

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civil Appeal No. 51 of 2008
CV 2007 - 01354**

BETWEEN

THE PRESIDENTIAL INSURANCE COMPANY LIMITED

CO-DEFENDANT/APPELLANT

AND

RESHA ST. HILL

CLAIMANT/RESPONDENT

AND

**EDWIN HOGAN
DEXTER DENNY**

DEFENDANTS/RESPONDENTS

(by original claim)

THE PRESIDENTIAL INSURANCE COMPANY LIMITED

CLAIMANT/APPELLANT

AND

**EDWIN HOGAN
DEXTER DENNY**

DEFENDANTS/RESPONDENTS

(by ancillary claim)

PANEL: Mendonça, J.A.
Bereaux, J.A.
Narine, J.A.

APPEARANCES: Mr. A. Newman, Q.C and Mr. S. Parsad for the Appellant,
The Presidential Insurance Company Limited.
Mr. J. Camacho for Claimant/Respondent, Resha St. Hill.

DATE OF DELIVERY: February 15th, 2010

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

R. Narine,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This appeal concerns the true construction of section 4(7) of the Motor Vehicles Insurance (Third-Party Risks) Act (the Act). The issue is whether that section requires an insurer to satisfy a judgment obtained by a claimant against the driver of the insured vehicle where (1) the policy of insurance purports to restrict liability to a named driver or named drivers and (2)

the driver of the vehicle at the material time is not a named driver but is driving with the consent of the insured.

2. The relevant background to this appeal may be briefly summarized. On June 28th, 2005 the Respondent, Resha St. Hill, was a passenger in motor vehicle registration number HBN 9082 which was being driven in a northerly direction along Abercromby Street, St. Joseph, when the vehicle owned by Edwin Hogan (Hogan) was so negligently driven by Dexter Denny (Denny) that it collided with the said vehicle registration number HBN 9082. As a consequence of the collision the Respondent suffered personal injuries.

3. On April 27th, 2007 the Respondent commenced these proceedings claiming damages for personal injuries against Hogan and Denny. The Respondent alleged that at the material time Denny was driving Hogan's vehicle as his servant and/or agent and/or with his consent. The Presidential Insurance Company Limited (the insurance company) was also joined as a defendant in the claim. The Respondent claimed against the insurance company a declaration that it is liable to indemnify Hogan and Denny in respect of any damages, interest and costs that might be found payable by them to him.

4. Neither Hogan nor Denny entered an appearance and accordingly the Respondent proceeded to judgment against them in default of appearance with damages to be assessed. The insurance company however filed and served a defence and an ancillary claim. In its defence, the insurance company admitted it insured the vehicle owned by Hogan but stated that under the terms of the policy the only person covered to drive the vehicle was the policy holder, namely Hogan. As a consequence, it contended that under the terms of the policy and the certificate of insurance issued to Hogan, all drivers, with the exception of Hogan were specifically excluded from driving his vehicle and/or from coverage under the policy.

5. By the ancillary claim the insurance company claimed damages for breach of the terms and conditions of the policy. It was alleged that Hogan failed to disclose the fact that he had intended the vehicle to be used by persons other than him and to have Denny endorsed as a named driver of his vehicle. The insurance company also claimed declarations that the insurance

policy was “restrictive in effect covering Hogan only and excluded all other drivers including Denny” and that Denny is solely responsible and answerable for the damages claimed by the Respondent.

6. By notice of application filed on June 20th, 2007, the Respondent applied to the Court for an order striking out the insurance company’s defence on the basis that it did not disclose grounds for defending the claim. The Respondent also sought an order striking out the ancillary claim on the ground that it disclosed no reasonable claim.

7. On November 27th, 2007 the insurance company filed an application to amend the defence and ancillary claim. So far as the proposed amendments are concerned I need not discuss them in any detail. It is, however, sufficient to say that the proposed amendments did not materially change the nature of the defence.

8. The applications of the Respondent and the insurance company were heard before Smith J (as he then was). He struck out the defence of the insurance company but not its ancillary claim. He also dismissed the application of the insurance company to amend the defence and ancillary claim.

9. In arriving at his decision to strike out the defence, the Judge found section 4 (7) of the Act to be decisive of the matter. This section is as follows:

“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.”

10. He adopted the interpretation of that section of Kokaram J, in High Court Action S1104 of 2000 **Benjamin v Jairam and others** where he concluded that “the plain and obvious effect” of section 4(7) of the Act is to write into the insurance policy as persons covered by it a class of persons driving with the consent of the person insured specified in the policy. Kokaram J, stated that it was “therefore impossible for an insurer... to avoid liability by asserting the existence of a

named driver only policy where the insured has given his consent to a person not specified in the policy to drive the insured's vehicle.”

11. Smith J then stated that applying that interpretation of section 4(7) to the facts of the case he found.

“... (i) the [Respondent] has recovered judgment against the Defendants. (ii) there is no issue or Defence or lack of consent as between the First Defendant (Hogan) and the Second Defendant (Denny). (iii) the insurer's only defence is that the Second Defendant was not a person specified in the policy as authorized to drive the First Defendant's vehicle. Pursuant to section 4(7) of the Act, this sole “Defence” of the Insurers is not a valid Defence to the Claimant's claim. I therefore strike out the Defence and give permission to the Claimant to enter final judgment against the Insurer.”

12. With respect to the application to amend, the Judge stated that by the amendment the insurance company was trying to raise a point already covered by section 4(7). This section had “legislatively written into all motor vehicle insurance policies a class of persons driving with the consent of the insured”. The Judge in those circumstances concluded:

“The Insurer cannot seek to override what the statute has imposed upon the Insurer. Even if the proposal form (which is part of the contract of insurance) states otherwise, it must yield to the statutory provision creating an indemnity for persons driving with the consent of an insured. The proposed amendment does not affect the liability of the Insurer to the Claimant so the application to amend the defence is futile. and I strike it out.”

13. The insurance company has appealed to this Court contending that the Judge was wrong to strike out the defence and to dismiss the application to amend the defence and ancillary claim. With respect to the order striking out the defence, Mr. A Newman, Counsel for the insurance company, contended that the Judge erred in his interpretation of section 4(7). Counsel submitted that on a true and proper interpretation of the section, and in order for the insurer to attract liability, the persons driving or using the vehicle with the consent of the person insured must be specified in the policy. Since the only person specified in the policy was Hogan, Denny was not

covered thereby. The insurance company therefore has a good defence to the action and the Judge was wrong to strike out its defence.

14. So far as the application to amend is concerned, the position of the insurance company is that its application will only become of relevance if it succeeds on the appeal from the order striking out its defence. In that event it will ask this Court to remit the application to amend before the Judge for further consideration.

15. However, on the other hand, Mr. Camacho, Counsel for the Respondent, contended that the meaning of the section was clear. The insurance company had to indemnify the driver of the vehicle once he was driving with the consent of the insured. The driver need not be specified in the policy. He saw no difficulty with what he considered to be the plain and obvious meaning of the section. If however there was any ambiguity then, he submitted, regard should be had to the purpose of the legislation which was to widen the net of insurance coverage for third parties who are injured on the road. It was therefore unnecessary for the driver to be named in the policy.

16. Section 4(7) was introduced by the Motor Vehicles Insurance (Third-Party Risks) Amendment Act, 1996. That 1996 amendment act made several amendments to the Act. The amendments improved the position of third parties, so that for example, the act increased the monetary limit of liability in third party risks policies. It widened the definition of “public road” and specifically extended insurance coverage to “trailers” as defined in the Act. The act made it simpler, quicker and less costly for injured persons to seek recovery against insurance companies by providing that insurance companies may be sued before the liability of the insured is determined. Among the specific amendments made by the 1996 act was to repeal the existing section 4(7) and substitute it with the present section. I have already set out the amended section earlier in this judgment. The repealed section was as follows:

“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 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.”

17. Before the enactment of the repealed section there were obstacles at common law in the path of persons successfully suing an insurance company for an indemnity where although the policy specified they were covered by it, they were not parties to the contract of insurance. The common law doctrine of privity of contract and the need for consideration presented themselves as hurdles to a successful claim. The section was intended to remove those hurdles. Its intent and effect at the time of its repeal was clear. The section created a contractual relationship between the insurer and the person or persons specified in the policy as covered by it, and gave to them a right to sue the insurers for an indemnity. So where the policy specified a named driver as being covered by it, the section created a contractual relationship between him and the insurance company and conferred upon him the right to sue the insurance company even though he was not a party to the contract of insurance (see **Digby v The General Accident, Fire and Life Assurance Co-operation Limited** [1943] A.C. 121 and **Tattersall v Drysdale** [1935] 2 K.B. 174).

18. Of course under the repealed section the converse was also true. Unless the driver was specified in the policy either by name or as a member of class to which the policy was extended, such as drivers driving with the consent of the insured, the driver could not succeed against the insurance company. Under the repealed section 4(7), therefore, unless the policy was specifically extended to drivers driving with the consent of the insured, the driver could not succeed against the insurance company, although he may be driving with the consent of the insured. It therefore stands to reason that under the repealed section, as Denny was neither specified in the policy nor a member of a class of persons specified in the policy as being insured by it, that the insurance company would have had a valid defence to this claim.

19. The Appellant in effect contends that the amended section is to the same effect and that the person or persons driving with the consent of the insured must be specified in the policy. It contends that the words “specified in the policy” in the amended section refer to or qualify the words “the person insured” as well as “persons driving or using the vehicle...with the consent of the person insured”. The Appellant further contends that this interpretation is apparent by reference to the words “in respect of any liability which the policy purports to cover in the case of those persons” appearing at the end of the amended section. The words “those persons” refer

to a plural subject and could not refer to the insured only. It must therefore refer to persons driving with the consent of the insured. Further they refer back to the liability which the policy purports to cover. The consequence is that unless the person driving the vehicle with the consent of the person insured is specified in the policy he is not covered thereby.

20. Whether the words “specified in the policy” refer to only the person insured or also to persons driving with his consent lies at the heart of understanding the proper meaning of this section. “Specified in the policy” is a modifier that is intended to describe something else and the question is what does it describe. As a general rule modifiers should be placed as close as possible to what it describes. On that basis the words “specified in the policy” should be seen as properly describing the person insured. It seems to me that if it were intended that “specified in a policy” should refer to persons driving the vehicle with consent, the draftsman would have come closer to achieving his intent by placing those words immediately after the word “persons” appearing immediately before “driving or using the vehicle”.

21. It is however contended by the Appellant that it could not be intended that “specified in the policy” refer to the person insured, since it is always the case that the person insured is specified in the policy. Those words would therefore be surplusage and it is to be presumed that the draftsman would avoid surplus words. I however do not regard this argument as carrying any weight. As has been said, it is not unusual for Parliament to say expressly what the courts would have inferred anyway (see **Walker (Inspector of Taxes) v Centaur Clothes Group Limited** [2000] 2 ALL ER 589).

22. With respect to the words at the end of the section on which reliance was placed, namely “which the policy purports to cover in the case of those persons” I do not think the Appellant’s argument to be persuasive. The fact of the matter is that the insured person specified in the policy may refer not only to one person but to “such person, persons or classes of persons as may be specified in the policy” (see section 4(1)(b)). In this light it is understandable that the draftsman would have referred “to those persons” so that persons driving with the consent of the person insured would be covered in respect of any liability which the policy purports to cover in the case of such person or persons or classes of persons specified in the policy.

23. If Counsel's argument were correct and the section in fact meant that the insurer is liable to indemnify the person insured and those persons who may be driving or using the vehicle but only if the persons driving are specified in the policy, then the amended section would not really have altered the law, which could not have been the intention of Parliament. Indeed if the Appellant is correct and "specified in the policy" describes the persons driving or using the vehicle with the consent of the insured then taken literally it would mean that the person or persons must be specified individually and not as a class and further this would have to be done at the outset of the policy. Far from not altering the law, this in fact would have narrowed the scope of the repealed section. This could not have been the intention of Parliament as it is clear that the 1996 amendment act was meant to increase the protection of third parties against risks arising out of the use of motor vehicles.

24. A further clear indication that "specified on the policy" does not refer to the persons driving with consent is derived from section 7(1)(b) of the Act. The 1996 amendment repealed the existing section 7(1)(b) and replaced it with a new section. The repealed section as well as the new section deal with the requirements in respect of securities. Under the repealed section, for a security to comply with the Act it must, inter alia, consist of an undertaking by the giver of the security to make good any failure by the owner of the vehicle or such persons or classes of persons as may be specified in the security duly to discharge any such liability which may be incurred by him or them and which is required to be covered by a policy of insurance under section 4.

25. The amended section changes a few things but material to this appeal is that it now requires the giver of the security to undertake to make good the failure of "the insured or any person driving or using the vehicle with the consent of the insured or the consent of the person authorized by the insured" to discharge any liability as is required to be covered by a policy under section 4 which may be incurred by any of the persons aforesaid. Although the draftsman may be criticized for using the word "insured" in context of a security, the point is that the amended section does not require the person or persons driving with consent to be specified in the security as was the case for persons or classes of persons to whom the security extended under the repealed section. The amended section is therefore a clear departure from the repealed

section which would have required authorized drivers to be specified in the security. This is consistent with the interpretation of section 4(7) that the person driving with consent, in order to be entitled to be indemnified, need not be specified in the policy. It would be odd if the legislation amended the Act so as to provide that persons driving with the consent of the insured or the consent of the person authorized by the insured would be entitled to the benefit of the undertaking even though not specified in the security but requires that such persons, in order to be insured under a policy, should be specified in it. There is no justifiable reason for the distinction.

26. In my judgment the words “specified in the policy” refer to the person insured and not the person driving with the consent of the insured. Assuming however for the purpose of argument that “specified in the policy” may also refer to the persons driving with the consent of the insured then there is some ambiguity in this section which in this case can be clarified by reference to **Hansard**.

27. In **Pepper v Hart** [1993] AC 593 the House of Lords relaxed the rule governing the use by courts of Parliamentary material as an aid to the construction of legislation which, inter alia, is ambiguous. Lord Griffiths in his speech stated (at page 634):

“In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.”

Pepper v Hart has been followed in this jurisdiction (see **Ramdass v Bahaw-Nanan** [2009] UK PC 51).

28. In the debates in the House of Representatives (see **Hansard for Friday October 11th, 1996**) relating to the 1996 amendment, the Attorney General, who piloted the Bill, stated, (at p.

534) that its intention was to reform the law in such a way “as to make it easier for persons who have suffered injuries and damage as a result of motor vehicle accidents to get compensation from the tortfeasor or the insurance company which insures the motor vehicle.”

29. With specific reference to section 4(7) the Attorney General identified both the mischief and the intention of the section where he stated (at p. 540):

“So what this Clause attempts to do is to prevent insurance companies from saying ‘well, we insured the owner or his servant or agent and the name of the driver is not on the policy’...In private practice what one sees, as a lawyer, that there are so many people who are injured in motor vehicle accidents and who have received compensation from the insurance companies, having regard to the spirit and intention of the legislation, but who did not receive because some of the companies argued that their names were not on the policies; that when the person was driving the vehicle he was not a servant and/or agent... These amendments, really, are to try to get away and to finish with all those arguments, and to have the full intent of the law delivered to the injured party.”

30. It is clear from the speech of the Attorney General quoted above that the mischief which the amendment was intended to address was that of insurance companies avoiding liability on the basis that the driver of the negligent insured vehicle was not named in the policy although he was driving the vehicle with the consent of the insured. The purpose of the legislation was equally apparent. It was to “get away” from and to be finished with such arguments. Against that background of the purpose and intent of the legislation, its meaning is clear. The insurer shall be liable to indemnify the driver who is driving with the consent of the insured even though he is not specified in the policy. It would be destructive of Parliament’s intention if the section were to be construed in any different way.

31. In my judgment therefore the Judge was right to strike out the defence. The amended section imposes a liability on insurers to satisfy a judgment obtained by a third party against the person driving the vehicle with the consent of the insured although not named or specified in the policy. The effect of the section is therefore to extend coverage to a class of persons, namely those driving the vehicle with the consent of the person insured. The insurance company

therefore cannot avoid liability on the basis that Denny was not named in the policy if, as is not disputed, he was driving with the consent of the insured.

32. In the circumstances I would dismiss this appeal. The Appellant shall pay to the Respondent, Resha St. Hill, her costs of the appeal in the sum of \$19,706.67, being two thirds of the costs allowed in the Court below.

Dated the 15th day of February, 2011

Allan Mendonça
Justice of Appeal