IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. W031/1981

BETWEEN WINSTON WHITTER PLAINTIFF

A N D BRITISH CARIBBEAN INSURANCE CO. LTD. DEFENDANTS

W.B. Frankson Q.C. and Mrs. Margaret Forte instructed by Gaynair Fraser for Plaintiff

Derek Jones and John Graham instructed by Myers, Fletcher & Gordon, Manton and Hart for the Defendants' Company.

Hearing on: 5th & 6th June, 1982

Delivered on: 1st November, 1982

J U D G M E N T

Bingham J:

The claim in this matter arises out of an injury suffered by the plaintiff while he was being transported from Ocho Rios to Kingston in a truck owned by one Claude Marr and driven by one Hoshea Higgins on 18th November, 1975. This truck was insured with the defendants' company under a policy of insurance dated 14th May, 1975, and this policy was in force at the time of the incident which resulted in the injury to the plaintiff.

The Policy in question was a Commercial Motor Vehicle Policy covering the insured Marr against various risks including Liability to Third Parties.

The plaintiff subsequently recovered damages on a Claim in Negligence brought against the owner of the vehicle Claude Marr and the driver Hoshea Higgins in this Court in Suit C.L. W319/1979. This judgment remains unsatisfied.

The plaintiff now proceeds by way of this Claim against the defendants' company as the insurers of the particular vehicle to indemnify

him. The plaintiff's Claim is made on the basis that Claude Marr was entitled under the policy of insurance to be indemnified by the defendants in respect of the Third Party Liability and that the plaintiff has now by virtue of the judgment which he obtained a direct claim against the defendants vested in him by virtue of Section 18(1) of the Motor Vehicle (Third Party Risks) Act.

The defendants seek to avoid liability on two grounds. They contend in their Defence that:-

(i) Under the policy the particular liability is not covered and seek to rely upon the terms of the said policy.

(ii) They were never notified by the plaintiff of the Claim within ten days after the Claim was filed against the insured man as required by the Act.

This second ground was abandoned at the hearing of this action by the Attorneys appearing for the defendants and we are no longer troubled with going into the merits of that matter.

The facts surrounding the claim is not in dispute. They form the basis of a judgment which still remains unsatisfied and were repeated before me by the plaintiff. They are follows:-

The plaintiff was in 1975 employed to one Mr. Lindo or Lindo's Industries who had a factory on Hagley Park Road in Saint Andrew. The plaintiff was employed as an Improved Apprentice. The business was one for the making of furniture. In November 1975 there was an Order which was to be delivered to a purchaser in Ocho Rios. On the afternoon prior to the date of delivery of the Order, Mr. Lindo requested the plaintiff and a fellow worker to assist the following day in effecting delivery

of the Order. They were to assist in loading the vehicle that was to take the Order acting on the direction of the truck driver; to travel to Ocho Rios with the furniture, and to assist in off loading the furniture when the truck arrived at its destination. The furniture were to be transported by one of Claude Marr's vehicles. Mr. Marr operated a Haulage Service and it was at his request that the services of the plaintiff and the co-worker was obtained.

It is clear from the evidence that for the period of time that the plaintiff was to be engaged in performing this service that he and his co-worker were under the direction and control of the driver of the vehicle one Hoshea Higgins. It was Higgins who was responsible for directing how the furniture should be loaded unto the truck and off loaded once the truck arrived at its destination.

On 18th November, 1975, the haulage of the furniture was effected without incident. It was on the return journey to Kingston when the truck got into the vicinity of the Bog Walk gorge that due to the negligent driving of Hoshea Higgins that the plaintiff was injured.

What falls for determination at this stage is, bearing in mind that the plaintiff was lawfully on the vehicle and carrying out a service, not only for his general employers Mr. Lindo or Lindo's Industries, but equally assisting Claude Marr in effecting delivery of the furniture; whether he was a person who qualifies for protection under Section II of the Policy, and is therefore a person for whom the insurers are at risk, in which event the plaintiff would be entitled to be indemnified in respect of the injury which he received.

Insofar as this particular branch of the Law is concerned it is clear that Section 5 of the Motor Vehicle (Third Party Risks) Act lays down by the requirements of the Act what a policy of insurance must comply with. Section 5(1)(a) reads that it must be a policy which:-

> (a) (b) "Is issued by a person who is an insurer and insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death, or bodily injury to, any person caused by, or arising out of, the use of a motor vehicle on a road:
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> Provided that such a policy shall not be required to cover
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> (i) liability in respect of the death arising out of, and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of, and in the course of his employment or
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> (ii) except in the case of a motor vehicle duly licensed for the purpose in which passengers are carried for hire or reward, and except in the case of a motor vehicle in which passengers are carried by reason of or in pursuance of a contract of employment with a person insured by the policy, liability in respect of the death of, or bodily injury to, persons being carried in or upon, or entering or getting into or alighting from, the vehicle at the time of the occurrence of the event out of which the claims arise."

The section does not end here but for the purpose of this judgment I have only resorted to referring to the relevant parts.

The Policy which is in evidence as Exhibit 1 is a Commercial Motor Policy. As such it is not the type of Policy which as a general rule offers cover against passenger risks. Where passenger risks are to be covered then such risks have to be specially requested by the insured with the resulting increase in the premium to cover the additional risk. The particular policy in this matter follows closely the wording of section 5 (1)(b) (i) and (ii) of the Act for the simple reason that insofar as it may

have been at variance with the Act, the Act prevails. The Act requires compulsory cover only for those class of persons who fall within the exception to the exception in Section 5(1)(b) (ii) of the Act.

Clause (iii) under the heading "Exception to Section II" is sub-headed "Liability to Third Parties," and is the section under which the plaintiff must bring himself as being a person for whom the insurers are at risk; is identical to Section 5(1)(b)(ii) of the Act.

It is common ground from the arguments advanced by Counsel on both sides that if the plaintiff is to succeed then he must fall within the class of persons who can bring themselves within the exception to the exception in Section II Clause (iii) of the Policy; such persons being protected by the Act, and are therefore persons for whom there must be compulsory cover.

On an examination of the relevant clause in the Policy, the matter turns therefore on the construction of the words "death or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment with a person insured by the Policy)."

The Policy in question being a Motor Vehicle Policy, a liberal construction may be applied. However, in the absence of any ambiguity the document being a contract in which the both parties may be taken to have set out what was their intention it has to be given its ordinary meaning. The Court cannot make a contract for the parties.

Having regard to the submissions made by Mr. Frankson, the Court has been asked to put a very wide interpretation on the wording in Clause (iii) to include not merely employees of the insured passengers who are on the vehicle by virtue of a contract of service with the insured and who are on

that vehicle by virtue of an obligation or necessity to be there, but to include as well persons who are on the vehicle by reason of or in pursuance of a contract of employment with a Third Party and who are on the vehicle for "sufficient practical or business reasons." He referred to the case of Izzard vs Universal Insurance Company Limited [1937] 3 A.E.R. 79.

I will not venture to relate the facts of this case or the ratio decidendi as it is clearly distinguishable being decided as it was on a construction of the English Road Traffic Act 1930 Section 36. This is the very section which now forms Section 5 of The Motor Vehicle (Third Party Risks) Act with this important distinction that the draftsman who drafted the Jamaican Statute saw it necessary to include the words "with the insured person" following after the words "contract of employment." It is true to say that having regard to the reasoning in this case had those words of limitation been included in the English Statute, the result would not have been the same. As the Jamaican Act as presently framed stands therefore it is my opinion that the exception clause in the policy, by the addition of the words "with the insured person" has introduced thereby an express limitation which excludes positive cover for all passengers save and except "persons on the vehicle by reason of or in pursuance of a contract of employment with the insured person."

Mr. Frankson in the face of this situation has contended that if on the facts in this case I were to find that the relationship of master and servant pro hac vice came into existence between Claude Marr and the plaintiff then on that basis it would be sufficient for him as the special employee of Marr to qualify as one who came within that class of persons having a contract of employment with the insured person within the meaning of the Act,

and for whom therefore there must be positive cover. In my opinion such a relationship does not go as far as that contended by Mr. Frankson. When the concept of master and servant pro hac vice does come into operation it is one which is designed to place the responsibility for a negligent act squarely upon the shoulders of the party who has taken upon themselves the burden for discharging such an obligation. Because of the fact that the general employer may have for the time being that the servant is out of his control neither the right to control what the particular servant does or how he does it, the law in its wisdom states that in event of anyone being injured by the act of the servant while under the control of the special employer, the special employer and not the general employer will be held responsible for the servant's act. Liability would also fall upon the special employer where the servant is injured by the negligence of an employee of his.

Denning L.J. as he then was, in Denham vs Midland Employers Mutual Assurance Limited [1955] 3 W.L.R. 84 at 87 in dealing with the concept of Master and Servant pro hac vice and the nature of that relationship had this to say:-

> "Much of the difficulty which surrounds this subject arises out of the nineteenth century conception that a servant of a general employer may be transferred to a temporary employer so as to become for the time being the servant of the temporary employer. That conception is a very useful device to put liability on the shoulders of the one who should properly bear it, but it does not affect the contract of service itself. No contract of service can be transferred from one employer to another without the servant's consent: and this consent is not to be raised by operation of law but only by the real consent in fact of the man express or implied. In none of the transfers cited to us has the consent of the man been sought or obtained. The general employer has simply told him to go and do some particular work

"for the temporary employer and he has gone. The supposed transfer, when it takes place is nothing more than a device - a very convenient and just device, mark you - to put liability on to the temporary employer and even this device has in recent years been very much restricted in its operation. It only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only what the servant is to do, but also how he is to do it: Mersey Docks and Harbour Board vs Coggins and Griffiths Liverpool Limited. Such a transfer rarely takes place, if ever when a man is lent with a machine, such as a crane or a lorry: nor when a skilled man is lent so as to exercise his skill for the temporary employer. In such cases parties do not contemplate that the temporary employer shall tell the man how to manipulate his machine or exercise his skill. But a transfer does sometime takes place in the case when the unskilled man is lent to help with labouring work: See Garrard vs A.E. Southey and Company. The temporary employer can then no doubt tell the labourer how he is to do the job. The labourer becomes so much part of the organisation that the temporary employer becomes responsible for him and to him."

Later on in the Judgment at page 89 the Learned Lord Justice makes the following observation:-

"I cannot regard the proposition about "temporary servant" and "temporary employer" as decisive of the questions now before us. We have to decide simply whether on the wording of the employers liability policy, Clegg was employed "under a contract of service" with Le Grands. I do not think that he was. His contract of service was with Eastwoods and Eastwoods alone. They selected him. They paid him. They alone could suspend or dismiss him. They kept his insurance cards and paid for his insurance stamps. He was never asked to consent to a transfer of his contract of service and he never did so. If he was not paid for his wages, or if he was wrongfully dismissed from the work, he could sue Eastwoods for breach of contract and no one else. I see no trace of a contract of service with Le Grands except the artificial transfer raised by law so as to make Le Grands liable to others for his faults or liable to him for their own faults; and I do not think that the artificial transfer so raised is a "contract of service" within this policy of assurance."

Although the present case deals with the construction to be put on a motor vehicle policy as distinct from an employer's liability policy it is my opinion that the words "contract of employment" and "contract of service" are synonymous terms and are to be given therefore the same meaning whether used in an employer's liability policy or in a motor vehicle policy as they are terms applicable in the field of insurance law. (See observations of Lord Denning, Master of the Rolls in Vandyke vs Fender 1970, 2 Q.B.D. 292 at page 305.

Applying the law therefore to the facts in this case even if I were to find as I am certainly minded to do, that on the virtually unchallenged evidence of the plaintiff, that the relationship of master and servant pro hac vice did exist between Claude Marr and the plaintiff, having regard to construction which I have placed upon the particular clause in the policy, as well as on the authority of Denham vs Midland Employers Mutual Assurance Limited to which I have referred, I hold that no contract of employment or contract of service came into existence between Claude Marr, the insured and the plaintiff in order to bring him within the exception in Section 2 Clause (iii) of the policy. As this clause is identical to Section 5(i)(b)(iii) of the Act, this means that the persons who are required by the Act and therefore under the policy to positive cover and for whom the defendants were at risk were:-

1. The insured Claude Marr

2. The authorised driver

3. Employees of the insured, who are on the vehicle by virtue of an obligation to be there as distinct from being there as a matter of personal choice. (See dictum of Lord Wright in Izzard's case as also the observation

of Lord Denning and Lord Justice Sachs in Vandyke vs Fender).

As the plaintiff did not fall within any of the abovementioned categories, it follows therefore that he is not covered by the Policy and his claim for indemnity therefore fails.

The result thus achieved is quite within the bounds of the Motor Vehicle (Third Party Risks) Act as it is presently framed. This result has been achieved in circumstances where the particular section of the Act under consideration, and which was copied from an English Statute, which interestingly enough still remains in its unaltered state. This is an Act passed to protect Third Parties of whom the plaintiff is unquestionably one. It seems somewhat strange therefore that the Jamaican Legislature of the particular period saw it fit to insert into the local Act a limitation designed to defeat the rights of Third Parties by the inclusion of the words "with the insured person" and thereby have effectively succeed in circumventing the very object for which the Act was passed. One can only hope that these words in the particular Section of the Act which by restricting compulsory cover have in this instant case wrought a grave hardship and injustice to the plaintiff will hopefully in due course be amended by the Legislature having the wisdom to cause the offending words to be deleted from the Act in question.

There will accordingly be Judgment for the defendants with costs to be agreed or taxed.

D.O. Bingham
Puisne Judge