[2020] JMSC Civ 122

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. SU2019CV00143

BETWEEN	**SHEM WAISOME**	**CLAIMANT**
AND	**BRITISH CARIBBEAN INSURANCE COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Ainsworth W. Campbell for the Claimant

Ms. De-Andra Butler instructed by Messrs Samuda and Johnson for the Defendant

EMPLOYER'S LIABILITY INSURANCE POLICY - PRIVITY OF CONTRACT - WHETHER THIRD PARTY MAY RECOVER JUDGMENT FROM INSURER

HEARD: March 19, 2020 & June 18, 2020

WOLFE-REECE, J

INTRODUCTION

[1] The Claimant, Mr. Shem Waisome, was injured on May 19, 2009 whilst in the course of his employment to E. Pihl & Sons A/S by a fellow employee, one Broswell McDonald. In 2013 he initiated claim number 2013HCV00109 against E. Pihl & Sons A/S and Broswell McDonald to recover damages for negligence. The Claimant successfully prosecuted his claim against the Defendants and was

awarded judgment on April 29, 2016 in the sum of $10,822,441.23 inclusive of interest and it was ordered that costs be agreed or taxed.

[2] E. Pihl & Sons A/S initiated bankruptcy proceedings after claim number 2013HCV00109 was filed but before the matter was heard and determined. The Claimant is now seeking to enforce the judgment he obtained, (in April 2016) against British Caribbean Insurance Company Limited (BCIC) under an indemnity agreement which the Claimant purports to have existed between BCIC and E. Pihl & Sons A/S at the time of his injury. On 16th January 2020 he filed a Fixed Date Claim Form on seeking the following orders:

> 1. *That the Defendant pay to the Claimant the sum of Ten Million Eight Hundred and Twenty-two Thousand Four Hundred and Forty-one Dollars Twenty-three Cents ($10,822,441.23) awarded to the Claimant on the 29th April 2016 in the claim No. 2013HCV00109 Shem Waisome v E. Pihl & Son A/S and Boswell McDonald with interest at 25% per annum from the 29th day of April, 2016 to the payment thereof.*
>
> 2. *Payment of Cost on the claim No. 2013HCV00109 Shem Waisome v E. Pihl & Son A/S and Boswell McDonald estimated at Three Million Seventy-Nine Thousand Nine Hundred and Eighty Thousand Dollars ($3,079,980.00).*

[3] By way of an Amended Notice of Application siled on July 3, 2019 the Defendant is seeking to have the Claimant's case struck out on the basis that there are no grounds for bringing the Claim against the Defendant Company.

[4] I therefore have concluded that to determine the issue raised the starting point must be to look at what is the Claimant's case.

CLAIMANT'S SUBMISSION

[5] Learned Counsel Mr. Campbell submitted that at the announcement of the judgment for claim number 2013HCV00109, he was advised by the attorney-at-law for E. Pihl & Son A/S that the company had filed for bankruptcy but that there

existed an Employer's Liability Insurance Policy that would assist the Claimant. Mr. Campbell argued that at the time when Mr. Waisome was injured, the said insurance policy between E. Pihl & Son A/S and BCIC was operational. Learned Counsel further noted that the Defendant agreed as a term of the insurance contract, to indemnify E. Pihl & Son A/S for financial loss incurred by virtue of any injury, bodily or otherwise, that an employee of insured sustained whilst in the execution of their duties.

[6] Mr. Campbell submitted that he approached the Claims Manager of BCIC to make enquiries as to whether the insurance company would be compensating the Claimant according to the terms of the judgment obtained in claim number 2013HCV00109. He further asserted that by letter dated May 6, 2016, the Claims Manager wrote to him advising him that they would not be paying the judgment as E. Pihl & Son A/S had breached the terms of the policy.

[7] Mr. Campbell claims that despite requests for a copy of the policy and an indication of the breach, BCIC has failed and/or refused to provide the Claimant with such information. Counsel noted that he was unable to get a copy of the original agreement and he is therefore asking the court to consider a draft contract which contains the following terms:

> *"It is hereby agreed that if any employee in the insured (E. Pihl & Son A/S) immediate service shall sustain bodily injury by accident or disease caused during the period of insurance and arising out of and in the course of his employment with the insured in the business or whilst engaged in in private work for any director or officer of the insured E. Pihl & Son A/S; the Company i.e. the Defendant will subject to terms, exceptions and conditions contained herein or endorsed herein (hereinafter collectively referred to as the terms of this policy) indemnify the assured against liability at law for damages, workers compensation and Claimant's cost and expense in respect of such injury or disease and will in addition pay all costs and expenses incurred with the company's written consent. The company i.e. British Caribbean Insurance Company Limited will also in the event of the death of the assured indemnify the insured's legal representative in terms of the policy in respect of liability incurred by the insured, provided that such personal representative shall as*

> *though they were insured observe, fulfil and be subject to the terms of the Policy in so far as they can apply."*

[8] Learned Counsel acknowledged that the privity of contract rule operated against the Claimant. However, he argued that the role of the court under the Civil Procedure Rules is to deal with cases justly. He went further in arguing that justice demanded that the judgments of the court should concur with society as a whole and its values and ideals as to what should constitute honest and proper behaviour between citizens, including corporate citizens.

[9] Mr. Campbell submitted that the Defendant had a duty to indemnify the Claimant on the basis that during the course of his employment a sum of $660 was deducted from his salary on a fortnightly basis to be paid over to the Defendant as insurance premium. He further urged on the Court that the doctrine of privity of contract should not be applied in the current case. Rather, the Court should be bold and use its power under the common law to see to it that justice is done. Counsel relied on the case of **Re: F. (Mental Patient: Sterilisation)** [1990] 2 A.C. 1 to substantiate his point. He quoted several passages of the judgment to this Court where the court recognised its inherent jurisdiction to modify the common law to prevent an unjust result. In particular reference was made to where the board cited with approval the dicta of Lord Scarman in **Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital** [1985] A.C. 871. At page 884, Lord Scarman expressed as follows:

> *"Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty; but merely the application of the principle ubi jus ibi remedium."*

DEFENDANT'S SUBMISSION

[10] The Defendant's defence is simple and straightforward; they have argued that the Claimant's claim must fail as there is no privity of contract between the parties. Whilst recognizing the by letter dated May 6, 2016 under the hand of the Claims Manager of the Defendant company which suggested that they were under no obligation to make a payment because the insured had breached the terms of the policy agreement. The Defendant company saw no basis on which they should divulge the details of such breach and insisted that there was no privity of contract between the parties and therefore, they were under no obligation to disclose the details of the contract to a third party.

LAW & ANALYSIS

Whether the Claimant is entitled to compensation under an employer's liability policy to which he was a third party

[11] The sole issue to be determined by the court is whether the Claimant is entitled to be compensation under an insurance policy to which he was a stranger. Before diving into the substantive issue, it is important to point out that an insurance contract, despite its unique nature, is a contract. The learned authors of the Stair Memorial Encyclopaedia provided a useful explanation on the formation of an insurance contract wherein they provided inter alia, that *"the contract of insurance, like the majority of other contracts, is formed as a result of offer and acceptance. Until there is* consensus in idem *there is no contract…"*

[12] A fundamental principle that governs the law of contracts is privity of contract. The Defendant argued that the privity rule disentitles to Claimant from bringing a claim in relation to the employer's liability insurance policy as he was not a party to the contract. The doctrine of privity of contract was explained at paragraph 128 of the Halsbury Laws of England Volume 22 (5th Edition) as follows:

> *The doctrine of privity of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts; irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements; and contracts with unincorporated associations.*
>
> ***Despite some earlier doubts, in the mid-nineteenth century the doctrine of privity was accepted by the courts, though those doubts have still been expressed from time to time, albeit by a minority of cases.*** *The privity of contract rule may be regarded as intimately connected with the doctrine of consideration and the rule that consideration must move from the promisee.* ***[Emphasis mine]***

[13] A noteworthy point is that the learned authors of the Halsbury Laws of England have pointed out that there has been some doubt about the privity rule, these doubts persist today as the strict application of the common law principle may have harsh implications of depriving a third party of any redress known to law.

[14] The principle was discussed by the House of Lords in the case of ***Beswick v Beswick*** [1968] A.C. 58. In that case, the respondent's husband agreed to assign the assets of his business to his nephew (the appellant) on the agreement that the appellant would make weekly payments of £6 10s to the respondent's husband for the remainder of the husband's life and upon his death £5 per week was to be paid to the respondent. On the death of the respondent's husband, the appellant made the first payment but refused to make any other payment. The respondent is therefore suing for £175 annuity and specific performance of the agreement between her late husband and the appellant. The Respondent brought the claim both in her capacity as administratrix of the estate of her deceased husband and in her personal capacity as the intended beneficiary of the contract.

[15] The House of Lords ruled in favour of the Respondent, Lord Hodson specifically stated at page 83 of the judgment that: *"The appellant has had the full benefit of the contract and the court will be ready to see that he performs his part (see the*

judgment of Kay J. in Hart v. Hart27).” It is important to note that in coming to their conclusion the Law Lords did not disrupt the common law rule relating to privity of contract, in fact, the principle was enforced as the House found that the respondent could not succeed on a claim in her personal capacity. Rather, she was granted the equitable relief of specific performance in her capacity as administratrix of her late husband’s estate. Lord Reid quite aptly outlined on pages 71 and 72 of the judgment as follows:

> *It so happens that the respondent is administratrix of the estate of her deceased husband and she sues both in that capacity and in her personal capacity. So it is necessary to consider her rights in each capacity.*
>
> *For clarity I think it best to begin by considering a simple case where, in consideration of a sale by A to B, B agrees to pay the price of £1,000 to a third party X. Then the first question appears to me to be whether the parties intended that X should receive the money simply as A's nominee so that he would hold the money for behoof of A and be accountable to him for it, or whether the parties intended that X should receive the money for his own behoof and be entitled to keep it. That appears to me to be a question of construction of the agreement read in light of all the circumstances which were known to the parties. There have been several decisions involving this question. I am not sure that any conflicts with the view which I have expressed: but if any does, for example, In re Engelbach's Estate, I would not agree with it. I think that In re Schebsman was rightly decided and that the reasoning of Uthwatt J. and the Court of Appeal supports what I have just said. In the present case I think it clear that the parties to the agreement intended that the respondent should receive the weekly sums of £5 in her own behoof and should not be accountable to her deceased husband's estate for them. Indeed the contrary was not argued.*
>
> *Reverting to my simple example the next question appears to me to be: Where the intention was that X should keep the £1,000 as his own, what is the nature of B's obligation and who is entitled to enforce it? It was not argued that the law of England regards B's obligation as a nullity, and I have not observed in any of the authorities any suggestion that it would be a nullity. There may have been a time when the existence of a right depended on whether there was any*

> *means of enforcing it, but today the law would be sadly deficient if one found that, although there is a right, the law provides no means for enforcing it. So this obligation of B must be enforceable either by X or by A. I shall leave aside for the moment the question whether section 56 (1) of the Law of Property Act,1925, has any application to such a case, and consider the position at common law.*
>
> *Lord Denning's view, expressed in this case not for the first time, is that X could enforce this obligation.* ***But the view more commonly held in recent times has been that such a contract confers no right on X and that X could not sue for the £1,000. Leading counsel for the respondent based his case on other grounds, and as I agree that the respondent succeeds on other grounds, this would not be an appropriate case in which to solve this question. It is true that a strong Law Revision Committee recommended so long ago as 1937 (Cmd. 5449):***
>
> ***"That where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name …" (p. 31).***
>
> ***And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legislation is probable at any early date I would not deal with it in a case where that is not essential. So for the purposes of this case I shall proceed on the footing that the commonly accepted view is right. [Emphasis mine]***

[16] It must emphasised that while Lord Reid urged the UK Parliament to accept the recommendations made by the Law Revision Committee, His Lordship did not attempt to change the law as it stood at the time, rather he accepted that the view more commonly held was the correct position, that is, that third parties to a contract cannot sue under same in their personal capacity.

[17] While Mr. Campbell accedes to the fact that the privity rule would preclude the Claimant from bringing a claim under an insurance policy to which he is not a party, learned Counsel has asked this Court to be “bold” and bypass the doctrine or modify the common law principle to reflect the values of the society. I find that counsel’s submission at paragraph 8 of his condensed submissions filed on March 19, 2020, captures the essence of his argument and I am of the view that to

paraphrase his words would diminish the valour with which he wrote, Learned Counsel argued as follows:

> *"Depending on the view of the facts as known the Court may be tempted to hold that the doctrine of Privity of Contract applies in favour of the Defendant, but it is submitted that it should not be so held in the circumstances of this claim. It is the duty of the Court to use its power inherent in common law to see justice done. The stricture of the law with regard to Privity of Contract normally construed belongs to a less aware and less complex environment than the present; it is the outworn concept that belongs to more primitive time and really does not apply to modern times…"*

[18] The submissions of Counsel in this regard are not novel, similar sentiments were expressed by Lord Steyn in the case of ***Darlington Borough Council v Wiltshier Northern Ltd (Lowes and others, third parties)*** [1995] 3 All ER 895 and by our very own Sykes J (as he then was) in the case of ***Claudette Edwards v Quest Security Services Limited*** (unreported) Supreme Court of Jamaica Claim No. 2005HCV01124 delivered on 20 September, 2005.

[19] In the case of ***Darlington Borough Council v Wiltshier Northern Ltd (Lowes and others, third parties)*** (supra), the Court of Appeal of England was minded to grant the Darlington Borough Council the right to sue under a contract to which it was not a party. I must emphasise the fact that the relief granted in this case was under the law of equity and by no means amounted to a deviation from the privity rule. Nevertheless, the reasoning of Lord Steyn is important in highlighting the judicial discontent with the privity rule.

[20] The brief facts of the case are that the Darlington Borough Council was desirous of building a recreational centre on a parcel of land, which it already owned. In order to circumvent certain borrowing restrictions, the council decided to have one Mr. Morgan Grenfell (Local Authority Services Ltd) act as the financier of the recreational centre. As such, Mr. Grenfell entered into a contract with the building contractor for the construction of the recreational centre. After Mr. Grenfell was reimbursed the building was transferred to the council. The council alleged that the

building had major defects. The Defendants sought to restrict the claim of the council by arguing that they were not a party to the contract and therefore could not recover substantial damages.

[21] While all members of the board of the English Court of Appeal ruled in favour of the council by declaring that the damages should be assessed on the normal basis, as if the council had been the employer under the building contracts, Dillion LJ and Waite LJ did not seek to erode the privity rule, rather they grounded their reasoning under the doctrine of constructive trust by arguing that Mr. Morgan Grenfell held the Council's interest on trust. Dillion LJ concluded on pages 902-903 as follows:

> *"In the light of cl 3(4) of the covenant agreement, if Morgan Grenfell had, before any assignment, sued in its own name for damages for the alleged breaches of the building contracts, it would have held any damages recovered as a constructive trustee for the council and would have been accountable accordingly in equity. Lloyds v Harper is thus analogous and Morgan Grenfell could have recovered from Wiltshier the losses of the council to whom it stood, in that respect, in a fiduciary relationship."*

[22] Steyn LJ on the other hand, dissented in his reasoning. His Lordship noted that he did not find it necessary to explore the issue of constructive trust, rather he reasoned that the case called for the court to deviate from the privity rule by honouring the intention of the parties. His Lordship expressly stated at pages 903-904:

> *"But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract. I will not struggle further with the point since nobody seriously asserts the contrary; but see a valuable article by Jack Beatson, a law commissioner, now Rouseball Professor of English Law at Cambridge, 'Reforming the Law of Contracts for the Benefit of Third Parties: a Second Bite at the Cherry' (1992) 45 CLP 1.*

> *The genesis of the privity rule is suspect. It is attributed to Tweddle v Atkinson (1861) B & S 393, [1861–73] All ER Rep 369. It is more realistic to say that the rule originated in the misunderstanding of Tweddle v Atkinson: see Atiyah's Rise and Fall of Freedom of Contract (1979) p 414 and Simpson's History of the Law of Contract: the Rise of the Action of Assumpsit (1975) p 475. While the privity rule was barely tolerable in Victorian England, it has been recognised for half a century that it has no place in our more complex commercial world. Indeed, as early as Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 at 855, [1914–15] All ER Rep 333 at 335 when the House of Lords restated the privity rule, Lord Dunedin observed in a dissenting speech that the rule made—*
>
> > *'it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.'*

[23] While the majority of the board did not agree with the reasoning of Lord Steyn, his reasoning was applied by Sykes, J in the case of ***Claudette Edwards v Quest Security Services Limited Claim*** (supra). In that particular case, the Defendant argued that cases such as ***Beswick v Beswick*** (supra) and ***Cleaver v Mutual Reserve Fund Life Association*** [1892] 1 Q.B. 147 had conclusively settled the issue concerning privity of contract, in that, non-parties to a contract had no right or obligation to sue or be sued under it. Sykes, J rejected the idea that the privity of contract rule is immutable. He started his analysis of the issue at paragraph 11 of the judgment by stating as follows:

> *'Mr. Dabdoub suggested that the cases he cited on the privity issue (Beswick and Cleaver) have conclusively settled the matter once and for all that non-parties to a contract have no standing to bring any claim concerning it. However, is this really so? I am of the view that unless there is a decision from the Judicial Committee of the Privy Council on an appeal from Jamaica or from the Court of Appeal of Jamaica that has precluded, irrevocably, a re-examination of the doctrine of privity in the context of insurance contracts generally and life and/or accident insurance contracts in particular then it is appropriate to see whether they are developments in other common law jurisdictions that may be of assistance. No case has been cited to me in which either the Privy Council on appeal from Jamaica or Court of Appeal of Jamaica has irreversibly said the privity of contract rule is so fundamental a rule that only Parliament can change the law*

> *or that the days of judicial modification of common law rules are long past. On the contrary, what the research reveals is growing judicial impatience with the rule and the tardiness of legislative intervention and but for the apparent timidity of counsel the judges would have acted long ago.'*

[24] His Lordship further expressed his displeasure with the privity of contract rule by stating at paragraph 15 that "*something is terribly wrong with the privity of contract rule*." Sykes CJ analysed the case of ***Darlington Borough Council v Wiltshier Northern Ltd (Lowes and others, third parties),*** supra and in so doing he expressed in no uncertain terms his approval of the reasoning of Steyn J.

[25] While it is clear that Sykes, J is discontented with the current state of the law in relation to the doctrine of privity of contract, it must be noted that the Learned Justice Sykes by no means suggested that there should be a total eradication of the principle. At paragraph 18, Sykes, J summarized what I consider to be, the unique facts of the case and the Learned Judge indicated his decision in the particular case was not a '*wholesale destruction of the privity rule.'* The Learned Judge expressed as follows:

> *"In the case before me, Miss Thompson was the intended beneficiary of the contract. That is indisputable. The clear intention of the parties was to confer a benefit on Miss Thompson or a beneficiary identified by her. In other words, Miss Thompson was given the option of disposing of her benefit to whomever she pleased. She chose Miss Edwards. But for the alleged change of beneficiary, Miss Edwards would have stepped into the shoes of Miss Thompson once she (Thompson) dies. The injustice of saying Miss Edwards in the event of Miss Thompson's death cannot bring an action is patent. Following on from the logic of Guadron J, why should the initially named beneficiary be prevented from attempting to establish that the second named beneficiary secured the benefit by inequitable conduct, which if established can have the effect of setting aside the purported change of beneficiary? The case also raises the issue of whether a person can be unjustly enriched and left to retain their ill-gotten gain. To permit Miss Edwards to maintain this claim does not require wholesale destruction of the privity rule. It would simply be a demonstration of what the common law has always done-updating the law to do justice while maintaining the stability of the law. The difference between Trident and the instant case is that there the*

> *initially identified beneficiary is complaining that she has been ousted by the unlawful and inequitable conduct of the now named beneficiary. If this is so, what doctrinal, logical or policy reason can there be to deny Miss Edwards the right to bring this claim? If the danger against which doctrinal and logical purity are guarding can be adequately addressed by adjustments in the law while providing a just result then the court should hesitate to bar a litigant merely because it wants to maintain doctrinal and logical wholesomeness.*
>
> *There is no indication that the Jamaican legislature is considering circumstances as are before me to say nothing of enacting legislation to correct this unjust doctrine in the manner sought by the claimant anytime soon.*

[26] I must reiterate the point that Sykes, J was by no means trying to impose or laydown a hard and fast rule meant at a total eradication of the privity rule. Rather, Sykes CJ was willing to deviate from the strict application of the rule to prevent the Defendant in that particular case form being unjustly enriched and retaining the profits of ill-gotten gain. While I agree with the reasoning of Sykes, J and fully appreciate the conclusion which he arrived at, I must mention his observation at paragraph 12 where he stated:

> *"It is no secret that judges have sought to evade the doctrine of privity by unconvincingly speaking of a trust of a promise, principal/agent relationship, ratification by the principal or even unjust enrichment."*

[27] On an assessment of the ruling of the Justice Sykes, I find that his conclusion did not differ much from previously decided cases. In fact, the ruling of the Learned Judge reflects what the common law courts have always been ready and willing to do, that is, to extent the hand of equity to alleviate any injustice that may result from the strict application of the common law. In coming to his conclusion, Sykes, J took into consideration the injustice that might be caused to the Miss Edwards if the beneficiary that replaced her was allowed to profit from its unlawful or inequitable conduct.

[28] In the current case, the Claimant has not claimed that there was the existence of a trust nor has he argued that there has been unjust enrichment on the part of the Defendant. Simply put, Counsel for the Claimant is asking the court to altogether

modify or bypass the common law principle of privity of contract in granting relief to the Claimant. Counsel relied on the case of ***Re F. (Mental Patient: Sterilisation)*** [1990] 2 A.C. to advance his point that in the absence of restrictions from parliament, the court had the inherent jurisdiction to extend judge-made laws to afford the claimant an appropriate remedy where one is lacking.

[29] I question the applicability of ***Re F. (Mental Patient: Sterilisation)*** (supra) to the current case. The decided case concerned the common law torts of assault and battery, more specifically, the House of Lords was asked to consider whether it would be lawful to carry out sterilisation procedures on a 36-year-old patient who was unable to consent to the operation by virtue of her suffering from a mental incapacity. The discretion of the House of Lords to extent the common law in the manner it did was not exercised on a whim, rather the Court was faced with a matter of great public importance. The Court was called upon the decide the circumstances in which medical professionals could administer lifesaving medical treatments or surgical procedures to persons under disabilities without first obtaining the patient's consent. In explaining the exercise of the Court's discretion in this regard, Butler-Sloss LJ expressed on page 38 as follows:

> *"The answer in my judgment is to be found in the realm of considerations of the public interest. It must be a matter of public interest that the same standard of physical and psychological care should be provided to those under a disability as to the general public. For my part, I cannot believe that a doctor is to be precluded from exercising his normal duty of care towards such patients, nor do I believe that the equivalent right of the patient to be offered treatment is to be denied to those under a disability.*
>
> *"Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty; but merely the application of the principle ubi jus ibi remedium."*
>
> *per Lord Scarman in Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] A.C. 871, 884.*

[30] While I find that the case of ***Re F. (Mental Patient: Sterilisation)*** (supra) cannot be readily applied to the case of bar, I agree with Counsel that in the absence of restrictions from the legislature, the court has the discretion to modify judge-made laws to prevent injustice. To this extent I fully endorse the words of Sykes, J in ***Claudette Edwards v Quest Security Services Limited,*** supra, where his Lordship expressed as follows:

> *"No case has been cited to me in which either the Privy Council on appeal from Jamaica or Court of Appeal of Jamaica has irreversibly said the privity of contract rule is so fundamental a rule that only Parliament can change the law or that the days of judicial modification of common law rules are long past."*

[31] The question to be determined is whether the circumstances of the instant case warrants deviation from the privity rule. Mr. Campbell correctly pointed to the fact under the Motor Vehicles Insurance (Third-Party Risks) Act of Jamaica, and the Third Parties (Rights Against Insurers) Act 2010 of England, third parties are able to claim against an insurer under circumstances specified within the act. In fact, the Third Parties (Rights Against Insurers) Act goes as fact as to enable a third party to bring a claim against an insurer in circumstances where the insured has become insolvent by transferring the rights of the insured under the policy to the third party. The Halsbury Laws of England Volume 5 (2020) 5th Edition described the relevant provision of the act as follows:

> *"Where the bankrupt is insured against liabilities to third parties and he incurs any such liability, either before or after the bankruptcy, his rights against the insurer under the contract of insurance in respect of the liability vest in the third party to whom the liability was incurred, and do not pass to the trustee in bankruptcy."*

[32] The position is not similar in Jamaica; in fact, the contrary is true, under the Insolvency Act, 2014 the liability of an insolvent company would past to the trustee. I find that in determining the issue before the court some guidance can be taken from the English Court of Appeal decision of ***Briscoe v. Lubrizol Ltd. and Another*** - [2000] ICR 694. The facts of the case are that the Plaintiff was employed to the 1st Defendant, Lubrizol Ltd. The 1st Defendant had an insurance scheme that

would enable its employees to obtain certain disability benefits, provided that they produce satisfactory evidence to the insurance company as to the disablement. The Plaintiff's claim for disability entitlement was rejected by the insurance company which resulted in Lubrizol Ltd declining to pay him the benefits claimed. The Plaintiff brought a claim against his employer and the insurance company claiming, inter alia, that the insurance company breached the duty of care owned to him when they rejected his application based on the evidence provided by his employer without conducting their own investigations. At first instance, the judge struck out the case against the insurers as disclosing no reasonable cause of action. The Plaintiff appealed the decision of the Judge and the Court of Appeal dismissed the appeal. In arriving at its conclusion, the court reasoned at pages 705-706 as follows:

> *"The insurers' duty is to make the appropriate payments if the event which triggers the making of such payments has occurred. Secondly, if there is a dispute as to whether the risk event has occurred, then that is to be decided by an arbitration between Lubrizol and the insurers. That is a condition precedent to Lubrizol being able to take action in the courts. It would be quite unjust and unreasonable, in my view, that the insurers should be at risk of being sued in the courts by employees of Lubrizol, who may be impecunious, and that a duty should exist which might give rise to such actions, even though an arbitration between Lubrizol and the insurers had been decided in the insurers' favour. Thirdly, this is not a case where the member who asserts that he or she is disabled is left without a remedy. The member can sue Lubrizol, as this plaintiff is in fact doing"*

[33] The reasoning of the court in ***Briscoe v. Lubrizol Ltd. and Another,*** supra, can be applied to the case. By all accounts, they Claimant had no contract with the BCIC, rather it was E. Pihl & Son A/S that was a party to an employer's liability insurance policy with the Defendant. It therefore seems natural to me that the appropriate route would be for the Claimant to seek to enforce the judgment against his former employer, who would in-turn be indemnified according to the terms of the policy by BCIC. There is no mystery as to why the Claimant did not go this route, as indicated earlier, E. Pihl & Son A/S has filed bankruptcy

proceedings, therefore seeking to enforce the judgment against the insurers may appear to them to be the more viable route but is this decision sound in law?

[34] In a great majority of cases which dealt with the privity rule, the court looked at the intention of the parties. Did the parties intend for the contract to confer a benefit to the third party? I have come to a similar conclusion as the Court of Appeal did in ***Briscoe v. Lubrizol Ltd. and Another,*** supra**,** in finding that the parties to the employer's liability contract did not intend to confer a legal right or benefit unto Mr. Waisome. As Lord Reid pointed out in ***Beswick v Beswick,*** supra, whether the third party has a right to the policy or contract is a matter of construction of the agreement. When one looks at the policy it is clear that the intention of the parties was to indemnify or reimburse E. Pihl & Son A/S for any financial loss which the company incurred as a result of injuries which its employees suffered whilst in the execution of their duties to the company. To my mind, it clear that the policy was intended to inure to the benefit of E. Pihl & Son A/S.

[35] The case at bar can be distinguished from ***Darlington Borough Council v Wiltshier Northern Ltd (Lowes and others, third parties), supra.*** In that case, the Court found that while the Council was not a party to the building contract its interest under the contract was held on trust by Morgan Grenfell. What the court reasoned is that before Mr. Grenfell transferred the property to the Council, he could have sued the building contractors as a party to the contract, in that event the sums recovered for damages would have been held on trust for the council who had an equitable interest in the property up until Mr. Grenfell was reimbursed the sums loaned to the Council and the recreational centre was transferred into the name of Council.

[36] In the current case it cannot be said that E. Pihl & Son A/S acted as a trustee for the Claimant. Rather any duty owed to the Claimant was owed by E. Pihl & Son A/S under the doctrine of employer's liability whereby, irrespective of the existence of the policy, E. Phil & Son A/S would be under an obligation to compensate the Claimant. To my mind, the employee liability policy stood as a separate legal

agreement between the Defendant and E. Pihl & Son A/S, whereby BCIC has a duty to make the appropriate payments to E. Pihl & Son A/S if the event which triggers the making of such payments has occurred, such right being subject of course to the terms of the policy.

[37] Similarly, the case at bar can be distinguished from ***Edwards v Quest Security Services Limited,*** supra**.** The first distinguishing feature is that it cannot be said that there was any dishonesty or malfeasance on the part of BCIC, therefore the issue of unjust enrichment does not arise. Secondly, there must be an understanding that while the Claimant may have benefited from the policy, at no point was it the intention of the parties to the insurance contract for the Claimant to have a legal interest in the agreement, whether residuary or otherwise. In ***Edwards v Quest Security Services Limited,*** supra, the situation was the contrary. Miss Edwards was initially named as a beneficiary under the policy which meant that on the death of the insured she would have had an interest in the policy, it was only reasonably to allow her to bring her claim n circumstances where her interest was being overthrown unlawfully or unjustly.

[38] I therefore conclude that the Claimant's claim against the Defendant could not succeed based the privity rule.

DISPOSAL

1. The Claimants statement of case is stuck out.

2. Costs awarded to the Defendant to be taxed if not agreed.