JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 68/82

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN: WINSTON WITTER - PLAINTIFF/APPELLANT

A N D : BRITISH CARIBBEAN INSURANCE CO. LTD. - DEFENDANT/RESPONDENT

Mr. W. B. Frankson, Q.C. and Mrs. M. E. Forte for the plaintiff/appellant.

Mr. Derek Jones and Mr. John Graham for defendant/respondent.

November 30; December 1 & 2, 1983; July 27, 1984

KERR, J.A.:

This is an appeal from a judgment of Bingham. J, in which judgment was entered for the defendant with costs to be agreed or taxed.

On November 18, 1975 the appellant was a passenger in a motor truck en route from Ocho Rios to Kingston. The truck was owned by one Claude Marr and driven by his chauffeur Hoshea Higgins. Through the negligent driving of Higgins the appellant was injured. He successfully brought an action against Marr and obtained judgment. The judgment remained unsatisfied. The truck was insured with the respondent's company under a policy of insurance that was then in force. The appellant then sought to recover the judgment debt and costs and interest thereon aggregating $26,502.71 from the respondent on the basis that Marr under the policy is entitled to be indemnified and by virtue of the enabling provisions - Section 18 (1) of the Motor Vehicle (Third Party Risks) Act (hereinafter referred to as the Act).

The appellant was employed as an apprentice in the furniture manufacturing business on Hagley Park Road, St. Andrew to one Mr. Lindo of Lindo's Industries. In November 1975 there was an order for furniture to be delivered in Ocho Rios. On the afternoon prior to the date of delivery, Lindo requested the appellant and another of his workers to assist in making delivery by loading the vehicle - Marr's truck - at the factory and unloading it in Ocho Rios. They were to travel to and from Ocho Rios in the truck. It was at Marr's request that the two workers were so assigned. In performing this service of loading and unloading the workers were under the directions of Higgins the driver.

The learned trial judge after careful analysis of the relevant Sections of the Act and in particular, Section 5(1), the terms of the policy, the English case of Izzard v. Universal Insurance Co. Ltd. (1937) 3 All E.R. p. 79 and contrasting the corresponding English Legislation with that in the Act, and the case of Denham v. Midland Employers Mutual Assurance (1955) 3 W.L.R., upheld the contention urged on behalf of the respondent that under the policy, the particular liability was not covered by the terms of the policy of insurance.

In the course of his judgment Bingham, J. said:

> "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."

This passage provided the grist for Mr. Frankson's mill, for he contended that the learned trial judge erred in law in holding that notwithstanding that the relationship of master and servant pro hac vice existed between Marr and the appellant, the appellant

was not a third party in respect of whom the respondent was obliged by the Act to furnish cover for such risks as occurred. The findings of fact of the learned trial judge were therefore inconsistent with the legal conclusion at which he arrived.

Before dealing with Mr. Frankson's arguments in support of his contention, it is convenient to refer to the relevant provisions and the cases upon which the learned trial judge relied:

Section 5(1) of the Act so far as is relevant provides:

> "(1) In order to comply with the requirements of this Act the policy of insurance must be a policy which -
>
> (a) is issued by a person who is an insurer; and
>
> (b) 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 the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road:
>
> Provided that such a policy shall not be required to cover -
>
> (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
>
> (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 onto or alighting from, the vehicle at the time of the occurrence of the event out of which the claims arise; or ....."

In Izzard v. Universal Insurance Co. Ltd (supra):

> "The assured owned a motor vehicle, which was insured under a policy of insurance, against commercial risks, but not against passenger risks. The policy provided that the company would indemnify the assured against liability in respect of the death of any person arising

> "out of or caused by the use of the vehicle, but excepting any person in the employment of the assured whose death arose out of and in the course of such employment, and any person whose death arose from an accident while he was being carried in or upon such vehicle "other than a passenger carried by reason of or in pursuance of a contract of employment," which proviso substantially followed the wording of the Road Traffic Act, 1930, s. 36(1) (b) (ii). The assured agreed to do haulage work for a company of builders, and to put a lorry at the company's disposal for the conveyance of workmen employed by the company to and from the workmen's homes at the week-ends, on the condition that the assured was to be paid for every journey, whether workmen were carried on the lorry or not. On one of these journeys, an accident occurred, and a workman was killed. His widow was awarded damages against the assured, who was subsequently adjudicated bankrupt. She thereafter claimed against the insurance company under the Third Parties (Rights against Insurers) Act, 1930:-
>
> HELD: as the words "contract of employment" were to be construed as including a contract with a third party, and were not subject to specific limitation by insertion of the words "with the insured person," which were not inferred from the general tenor of the Act of 1930 or the policy, the appellant was entitled to recover damages under the policy of insurance."

The learned trial judge noted the subtle but important difference between the English Act and the Jamaican Statute in that in the Jamaican Statute "contract of employment" was expressly limited by the insertion of the words "with the insured" and went on to say:

> "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'."

With that I am in entire agreement. The contract of employment under the terms of the policy which substantially followed the wording of the proviso must be <u>with the insured.</u>

It is this unfavourable limitation that necessitated counsel for the plaintiff embarking on a different tack before the trial judge, namely that should he find the relationship of master and servant pro hac vice between the plaintiff and the insured that

would be sufficient factual basis for holding that there was compulsory coverage for the plaintiff. There as here the Insurance Company relied on the case of Denham v. Midland Employers Mutual Assurance LD. (supra). In that case:

> "An employer engaged L. G. Ld., boring and pump engineers, to do certain work on his land; and he provided one of his own unskilled labourers to help with the work. The labourer continued to be paid by his employer, who alone had power to dismiss him and who kept his National Health Insurance card; but he worked alongside L. G. Ld.'s skilled employees and under the specific direction of that company's foreman. The labourer was killed in circumstances making L. G. Ld. liable to pay damages to his widow on the ground that his death was due to the company's negligence or that of its servant. L. G. Ld. were covered by (1) an employers' liability policy covering liability to "any person under a contract of service .... with the insured": (2) a public liability policy excluding the liability mentioned in (1):-
>
> Held, that, although L. G. Ld. would have been liable as a temporary employer for injury to a third person by the negligence of the labourer in the course of his work, and similarly L. G. Ld. were liable to his widow in the present case, the labourer's contract of service was with his original employer alone; that it was only the use and benefit of his services which had been transferred to L. G. Ld.; and that such a transfer did not render him "a person under a contract of service" to L. G. Ld. within the meaning of the employers' liability policy but fell within the terms of the public liability policy."

Mr. Frankson in support of his submission that the plaintiff fell within the coverage contemplated by Section 5(b)(ii) of the Act, argued in effect that the measure of control which Marr through Higgins exercised over the plaintiff was such as to give rise to a "contract of employment with Marr" within the contemplation of the Act. The control was in effect to direct him what work to do and how to do it. He cited in support amongst other cases - Mersey Docks & Harbour Board v. Coggins & Griffiths (1946) 2 All E.R. p. 345 and Gerrard v. Southey (1952) 1 All E.R. p. 597. Further in determining whether a contract existed between Marr and plaintiff the Court ought not to concern itself with examination of the relationship to ascertain if the contract was technically

perfect e.g. as regards consideration. It is enough that there were mutual obligations on the parties. Such obligations existed in the relation of master and servant pro hac vice. Employment, continued Mr. Frankson, must be given the same meaning in Section 5(b)(ii) as in 5(b)(i).

Now as I see it, Section 5(b)(i) was a straightforward exception from compulsory coverage in respect of injury arising out of and in the course of employment by a person in the employment of the insured. This would include persons like a chauffeur or conductress or baggage man on the vehicle in question. Section 5(b)(ii), however, by an exception to an exception created a positive compulsory coverage for injury in respect of passengers falling within two sub-categories:

(i) Passengers on a motor vehicle licensed for the purpose of carrying passengers for hire or reward.

(ii) Passengers carried by reason of or in pursuance of a contract of employment with a person insured by the policy.

It is the second sub-category that is relevant to the instant case. By inserting in subsection b(ii) the words "by reason of, or in pursuance of a contract of employment with the insured" the legislature clearly intended that the compulsory coverage would be limited to persons so expressly described.

In my view cases such as Mersey Docks & Harbour Board vs. Coggins & Griffiths are unhelpful to the plaintiff's cause. They are concerned with actions in tort where it has to be determined whether vicarious liability should be on the general master or the master pro hac vice for the negligent or wrongful act of the servant against third parties. In expounding the principle in the Mersey Docks' case Viscount Simon said:

> "It is not disputed that the burden of proof rests upon the general or permanent employer - in this case the board - to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And,

"in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances."

And having considered a number of cases he said further:

"I would prefer to make the test turn on where the authority lies to direct, or to delegate to, the workman, the manner in which the vehicle is driven. It is this authority which determines who is the workman's superior. In the ordinary case, the general employers exercise this authority by delegating to their workman discretion in method of driving, and so the Court of Appeal correctly points out ([1945] 1 All E.R. 608), that in this case the driver Newall:

> ..... in the doing of the negligent act, was exercising his own discretion as driver - a discretion which had been vested in him by his regular employers when he was sent out with the vehicle - and he made a mistake with which the hirers had nothing to do.

If, however, the hirers intervene to give directions as to how to drive which they have no authority to give, and the driver pro hac vice complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors."

And by Lord Porter at p. 350:

"In determining this question it has to be borne in mind that the employee's position is an important consideration. A contract of service is made between master and man and an arrangement for the transfer of his services from one master to another can only be effected with the employer's consent, expressed or implied. His position is determined by his contract. No doubt, by finding out what his work is and how he does it and how he fulfils the task when put to carry out the requirements of an employer other than his own, one may go some way towards determining the capacity in which he acts, but a change of employer must always be proved in some way, not presumed. The need for a careful consideration of the circumstances said to bring about the change of employment has latterly been accentuated by the statutory provisions now in force for compulsory health and accident insurance and, in the case of many firms, by the existence of funds accumulated under a trust for the benefit of employees who will not lightly incur the risk of losing such benefits by a transfer of their services from one master to another. Nor is it legitimate to infer that a change of master has been effected because a contract has been made between the two employers declaring whose servant the man employed shall be at a particular moment in the course of his general employment by one of the two. A contract of this kind may of course determine the liability of the employers inter se, but it has only an indirect bearing upon the question which of them is to be regarded as master of the workman on a particular occasion."

Here we are concerned with interpreting the terms of a contract of indemnity, albeit that certain terms by the dictates of the statute must be included or taken as included. Now the question whether a transfer of workmen so as to create a relationship of master and servant pro hac vice creates a contract of employment was considered in Denham's case (supra). In the course of his judgment Denning, L.J. at pp. 88-89 said:

> "The real basis of the liability is, however, simply this: if a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility. So also if a temporary employer sets a labourer to work alongside his own skilled men he should take just as much care to see that the plant and material are safe for the labourer as for the skilled men. The labourer should not be defeated by knowledge of the danger any more than the skilled men. I cannot regard the propositions 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 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 the contract of service and he never did so. If he was not paid his wages, or if he was wrongfully dismissed from the work, he could sue Eastwoods for breach of contract and no one else. If he failed to turn up for work Eastwoods alone could sue him. I see no trace of a contract of service with Le Grands except the artificial transfer raised by the 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 the artificial transfer so raised is "a contract of service" within this policy of assurance. There was no contract of service between Clegg and Le Grands. Le Grands are, therefore, not entitled to recover against the Midland Employers Mutual Assurance Company under the employers liability policy, but only against Lloyd's under the public liability policy. This view is confirmed by the fact that the premium on the employers liability policy is regulated by the "amount of wages and salaries and other earnings paid to employees by the insured" during the period of insurance. The premium is, therefore, paid to cover the risk of injury to men on the pay roll of Le Grands, and not to men on the pay roll of anyone else. It is also confirmed by the fact that Eastwoods would be the

> "employer of Clegg for the purposes of the Workmen's Compensation Acts (see section 5 of the Act of 1925)."

And in somewhat similar vein Romer, L.J. said at p. 89:

> "The question, as it seems to me, is a short one and may be stated thus: At the time when the workman, Clegg, met with his accident was he, on the facts as found by the arbitrator, a person under a contract of service with Le Grand Sutcliff & Gell Ld. within the contemplation of the policy which the respondents issued to Le Grands? If he was, then the respondents are liable under the policy; if he was not, then no liability attaches to them. Immediately before he went to work for Le Grands, Clegg was working under a contract of service with Eastwoods, and in my judgment he was still performing his obligations under that contract at the time when he met his death. If it be said, as it is said, that when he started to work for Le Grands he entered into a new contract of service with that company, one is entitled and bound to inquire what the terms of that contract were. Among the common features of a service contract are an obligation by the employer to employ a man, and to pay him an agreed or proper wage, and a right to control his services and the manner in which he performs them, and to dismiss him if reasonable cause is shown; and, on the workman's side, he must obey all reasonable directions, present himself for work at an agreed hour, and continue to work for the agreed period, and will be guilty of breach of contract if he refuses to perform these obligations. In my opinion the only one of the features which I have mentioned which was present in the association which existed between Clegg and Le Grands was that he had to perform the tasks which were allotted to him in whatever way Le Grands told him to perform them. None of the other features was present. Le Grands were under no duty to give him employment nor to pay him, nor could they dismiss him. On the other hand, Clegg was under no duty to Le Grands to work for them for any agreed hours or at all and could not have been sued by them for breach of contract if he stayed at home instead of reporting for work. Further, the inference which I draw from the arbitrator's findings is that the reason why he subjected himself to the control of Le Grands as to what he did and how he did it was that Eastwoods told him to do so."

He then quoted with approval from Moore v. Palmer (1886) 2 T.L.R. 781-782, the following per Bowen, L.J.:

> "The great test was this - whether the servant was transferred or only the use and benefit of his work."

Mr. Frankson was not unaware of the difficulties presented to his arguments by such pronouncements in the Denham's case. He

endeavoured to overcome them by submitting that the Denham's case is distinguishable on the following grounds:

(1) The Court had to decide which of two policies were appropriate.

(2) The plaintiff consented to the transfer whereas there was no consent in the Denham's case.

(3) The plaintiff was performing an entirely different work from what he was employed to do by Lindo his general master.

Re No. (1) above, that was special to the case but it did not in any way affect the general proposition that the relationship of master and servant pro hac vice did not per se create a contract of service. Indeed as may sometimes happen the servant may be gratuitously lent by the General Master for a limited time and use.

In that regard the observations of Romer, L.J. at pp. 90-91 are relevant:

> "It is true, as Denning L.J. has pointed out, that for some purposes Le Grands undoubtedly assumed the obligations and liabilities of a master in relation to Clegg: for example, they would have been answerable to a third party who was injured as a result of Clegg's negligence while working for them. This consideration does not, however, in my opinion, affect the real issue in this case, which is whether Clegg at the time of his death was a person under a contract of service with Le Grands, within the meaning of that phrase as used in the policy. In my judgment he was not, and I am fortified in this conclusion by the fact that by paragraph 5 of the conditions attached to the policy the annual premium payable to the insurers was measured by reference to the wages paid by Le Grands to their employees, which is some indication that the contracts of service envisaged by the policy were contracts of the ordinary kind which exist between master and servant and possessing the features to which I have earlier referred."

Re (2) - the question of the consent of the plaintiff - this was an astute and subtle argument. The consent of which Lord Denning spoke was not "consent to working for a temporary master." In every case where the servant works for a temporary employer it is either within the contemplation of his contract with the original master e.g in cases where industrial machines are

being hired out with the driver as in the Mersey Docks' case or, where the service is more personal, it may be inferred in the absence of protest that the servant consented as in such cases a servant would not be obliged to perform services of a personal nature to a master not of his approval. The consent that is pertinent here, is consent by the servant to a transfer of his contract of service and not merely of "the use and benefit of his work."

Re (3), in a brave last stand, Mr. Frankson earnestly argued that on the basis of the work being so entirely different the reasonable inference was that there were new arrangements between the plaintiff and Marr giving rise to a new contract of service.

Whatever merits that may lie in such an argument, the following from the plaintiff's evidence in cross-examination robs it of all factual support:

"Q: So when Mr. Lindo told you that he wanted you to go to Ochi you could have told him no?

A: Yes Sir.

Q: So in fact you were really doing Mr. Lindo a favour?

A: Yes Sir.

Q: Did you regard yourself as in any way responsible for Mr. Lindo's furniture?

A: Not directly.

Q: What you mean by that?

A: While I was there on truck I would not make anything happen to the furniture.

Q: You knew that Mr. Lindo was expecting you to do whatever you could to see to it that nothing happen to the furniture?

A: Yes Sir.

.....

Q: So apart from watching out for Lindo's furniture your only purpose would be to load and unload the truck?

A: Yes Sir.

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"Q: Mr. Lindo was expecting you to come back to town on the truck?

A: Yes Sir.

Q: If the accident had not happened you would have reported to Mr. Lindo that everything was O.K.?

A: Yes Sir.

Q: You would have reported to Mr. Lindo on your return to town?

A: Yes if we got back in time.

Q: And if you did not get back in time you would report to Mr. Lindo the following morning?

A: Not must because the driver would tell him.

.....

Q: So what you understood was your position that day?

A: On the morning when the driver came Mr. Lindo told me I was going to work with the driver and we must obey whatever he says.

Q: So if the driver told you to unload you would be obliged to do it?

A: Yes Sir.

Q: And if the driver told you to come back to Kingston on truck you would be obliged to do it?

A: Yes Sir.

Q: In fact when the driver was ready to come to Kingston he called you and told you he was ready to leave?

A: Yes Sir.

Q: As far as you were concerned Mr. Lindo had put Mr. Higgins in charge of you and Oliver for the day?

A: Yes Sir.

.....

Q: If the driver told you that you were to stay in Ocho Rios you would feel obliged to stay there?

A: Yes Sir.

"Q: When Mr. Higgins told you come we are going back to Kingston you were bound to go with him?

A: Yes we were bound to go with him."

In my view there was no contract of employment between Marr and the plaintiff. The essential elements for the creation of such a relationship between Marr and the plaintiff as set out in the Denham's case were lacking between Marr and the plaintiff. The only reasonable inference to be drawn from the evidence was that his contract of employment with Lindo persisted and his journey was in Lindo's interest.

Accordingly, he was not covered by the policy, the terms of which enabled the insurer to limit the scope of the Company's indemnity by complying with the minimum requirements of the Act.

Because of the decision to which I have come on the main issue it is not necessary to deal with Mr. Graham's alternative point that the exception created by Section 5 (b) (i) would apply because if the plaintiff/appellant was in the employment of the insured, the injury arose out of or in the course of his employment.

On the other hand because of the earnest arguments of Mr. Frankson, I feel constrained to say that although Lindo was not obliged to use Marr's transport for conveying the plaintiff to and from Ocho Rios, this was clearly in the contemplation of all the parties concerned and therefore it is of no moment that the accident occurred on the return journey. The arrangements include unloading the furniture at Ocho Rios. The plaintiff was directed to do so and to place himself at the disposal of Marr's servant by his master Lindo and he was acting in Lindo's interest. Accordingly, on the authority of Izzard's case had the Jamaican Legislation not limited the category to persons in "contract of employment with the insured" I would be prepared to hold that the plaintiff would be entitled to the protective cover under the Act and to consequential judgment in his favour.

In that regard I note with interest that Izzard's case was decided in 1937. The Jamaican Legislation dealing with this type of Insurance came into being in 1939 [Law 4 of 1939]. Accordingly, the conclusion that the inclusion of the words "with the insured" after "contract of employment" was expressly intended to limit the category of persons to be covered, seems inescapable. It is manifestly an impediment to the statute fulfilling its primary purpose, namely the protection of third parties.

The unhappy position of the plaintiff brings generally to mind, the point made by Sir Carleton Kemp Allen in his "Aspects of Justice" thus:

> "In the vast mass of modern legislation there are many enactments which judges consider unjust in principle or harsh in consequences, or perhaps both, but they would fail in their duty if they did not apply them to the best of their understanding. As I have said, whenever by his interpretation he can avoid hardship, the good judge will do so, but there are many occasions when he cannot avoid a result which he deplores. Yet he has acted justly."

So be it. A provision such as Section 5(b)(ii) in this country of crowded and often narrow roads and a high accident rate is anachronistic. The Act cries out for helpful amendments. It is a cry that only the Legislature can competently answer.

Accordingly, for the reasons set out herein, I would dismiss the appeal.

WHITE, J.A.:

I have had the opportunity of reading the draft of the judgment of Kerr, J.A. I agree with his reasoning; and concur in the dismissal of this appeal.

CAMPBELL, J.A. (AG.):

I have had the benefit of reading the judgment in draft of Kerr, J.A. I am in full agreement with his reasoning and conclusion and have nothing further which may usefully be added.