IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT OF JUSTICE

SUIT NO. C.L. 1296 of 1973

BETWEEN	Central Fire and General Insurance Company Limited	Plaintiff
AND	Norman Perrin	Defendant

Tried: October 5 & 6, 1977

Allan Rae for plaintiff

W. B. Frankson for defendant

December 2, 1977

Parnell, J.

This case was well argued by Mr. Rae and Mr. Frankson. It has raised an interesting and important point in the area of motor vehicle insurance contracts. And the point of law which emerges to be decided, has come at a time when, owing to the restriction of importation on new cars into the Country during the present economic difficulties, owners of cars have to face another difficulty. There is a shortage of sufficient spare parts to fix existing units.

The matter for consideration may be put in the form of a dialogue between two car owners, Mr. Bumble and Mr. Pickwick.

Bumble: " I have a 1969 Ford 1600 c.c. but I had to replace several parts with all sorts of make shift. Cannot get parts easily today as in the fifties. You have any trouble with your old Chev?"

Pickwick: " Well old man I have trouble all the time and I have some now with my Insurance."

Bumble: " What kind of trouble?"

Pickwick: "During the currency of my third party insurance I had to change the "horse power" of the engine. Could not get an exact engine size after she was hit by a mini bus down Spur Tree. I changed the engine with a little higher power and I informed my company. Two days after I ran into a pick-up. Would you believe it that the company has informed me that it cannot be responsible because it is a different car I have because of the engine change? What do you think? Do you believe that my third party insurance can go like this?"

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Ford Capri car is insured

On the 25th May, 1972, the defendant Perrin completed a proposal form with a view to his taking out a comprehensive motor vehicle insurance with the plaintiff company on his motor car. The motor car was a Ford Capri 1969 model, 4 cylinders, lettered and numbered K.A. 509. The horse power was given as 1598 c.c. and the engine number as JR.71022.

On the 6th September, 1972, a comprehensive policy of insurance was issued by the plaintiff to cover the use of the motor vehicle described in the proposal form for the period May 25, 1972 to May 24, 1973. Paragraph 10 of the policy under the heading "conditions" states as follows:

> "The due observance and fulfilment of the terms of this policy in so far as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

And paragraph 3 has this condition:

> "The Insured shall take all reasonable steps to safeguard the Motor Vehicle from loss or damage and to maintain the motor vehicle in efficient condition and the Company shall have at all times free and full access to examine the motor vehicle or any part thereof or any driver or employee of the Insured. In the event of any accident or breakdown the motor vehicle shall not be left unattended without proper precautions being taken to prevent further loss or damage and if the motor vehicle be driven before the necessary repairs are effected any extension of the damage or any further damage to the motor vehicle shall be excluded from the scope of the indemnity granted by this Policy."

Engine changed from 1600 c.c. to 3000 c.c.

About 10 months after the policy became effective, the defendant completed a form seeking a change of engine to his motor vehicle with a corresponding endorsement on his policy to indicate the variation. The form was completed on or about March 13, 1973 with a request that the "change" or "variation" be made effective as from March 9, 1973. The plaintiff received the form on or about March 19, 1973.

Request is refused

On the 22nd March, 1973, the plaintiff wrote the defendant as follows:

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" Enclosed please find Daily Return Sheet dated 15th March, 1973 and Change Form which you sent to us requesting change of car engine.

We regret we are unable to effect this change as this Policy is under claim and is still pending settlement."

Defendant's car involved in accident

On April 12, 1973, during the currency of the policy covering the defendant's motor vehicle with a 1598 c.c. engine the said vehicle was involved in a collision in which two persons were killed and other passengers were injured. It appears that earlier on March 7, 1973, the defendant's motor vehicle was involved in a mishap. On July 6, 1973, the plaintiff wrote the defendant in connection with the incidents on March 7 and April 12 as follows:

"We hereby advise you that having investigated the above claims we are satisfied that the car which was insured under the policy was not the car involved in either accident and we have no alternative but to repudiate both claims."

Summary of events

The position between the plaintiff and the defendants up to July 6, 1973 may be summarised as follows:

(1) On 25.5.72, the defendant completed a proposal form requesting a comprehensive coverage for Ford Capri, K.A.509 with horse power 1598 c.c. (commonly called 1600 c.c.).

(2) On 6th September, 1972, the plaintiff issued a policy of insurance to cover the said motor vehicle with a horse power of 1600 c.c. from May 25, 1972 to May 24, 1973.

(3) On 13th March, 1973, the defendant completed a request form asking for a "variation" of the policy in respect of a change of engine in the car from 1600 c.c. to 3000 c.c. The variation is requested to be effective as from March 9, 1973.

(4) On 22nd March, 1973, by letter to the defendant, the plaintiff refused the request.

(5) On March 7, 1973, and on April 12, 1973, the motor vehicle of the defendant was involved in a mishap. It is clear that on the latter date the engine was a 3000 c.c. It is

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not clear if in fact on the former date the engine had yet been changed.

6. On July 6, 1973, the plaintiff repudiated the claims arising under the respective mishaps.

Plaintiff files action

In August 1973, the plaintiff filed a writ against the defendant claiming a declaration to the effect that the policy of insurance issued on September 6, 1972 -

> "was obtained by the non disclosure of material facts or by the misrepresentation of facts which were false in some material particular."

Having obtained an order to amend its statement of claim, the plaintiff filed an amended statement of claim in October, 1975. I shall outline in full the contents of paragraphs 6 to 8 thereof:

> 6. "The Plaintiff says that the representation of fact as to the c.c. rating of the said motor vehicle referred to in the said application as 1598 and contained in the said application was false in the following particular which it was material to be known to the Plaintiff in or about the making of the said policy, namely that in truth and in fact the said motor car was a Ford Capri motor car of a c.c. rating of 3000 which is a motor vehicle of a considerably higher power and speed.
>
> 7. In the alternative the Plaintiff says that the Defendant by his manner as to the c.c. rating of the said motor car contained in the said application failed to disclose facts material to be known to the Plaintiff in or about the making of the said policy.
>
> 7.(a) In the further alternative without the consent of the Plaintiff replaced the engine of the said motor vehicle with a more powerful engine rating 3000 c.c. and did use the said motor vehicle without the consent of the Plaintiff in the said policy of insurance.
>
> 8. On the 12th day of April, 1973, during the currency of the said policy covering a vehicle of 1598 c.c. rating and while the Certificate of Insurance was in full force and effect the Defendant was involved in an accident in which Lowell Dewar care of the Military Work Shop, Up Park Camp, Saint Andrew and Zipporah Wilson were killed and other passengers in a car driven by the said Lowell Dewar suffered bodily injuries."

At the trial in order to save time both attorneys decided to proceed. The case proceeded on the basis of certain admitted facts the substance of which I have already summarised. There is nothing to contradict the pleadings of the defendant and exhibits 4 and 5 (tendered by consent) which

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indicate that the change of engine horse power from 1600 c.c. to 3000 c.c. was effected in March after the policy of insurance had been issued. The complaint of the plaintiff is, therefore concentrated in terms of paragraph 7(a) of the amended statement of claim which has already been quoted.

Defendant files his defence

The defendant has met the plaintiff's claim with a spirited defence, laced with a counter claim. To put it briefly, the defendant maintains:

(a) That the answers to the questions in the proposal form are true in substance and in fact;

(b) That the plaintiff is not entitled to avoid the policy;

(c) That the plaintiff, in breach of its contract has failed to indemnify the defendant against the constructive total loss sustained by him as a result of the accident on April 12, 1973. The sum claimed is put at $1,495.00

Legal Arguments

In an interesting and persuasive agrument, Mr. Rae made the following points:

1. When the plaintiff refused the request of the defendant for a change of engine rating to be noted on the policy, two alternatives were open to the defendant.

2. The alternatives were that he should have terminated the contract of insurance for the purpose of seeking a coverage elsewhere or he could have relied on the insurance contract by refitting the damaged 1600 c.c. engine with another 1600 c.c. engine.

3. To comply with (1), the defendant would have had to notify the plaintiff whereas no notice was required to comply with (2).

4. That the defendant was in breach of his policy when he fitted a 3000 c.c. engine in his car without the consent of the plaintiff and he is therefore barred from making a claim under it.

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5. It is a material misrepresentation to use a 3000 c.c. engine instead of a 1600 c.c. because the risk of the plaintiff is thereby increased.

No authority is required to support the simple proposition that a representation touches some existing fact or some past event. A statement which contains an element of futurity is equivalent to a promise to do something in future.

Mr. Frankson's submission on this aspect of the case is to the effect that if misrepresentation is to be relied on by the plaintiff it must be shown that some fact unknown to the plaintiff and known to the defendant existed at the date the proposal was made and which affected the mind of the plaintiff's representative in making the contract. He submitted further that if the plaintiff is to succeed at all the material time with reference to which the declaration is sought must be traced from and after the 9th March, 1973 and not before. I am partly in agreement with these submissions. As I have already mentioned, there is no evidence that at the time the proposal form was executed motor vehicle K.A.509 had a 3000 c.c. engine and not a 1600c.c. (1598 c.c.) as mentioned by the defendant. An exhibit in the case (exhibit 3) shows that on September 16, 1969 when the car was examined by the Traffic Authority as to its fitness, the rating was put at 1598 c.c. Another certificate of fitness (exhibit 3A) issued on March 8, 1973 shows that K.A.509 when examined on that date had an engine rating of 2998 c.c. It is not too difficult, therefore, to understand why the plaintiff had reason to believe that on March 7, 1973 when the car was involved in a collision, it had in a more powerful engine than when the risk was first undertaken. Despite the clear documentary evidence that the motor car had a 3000 c.c. rating on March 8, 1973, the defendant requested a change effective as from March 9, 1973. It is not strictly accurate, therefore, to argue that the material date with reference to the change of engine is March 9.

There is a presumption of fact that where a thing is proved to have been in existence or in a certain state on a given date, it continues to exist or remain in that state for a reasonable time thereafter. And it is reasonable to assume that if a motor car is fitted with an engine of a certain rating when made, that that engine will remain in use for a reasonable time. In this

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context, up to May 1972 is a "reasonable time" for the purposes of the presumption in the case of a 1969 model car.

A motor vehicle insurance contract may be regarded as a contract of indemnity. And it has certain peculiarities or characteristics which make it different from an ordinary contract between two parties. The whole scheme of the Motor Vehicles Insurance (Third Party Risks) Act, shows that for the benefit of the public and of third parties, those who negotiate the making of a policy of insurance under the Act are not free to do as they please. And any condition or requirement which is inconsistent with the Act is null and void. Some of the characteristics of a contract of motor insurance may be pointed out as follows:

(1) It is compulsory. So long as a motor vehicle is to be used on the public road, there must be in force in relation to the user of that vehicle, a policy of insurance in respect of third party risks. See section 4(1) of the Act.

(2) The insurance company is generally liable to pay damages to a third party whether the person who incurred the liability can or cannot pay it himself. Section 5(3).

(3) Certain conditions imposed in the policy for the benefit of the insurance company are void in respect of liability incurred in respect of death or bodily injury to any person arising out of the use of the insured vehicle on the road. And one of the conditions that is void is a restriction on the horse power or value of the vehicle. See section 6(2)(f) of the Act.

(4) Even where an insurer is entitled to avoid or cancel a policy of insurance, once a certificate of insurance has been issued and judgment has been entered in favour of a party in respect of liability arising out of the use of a motor vehicle which caused death or bodily injury to a third party, the insurer is still liable to satisfy the judgment unless the insurer secures a declaration from the

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Court that:

> "apart from any provision contained in the policy, it is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."
> See sections 18(1) and 18(3) of the Act.

On the face of the Act, it appears that the clear provisions of sections 5(1)(b); 6(2)(f); and 18 of the Act are sufficient to answer the ingenious argument of Mr. Rae. His main contention is based on the hypothesis - which he stressed with force - that a motor vehicle insurance policy is to be treated like any ordinary contract in the area of subject matter, enforceability and avoidance.

The plaintiff has come to Court by virtue of Section 18(3) of the Act. It seeks a declaration with a view to avoiding the policy of insurance issued to the defendant. But third parties have acquired a right to sue the defendant for damages arising out of the use of the motor vehicle while under the said policy. And under the Act, the ~~defendant~~ Plaintiff is bound to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy covers.

Where the ground for avoidance of the insurance policy is based on non-disclosure of a material fact or by a representation of a fact which was false in a material particular, the plaintiff company is required to show on a balance of probabilities two things, namely:

(1) That the suppression of a material fact or the representation of the alleged fact by word or conduct influenced the judgment of a prudent insurer in determining whether the risk should have been undertaken; and

(2) That up to when the contract was concluded the insured had not repented with a view to speaking the truth.

Realising that (1) and (2) above may not be easy to surmount, the plaintiff seeks another escape route. What it is saying in simple terms is that if after a motor vehicle has been insured with a 1300 c.c. engine and it is replaced during the currency of the policy without its consent with a 1600 c.c. engine it is entitled to avoid the policy even where third parties have

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acquired rights under the policy owing to damages suffered as a result of the use of the motor vehicle on the public road. It is said that a more powerful engine will increase the risk contemplated and an increase of risk carries an increase of premium. At the moment I am unable to envisage what the argument of the insurer would be if an insured vehicle with a 1600 c.c. engine is replaced with a 1100 or 1300 c.c. without its consent. And instead of changing the engine, suppose there was a change of wheel base, so that what looked like an "innocent" touring car when insured now resembles a "racing machine" with a change of wheel base. In the first instance - according to the logic of the argument - the risk would have been diminished with a less powerful engine but it would have been increased with a wider wheel base although in each case it is the same otherwise identifiable motor vehicle which was insured.

An insured may increase the risk of the insurer in several ways. The young sportsman may indulge in a racing exercise along the Queen's Highway and this may result in a collision. The henpecked executive may indulge in a pub-crawl before he goes home. While driving home and in a state of inebriation, he may collide with a pedestrian. In all these instances, it would be unthinkable that an insurer could secure an order which would allow an avoidance of the policy of insurance to the prejudice of the statutory right of third party to be indemnified by the insurer.

The true position seems to be that during the currency of the insurance policy, there is no implied condition that the risk may not be materially altered. Wiles, J. put the matter clearly nearly 120 years ago. This is what he said:

> "In effect, there being no violation of the law and no fraud on the part of the assured, an increase of risk, to the subject matter of insurance, its identity remaining, though such increased risk be caused by the assured, if it is not prohibited by the policy, does not avoid the insurance." Thompson v. Hopper /1858/ E.B. & E. 1038 at 1049.

The same point was made by Du Parcq, J. (as he then was) in Seaton v. London General Insurance Company /1932/ 48, L.T. Rept.574. In that case a motor lorry was insured. The owner in the proposal form declared that the vehicle would be garaged on his own premises. During the currency of the policy, the owner removed the engine for repairs and took it to a workshop some distance away. The engine was destroyed by fire while at the workshop.

On a claim under the policy, the insurance company ~~may~~ resisted it on the ground that:

> " a lorry was not a motor lorry when it had been deprived of its motive power."

This ingenious argument was rejected on the simple ground that although the engine and body together constituted the insured lorry, the fact of the removal of the engine did not deprive the claimant of the right to an indemnity under the policy. In 1853, there was no compulsory motor vehicle insurance in England. In fact, motor cars were unknown then. By 1932, motor vehicles were popular and compulsory insurance for their use on the road was in force.

It seems to me that on the facts before me and in the present state of the law, the plaintiff's prayer for a declaration must fail. Those who undertake to cover the use of a motor vehicle on a road must be aware that where a person has suffered death or bodily injury arising out of the use of the insured vehicle, the vested right of an innocent third party to be compensated, cannot be dismissed lightly nor can it be put in limbo. That is a risk which the insurer did undertake to run by being an insurer of motor vehicles. The law, therefore, holds him to his word and to his duty.

There is a matter which I should mention at this stage. No argument was addressed to me on the point and, therefore, I shall only make a brief reference on it. Under the policy, there is an arbitration clause, namely, paragraph 9 of the "conditions." It says that:

> "all differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference."

Notwithstanding this agreement, the plaintiff having written a terse letter to the defendant repudiating liability under the policy, promptly thereafter filed a writ seeking a declaration and ignored the solemn promise under the contract. A stickler for the law would say that such a course was open. But on moral grounds, it is doubtful whether the plaintiff can attract any applause on its stand. Up to the time the writ was filed, it appears that there was no formulation of a dispute which was ready for submission to an umpire. An arbitration clause cannot oust the jurisdiction of the Court.

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A statutory right granted to a party under a contract cannot be barred by a gentleman's agreement. In a matter of this kind, however, the Court would view with favour any attempt made to submit differences to arbitration before a rush is made to the Supreme Court with the likely result which this case has produced.

Can the defendant succeed in his claim for the loss of his vehicle?

As I have already mentioned, the defendant has counter claimed for constructive total loss of his car. The particulars of special damage have been outlined as follows:

"Insured value of motor car destroyed $1,300.00

Loss of use of motor car 13 weeks at $15 per week $ 195.00

Total: $1,495.00"

There is also a claim for damages for breach of contract.

The contractual obligation of the plaintiff relied on by the defendant to support this head of claim is to be found in section 1 of the policy under the heading "loss or damage." The relevant portion reads:

> "The Company will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon.
>
> (a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear."

As I understand it, the plaintiff has not alleged and indeed is unable to allege and prove that the collision which took place on April 12, 1973, would not have taken place but for the presence in the car of a 3000 c.c. engine. If the collision is directly traceable to the functioning of the 3000 c.c. engine as against a 1600 c.c. engine in a similar make and model car at the time of the collision and under the same circumstances, then perhaps a different situation would arise. And at the moment it looks almost impossible for this fact to be proved. But even if it is assumed that this fact could be proved, whether this would have been enough to bar the defendant's counter claim is another matter. A motor car does not necessarily caress a lamp post or mount an embankment merely because the engine has 6 cylinders instead of 4.

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On the principle that a man should not be allowed to reap a benefit from his own wrong doing, it could be argued that the defendant could be prevented from enforcing the contractual clause already mentioned if it is shown that but for the change of engine without the consent of the plaintiff, the collision with the resultant damage to the car would not have occurred.

Did the defendant do anything wrong in changing the engine?

Mr. Frankson, in his usual felicitous style, has argued that when the 1600 c.c. engine was replaced with 3000 c.c., the action of the defendant was and is permitted under condition 3 of the policy. I have already quoted it but for emphasis, I shall repeat condition 3 in so far as it is relevant.

> " The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the vehicle in efficient condition and the Company shall have at all times free and full access to examine the motor vehicle or any part thereof or any driver or employee of the insured."

Mr. Frankson has argued in effect that where replacement of a part of an insured vehicle becomes necessary it is a reasonable step to safeguard the motor vehicle within the meaning of Condition No.3 if the appropriate part is in fact replaced. I agree with him. Maintaining a motor vehicle in an efficient condition, covers a replacement of a damaged, or otherwise worn out engine. And so long as the insurer is advised of the change and the insured is prepared to abide by any variation in the premium the insured would have done what is sufficient to bring himself within the meaning and intendment of the policy. Where such a situation arises, the insurer is estopped from arguing that its consent was not given to the replacement or to the change being effected.

When the plaintiff was requested to note the change of engine in the car, it was not suggested that such a move was improper or that it was not permitted under the policy. The reply was:

> "We regret we are unable to effect this change as this Policy is under claim and is still pending settlement."

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Every insurer has a statutory right to cancel a certificate of insurance if it has a clause in the policy to this effect. Section 17 of the Act preserves the right of the insurer to cancel the insurance subject to any third party right existing at the date of the cancellation. Paragraph 7 of the policy of insurance issued to the defendant has this provision:

> " The Company may cancel this Policy by sending seven days' notice by registered letter to the Insured at his last known address and in any such event will return to the Insured the premium paid less the pro rata portion thereof for the period the Policy has been in force or the Policy may be cancelled at any time by the Insured on seven days' notice and (provided no claim has arisen during the then current Period of Insurance) the Insured shall be entitled to a return of premium less premium at the Company's Short Period rates for the period the Policy has been in force.

If the plaintiff was seriously apprehensive about the change of engine in the car of the defendant, it lost a golden opportunity on March 22, 1973, when it failed to resort to its right of cancellation under the policy. The defendant was given a free hand to continue with his policy while the claim then under investigation was being considered. A cancellation would have released the plaintiff for the future from contingent liability which otherwise under the policy it would be compelled to bear.

One of the maxims of Syrus is put thus: the next day is never so good as the day before. It is an adage aimed at procrastination. If there is any virtue in certain areas to adopt Fabian strategy, it is doubtful whether in these troubled and fast moving times, it is a method which men of business like an insurer of a motor vehicle may follow with safety.

Mr. Rae marched up to the difficulty facing him very boldly. I would not say as at present, advised that his argument was marked with mere novelty and eloquence. He satisfied me with his sincerity in urging, in effect, that a man should not be allowed to vary his contract unilaterally and then seek to enforce it. Put in this form it sounds simple and persuasive. It must always be remembered, however, that the public at large has a special interest in a motor vehicle insurance policy and that it is the duty of the Court to protect that interest within the limits of the law.

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Assessment of damages

In the absence of evidence, I am unable to assess the sum which the defendant has claimed as special damages. But for the breach of contract, I award the sum of twenty-five dollars. The ascertainment of the special damages will be referred to the Registrar.

Judgment

There must be judgment for the defendant on the claim and counter claim. And on the counter claim the defendant is entitled to the following:

(1) A declaration that the policy of insurance and the certificate of insurance issued by the plaintiff to the defendant were at all material times in full force and effect;

(2) A declaration that the plaintiff is liable to indemnify the defendant against all liabilities to third parties arising out of the use of the said motor vehicle on the road and to which the defendant has been held liable to pay;

(3) The sum of twenty five dollars for breach of contract.

(4) Such sum as special damages agreed or proved at an assessment to be arranged by the Registrar;

(5) The defendant is entitled to his costs to be agreed or taxed save that he is not entitled to his costs for proving at an assessment what his special damages will show. It is not the plaintiff's fault that this aspect of the matter was not aired at the trial before me.