JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 23/2004

BEFORE: THE HON MR JUSTICE FORTE, P.
THE HON MR JUSTICE SMITH, J.A.
THE HON MR JUSTICE K. HARRISON, J.A.

BETWEEN:	WALTRAUD EAST	CLAIMANT/APPELLANT
AND	INSURANCE COMPANY OF THE WEST INDIES	DEFENDANT/ RESPONDENT

Dr. L. Barnett, Mr. Rudolph Francis and Mrs. Althea McBean-Wisdom, instructed by Frater Ennis and Gordon, for the Appellant

Mr. Christopher Kelman instructed by Myers Fletcher and Gordon for the Respondent.

December 7, 8, 9, 10, 2004 and July 29, 2005

FORTE, P.

I have had the opportunity of reading in draft the judgment of K. Harrison, J.A. I agree with his reasons and conclusions and there is nothing useful that could be added.

SMITH, J.A.

I agree with the judgment of Harrison, J.A., and there is nothing useful that I could contribute.

K. HARRISON J.A:

Introduction

This is an appeal from the judgment of Miss Justice Smith delivered on the 6th February 2004, arising from a suit filed by Waltraud East ("the appellant")

against Insurance Company of the West Indies ("the respondent") pursuant to section 18(1) of the Motor Vehicles Insurance (Third Party Risks) Act. The question which the appeal raises is whether the learned trial judge was correct in finding that the Respondent had proved that there was a policy limit of $750,000.00 to any claim under the relevant insurance policy for injury to one person as a result of a motor vehicle accident.

The background facts

In 1987, a policy of Insurance was issued by Motor Owner's Mutual Insurance (MOM) to Triple "C" Electrical Construction Company ("the insured") covering liability incurred by the insured in relation to death or bodily injury sustained by an individual in a motor vehicle accident.

On the 19th November 1987, the appellant's husband was involved in a motor vehicle accident along Moneague main road in the Parish of St. Ann and he was fatally injured. The accident was due to negligence on the part of the insured's driver whilst he was driving motor truck registered CC 357D. MOM was insurer of the insured's motor truck at the material time.

The appellant, who was a passenger in her husband's motorcar was seriously injured in this accident. On the 8th September 1989, she brought an action in the Supreme Court against the insured and its driver, in order to recover damages in respect of her injuries, loss and expense.

On the 18th July 2000, she was awarded damages against the insured in the sum of $20,784,964.51 in addition to interest and costs.

In or about 1988, MOM ceased doing business and the Respondent acquired its insurance portfolio.

The Appellant contends that by reason of the provisions of section 18(1) of the Motor Vehicles Insurance (Third Party Risks) Act, the Respondent is liable to pay the amount of the judgment debt, interest and costs. In the circumstances, Attorneys at Law for the Appellant, requested payment of the judgment debt from the Respondent.

The Respondent refused initially to pay the judgment debt. It contended that a copy of the Notice of Proceedings was not served on it. After further discussions however, the Respondent paid the policy limit of $750,000.00 to the Appellant in March 2001. Despite this payment, the Appellant filed suit against the Respondent in the Supreme Court on the 9th January 2002, in order to recover the balance of the judgment debt.

At the time of trial, the schedule to the policy issued in 1987 was lost. The Respondent relied however, upon secondary evidence. Mrs. Carmen Singh and Mrs. Gretchen Garriques, both insurance executives, gave evidence on behalf of the Respondent with regard to the contents of the lost policy schedule that was in force at the time of the accident.

The appellant was unsuccessful in her claim against the Respondent. The learned trial judge found on the evidence presented, that the Respondent had satisfactorily proved that there was a statutory limit of $2,000.00 and a policy limit of $750,000.00 to a claim under the insurance policy for injury to any one person.

Challenges

The Appellant now challenges the following findings of fact and of law made by the learned judge.

(a) Findings of fact

(i) That the evidence of Mrs. Carmen Singh who was employed to MOM at the time when the insurance policy was in force is a witness whose testimony can be relied on regarding the policy limit at the time of the accident.

(ii) That the evidence of the said Carmen Singh that she could not remember any particulars of the policy schedule that was issued immediately before the one in question or the one issued immediately thereafter did not make her evidence unreliable.

(iii) That the policy in force at the time of the accident was limited to $750,000.00 for death or bodily harm to any one person.

(a) Findings of Law.

(i) That the Appellant cannot recover more than the statutory limit, or the sum assured under the policy for death or injury to any one person.

(ii) That the Appellant was not entitled to recover interest as claimed due to the finding of facts that there was a policy limit of $750,000.00 in force at the date of the accident.

The Grounds of Appeal

Ground 1 reads as follows:

"1. The learned trial judge failed to give the correct interpretation of section 18(1) of the Motor Vehicles Insurance (Third Party Risks) Act and thereby came to the wrong conclusion that the Claimant was not entitled to recover more than

> the limit under the insurance policy which was in force at the time of the accident."

Dr. Barnett did not pursue ground 1 for good reason. The interpretation of section 18(1) of the Motor Vehicles Insurance (Third Party Risks) Act ("the Act") was decided in ***Global Insurance Company of the West Indies v Johnson and Stewart*** SCCA 70/99 (un-reported) delivered on the 14th April 2000. That case held that on a true interpretation of section 18(1) of the Act, it was the statutory minimum and not the policy limit that is the ceiling for recovery by a third party. The Court of Appeal recognized and treated itself bound by the decisions of the Judicial Committee of the Privy Council: see ***Suttle v Simmons*** [1989] 2 Lloyd's L.R 227; ***Matadeen (in substitution for Suresh Matadeen, deceased) v Caribbean Insurance Co. Ltd.*** Privy Council Appeal No. 46 of 1999 delivered on the 19th December 2002 (unreported) and ***Goberdham v Caribbean Insurance Co. Ltd.*** [1998] 2 Lloyd's L.R 449.

Ground 2

The appellant contends that:

> "The learned trial judge wrongly received and admitted oral evidence from the witnesses Carmen Singh and Gretchen Garriques of the contents of the policy schedule which the Defendant/Respondent say (sic) was in force at the time of the accident, and allowed it to influence her mind in coming to her decision that the policy in force at the time of the accident was one which limited coverage to the insured for death or injury to any one person to the sum of $750,000.00."

The reception of secondary evidence and findings by the learned trial judge

Dr. Barnett submitted that a proper foundation was not laid for the reception of secondary evidence. In the circumstances, he submitted that the learned trial judge was in error when she concluded that there was acceptable evidence with regard to the policy limit. He argued that the learned judge had not seen the original or a copy of the insurance policy schedule so several possibilities could arise with regard to the policy limit. First, he says that there maybe an express policy limit that is equivalent to the statutory minimum. Second, there maybe, an express policy limit which is dependent on the agreement negotiated by the parties. Third, there maybe, no policy limit in place. Fourth, if there is a policy limit, it may only be applicable in certain defined circumstances.

Dr. Barnett argued that the language of the particular policy will determine on its construction, what is the true position, bearing in mind the principle that an exception or limitation clause is construed against the party for whose benefit it was inserted. We were referred to the cases of ***Beverley's Transport Ltd. v The Jamaica General Insurance Co. Ltd*** (1995) 32 JLR 169 and ***Jamaica Co-operative Fire and General Insurance Co. Ltd. v Sanchez*** (1968) 11 JLR 5. The latter case is one that shows that there are un-limited policies. In my opinion however, the Court cannot decide this issue on mere speculation.

Dr. Barnett further submitted that where oral evidence is given regarding the terms of a written agreement that is lost, evidence must be led that all reasonable efforts have been made to find the document. He also submitted that it is incumbent upon the Respondent to show:

a) that reasonable care was taken to preserve the policy while it was still of practical importance;

b) that all reasonable care was taken to preserve the policy and;

c) that there is secondary evidence, as to the contents, which is otherwise admissible and credible.

Mr. Kelman submitted in response, that the learned trial judge correctly applied the law to the evidence regarding the contents of the lost document. He submitted that evidence was adduced by the Respondent to show:

i) That the policy schedule could not be located after due search for it and;

ii) That the content of the policy schedule was read by one of its witnesses.

He argued that the witnesses' statements were completely legitimate and trustworthy and that:

a) They came from persons with great experience in the insurance industry;

b) they were un-contradicted and;

c) they were properly assessed by the learned judge she having had the opportunity to observe their demeanour as they gave evidence from the witness box.

Mr. Kelman referred us to the case of ***Brewster v Sewell*** (1820) 3 B & Ald 296. The case is summarized as follows:

> "...The plaintiff was unable to produce a policy of insurance against loss by fire on which a claim had been paid. Subsequent to the fire, which occurred some five years before the proceedings, a fresh policy had been issued. Evidence was given of a thorough but unsuccessful search for the earlier policy. An agent of

> the insurance company stated inter alia, that on the day following the fire, the policy was placed in his hands; that he had it in his possession at the time of the loss and also afterwards. When the plaintiff came to make another larger insurance, and that upon that insurance being made, in his opinion the original policy became useless paper, and that he did not know what became of it afterwards. He had searched for it but could not find it. He thought he must have returned it to the plaintiff but he was not certain. The clerk to the plaintiff's Attorney was called and he stated that on a few days before the trial, he went to the plaintiff's house for the purpose of searching for the policy in question. He was shown drawers where the plaintiff kept his documents. He minutely examined the drawers but could not find the policy. Other sections of the house were searched but he was still unsuccessful locating the policy. Garrow, Baron, was of the opinion, at the trial that this was not sufficient evidence of the destruction of the policy, so as to let in secondary evidence, and he non-suited the plaintiff. A rule nisi was obtained to set aside the non-suit. The court held that, in the circumstances, the original policy had become 'mere waste paper' and that sufficient evidence of due search had been given to allow proof of its contents by secondary evidence".

Mr. Kelman also referred to Keane on "The Modern Law of Evidence" 5th Edition where the learned author states inter alia at pages 232-233:

> "iv) Lost documents – secondary evidence of the contents of a document is admissible on proof that the original has been destroyed or cannot be found after due search. The quality of the evidence required to show the loss or destruction varies according to the nature and value of the document in question".

In ***Erskine v Goel*** (1977) 25 WIR, 78 George J.A. , stated at p. 110:

> " ...secondary evidence is receivable in court, of anything which a person saw without the need for producing the original or accounting for its absence. (See ***Hockin v Ablquist*** *Bros* ([1943] 2 All ER 722, [1944] KB 120).) And a person can also give secondary evidence of the contents of any document

> which he has read or of which he had a copy, if the absence of the original can be satisfactorily accounted for, *eg*, if it is lost or destroyed or its production is physically impossible or highly inconvenient".

In this case, the Respondent called two witnesses to testify on its behalf in relation to the lost policy schedule. Both witnesses have worked several years in the insurance industry. The first witness was Mrs. Carmen Singh. She is an ex-employee of MOM and was employed to the Respondent from 1989 to 1991. She worked with MOM from 1974 to 1988. In the mid 1980s she was promoted to the position of Motor Underwriter. In her witness statement she stated:

> "I confirm that in 1987 the limit of liability in respect of motor insurance issued by MOM, whether under comprehensive or third party cover for death or bodily injury to any one person was $750,000. This coverage was consistent with industry standard at the time and when the MOM insurance portfolio was taken over by ICWI in 1988, this limit of liability was not changed until later."

She further stated:

> "In 1987 the then statutory liability fixed by section 5(2) of the Motor Vehicles Insurance (Third Party Risks) Act was $2000.00.
> ...
> I am quite sure that the applicable policy limit in respect of death or bodily injury to any one person as at November 19, 1987 was $750,000.00."

By agreement between the parties, two Insurance certificates dated 4th April 1989, were admitted in evidence as exhibits 4A and 4B respectively. Mrs. Singh stated:

> "The handwritten proposal form for April 4 1989, to April 3,1990, is also a proposal in respect of Third Party Risks. Certificates of insured were issued in respect of

> the relevant motor vehicle dated April 4, 1989 (one in respect of the regular licence number CC 357D and one in respect of the temporary licence number 1433). The relevant policy schedule which is dated July 23, 1990....confirms that even then the limit of liability in respect of death or bodily injury to any one person was $750,000.00."

Mrs. Singh's witness statement was amplified at the trial and in chief she said:

> "In 1984 I was working at MOM. Policy schedule was prepared for Triple 'C' Electrical Company. I would have seen those documents. Most of those documents would be seen by me. The schedule would be checked off – if found correct, then it would be signed by me".

Under cross-examination Mrs. Singh said:

> "In respect of Triple 'C', the policy schedules I found was for 1984, 85, 86. The one for period 1987 – 1988 I did not find. I did not find one for 1988 – 1989. There was none for that period.
>
> ...
>
> I saw subsequent policies for 89/90 issued by ICWI to Triple 'C' Construction."
>
> The date for 89/90 policy was I believe the 4/4/89, expiry date 3/4/90. Extent of coverage was a 3rd party policy – 3rd party limits then by ICWI was –
>
> I. "Property damage - $250,000
>
> II. Bodily injury to one person - $750,000.
>
> III. Bodily injury to any one event - $2M."

She agreed under cross-examination that Ex. 4A (the certificate of insurance for the insured in respect of the 1971 Bedford motor truck for period 4th April 1989 to 3rd April 1990) did not show a policy limit. She also agreed that Exhibit 4B (the certificate of insurance for the insured in respect of Bedford D6 motor truck

Temp.# 1433 for period 4th April 1989 to 3rd April 1990) did not mention a policy limit.

Mrs. Singh said she made enquiries about the policy schedule for the policy that was in force at the time of the accident but it could not be located. She did not personally make any effort to locate the policy.

Mrs. Gretchen Garriques was the other witness called by the Respondent. She is employed to the Respondent as a Claims Manager and stated in her witness statement as follows:

> "The defendant's records confirm that on November 19, 1987, Triple 'C' Construction Company Limited had in place with MOM a policy for motor vehicle third party insurance coverage in respect of a Bedford Motor Truck licence No. CC357D. I am able to confirm this because I have seen the MOM motor claim form dated November 24, 1987 which was filled out by Triple 'C' Construction Company Limited."

She also stated:

> "In 1987 the third party liability limit for all Motor Comprehensive and Third Party Liability policies of insurance which were issued by MOM, in respect of death or bodily injury to one person was $750,000.00. This was in keeping with the standard policies which were then being used in the insurance industry in general and was substantially more than the then statutory liability of $2,000.00 which was fixed by section 5(2) of the Motor Vehicles (Third Party Risks) Act."

Then she said:

> "There is no doubt in my mind that the applicable policy limit as at November 19, 1987 was $750,000.00 in relation to death or bodily injury to one person."

Under cross-examination she said:

> "At time when ICWI acquired portfolio of MOM there was a transfer of all the documents from MOM to ICWI of all of the policies. There was a listing of all the policies being taken over by ICWI from MOM. The particular policy was in force at the time in respect of Triple 'C' with CC 357D – I have seen the policy that was originally issued for it. In 1987 it was a renewal of the policy that was in existence – what we cannot find is the policy schedule for the period 1987/88.
> ...
> I have never seen the policy schedule for 1987/88; it has not been found but one should have been issued. The policy was not seen by me. The policy is given to the client. The policy schedule and the proposal would be what we keep on the file.
> ...
> Certificate of insurance does not state the limit of insurance policy.
>
> ...there was correspondence to the effect that the policy limit was $750,000."

She also said

> "The policy in force on 19/11/87 was one which insured the policy holder against liability for death or injury for $750,000.00. My conclusion is based on:
>
> a) Policy issued to Triple 'C' before 1987 in respect of the same motor vehicle (i.e. before the date of the accident) and;
>
> b) Policy issued subsequently to the same insured for the same motor vehicle.
>
> c) My knowledge of what we issued in terms of policies in the industry – i.e. ICWI and MOM."

Mrs. Garriques stated that a copy of the insured's policy could not be located but she had examined two other sample policies. Efforts were made by her to locate the actual policy but she was unsuccessful. She also stated that exhaustive searches were carried out in the Respondent's file room as well as at

their off-site storage facilities in order to locate the document but this also proved unsuccessful.

During the trial, a 1984 policy schedule in respect of the insured's 1971 Bedford stake truck was admitted in evidence as exhibit 2. This policy had a limit of $750,000.00 in respect of death or bodily injury to any person. In ruling on the admissibility of this document, the learned judge said:

> "...in the court's view it goes to show the course of conduct which existed between the Insurer and Triple 'C' Construction Company in 1984. On that basis the court rules that it is relevant."

The learned judge also admitted the document in evidence on the basis that it was in fact made and not in relation to the truth of its contents.

Dr. Barnett submitted firstly, that other documents could only be examined where there is an ambiguity. He referred to Ivamy, General Principles of Insurance 6th Edition at page 244 where the learned author states inter alia:

> "Where there is an ambiguity on the face of the policy, and a question, therefore, arises as to its meaning and effect, the court may take into consideration any documents ... if not incorporated into the policy, in which the insurers profess to set out or explain the purport and effect of their policies, and any verbal explanations given by themselves or their agents."

Dr. Barnett also referred to ***McCutheon v David Mac Bryne Ltd.*** [1964] 1 WLR 125 and ***Hollier v Rambler Motors (AMC) Ltd*** [1972] 2 WLR 401.

Secondly, he submitted that it is only where there is an ambiguity in the language of a contract, that a course of dealing between the parties may be used to construe the contract. He argued that if parties are free to vary the terms of a

policy from time to time, proof of the terms at one time or of general practice is not proof of the terms at another time.

In Hollier (supra) the headnote reads as follows:

> "The plaintiff had had his car repaired at the defendant's garage on three or four occasions over a period of five years. On at least two of the occasions, he had signed a form but had not read the printed words 'The company is not responsible for damage caused by fire to customers' cars on the premises'.
> By an oral agreement made between the plaintiff and the defendants, the defendants agreed to repair his car, and, while at their premises, the car was damaged by a fire caused by the defendants' negligence. The plaintiff claimed damages for breach of the implied term that the defendants would take reasonable care of his car. The defendants relied on the condition excluding responsibility for damage to cars caused by fire which they contended was incorporated into the oral agreement because of the previous course of dealing between the parties. Judge Worthington – Evans held that the condition was incorporated into the contract and excluded the defendants' liability for negligence, and he dismissed the claim.
>
> On appeal by the plaintiff:
>
> Held, allowing the appeal, that there was no sufficient course of dealing, so that the condition relied on could not be imported into the oral contract to exempt the defendants from their own negligence...".

Conclusion on ground 2

I shall deal first with the course of dealing issue. I do not believe that a single transaction can constitute a course of dealing so that one can draw an inference that the policy limit was fixed at $750,000.00. In my view, the learned judge erred when she stated that "exhibit 2" had established that a course of conduct had existed between the insurer and Tripple "C" Construction Company.

Was there other evidence that the learned judge could have acted upon? In the state of things, the answer would depend on the proper inference to be drawn from the facts. There was evidence which showed that the relevant policy schedule was (a) lost and; (b) could not be located after a search was carried out. There was also evidence with respect to the standard practice in the insurance industry regarding policy limits for motor vehicle insurance policies during the year 1987 and subsequent years. The learned judge who saw and heard the witnesses would have been in a position, to determine, what evidence was credible. In my view, the secondary evidence clearly established that the policy limit at the time of the accident was $750,000.00.

Ground 3

It was contended that:

> "The learned trial judge wrongly rejected the submission of Counsel for the Claimant/Appellant that she is entitled to interest on the sum of $750,000.00, from the date of the accident until payment of that sum to her on the 23rd March, 2001 and costs."

I turn now to section 18(1) of the Act. It provides as follows:

> "18. (1) If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1) (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by

> virtue of any enactment relating to interest on judgments."

Dr. Barnett submitted that the correct approach with regards to the payment of costs and interest is that taken by Crane, J. in **Maharaj v Presidential Insurance Co. Ltd.** (1990) 1 TT L.R 205. That case held inter alia, that the limitation with respect to the amount recoverable under the Act, does not extend to liability as a result of litigation, such as costs and interest on judgments. In the circumstances, he submitted that consequential payments arising from the judgment are to be treated as separate and apart from the contractual and statutory requirements of the Motor Vehicles Insurance Policy. It was therefore his view, that the Appellant would be entitled to interest and costs despite any limitations in the policy.

Mr. Kelman submitted however, that although the appellant is entitled to interest on the statutory limit of $2,000.00, no interest should be paid on the sum of $750,000.00 since she was already paid that sum in 2001. He argued that the latter figure far exceeds the statutory limit and would have taken care of any interest that was due. In my view, there is merit in the submissions of Mr. Kelman. In any event, the appellant is not entitled to interest from the date of the accident as claimed. In **Presidential Insurance Company Ltd. v Molly Hosein Stafford** Privy Council Appeal No. 66/97 delivered 22nd March 1999, their Lordships held that a claimant was entitled to interest at the judgment rate from the date of final judgment in the first action down until the judgment debt was sufficiently discharged. (emphasis supplied). The learned trial judge was therefore correct when she made no order regarding the question of interest.

I now turn to the issue of costs. The Privy Council decided in **Presidential Insurance Ltd.** (supra): that the injured party was entitled to recover his costs from the insurer and this includes the costs which the defendant in the earlier action was ordered to pay. Mr. Kelman submitted however, that no evidence was led at the trial presided over by Smith, J., regarding the amount of costs that is due to the appellant. There was also no evidence whether these costs were agreed or taxed. In the circumstances, Mr. Kelman submitted that this court ought to refrain from making an order with respect to costs. I am in full agreement with these submissions. It is my view that the costs in the previous action ought to have been taxed and/or certified and claimed in the action before Smith J. Ground 3 of the appeal therefore fails.

Conclusion

I am of the opinion, that the appeal ought to be dismissed with costs to the respondent.

FORTE, P.

ORDER:

(1) Appeal is dismissed

(2) Costs of the appeal to the respondent to be taxed if not agreed.