section too that he required no removal of any restriction as to *"age/licence"* and that he would pay no additional premium. Then under the section headed 'UNDERSTANDING' at the clause number 2, the following is stated:

> **"*Unless otherwise agreed the cover will exclude driving by anyone holding a licence for less than one (1) year*, or under 21, or over 70 years of age." (Emphasis added)**

Number 3 under the same heading 'UNDERSTANDING' then follows to the following effect:

> ***"The policy will not operate in respect of claims arising while the vehicle is being driven or is for the purpose of being driven by any person other than the drivers or category of driver(s) specified unless an additional premium has been paid for OPEN DRIVING or the excess may double."***

[17] These declarations, incidentally, fall above the claimant's signature and without any unintialled amendment. This is taken to mean that they were originally stated and remained unchanged or unaltered by the claimant. Following those representations under the heading 'UNDERSTANDING', there is a declaration signed by the claimant, as proposer, stating, *inter alia:*

> ***"I/we desire to effect an insurance with the Insurer in the terms, conditions and exceptions, of the policy to be issued by the insurer. We agree that this proposal and any declaration forms(s) completed by other driver(s) shall form the basis of the contract between me /us and the Insurer and shall be deemed as incorporated in the policy to be issued."***

Then it goes on:

> ***"I have read, understood and accepted the UNDERSTANDINGS AND DECLARATIONS as stated in I and II above and that any breach thereto renders the policy of insurance void from inception."***

[18] From the foregoing terms of this proposal, it is abundantly clear that the claimant represented to the defendant, as part of his offer, that he understood and accepted that unless otherwise agreed, the cover would exclude driving by anyone holding a licence for less than one year which is the term under scrutiny in these proceedings. He also, obviously and indisputably, understood and accepted that a breach in that regard would render the policy void.

[19] Furthermore, he would have known, understood and accepted that the policy would not operate in respect of claims arising while the vehicle is being driven or is for the purpose of being driven by any person other than the drivers or category of driver(s) specified unless an additional premium had been paid. This was part and parcel of the proposal made by the claimant which was evidently duly accepted by the defendant.

[20] The question now is whether all this, ultimately, formed part of the policy issued by the defendant. This can only be so if it is found to have been expressly incorporated into the policy by the proposal. In examining this question, it is seen that there is a "basis of contract" clause in the proposal itself. This clause expressly and unequivocally incorporated the terms of the proposal into the contract between the parties. From this, therefore, it may be safely concluded that the terms contained in the proposal form in respect of unauthorized drivers would have validly became a part of the contract between the parties.

[21] Following on his proposal, the claimant paid the required premium indicated by the defendant and the defendant then issued a policy and a certificate of insurance in compliance with the law. This certificate of insurance bears express reference to a policy number MPCC279560. Clause 5 of the certificate of insurance provides:

> *"P**ersons or classes of persons entitled to drive***
>
> ***(A) the policyholder***
>
> ***(B) Any person driving on the policyholder's order or with the policyholder's permission in keeping with the terms and conditions of the policy."*** (Emphasis supplied)

[22] The reference in the certificate of insurance to the terms and conditions of the policy must be taken to mean, by implication and by extension, the terms and conditions contained in the proposal form which would have been incorporated into the said policy. Such terms would have been within the knowledge and understanding of the claimant as evidenced from the declaration he signed and would have been agreed to by him.

[23] Therefore, when the defendant, as insurer, came to issue its policy, its only obligation was to issue it with the terms and conditions usually attached to its policies, in so far as those were not inconsistent with the express terms of the parties' preliminary contract as embodied within the proposal. It is stated that the principle of incorporating the insurer's standard terms demonstrates that once the essentials of the insurance are defined, the agreement to insure may be binding even though it does not express the whole terms and conditions of the insurance that will be contained in the policy when issued. (See **MacGillivray & Parkington on Insurance Law,** 6th edition, page 86).

[24] So, even if the claimant had not seen the actual policy, he cannot say he was unaware of its terms in this regard and that they were never communicated to him. I must, therefore reject, as untenable, the submission advanced on behalf of the claimant that the limitation was not proposed by the claimant nor was it communicated to him.

[25] When all things are considered, therefore, I cannot agree with the argument advanced by Mr. Kinghorn that the defendant has not established that there was a policy of insurance between the parties which indicated the limitations of the policy to the effect that the person driving the motor vehicle or who had the motor vehicle in his charge for the purpose of so doing should have a licence more than a year old. I find, therefore, that the claimant's policy was subject to a valid and subsisting limitation as to driver as contended by the defendant.

Whether motor vehicle was under the control of an unauthorized driver

[26] The related issue that now falls to be considered is whether the defendant is justified in refusing to honour the claim for indemnity on the basis that the car was under the control of an unauthorized driver at the time it was stolen. The resolution of this question will depend on the interpretation to be given to paragraphs 2 and 3 under the heading 'UNDERSTANDINGS' as contained in the proposal form and section IX of the standard form policy exhibited by the defendant.

[27] By way of reminder for immediate purposes, paragraph 2 of the 'UNDERSTANDINGS' in the proposal form states, in part, that unless otherwise agreed, the cover would exclude driving by anyone holding a licence for less than one year.

Paragraph 3 then provides that the policy would not operate in respect of claims arising while the vehicle is being driven or is for the purpose of being driven by any person other than the driver(s) or category of driver(s) specified, unless an additional premium has been paid for open driving, or the excess may be doubled.

[28] Section IX under the heading, 'GENERAL EXCEPTIONS' in the standard form policy, for its part, provides that the defendant would not be liable in respect of any loss incurred whilst, *inter alia*, the motor vehicle is being driven by or is for the purpose of being driven in the charge of any person other than an authorized driver.

[29] In looking at whether the defendant is justified in refusing the claim on the basis of the foregoing, I have noted that the claimant has not said anything in his evidence about the driver of the car or about who had the car under his care and control at the time the car was discovered stolen. It is the defendant, through the affidavit of its witness, Ms. Ruth Ann Morrison-Anderson, and the Motor Vehicle Claim Form exhibited thereto, that has established the circumstances under which the car went missing from Guys Hill. This, of course, would be in keeping with the burden of proof on the defendant to show that it is not liable to indemnify the claimant on the basis alleged.

[30] Paragraph 6 of the affidavit of Ms. Ruth Ann Morrison-Anderson states:

> ***"The said motor vehicle was stolen from a churchyard on or around 24th April, 2007 and the driver who had possession and control of the vehicle, and who parked the vehicle at the spot from which it was stolen was one Stewart Green and pursuant to AGI's Motor Claim Form the Insured and the***

said Stewart Green signed verifying that the said Stewart Green was, in fact, the driver at the material time."

[31] The interesting thing to note is that the assertion in the affidavit of Mrs. Morrison-Anderson has been substantiated by the terms of the Motor Vehicle Insurance Claim Form exhibited to that affidavit. It is seen that this form bears the signature of the claimant who purportedly signed in the capacity as owner of the motor car and a signature purportedly of a Stewart Green who signed as driver. This is the Motor Vehicle Claim Form that the unchallenged evidence reveals was submitted by the claimant. I therefore accept as a fact that the claimant signed that form as owner of the motor vehicle in question and that Mr. Stewart Green signed as driver.

[32] Furthermore, in that form, Mr. Stewart Green set out the circumstances under which the car went missing. He indicated that on the day, 24 April 2007, he drove the vehicle from Ocho Rios to Guys Hill, St. Catherine, and that at about out 9:00 p.m., he securely parked the car at the Gospel Hall Chapel and went to bed. When he woke up at about 5:00 a.m. the next morning, he discovered that the car was not there.

[33] The same form also stated that Mr. Green's licence was issued on 22 February 2007. The incident leading to the claim happened in April, 2007. This means that at the relevant time, Mr, Green's licence would have been less than a year old. The claimant, himself, signed the form containing all these assertions of facts. By so doing, the claimant is taken to have accepted and adopted all the material facts presented by Mr. Green. The circumstances surrounding the loss of the vehicle were, in fact, disclosed by

the claimant and Stewart Green, himself. This is good and unchallenged evidence being relied on by the defendant.

[34] It is against this background and on this basis that the defendant is resisting the claimant's claim to indemnify him for the loss of the car. The defendant's contention is that Mr. Green was a person not authorized to drive or to have the car in his charge for the purpose of driving. Reliance is, therefore, being placed on the provisions which render the policy void in the face of such breaches and/or inoperative in such circumstances.

[35] In looking at whether the objection raised by the defendant on this ground is a valid one, it is first appreciated that the evidence does reveal that there was no payment of an additional premium by the claimant, neither did he choose to bear an increased excess/ deductible. Based on the policy selected by the claimant, there was no open cover for drivers. In the line # 18 on the proposal form the question was asked*: "Do you require to remove any policy restrictions- age/licence? If yes, Additional Premium"*? The claimant put *"No"* by way of response. All this must be deemed to have been incorporated into the policy of insurance in keeping with the terms of his proposal and the general law. It is clear then that no arrangement was made at any time between the parties for someone with a 'young licence' like that of Mr. Green to drive the car or to have charge of the car for the purpose of driving it.

Whether an unauthorized person was 'driving' the motor vehicle

[36] I accept the argument of counsel for the claimant that there is no evidence that the car was being driven at the material time given the definition of that term as stated in **Bourgoyne v Phillips,** reported at page 75 of the **Bingham's Motor Claims' Cases.** There it is noted that, *"[t]he essence of driving is the use of the driver's control to direct the movement of the car however produced."* It is evident on this definition that from all indication, Mr. Green would not have been driving the car at the material time. It goes without saying then that the defendant could not refuse to indemnify the claimant on the basis that the car was being driven by a driver excluded by the terms of the policy.

Whether the motor vehicle was in the charge of an unauthorized person for the purpose of driving

[37] However, as can be seen, the exception or limitation relates not only to a situation where the car is being driven by such an unauthorized person but also when the car is in that person's charge for the purpose of being driven by him. Mr. Kinghorn had argued that if I were to find that Mr. Green was driving, then it was such that the purpose for which the vehicle was being driven by him had come to an end and was stolen after he had driven it. For this argument, he placed reliance on **Kirkbride v Donner** [1974] 1 Lloyds Report, 549. An insight into the facts of that case may prove useful. The facts are summarized as follows.

[38] The plaintiff, who was the insured, signed a proposal in which she stated that she was the only person who would be under 25 years old to drive the car. She allowed her brother who was under 25 years old to drive to a theatre club on an arrangement that she would use it to drive him back at the end of the visit. Her brother drove the car there

parked it and handed her the keys. During the evening the car was stolen and not recovered. The Insurers refused to meet the loss. However, it was held that they were not entitled to decline liability under the policy because, *inter alia*, the plaintiff's brother was not in charge of the car when it was stolen since the purpose for which he had driven the car had come to an end and the plaintiff herself was at the club.

[39] A comparison of the facts of that case with the case at bar instantly reveals, without any need for deep analysis, that the circumstances are totally different thereby providing a basis for distinguishing this case. In **Kirkbride v Donner,** the arrangement for the insured to have driven the car after it was parked and the fact that the brother had handed her the keys after he had parked it, are patent elements pointing to absence of control over the vehicle by the brother at the material time. The arrangement was already made that the insured was the one to have driven the car on the return journey that is to say upon the resumption of driving after it was parked. There was clear evidence of that for the court's consideration. So, it could not at all be said with all sincerity that at the time the car was parked in such circumstances, it was parked for the purpose of being driven by the brother. His handing over of the key to the insured was a strong indicator of his relinquishing of control over the motor vehicle in question. The finding of the court that the car was not in his charge for the purpose of driving at the material time was, thus, inevitable.

[40] Turning to an examination of the circumstances of the instant case, it can be said that it is established, and I have accepted it as true, that the motor vehicle in question was driven by Stewart Green to Guys Hill. He parked the vehicle at the spot from where

it was taken. There is no evidence from anywhere to show that he handed over the keys to the claimant or anyone else having parked the car there. The only reasonable and inescapable inference, in the absence of evidence to the contrary, is that Mr. Green continued to exercise control over the vehicle. Unlike in **Kirkbride v Donner,** the claimant, who was the insured, was not himself present. He has given no evidence to state the purpose for which Mr. Green would have had the car under his control and in his possession before the car was stolen. There is no evidence as to what was to happen after Mr. Green woke up on the morning following his driving of the car to Guys Hill. Those facts would have been within the claimant's peculiar knowledge, not the defendant's. He would, at least, bear an evidential burden on this question.

[41] Now, Mr. Green having driven the car to the spot and returning the next morning to the same spot, having not handed the keys to anyone, must be taken to have been the one exercising exclusive control at the time. On top of all this, Mr. Green, himself, indicated on the claim form submitted to the defendant that he was the driver of the car at the time it went missing. No other person was designated driver of the car at the time it was removed from where it was parked. It follows then that there would have been no one else at the time who was authorized by the claimant to remove the car from the spot it was parked by Mr. Green had it not been stolen. I find there is nothing to destroy or weaken the inference that arises, in all the circumstances, that the car was in the charge of Mr. Green.

[42] The ultimate question to be resolved would now be: was it in his charge for the purpose of being driven? On this question as to what is meant by the phrase *'for the*

purpose of being driven' the English case of **Samuelson v National Insurance and Guarantee Corporation Limited** [1986] All ER 417 has proven quite instructive. I must say that an insight into the facts would serve to promote a clearer understanding of the relevant principle to be applied to the instant case. The facts are as follows. The plaintiff effected a policy of insurance with the defendant's company in respect of his motor car. The policy provided that the plaintiff would be indemnified against, *inter alia*, loss of the vehicle caused by theft. The policy stated that use of the vehicle for any purpose in connection with the motor trade and driving by anyone other than the plaintiff were not covered under the policy.

[43] Under the general exceptions, the policy in paragraph 1 (a) (i) provided that the insured plaintiff would be liable to be indemnified while the vehicle was in the custody or control of a member of the motor trade for the purpose of being repaired. However, it stated in paragraph 1(c) that the insurers *"shall not be liable in respect of any accident, injury, loss or damage occurring whilst any motor vehicle in connection with which insurance is granted under this policy is … (c) being driven by or* ***for the purpose of being driven*** *in the charge of any person other than the plaintiff."* (Emphasis added.)

[44] The plaintiff delivered the vehicle to a car repairer for repairs. During the course of those repairs the car repairer drove the vehicle to the sole agents for that make of vehicle in order to obtain spare parts for it and to have them fitted in the car. He parked the car near the agents' premises and on his return discovered that it had been stolen. The vehicle was never recovered and the plaintiff claimed its value from the insurers. The plaintiff contended that the car was in the custody or control of a member of the

Motor Trade for the purpose of its repair when it was stolen. That would have made the insurers liable as that risk was covered by the policy.

[45] The judge at first instance found the insurers not liable on the basis that the vehicle was *'for the purpose of being driven'* in the charge of a person other than the plaintiff. On appeal by the plaintiff to the Court of Appeal it was held, allowing the appeal, that at the time the car was stolen the insurers were liable for the loss. The head notes that reflect the substance of the decision read:

> ***"There was nothing inherently objectionable in construing a contract of insurance in such a way as to put the insurers on and off risk at short intervals. Accordingly, the issue was whether at the precise time it was stolen, the car was in charge of the car repairer for the purpose of its repairs or whether it was in his charge for the purpose of being driven. On the facts, when the car repairer was physically driving the vehicle to the agents para. 1 (c) applied to take the car off risk. However, as soon as the car repairer parked the car outside the agent's premises to purchase spare parts, he was in charge of the car for the purpose of repairing it and para. 1 (a) (i) applied to put the car on risk again. It means at the time the car was stolen the insurers were liable for the loss."***

[46] Their Lordships found that at the time the car was stolen, it was not parked for the purpose of being driven but for the purpose of being repaired. However, Lord Goffe, speaking of the provision in that policy, which is more or less identical to paragraph 3 of the policy in question in the case at bar, stated at page 421:

> ***"The function of the exception in paragraph 1 (c) is plain. It is essentially directed to excluding the cover where the vehicle is driven by an unauthorised person, but it is recognised that there are circumstances in which, although the car is not actually being driven by an unauthorised person, nevertheless it may, for the purpose of being driven, be in his charge'.***

[47] I would adopt this view and state that the meaning of the exception contained in the policy in this case is plain. The natural and ordinary meaning of the words used is to exclude the cover in circumstances where the motor vehicle is in the charge of an unauthorized person for the purpose of being driven. There is no need to go beyond the natural and ordinary meaning of the words.

[48] Applying this principle to the instant case, the issue for the court would be: was the car parked at the time it was stolen for the purpose of being driven by Stewart Green who would, undoubtedly, have been a driver excluded under the policy? The glaring difference between this case and **Samuelson v National Insurance and Guarantee Corporation Limited** is that there was clear evidence in that case as to the reason or the purpose for which the car was in the charge of the other person at the time it was stolen, while in this case, there is no explanation emanating from the claimant explaining the purpose for which Stewart Green had the car. There is no evidence, directly, or by implication, that the car was in his charge for any purpose other than the resumption of the driving of it by him.

[49] In any event, even if it were for repairs there is no provision in this policy, like in that of **Samuelson v National Insurance and Guarantee Corporation Limited**, that would excuse the insured when the vehicle is in the hands of unauthorized persons for the purpose of repair or anything else. Mr. Nicholson's submissions, on behalf of the defendant, that **Samuelson's** case can be distinguished from the case at bar is accepted.

[50] In the end, the court must give effect to the terms of the policy as agreed on by the parties. The parties agreed to the various exceptions and limitations contained in the policy which, *inter alia,* expressly and clearly stipulated who would be authorized or not authorized to drive. As Mr. Nicholson submitted, the words used in the, proposal form, the policy and the certificate of insurance, setting out the parameters of the policy in this specific regard, are clear and unambiguous and so there is no need to go outside the plain and ordinary meaning of the terms of the contract.

[51] The simple fact is that Mr. Green who obtained his licence on 22 February 2007 and being, therefore, the holder of a licence at the time of the incident for a little less than two (2) months, was not authorized by the terms of the policy to drive that car or to have it is in his charge or under his control for the purpose of driving it. This was a term in the proposal that the claimant made which was eventually incorporated into the contract by virtue of the "basis of contract" clause. I find that there was a breach of the policy of insurance by the claimant.

Whether defendant liable to indemnify claimant for the loss

[52] Mr. Kinghorn has made, as his final submissions, the point that even if on the evidence presented, the court is satisfied that there was in fact a breach of the contract of insurance on the part of the claimant, the defendant must prove three things to establish that the breach affected the existence and validity of the contract on the date the vehicle was stolen. He argued that the onus is on the defendant to prove that (i) the breach was a fundamental breach; (ii) the defendant accepted the fundamental breach

as ending the contract and (iii) the defendant had communicated that acceptance of the fundamental breach to the claimant.

[53] While Mr. Kinghorn's contention is quite unassailable in terms of general contract law principles, it cannot assist the claimant's case in the context of the law specifically relating to insurance contracts as the one under review. The claimant in his proposal that has been incorporated within the terms of the policy has declared that he*, inter alia*, warranted that the answers and particulars he gave in the proposal form are true and that he had not suppressed or misstated any material fact. One of the answers given by the claimant was that he did require standard cover for the drivers and that he did not require that any policy restrictions in terms of *'age/licence'* be removed. Now under the 'UNDERSTANDINGS', which the claimant accepted, the limitation as to age of a driver's licence was expressly and unambiguously spelt out. In those circumstances, the claimant affixed his signature immediately below the following provision*:* ***"I have read, understood and accepted the UNDERSTANDINGS AND DECLARATIONS as stated in I and II above and that any breach thereto renders the policy of insurance void from inception."***

[54] This shows that the claimant had warranted that he would not require the restriction in question to be removed. He clearly agreed to contract with the restriction imposed. He also had known and had expressly agreed that the breach complained of would be one that would render the contract void from inception. It was also communicated to him and was agreed by him that the risk resulting from such a breach

was one that was one excluded from the cover of the policy. The proposal and the policy issued subsequently all bear that out.

[55] It is well established on the authorities that the policy of insurance embodies the contract between the insured and the insurer and that the policy can contain terms not only limiting and restricting the use of the vehicle but also it can make provisions for the insurer to avoid the policy and to avoid liability if the user of the vehicle does not conform with the terms and conditions set out in the contract. (See: **Herbert v Railway Assurance Co.** [1938] 1 All E.R. 650; **Gray v Blackmore** (1933) K.B. 95 and as applied in **Conrad McKnight v NEM Insurance Co. (Ja.) Ltd and Another** 2005 HCV 3040 delivered July 13, 2007). In this case the claimant would have expressly agreed to the limitation as to driver and would have agreed that a breach in that regard would render the policy void and/or inoperative. That was what he agreed, he must be held bound by his agreement.

[56] From all this, I find it comfortable to conclude that from the very outset the claimant knew, understood and accepted on the terms of the proposal, that ultimately formed the basis for the contract, that unless otherwise agreed, any loss resulting from the driving or the control of the vehicle by a person with a licence less than a year old was a risk excluded from the cover of the policy. He knew and accepted that the policy does not operate in such circumstances.

[57] Furthermore, the specimen policy exhibited by the defendant which is accepted as a specimen of the defendant's standard policy, and taken by me to be representative

of the claimant's policy of insurance, contained a clause headed "NAMED DRIVERS WARRANTY". It provides:

> ***"Notwithstanding anything to the contrary contained in this Policy the Company shall be under no liability, apart from that liability compulsorily insurable under the Legislation in connection with any vehicle described in the SCHEDULE, while such vehicle is being driven by or is for the purpose of being driven by him/ her in the charge of any person other than those named hereon and hereby warranted as such by the schedule of this policy."***

[58] The provision relating to the driving of the car by a person unauthorized by the terms of the policy is obviously a warranty under the terms of the contract. It is established that a warranty in insurance law does not bear the same meaning as it does in general contract law. As **MacGillivray on Insurance Law**, tenth edition, at page 223 para. 10-2 explains:

> ***"Any attempt at a comprehensive definition of "warranty" in insurance law is complicated by the sometimes indiscriminate use of the word to refer to clauses* in policies *which do not possess the traditional attributes of a warranty and by changes in legal terminology over the years. It has a different meaning from a warranty in the general law of contract. An insurance law warranty is a term of the contract of insurance in the nature of a condition precedent to the liability of the insurer. Typically it is a promissory term whereby the assured promises either that a given state of affairs existed prior to the inception of the insurance or that it will continue to exist during the currency of the risk, and breach of the warranty discharges the insurer's liability on the policy from the time of the breach."***

[59] Within the same context, the learned editors in the text, **Insurance Disputes**, second edition, at page, page 142, para.6.12, have pointed out:

> ***"The effect of a warranty is dramatic in that the insurers can treat themselves as discharged from liability under the policy in the event of a breach of warranty notwithstanding the lack of materiality of the subject matter of the warranty or the innocence of the assured in giving an inaccurate answer."***

[60] That, it is said, is the draconian effect of a "basis of contract" clause which serves to incorporate such warranties made in the proposal form as a term of the contract between the parties. There is no statutory provision or any other legal guidelines in our jurisdiction that would mitigate its effects. The claimant is caught by that clause. The terms that the motor vehicle was only to be driven by a person authorized do so in keeping with the terms of the policy was a condition precedent to the defendant's liability. The breach by the claimant would, in all the circumstances, entitle the defendant to discharge the contract from the moment of the breach.

[61] There would have been no legal requirement, then, for the defendant to first communicate to the claimant that it had accepted the breach before it can avoid liability as Mr. Kinghorn is contending. This is not a mere breach of a fundamental term or condition under general contract law that gives the right to the innocent party to elect either to rescind or to affirm the contract. This was a breach of insurance warranty that gives the right to the defendant to avoid liability from the moment of breach.

[62] In concluding, I will simply say that in the light of the terms of the insurance policy entered into by the parties, I am in agreement with Mr. Nicholson, that the liability that has arisen in this case does not come within, or had arisen out of, a risk insured by the express terms of the policy. The defendants are, therefore, not liable to indemnify the claimant for the loss of his motor vehicle since the policy was not operating at the

material time. Indeed, the defendant, as insurer, did not undertake to indemnify the claimant in the circumstances in which the loss occurred. In keeping within the letter of the decision in **Samuelson v National Insurance Corporation,** the defendant would have been 'off risk' at the time the loss or theft occurred.

Conclusion

[63] The claimant, therefore, is not entitled to recover from the defendant for the loss of his motor vehicle and so his claim, inevitably, fails. The declarations and orders sought by the claimant in the Fixed Date Claim Form are, therefore, denied.

[64] The order of the court shall be: judgment for the defendant with costs to be agreed or taxed.