THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2014-02301

BETWEEN

GARY THOMAS

Claimant

AND

LARRON JAIPERSAD

First Defendant

BANKERS INSURANCE COMPANY OF TRINIDAD AND TOBAGO LIMITED
(Sued as Bankers Insurance Company Limited)

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. R. Ramlogan instructed by Mr. R. Gosine for the Claimant

Ms. S Nanan for the First Defendant

Ms. C. Maharaj instructed by Mr. A. Hosein for the Second Defendant

Judgment

1. On the 31st March, 2013, the Claimant was driving motor vehicle registration number TCB 2482 ("the Claimant's vehicle") when motor vehicle registration number PBG 6465 owned by the First Defendant ("the First Defendant's vehicle") and driven by Joel Tendie Jeremiah ("the driver") collided with the Claimant's Vehicle. As a result the Claimant claims inter alia damages done to his vehicle in the sum of $62, 471.00. At the time of the collision the First Defendant's vehicle was insured by the Second Defendant, Banker's Insurance Company of Trinidad and Tobago Limited. The Second Defendant has denied that it is liable to indemnify the First Defendant with respect to the damages claimed by the Claimant. It was agreed by the parties and ordered by the Court on 15th, May, 2015 that the sole issue to be determined is whether the Second Defendant can rely on the exceptions contained in the insurance policy to avoid liability.

The Claim

2. The Claimant avers that on the 31st March, 2013 whilst he was lawfully driving his motor vehicle in a northerly direction along Quarry Village, Siparia, the driver of the First Defendant's vehicle so negligently managed and/or controlled the First Defendant's vehicle which was proceeding in the opposite direction on the said road. That the First Defendant's vehicle came unto the Claimant's side of the road and collided with the Claimant's vehicle causing him to suffer personal injuries, loss and damage.

3. The Claimant alleges that the collision occurred as a consequence of the negligence of the driver who was at all material time the servant and/or agent of the First Defendant.

4. The Claimant avers that the Second Defendant was at all material time Insurer of the First Defendant's vehicle and is being sued by virtue of the provisions of section 10A of the Motor Vehicles Insurance (Third Party Risks) Act, Chapter 48:51 as amended by the Motor Vehicles Insurance (Third Party Risks 1996) (Amendment) Act ("the Act").

5. The Claimant claims that under section 4(1)(b) of the Act, the Second Defendant agreed by payment of a premium paid by the First Defendant to insure the First Defendant in respect of any liability at law for the compensation, costs and expenses which might be incurred by the First Defendant in respect of any damage to the property of any person caused or arising out of the use on a road in Trinidad and Tobago of the First Defendant's vehicle, being such a liability of third party risks as is required to be covered by a Policy of Insurance. That the Second Defendant in pursuance of section 4(1)(b) of the Act delivered to the First Defendant a Certificate of Insurance.

6. The Claimant alleges that by letter dated 21st June, 2013, the Claimant through his attorney requested payment from the Second Defendant for the loss suffered by the Claimant but the Second Defendant failed to pay the said damages or any part thereof.

The Defence

7. The Second Defendant admits that it agreed to insure the First Defendant's vehicle under Policy of Insurance No: 01/416/220c/82916 ("the Policy of Insurance") against liability which might be incurred by the First Defendant but alleges that such liability, if any has been incurred by the First Defendant did not arise against such insurance coverage and in the circumstances covered by the Policy of Insurance.

8. The Second Defendant alleges that the First Defendant is not entitled to an indemnity under the Policy of Insurance and consequently the Claimant is not entitled to the relief sought for the following reasons:

    i. The First Defendant's vehicle was at all material times being used contrary to the limitation as to the use agreed between the First and Second Defendants and incorporated into the Policy of insurance.

    ii. The limitations as to the use specifically restricted the use of the First Defendant's vehicle to:

a) Use for social, domestic and pleasure purposes and used by the Insured in person in connection with his business or profession.

b) Use for social, domestic and pleasure purposes and for business of the Insured and the Insured's employer or partner including the carriage of sample.

The policy does not cover use for hire or reward or for commercial travelling or racing, pace making, reliability trials, speed testing. Competitions, rallies or for any purpose in connection with the Motor Trade except for the overhaul, upkeep or repair.

iii. At the time of the collision, the First Defendant's vehicle had been rented out to and was being driven by Joel Tendie Jeremiah ("the driver"), in breach of and outside the scope of cover of the Policy of Insurance which restricted the use of the First Defendant's vehicle as a private car.

9. Further, the Second Defendant alleges that under the Policy of Insurance issued to the First Defendant stated the following applicable endorsement:

"LESS THAN THREE YEARS EXPERIENCE: it is agreed that the Company shall not be liable to make any payment under this Policy in respect to loss, damage or liability arising whilst any motor car insured hereunder is being driven by him or in charge of any person who has a license for less than 3 years."

10. The Second Defendant claims that the driver of the First Defendant's vehicle at the material time did not have the relevant driving experience as stipulated by the Policy of Insurance since he was the holder of a driver's license which was only issued to him on the 20th December, 2012 (about 3 ½ months more or less before the alleged collision occurred on the 31st March, 2013). That the driver, in a Motor Claim form signed by him on the 8th June, 2013 acknowledged that he was the holder of a driver's license for less

than three years at the time of the collision. This is not an issue to be determined by the Court, since the license of Joel Tendie Jeremiah clearly shows that the date of issue was 20th December, 2012.

11. The Second Defendant alleges that by letter dated the 1st July, 2013, it wrote to the Claimant outlining its defence and on the 30th July, 2013 it then wrote to the Claimant's attorney in response to his letter dated 21st June, 2013.

Issue

12. Whether the Second Defendant can rely on the exceptions contained in the Policy of Insurance to avoid liability.

Law

13. According to ***Halsbury's Laws of England Vol. 60 para. 697***, a motor policy often contains a provision extending the insurance cover, usually against third party risks only, to any person driving the insured car on the order or with the permission of the insured, the permitted driver being treated as though he were the insured. Such a provision is required if the insured is in the habit of causing or permitting his car to be driven by another person because if the insured, in the absence of such a provision, causes or permits his car to be so driven, and the other person does not himself hold an insurance policy covering him while driving the car, the insured will not only be guilty of an offence but will also be responsible for injuries, within the scope of compulsory insurance, caused by the use of the car, the uninsured use being a breach of statutory duty by the insured who has caused or permitted it. Sometimes the permitted driver is limited to someone who is a relative or friend of the insured. However, the extension is often qualified by a provision that the permitted driver is not entitled to an indemnity under any other insurance policy. There is also invariably a requirement that the permitted driver must hold, or must have held and must not be disqualified from holding, a driving license

and there may be an express exclusion of certain classes of persons from the category of permitted drivers.

14. Section 4 of the Act outlines the requirements with respect to insurance policies. The applicable subsections are as follows:

"4 (1) In order to comply with the requirements of this Act, a policy of insurance must be a policy which-

(a) is issued by a person who is an insurer; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of any death of or bodily injury to including emergency treatment therefore performed by a duly registered medical practitioner or damage to the property of any person caused by or arising out of the use of the motor vehicle or trailer mentioned in the policy on a public road."

"4 (7) 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."

"4 (8) 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 duplicate 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."

15. Section 10(1) of the Act provides as follows:

"If, after a certificate of insurance has been delivered under section 4(8)to 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 section 4(1)(b) (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, in addition to any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

16. Section 12 of the Act provides as follows:

"12 (1) Where a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, so much of the 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 persons driving the vehicle;

(b) the condition of the vehicle;

(c) the number of persons that the vehicle carries;

(d) the weight or physical characteristics of the goods that the vehicle carries;

(e) the times at which or the areas within which the vehicle is used;

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

(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 this Act, shall, as respects such liabilities as are required to be covered by a policy under section 4(1)(b), be of no effect.

(2) Nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person."

Submissions

The Defendant's Submissions

17. It is the argument of the Second Defendant that it is not liable to indemnify the First Defendant since clause 26 of the endorsements of Policy of Insurance states as follows:

"(26) EXCLUDING DRIVERS WITH LESS THAN 1 YEAR DRIVING EXPERIENCE. It is agreed that the Company (the Second Defendant) shall not be liable to make any payment under this policy in respect of loss, damage or liability arising whilst any motor car insured hereunder is being driven by him or in the charge of any person who has a license for less than 1 year."

18. Counsel for the Second Defendant submitted that Joel Tendie Jeremiah who was at all material times the driver of the First Defendant's vehicle did not have the relevant driving experience and was the holder of a licence to drive from the 20th December, 2012, approximately three and a half months (less than one year) prior to the collision which occurred on 31st March, 2013.

19. Counsel for the Second Defendant quoted several paragraphs from the authority of ***The Presidential Insurance Company Limited v Resha St. Hill (2012) UKPC 33*** as per Lord Mance. These paragraphs were as follows:

At paragraph 7 of the judgment the Board in commenting upon the United Kingdom Road Traffic Act 1930 section 36.4 stated (which is similar to our section 4(7)) "The purpose of s.36(4) was not to impose on any insurer a liability which it had not purported to undertake."

At paragraph 11 it stated further "…the Board considers that the retention of the plural 'those persons' at the end of the amended s.4 (7) points strongly towards a conclusion that the amended section was (like its unamended predecessor) not intended to impose on any insurer a liability which the policy did not purport to cover in respect of the person insured or the persons driving or using the vehicle with his or her consent…"

At paragraph 14, His Lordship stated "….s.4 (7) does not intend to override policy language, by obliging insurers to meet liability incurred by drivers not within the scope of the policy cover…."

At paragraph 15 it stated "Likewise, S.12(1) invalidates in respect of claims by injured persons policy restrictions relating to matters such as age or physical or mental condition of persons driving the vehicle, or the condition of the vehicle, or the number of persons or weight or physical characteristics of the goods that the vehicle carries….."

At paragraph 20 it stated "… 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…"

20. Counsel for the Second Defendant further relied on the authority of ***HCA No.S-1157 of 1999 Between Wazeefa Rahim and anor v Johnny Norton and ors.*** Counsel for the Second Defendant submitted that in ***Wazeefa Rahim*** supra Justice P. Moosai (as he then was) had before him a matter somewhat similar to these proceedings save and except that the policy being dealt with therein was one where there was a restriction as to age and driving for two years and more. That His lordship at page 10 stated "As I observed earlier the contract of insurance is premised on age plus experience. It is conjunctive, not disjunctive…"

21. Further, Counsel for the Second Defendant submitted that His lordship in ***Wazeefa Rahim*** supra at page 10-11 found that "I am therefore of the view that the policy of insurance in the instant case authorizing the driving of this vehicle by persons 25 years and over and who have been driving for a period of two years and more was an attempt by the insurance company to restrict the insurance of the persons insured thereby by reference to age of the persons driving the said vehicle. It was an unlawful restriction."

22. Counsel for the Second Defendant also relied on the case of ***HCA No.3565 of 1999 Between Cameron Maintenance Services Limited and Security Escort Service (Trinidad) limited and ors***, *a*s per Justice Tam. Counsel for the Second Defendant submitted that this was a case whereby the Insurer was contending that it is not liable for the amounts payable (or to become payable after assessment) to the plaintiff under the judgment because Mohammed was neither a person, nor belonging to the class of persons, insured by the policy. That this case dealt with a policy whereby the Insurer attempted to restrict a policy by any person under 25 years of age and/or whose driving permit is less than 2 years in force.

23. His Lordship stated at page 5 of ***Cameron*** supra stated: "The freedom of insurer and insured to enter into a contract of insurance upon such terms and conditions as they may agree remains unaffected. As between themselves, their contract remains valid and binding. However, in cases involving third-party rights, those contractual terms and

condition may be affected by section 12(1) which expressly outlines specific instances that are to be of no effect against a third-party…"

24. Counsel for the Second Defendant submitted that in the present case the restriction that is being advanced by the Second Defendant is not a provision under section 12(1) of the Act which is prohibited in other words the parties that is the First Defendant and Second Defendant were free to enter into this qualification under the contract of insurance. That the restriction is not against public policy nor is it illegal. Further, that the parties were free to contract under whatever terms and conditions they may wish once same is not illegal and against public policy.

25. Further, Counsel for the Second Defendant submitted that in ***Cameron*** supra his Lordship at page 6 went on to comment in relation to the clause being dealt with therein and stated as follows:

"In the case of the policy endorsement, the restriction as to age and the restriction as to driving experience are joined by the symbol "and/or". The ambiguity that this creates is obvious. It makes it unclear whether the clause is to be conjunctive or disjunctive and creates uncertainty, so much so that it may even be declared void for uncertainty.

26. That At pages 7-8 his Lordship in ***Cameron*** supra held "in my view, the clause is to be read as one and is not to be severed by treating it as two separate clauses….Looked at in this way (i.e. as a single clause), it is caught by section 12(1)(a) as containing an age restriction and is to be of no effect against the injured third-party. To put it another way, the entire conjunctive clause is of no effect against the third-party because it contains an age restriction. ….. Finally, if there is any ambiguity contained in the clause under review, the courts have shown that it is to be resolved in favour of the injured third-party and against the insurer under the contra proferendum rule."

27. Counsel for the Second Defendant further relied on ***CV 2013-00377 Cathy-Ann Croney v Kevin Parkinson, Bert Swift, Bankers Insurance Company Trinidad and Tobago***

Limited. The Honourable Madam Justice Jones in her ruling(oral) dated 3rd March, 2015, at page 3 stated as follows:

"Is the Insurer liable to indemnify the First Defendant with respect to the Claimant's injury.

In this regard the liability of the Insurer falls to be considered under the provisions of the Motor Vehicles Insurance (Third Party Risks) Act ("the Act").

Insofar as it is relevant clause 5(5) of the policy states that the "Company shall not be liable to pay as per excess of any claim in respect of which indemnity is provided by any Section of this Policy whilst ant vehicle referred to in the "Description of Vehicles" is being driven by or is for the purpose of being driven by him in charge of any person under 25 years of age or any person having less than three year's driving experience."

This position is repeated in endorsement number 26 of the policy which provides that drivers with less then three years driving experience are not covered by the policy. At the end of the day I accept the Third Defendant's submission that by the terms of the policy it is not liable for any damage caused while the vehicle is being driven by a person having less than three years driving experience.

The wording of the clause is clear. There is no ambiguity in either the clause or the policy that would open the door for the application of the contra preferendum rule in favor of the Claimant. To my mind by clause 5(5) of the policy the Insurer is not liable to pay or indemnify the insured when the vehicle is being driven by a person having less than three years driving experience.

Driving experience is not one of the matters identified in Section 12 of the Act that will prevent an Insurer avoiding liability to third parties under the Act…"

28. Counsel for the Second Defendant relied on the matter of Privy Council ***Appeal No 0063 of 2014 Insurance Company of the Bahamas Ltd. v Eric Antonio Judgment*** dated 7th December 2015, where Lord Mance stated as follows:

"1. Whether a victim of negligent driving can look to insurers of the negligent driver can be vitally important for the victim. But it is a matter over which the victim has commonly no control. It depends upon whether insurance has been arranged by or on behalf of the driver or driver's employer, and it also depends upon the terms of that insurance, subject to limited statutory qualifications to ensure that these cannot always be relied upon as against a third party victim. There are as a result cases including the present - as the Board will humbly advise Her Majesty for reasons which will appear - in which the victim has no insurer to which to look.

2. That is a problem which could only partially be addressed by extended statutory intervention of the sort which the Board noted as possible in The Presidential Insurance Co Ltd v Resha St Hill [2012] UKPC 33, para 31 and The Presidential Insurance Co Ltd v Mohammed [2015] UKPC 4. Any complete solution, covering in particular situations where no relevant insurance cover exists at all, requires more wide-ranging arrangements, such as the long-established extra-statutory Motor Insurers' Bureau in the United Kingdom and the other national insurers' bureau now required throughout the European Union under Directive 2009/103/EC of 16 September 2009.

3. The solution is not for courts to impose on insurers liabilities which they are not required to bear either under the insurance cover which they have properly issued or under current legislation. Insurance is based on an assessment of the risks undertaken and of the premiums appropriate to cover such risks. Named driver policies are a means by which insureds and insurers identify the cover required and define and limit the premiums payable. They are permissible under current law in The Bahamas. To impose on insurers liability for accidents caused by other drivers not named on the relevant policy is to expand the risks and to undermine the purpose of named driver cover. If such liability is imposed in respect of insurances already issued, insurers will have received no premiums for such risks. In relation to future insurances, higher premiums would have to be charged across the board, and individual motorists will be unable to obtain the benefits of reduced premiums under named driver cover. Some motorists might not be able to afford the resulting increased premiums.

4. It is for the legislature in each country where the above problem continues to exist to consider whether and how to address it. The Board endorses the observations made by the President, The Hon Mrs. Justice Allen, in the Court of Appeal in para 60 of her judgment in this case, commending to the relevant authorities measures to address the problem for the future."

29. Counsel for the Second Defendant contended that the instant matter there is no ambiguity and the Insurers have been careful to draft clause 26 as a separate restriction so that there was no confusion as regards same as such they are perfectly entitled to rely upon this restriction to avoid indemnity under the Policy of Insurance and the Act.

30. Counsel for the Second Defendant submitted that in light of the fresh authorities, it is clear that the restriction placed on the policy by the insurer is a proper one which is not caught by Section 12 of the Act, nor is there any ambiguity so that no resort can be had to the contra preferendum rule but to simply apply a literal interpretation of the policy. Therefore, that the Claimant's claim as against the Second Defendant must fail.

The Claimant's Submissions

31. Counsel for the Claimant contended that the onus lies on the Second Defendant to prove there was a breach of policy.

32. Counsel for the Claimant submitted that the basis of the contractual arrangement between the Insured and the Insurer is the proposal form. That the proposal form is a questionnaire document which was filled out by the First Defendant and signed by the Second Defendant as the Insurer.

33. Counsel for the Claimant submitted that under paragraph 10 of the said proposal form, the question asked was as follows:

"Is driving to be limited to (tick as appropriate):

Policy holder only

Any unnamed driver

Policy holder and Spouse

Two named drivers"

34. That what was ticked off was "any unnamed driver". The signature of the First Defendant was placed at the end of the said proposal form and dated the 1st November 2011.

35. It is the argument of the Claimant that the policy does not restrict anyone from driving the First Defendant's vehicle and consequently, driving experience is not an issue. That on the front page of the private motor vehicle policy schedule which is dated the 26th July 2013, reference is made to the authorized driver as the Insured and anyone driving with his permission. The limitation as to use is not limited to driving experience. That it was only at page 12, the exclusion of experience is mentioned.

36. Counsel for the Claimant argued that the exclusion mentioned in the Policy of Insurance is not consistent with the terms as set out in the proposal form. That the proposal form dated the 1st November 2011 forms the contractual arrangement between the Insurer and the Insured and makes no provision for driving experience. Further, Counsel for the Claimant argued that the Insurer cannot impose new terms in a Policy of Insurance which did not form part of the obligations in the proposal form.

Analysis and Findings

37. The authorities clearly demonstrate that an insurer is free to contract with an insured and in so doing exclude persons or classes of persons except those persons in respect of which the legislature has debarred it from excluding, namely the persons falling within the category of persons listed at section 12 of the Act. It is not in dispute nor does it appear that the Claimant is arguing that the driver is one of those persons who fall within the exclusion set out by section 12. It is the finding of the court that the driver in this case does not fall within any of the categories set out by the Act as exclusion of liability by way of years of experience is not prohibited by that section.

38. The court also agrees with the submission of the Second Defendant that the matter of the limiting of exclusion of liability clauses is one for the legislature and the court ought not to purport to legislate by way of its decisions. But this is not here the case.

39. The submission of the Claimant appears to be that the contract between the Claimant and the Second Defendant was made by way of the proposal form and therefore the Second Defendant is bound by the terms set out in the proposal form. It is his argument that the proposal form in fact permits the selection of the option to have coverage for any unnamed driver and this in fact is what was selected by the Claimant at the time of signing of the proposal form. It follows that if he is correct, the Second Claimant having contracted to indemnify in respect of liability of any named driver, will not be legally entitled to avoid the policy on that basis.

40. What then is the legal status of the proposal form. The proposal form concludes with a declaration, which is often required to be separately signed by the proposer so as to draw his particular attention to the importance of what he is signing, by which he warrants that the statements contained in the proposal are true, or agrees that they are to be the basis of the contract between the parties, or accepts that their truth is to be a condition precedent to the validity of the contract. All three variations of the same term may be included, and an additional clause may be inserted to the effect that no material information has been withheld[1]. The purpose of the formulae is usually to incorporate the proposal into the eventual policy. If it is incorporated the proposal becomes a contractual document by

reference to which the insurers' rights to repudiate are governed[2]. If there is no incorporation the proposal provides a record, for the purpose of applying the common law rules, for establishing facts expressed and, by inference, facts withheld from the insurers: ***Halsbury's Laws of England, volume 60 (2011) paragraph 74.***

41. Section 4, sub-sections 8 and 9 of the Motor Vehicles Insurance (Third-Party Risk) Chap. 48:51 states as follows:

"(9) A policy of insurance together with a certified copy of the proposal form upon which the policy was issued shall be delivered by the insurer to the insured before the expiration of a period of one week from the date of issue of the certificate of insurance under subsection (8)." (Sub-section 8 has been set out earlier in this decision).

42. Mr. Justice Kokaram in ***Vanissa Sukhbir v GTM Fire Insurance Company Limited*** HCA S416 of 2001 went on to recite the relevant principle in contract law at paragraph 7 as follows;

> "The general principles of contract law are applicable to the formation of contracts of insurance. There is no rule of common law requiring contracts of insurance to be in any particular form or in writing at all.11 Usually these contracts are made by the offer of the proposed insured by the completion of a proposal form which is given to the insurers for their consideration and acceptance. Negotiations may or may not ensue leading ultimately to the issuing of the policy of insurance.
>
> Insofar as the Act is concerned the relevant sections are as follows: Section 3 (1), Section 4(8), Section 5 and Section 20(1). The parties are however free to contract subject to the bid and there are no prescribed forms for a contract of insurance.
>
> A binding contract of insurance however can be made notwithstanding the failure to fill out a proposal form or the issuing of a policy. The only requirement is that there is consensus ad idem on the material terms of the policy. This is a fundamental

feature of insurance law:

"An acceptance will be of no effect in law unless the parties have agreed upon every material term of the contract they wish to make. The material terms of a contract of insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. As to all these there must be a consensus ad idem, that is to say, there must either be an express agreement or the circumstances must be agreed. Without such agreement, it would be impossible for the courts to give effect to the parties contract except by virtually writing the contract for them which is not the function of the courts to do.

An agreement on these and other less essential terms of the proposed insurance may be achieved either at once, or only after a process of lengthy negotiations as is common in the case of large commercial risk. When negotiations become protracted, and there is subsequently a dispute concerning the existence of a binding contract or its terms, it is necessary to review the whole course of the negotiations in order to see if there was at any stage full agreement on the material of the insurance or, as the case may be, agreement that a particular term was agreed. In carrying out this exercise a tribunal should have regard to subsequent events which bear upon the question at issue. There is no rule of insurance law that there can be no binding contract of insurance until the premium has been actually paid or the policy has been issued. Once the terms of the insurance have been agreed upon by theparties, there is prima facie a binding contract of insurance until the premium has been issued. Once the terms of the insurance have been agreed upon by the parties, there is prima facie a binding contract of insurance, and the assured is obliged to pay a premium as agreed, while the insurers for their part must deliver a policy containing the agreed terms." ***Mc Gillvray***.

43. This court agrees with the law set out by my brother Kokaram J. Therefore, there may be occasions wherein the matters certified in the proposal form are agreed on by both proposed insurer and insured. This is so whether the proposal form is incorporated in the policy or not. The essence of the establishment of the contractual relationship lies with the meeting of the minds in respect of every facet of the contract. So that in this case for

the exclusion clause to have validity there must have been a meeting of the minds on it. The parties must have agreed that the liability of the Insurer would be limited to that which specifically excluded drivers whose driving experience was below three years in order for the Second Defendant to succeed in its argument.

44. In this case, the only evidence before this court on that issue is that of the documents attached to the pleadings. The parties have therefore agreed that the court is to have recourse to the said documents in making its determination on this issue.

45. Annexed to the Defence of the Second Defendant is the Policy along with The Schedule to the policy and the Proposal Form. Under the rubric "Conditions" set out at page seven of the policy, it is written at clause 1, that the Policy and Schedule are to be read together as one contract. It appears therefore that the Insurer did not treat the Proposal form as being incorporated with the policy thereby forming part of the contract. Despite this however, whether the Proposal Form forms part of the contract is an issue for determination by this court based not on only that which is stated by the insurer in the policy but by that which the court so finds after a review of all the available documents.

46. In this case, despite the selection of "any unnamed driver" by the insured in the Proposal Form, the form appears to have been endorsed on behalf of the insured on the second page. Stated therein is the calculation of premium based on the coverage which the insurer was prepared to agree to. It is set out therein that the coverage was to be restricted to persons over the age of twenty-five years and those who had more than three years driving experience. The endorsement also refers to the policy number as being 82916, which is the number of the policy annexed to the Defence. In those circumstances, it is the finding of the court that the Proposal form forms part of the contract even though not specifically incorporated into the policy.

47. So that an examination of the contract shows that the Insured desired and asked for coverage including that for any unnamed driver, but that the insurer restricted the

coverage. It is therefore clear that there was no meeting of the minds on the issue of such restriction in so far as the documents demonstrate.

48. Further, the Schedule defines "authorized driver" as being any other person driving with the permission of the insured so long as he is permitted in law and is not disqualified by reason of a court order, enactment or regulation. Section 1 of the policy treats with the liability to Third Parties. The exceptions to section 1 are set out after sub-section 3 of section one. They refer and relate inter alia to the exceptions set out in the policy one of which is the exclusion of drivers with less than three years driving experience.

49. There is in this case no direct evidence or information from which it can be inferred that the Insured was informed of this restriction imposed on his proposal for coverage and that the agreed to same. There is also no evidence or information that would lead the court to conclude that the Policy when issued on the 26th July 2013, some one year and seven months after the Proposal Form was signed by the insured in November of 2011, was brought to the attention of the Insured or delivered to him so that he would have been aware of the exclusion and would have been therefore in a position to either accept or reject the restriction on liability.

50. Additionally, the Second Defendant has not annexed The Certificate of Insurance to its Defence. The court is therefore left in the dark as to whether the Certificate, which would have been in the possession of the Insured would have contained the said restriction thereby providing notice to the Insured of the restriction on liability once again providing the opportunity to him to either repudiate or affirm the contract.

51. It therefore follows that in the absence of these material particulars, there appears on the face of the documents to have been no meeting of minds on coverage for any unnamed driver. The Insured proposed coverage for any unnamed driver, but the Insurer refuses and unilaterally imposes restrictions without giving notice to the Insured.

52. One disturbing feature of this case is the fact that the policy appears to have been issued over one year after coverage would have expired in respect of an annual certificate granted to the insured which in the usual course of events. It is disturbing because prudent contractual arrangements, particularly where the Insurer refuses to insure for that which is proposed by the Insured, would dictate that the exclusions are brought to the attention of the Insured by way of the policy at the least, validly issued during the term of the coverage. But this was not here the case.

53. The court must therefore determine this issue in favour of the Claimant, the exclusion of liability for drivers having less than three years experience not being a term of the contract in the court's view.

54. In the absence of agreement between the parties for the disposal of this claim the court will proceed to give directions for trial.

Dated the 3rd March 2016

Ricky Rahim
Judge