GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.13 OF 2003

BETWEEN:

LLOYD'S CORPORATION

Appellant

and

JOHN BUCKMIRE

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]
The Hon. Mr. Othniel Sylvester, QC	Justice of Appeal [Ag.]

Appearances:

Mr. J. Brsitol for the Appellant
Ms. C. Edwards for the Respondent

2003: December 3;
2004: March 8.

JUDGMENT

[1] SYLVESTER, J.A. [AG.]: The Appellant is an Insurance Underwriter carrying on business in Grenada by its agent Grenada Fire and General Insurances Ltd. and at all relevant times was the insurer of the Respondent's vehicle registration No H8406, which was involved in a motor vehicle accident on or about 20th June 2000.

[2] By the said policy of insurance, the Appellant contracted and agreed to indemnify the Respondent against loss of or damage to the said vehicle by accidental loss.

[3] The Appellant refused to reimburse the Respondent for damage caused to the said vehicle as a result of an accident based on an alleged breach of Condition 3 of the said policy of insurance by which the Respondent undertook to take all reasonable steps to safeguard the said vehicle from loss or damage.

[4] For the purposes of the trial, it was agreed by the parties that the Respondent was intoxicated at the time of the accident and the matter proceeded on the sole issue "whether or not the Defendant was entitled to avoid the said policy of insurance on the ground that the Claimant was intoxicated at the time of the accident".

[5] The Appellant, by its defence pleaded at paragraphs 3 and 4: -

> "3. It was a condition of the said contract of insurance, namely Condition 3 thereof, that the Insured shall take all reasonable steps to safeguard his motor vehicle from loss or damage.
>
> "4. At the time of the said accident the Plaintiff was so intoxicated that he was in breach of the said Condition 3. By reason of the said Condition the Plaintiff is not entitled to be indemnified in respect of such loss as he may have suffered as a result of the said accident.

[6] The condition, the breach of which the Appellant relied on to justify its right to avoid the policy, is as follows:

> "The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition and the Underwriters shall have at all times free and full access to examine the motor vehicle or any part thereof or any driver or employee of the Insured."

[7] The Clause contained in the policy, which entitles the Appellant to avoid the policy is Clause 10: -

> "The due observance and fulfilment of the Terms of this certificate in so far as they relate to anything to be done or not to be done by the Insured and the truth of the statement and answers in the proposal shall be conditions

precedent to any liability of the Underwriters to make any payments under this certificate."

[8] There is a Schedule attached to the Certificate of Insurance, which inter alia limits the liability of the Appellant and stipulates "The Authorised Driver" of the vehicle for the purpose of the policy of insurance with a proviso: -

"Authorised Driver: Any of the following: -

(a) The Insured

(b) Any person driving on the Insured's or with his permission.

Provided that the person driving holds a licence to drive the motor vehicle or has held and is not disqualified from holding or obtaining such a licence. The Term "licence" means a licence or other permit required by the licensing or other laws or regulations."

[9] It is further provided by the conditions of the policy that the Certificate and the Schedule shall be read together as one contract:

"This Certificate and the Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of the Certificate or of the Schedule shall bear such specific meaning wherever it may appear."

[10] Reading the Policy of Insurance as a whole, it is quite clear that there is no exception clause in respect of negligence, nor of the imprecise word "intoxication" in the contract. On the contrary by Section 1 of the Policy of Insurance the underwriters undertook to indemnify the insured against loss or damage by accidental loss.

The material part of SECTION 1 – LOSS OR DAMAGE reads thus:

1. "The Underwriters will indemnify the insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon.

(a) by accidental collision or ..."

[11] It follows therefore that mere intoxication in the context of the provisions of this policy cannot be the basis for the Appellant to avoid the contract. In the absence of an exception clause to that effect, being intoxicated at the time of an accident is an accidental loss. The Appellant itself pleaded the occurrence was an accident.

[11] I hold that if it were intended that intoxication would void the policy of insurance, it should have been specifically stated therein and the extent of the intoxication would have had to be such as to "disturb the quiet and equable exercise of the intellectual faculties of the [insured]" as explained by Lord Coleridge in Mair v Railway Passengers Assurance Co [1877] 37 LT 356 at 358.

[12] To allege as the Appellant did in paragraph 4 of its Defence that "at the time of the said accident (*my emphasis)* the Plaintiff was so intoxicated that he was in breach of condition 3", and that he is not entitled to be indemnified, is a misconception of the duty imposed on the insured and the obligation undertaken by the Appellant under the terms and conditions of the policy.

[13] By the state of the pleadings the Respondent was not required to prove care as a condition precedent to cover under the policy so that when it was agreed that the sole issue was whether or not the Defendant (Appellant) was entitled to avoid the said policy of insurance on the ground that the Claimant (Respondent) was intoxicated at the time of the accident; (*my emphasis*) the short answer to that issue was in the negative.

[14] However, because of the arguments advanced by the parties I consider it necessary to examine in some detail the policy of insurance as a whole.

[15] In common law countries like England and the Eastern Caribbean States insurance policies of this type are presumed and construed to cover loss caused by negligence of the insured or his/her employees.

[16] Loss negligently caused may be excluded directly or indirectly and even then in accordance with general rules of construction applicable to all insurance terms, an exception of negligence will be construed restrictively.

[17] Further, by the schedule to the certificate the limits of liability are detailed and the authorised driver of the vehicle is spelt out. It is noteworthy that intoxication of the driver or the driver being under the influence of drugs or alcohol is not stated therein.

[18] In argument before this Court, it was advanced by the Respondent that the terms of condition 3 relates only to the physical condition of the vehicle, a construction with which I do not agree. Equally so, I reject the argument of the Appellant that the Respondent being intoxicated at the time of the loss he would not have taken all reasonable steps to safeguard the motor vehicle from accident as contemplated by the policy of insurance.

[19] In my view the duty imposed by the phrase "all reasonable steps" does not mean an obligation to take every practicable caution.

[20] In construing motor insurance policies there are two applicable well established rules of construction in case of doubt, which together simply mean that policies should be construed strictly against the party who is the author of the same or who is putting them forward (*contra proferentem*).

[21] As stated by Malcolm A. Clarke the Learned Author of The Law of Insurance Contracts 2nd ed para 15-5C at pages 352 - 353 quoting from the judgment of Staughton LJ in Youell v Bland Welch & Co Ltd [1992] 2 Lloyd's Rep 127 at 134:

> "There are two well established rules of construction, although one is perhaps more often relied on with success than the other. The first is that, in case of doubt, wording in a contract is to be construed against a party who seeks to rely on it in order to diminish or exclude his basic obligation, or any common law duty which arises apart from contract. The second is

> that, again in case of doubt, wording is to be construed against the party who proposed it for inclusion in the contract: it was up to him to make it clear."

[22] To accept the interpretation put on Condition 3 by the Appellant and to hold that the Appellant is entitled to avoid the policy, in the circumstances of this case, would be to ignore the rules of construction referred to above and to open a flood gate for insurance companies to avoid policies of insurance on a mere allegation of intoxication.

[23] Accordingly, I will dismiss the appeal affirm the judgment of the Court below and order that the Appellant pays the Respondent's costs of this appeal.

[24] CPR Part 65.13 is the relevant provision. The cost awarded in the Court below was $11,805.00. There is no appeal against this sum nor any apparent disagreement thereon. I will therefore award costs in the sum of $7,870.00 being two-thirds of the cost below to be paid by the Appellant to the Respondent.

[Sgd.]
Othniel Sylvester, QC
Justice of Appeal [Ag]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]

[25] ALLEYNE, J.A.: The Appellant is an insurance underwriter which, through its agent in Grenada effected an insurance policy in favour of the Respondent in respect of a certain motor vehicle, by which the Appellant undertook to indemnify the Respondent against loss or damage to the vehicle in certain circumstances.

[26] Condition 3 of the policy is, so far as relevant to the issues in this action, in the following terms:

> "The Insured shall take all reasonable steps to safeguard the Motor Vehicle from loss or damage and to maintain the Motor Vehicle in efficient condition and the Underwriters shall have at all times free and full access to examine the Motor Vehicle or any part thereof or any driver or employee of the Insured."

[27] On June 20th, 2000, the motor vehicle, while being driven by the Respondent, was involved in a collision, and sustained damage. As a result, the Respondent claimed against the Appellant for indemnity under the policy of insurance. The Appellant refused to honour the claim on the ground that the Respondent was at the time of the accident so intoxicated that he was in breach of the condition of the contract set out in the last paragraph.

[28] In his judgment rendered on June 16th 2003, the learned trial Judge at paragraph [4] had this to say:

> At the hearing, both sides agreed that the sole issue to be decide was whether or not the Defendant (the appellant in this appeal) was entitled to avoid the said policy of insurance on the ground that the Claimant (the respondent herein) was intoxicated at the time of the accident. For this purpose, the parties proceeded on the basis that the Claimant (respondent) was intoxicated when the accident occurred. Skeleton arguments were submitted on the issue as identified above and the Court was invited to rule thereon.

[29] I think that it is necessary to say at the outset that at the hearing of the appeal there appeared to be a dispute between counsel as to whether they had agreed that the level or extent of intoxication of the Respondent was such as to render him incapable of driving the vehicle safely at the time of the accident. The trial Judge appears to have proceeded on the basis that it was conceded that this was the case, and having ruled against the Appellant on the interpretation of the condition, he gave judgment for the Respondent for the sum claimed. The Appellant has not challenged that aspect of the judgment, and should the appeal be unsuccessful, that award of damages would stand. If, however, the appeal were successful, I have formed the impression that counsel for the Respondent

would wish to litigate the question of the degree of intoxication of the Respondent, and its effect on the right of the Appellant to decline liability to indemnify the Respondent under the policy. In its Defence, the Appellant pleaded that the Respondent 'was so intoxicated that he was in breach of the said condition 3'. It seems to me that the Appellant agrees, and in any event it is my view, that if 'intoxication' would amount to a breach of that condition, the degree of intoxication would be a deciding factor, and would have to be a factual issue to be decided on evidence at trial.

The interpretation of the condition

[30] Learned counsel for the Appellant submitted that the learned trial Judge relied on the authority of McInnes v National Motor and Accident Insurance Union[1], a case which did not relate to the question of sobriety of the driver. Counsel urged that the case of National Farmers' Union Mutual Insurance Society, Limited v Dawson[2] addresses the question of the sobriety of the driver, and, properly understood, applies to the facts of this case. It is the case for the Appellant that under condition 3, the obligation to 'take all reasonable steps to safeguard the Motor Vehicle from loss or damage' includes the obligation to take all reasonable steps to ensure that the vehicle is not driven by a driver, whether the insured or otherwise, who is so intoxicated as to be able to drive the vehicle safely.

[31] It seems to me that condition 3 imposes upon the insured two separate and distinct obligations, the first, to take all reasonable steps to safeguard the vehicle from loss or damage, and the second, separated in the text of the condition by the word 'and', to maintain the vehicle in efficient condition. The second obligation unquestionably relates to the physical condition of the vehicle; the obligation to ensure that it is mechanically sound, that the tyres, brakes, lights and other relevant parts of the vehicle are not in such condition as to compromise the safety of the vehicle when in use or otherwise, and such other considerations as might

[1] [1963] 2 Ll. Rep. 415
[2] [1941] 2 K.B. 424

arise in any particular case. The list does not claim to be exhaustive. To what does the first question relate?

[32] In Dawson[3] counsel for the insurers argued that 'if to get drunk and then drive in that state is not a failure to use all care and diligence to avoid accidents, it is difficult to imagine what is'. In that case the insured was, at the time of the accident, 'under the influence of alcohol to such an extent as to be incapable of having proper control of a car'.[4] Condition 3 of the policy of insurance provided as in part follows:

> "The insured shall keep every motor-car insured by this policy in an efficient state of repair, and shall use all care and diligence to avoid accidents and to prevent loss and to employ only steady and sober drivers."

The policy in the case at bar makes no reference to employing steady and sober drivers, but in other respects, so far as condition 3 is concerned, is in the same terms.

[33] Viscount Caldecote C.J. at page 429, said in relation to condition 3 of the policy in Dawson:

> "The condition does not purport to restrict the insurance by reference to the physical or mental condition of persons driving the vehicle. At most it purports to restrict the insurance from applying to cases where the insured has not used all care and diligence to do the things specified in the condition, and that is something quite different, in my estimation, from a restriction which refers to the physical or mental condition of persons driving the vehicle."

I note that the learned Chief Justice was careful to emphasise that he was dealing there with the argument that the money paid by the insurer pursuant to section 12 of the Road Traffic Act 1934 was recoverable from the insured "because it purports to restrict the insurance of the insured by reference to the physical or

[3] [1941] 2 K.B. 424, 428
[4] *ibid*. at page 425

mental condition of persons driving the insured vehicle." His Lordship found that the condition does not so restrict the insurance.

[34] On the other hand, in relation to the issue of the insurer relying on the condition to found a claim for damages for breach of obligation, His Lordship had this to say:

> "So, if the insured does not use all care and diligence to avoid accidents because he sends the car out with no brakes, no horn or no lamps, or utterly unfit in some way or other for use on the road, I think again that he has broken his contract and is liable in damages for the breach. It would seem astonishing to say that he has used all care and diligence to avoid accidents if he, after having consumed so much alcoholic liquor that he is unfit to have proper control over a vehicle on the road, drives a vehicle on the road. ... The condition obviously deals with something more than the "selection of drivers and cars," and I can see no reason why the insured should be excused from using care and diligence to avoid accidents apart from anything he may do in selecting drivers and cars."[5]

[35] It seems clear to me that His Lordship was there distinguishing between the obligation not to employ a drunken driver, the obligation not to send out the car with defective brakes etc., and the separate obligation expressed in the words "to use all care and diligence to avoid accidents." His Lordship, in my view, must be taken to have there held that for the insured to have driven the car after having consumed so much alcohol as to be unfit to have proper control of the vehicle was a breach of the condition.

[36] It seems to me that we can and should properly bifurcate the condition in the policy before us. The insured was required to take all reasonable steps to safeguard the vehicle from loss or damage. Like Viscount Caldecote, I would find it astonishing to say that the insured has taken all reasonable steps to safeguard the vehicle from loss or damage if he drives the vehicle after having consumed so much alcohol as to be unfit to have proper control over the vehicle, by reason of which the vehicle has suffered loss or damage.

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[5] *ibid.* at page 430

[37] The learned trial Judge found compliance with this condition to be a condition precedent to liability on the part of the insured. I agree. I do not, however, agree with the learned trial Judge that " the language does not contemplate the insured going beyond the maintenance and protection of the motor vehicle in a physical sense." I think that the learned trial Judge was wrong in rejecting the wider interpretation on the basis that to place upon the insured the obligation of ensuring that the driver is not intoxicated "would invite speculation as to the degree of intoxication".

[38] I would allow the appeal, and remit the case for trial by the High Court, for determination of the question whether at the time of the accident the Appellant was so intoxicated that he was in breach of condition 3, that is to say that he was so intoxicated as to be unfit to have proper control of the vehicle on the road. I would allow the Appellant the costs below and of the appeal, in the sums of $11,805.00 and $7,870.00 respectively.

Brian Alleyne, SC
Justice of Appeal