[2015] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 84/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)

BETWEEN	**MECHECK WILLIS**	**APPELLANT**
AND	**GLOBE INSURANCE COMPANY OF JAMAICA LIMITED**	**RESPONDENT**

Mrs Marvalyn Taylor-Wright and Anwar Wright instructed by Taylor-Wright and Co for the appellant

David Johnson instructed by Samuda and Johnson for the respondent

11 February, 29 May and 19 June 2015

PANTON P

[1] On 29 May 2015, we made the following order in this matter:

> "Appeal dismissed.
> Costs to the respondent to be agreed or taxed."

We promised then to put our reasons in writing, and this we now do.

[2] This appeal was from the judgment of Mangatal J who refused certain orders sought by the appellant against the respondent. The issue for our determination (as it

was for Mangatal J) was whether the appellant, who was injured in a motor vehicle accident, had a statutory entitlement to recover from the respondent insurance company the fruits of a judgment awarded against the owners of the motor vehicle. This determination depended on the interpretation of section 18(1) of the Motor Vehicles Insurance (Third-Party Risks) Act (hereinafter referred to as "the Act").

[3] On 27 January 2001, the appellant while driving his Mazda motor vehicle along the Phoenix main road in the parish of Saint Ann was involved in an accident with a Nissan Sunny motor car owned by Yvonne and Patrick Flynn, and driven by Devar McFarlane, aged 16 years. Due to McFarlane's negligence, the appellant was seriously injured. He filed suit against the Flynns and McFarlane's estate. There was no acknowledgment of service so a default judgment was entered against the Flynns on 29 July 2010, for damages to be assessed. Those damages were assessed and ordered by Fraser J on 23 June 2011 as follows:

> "1. Special damages are awarded in the sum of $17,456,574.65 with interest at the rate of 6% form [sic] January 27, 2001 to June 21, 2006 and at the rate of 3% from June 22, 2006 to June 23, 2011.
>
> 2. General damages are awarded for pain and suffering loss of amenities in the sum of $9,500,000.00 with interest at the rate of 3% from July 13, 2007 to June 23, 2011.
>
> 3. Costs of [sic] the Claimant to be agreed or taxed."

[4] Consequent on his failure to recover from the Flynns, the appellant filed a fixed date claim form against the respondent on 6 September 2011 seeking a declaration that the respondent is liable to pay to the appellant "the maximum sum payable under the Contract of Insurance in existence on the 27th day of January, 2001 in respect of [the] motor vehicle…". The appellant also sought an order that the respondent do pay interest at the statutory rate of six per centum per annum from 23 June 2011 until payment.

[5] Evidence was received by Mangatal J confirming the age of the driver of the motor vehicle at the time of the accident, and the existence of an insurance policy between the Flynns and the respondent Globe Insurance Company. The respondent's stance has been that it is not liable due to the fact that the driver of the motor vehicle had no driver's licence and was not qualified to obtain or hold one, due to his age. The insurance policy did not cover the situation, according to the respondent.

[6] Mangatal J refused the orders sought. She did so, reasoning as follows:

- the driver of the motor vehicle, being 16 years old at the time, was not permitted by law to drive a motor vehicle on a public road;

- in determining whether liability is covered for the purposes of section 18(1) of the Act, the paramount consideration must be whether on a proper construction of the terms of the insurance policy, the liability arose from a risk that was covered by the express terms of the policy, and in respect of persons entitled to indemnity at the time of the incident;

- the driver was not insured under the policy, and so the respondent had no duty to provide indemnity in respect of the judgment against the Flynns, the owners of the vehicle;

- the law does not require an insurer to provide insurance coverage in respect of third parties' claims arising in respect of the driving of a motor vehicle by a person who is not licensed, permitted or authorized to drive under the law;

- the insured in the instant case, having breached the policy, are not entitled to be indemnified;

- there is no coverage at all in the instant case as the driver was not licensed to drive; and

- the loss suffered by the appellant was not one that was contemplated or covered under the policy of insurance, hence the respondent is not liable to provide indemnity or to satisfy the judgment of 23 June 2011.

[7] In his grounds of appeal, the appellant complained as follows:

a. The learned trial judge erred in failing to pay sufficient regard to the legislative scheme of the Motor Vehicles (Third-Party Risks) Act, which is aimed at protecting innocent third parties.

b. The learned trial judge erred in deciding the case on the basis of the breach of contract relied on by the insurer, namely, permitting the car to be driven by an unlicensed driver.

c. The learned trial judge erred in holding that the right to indemnity does not arise unless the loss occurred at a time when the motor vehicle was being operated by persons covered by the policy.

d. The learned trial judge erred in holding that cover under the insurance policy does not apply where the driver is not licensed to drive, and there is no exception evident on the policy to restrict the insurer's liability to a third party.

[8] Mrs Marvalyn Taylor-Wright, in written submissions dated 14 November 2014 and in oral arguments before us on 11 February 2015, said that the appellant's main contention was that the insurer had a statutory, as distinct from a contractual, liability to honour the judgment sum or the policy limit whichever is the lower. According to her, the intention of the legislature, given the scheme enacted in the Act, was to protect innocent third parties against the risks to which they are exposed by the use of motor vehicles on the public roadway. She argued that the learned trial judge erred in emphasizing that the driver was not covered at the time of the accident. That, Mrs Taylor-Wright said, was an irrelevant consideration. Other common law jurisdictions, she said, have interpreted legislation similar to ours in a manner "protective of the rights of the third party and preventing an insurer from relying on contractual defences". In that regard, she referred to the cases: **National Insurance Co Ltd v Nicolletta Rohtagi And Ors** [2002] Supp (2) SCR 456, **Eastern Caribbean Insurance Ltd v Edmund Bicar** HCVAP 2008/014, delivered 3 May 2010, and **Matadeen v Caribbean Insurance Co Ltd** [2002] UKPC 69.

[9] Mrs Taylor-Wright also submitted that there is nothing in the legislation that restricts the liability of the insurer in respect of third parties in circumstances where the vehicle is not being operated by persons specified in the policy of insurance. As long as the persons against whom judgment was obtained were specified in the policy as being

insured, then payment by the insurer is compulsory under the contract, she said. Further, she submitted that "the important consideration for the learned judge was not whether the [a]ppellant had a valid claim to be indemnified but whether the [a]ppellant had a right to be compensated by the [r]espondent insurer under section 18(1) of the Act".

[10] It is necessary to set out the provisions of section 18(1) of the Act, and also to see what was determined in the cases on which Mrs Taylor-Wright relied. The section reads thus:

> "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 the amount covered by the policy or the amount of the judgment, whichever is the lower, 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.
>
> (1A) The right of payment under subsection (1) shall not be limited by reference to –
>
> (a) the minimum liability coverage required under subsection (1), (2) or (3) of section 5;
> (b) any limitation of liability to claim specified in subsection (4) of section 5.

(2) Subject to subsection (1A), no sum shall be payable by an insurer under the foregoing provisions of this section –

(a) liability for which is exempted from the cover granted by the policy pursuant to subsection (4) of section 5; …"

[11] Given the reference in the section to the "liability as is required to be covered by a policy", it is important to see what was in fact covered. In this regard, the certificate of insurance issued to the Flynns names the policyholders and any other person who is driving on the policyholders' order or with their permission, as the persons or classes of persons entitled to drive the vehicle. There is attached a proviso that the person driving must be one who:

> "is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the Motor Vehicle."

[12] In the instant situation, the driver was not legally permitted to drive a motor vehicle. In my view, that means there was no valid insurance policy in place at the time of the unfortunate accident that has had such catastrophic consequences on the life of the appellant. According to Mrs Taylor-Wright's argument, though, the proviso in the certificate of insurance is of no moment, as the statute provides for compensation by the insurer. This argument is based on her interpretation of the section and the cases referred to earlier.

[13] The case **National Insurance Co v Nicolletta Rohtagi** does not, in my view, support the position being advanced by Mrs Taylor-Wright. That case was part of a "group of appeals" in which the question for consideration was whether it was open to an insurer, who had not appealed under section 173 of the Motor Vehicles Act against an award by the Motor Accidents Claims Tribunal, to file an appeal questioning the quantum of the award as well as the finding of negligence against the offending vehicle. The court concluded that an insurer could not appeal against quantum or findings of negligence or contributory negligence.

[14] The facts of the case are that one Anil Kishore Roghtagi died in a motor vehicle accident which took place on 8 August 1995. The dependants of the deceased filed a claim petition before the Tribunal which awarded a stated sum as compensation. The insurer appealed to the High Court but the appeal was dismissed on the ground that no appeal was maintainable as regards quantum of compensation. The insurer filed a further appeal. The learned judges, in arriving at their decision on this further appeal, considered sections 147, 149, 170 and 173 of the Motor Vehicles Act 1988 which have provisions similar to our Motor Vehicles Insurance (Third-Party Risks) Act.

[15] In its judgment, the court, having traced "the historical development of the law for compulsory third party insurance in England", stated that "in common law, an insurer was not permitted to contest a claim of a claimant on merits i.e offending vehicle was not negligent or there was contributory negligence". The insurer could, however, the court said, contest the claim only on statutory defences specified for in the statute. I think that it is this statement that has caused Mrs Taylor-Wright to

submit that the learned trial judge in this case ought to have concentrated on the statute rather than the certificate of insurance.

[16] The court in **National Insurance Co v Rohtagi** also said that "the intention of the legislature was to protect third party rights and not the insurer". This however, in my view, does not mean that insurers have no rights. If they had no rights, it would mean that the terms of an insurance policy agreed to by the insurer on the one hand and the policyholder on the other would bind only the insurer, and the policyholder would be at liberty to do anything he wished and the insurer would be obliged to pay. I find it difficult to subscribe to such thinking.

[17] In any event, this case on which Mrs Taylor-Wright relied does not assist, given the facts and what the learned judges stated was the issue for consideration, that is, whether the insurer could question quantum and the finding as regards negligence.

[18] In **Eastern Caribbean Insurance Ltd v Bicar**, the Court of Appeal held that an insured person includes not only the policyholder but also any other person or class of persons specified in the policy. The insurer was required to indemnify such persons in respect of any liability covered by the policy, and to pay to the person entitled to the benefit of the judgment sum in respect of the liability. The grounding of the liability of the insurer to pay a judgment debt in respect of which an authorized driver has become liable is not dependant on a finding of vicarious liability on the part of the policy holder. The obligations may arise quite separately and independently of the other once it can

be shown that the driver falls within the category of persons specified under the particular policy as being covered thereunder.

[19] The question of the driver falling within the category of persons specified under the policy makes this case also unhelpful to Mrs Taylor-Wright's position as the driver in the instant appeal was not covered by the policy.

[20] Finally, the **Matadeen** case from Trinidad and Tobago concerned questions that arose "out of attempts by the victim of a car accident to recover from the insurers of the vehicle responsible for the accident, damages, interest and costs due to him". The questions that were discussed and dealt with in the judgments of the High Court and Court of Appeal of Trinidad and Tobago, as well as the Privy Council related to:

i. the limitation of actions;
ii. issue estoppel; and
iii. the doctrine of "former recovery".

In my judgment, those issues have absolutely no bearing on the facts and issues in the instant appeal. Mrs Taylor-Wright no doubt received some encouragement from paragraph 47 of the Privy Council's judgment, which reads in part:

> "The section 10 cause of action is sui generis. It requires that a certificate of insurance has been delivered and that a judgment has been obtained by the injured party against a person covered by the policy. Subject to those conditions precedent (and to the let-outs in subsections (2) and (3), it allows recovery by the injured party against the insurer subject to a ceiling of the specified minimum. Contractual defences that would enable the insurer to resist claims by the insured are of no avail. The action is an action on the statute."

[21] The last two sentences of this passage gave fodder for the submission that the learned trial judge concentrated on the contract when she ought to have given attention to the statute. The submission however overlooked the fact that the earlier sentence pointed to the "let-outs" in subsections (2) and (3), suggesting that exemptions provided for in the statute cannot be ignored. Section 10 of the Trinidadian statute, it should be noted, does not contain the "let-out" that is in our own legislation in the form of section 18(2) (quoted earlier). This "let-out" was inserted in the Act in 1989 and relieves the insurer of liability where such liability "is exempted from the cover granted by the policy pursuant to susbsection (4) of section 5". Driving without a driver's licence was exempted from coverage in the instant case.

[22] Mr David Johnson for the respondent in his written and oral submissions acknowledged that section 18 of the Act was aimed at protecting third parties. However, for the insurer to be liable, he said that it had to be shown that the insurer was at risk. On the facts as are chronicled, the respondent was not at risk at the relevant time as "the motor vehicle was being driven by someone who was not contemplated by the policy at all", said Mr Johnson.

[23] Counsel relied on the cases **Eastern Caribbean Insurance Ltd v Bicar**, **The Presidential Insurance Co v Resha St Hill** [2012] UKPC 33, **Goberdhan and Others v Caribbean Insurance Company Ltd** [1998] UKPC 25 and **Gray v Blackmore** [1934] 1 KB 95. The **Eastern Caribbean Insurance** case has already been referred to, as being of no assistance to the appellant. In respect of **Presidential Insurance Co Ltd v Resha St Hill**, a case from Trinidad and Tobago,

the respondent was "the innocent victim of a motor car accident on 8 June 2005 caused by a collision between the car in which she was a passenger and another car owned by Edwin Hogan but being driven by Dexter Denny with Mr Hogan's consent." [Lord Mance]. The accident was due to Mr Denny's negligence. Mr Denny had no insurance to drive the car, and although he was driving with the consent of Mr Hogan, the owner, the policy of insurance taken out by Mr Hogan, was limited expressly to "The Policy Holder & Carlos Hogan (only)". The appellant was joined as co-defendant in proceedings by the respondent to recover damages for her injuries. The appellant relied upon the limitation in the policy as its defence. The trial judge struck out the defence, and his decision was upheld by the Court of Appeal of Trinidad and Tobago. However, the insurer's appeal to the Judicial Committee of the Privy Council was upheld.

[24] The insurer's defence was based on section 4(7) of the Motor Vehicle Insurance (Third Party Risks) Act (as amended in 1996) which reads:

> "Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons".

The Judicial Committee, in interpreting this section, referred to the un-amended version and even consulted Hansard "to try to identify the mischief at which the amendment … was aimed and its objective setting". At the end of that process, the Judicial Committee concluded that perusal of Hansard did not throw any clear light on what Parliament may

have understood. In the end, the natural meaning of the amended section 4(7) prevailed and the appeal was allowed and judgment entered in favour of the insurer, thereby restoring the defence.

[25] Paragraphs 19 and 20 of the judgment of the Privy Council, delivered by Lord Mance reads:

> "19. More generally, the consequences of the interpretation put on s.4(7) in the courts below appear somewhat surprising. First, it would make insurers liable even if the policyholder consented to a driver who was not within the scope of the policy driving or using the vehicle on the basis that he had his own separate insurance cover, and even if he did in fact have his own insurance cover. There would in this latter situation be potential double insurance, and insurers could on the face of it end up having to share any liability. Second, as the Board has noted in paragraph 12 above, the respondent's argument contemplates that the legislator intended to provide cover to anyone driving or using with the consent of the policyholder or of anyone else in respect of whom the policy purported to grant cover.
>
> 20. Third, and perhaps even more significantly, insurers customarily rate motor insurance policies by reference to the driving experience and claims history of those permitted to drive the vehicle insured. If s.4(7) exposes insurers, contrary to the express terms of their policies, to having to indemnify any person injured by anyone driving the vehicle with the consent of the person insured, even though the policy precludes the insured from extending cover to such driver by giving such consent, then insurers would face an open-ended exposure. A named driver(s) clause could no longer have its traditional significance for rating, or indeed much significance at all, unless insurers were expected to undertake the very different and difficult task of assessing the moral risk that their policyholders might, contrary to the policy wording,

> permit others to drive. Further, even assuming that some implied right would exist to recover from the policyholder sums paid to discharge a liability incurred by such other drivers, that would be cold comfort in many cases, and certainly of no real assistance to insurers in rating policies. It would seem unlikely under this scenario that policy holders could continue to expect to receive the benefit or full benefit of the reduction in premium which normally follows from agreement to a limitation of policy cover to only one or more specified drivers."

[26] In **Gray v Blackmore** there was earlier confirmation by Branson J that an underwriter and an assured may agree to a policy "with any conditions that they choose; but if the assured takes the car upon the road in breach of those conditions he cannot thereby throw a greater obligation upon the underwriter" [page 107 to 108]. An extra burden ought not to be placed on an underwriter who never agreed to undertake it.

[27] Mr Johnson urged us to affirm the judgment of Mangatal J, and refuse the various orders sought by the appellant. He was of the view that the authorities on which the appellant relied supported the respondent's position.

[28] I agreed with the submissions of Mr Johnson. In my opinion, the learned trial judge was correct in her interpretation of the legislation and its application to the facts of the case. The contents of the insurance certificate cannot be ignored. The certificate provides information as to what is, or is not, covered by the policy. When the vehicle is being operated in keeping with the terms of the policy, third parties have no need to fear as their interests are protected in the event of injury to person or damage to

property. It is unfortunate for the appellant that the appeal had to be allowed, given the seriousness of his injuries, the length of time that has passed, and the obvious fact that he has been unable to collect from the Flynns. It seems to me that situations such as this require the intervention of the state in the form of the creation of a fund that would provide for innocent, unfortunate victims such as the appellant.

[29] In the circumstances, I found no merit in the appeal and agreed that it ought to be dismissed, with costs to the respondent to be agreed or taxed.

PHILLIPS JA

[30] Mecheck Willis, the appellant, sought declarations from Mangatal J that Globe Insurance Company of Jamaica Limited, the respondent, was obliged to indemnify him under the Motor Vehicles Insurance (Third-Party Risks) Act (MVIA), in respect of a judgment obtained by him in an earlier suit against the insured, Yvonne and Patrick Flynn (the Flynns). The orders sought by the appellant were refused by Mangatal J on 8 June 2012 and the appellant has now appealed that decision.

[31] On 29 May, we made the following orders:

> "Appeal dismissed.
> Costs to the respondent to be agreed or taxed."

We promised to put our reasons in writing. This is a fulfillment of that promise.

Factual background

[32] On 27 January 2001, the appellant was driving a Mazda motor vehicle along the Phoenix main road in the parish of Saint Ann, when a Nissan Sunny motor vehicle, being driven by Devar McFarlane in the opposite direction, collided into the appellant's motor vehicle resulting in Devar McFarlane's death and serious injuries to the appellant. The appellant alleged that the accident was caused by the negligence of Devar McFarlane who was the servant and/or agent of the Flynns.

[33] At the time of the accident, the Flynns were the owners of the said Nissan Sunny motor vehicle being driven by Devar McFarlane and he, Devar McFarlane, was a 16 year old unlicensed driver. The Nissan Sunny motor vehicle being driven by Devar McFarlane was insured by the respondent and a certificate of insurance (insurance policy) was issued to the Flynns that provided indemnity for the Flynns and persons authorized by the Flynns to drive the said motor vehicle, provided that the authorized driver was permitted, in accordance with the licensing or other laws of Jamaica to drive the said motor vehicle (clause five of the policy).

[34] In 2007, the appellant filed a claim against the Flynns and David McFarlane (Administrator *Ad Litem* of the estate of Devar McFarlane) for *inter alia*, damages for negligence (Claim No 2007 HCV 00460). The Flynns failed to acknowledge service or file a defence and so on 29 July 2010, the appellant obtained a default judgment against them for damages to be assessed and costs to the appellant. On 12 August 2010, a notice was filed by the appellant discontinuing proceedings against David

McFarlane. On 23 June 2011, on the assessment of damages hearing, Fraser J awarded special damages in the sum of $17,456,574.65 with interest and general damages of $9,500,000.00 with interest and costs to the appellant.

[35] Since the inception of the appellant's claim, the respondent has denied liability and has also denied any obligation to indemnify the claim. This is because the respondent contended that the vehicle was being used in breach of the terms and conditions of the policy of insurance requiring the driver to be licensed. This denial of liability continued throughout the previous and current court proceedings and most correspondence sent to, or served by the appellant's attorney-at-law on the respondent were returned, referring therein to their earlier correspondence indicating that they were not accepting liability.

Previous proceedings

[36] On 3 March 2010, the respondent filed a claim against the Flynns (HCV 00942/2010) seeking declarations that it was not obliged to indemnify them against all claims arising out of the accident on 27 January 2001, in which the Flynns' motor vehicle had been driven by Devar McFarlane. However, this claim was abandoned because service of the claim could not be effected.

[37] On 6 September 2011, the appellant filed a claim against the respondent (HCV 05538/2011), seeking declarations which stated: (i) the respondent's liability to the appellant under the MVIA in respect of the order of Fraser J granted on 23 June 2011 against the Flynns; (ii) the respondent's liability to pay to the appellant the maximum

amount payable under the policy; and (iii) the respondent's liability for costs to the appellant for the current claim together with interest on the judgment sum awarded in the previous claim.

[38] The appellant's claim against the respondent in the court below for declaratory orders was heard by Mangatal J on 22 May 2012 and, as indicated, her decision was given on 8 June 2012. It was the appellant's contention *inter alia* that: (i) he was entitled to be compensated under section 18(1) of the MVIA; (ii) the respondent's contention could not succeed since the policy did not specifically exclude persons who did not possess a driver's licence; (iii) the exclusion cause was ambiguous so the *contra preferentem* rule was applicable; and (iv) by introducing the age of the driver as a part of its defence the respondent would run afoul of section 8 of the MVIA which prevents any attempt by the insurer to restrict its liability by reference to age.

[39] During the proceedings, the respondent's counsel had obtained orders from Gayle J to issue witness summonses for Gertrude and David McFarlane, the mother and father, respectively, of Devar McFarlane and to file the affidavit deposed by counsel, which addressed the issues raised in the defence. The respondent's position was *inter alia* that: (i) the certificate of insurance and policy schedule issued to the Flynns provided indemnity for the Flynns and persons authorized by the Flynns to drive the said motor vehicle on the condition that the authorized driver was permitted in accordance with Jamaican laws to drive the said motor vehicle; (ii) Devar McFarlane was 16 years old at the time of the accident and was not the holder of a driver's

licence; (iii) the right to indemnify does not therefore arise unless the loss occurred while the motor vehicle was being operated by the person(s) covered under the insurance policy; and (iv) the coverage afforded to the Flynns under the said insurance policy did not extend to claims arising out of the accident on 27 January 2001 because Devar McFarlane was not a person permitted in accordance with Jamaican laws to drive the said motor vehicle.

[40] Mangatal J made the following findings of fact at paragraphs [20]-[21] of her reasons for judgment:

1. Devar McFarlane was 16 years old at the time of the accident and did not have a driver's licence or Taxpayer Registration Number (TRN) which is a necessary prerequisite to the grant of a driver's licence.
2. Devar McFarlane was driving the Flynn's motor car at the time of the accident causing injury to the appellant.
3. Devar McFarlane was not a person authorized to drive on Jamaican roads at the time of the accident.

[41] In construing the terms of the insurance policy, Mangatal J found, that in order for the appellant to recover on the indemnity provided by the respondent, the liability must be one that the insurance policy purports to cover. For that reason, the right to indemnify does not arise unless the loss occurred at a time when the motor vehicle was being operated by persons under cover by virtue of the insurance policy.

[42] In determining whether this liability was covered by the insurance policy, Mangatal J opined that the paramount consideration must be a proper construction of the insurance policy's terms and conditions. The policy schedule (exhibited to the further affidavit of Ms Tamara Glaves, the respondent's claims manager, sworn to on 17 April 2012) states that authorized drivers and limitations of use are in accordance with items five and six of the certificate of insurance which provide that the person driving other than the Flynns should be authorized to drive the said motor vehicle under Jamaican law.

[43] Mangatal J found that at the time of the accident, Devar McFarlane was not a licensed driver and was therefore not a person specified in the insurance policy as being insured against any liability. Since Devar McFarlane was not a person specified in the insurance policy, he was not insured and the respondent was not obliged to provide indemnity in respect of the judgment against the Flynns. Mangatal J, in refusing the orders sought by the appellant, stated that:

> "The loss suffered by Mr. Willis was not one that was contemplated/ considered/covered under the policy and therefore Globe is not liable to provide indemnity or to satisfy Mr. Willis' (the appellants') judgment in the 2007 claim…" (at para [36])

The appeal

[44] The appellant therefore sought to appeal and set aside Mangatal J's refusal of the declaratory orders requested in the court below and that the respondent provide indemnity to the appellant for the damages ordered in the judgment entered against

the Flynns in claim No 2007 HCV 00460. While the appellant had not challenged Mangatal J's findings of fact, he nonetheless challenged the following aspects of the judgment:

1. "…The right to indemnity does not therefore arise unless the loss occurred at a time when the motor vehicle was being operated by persons under cover by virtue of the Policy." (para [25])

2. In this case the judgment is not in respect of a liability as is required to be covered under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy), which is what section 18 addresses." (para [30])

3. "…Devar McFarlane was not a person so insured and Globe is not obliged to provide indemnity in respect of the judgment against the Flynns." (at para [30])

4. "The loss suffered by Mr. Willis was not one that was contemplated/considered/covered under the policy and therefore Globe is not liable to provide indemnity or to satisfy Mr. Willis' judgment in the 2007 Claim…" (at para [36])

[45] Four grounds of appeal were filed:

1. The learned trial judge erred in law by permitting the respondent to raise a contractual defence against the appellant (third party) and by so doing, failed to pay sufficient regard to the legislative scheme of the MVIA to protect innocent third parties.

2. The learned trial judge erred in law in holding that the right to indemnify does not arise unless the loss occurred at a time when the motor vehicle was being operated by persons under cover by virtue of the policy.

3. The learned trial judge erred in law in holding that Devar McFarlane was not a person insured and Globe was not obliged to provide indemnity in respect of the judgment against the Flynn's.
4. The learned trial judge erred in law in holding that cover under the insurance policy does not apply where the person driving is not licensed to drive; when there was no exception evident on the policy that so restricts the insurer's liability to a third party.

[46] Mrs Marvalyn Taylor-Wright, attorney-at-law for the appellant, submitted on all four grounds filed in the appeal. In relation to ground one, Mrs Taylor-Wright submitted that the intention of the legislature was to protect the rights of third parties. This intent, she argued, has been clarified by the legislature in section 4(1) of the MVIA which criminalizes the use of motor vehicles on roads without third-party insurance and has been upheld by this court in **The Administrator General v National Employers Mutual Association Limited** (1988) 25 JLR 459. She also contended that any stipulation that restricts the driver under the terms of the insurance policy merely describes the persons who are authorized to drive and does not restrict the purpose for which the vehicle was being used or render the policy inoperative. She cited various authorities from different jurisdictions such as India, Saint Lucia and Trinidad and Tobago and placed reliance on the Judicial Committee of the Privy Council case of **Matadeen v Caribbean Insurance Co Ltd** [2002] UKPC 69 to show that the breach

of a condition of the insurance policy was simply a breach of contract and that this defence was not available to the respondent against the appellant.

[47] On ground two, counsel submitted that there is nothing in the MVIA that restricted the liability of the insurer in respect of third parties, in circumstances where the vehicle was not being operated by persons specified in the insurance policy. She cited **The Presidential Insurance Company Limited v Resha St Hill** [2012] UKPC 33 and **The Administrator General v National Employers Mutual Association Limited** as authority for this proposition.

[48] In support of ground three, Mrs Taylor-Wright contended that it was not permissible to extend the liability required to be covered by the insurer beyond that which is required by the statute and once the scope of statutory liability is covered by the insurance policy the appellant third party was protected. The liabilities covered by the insurance policy are set out in the MVIA sections 5(4)(a) to (f) and no reference had been made to "driving of a motor vehicle by a person not licenced, permitted or authorized to drive under the licensing or other laws of Jamaica". She cited **Goberdhan and Others v Caribbean Insurance Company Limited (Trinidad and Tobago)** [1998] UKPC 25 to show that the factor of an unlicensed or unauthorized driver does not affect the statutory liability of the insurer under the MVIA.

[49] Mrs Taylor-Wright's submissions on the final ground were that, this court in **The Administrator General v National Employers Mutual Association Limited,** made it impermissible to imply an exclusion of liability clause into an insurance policy in

order to deprive the appellant of the protection of the statute since there is no clause in the insurance policy that specifically excludes third party liability where the motor vehicle was being driven by an unlicensed driver. In the absence of this express provision, Mangatal J was wrong to imply an exclusion of liability into the insurance policy in order to deprive the appellant of protection under the statute.

[50] Based on the foregoing submissions, Mrs Taylor-Wright concluded that section 18(1) of the MVIA makes it compulsory for the insurer to make payment and by virtue of **The Presidential Insurance Company Limited v Molly Hosein Stafford** [1999] UKPC 14 the respondent is obliged to pay the statutory minimum which the insurer was required to cover, plus the costs of the present claim and costs of the claim in the court below in which judgment was obtained against the insured. The respondent must also pay statutory interest on the amount payable in respect of the judgment.

[51] The respondent's attorney-at-law, Mr David Johnson, sought to affirm Mangatal J's judgment. He submitted that Mangatal J's findings of fact are relevant to these proceedings because the real issue to be determined by this court was whether the respondent was the insurer of the Nissan Sunny motor vehicle while it was being driven by Devar McFarlane, an unlicensed driver.

[52] Mr Johnson challenged Mrs Taylor-Wright's contention that Mangatal J's decision was predicated on a breach of contract. He submitted that a reading of paragraphs [25] through [32] of Mangatal J's judgment clearly outlined the basis upon which the trial judge made her decision. He further submitted that the applicable policy conditions

were to be found in clause five of the insurance policy and the effect of that clause was to restrict liability caused while the motor vehicle was being used in contravention of the insurance policy. He cited **Gray v Blackmore** (1934) 1 KB 95, **The Administrator General v National Employers Mutual Association Limited** and **Conrad McKnight v NEM Insurance Company Limited** Claim No 2005 HCV 3040, delivered 13 July 2007 in support of those assertions.

[53] Mr Johnson submitted on each of the four grounds posited by Mrs Taylor-Wright. On ground one, he submitted that Mangatal J had regard to the legislative scheme of the MVIA and her consideration of whether or not the policy covered an uninsured driver was relevant. Of significance, on ground two, he contended that on a full examination of Mangatal J's findings it was evident that it accorded with existing law. He went on to state that the authority of **The Presidential Insurance Company Limited v Resha St Hill** supported his contention that the insurance company had a valid defence against a third party claimant where the driver was not covered by the insurance policy. In relation to ground three, he submitted that the authorities cited by counsel for the appellant could not assist her because counsel had failed to appreciate the issues impacting the insurer's liability. On ground four, he contended that clause five of the insurance policy was clear and unambiguous and so the appellant who was challenging the insurance policy could not create an ambiguity to seek assistance from the *contra preferentem* rule, when there was none.

[54] It was Mr Johnson's final contention that it was permissible for the insured and the insurer to agree with any conditions they may choose to incorporate into the policy of insurance. If the motor vehicle covered under the said insurance policy was at the material time being used for a purpose not permitted by the policy then there would be no valid insurance policy. Additionally, as the loss suffered by the appellant was not one that was contemplated by the respondent, the respondent was not obliged to provide indemnity to the appellant. Counsel therefore submitted that the appeal should be dismissed with costs to the respondent.

Issues

[55] Based on the grounds of appeal advanced by the appellant, the issues in this appeal can be stated as follows:

1. Having regard to the legislative scheme of the MVIA, is a third party entitled to recover from the insurer, a judgment obtained against the insured, in circumstances where the incident giving rise to the claim occurred at a time when the vehicle was being used in contravention of the terms of the insurance policy? (ground one)
2. Whether the liability that arose as a result of the accident in the case at bar is a liability that was covered by the terms of the policy? (ground two)

3. If the liability that arose in the case at bar was not covered by the terms of the policy, is the respondent nonetheless liable to indemnify the appellant third party? (grounds three and four)
4. Can the respondent rely on the contractual defence to escape liability arising under the policy? (ground four)

Issue 1: Legislative scheme of the MVIA

[56] It is trite law that an insurance policy is in essence a contract between the parties and is subject to general contractual principles. Parties can agree to whatever terms they wish provided that these terms are not in contravention of any law. Consequently, an insurance policy may contain terms limiting the user of the motor vehicle and making provisions for the insurer to avoid liability, if the user of the vehicle does not conform to the terms expressly set out in the insurance policy. This view is enunciated by Gordon JA (Ag) in **The Administrator General v National Employers Mutual Association Limited** where he said at page 477:

> " … the policy of insurance embodies a contract between the insured and the insurers and that this policy can contain terms limiting the user of the vehicle and providing for the avoidance of the policy and the avoidance of liability if the user of the vehicle does not conform with terms stipulated in the contract."

[57] The absence of a contractual relationship between the appellant and the respondent does not prevent the appellant from seeking redress before the court. McDonald-Bishop J, in **Conrad McKnight v NEM Insurance Company** at paragraph 8, opined that the MVIA makes it mandatory for motor vehicles to be insured against

third party risks before it may lawfully be used on Jamaican roads. This statutory protection afforded to third parties is found in section 4 of the MVIA which criminalizes the driving and use of motor vehicles on a road without third party insurance as follows:

> "(1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act.
>
> (2) If any person acts in contravention of this section he shall be guilty of an offence…"

[58] Section 5 of the MVIA illustrates the necessary requirements for the provision of a motor vehicle insurance policy with certain exceptions as follows:

> "(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) subject to the provisions of this section, insures such person, persons or classes of persons, as may be specified in the policy, against any liability incurred by him or them in respect of –
>
> (i) the death of, or bodily injury to, any person; and
> (ii) any damage to property, caused by or arising out of the use of the motor vehicle on the road.
>
> (2) In respect of death or bodily injury claims, the policy shall be required to cover –
>
> (a) subject to paragraph (b), liability to any one person for a sum of not less than one million dollars; and

(b) a total liability of not less than three million dollars, in relation to each motor vehicle insured under the policy, arising out of all such claims as aforesaid in connection with any one accident.

(3) In respect of property damage claims, the policy shall be required to cover –

(a) subject to paragraph (b), liability to any one person for a sum of not less than five hundred thousand dollars; and
(b) a total liability of not less than one million dollars, in relation to each motor vehicle insured under the policy, arising out of all such claims as aforesaid in connection with any one accident.

(4) The policy shall not be required to cover –

(a) 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;

(b) any contractual liability;

(c) in respect of any death or bodily injury claim by any one person, liability for the first one hundred dollars;

(d) in respect of any death or bodily injury claim generally, liability for any sum in excess of three million dollars arising out of all such claims in connection with any one accident for each motor vehicle insured under the policy;

(e) in respect of any damage to property, liability for any sum in excess of one million dollars arising out of all claims for such damage in connection with any one accident for each motor vehicle insured under the policy; or

(f) subject to subsection (5), until other provision is made pursuant to section 25, 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 out of which the claims arise…
>
> (5)…
>
> (6)…
>
> (7)…
>
> (8) Notwithstanding any rule of law or anything in this or any other enactment to the contrary, a person issuing a policy of insurance under this section shall be liable to indemnify the persons, or classes of persons specified in the policy, in respect of any liability which the policy purports to cover, in the case of those persons or classes of persons.
>
> (9) A policy shall be of no effect for the purposes of this Act unless and until there is issued by the insurer in favour of the person by whom the policy is effected, a certificate (in this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.
>
> (10)…"

[59] Section 5(1) of the MVIA stipulates that an insurance policy issued by an insurer must cover death, bodily injury and property damage. Of importance to this appeal is section 5 subsections (1), (2), (4), (8) and (9). Subsections (1) and (2) of section 5 as set out above, state the minimum coverage applicable to claims in respect of death, bodily injury and property damage. Section 5(4) lists the type of liabilities that an insurance policy is not required to cover and section 5(8) forces the insurer to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover. Section 5(9) requires a certificate of insurance, in the prescribed form, to be issued by the insurer to the insured, in order

for the policy to be effective. In the case at bar, (upon a reading of the policy schedule exhibited to the further affidavit of Tamara Glaves dated 17 April 2012) there can be no dispute that the insurance policy issued by the respondent to the Flynns complies with subsections (1), (2) and (3) of section 5 of the MVIA. It is also accepted that a certificate of insurance was issued to the Flynns complying with section 5(9) of the MVIA (which is also exhibited to the further affidavit of Tamara Glaves).

[60] While it is open to the parties to set the terms and conditions of the insurance policy, this freedom is curtailed by certain statutory restrictions found in section 8 of the MVIA which renders such restrictions null and void against third party claims as follows:

> "(1) Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in subsections (1), (2) and (3) of section 5:
> …
> (2) Where 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, so much of a policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters –
>
> (a) the age or physical or mental condition of person driving the vehicle; or
>
> (b) the condition of the vehicle; or
>
> (c) the number of persons that the vehicle carries; or
>
> (d) the weight or physical characteristics of the goods that the vehicle carries; or
>
> (e) the times at which or the areas within which the vehicle is used; or

(f) the horse power or value of the vehicle; or

(g) the carrying on the vehicle of any particular apparatus; or

(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the law for the time being in force relating to motor vehicles,

shall as respects such liabilities as are required to be covered by a policy under subsections (1), (2) and (3) of section 5, be of no effect:
…"

[61] As can be seen, section 8(1) of the MVIA renders of no effect any condition excluding the insurer's liability in the event of the things occurring after the happening of the event giving rise to the claim and section 8(2) of the MVIA invalidates a number of policy restrictions. These exclusions and restrictions are not applicable to the case at bar.

[62] Section 18(1) of the MVIA directly empowers third parties to seek redress to force insurers to satisfy judgments against persons insured in respect of third party risks. This recoverable sum can either be the judgment sum, or the policy limit, whichever is lower. It states that:

"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 the amount covered by the policy or the amount of the judgment, whichever is the lower, 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."

[63] In my opinion, and as stated by Forte JA in **Administrator General v National Employers Mutual Association Limited**, this section requires three conditions to be met in order to activate the third party's right to recover from the insurer: (i) a certificate of insurance must have been issued by virtue of section 5(1) of the MVIA; (ii) the judgment must be in respect of a liability which is required to be covered by a policy under section 5(1), (2) and (3) and which has been obtained against the insured; and (iii) the liability must be a liability covered by the terms of the policy. In the case at bar there is compliance with two of these conditions since a certificate of insurance has been issued complying with section 5(1) of the MVIA and a default judgment has been obtained against the insured dated 9 July 2010 and the judgment dated 23 June 2011 in respect of assessment of damages arose out of a liability covered under subsections (1), (2) and (3) of section 5. The only remaining question is whether or not the 'liability was one which was covered by the terms of the policy'.

Issue 2: Liability covered by the terms of the policy

[64] Lord Lowry on behalf of the Board in **Motor and General Insurance Company Ltd v John Pavy** [1993] UKPC 47 a case from the Court of Appeal of Trinidad and Tobago stated at page 93 that :

> "the expression 'liability… covered by a policy' in section 10 (1) (similar to section 18 (1) of the MVIA) means a liability which comes within or arises out of risk apparently insured by the express terms of the policy, whether or not it is a liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the insured has committed some breach of the terms of the policy."

[65] In the case at bar, the relevant provision is to be found in the policy schedule, which lists the authorized drivers and limitations of use as those in accordance with clauses five and six of the certificate of insurance issued in conjunction with the policy. Clause five of the certificate of insurance issued to the Flynns in respect of the said motor vehicle for the period 1 July 2000 to 30 June 2001 identifies the person or classes of persons entitled to drive the motor vehicle as

> "(a) The policyholders
>
> (b) Any other person who is driving on the Policyholders' order or with their permission provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive this motor vehicle or has been so permitted and is not disqualified by order of a court of law or by reason of any enactment or regulation in that behalf from driving the motor vehicle."

[66] An examination of the terms of the insurance policy reveals that the policy by express provisions restricted the scope of the risk which the insurers would otherwise have undertaken by expressly stating that the authorized driver must be permitted to drive under Jamaican law and must not be disqualified from holding a driver's licence. This restriction is clear and unequivocal and hence no discussion is necessary on the *contra preferentem* rule.

[67] The respondent is not prohibited by legislation from including the restriction contained in clause five of the insurance policy. In fact, this restriction finds statutory support in section 16(1) of the Road Traffic Act which criminalizes driving or authorizing someone to drive on Jamaican roads without that person being the holder of a driver's licence. Section 18(1)(iii) of the Road Traffic Act makes attaining the age of 17 years a prerequisite to the grant of a driver's licence. Given that the terms contained in the policy are clear and unequivocal and given that the restrictions placed within the policy are not illegal or avoidable as falling under section 8 of the MVIA, Mangatal J was correct in finding that when the Flynns' motor vehicle was being driven by an unlicensed driver this was not a 'liability covered by the terms of the policy'.

Issue 3: Effect of the breach of terms of the insurance policy

[68] The next question to be answered is whether the respondent is liable to indemnify the appellant where the liability that occurred was not one which was covered by the terms of the policy. The law in relation to this issue has remained the same throughout the years and across different jurisdictions and different courts.

[69] In the early case of **Lester Bros (Coal Merchants) Ltd v Avon Insurance Co Ltd** (1942) 72 LI L Rep 109, it was held that if the driver has no licence then the insurers were not entitled to indemnify the third party. In **Mumford v Hardy and Another** [1956] 1 All ER 337, Lord Goddard CJ considered the effect of a breach of the statutory requirement that prevented a person under 16 years from driving a motor vehicle on a road on the liability of the insurers. He held that an insurance policy did not

extend to a driver who was not the holder of a driver's licence, and who had obtained a provisional driver's licence contrary to a clause in the insurance policy and contrary to legislation.

[70] There are a number of cases decided in our courts on the issue of the liability of the insurer, where the liability that had occurred was not one which had been covered by the terms of the policy. In **The Administrator General v National Employers Mutual Association Limited**, the motor insurance policy contained a clause that excluded the insurer's liability if the vehicle was being used for hire or reward. The motor vehicle which was the subject of the policy was involved in an accident resulting in the death of an individual. The administrator of the deceased's estate brought an action against the driver of the motor vehicle and recovered damages with interest. The driver was unable to satisfy the judgment against him and so the deceased's estate brought an action against the insurance company under section 18 of the MVIA to satisfy the judgment. The insurance company denied liability on the basis that the motor vehicle was being used for hire or reward at the time of the accident in breach of the terms of the insurance policy. Although Forte JA stated that "the trial judge's finding that the motor vehicle was being used for hire or reward was unreasonable, he nonetheless found that:

> "[a] third party in such an action cannot recover the sums payable by virtue of a judgment on the basis of section 18 of the [MVIA,] unless the liability is one which is covered by the policy of insurance. If it can be established that the vehicle was being used for a purpose outside of the scope of an existing policy of insurance, then no liability would exist under that policy and consequently section 18 would not apply." [page 466]

[71] The facts in **Conrad McKnight v NEM Insurance Company** are similar to the case at bar. In that case a motor vehicle accident occurred injuring a minor. At the time of the accident the vehicle was being driven by Mr Milton Ellis in breach of the terms of the insurance policy that stated that the "named driver" was Mr Fred Wilson. McDonald-Bishop J, stated that the liability that occurred when the motor vehicle was being driven by someone other than Mr Fred Wilson was not a liability that was covered by the terms of the policy and could not render the insurer liable to satisfy the judgment.

[72] In the recently decided case from this court of **Advantage General Insurance Company Limited v Lloyd Heman** [2015] JMCA Civ 13, the insurance policy contained a term that the driver of the motor vehicle must not have held a driver's licence for less than three years. An accident occurred resulting in injuries to Mr Heman and the insurers denied liability for the aforementioned reason. Dukharan JA in explaining the effect of a similar breach of a term of the insurance policy stated that:

> "…a third party in an action brought under section 18 (1) of the [MVIA] cannot recover the sums payable by virtue of a judgment against the insured, unless the insurer's liability is covered by a policy of insurance, and if it can be established that the vehicle was being used for a purpose outside the scope of the existing policy of insurance, then no liability would exist under that policy and the third party could not recover." [paragraph 18]

[73] The effect of a breach of a fundamental term of the insurance policy has been explained by the Privy Council in another case from Trinidad and Tobago, namely, **Presidential Insurance Company Ltd v Resha St. Hill** in which the motor vehicle that was the subject of an accident was driven by another person with the owner's

consent, although the insurance policy was limited to the policyholder and a relative. The Board held that the insurer was not liable to indemnify the third party because the liability was not one that was covered by the terms of the policy. Lord Mance in delivering the judgment of the Board stated at page 9, that in construing section 4(7) of the Motor Vehicles Insurance (Third-Party Risks) Act of Trinidad and Tobago (which is similar to section 5(8) of the MVIA) to force insurers to indemnify any person injured by anyone driving the vehicle with the consent of the person insured, even though the policy precluded the insured from extending cover to such a driver by giving such consent, would mean that insurers would face an open-ended exposure. Consequently, insurers would be forced to undertake the difficult task of assessing the moral risk that their policyholders may permit unauthorized persons to drive.

[74] In **Presidential Insurance Company Ltd v St Hill** Lord Mance on behalf of the Board went on to state that section 4(7) of the Motor Vehicles Insurance (Third-Party Risks) Act of Trinidad and Tobago does not intend to override policy language, by obliging insurers to meet liability incurred by drivers not within the scope of the policy cover, but to whose driving or use of the vehicle the policyholder consented. The Board acknowledged section 8(1) of the Motor Vehicles Insurance (Third-Party Risks) Act of Trinidad and Tobago (which is similar to section 8(1) of the MVIA) which states that the section renders of no effect any condition excluding insurers from liability under the policy in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to the claim. Their Lordships also acknowledged section 12(1) of the same statute (which is similar to section 8(2) of the MVIA) which

invalidates policy restrictions relating to matters such as age or physical characteristics. Consequently, the Board stated that if the legislators had intended to place restrictions relating to breaches in respect of the terms of the policy, then they would have expanded section 8(2) to include such restrictions. Since this had not been done, the provisions of the Motor Vehicles Insurance (Third-Party Risks) Act of Trinidad and Tobago were to be given their natural and ordinary meaning which would be that liability must be one that is covered by the terms of the policy in order to render the insurer liable to indemnify the judgment.

[75] The Privy Council, as recently as 3 February 2015 in **Presidential Insurance Co Ltd v Mohammed and Others** [2015] UKPC 4, cited **Presidential Insurance Company Ltd v St Hill** with approval and held that it is only where the insured's liability is covered by the policy that the insurer must pay. In that case, an accident occurred when a taxi, being driven by someone other than any of the two named drivers in the insurance policy with the consent of the taxi owner, crashed into the Mohammeds' shop causing extensive damage. It was also later discovered that the person driving the taxi was not licensed to do so. The Mohammeds obtained a default judgment and an award of damages against the taxi owner and later sought a declaration for the insurer to satisfy the judgment against the taxi owner. In its initial defence and counterclaim, the insurers sought to avoid liability by asserting that the insurance policy only covered the two named drivers. However, when it was discovered that the driver at the time of the accident was not licensed to drive a taxi, they sought an order at first instance to re-amend its defence and counterclaim to assert that the

driver was unlicensed and referred to the clause in its policy that excluded such drivers. The Mohammeds filed an application to strike-out the insurer's defence and counterclaim. The court dismissed the Mohammeds' application to strike out and granted the insurer's application to re-amend its defence and counterclaim.

[76] When the matter was heard in the Court of Appeal of Trinidad and Tobago, their Lordships unanimously allowed the appeal and refused the insurers' application to re-amend its defence and counterclaim. On appeal to the Privy Council, the Board held as in **Presidential Insurance Company Ltd v St Hill**, that no liability can be imposed on an insurer that it did not purport to cover in respect of the person insured or the persons driving or using the vehicle with his or her consent, and there was nothing in the Motor Vehicles Insurance (Third-Party Risks) Act of Trinidad and Tobago that prevented the insurer from arguing that the terms of the insurance policy did not cover the liability that arose in the Mohammeds' claim.

[77] The foregoing authorities all demonstrate that an insurer is not liable to indemnify a third party where the liability which had occurred is not one which is covered by the terms of the policy of insurance, and particularly with regard to an unlicensed driver the liability would not be covered by the policy.

[78] In the instant case, the respondent stipulated in the insurance policy that it would only insure the motor vehicle according to the terms contained in the policy. The fact that when the accident occurred the Flynns' motor vehicle was being driven by Devar McFarlane, a 16 year old unlicensed driver, means that Devar McFarlane was not

an authorized driver and hence a fundamental term of the insurance policy had been breached. Since this liability was not covered in the policy, the respondent would be entitled to avoid the liability arising out of the accident, and the appellant would not be indemnified by the respondent, and would therefore not be able to obtain the judgment sum or the policy limit from the respondent.

Issue 4: The contractual defence

[79] Mrs Taylor-Wright on behalf of the appellant asked this court to find that a breach of condition of the insurance policy was not a defence that was open to the respondent, since such a breach does not render the insurance policy itself inoperative, particularly as there was no clause excluding liability for injury to a third party in circumstances where the car was being driven by an unauthorized driver. Counsel sought to distinguish the instant case from the facts in the case of **Conrad McKnight v NEM** in which there was a clause that expressly stated that the policy was inoperative if the vehicle was being driven by a person other than the named driver. However, as the breach in the instant case (use by an unlicensed and therefore unauthorised driver) is a fundamental breach, that is one that affects the heart of any motor insurance policy, it cannot be ignored, and so the absence of an express exclusion clause cannot render the insurers liable to indemnify the appellant.

[80] Dukharan JA stated in **Advantage General Insurance Company Limited v Lloyd Heman** at paragraph [20], that the defence that a motor vehicle was being operated by an unauthorized driver at the material time is a clear defence. This view

has also been accepted by the Privy Council in **Presidential Insurance Co Ltd v Mohammed and Others**, where Lord Hodge at paragraph 16 speaking on behalf of the Board, stated that when interpreting the section, the words in parenthesis "(being a liability covered by the terms of the policy)" does not prevent an insurance company from pleading successfully the defence that the claim was not covered by the terms of the insurance policy. In light of the express provisions in the insurance policy that permit only the Flynns and persons authorized by the Flynns to drive, provided that they are permitted to drive by Jamaican law, in my view Mangatal J was correct in finding that the liability that arose as a result of the accident was not a risk that was contemplated or expressly provided for by the respondent. Consequently, there is no requirement for the respondent to indemnify the appellant.

Compensation of victims of uninsured drivers

[81] The injuries suffered by the appellant are serious and substantial and it is most unfortunate that no facility exists in Jamaica to satisfy the judgment in this claim. The Privy Council in **Presidential Insurance Co Ltd v Mohammed and Others** has highlighted the step taken by Great Britain's legislature to protect innocent third parties from the actions of uninsured drivers with the creation of the Motor Insurer's Bureau (Compensation of Victims of Uninsured Drivers) Agreement. This agreement provides that if judgment in respect of any relevant liability is obtained against any person in any court in Great Britain, whether or not the person is covered by a contract of insurance and any such judgment is not satisfied in full within seven days the Bureau will pay or cause to be paid the said sums in full with costs. While I recognize that unfortunately

there is no institution of this type in Jamaica, the Jamaican legislature ought to take the crucial and novel step of being the first in the region to implement such a scheme in order to cure the social evil created when unlicensed drivers cause personal injury, property damage or death to innocent third parties for which there is no compensation.

Conclusion

[82] It would be wrong to impose on an insurer a liability that the insurance policy did not purport to cover. In order for the appellant to benefit from the indemnity provided by the respondent, the liability must be one that is covered by the insurance policy. While Devar McFarlane, an unlicensed driver, was driving the Nissan Sunny motor vehicle that was owned by the Flynns they would have breached a fundamental term of the insurance policy, and as a result the respondent was absolved from all liability arising out of the accident on 27 January 2001. In light of the foregoing considerations, I essentially agree with the judgment of Mangatal J and agreed that the appeal should be dismissed with costs to the respondent.

McDONALD-BISHOP JA (AG)

[83] I have had the opportunity of reading in draft, the comprehensive judgments of the learned President, Panton P and my learned sister, Phillips JA. I am in agreement with their reasoning and conclusion and have nothing further to add.