CA 1. Insurance policies — Loss payable clause — Interpleader — Whether the plaintiff a finance company specifically named in the Loss Payable Clause entitled to sue for proceeds of insurance policies when insureds suffered loss covered by policies — Assignment — Equitable assignment — Interest in the subject matter of the insurance — Whether plaintiff had insurable interest.

Cases referred to: p 13 (end)

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. C.A. 78/89

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

BETWEEN	CENTRAL FIRE AND GENERAL INSURANCE COMPANY LIMITED	DEFENDANT/APPELLANT
AND	ASSOCIATES COMMERCIAL CORPORATION	PLAINTIFF/RESPONDENT

Pamela Benka-Coker, Q.C. and Christopher Samuda instructed by Piper and Samuda for the Appellant

Dr. Lloyd Barnett and Paula Blake instructed by Milholland, Ashenheim and Stone for the Respondent

June 27, 28, 29, July 29 & September 19, 1994

DOWNER, J.A.:

The issue to be decided in this case is whether the plaintiff, Associates Commercial Corporation - The Corporation - a finance company specifically named in the Loss Payable Clause was entitled to sue for the proceeds of an insurance policy, when the insureds suffered loss covered by these policies. The Corporation was incorporated in the United States and had provided the funds for the purchase of a 1977 White Freight Liner for H & H Trucking and Equipment and a trailer for Raul Gracia. Both the insureds operated their business in the United States. Bingham, J. in a closely reasoned judgment found for the Corporation.

As regards the trailer, it was damaged sometime in January, 1983 and the claim on the policy was US$3,264.28. As for the truck, the White Freight Liner - it was stolen and the claim was US$26,000.00. These claims were not disputed. The following extract from a letter by the defendants - Central Fire and General Insurance Company Limited - Central Fire - admitted this. In a letter of June 3, 1983, Central Fire wrote to the Corporation, thus:

"Dear Sir:

Re: Payment of Motor Vehicle Insurance Claims in Jamaican Dollars for:

Raul Garcia - $3,264.28
H & H Trucking & Equipment - $26,000.00

This is to confirm our several conversations between yourself and the writer, in which you advised that your Company has a financial interest as Mortgages in both the following claims:

1. Stolen truck insured under the name of Robert A. Hampton and O.H. Hayes doing business as H & H Trucking & Equipment, valued at $27,000 less deductible excess of $1,000, Net Claim: $26,000.

2. Damaged Trailer insured under the name of Raul Garcia. Cost of Repairs: $3,764.28, less deductible excess of $500, Net Claim: $3,264.28.

We explained to you that we have no American dollars with which to settle these claims and we have asked you to accept both payments in Jamaican dollars, with which you advised us that your Jamaican lawyers would contact us accordingly."

Then after dealing with two other connected matters no longer in issue, the letter ends.

"In order to expedite the settlement of these claims, as previously advised, we require the following documentation from you:

1. A copy of the Mortgage Deed for each vehicle, certified by a Notary Public.

2. A Declaration from you, that your local legal representative is duly authorised to issue a Release on your behalf for the total claim in each case, notwithstanding what is the balance owing by your clients.

3. Two separate Releases with agreed wording between your local representative and our lawyers, towards the above agreement, totally discharging our Company from any claim whatsoever.

We shall then be in a position to issue our cheque in Jamaican dollars for the claims to your local legal representative, who can then take up the matter on your behalf with the Bank of Jamaica."

This letter was in response to telex which in part reads as follows:

> "To: Central Fire & General Insurance Co. Ltd.
> 57 Laws Street
> Kingston, JA.
>
> From: Associates Commercial Corporation
> 55 East Monroe Street - Suite # 3600
> Chicago, Illinois 60603
> 270258 EXPRSTLX CHGO
>
> Re: Insurance Claims of Raul Garcia and H & H Truck & Equipment
>
> I have discussed the above referenced insurance claims with Mr. Edward Ashenheim, Esq. and advised him that he will be authorized to receive $29,264.28 (U.S.) from Central Fire in full payment of these claims in either U.S. currency or the Jamaican currency equivalent."

Although Central Fire is a Jamaican company, it carried on general insurance business through agents in Texas and it seems also New York. Since the central issue turns on the terms of the Loss Payable Clause in both instances, it is necessary to examine that instrument.

The interpretation of the Loss Payable Clause

The basis of the decision in the court below depended on the interpretation of the clause which assigned the proceeds of the insurance policy to the Corporation in both instances. The crucial phrase is:

> "Loss or damage, if any, under this insurance shall be payable as interest may appear to... Associates Commercial Corp. and this insurance as to the interest of the Bailment Lessor, Conditional Vendor, Mortgagee or other secured party or Assignee of Bailment Lessor, Conditional Vendor, Mortgagee or other secured party (herein called the Lienholder) shall not be invalidated by any act or neglect of the Lessee, Mortgagor, Owner of the within described automobile or other Debtor nor by any change in the title or ownership of the property;..."

Such a clause is well-known in the insurance world. It is designed to protect the lender. It would be inimical to commerce if the legal system failed to give adequate protection to a mortgagee

in circumstances such as this - the presumption must be that the Corporation insisted on a written assignment from the insureds in the Loss Payable Clause as a condition for making the loan, so when there is a loss or damage, claimed by the insureds, proceeds would be paid as interest may appear to the Corporation. In this case the interest which appeared to the Corporation was US$29,364.28 as stated in its telex and admitted by the insurer, Central Fire. Nonetheless, Mrs. Benka-Coker, Q.C., in her able submissions attacked the reasoning of the judgment. She contended that it was obligatory for the Corporation to join the insureds either as plaintiffs, and if they refused, as defendants in their proceedings. The failure to do that, she argued, must result in the order below being set aside. It was a highly technical argument and to appreciate it, reference must be made to the Civil Procedure Code, the Loss Payable Clause and the relevant statutory and common law authorities.

The first aspect to note is that the Loss Payable Clause is part of the insurance policy. The fact appears immediately after the caption. It reads:

> "This endorsement forms a part of the policy to which attached, effective from its date of issue unless otherwise stated herein."

The insureds must have signed the policy although that document was not exhibited. It is useful to restate the gist of the words which compelled Central Fire to pay the proceeds for any loss or damage under the Loss Payable Clause. They read:

> "Loss or damage, if any, under this insurance shall be payable as interest may appear to Associates Commercial Corp., Box 20668, Houston, TX 77025.
>
> **Attention: Niel Johnson."**

This clause brings into play section 49(f) of the Judicature (Supreme Court) Act which reads:

> "49. With respect to the law to be administered by the Supreme Court, the following provisions shall apply, that is to say -
>
> (f) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or thing in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor."

When the section is applied to the circumstances of this case, there would be no need for the assignors, i.e. the insureds to be parties to these proceedings for Central Fire had notice of the absolute assignment by the insureds, and ought to have paid over the proceeds to the Corporation. Section 49(f) speaks of debt or legal thing in action and the debt would be a specific amount. It describes the person who has been given the notice in writing as the debtor or trustee who in this case would be Central Fire. The effect of this section was recognized in King v. Victoria Insurance Co. Ltd.(1896) A.C. 250 at 253, Lord Hobhouse said:

> "The bank claimed against the plaintiffs under the policy for a loss of 9201. The plaintiffs paid that amount and took a formal assignment from the bank of all their rights and causes of action against the government, the bank stipulating that the assignment should not authorize the use of their name in legal proceedings."

Note the plaintiffs were Victoria Insurance Co. Ltd. The ruling on the effect of the assignment pursuant to the comparable Act in Queensland was stated by his Lordship, thus at p. 254:

> "Assuming that the plaintiffs were bound to pay, the Court held on the authority of **Simpson v. Thomson** 3 App. Cas. 279 that they could not by mere force of subrogation sue in their own names. But they held that this right was conferred by the bank's express assignment, aided by the terms of s.5, sub-s. 6, of the Judicature Act, 40 Vict. c. 66. That Act follows exactly the English Judicature Act of 1873. The learned judges below consider that the term "legal chose in action" includes all rights, the assignment of which a Court of Law or Equity would before the Act have considered lawful, and that the right in question is a right of that kind."

Towards the end of the Board's opinion at p. 256 Lord Hobhouse reiterated his ruling, he said:

> "It is true that subrogation by act of law would not give the insurer a right to sue in a court of law in his own name. But that difficulty is got over by force of the express assignment of the bank's claim, and of the Judicature Act, as the parties must have intended that it should be when they stipulated that nothing in the assignment should authorize the use of the bank's name."

It is true that the written assignment, the insurance policy was not exhibited in this case but the case was conducted on the basis that it existed. The statement of claim avers and the Defence admits the existence of the insurance policies. Apart from Loss Payable Clause, which expressly mentioned the Corporation as an assignee, three other insurance documents mentioned the Corporation as the Loss Payee.

In addition to reliance on section 49(f) of the Judicature (Supreme Court) Act, the judgment below could be supported on the basis of the insureds' complete assignment of the proceeds of the policy in instances of loss or damage. It was thus a good equitable assignment. The implication was that a trust was created when the insureds (the assignors) directed the insurer, Central Fire to pay the proceeds of the policy to the Corporation as beneficiary.

Powerful support for this contention comes from William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd. (1905) A.C. p. 454 at 460 Lord Macnaghten said:

> "It is difficult to conceive a plainer case of an equitable assignment or a clearer case of notice to the debtor. As between Kramrisch & Co. and Brandt the case was complete, and more than complete, without Brandts' letter of January 7 and its enclosures. There was an understanding that the money should be paid direct to Brandts. There was besides a declaration of trust. There was an engagement to give Brandts "a sole and absolute lien," that is, sole and absolute control and dominion over the proceeds of the goods."

Later at page 462 His Lordship stated the requirements for the creation of a trust, thus:

> "The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor."

The errors in the appellant's submissions were that the effect of section 49(f) of the Judicature (Supreme Court) Act was minimised and that the assignors still had an interest in the proceeds to be paid for loss or damage. That is why reliance was placed on cases as E. M. Bowden's Patent Sydicate Hill v. Herbert Smith (1904) Ch. 86, Durham Brothers v. Robertson (1898) 1 Q.B. 768 Walter & Sullivan Ld. v. J. Murphy & Sons Ld. Same v. Same (1955) 1 W.L.R. 919. These were cases where respectively at the time of commencement of the action the claimant was not an equitable assignee of the patent, or where there was no absolute assignment, or where the equitable assignment was by way of charge or part of debt. It was in these cases that the assignor had to be joined as a party to the action. As the Loss Payable Clause makes the assignment absolute,

there was no need to join the assignor who had no interest by the terms of the assignment in the payments for loss or damage. Although he did not mention section 49(f) of the Judicature (Supreme Court) Act or expressly deal with equitable assignments Bingham, J. sets out the relevant law with clarity in his judgment. It reads thus:

> "The law governing assignees is clear in this regard. Although in practice the assignor or principal creditor is usually the proper plaintiff there is nothing to preclude the assignee from suing in his own name having regard to the nature of the assignment, as in this case where the benefit of the policies in event of a loss was from the outset assigned to the plaintiff corporation and this fact was one of which the defendant Central Fire had actual notice. In my opinion, this is sufficient to operate as an out and out transfer of the benefit accruing from the policies as the ownership in the subject matter to which the two policies related remained vested in the plaintiff corporation until the sums borrowed to acquire the vehicles in question had been fully repaid."

It is now instructive to record that Mrs. Benka-Coker, Q.C. stated in her skeleton arguments that:

> "The appellant proposes to argue only 3 grounds of Appeal and will abandon the others at the hearing of this appeal. They are the supplemental ground of appeal, which encompasses ground 3 of the original Grounds of Appeal, grounds 1 and 11 of the original Ground (sic) of Appeal."

That supplemental ground reads as follows:

> "It is the contention of the appellant that the learned trial judge erred in law when he held that the assignee, (the plaintiff/respondent) had the right to sue in its own name to recover the amount of the loss without joining the assignor as a party to the action."

Then grounds 1 & 11 of the original grounds read thus:

> "1. That there was no evidence on which the Learned Trial Judge could find that the sum claimed as Special Damages had been proved, and the Learned Trial Judge erred in law in holding that the said sums claimed for Special Damages had been proved.
>
> 11. That the Learned Trial Judge erred in Law in holding that the rate of interest in this matter should be 17%, and failed to direct himself to the usual rates of interest awarded on Special Damages."

The appeal must be confined to these grounds.

Returning to the interpretation of the Loss Payable Clause, bearing in mind that the recital on this clause reads:

> "(The information above is required only when this endorsement is issued subsequent to preparation of the policy.) This endorsement forms a part of the policy to which attached, effective from its date of issue unless otherwise stated herein."

The Loss Payable Clause has a provision which it is to be noted. It reads:

> "If the named insured fails to render proof of loss within the time granted in the policy conditions, such Lienholder shall do so within ninety-one days thereafter, in form and manner as provided by this insurance, and further, shall be subject to the provisions of this insurance relating to appraisal and time of payment and of bringing suit."

This provision reinforces the absolute nature of the assignment as in circumstances where the insured or assignor fails to claim for loss or damage, the Corporation as lienholder can make the claim and will be paid the proceeds.

On this aspect of the case, the appellant has failed. Either by virtue of the statutory provisions or as an equitable assignee, the Corporation was entitled to sue in its own name.

The Law as to joinder of parties

Dr. Barnett for the respondent, the Corporation, relied on section 100 of the Civil Procedure Code to support the order made

in the court below. This is the other reason for ruling against Central Fire. That provision reads:

> "100. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties; and the Court may in every cause or matter, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

No objection was raised in the court below concerning the absence of the insureds by Central Fire. The evidence established that both insureds are outside the jursidiction. Even if it were necessary to join them as plaintiffs or defendants there would be two objections. Firstly, neither insureds would have any interest to claim since the Corporation or lienholder has claimed the entire amount of the proceeds for loss or damage. Secondly, the courts in interpreting the counterpart to section 100 of the Judicature (Civil Procedure Code) Law have shown a reluctance to order joinder when the whereabouts are not known of the party sought to be joined or that policy may be outside the jurisdiction. In Hall v. Heward (1886) 32 L.R. Ch. p. 430, Cotton, L.J. stated at p. 435:

> "In the present case if the heir-at-law were known it would be right to say that he must be here in order that the question might at once be decided whether he had any title. But neither side alleges that he is known, and it would be a new departure, and contrary to the spirit of recent legislation, to refuse redemption altogether until he can be found and made a party."

Then Lindley, L.J. said at p. 436:

> "It is said that a redemption of the whole cannot be directed because the heir-at-law is not here. No doubt if he could be found he ought to be a party, but if he cannot be found is the mortgagee to keep the property free from the equity of redemption? There must be some way of avoiding that. The technical difficulty in directing redemption was got over in Pearce v. Morris Law Rep. 5 Ch. 227 and the Vice-Chancellor has framed his judgment on that model, inserting words to preserve the right of the heir-at-law against the party redeeming."

The instant case is stronger, because the heir-at-law might have had a claim, but what claims could the insureds have, when the debtor or trustee who is Central Fire is bound to pay the full claim to the Corporation?

The other problem of joinder in this case was highlighted in **Wilson, Sons & Co. Ltd. v. Balcarres Brook Steamship Co. Ltd.** (1893) 1 Q.B. p. 422. The following extracts from the judgment illustrate how the courts exercise their discretion as regards joinder when parties are outside the jurisdiction, Lord Esher, M.R. said at p. 427:

> "A larger power was given to the court by the new procedure as to joinder of parties; but that procedure ought as it seems to me, to be administered with regard to the principles of the old law on the subject."

Then addressing another aspect of the court's discretion Lord Esher continued thus at p. 428:

> "To say that, although a joint contractor is resident abroad, there is an absolute right to have him joined, gives rise to many difficulties, which I have pointed out during the argument. Suppose the Court to have ordered that such a joint contractor should be joined. He must then be served; but a writ cannot be issued for service out of the jurisdiction without the leave of the Court. The Court has a discretion with regard to granting that leave. So the Court might be in this difficulty: After ordering that he should be joined, when leave was asked to issue a writ for service upon him out of the jurisdiction, or of which notice was to be given to him out of the jurisdiction, the Court might find, when the circumstances were brought before them upon that application, that it would be unjust and improper to give such leave, and they might refuse it. I think, therefore, that it was a matter of discretion whether the order should be made."

Bowen, L.J. put the matter shortly, thus at p. 430:

> "... and I should hesitate long before compelling a plaintiff to pause in his pursuit of one joint contractor within the jurisdiction until he has chased the other who is beyond the jurisdiction."

A.L. Smith, L.J. supported the other two Lord Justices. The difficulties in the instant case would be compounded as both insureds as assignors are outside the jurisdiction. Another authoritative statement of the principle on which the court exercise its discretion as regard joinder appears in **William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.** (1905) A.C. p. 454, Lord Macnaghten said at p. 462:

> "Strickly speaking, Kramrisch & Co. or their trustee in bankruptcy, should have been brought before the Court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the Dunlops disclaimed any wish to have him present, and in both Courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts."

On the argument concerning joinder Dr. Barnett for the respondent had the better submissions.

As regards the restitutionary claim which includes interest

As Central Fire admitted the claim it is difficult to ascertain why the issue of special damage or why **Bonham-Carter v. Hyde Park Hotel Ltd.** T.L.R. dated April 16, 1948 and **Murphy v. Miller** S.C.C.A. 5/74 were cited. The Corporation has been kept out of their monies and presented its claim as regards the loss as follows:

"The Plaintiff claims against the Defendant:

Under Paragraph 2	US$26,000.00
Interest thereon at the rate of 17% per annum from 5th December, 1981 to 20th January, 1984	9,395.52
Under Paragraph 4	3,264.28
Interest thereon at the rate of 17% per annum from 3rd January, 1982 to 20th January, 1984	1,135.64
	US$39,795.44 "

It is true that the pleader used the label damages at the end of the Statement of Claim but the substance of the claim is restitutionary. Interest therefore, must be paid at the prevailing rate for this type of financing. The evidence on rates was given by Rick Startmeiter, the Office Manager of the Corporation in Texas. He is the keeper of the records of his office and he had considerable experience of financial matters. He gave the rate of interest as 17% per annum and this was accepted by the learned judge below. We see no good reason to disturb his finding since the evidence was unchallenged. The order below reads:

> "It is this day adjudged that the Plaintiff recover against the Defendant US$39,795.44 in the currency of the United States of America together with interest at the rate of 17% per annum calculated on the amount of US$29,264.28 in the currency of the United States of America from the date of service of the Writ of Summons on the Defendant up to the date hereof and costs to be agreed or taxed."

We affirm that order with the adjustment as to time as regards interest to be computed to the date of this judgment or when the amount is paid. The appellant must pay the costs of appeal which is to be taxed or agreed.

RATTRAY, P.:

I agree

GORDON, J.A.:

I agree.